



Season of change continues as industry tackles tough issues

No question about it, the title insurance industry is in a season of change.

As dramatic as 2011 was — as outlined in the first part of our two-part series on legal, regulatory and legislative trends in the Dec. 5, 2011, edition — the industry will be rolling up its sleeves to address even tougher issues in 2012, including insolvency, escrow fraud and new closing disclosure prototypes. In the second part of our series, industry experts share how they believe these issues will play out in 2012 and how these concerns will impact the industry.

Addressing the solvency shake up

When two underwriters announced they were ceasing the issuance of new policies after they discovered agents had committed escrow fraud, industry members and regulators took notice. And it's not just these two instances. In 2011, a large agent shut its doors due to escrow fraud it had perpetrated.

With transparency the new buzzword, leaders in the industry are attempting to work on an industry solution to curb the potential escrow fraud epidemic as regulators investigate ways to protect policy holders from insolvent insurers.

The defalcations that led to the downfall of Southern Title Insurance Corp. and New Jersey Title Insurance Co. shed additional light on what could be considered a gap in the oversight of title agents across the country with regard to escrow functions.

“I think that for the longest time in many states escrow and title were considered separate because many agents are assigned to a policy issuing agency contract,” said David Townsend, president and chief executive officer of Agents National Title Insurance Co., explaining his belief that states will be engaging in increased market conduct and escrow scrutiny. “It is silent as to escrow authority because, in a lot of states, escrow is unregulated. So what I perceive happening is greater scrutiny on the escrow side of things and a focus on defalcations; basically escrow fraud prevention.”

□ *Continued on Page 3*

ON THE RECORD

My view is that we can't expect regulators to roll up their sleeves and provide the answers to some of the very vexing circumstances that cause losses and jeopardize a consumer's interests. The industry can come up with the right answers to deal with these things, and should.

– Frank Pellegrini, chief executive officer of Prairie Title
Season of change continues as industry tackles tough issues , page 3

INSIDE THIS EDITION

CFPB keeps moving forward on closing disclosures [Page 6](#)

Alabama Supreme Court declines to answer value of damages question [Page 7](#)

Fraud convict sues title agency for breach of contract [Page 8](#)

Switched legal descriptions lead to negligence suit [Page 9](#)

GSE reform bill moves forward [Page 11](#)

Proposed Dodd-Frank changes lead to AfBA debate [Page 12](#)

Nevada AG sues LPS for alleged robo-signing allegations [Page 14](#)

La. insurance commissioner addresses offering 'things of value' [Page 16](#)

IN THE NEXT EDITION AND BEYOND ...

When the bottom fell out from under the real estate market, several builders were left unpaid for work they had done on properties. The mechanic's liens on the properties have caused an increase in claims arising from these liens. Find out how certain underwriters have addressed the problem in our next issue.

Editor's Note

Dear Readers,

The beginning of a new year is a time to plan for the months to come, set goals and prioritize items on your to-do list. Last year ended with many things left on the title industry's to-do list, as you can see from this edition's cover story.

From another round of RESPA reform, to lingering regulator concerns about agent and underwriter solvency, much will be done on the regulatory front that will significantly impact how the title industry operates for years to come.

"I think it's so easy to look at all of these issues and feel overwhelmed and get a little bit of advocacy fatigue," said **Justin Ailes**, vice president of government affairs for the American Land Title Association.

This idea of advocacy fatigue reminds me of a famous quote by English clergyman and writer, **Sydney Smith**, who said "It is the greatest of all mistakes to do nothing because you can only do a little. Do what you can."

That sentiment is echoed by many of the people I spoke with for the forecasting series. "I think if I were to pick one word to describe what we need to focus on for 2012, it would be engagement," said **Mary Schuster**, president of op2. "It's engaging the industry with the regulators."

"What we need to be doing as an industry is take control of the environment ourselves," said **Mary O'Donnell**, president of Westcor Land Title Insurance Co. "I think our industry is stronger when we self-police it and when we self-analyze the risk in individual underwriters and agents and determine the risk profile we can and cannot live with and the kind of market conduct we can and cannot live with. I'd love the day we can go to our regulating bodies and say, 'We got it under control and here is what we are doing to control risk and control the solvency and control market conduct.' The more we define that as an industry and take control of it ourselves and not wait for our legislative and regulatory friends in a 50-state environment to decide what that should be, I think the better and stronger our industry will be."

As the industry works through these issues and engages its regulatory bodies, *The Legal Description* and October Research will be there with the news, forums and education you need to thoughtfully participate in the conversation.

Until next time, stay legal.



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Cover Story

□ *Continued from Page 1*

Nick Henderson, president of First Nebraska Title and Escrow Co., also noted that there has been a heightened recognition that there is a major function of the title insurance industry that is not related to title.

Vincent Danzi, general counsel for Equity Settlement Services Inc., said the situations with Southern Title and New Jersey Title have caused him to wonder whether regulatory oversight has been focused on the right area of the title agent's work and said, perhaps, consolidating insurance regulators and banking regulators, like has been done at the Consumer Financial Protection Bureau (CFPB), is a sign of things to come.

"It is interesting, for instance, that in New York State, the insurance department does not license title agents. I think many of us have looked at the coordinated licensing of title agents as an important step to establishing a regulatory framework for our industry. And yet as I read the recent headlines, I think to myself, 'Has the regulatory emphasis been in the wrong part of our business,'" he said.

Danzi said he believed more states will look at escrow licensing next year.

First and foremost on the mind of the regulators is how to protect the policyholders who are purchasing title insurance. To assure that this happens, regulators may require more reserves or increased oversight of agents from their underwriters.

"I think you are going to see several departments of insurance who will require more reserves and require better agent monitoring from their underwriters," said **Michael Holden**, state agency manager at North American Title Insurance Co.

Because of their concerns about solvency and defalcation, some states are looking to hold the underwriter liable for the actions of their agents, something that has both agents and underwriters concerned.

Justin Ailes, vice president of government affairs at the American Land Title Association, noted several states where steps have already been taken to impose stricter liability on underwriters.

"Minnesota attempted to pass a strict liability statute," he said. "Maryland regulators pressed for new CPL [closing protection letter] and solvency legislation. Beginning back in 2009, Washington State took some enforcement steps to hold underwriters vicariously liable for the marketing acts of their agents. And back in 2010, Illinois found underwriters liable for theft of escrow funds on policies issued by a properly terminated agent."

Industry members also are concerned and have been looking for ways to address the situation as well.

"I think the optimum solution is an industry solution," said **Frank Pellegrini**, chief executive officer of Prairie Title. "I think the regulators welcome that. My view is that we can't expect regulators to roll up their sleeves and provide the answers to some of the very vexing circumstances that cause losses and jeopardize a consumer's interests. The industry can come up with the right answers to deal with these things, and should."

Charles Cain, vice president and agency manager for the Midwest region for WFG National Title Insurance Co., suggested that it might be difficult to come up with an industry solution.

