THE LEGAL DESCRIPTION

Legislative and Legal Analysis for Settlement Services

July 17, 2017 | Volume 17, Number 21

INSIDE THIS EDITION

IN THE NEXT EDITION AND BEYOND...

During NS3, four underwriters got on stage for a candid conversation about the economy, technology, millennials and more. We provide you the inside scoop on what they shared with attendees.

Matters of State: Diverse regulators discuss wide range of issues

During the National Settlement Services Summit in San Antonio in June, four regulators from diverse states, and diverse regulatory frameworks, shared their insight into a wide range of topics being address in their states. Issues ranged from unlawful inducements to escheatment, Blockchain and geographical targeting orders.

Brett Barratt, deputy commissioner, Utah Department of Insurance, moderated a panel with **Jeffrey Joseph**, assistant general counsel, Florida Office of Insurance (OIR); **John Lartz**, deputy director of the Division of Financial Institutions at the Illinois Department of Financial and Professional Regulation; and **Chuck Myers**, supervisor of the RESA Investigations Section, Virginia Bureau of Insurance.

The geography of their states is diverse, but their regulatory structures could be even more so. While the Title and Escrow Commission has some rulemaking authority in the Utah Department of Insurance, Virginia's bureau is part of a separate corporation that is charged with the regulation of, among other things, insurance products. Illinois is a limited regulatory state, but Florida has a bifurcated regulatory system.

Inducements, controlled business

One thing each state has to address is unlawful inducements.

CONTINUED ON PAGE 3

ON THE RECORD

"Many small business owners lack the capital and expertise they need to prevent a cybersecurity attack. Unfortunately, one simple hit can destroy everything a small business owner has created. That's why we need to ensure small businesses have access to the best cybersecurity resources and information possible. Providing cybersecurity training to lead small business development center employees will broaden their expertise to help more small businesses prevent an attack and potentially help save their companies."

House Small Business Committee Chairman Steve Chabot
Federal legislation would improve cybersecurity resources for small businesses

ABOUT US

The Legal Description is a production of October Research, LLC specializing in business news and analysis for the settlement services industry and is published 24 times a year.

Contact information:
October Research, LLC
ATTN: The Legal Description
3046 Brecksville Road, Suite D
Richfield, OH 44286
Tel: (330) 659-6101
Fax: (330) 659-6102
Email: contactus@octoberresearch.com

TO SUBSCRIBE, PLEASE GO TO
www.OctoberStore.com

Volume 17, Number 21
ISSN: 1940-3143 (print) 1940-5367 (online)

EDITOR'S NOTE

THE LEGAL DESCRIPTION

Much more to learn

Dear Readers,

The National Settlement Services Summit (NS3) was more than a month ago, and yet I am personally still learning a lot from sessions I attended and conversations I had.

Look no further than this edition's cover story on the Matters of State session. Such a wide variety of experiences were shared that will prove invaluable moving forward. I'll be working on ideas from that session alone for a long time!

We'll have more on other sessions in coming months, starting with coverage of the insightful conversation four underwriter executives had at the conference.

Speaking of learning more from the sessions, if you haven't heard yet, we are bringing back **Tom Cronkright**, CEO of Sun Title Agency LLC, who shared his company's own experience during a session on cybersecurity. He and his co-presenter, Security Assurance Facilitations Experts (SAFE) CEO **Matt Froning**, will provide insight on filling the gaps in cybersecurity training and processes that leave agencies vulnerable, as well as answer the multitude of questions Cronkright received after his session.

I'm so glad that my NS3 experience didn't end when I left San Antonio. Your experience can continue as well. Before we know it, it will be time to prepare for next year!

Until next time, stay legal.

Andrea Golby

Andrea Golby
Editor
agolby@octoberresearch.com

CONTINUED FROM COVER

"In Utah, a title producer is allowed to give a customer or potential customer a gift, a meal, golf outing, etc., up to a $75 limit per day," Barratt stated. "Because we have this Title and Escrow Commission, which writes rules, we have some quirky rules, where a title professional cannot provide a food item to a real estate professional. So they can take them to lunch, but they can't bring in donuts."

Myers noted that in January his department issued an informative letter addressing the issue of providing free home warranties.

"It seems there are a lot of Realtors that were approaching the title/settlement agent and wondering what they were going to do for their customers in exchange for referral," he said. "It seemed to be widespread in different parties, especially hot markets like Northern Virginia near D.C. and down around Virginia Beach where there is a lot more activity than throughout the rest of the state.

