Conestoga Title Insurance Co.

WagonLode

A Land Title Update

2017, Vol. V, No. 3

Fall 2017

We began this issue thinking it would be the 'Thin Issue.' That is, following soon after Vol. V, No. 2, which was full of content, we thought this one would be shorter. Not only is this issue full sized in its own right, we have material committed for the next issue. There is always something going on in our business that needs reporting and 'old' underwriting topics to revisit. Indeed, in this issue you will find an article by attorney Richard (Dick) Craig on the still bothersome *Craft v. United States* decision and a primer on eminent domain by Conestoga Title's newest Underwriting Counsel, Mitch Thoreson. [Mitch is also the subject of the "Employee Spotlight" segment.] Don Delgado offers a timely reminder about disaster recovery planning/business continuity as a part of Best Practices for an agency. Jonathan Markel suggests how you can grow your business by asking for referrals. Our next issue will contain an article on what cyber insurance policies cover and another on ransomware. Plus, there will probably be big news from the DC Circuit Court in the PHH case. Enjoy this 'thin' issue! – *Ed.*

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From the President's Desk
Reviewing the Summer Season
John M. Nikolaus, CLTP

The summer of 2017 was a busy one for our agents and Approved Attorneys. We have heard similar feedback concerning market conditions throughout our geographic footprint. The real estate market has been active, interest rates have been relatively attractive, real estate values have been up, and a lack of inventory has existed in the residential market. When a property is in good condition and priced right, a competitive environment is created.

As a result of the active market, we have been busy at Conestoga Title accommodating the needs of our agents, Approved Attorneys, and policyholders. We welcomed Mitch Thoreson as an additional attorney in our Underwriting Department. Mitch's previous experience as a title agent has proven to be a valuable asset when interacting with our agents and his presence on staff provides more depth in our underwriting department. We established a centralized system for the submission of underwriting inquires. To better serve our clients, underwriting matters are now submitted to UWrequests@conestogatitle.com. Underwriting email is now received by our Underwriting Department Administrator, Rebecca Breault, who distributes the workload to a member of our underwriting team based upon availability. We have found that the new system leads to more timely responses and enhances the level of service to our clients. We have also hired Douglas Rauchut, a seasoned title professional, as our Audit Manager. Doug relates well with our agents, as he had previously owned and managed his own title agencies in the past. We have rolled out our new website, www.conestogatitle.com. The site provides a new, fresh look and contains extensive information about our company, background, philosophy and resources available to our clients.

Looking forward, we anticipate an active fall season and continued brisk activity in the fourth quarter. We will continue our quest to provide the best possible service to our clients. We appreciate your business and look forward to continued growth in the fourth quarter and beyond.

Agency Admin and Audit
Business Continuity & Disaster Recovery
Don Delgado, Vice President, Agency Administration

Hurricane Harvey has left a path of devastation and destruction in Texas and beyond. Our hearts go out to everyone in that area of the country whose lives have been impacted. Harvey will no doubt have been catastrophic to many businesses. According to FEMA, 40% of businesses do not reopen after a disaster and another 25% fail within one year.

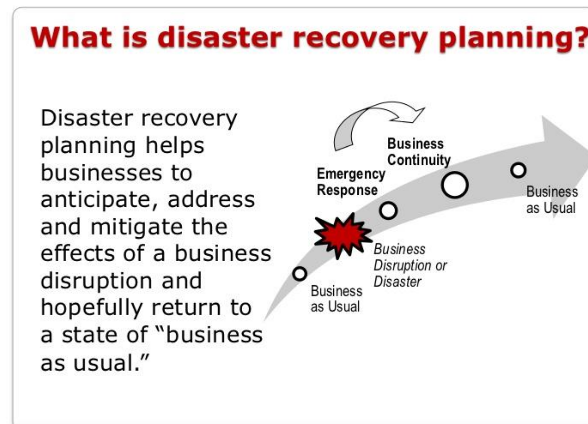
None of us ever expects to be the victim of a natural disaster, but no area of our country is immune to one. Regardless of ALTA's Best Practices related to Disaster Recovery and Business Continuity plans, you should have such plans in place to increase your chances of recovering from a natural disaster and keeping your business alive in the event that one hits your area.

It may seem like a daunting task to develop and implement formal Disaster Recovery and Business Continuity Plans. You do not need to start from scratch. There are a number of resources available to help. Following is a list of resources that you can utilize to make the task much less intimidating:

- Ready.gov (https://www.ready.gov/business/implementation/continuity) -- Provides the basic steps to Business Continuity Planning and IT Disaster Recovery Planning (https://www.ready.gov/business/implementation/IT)

- PrepareMyBusiness.org (http://www.preparemybusiness.org/planning) – Includes downloadable material including a kit (http://www.agilityrecovery.com/assets/SBA/drkitsba.pdf)

- DisasterSafety.org (https://disastersafety.org/ibhs-business-protection/ofb-ez-business-continuity/) – Includes a downloadable Tool Kit (http://disastersafety.org/wp-content/uploads/OFB-EZ_Toolkit_IBHS.pdf) and a Mobile App



No matter the size or scope of your business, if you want to stay in business in the event that a natural disaster hits your area, you must take the threat seriously and develop Disaster Recovery and Business Continuity Plans. We strongly encourage those who have not yet developed such plans to take advantage of the resources and tools listed above.