"For the underwriters, it will take a regulatory scheme for them to be able to ask for or require higher levels of fidelity coverage for closing and settlement. It's very difficult in the marketplace unless the entire industry were to change in a given jurisdiction and that is not very likely," he said. "That being said, I do not think underwriters are adverse generally when regulators are looking to create those standards for the agents."

NAIC tackles big agenda

During the fall meeting of the National Association of Insurance Commissioners (NAIC), the Title Insurance Task Force announced that much of the task force's time this year will be taken up by addressing solvency issues. The first item on its to-do list is to coordinate with the Financial Condition Committee to modernize the solvency regulation of title insurance. **Bruce Ramge**, director of the Nebraska Department of Insurance and chair of the task force, wrote a letter to the chairs of the Accounting Practices and Procedures Task Force, the Financial Examiners Handbook Technical Group, the Examination Oversight Task Force, the Capital Adequacy Task Force and the Financial Analysis Research and Development Working Group, asking them for their assistance in this endeavor.

In addition, the task force plans to examine ways to mitigate the impact of title insurer and agent insolvencies on policyholders. Such efforts may include: promoting the use of blanket lenders' policies and individual owners' policies to replace policies issued by insolvent insurers; examining the financial failures of title agents; and promoting the use of CPLs.

The task force also agreed to continue fighting mortgage fraud in 2012, which may include working with the Antifraud Task Force and other NAIC committees, task forces or working groups to combat mortgage fraud; and mitigating

Cover Story

title agent defalcations through the promotion of closing protection letters and other remedies. In addition, it will have the Title Insurance Market Conduct and Mortgage Fraud Working Group continue its work.

RESPA remixed

Beginning in May, before it was officially open for business, the CFPB began tackling one of its most important and clearly defined tasks, combining the disclosures required under RESPA and the Truth in Lending Act.

After spending months focusing on disclosures that combine the Good Faith Estimate and initial Truth in Lending (TIL) disclosure, on Nov. 8 the CFPB released its much anticipated first round of combined HUD-1 settlement statement/TIL closing disclosures. It issued its second round of closing disclosures on Dec. 14.

In a blog post on its website, CFPB staff noted that it is in the process of replacing the two forms with one that is easier to use, as required under the Dodd Frank Wall Street Reform and Consumer Protection Act. It is also working to “fold in some other federal disclosures that are currently or would be provided on other pieces of paper.”

Members of the title industry anxiously awaited the release of these first prototypes and had much to say about the new forms.

“The proposed revisions, in my opinion, are more in tune with the needs of the average consumer and will be more useful tools than what are currently available,” said **Charlene Perry** of The Preferred Title Group Inc. “This is an issue that needed to be addressed, but once the new rules have been finalized, we in the industry will be faced yet again with the need to acquire revised software, spend time and money training staff and so forth.”

“Last time [the forms] came out, our industry, and we locally, took it as an opportunity to try to inform our clients, try to be leaders in that area,” Henderson said. “We’ll do that again. We’ll get the information out. We’ll try to educate our lender and Realtor clients as much as possible. But, conversely, we just got a form that people seem to have rounded on a bit and here we go again. It was expensive in time and dollars.”

Francis C. Riley, partner at the Princeton, N.J.-based firm of Saul Ewing LLC, said the forms first and conforming regulations later approach “may actually give consumers and industry groups a better chance at affecting what the regulations look like than the standard proposed rule, comment period, final rule process.”

Mary Schuster, president of op2, agreed, saying the key to making the upcoming changes to the forms meaningful to

Data issues persist in 2012

In the last few years, technology has grown by leaps and bounds, allowing recorders to store and provide land records to their constituents more efficiently. The cost of providing this technology — and the time it takes to implement it — has caused some recorders to increase the price of access. At the same time, belt-tightening title companies are finding the cost to purchase land records extremely high — especially when the new technology in some counties actually cuts the cost for the recorder.

These disagreements sometimes lead to legal battles that cost both sides significantly. One example is a case out of Missouri, *Webster County Abstract et al v. Webster County*, in which the court ruled that county recorders are not limited by the Missouri Sunshine Law in what they can charge for copies. Rather, their limit is the statutory fee under the recorder’s statute, which is \$2 for the first page and \$1 for each additional page.

Another significant case that limited the cost effective access to public land records was *Burnet v. Bergen County*, which was decided by the New Jersey Supreme Court. The plaintiff in the case, **Fred Burnet**, wanted to acquire copies of Bergen County’s land records, which were on 2,559 rolls of microfilm.

In addition to court opinions impacting the access to public records, several state legislatures have also introduced legislation that limits the access to these records. According to ALTA’s Real Property Records Committee, there were bills in several states that raise the cost of and restrict access to public land records.

One such bill, **Arkansas SB 946**, permits county officials to negotiate with commercial entities regarding the reasonable fee for bulk access to public records. This bill was signed by the governor on March 31, 2011. Another bill, which was left pending, is **Indiana HB 1304**. If passed, the bill would allow county recorders to deny access in the recorder’s office to a public record if the public record is available from the county’s website.

David Townsend, president of Agents National Title Insurance Co., said stabilization in the cost to access land records is critical for the industry, noting: “I can see going forward we are going to try to work with the recorders and those that control public documents to make sure that access at a reasonable cost is maintained. It’s a state-by-state issue at this point and every state is going to handle it differently.”

Cover Story

both the consumer and the industry is to be engaged. She encouraged industry members to voice their opinions about the forms and find ways to communicate the concerns they have with the different prototypes that come out and find solutions to address those concerns.

First Am v. Edwards

In a much-watched case regarding the necessity of showing damages when bringing a class action, First American and Denise Edwards took their arguments to the Supreme Court on Nov. 28. The court's decision, which is expected to be handed down by the end of June, will have a significant impact on the title insurance industry.

In the case, *First American v. Denise P. Edwards* (Case No. 10-708), the court must decide whether a private purchaser of real estate has standing to sue for RESPA violations under Article III if she has suffered no damages.

First American's attorney argued that Edwards is required to show injury in fact, while Edwards' attorney and the U.S. solicitor general argued that Congress provided Edwards with a statutory injury in fact.

Holden said he was impressed with the questions and knowledge the justices brought to the discussion of title insurance, but said they may have missed the point that there is a difference between a Realtor who tells a buyer to use its in-house title or mortgage company, and the situation with First American and Tower City.

"That was the only thing that I thought wasn't really being discussed," Holden said. "The allegation is that because First American owns 17 percent that they had an exclusive agency relationship with Tower City Title and that is not even true. When underwriters buy minority interests in agencies, they are buying a revenue stream. That is what First American did when it bought an interest in Tower City Title. They said, 'This company is profitable; it meets our core business function and we expect it to make us a return,' and it did for a long time, in addition to the revenues they were already receiving having them as an agent."

Marx Sterbcow, managing attorney at The Sterbcow Law Group, said he believes the decision will hinge on Justice Anthony Kennedy's opinion.