"We are getting a lot of questions from our agencies now saying, 'if we want to do this, how does that work?' " Myers continued. "If its advertising, that is a different story, but generally the way the Code reads in Virginia, if there is anything of value, direct or implied, it is considered rebating."

Relatedly, though states have several different terms for it, each state has addressed controlled businesses.

"The concept is where you have a single entity that wants to do a real estate transaction from end to end," Barratt said. "You'd have a Realtor who is also doing title work, doing the closing. Very often a lender is part of that group. That is something that is right on the forefront of issues in the state of Utah right now. They are very complicated transactions oftentimes because we have certain laws in Utah that a title agency can't share an office or share fees with a Realtor or lender. They need to be separate. They can be in the same building, but must have separate entrances. So we kind of stem the tide of this entrepreneurial idea of one-stop shop of one entity doing all manner and all activities in a real estate transaction."

Myers said the situation is very similar in Virginia.

CFPP engagement

Industry members aren't the only ones who have to work with the Consumer Financial Protection Bureau (CFPB) at some level, with or without positive results. Barratt noted that his department will reach out and provide input and comments on certain issues without knowing if the CFPB will respond.

"Some of our agents and some of the people in our marketplace will come to the Utah Insurance Department and ask for guidance," he said. "We are very hesitant to give guidance related to federal law because we don't want to steer anyone in the wrong direction and that is outside of our scope of authority."

He also noted that the way the CFPB requires simultaneous issue rates to be listed on Loan Estimates and Closing Disclosures has caused some issues in several states. Joseph agreed, noting that 26 states had issues with that requirement.

"The closing disclosure caused agents to have to disclose things in a manner which did not follow Florida law," he said. According to Joseph, the Florida OIR and the Department of Financial Services had conversations with the CFPB and agreed that Florida could create its own forms to be used in conjuncture with the new Closing Disclosure. This allowed agents to maintain compliance with Florida law and clarified the calculations for consumers. "The Department of Financial Services (DFS) created a form for their agents to use at closing. It is available on the DFS website."

Lartz said his department has not addressed simultaneous issue rates with the CFPB, though that is predominately the practice in Illinois. He noted that the state has its own disclosure form that it has used for a long time, though the department has been considering an update to it.

Technology related issues

On the heels of a letter being sent from the American Land Title Association requesting that the CFPB put out an advisory about recent email and wire fraud scams, the regulators were asked if they are considering putting out their own warning to consumers about the threat of wire fraud. Each of the regulators stated that they are aware of the issue and keeping an eye on the issue, but have not issued any formal warnings.

Lartz briefly highlighted the Blockchain pilot project that was done in Cook County, as well as the Illinois Blockchain Initiative, which involves the state's Department of Financial and Professional Regulation, the Department of Insurance and the Department of Innovation and Technology.

"The pilot program, from what I gather, went well. I'm not sure where it's going to go, but I think there is going

to be further development into it," he said. "Blockchain is an electronic ledger of digital records, events or transactions that are represented in condensed form. It's a thing to keep your eye on because the same way the Internet drastically affected how we deal with information, blockchain is going to drastically change how we keep records."

Lartz noted that this technology is in its infancy. While there was an inability to record any documents, there were a number of positive results. Blockchain technology for real estate transactions should be developed further. However, there are a number of technological and legal issues that must be addressed before Blockchain can be fully utilized.

Geographical Targeting Orders

Being the only state where industry members are now required to comply with them, Joseph discussed the impact the current Geographical Targeting Orders (GTOs) are having in Florida.

The goal of the GTOs, which were also issued for metro areas in California, New York and Texas, is to look into money laundering for drug trafficking and terrorism financing.

"FinCEN reported that 30 percent of the transactions that are covered by this GTO involve a purchaser that was the subject of a previous suspicious activity, so it does seem to be working," he said. "I know it's a huge inconvenience. I've talked to several of the underwriters that we regulate and their concern is they would miss one because their agent wouldn't report it. But it does seem to be working.

"I'm going to guess that terrorists and drug traffickers are going to catch on at some point and start moving to different areas, so I imagine that the cities will start to expand. Chicago seems to be a likely place.

Lartz agreed, saying Chicago and other major metropolitan areas will likely be targeted soon.