[You may have to cut and paste above links.]

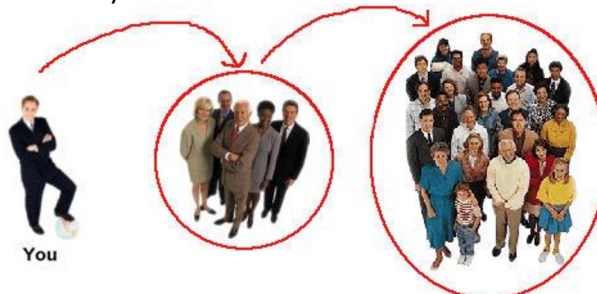
Marketing Minute
Use Referrals to Grow Your Business
Jonathan Markel, Regional Agency Representative

Are you asking for referrals on a consistent basis? Maintaining a loyal customer/client base is essential to keep business and title orders flowing through the door. Providing excellent service to your clients should be the goal of every title agent, but simply doing this will not always result in continued title orders. It is an important start, but title agents need to keep the communication line open with realtors, loan officers, builders, and attorneys. Asking those sources of business for referrals should be part of your arsenal.

The advantages of working by referral are obvious, so why don't we do it more often? It is incredibly cost effective, it usually shortens the average sales cycle, and the rate of conversion from prospect to sale is exponentially better than selling cold. So why don't many good sales professional ask for referrals on a more consistent basis? The answers are fear and simply forgetting to ask for referrals (too busy and gets out of our radar).

Fear might be a surprising answer but I think this certainly plays a role. People do not like being told "no" and the fear of rejection is real. Some people might worry that you are being a 'pest' or, even worse, they view you with pity. This should not be the case or your way of thinking. You have to remember that these people are your customers and have previously used your services. As long as you continue to offer excellent service, your clients will be glad to help you out and send you more business.

The second reason is simply forgetting to ask for referrals. It is understandable that this happens especially when things get crazy (spring and summer markets, situations to which a lot of us can relate). But we should try to make efforts, even during the busy season, to ask for referrals and keep in touch with our good clients whose business we value. One simple idea to overcome 'forgetting' is to mark off a time period every week to talk with your clients and ask for referrals.



It is not rocket science: The more referrals you request, the more business you are going to get. Title agents and attorneys must be proactive with clients. Understand where they are coming from and communicate with them. Let them know you are there; be visible to them on a regular basis. Remember, your clients love you! Do not be afraid to ask for referrals or more business!

Underwriting Topics
Regulatory Takings and the Story of
Lucas v. South Carolina Coastal Council

Mitchell J. Thoreson, Underwriting Counsel

Eminent domain, or the power of a governmental authority to acquire, without owner consent, privately-held real property, is an idea which stretches back hundreds if not thousands of years. Indeed, our own country is not immune from this power; however, it does have its limitations. Specifically, the Fifth Amendment to the United States Constitution provides "…nor shall private property be taken for public use, without just compensation."

Traditionally, the two most common areas of government activity which constitute an eminent domain taking are: (1) acquisition of property for government ownership, such as to construct roads or public parks; and (2) acquisition of property for ownership or control by certain common carriers, (e.g., utility providers, railroads) for public use.[1] Typically, in eminent domain situations, the governmental entity follows state statutory laws setting out the process for acquisition, usually through letters and notices to the affected property owner, valuing the taking through appraisals, and filing a lawsuit naming all interested parties.[2] But what if, instead of the government approaching the property owner for a specific acquisition, the property owner finds that certain governmental activity has, in essence, "taken" his or her property or its value? That is the exact situation in which David Lucas found himself with respect to the State of South Carolina several years ago.

The South Carolina coast was a developer's paradise in the 1980's. At that time, developers were acquiring and developing property from Myrtle Beach down to Hilton Head Island. One of these areas was the Wild Dunes development located in the Charleston area, which consisted of homes and condominiums along the coastline of the Isle of Palms. In 1986, David Lucas purchased two of the remaining beachfront lots in the Wild Dunes development for $975,000.[3] He intended to build homes on these two lots, which would be constructed amongst other neighboring homes already built on adjacent beachfront lots over the past few years.[4]

Unfortunately for Mr. Lucas, while he was working through obtaining design and building approvals from various neighborhood and local government boards, the State of South Carolina passed the 1988 Beachfront Management Act.[5] Among its many stated purposes, the Act was designed to limit construction within the beach and associated dune system along the coast of South Carolina. The Act was intended to protect and preserve the beaches from erosion and other potential negative effects resulting from construction in these critical areas.[6] The result of the Act, essentially, was to prohibit Mr. Lucas from building or placing anything on either lot except for a trailer and boardwalk, both of which would arguably be prohibited by Wild Dunes covenants. Mr. Lucas claimed that through the passage of this Act, his property was rendered completely valueless and it therefore constituted a governmental "taking" (a regulatory taking), which entitled him to "just compensation". The State's position was that takings are not compensable if done pursuant to the State acting to protect the public.