"Kennedy seemed concerned about the economic marketplace impact from his questioning of First American's attorney," he said. "The ruling could go either way or the Supreme Court could remand it back to district court with specific instructions on how to determine injury in fact under law. Kennedy is an economic theorist by nature so it is highly possible they could remand back to district court and allow the plaintiffs the opportunity to hire an economist to

establish the economic injury in fact. It definitely seems as if Kennedy is torn in this case but he seems worried about the impact of fixed market conditions on consumers and on other businesses."

Riley was a bit more certain about the specific outcome.

"I think that each and every justice viewed as infirmed Edwards' argument that RESPA creates a fiduciary or agency between the consumer and the title agent relative to the procurement of a title policy, which in turn provides for actual damages when there is a breach of the fiduciary duty (acceptance of a kick back from the underwriter, *i.e.*, investment in the agency by the underwriter) in the form of disgorgement of fees," Riley said. "It also appears that the discussion by several justices about an economist's opinion that AfBA's in general and the one at issue in this case specifically place consumers at an economic disadvantage that equals to actual damages was nothing other than a sideline, academic frolic. There is simply no evidence in the record, nor argument, that supports a finding that Edwards or others suffered an economic loss or suffered some ethereal loss that at common law might give rise to right to 'damages' which RESPA effectively makes clear are incorporated within and thus give rise to Article III standing.

"The court will likely find that Edwards has no Article III standing since Article III does not confirm standing to sue in Federal Court under a federal statute for 'damages' that only find their genesis in academic or philosophical debate," he continued.

Holden had ideas about what a potential outcome could mean for the industry, noting that if the court finds Congress dictated that buyers have the right to have a conflict-free transaction, it must also note that Congress has provided a remedy for that potential conflict, disclosure.

"If they remand this case back to the trial court and it becomes a class action lawsuit, First American is going to have to deal with [the outcome], but the real outcome is going to be that when an underwriter owns part of an agency, they are going to have to disclose it, just like if a Realtor owns part of a title agency. It's going to be another category of conflict. The argument is that Congress said you have a right to a conflict-free title insurance transaction and because that was not given to Edwards, she has standing to bring her lawsuit. You could argue the merits of whether or not Congress created that right, but then you can't ignore the fact that in the same law Congress created the cure for when there is a conflict, which is disclosure."

The Legal Description will continue to follow all of these issues in 2012. Stay tuned!

Feature Report

CFPB keeps moving forward on closing disclosures

Just in time for the holidays, the Consumer Financial Protection Bureau (CFPB) unveiled its latest round of prototypes for the combined HUD-1/Truth In Lending disclosures. This time, the CFPB decided to make one form similar to the current HUD-1 and the other similar to the initial disclosures it's been working on.

"We're giving a close-up to closing costs this month by trying to figure out which of two different designs communicates both the closing costs and transaction details clearly. One is similar to the existing HUD-1 settlement statement that consumers now receive when they close a mortgage loan. The other is based on our prototype for the disclosure you get when you first apply," the CFPB said.

The CFPB said that most respondents liked the prototypes and found them easy to navigate. The bureau also pointed out that it received more than 3,000 comments. It used those comments to make improvements in a single new prototype based off of the last round's designs.

"Now we also want to keep working hard to make things clearer for consumers, so we are testing an entirely new design for disclosing closing cost details," the CFPB stated. "We're curious to see if something different may work even better. This new design provides the same information as the other prototype, but it uses a format for the closing costs that is based on our application disclosure prototype. It has sections that correspond to the application disclosure and a little more plain language. We're wondering if this design will make the disclosure even clearer and easier for consumers. Also, what improvements could we make to both designs?"

The CFPB is testing both designs in Birmingham, Ala., but is also seeking input via the Know Before You Owe portal.

Industry reaction

Before the latest round of forms came out, the American Land Title Association's (ALTA) RESPA Task Force submitted suggestions for improvement in a letter to **Raj Date**, special advisor to the Secretary of the Treasury on the CFPB.

The task force's first suggestion was to separate the disclosure into two distinct parts: one for completion by the lender and the other for completion by the closing or settlement agent.

"Some of the information disclosed on the form is known by the lender and other information is in the possession of the settlement agent," the letter stated. "Appropriately dividing the form into two parts will allow the lender and the settlement agent to separate their responsibilities under RESPA and TILA. In addition to appropriately separating responsibility, software programming will be improved under a two-part disclosure."

ALTA also noted that it is not clear under the current drafts whether the disclosure is intended to be a pre-closing document or a final disclosure form. The task force suggested the CFPB make it a final disclosure form and clarify the language to reflect that function.

"Currently, each draft form states at the top of page one that, 'This form is a statement of final loan terms and actual settlement costs,'" the task force stated. "However, at the end of each document, the signature line indicates that, 'By signing below, you are only confirming that you have received this form. You do not have to accept this loan because you have signed or received this form or applied for this loan.' These two statements are inconsistent. If the final costs are being disclosed, then the consumer has accepted the loan and the closing has occurred."

The task force noted that currently there are some charges that are rolled together. The group said that the form should be modified to allow sufficient itemization so lenders are able to show their work.

"Additionally, in our experience with closings using the current 2010 HUD-1, consumers prefer and more easily understand fully itemized charges rather than a single figure representing a total of many undisclosed charges," the task force stated.

The task force also suggested that the CFPB reform the use of tolerances.

"Current tolerance requirements have led to several unanticipated and undesirable consequences for consumers, lenders and settlement agents," ALTA stated. "Many lenders issue multiple versions of the same initial GFE disclosure when no changed circumstance exists to authorize such an action. This creates unnecessary borrower confusion regarding which version of the disclosure is accurate. If consumers are given a new disclosure with each changed circumstance, at some point they become inundated with data and the disclosures lose their usefulness."

The group noted that it is unclear whether tolerance requirements will be included under the new form, but suggested that if they are included, they pertain only to the lender's own charges.

The group also expressed its belief that provider lists hurt competition, suggesting that the CFPB discontinue the practice.

"While the 'provider list' concept requires a lender to offer the consumer at least one choice in provider for each service that the consumer can select, the list has become a preferred or suggested list and has not facilitated additional

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Case Law Memorandum

Alabama Supreme Court declines to answer value of damages question

Stewart Title Guaranty Co. v. Shelby Realty Holdings LLC (U.S. District Court for the District of Alabama, No. 2:08-cv-00267-RDP)

The Alabama Supreme Court declined to answer a certified question from the U.S. District Court for the Northern District of Alabama, which asked the court to determine whether an insured's valuation evidence is limited to the use to which the property is being devoted as of the date of the discovery of the defect of title.

The facts:

Shelby Realty Holdings LLC purchased a mortgage on a piece of property and foreclosed on the property the same day, May 29, 2003. On June 10, 2003, Shelby Realty recorded the foreclosure deed in the records of the Probate Court of Jefferson County, Ala. In its capacity as an agent for Stewart Title Guaranty Co., Birmingham Title Services Corp. issued a title insurance policy in favor of Shelby Realty insuring fee simple title to the property in Shelby Realty.

On April 20, 2004, Birmingham-Southern College filed suit against Shelby Realty, alleging that the college had fee simple title to the property, and that Shelby Realty only possessed a leasehold interest in the property. On April 22, 2005, the court held that the college retained its fee simple interest in the property and that Shelby Realty had only a leasehold interest.

On Dec. 28, 2006, Shelby Realty and the college entered into a purchase and sale agreement whereby Shelby Realty sold to a subsidiary of the college Shelby Realty's interest in the property. Stewart Title then sent a check to Shelby Realty in the amount of \$264,000, which Stewart Title claimed represents the difference in the value of the fee interest, assuming that the property was used as apartments. On Jan. 8, 2008, counsel for Shelby Realty sent a letter to Stewart Title enclosing a proof of loss on behalf of Shelby Realty, and asserted that Shelby Realty was entitled to additional amounts under the terms of the policy predicated upon Shelby Realty's future intended use of the property as condominiums.

To help the district court determine how liability should be determined under the policy, the court certified the following question to the Alabama Supreme Court: "Under a title insurance policy, is the insured's valuation evidence limited to the use to which the property is being devoted as of the date of the discovery of the defect in title, or is an insured allowed to recover damages for the highest intended and best use of the property, even if the property was not being used in that manner at the time of the loss?"

What the court decided:

In determining not to answer the question, the court noted that the question is framed in the abstract, with no reference to any specific language in the policy.

"However, the dispute in this case, as demonstrated by the arguments of the parties, appears to involve the determination of the date that should be used to ascertain the value of the certain property foreclosed on by Shelby Realty and as to which Birmingham Southern College held fee-simple title," the court stated. "This court has not had an occasion to discuss the valuation method prescribed by the type of title-insurance policy at issue here. Various authorities note that courts, in construing similar policies, have selected differing dates for setting the value of the subject property, including the value of the property on the date the insured purchased the property or, as Stewart Title suggests, the date the defect in the title is discovered."

The court noted that based on the arguments of the parties and the text of the title insurance policy, the question cannot be answered without resorting to the specific language of the policy.

"Specifically, we note that there is language in the policy here that appears to address the appropriate valuation method," the court stated. "For example, the policy appears to limit Stewart Title's liability to pay, upon demonstration of 'actual monetary loss,' to the lesser of the amount of insurance stated in Schedule A or the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by the policy."

"It is not apparent from the materials before us that the district court has had the opportunity to address whether the specific language of the policy would control the determination of the value of the property."

Case Law Memorandum

□ Continued from Page 7

“The parties, in their briefs to this court, do not address the construction of the policy at issue and instead refer this court to various authorities discussing how valuation may be determined in various title-insurance contexts,” the court continued. “Additionally, it is not apparent from the materials before us that the district court has had the opportunity to address whether the specific language of the policy would control the determination of the value of the property.”

The court pointed out that because the district court might determine that the valuation issue can be properly and fairly resolved by looking to the specific language of the policy, answering the certified question would necessitate the Alabama Supreme Court fashioning a broad rule with the possibility that it would have no application to the particular facts presented.

Because of this, and the fact that precedent determinative of construing an insurance policy has been well established, the court had no grounds under Rule 18 to answer the question.

Fraud convict sues title agency for breach of contract

Ralph O. Douglas v. American Title Co. (Court of Appeals for the First District of Texas, No. 01-07-00358-CV)

Shortly after a real estate investor contracted with a title agency to do title work on several Texas properties, he was indicted for real estate fraud and, the agency halted all related transactions. The real estate investor then sued the title agency for breach of contract. The case was eventually heard by the Court of Appeals of the First District of Texas on the trial court’s granting of dismissal of the real estate investor’s claims.

The facts:

In May 1999, **Ralph Douglas** contracted with American Title Co. (ATC) to perform title services for several Harris County properties. He was shortly thereafter indicted for real estate fraud and ATC, at the request of the Harris County District Attorney’s Office, halted all transactions and real estate closings involved in Douglas’s fraud. Douglas subsequently sued ATC for breach of contract related to one of the properties. ATC was granted a summary judgment from which Douglas pursued a restricted appeal that was dismissed by the Court of Appeals for the First District of Texas for lack of subject-matter jurisdiction.

In January 2004, Douglas filed a second suit against ATC alleging that ATC had failed to produce mortgage records for the subject property and three other properties. ATC moved to declare Douglas a vexatious litigant and sought security pursuant to Chapter 11 of the Texas Civil Practice and Remedies Code. The trial court granted the motion and, when Douglas failed to post the required security, dismissed the case. Douglas appealed and the Court of Appeals for the First District of Texas reversed and remanded, concluding that the trial court’s declaration of Douglas as a vexatious litigant was an abuse of discretion.

On remand and in response to ATC’s special exceptions, Douglas amended his petition and the special exceptions were denied. ATC then moved to dismiss Douglas’s suit pursuant to Chapter 14’s statutory scheme authorizing dismissal of *pro se* inmate claims found to be frivolous or malicious. Following an evidentiary hearing, the court granted ATC’s motion to dismiss and Douglas appealed.

What the court decided:

The Court of Appeals for the First District of Texas affirmed the trial court’s judgment. The court noted that Douglas contended that the trial court’s grant of ATC’s motion to dismiss pursuant to Chapter 14 was an abuse of discretion because his claims were neither malicious nor frivolous, and the court’s denial of ATC’s special exceptions demonstrated that Douglas had a viable cause of action, that was not frivolous or malicious, and that Douglas’s suit was not based on an indisputable meritless legal theory or irrationally or wholly incredible factual allegations.

The court pointed out that in his amended petition, Douglas contended that ATC had a legal duty to produce his mortgage records pursuant to the Texas Insurance Code and U.S.C.A. Title 12, Banks and Banking. He contended that his right to sue for the release of the mortgage records derived from article

□ Continued on Page 9

Breach
of
Contract

Case Law Memorandum

□ Continued from Page 8

9.34 of the Texas Insurance Code.

“Neither article 9.34, repealed in 2005, nor its successor, section 2704.001, requires a title company to maintain its records for copying and production,” the court stated. “Although both statutes require title companies to take certain steps prior to issuing a title insurance policy in Texas, neither statute creates a private cause of action for a title company’s failure to comply with those provisions. Accordingly, Douglas’s claims, based upon an indisputably meritless legal theory, have no arguable basis in law and the trial court’s dismissal pursuant to Chapter 14 was proper.

“Douglas’s contention that the court’s dismissal is an abuse of discretion because it ‘was contrary to the court’s order denying ATC’s motion for special exceptions,’ is inapposite because one — the court’s order denying special exceptions with respect to Douglas’s amended original petition — does not preclude the other — dismissal as a frivolous or malicious pursuant to Chapter 14,” the court continued. “Indeed, a point of error as to an abuse of discretion fails because the trial court has inherent authority to reconsider any interlocutory order at any time before final judgment.”

Switched legal descriptions lead to negligence suit

Patricia Tyson v. Chicago Title Insurance Co. (Missouri Court of Appeals, No. WD 72673)

A title insurer that fixed legal descriptions of the warranty deeds for units of a duplex that had been mistakenly switched was sued for negligence by the owner of one of the units after the owner was named in a quiet title suit to address the switched legal descriptions on her mortgagee’s deed of trust.