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[1] There are other areas and complexities which have arisen in the last hundred or so years in the American law, which we will leave for another discussion.

[2] The process of exercising the power of eminent domain is called "condemnation."

[3] *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1006 (1992).

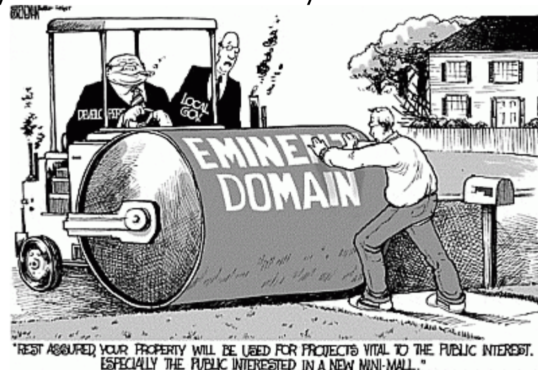
[4] *Id*. at 1008.

[5] *Id*.

[6] *Id*. at 1008-09.

The trial court ruled in favor of Mr. Lucas, that there was indeed a taking without just compensation, and awarded him $1,232,387.50 as just compensation for the regulatory taking. The South Carolina Supreme Court reversed the trial court's decision in a somewhat convoluted opinion based largely on the U.S. Supreme Court case of *Mugler v. Kansas*, 123 U.S. 623 (1887). The South Carolina Court ruled (as deftly summarized by the U. S. Supreme Court) that "when a regulation respecting the use of property is designed 'to prevent serious public harm', no compensation is owing . . . regardless of the regulation's effect on the property's value."[7]

The case eventually landed in the United States Supreme Court. In a majority opinion written by Justice Scalia, the Court ruled in favor of Mr. Lucas, reversed the South Carolina Supreme Court, and held that governmental regulation that deprives a property owner of all economically beneficial use of the property constitutes a taking for which just compensation must be paid.[8] In plain English, this means that if a law is passed which renders an owner's property useless and without practical value, that owner deserves just compensation for a taking under the Fifth Amendment to the U.S. Constitution.[9] Note that because the U.S. Constitution (including its Amendments) is the supreme law of the land, the effect of this case is broad, and applies to all persons and governmental entities regardless of whether you live in South Carolina, Pennsylvania, or any other state in the country.



No matter on which side you fall -- be it property rights or environmental protection -- strong opinions and emotions linger on both sides of the fence. For more details, I would encourage you to read the S.C. Supreme Court opinion, *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 404 S.E.2d 895 (1990), *further review*, 309 S.C. 424, 23 Envtl. L. Rep. 20,297, 424 S.E.2d 484 (1992), and the U.S. Supreme Court opinion, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). For additional information about David Lucas and to read the story as told from his point of view, pick up a copy of his book, Lucas vs. The Green Machine (Alexander Books, 1995).

As a final note, you might be interested to know how this story ends. The matter was eventually sent back to the trial court for proceedings consistent with the U.S. Supreme Court opinion, meaning the compensation amount needed to be determined. Ultimately, Mr. Lucas settled with the State for the State to purchase the lots for $1,575,000, apparently leaving less than $10,000 in Mr. Lucas's pocket after paying everyone else off in the process of the litigation (attorneys, lenders, etc.).[10] What is most surprising, perhaps, is that the State wound up selling the two lots, approved building permits, and houses were built on both properties which still stand to this day.

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[7] *Id*. at 1010 (citing *Mugler*).

[8] *Id*. at 1027-1032.

[9] The question of whether an owner deprived of less than "all" economically beneficial use of the property is, naturally, left open; although in Footnote 8 of the majority opinion, Justice Scalia does comment that such situations may require just compensation depending on the facts of the matter.

[10] See Lucas vs. The Green Machine at pp. 249-50. Unfortunately, stress and turmoil are not necessarily compensable in the eminent domain context (or really in any litigation context for that matter).

Special Feature Article: The Craft Ultimatum

Richard E. Craig, Esq., BrigliaHundley, P.C.

The purpose of this piece is to serve as a reminder that the underwriting and conveying of title is a pragmatic process and is always affected by case law as well as legislation. Currency is important. We are going to look at a case that received a huge amount of attention several years ago and has somewhat receded into the shadows. It is still here, however, and its effect continues. We will examine an example of its effect and look at the importance of pragmatism in the resolution of what at first glance appears to be an insurmountable obstacle to closing a sale and purchase.