The facts:

The case involves switched legal descriptions in relation to two units of a duplex, 106 and 108 SW Donovan Rd. in Lee’s Summit, Mo. For many years, the two properties were identified in their respective chains of title by the legal description of the other property.

On Feb. 13, 1993, **Dianne Lindwall** and three co-owners (collectively the Lindwall Group) purchased 106 SW Donovan and received a general warranty deed identifying the property conveyed as Unit 61, when the proper legal description for the property was Unit 60.

On Jan. 3, 2003, **David Meyers** purchased 108 SW Donovan. The deed he received referred to the property as Unit 60, even though the proper legal description for the property was Unit 61. He executed a deed of trust in favor of ABN AMRO Mortgage Group Inc., which also incorrectly identified the property as 108 SW Donovan and Unit 60. Both the deed and deed of trust were prepared and insured by Stewart Title Insurance Co.

In February 2006, Myers listed his unit for sale. Chicago Title Insurance Co. conducted a title search on the property and discovered that the legal descriptions for 106 SW Donovan and 108 SW Donovan were reversed. The title commitment prepared for the sale required that corrective vesting deeds be prepared for both properties. Chicago Title prepared those deeds and they were executed by the Lindwall Group and Meyers, but not recorded.

After the corrective vesting deeds were executed, Chicago Title was informed that the sale on 108 SW Donovan had fallen through. The insurer held the corrective vesting deeds to record in connection with a future sale of the property.

Myers died without selling 108 SW Donovan. Upon learning of his death, Chicago Title recorded the corrective vesting deeds on Dec. 5 and 7, 2006.

The ABN AMRO deed of trust contained the same defect that Myer’s general warranty deed had contained, however, the deed of trust was not corrected. On Jan. 15, 2007, **Patricia Tyson** filed in the probate division a small estate affidavit to establish her title as distributee of the property that belonged to Myers at his death. The affidavit correctly identified the property as 108 SW Donovan, Unit 61, and showed that the property was subject to the ABN AMRO deed of trust. Tyson did not make any payments on the deed of trust. ABN AMRO sought to foreclose, however, because the deed of trust

□ Continued on Page 10

Negligence

Case Law Memorandum

□ *Continued from Page 9*

identified the secured real estate as unit 60 instead of unit 61, the foreclosure initiated by ABN AMRO was against 106 SW Donovan, then owned by the Lindwall group.

The Lindwall group filed a petition to quiet title, in which Tyson and ABN AMRO were necessary defendants. After mediation, the parties entered into a consent judgment on Dec. 17, 2008, quieting title in the respective properties and correcting the deed of trust.

In the meantime, on Oct. 2, 2008, Tyson filed a petition for damages for negligence against Chicago Title. She alleged that as a result of negligent actions, Chicago Title was liable to her for attorneys' fees and costs incurred in the quiet title action. Specifically, Tyson alleged that Chicago Title was negligent in that it failed to take or complete any action to amend the deed of trust in favor of ABN AMRO. She contended that as a direct result of these negligent actions, she was required to become a party to the quiet title action, which caused her to sustain damage in the way of attorneys' fees and damage to the title of the property.

On April 19, 2010, the court conducted a trial in the negligence action and entered judgment in favor of Tyson, and against Chicago Title, in the amount of \$11,531.12.

Chicago Title appealed the decision, arguing that the trial court erred in entering judgment in favor of Tyson because she failed to prove the two elements necessary to sustain a claim for negligence. The insurer claimed that it did not owe Tyson any duty as a matter of law and that Tyson could not and did not establish causation. The insurer also contended that Tyson is not entitled to attorneys' fees, as a matter of law.

What the court decided:

The appellate court reversed the trial court's decision, finding that Chicago Title was "so clearly entitled to reversal on the dispositive issue of causation."

The court noted that, according to Tyson, the recording of the corrective vesting deeds by Chicago Title created an anomaly in the title records, causing the property described in ABN AMRO's deed of trust to be the property owned by the Lindwall group.

"Tyson's theory of causation completely ignores reality," the court states. "The ABN AMRO deed of trust identified the wrong property both before and after the recording of the corrective vesting deeds. On Jan. 3, 2003, when Myers delivered the deed of trust in favor of ABN AMRO, the deed of trust incorrectly identified the property as unit 60 for the legal description."

"It was Tyson's actions and omissions that necessitated the quiet title action," the court said. "If Tyson had accepted the obvious (that the mortgage company would not ignore the default, and that the Lindwall group would need to take legal action, and that Tyson would have to be joined to the action), and if Tyson had cooperated voluntarily with an amendment of the deed of trust, there would have been no litigation. Tyson was well aware of the deed of trust prior to any legal action being filed. Her small estate affidavit included the correct legal description, unit 61, for the 108 SW Donovan property, which Tyson inherited from Myers. It also acknowledged the existence of the deed of trust and the amount owed on the property."

The court also noted that prior to the filing of the quiet title action, the Lindwall group had contacted Tyson after they received the foreclosure notice and asked her to file corrective documents, and she refused.

"Tyson's status as a defendant in the title litigation had no causal relationship to anything done by Chicago Title," the court stated. "The quiet title action would have included Tyson whether or not Chicago Title had recorded the corrective vesting deeds, because Tyson claimed an interest in and title to the property formerly owned by Myers. Tyson was a necessary party under Rule 52.04(a). As a necessary party, Tyson would have been brought into the action filed by the Lindwall group, regardless of Chicago Title's actions in this case."

Federal News

GSE reform bill moves forward

The U.S. House Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises approved a draft measure intended to bring sweeping changes to the secondary mortgage market in an effort to reintroduce private investment. The bill, known as the Private Mortgage Market Investment Act, would also scrap the Dodd-Frank Wall Street Reform and Consumer Protection Act's credit risk retention provisions.

Subcommittee Chairman **Scott Garrett**, R-N.J., the bill's sponsor, said the measure would institute reforms to ensure robust private investment in the U.S. mortgage market without a government guarantee. The bill is the culmination of Republicans' year-long effort to chip away at government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac.

"We've asked stakeholders what they need in order to reenter to begin to invest again and provide the capital and liquidity in this marketplace," Garrett said during a Dec. 14 markup hearing. "The bill that is before you tries to address most of those considerations."

Garrett said the bill would facilitate continued standardization and uniformity of mortgage securitization by:

- Directing the Federal Housing Finance Administration (FHFA) to create several categories of mortgages with uniform underwriting standards for each;
- Directing FHFA to develop standard and uniform securitization agreements;
- Developing clear, transparent representations and warranties coupled with an adequate repurchase program to ensure risk retention;
- Abolishing Dodd-Frank's risk retention provisions;
- Streamlining the process for securities that meet the standard underwriting characteristics and securitization agreements to be sold to investors; and
- Establishing a mandatory arbitration process to ensure underwriting and securitization standardization compliance.