Some of us may recall that day in April, 2002 when the decision in *United States v. Craft*, 535 U.S. 274, 276 (2002), was handed down and greeted by a universally appalled title industry. No one had ever imagined such an audacious and unprecedented assault on the most sacred of legal fictions: The tenancy by the entirety.

Don Craft failed to file tax returns for several years and then failed to pay the tax liabilities assessed by the IRS. Don and Sandra Craft, a married couple, owned a piece of property in Michigan as tenants by the entirety. Upon notice of the filing of the tax lien by the government, Don and Sandra executed and recorded a quitclaim deed conveying the property to Sandra individually. Subsequently, Sandra sold the property with the agreement of the government, free of the tax lien, provided half of the sale proceeds be held in escrow pending a determination of the government's interest. Sandra then brought action against the government to quiet title to the escrowed funds in the U.S. District Court. The government by motion for summary judgment contended that the lien attached to Don's interest in the tenancy by the entirety. Sandra contended that it could not attach because Don had no individual interest as a tenant by the entirety. The District Court granted the government's motion, and Sandra appealed to the Sixth Circuit.

The Sixth Circuit held that the tax lien did not attach because Don held no individual interest under Michigan law. The United States Supreme Court reversed the Sixth Circuit, holding that Don Craft's "interests in the entireties property constitute property or property rights to which a federal tax lien may attach." The ruling squarely contradicts the Supreme Court's long settled position reserving the determination of property rights to the states as enunciated in 1960 in *Aquilino v. United*

States, 363 U.S. 509, and reaffirmed in a number of cases thereafter.

It is now a reality that the application of *Craft* is in full force as to federal tax liens. Our interest in this piece, however, is the extent that *Craft* has reached beyond tax liens to the enforcement of non-tax liens. To that end, we will now look at a recent case and its disposition by agreement, which case illustrates that *Craft* has been extended to Department of Justice liens. Further, the case indicates that there are certain practical strategies workable in certain instances to avoid or confront government enforcement.

The case is a criminal matter in the Eastern District of Virginia, arising out of a scheme perpetrated by a local financial planner/securities dealer involving embezzlement of client funds over a period of several years to fund investment in high risk, speculative ventures. The dealer owned and resided in a fashionable rural residence in Northern Virginia with his wife, holding title as tenants by the entirety. After he was convicted, he was sentenced to a number of years in a federal penitentiary with a hefty fine and a restitution order.

His wife and family were also in unfortunate circumstances as a result, and, acting for herself and as attorney-in-fact for her husband, she listed and sold their residence with his concurrence. Prior to the sale, the DOJ filed a lien against the husband in the county wherein the residence was located. The sale and settlement proceeded notwithstanding the lien. Thereafter, the government initiated its usual enforcement procedures. A close examination of the facts revealed that (a) there was no equity in the property at the time of sale, (b) the purchase money financing was very close to 100 percent, and (c) the greatest portion of the purchase money funds was used to pay off the existing mortgage loan which pre-dated the DOJ lien.

18 U.S.C. § 3613(c) explicitly directs that fines/restitution liens be treated as federal tax liens. Further, it provides that "[a] fine imposed … is a lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal Revenue Code of 1986." Accordingly, fines, penalties, and restitution imposed by order, that arise pursuant to § 3613 should be treated in a similar fashion as federal tax liens. Thus, the application of *Craft* is the next step.

In accordance with 18 U.S.C. § 3613, courts have extended the *Craft* reasoning to restitution orders in holding that federal judgment liens attach to entireties property. See, *States v. Godwin*, 446 F.Supp.2d 425 (E.D. Va. Aug. 29, 2006); see also *United States v. Poulsen*, 2010 WL 1849294 (S.D. Oh. May 3, 2010); see also, *United States v. McArthur*, 7 F.Supp.3d 1220 (S.D. Ala. Feb. 21, 2014). So, it is quite clear that *Craft* has been logically extended to the enforcement of DOJ liens and that federal law determines the property rights of the convicted offender.

In our example case, the lien attached to the entireties interest of the husband and the purchaser took title subject to the lien. However, the real controversy in this case boiled down to whether the DOJ lien, notwithstanding that it attached prior to the recordation

of the purchase money deed of trust/mortgage, was prior to the purchase money security interest. Case law would indicate that the DOJ lien would not have priority due to its treatment as if it were a tax lien pursuant to 18 U.S.C. § 3613. See, *Slodov v. United States*, 436 U.S. 238 (1978); see also, IRS Publication 785 (10-2005) (referencing Revenue Ruling 68-57). Fortunately, an accommodation was reached with the government and the DOJ lien was released as to the subject property. The purchase money issue remains open in the Fourth Circuit.

As a side note, the fact that there was very little, if any, equity in the property on either side of the sale and purchase would have been important had the government been brought into the picture prior to settlement; however, it is likely that a release as to the property could have been accomplished.

As recent as the final editing of this article, the Western District of Virginia issued an opinion ordering that government forfeiture of real property used in connection with unlawful marijuana operations can break the tenancy by entirety. In *United States v. Franco*, Case No. 5:14CR00011 (W.D. Va. July 26, 2017), the Court ruled that the offender husband's entireties interest would be immediately forfeited to the government. The innocent wife's entireties interest, however, would be protected in the following manner: (1) that she retain full and exclusive use of the property for her life; (2) that restrictions be placed against governmental alienation of the property without her consent and against attempts to levy upon her husband's interest; and (3) that she retain the right to obtain her husband's forfeited entireties interest if she should survive her husband. The Court discussed the Circuit Courts of Appeals split over forfeiture actions with respect to tenancies by the entirety. Of particular interest to this article, the Court included *Craft* in a footnote when it stated, "Thus, though state law defines the nature of the property interest in question, federal law governs whether the subject property is forfeitable."

There are other tales, but I hope this limited but close look at an actual case resolved under the shadow of *Craft* illustrates that (1) *Craft* is alive and well, (2) currency in the law is critical to underwriting title, and (3) pragmatism and timeliness are the best tools in dealing with federal liens.

Dick Craig is a long-time veteran of the title industry. He spent many years as Vice President, State Counsel and Manager for one of the largest title insurers and then returned to private practice, first with Cochran & Owen and then BrigliaHundley. He serves as outside claims counsel for Conestoga Title and other underwriters.

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By: Richard E. Craig, Briglia Hundley P.C.
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Underwriting Topics
Marketable Title versus Insurable Title
R. Michael Smith, VP Underwriting

In contract negotiations, an often neglected provision is the quality of title to the property to be conveyed. It may be seen as a matter for the lawyers, but whether or not the final language calls for "good and marketable" or "marketable and insurable" title is significant. Traditionally, marketable title is what is to be conveyed, but few titles are perfect, which is what a truly marketable title requires. The availability of title insurance to cover the acceptable title defects is one answer to that problem, but it has to be borne in mind that an insurable title is not a perfect one.

Justice Potter Stewart admitted that a definition of obscenity might not be possible but that he knew it when he saw it. A definition of *marketable title* might be similarly difficult but the courts seem to know it when they see it. Given that most real estate purchase contracts promise delivery of marketable title, it would seem that its definition is a matter of common understanding. The converse is probably closer to an accurate statement. The title industry has not assisted in defining marketable title even though its policy forms have included *unmarketability of the title* as one of the insuring provisions. A definition of that term first appeared in the 1992 ALTA policies and was enlarged in the 2006 ALTA policy forms.

Justice Potter Stewart was not speaking about marketability

A comprehensive statement about marketable title appears in *Madbeth v. Weade*, 204 Va. 199, 129 S.E.2d 667, 669-670 (1963):

> A marketable title is one which is free from liens or encumbrances; one which discloses no serious defects and is dependent for its validity upon no doubtful questions of law or fact; one which will not expose the purchaser to the hazard of litigation or embarrass him in the peaceable enjoyment of the land; one which a reasonably well-informed and prudent person, acting upon business principles and with full knowledge of the facts and their legal significance, would be willing to accept, with the assurance that he, in turn, could sell or mortgage the property at its fair value.

Many subsequent decisions have quoted this passage but have usually relied upon one of the clauses to support the finding of marketability or lack thereof. In other words, it would appear that a title is marketable if it meets one of the *Madbeth* tests, not all of them. That suggests that a marketable title may be less than a perfect condition which is an impression favorably drawn from cases in jurisdictions other than Virginia as well. *See, Wagstaff v. Deutsche Bank National Trust Co.*, Case No. 07-13101DK, 08-00204DK (Bkcy. Ct. Md. Dis. 2010); *Stewart Title Guaranty Company v. Greenlands Realty, LLC*, 58 F.Supp.2d 370 (D. NJ 1999).

Madbeth addresses a couple of other points about marketable title that are important to remember. First, in Virginia, marketability of title is a question of law, not of fact. Other jurisdictions have found marketability to be a fact issue. *See*, "Title Insurance Coverage for Unmarketability of the

Title," John C. Murray, PLI (Commercial Real Estate Financing 2006: What Borrowers & Lenders Need to Know Now), January-March 2006. If it is an issue for the court, expert opinion on title would not be admissible at trial. Virginia Circuit Court decisions seem to imply, however, that trial judges approach marketability as a mixed issue of law and fact, allowing expert testimony and permitting juries to determine the issue when the facts available may be within their common understanding of real estate practices. See, for example, *Figman v. Davis*, 23 Va. Cir. 546, 1989 WL 646437 (Loudoun Cir. Ct. 1990) admitting testimony of "an experienced commercial banker" on the issue of marketable title.