Garrett said the measure would also ensure the rule of law and legal certainty by:

- Removing conflicts of interest between servicers and investors;
- Clarifying the rules around the eligibility of obtaining second lien mortgages;
- Preventing regulators from unilaterally forcing investors to reduce the principal of loans they have invested in;
- Allowing for the appointment of an independent third party to act for the benefit of investors in mortgage-backed

securities; and

- Standardizing servicer accounting and reporting for restructuring, modification or work-out of loans used as collateral.

Further, Garrett said his measure seeks to provide additional transparency and disclosure by:

- Increasing the quality of the loan level information and the disclosures that investors can use to evaluate the value of the mortgages;
- Ensuring investors have sufficient time to review and analyze disclosed information before making investment decisions;
- Increasing pricing transparency by disclosing pricing history on securitization deals; and
- Requiring the creation of an individualized marker for each loan within a securitization.

Subcommittee ranking member **Maxine Water**, D-Calif., said the measure raises many interesting ideas about the future of the private mortgage market.

"The standardization provisions in your bill might prevent a repeat of what we're seeing today in the terms of the numerous protracted investor lawsuits against firms that originated loans and packaged them into securities that didn't meet the standards that investors were expecting," she said.

Waters, however, opposed the effort to eliminate Dodd-Frank's risk retention provision requiring originators to retain 5 percent of the risk in the mortgages they write unless the mortgage meets certain underwriting criteria.

Rep. **Carolyn Maloney**, D-N.Y., also spoke in favor of Dodd-Frank's risk retention requirements.

"There is no doubt banks would be more careful about making loans and structuring loans and mortgage backed securities if they were required to have some skin in the game," she said. "I feel this effort to repeal risk retention removes safety and soundness and protections for investors and participants in the overall economy."

Waters also questioned whether the FHFA or the Securities and Exchange Commission should be the regulator primarily responsible for administering the changes suggested by the bill.

Garrett expressed a willingness to work with Democrats to find common ground on some of the bill's finer points before his measure is considered by the full House Financial Services Committee.

CFPB takes action

Proposed Dodd-Frank changes lead to AfBA debate

The Dodd-Frank Act contains more than 2,000 pages, and among those pages are plenty of rules, big and small, that touch businesses across the country. One small rule, that has been somewhat overlooked, could fundamentally change the way affiliated title agencies do business.

The wording in question is within the criteria for the qualified mortgage (QM). Under Section 1412 of the Dodd-Frank Act, in order for a loan to be eligible for an ability-to-pay safe harbor and be considered a QM, the loan must follow certain criteria, including that the total points and fees payable in connection with the loan do not exceed 3 percent of the total loan amount. The act used the definition under the Home Owners and Equity Protection Act (HOEPA) for deciding what constituted points and fees, and that definition counts fees retained by a mortgage lender's affiliated company toward the 3 percent threshold, but not fees paid to a third party. So, as of now, title fees are included in this calculation if they are paid to an affiliate of the originator.

The move to exempt title companies is supported by the Real Estate Services Providers Council (RESPRO), the Community Mortgage Lenders of America (CMLA), the Mortgage Bankers Association (MBA) and the National Association of Realtors (NAR).

RESPRO sent a letter to the Federal Reserve in August outlining what it perceives as the problems with the QM and the qualified residential mortgage (QRM) because of this definition. The group stated that if the points and fees component of the QM definition was not modified in the final rules, a loan in which a mortgage lender's affiliated title company is used would more than likely exceed the 3 percent threshold, preventing it from being a QM.

"We pointed out that if the regulation takes effect as proposed, companies with affiliated mortgage and title operations will withdraw from either the mortgage or title markets in certain marketplaces throughout the country, particularly low-income and low-middle income marketplaces, which will reduce competition in these marketplaces and thereby reduce the affordability of mortgage credit," the group stated in the letter. "To prevent this result, we urged the board to create a narrow exemption for affiliated title fees from the 3 percent points and fees threshold in the QM definition that will not compromise the goals of Dodd-Frank and HOEPA."

Affiliated title companies often are a divisive issue in the industry, which puts the American Land Title Association (ALTA), in a difficult position. Because the opinions within

its membership base diverge on this issue, ALTA has chosen to not lobby or affect this debate one way or the other.

The question is, should affiliated title companies be exempt from this 3 percent rule?

David Townsend, president and chief executive officer of Agents National Title Insurance Co., pointed to the HUD-1 as a reference point, which lists title insurance in a different section than flood, credit, tax certifications, etc.

"I would exempt title for this reason — the costs are so variable, that they could be under the threshold in one state, but not in the other," he said. "You cannot compare title charges to flood certification or origination fees. A \$100,000 lender's policy in Missouri might be under the 3 percent in Missouri but not in Texas due to higher title insurance premiums. I think that poses a problem."

The National Association of Independent Title Agents (NAILTA) is openly working to keep the language as is.

"At the end of the day, there's no hard science reason why affiliated businesses should be exempt from the cap," said **Robert Holman**, secretary for NAILTA and president of General Title Insurance Co. He argues against an assertion by some proponents of affiliations that taking away the lender's ability to profit from the risk will reduce the lender's ability to make loans available. "There's absolutely no evidence, other than anecdotal, that having affiliates compete on a level-playing field with non-affiliates will result in fewer loans or less competition in the industry."

Holman believes that keeping the cap as is will help create a more-level playing field for all title companies.

Andy Maloney, president of the Nashville Title Insurance Corp., agreed that this would level the playing field and actually could lead to the end of affiliated businesses. However, Maloney thinks the affiliated companies need to be exempt because they are not part of the lender's loan costs.

"Closing and title should be exempt from any federal legislation because it is a very local product and process," he said. "Trying to price or regulate closing and title is like trying to predict the weather on a national scale. You can't do it because it is very localized. Personally, it really does not matter to me as an independent agent. We normally get Realtors and loan officers that work for companies that have affiliated business arrangements [AfBAs] because we outwork them and are better on our customer service."

CFPB takes action

Cordray vote shot down by Senate Republicans

As expected, Republicans blocked an effort to allow the Senate to vote on **Richard Cordray's** nomination to become the first permanent director of the Consumer Financial Protection Bureau (CFPB).

On Dec. 8, the Senate considered a cloture motion, which would have ended debate on the matter, in an effort to force a vote on the nomination. Democrats were only able to garner 53 votes for cloture — seven votes shy of the 60 needed to break a Republican filibuster.

“Republicans know [Cordray] is qualified,” said Senate Majority Leader **Harry Reid**, D-Nev. “They are blocking his nomination, not allowing a vote, because they don’t like the federal agency he would lead, an agency that has been established by law. Republicans are doing this to undermine the system of law we have in our country.”

Senate minority leader **Mitch McConnell**, R-Ky., said Republicans are trying to ensure that there is accountability at the bureau.

The Senate GOP has continually expressed concern that the Dodd-Frank Act grants too much power to the CFPB’s single director. They want the director position to be

replaced by a five-member commission and they have promised to block any CFPB nominee until the bureau’s leadership structure is changed.

McConnell said President Obama and other Democrats were well aware of his party’s plan to block the Cordray nomination. He accused the president of playing politics.