The second additional matter raised by *Madbeth* is that, upon identification of a defect or encumbrance upon title establishing a potentially unmarketable title, the burden shifts to the proponent of the title to establish that it is marketable or to remove the defect. In other words, it seems that it takes something less than a *prima facie* showing of unmarketability to shift the burden of proof to the proponent of marketability. Given that the law undoubtedly assumes good title in a record holder of same, this seems to be an opening for the very chaos that *Madbeth's* definition above would seek to avoid. In *Madbeth*, however, the proponent of marketability took neither action. It is probable that the Supreme Court would have sustained the title if the proponent had produced some evidence to refute the challenge.

Principles of marketability predate *Madbeth*. For instance, a grantee of title should receive it free of judgment liens or tax liens, but a title is marketable if such liens can be satisfied out of purchase money. Note that they must be currently payable and their existence must not be in doubt (i.e., they must attach to the title and must be legally enforceable). Another principle is that title must be marketable at date of delivery of the deed and may be unmarketable at date of contract. In another Virginia case, the Court found that purchaser's counsel's opinion on marketability was wrong and imputed that faulty knowledge to the purchasers; consequently entering an order of specific performance against them directing their purchase of the property in question. At common law, any defect in or burden upon the title would make it technically unmarketable. The modern approach seems to be that an unmarketable title is one which has such a serious defect that a reasonable person with knowledge of the defect would not purchase the property in the exercise of good business judgment, because such purchase would expose the purchaser to the hazard of litigation or the inability to resell or mortgage the property. For example, ordinary easements for utilities, although they impact the title, would not support an unmarketability of title claim because such easements are normally accepted in the sale of real estate. Also, mortgage liens that are to be satisfied out of purchase money do not permit the purchaser to reject the title.

As mentioned above, the 2006 ALTA policies insure against loss or damage resulting from an unmarketable title. "Unmarketable title" is defined in the Conditions as a title *affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title or a prospective purchaser of the Insured Mortgage to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title*. An untested portion of

the definition is what happens to insurance protection for a seller who contracts to convey "free and clear of all liens" as this would appear to be greater than a marketable title.

Commercial real estate contracts often offer to convey title that is marketable and insurable. "Insurable title" in this context, in the common understanding of commercial counsel and lenders, probably means those title defects or marketability issues that a title insurer would "insure against" under normal policy provisions or special coverages but without additional premium. Sometimes the title to be conveyed is called marketable subject only to the list of permitted exceptions which is usually the title insurer's schedule of special title exceptions presented to the purchaser during the purchaser's due diligence period.

Cases that discuss insurable title are even rarer than those on marketability. In *Presidential Gardens/Duke Street Limited Partnership v. Slye*, 802 F.2d 106 (4th Cir. 1986), the contract called for delivery of title *to be merchantable and insurable (subject to the Permitted Exceptions)*. First American Title issued a title insurance commitment that took exception to a deed of vacation, but the Fourth Circuit held that the deed was a nullity. Due to a lack of joinder in that deed of vacation by the locality, the Fourth Circuit held that the deed was a nullity. The buyer claimed that that matter made the title unacceptable because it was an encumbrance on the title. The Court said that, since it is a nullity, it is not an encumbrance (even if it might have been if it had not been a nullity). To complete the loop, the Court then found the title insurable because First American had issued a commitment to insure subject to the now-nullified deed of vacation, which eliminated it as a title exception. In fact, the Fourth Circuit suggested that unless the title insurer refuses to issue a title commitment and/or policy, the title is insurable if that is what the contract demands. See also, *Bradford v. Goodwin*, 2001 WL 34008776, 17 VLW 223 (Loudoun Cir. Ct. 2001); *Wagstaff, supra*; *Aronoff v. The Lenkin Company*, 618 A.2d 669 (DC Ct. App. 1992).

As a title underwriting principle, however, a known marketability problem should be disclosed to the purchaser even if such is insurable so that the purchaser may choose to accept insurance over the problem. Be aware that a contract that promises "insurable title" in order to avoid the seller's obligation to deliver one that is marketable may be seeking to compel the purchaser to accept an unmarketable title if a title underwriter will "insure over" the defect.

The final advice as to whether or not marketable or insurable title is preferable for any party to the contract is a legal one. Certainly, though, the quality of the title is an important consideration for all during negotiations and, with well-crafted contingencies, may be a way out of a bad deal or the means to collect damages from a buyer grasping at straws to avoid performance. Knowledge of the title in advance by the seller or provision for a reasonable period for due diligence as to the title for the buyer is recommended.

Circling the Wagons
Industry News

Skims, Scams, and Scums

In the mortgage and title space, there seems to be a never-ending string of scams and frauds that have escalated from signature falsifications to complex internet schemes to steal millions of dollars. Here is a digest of some of the latest stories: **Pennsylvania** – A former Hazelton area realtor had his license revoked for selling homes that were not for sale by falsely listing them. He targeted a Hispanic market of first time homebuyers unfamiliar with the system. In Aliquippa, a little shop of horrors existed in an auto repair disguise. The site was the focal point for West African scammers to redirect loan funds from a settlement company to a fake bank account. Federal indictments for money laundering have been handed down in that matter, automatically. Meanwhile, in federal court in Philadelphia, submission of fraudulent loan applications by a builder/developer resulted in 60 months in prison for wire fraud. And another federal wire fraud indictment was presented to a former real estate appraiser who specialized in overvaluing property for federally-backed home equity loans. **New Jersey** – A former local housing authority official was given three years' probation and ordered to pay restitution for using a HUD credit card for her personal needs. Ten years in prison was the result for another NJ resident whose crime was money laundering. The complex scheme involved fake identities for borrowers, title agencies, notaries, and settlement companies. **District of Columbia** – Think this only happens to those less sophisticated in the real estate marketplace? A DC couple sent $ 1.5M to a wire address allegedly that of their closing title agency. Turned out that the agency's email system had been compromised and the couple's transaction had been phished from the system. They responded to a fake email by sending the balance of their settlement funds to a false bank account. They are suing the title and settlement company for what is tantamount to the NCAA's 'lack of institutional control.' **Virginia** – A more 'traditional' type of mortgage fraud (false loan applications, misapplication of investors' funds, etc.) resulted in conviction in federal court of a former University of Virginia football player and others. In a separate federal action, Navy Federal Credit Union was shown to be the victim of home equity lending fraud perpetrated by one individual who duped others into buying homes that went into his name while they carried, and subsequently defaulted, on the mortgage debts to the Credit Union. **Kentucky** – Another appraiser who falsified appraisals received ten months in prison or home confinement after admitting to conspiracy to commit wire fraud charges. **Nevada** – It is said that a special place in hell is reserved for those who harm widows and orphans, then this situation identifies a new resident of that place unless redeemed: A former director of community development at a national nonprofit, who funneled FNMA's 'First Look' properties (those in REO from foreclosure) to other nonprofits so that the NPs could move the properties to low income individuals, took bribes from those nonprofits, which then flipped the homes at a profit, ignoring their socioeconomic purpose for existing.

Recent Legislative and Caselaw News

Maryland

Maryland had several new laws of interest to our industry take effect on October 1, 2017. Senate Bill 31 permits the use by title insurers of a ratings bureau for setting premium charges. Senate Bill 487 provides new protections for ground lease tenants and fee purchasers against excessive recovery of past due rents or charges due from prior owner's tenants. Senate Bill 376 removed the requirement for preparation by a Maryland attorney from mortgages, deeds of trust, and assignments or releases of either type of instrument. [Such instruments do have to be prepared by a party to the instrument or a Maryland attorney.]

Pennsylvania

In a case that has to be viewed as fact specific, a Pennsylvania Superior Court relieved a title insurer from its obligations under a closing protection letter. The lender was found to have used the closing entity as its own agent for handling its funds and, further, under Excl. 3(a) of the loan policy had created the circumstances of its own loss by selecting the closing entity as its agent. The court seemed to say that both the insurer and the lender were victims of the closer's misapplication of the lender's funds but that, as between the two innocents, the lender had the better opportunity to prevent the loss.

Ohio

The Ohio seminar (see below) will cover all of these topics: New curative statute, good funds legislation, and a mechanic's lien decision out of the Eighth District Appeals Court that has title insurers scratching their heads.

New Jersey

A recent decision by the Appellate Division held that a life estate can be subordinated to a mortgagee's interest even if the life tenants object to the subordination.

Indiana

In a decision being appealed to the Indiana Supreme Court, for now, any interest in property that is recorded, even if not in the chain of title, must be noticed in a tax sale proceeding. This means that a tax sale purchaser may not be a bona fide purchaser without notice of interests that do not rise to the level of constructive notice. The court's decision seems to be based on an interpretation of the tax sale statutes which place a greater burden of inquiry upon the purchasers and due diligence upon the officials conducting the tax sale.

Federal Issues

In astronomy, a black hole is a powerful field of forces so strong and dense that even light cannot escape. Under the CFPB's various 'Know Before You Owe' Rules – specifically, the TRID Rule – there is a Black Hole awaiting resolution. ALTA is one of several industry trade groups that has asked for clarification by the CFPB of the this problem: If a Closing Disclosure issues that reveals tolerance violations how does a creditor lawfully reset the tolerances when there exists a prohibition against any further Loan Estimate after the CD? CFPB guidance on merciful enforcement has not left many lenders comforted that they can venture into this space. What CFPB will do is still unclear.