“Now [President Obama] is suddenly making a push to confirm his nominee because it fits into some picture he wants to paint about who the good guys are and who the bad guys are here in Washington,” McConnell said. “So once again, Democrats are using the Senate floor to stage a little political theater. They are setting up a vote they know will fail so they can act shocked about it later. The CFPB requires reforms before any nominee can be confirmed. It’s time the president takes these concerns seriously.”

Treasury Secretary **Timothy Geithner** was quick to comment on the action taken by Senate Republicans.

“Americans deserve the full protections signed into law under Wall Street reform” he said. “The longer the Senate fails to confirm **Cordray** to lead the CFPB, the longer they will be denied that protection.”

CFPB seeks input on inherited regulations

The Consumer Financial Protection Bureau (CFPB) announced that it is seeking public input on ways to streamline the regulations under more than a dozen consumer financial laws that the agency inherited from seven different federal agencies under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

“Our goal is to make it easier for banks, credit unions and others to follow the rules,” said **Raj Date**, special advisor to the Secretary of the Treasury on the CFPB. “We’re asking the public to help us identify and prioritize concrete ways that we can streamline the regulations we inherited so that they work better for consumers and the firms that serve them.”

The Notice and Request for Information issued by the CFPB asks the public to identify provisions of the inherited regulations that the agency should make the highest priority for updating, modifying or eliminating because they are outdated, unduly burdensome or unnecessary. In addition, it seeks suggestions for practical measures the bureau could take to make complying with the regulations easier.

Opportunities for streamlining rules and facilitating compliance may include:

- Simplifying regulations that have become unnecessarily difficult to understand and comply with over time;
- Standardizing definitions of common terms across regulations where statutes permit;
- Updating regulations that are outdated or unnecessary due to changing technologies; or
- Removing unnecessary restrictions on consumer choice or business innovation.

In the coming weeks, the CFPB will republish the regulations it inherited — a necessary step any time one agency takes over rulemaking authority from another. With public input from the notice, the bureau will determine where there may be opportunities to streamline these regulations and an appropriate schedule for proceeding.

Comments must be submitted by March 5, 2012. Commenters will have 30 additional days, until April 3, 2012, to respond to other comments.

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Industry News

Nevada AG sues LPS for alleged robo-signing allegations

Nevada Attorney General Catherine Cortez Masto announced a lawsuit against Lender Processing Services Inc., DOCX LLC, LPS Default Solutions Inc. and other subsidiaries of LPS, alleging deceptive practices against Nevada consumers.

The lawsuit, filed on Dec. 15, 2011, in the 8th Judicial District of Nevada, follows an extensive investigation into LPS' default servicing of residential mortgages in Nevada, specifically loans in foreclosure. The lawsuit includes allegations of widespread document execution fraud, deceptive statements made by LPS about efforts to correct document fraud, improper control over foreclosure attorneys and the foreclosure process, misrepresentations about LPS' fees and services, and evidence of an overall press for speed and volume that prevented the necessary and proper focus on accuracy and integrity in the foreclosure process.

On Dec. 16, LPS released a statement disputing the allegations, noting that it had worked with the Attorney General's Office for more than 14 months to "resolve its inquiry in a manner which would benefit the citizens of Nevada."

"Unfortunately, the company's efforts to engage in meaningful discussions with the Nevada Attorney General's office have been frustrated by the Nevada Attorney General's decision to outsource its investigation to Cohen Milstein Sellers & Toll PLLC, a plaintiff's law firm located in Washington, D.C., in apparent violation of Nevada law," LPS said in its statement. "The complaint highlights misconceptions about LPS and seeks to sensationalize a variety of false allegations in a misleading manner.

"As the company has previously disclosed, it has discovered, during its own internal reviews, potential issues related to some of its past document execution practices," the statement continued. "However, the company is not aware of any person who was wrongfully foreclosed upon as a result of a potential error in the processes used by our employees."

Pennsylvania court establishes foreclosure diversion program

The Schuylkill County, Pa., Court of Common Pleas published Administrative Order 2011.3 in the Pennsylvania Bulletin on Nov. 19. The order establishes a mandatory residential foreclosure diversion program, automatically staying foreclosures for 90 days while the parties to the foreclosure undergo dispute resolution.

Beginning on Dec. 19, all complaints for mortgage

foreclosures of residential owner-occupied properties must be accompanied by a certification cover sheet. The certification cover sheet must be filed with the complaint or the complaint will not be accepted by the Prothonotary's Office.

After the complaint is filed, the Prothonotary must provide a copy of the Mortgage Foreclosure Diversion Program urgent notice to the plaintiff or counsel for the plaintiff. The plaintiff must serve a copy of the notice along with the complaint on the defendants in accordance with the Pennsylvania Rules of Civil Procedure.

The service of the complaint, certification cover sheet and urgent notice upon the defendant will result in an automatic stay of any further proceedings, such as the filing of an answer or the filing for a default judgment, for 90 days from the date of service.

Within seven days following service of the complaint and urgent notice, the defendant must contact Schuylkill Community Action to schedule an appointment for an intake meeting with the housing counselor. The intake meeting must occur within 14 days of the initial contact. The defendant must bring to the meeting and provide to the housing counselor all requested financial and employment information to enable the housing counselor to draft a written mortgage modification plan.

Once the initial intake meeting is finished, the housing counselor will provide the defendant with a certification of participation and help the defendant in serving certification on the plaintiff. If the plaintiff does not receive a certification of participation within 30 days following service of the complaint and urgent notice, the plaintiff may petition the court, after notice to the defendants, to lift the stay.

Within 30 days of the intake meeting, the housing counselor must submit to the plaintiff or the plaintiff's representative a mortgage modification plan or a statement that the housing counselor was unable to develop a plan. If no plan is submitted, the plaintiff may immediately petition the court, after notice to the defendant, to lift the stay. If a plan is submitted, the housing counselor will attempt to negotiate a resolution of the default with the plaintiff's representative. If the plaintiff's representative fails to participate in negotiations with the housing counselor, the housing counselor may assist the defendant in petitioning the court, after notice to the plaintiff, to extend the stay until negotiations occur.

If an agreement is reached through negotiations, the plaintiff's representative will prepare any documents necessary to implement the agreement and withdraw the complaint. If no agreement is reached through negotiations, the housing counselor will complete the request for a court supervised conciliation conference and forward it to the court administrator. The defendant must indicate on the

Industry News

request if the assistance of a Schuylkill County pro bono attorney to serve as a neutral facilitator at the conciliation conference is being requested.

Once the conciliation conference is completed, the court may order that the stay be lifted, that the stay be continued for a reasonable time to allow for further voluntary negotiations and/or the preparation and execution of documents to implement any agreement or any other action the court deems appropriate.

Conn. encourages participation in federal foreclosure review

Connecticut Attorney General **George Jepsen** and state Banking Commissioner **Howard Pitkin** are encouraging Connecticut borrowers who believe they suffered financial injury because of harmful mortgage loan servicing and foreclosure practices to participate in an Independent Foreclosure Review and Claims Process.

To be eligible for review and financial remediation, borrowers must have had a mortgage in the foreclosure process between Jan. 1, 2009, and Dec. 31, 2010. In addition, the property securing the loan must have been the borrower's primary residence, and the loan must have been serviced by one of 24 loan servicers, including Bank of America, Chase and GMAC.

The Independent Foreclosure Review and Claims Process was ordered by the Office of the Comptroller of the Currency and the Board of Governors of the Federal Reserve System — the federal agencies with responsibility and authority to regulate and supervise the loan servicers.

The federal agencies have ordered independent firms to evaluate whether individual borrowers suffered financial injury as a result of their loan servicer's errors, misrepresentations or other deficient foreclosure practices; and to determine the appropriate amount of financial remediation that the loan servicer must provide to individual borrowers.

Solicitor general submits opinion on unearned fee split

The U.S. solicitor general filed an amicus curiae brief in the U.S. Supreme Court on behalf of the United States on Dec. 5, in the case of *Tammy Foret Freeman, et al., v. Quicken Loans Inc.* (10-1042). The issue in the case, one that has split the U.S. circuit courts, is: Whether, to establish a violation of Section 2607(b), a plaintiff must demonstrate that an unearned fee for a real estate settlement service was divided between two or more persons.

It is the solicitor general's contention that only one person

is necessary for a Section 2607(b) violation to occur.

“By its plain terms, the text of Section 2607(b) prohibits two separate actions: giving an unearned fee, and accepting an unearned fee,” Solicitor General **Donald Verrilli, Jr.** wrote in the brief. “Thus, giving an unearned portion of a charge is prohibited even if there is no culpable acceptor, and accepting an unearned charge is prohibited even if there is no culpable giver. Although violations of Section 2607(b) typically involve transactions between two or more parties rather than wholly unilateral conduct, Section 2607(b) does not require that both parties be culpable actors. Rather, Section 2607(b) unambiguously covers the acceptance of unearned fees from the consumer herself.”

Verrilli based the United States's argument on the U.S. Department of Housing and Urban Development's (HUD) interpretation of RESPA. Verrilli argued that the Court should defer to HUD's interpretation.

Virginia to consider additional foreclosure sale requirements

When the Virginia General Assembly comes back in session on Jan. 11, it will be considering a recently prefiled bill regarding foreclosure sales.

The bill, **HB 28**, was prefiled by Del. **Robert Marshall, R-Manassas**.

The bill states that after July 1, all assignments of a debt or other obligation secured by a deed of trust or mortgage must be recorded in the clerk's office of the circuit court where the deed of trust or mortgage is recorded. The trustee, or any substitute trustee, would not be permitted to proceed with any sale of the property conveyed to him by the deed of trust or mortgage at the request of a person who asserts that he is the holder of the obligation secured thereby unless the land records of the county or city in which the property is located contain a duly recorded instrument evidencing the assignment of the secured obligation to such person.

It would also require that at least 45 days before any proposed sale in execution of a deed of trust, the party secured or the mortgage servicer would have to provide written notice to the present owner of the property to be sold of the intent of the party secured to foreclose on the property. The notice would have to contain the name, address and telephone number of the party secured, the trustee and any employee or department of the mortgage servicer, the party secured or any agent of the party secured that can be contacted for inquiries regarding alternatives to foreclosure, including loan modifications. The notice would have to be sent by certified or registered mail to the present owner's last known address as such owner and address appear in the records of the party secured.

La. addresses offering ‘thing of value’

In a bulletin released on Nov. 30, **James Donelon**, commissioner of the Louisiana Department of Insurance expressed concern that title insurance producers in the state are violating Louisiana law by providing things of value to clients in exchange for business.

“It has been brought to my attention that serious issues may exist regarding the manner in which some title insurance producers are soliciting business in the title insurance marketplace,” Donelon said in Bulletin 2011-02. “Concern has arisen that licensed title insurance producers may have paid money or provided other valuable consideration to persons involved in a real estate transaction who are not duly licensed title insurance producers in exchange for title insurance business referrals. Title insurance solicitation of real estate transactions in this manner may violate LSA-22:1562(A)(1). Such solicitation may also subject violators to other administrative action by the Louisiana Department of Insurance., including but not limited to LSA-R.S. 22:1969 which sets forth penalties for unfair methods of competition or unfair or deceptive acts or practices.”

The law states that no insurer or insurance producer may pay money or commission or brokerage, or give or allow any valuable consideration or compensation to any person or business entity not duly licensed as an insurance producer, nor to an insurer not licensed to do business in the state, for or because of services rendered or performed in the state in selling, soliciting, negotiating or effecting a contract of insurance on any property or risks, or insurable interests, or business activities transacted within the state.

“As commissioner of insurance, I am authorized to impose an array of civil sanctions against a title insurance producer found to be in violation of LSA-22:1562,” Donelon said.

“These sanctions include a civil fine of not less than \$2,000, nor more than \$50,000, as well as suspension or revocation of the producer’s title insurance license. Additionally, since criminal penalties are set forth in LSA-R.S. 22:1562(B)(1), if the facts merit, I am obligated to make a referral to the appropriate criminal prosecutor. Also, a criminal conviction for a violation of LSA-R.S. 22:1562(B)(1) shall constitute grounds for suspension or revocation of the producer’s title insurance license.”

Donelon provided the following list of types of consideration or compensation that would be in violation of the law:

- The giving of gift certificates, sporting event tickets, prepaid dinner arrangements and casino junkets;
- The paying for or providing of goods and services such as office operational expenses, office equipment, office furnishings, office supplies, postage, computer hardware or software, telephones, telephone systems, copiers, fax machines, vehicles, administrative, management or staff services;
- The payment of marketing or advertising expenses of a real estate company, Realtor or mortgage lender or offering office space at rental rates that are substantially below fair market value;
- The paying of any expenses related to attending a company function that otherwise would have been incurred by a real estate company, Realtor or mortgage lender;
- The offering, providing or underwriting of a continuing education program in a manner that results in the defraying of any expenses that otherwise would have been incurred by a real estate company, agent or mortgage lender; or
- The offering or donating of the use of vacation property.

□ *Continued from Page 6*

consumer shopping. Instead the list has stunted consumer shopping for these services, causing significant impact to consumers and many small businesses, including smaller title agents and similar service providers,” the group stated.

“We are also perplexed to find little crossover between closing cost concepts in the initial disclosure form and those in the final closing disclosure,” the letter continued. “This carryover allows consumers to identify what they were quoted as an estimate cost in the initial disclosures to what they are actually charged in the final closing disclosure.”

The group also suggested that the CFPB improve the columns delineating those charges that were paid outside of closing. ALTA said that if each line of the section were to be connected to other parts of the form for purposes of tolerance or other calculations, software programming will be extraordinarily complicated.

The last suggestion the group made was for the CFPB to work with software providers who create and maintain lender operating systems as well as title and settlement operating systems to determine which concepts are practically achievable, at what cost and in what timeframe.