There has been much talk about tax reform including effective limitation of the mortgage interest deduction by increasing the personal standard deduction. Realtors claim that any diminution of the MID will lead to lower home sales because buyers will be discouraged by the loss of this economic benefit. The current Administration argues that buyers are not motivated by the MID; instead they are moved by job security and a growing economy. Whoever is right is unknown because empirical data does not exist that supports either side. What may be significant is that the National Association of Home Builders, a longtime supporter of the MID, has stated that it will listen to arguments favoring reduction of the benefit. Although not being specific as to its change in policy, the NAHB says that it wants to be flexible in light of changing national norms on the issue.

Recently introduced in Congress is bipartisan legislation to amend the TRID Rule so as to bring order into the simultaneous issue confusion. That such legislation has to pass through the House Financial Services Committee suggests that it has little chance of success despite the fact that it would crop regulations promulgated by the CFPB. Also pending in Congress is legislation that will prune the recent CFPB arbitration rule.

The Equifax Breach

I am surprised to learn that *The Equifax Breach* is not the title of a Robert Ludlum thriller. Except for the facts that the storyline has no solitary, iconoclastic, human-against-intangible-power hero, it does not lack for potential conspiracy plots, multiple victims (in the millions), and obscure villains. With as many as 143,000,000 consumers affected, it is safe to conclude that every family in the United States has had confidential financial data stolen including SSNs, home addresses, birth dates, loan numbers, etc. For affected individuals, the potential risk of identity theft is possibly greater for the future, because the nature of the purloined information is just what it takes to obtain, legitimately, new credit by a bad actor. This is a terrible situation, but it gets worse. Turns out that Equifax may well have known of the breach eight months before the breach was announced. The lack of prompt notice is being investigated. Massachusetts and San Francisco have filed suit against Equifax and several class actions are pending. Two other troubling *sequelae* have followed the announcement of the breach: While several key employees at Equifax have resigned, several highly placed employees sold stock or cashed in stock options in the days before the announcement. Needless to say, prior to the breach, the stock was trading at a high price that immediately tumbled afterward. Also, Equifax offered its own ID protection product to anyone affected for free for one year of service. There have been connectivity problems on top of the rather creepy sense that Equifax will profit from its own carelessness.

With all that our industry has had to endure over the last decade or so with GLB and Dodd-Frank, NPI, and Best Practices, and the CFPB – the large dollar expenditures for training and software, loss of small companies who worked for years ethically and with concern for the homebuyer – are you shocked to know that those same laws do not impact the credit reporting bureaus the same way that they do you and your lender customers? While you have been parsing cybercrime insurance policies and protecting your wired funds' process, the data you have been protecting at great expense has just been part of a massive data dump that will probably affect our relationships with lenders and other related settlement service providers. Your customers' information may have been compromised and your business may be impacted.

On Monday, September 25th, Deloitte, one of the 'Big Four' accounting firms, announced it had been hacked. While it has acknowledged only that a few major clients lost data, the event is significant for another reason. [P.S. *The Guardian*, out of England, reported that FNMA and FHLMC were among the corporate victims, but later denials came from the two GSEs that they were compromised. We unknighted commoners may never know what or who has been affected.] One of Deloitte's major products is consulting in and selling cyber security programs for its customers. The Deloitte brand will suffer, as may confidence in cyber security systems generally.

Training on the Horizon

Conestoga Title's Ohio Seminar is just a few sunrises in the future: Thursday, October 19, 2017 to be exact. It is being held again at the Ohio Union at The Ohio State University. The Agenda, the setting, the level of education … resulted in standing room only for registrants after only one email blast. Standby registrations are still being taken in case of dropouts. Contact Colleen Sheerin at Conestoga (csheerin@conestogatitle.com) if you want to be placed on the standby list. The program is pending approval for 6 hours of agent CE (2 in Ethics) and has been awarded 6 hours of CLE.

By the time the next issue of the *WagonLode* is published, Conestoga College 2018 registration will already be in process. Watch your inbox for the first announcement soon. Nine (9) hours of CE and CLE will be sought. Keep these dates open: Monday and Tuesday, January 15-16, 2017. The program will be held at the Eden Resort and Suites, Oregon Pike at US 30, in Lancaster, Pennsylvania.

Employee Spotlight
Mitchell J. Thoreson

Mitch Thoreson is the newest member of Conestoga Title's Underwriting Department. He comes to us from South Carolina and joined Conestoga in June 2017. While in South Carolina, Mitch spent eight years in general legal practice, focusing primarily in the areas of real property and municipal law, including land disputes, easement and right-of way acquisitions, foreclosures, and commercial real estate closings. He has also worked as a licensed South Carolina title agent for several years. Mitch is a graduate of Emory University with a B.A. in History, and received his J.D. with honors from Mercer University School of Law. He is admitted to practice in all South Carolina State and Federal Courts, as well as the Fourth Circuit Court of Appeals and the United States Supreme Court. Mitch's wife is from the Harrisburg area making a return to Central Pennsylvania a family desire: The Thoresons have two preschool children and grandparents at the ready! Mitch is an avid golfer and enjoys spending time in the great outdoors when he gets a moment for rest and recreation.

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