Escheatment

Before the session, the regulators asked for questions from attendees that they could speak to during their time on stage. One of the questions asked regarded escheatment. Myers in particular has addressed these issues, having rewritten state regulations concerning this issue when Virginia amended its Rules Governing Settlement Agents in 2016.

He noted that state law requires entities to escheat funds to the state treasury every five years. Title agents who wanted to stop doing settlements or retire felt they must continue to issue stale checks to consumers over and over, which became problematic and costly for agencies.

In addition to the cost of mailing checks and tracking consumers down, Virginia law requires that once a company does escheat those funds, they must retain records for five years after you zero balance your account. This means that after waiting five years to escheat those funds, they then had to wait five more years to close those files.

The new regulations require title and settlement industry members to escheat on an annual basis.

"It gives the agent the ability to do their due diligence up front if there are any unclaimed checks or stale checks that come out and for some reason folks aren't cashing them," Myers said. "It gives them the option to be able to identify, do their due diligence, put it together and escheat."

He said it gave agencies a way to reduce some of their expenses and headaches.

CFPB finalizes updated disclosure rule

The Consumer Financial Protection Bureau released its amendments to the TILA-RESPA Integrated Disclosure Rule (TRID), designed to formalize guidance and provide greater clarity and certainty.

Among other things, the rule addresses tolerances for the total of payments and questions regarding the privacy and sharing of information.

In its rule summary, the bureau states, "The Bureau of Consumer Financial Protection (Bureau) is modifying the Federal mortgage disclosure requirements under the Real Estate Settlement Procedures Act and the Truth in Lending Act that are implemented in Regulation Z. This rule memorializes the bureau's informal guidance on various issues and makes additional clarifications and technical amendments. This rule also creates tolerances for the total of payments, adjusts a partial exemption mainly affecting housing finance agencies and nonprofits, extends coverage of the TILA-RESPA Integrated Disclosure (integrated disclosure) requirements to all cooperative units, and provides guidance on sharing the integrated disclosures with

various parties involved in the mortgage origination process."

Among other things the final rule:
• "Creates tolerances for the total of payments. The Truth in Lending Act (TILA) establishes certain tolerances for accuracy in calculating the finance charge and disclosures affected by the finance charge. In light of prior changes to certain underlying regulatory definitions, the final rule establishes express tolerances for the total of payments to parallel the existing provisions regarding the finance charge."
• Provides guidance on sharing disclosures with various parties involved in the mortgage origination process. The bureau has received a number of requests for guidance concerning the sharing of the integrated disclosures with sellers and various other parties involved in the origination process, including real estate agents, in light of privacy concerns. The final rule incorporates and expands upon previous webinar guidance in the Official Interpretations (commentary) to the regulation to provide greater clarity.
• Adjusts a partial exemption that mainly affects housing finance agencies and nonprofits. The existing rule provides a partial exemption from the integrated disclosure requirements for certain non-interest bearing subordinate lien transactions that provide down payment and other homeowner assistance (housing assistance loans). The bureau has learned that the exemption may not be operating as intended. The final rule includes two amendments to expand the scope of the partial exemption and provide additional flexibility when loans satisfy the partial exemption.
• Provides a uniform rule regarding application of the integrated disclosure requirements to cooperative units. Under the existing rule, coverage of cooperative units depends on whether cooperatives are classified as real property under state law. Because state law sometimes treats cooperatives differently for different purposes, there may be uncertainty and potential inconsistency among market actors regarding coverage of the integrated disclosure requirements. The final rule requires provision of the integrated disclosures in transactions involving cooperative units, whether or not cooperatives are classified under state law as real property."

In addition, it states, "The clarifications and technical corrections in this final rule address a variety of topics, including: affiliate charges; the calculating cash to close table; construction loans; decimal places and rounding; escrow account disclosures; escrow cancellation notices; expiration dates for the closing costs disclosed on the Loan Estimate; gift funds; the "In 5 Years" calculation; lender and seller credits; lenders' and settlement agents' respective responsibilities; the list of service providers; non-obligor consumers; partial payment policy disclosures; payment ranges on the projected payments table; the payoffs and payments table; payoffs with a purchase loan; post-consummation fees; principal reduction (principal curtailment); disclosure and good-faith determination of property taxes and property value; rate locks; recording fees; simultaneous second lien loans; the summaries of transactions table; the total interest percentage calculation; trusts; and informational updates to the Loan Estimate. This final rule will generally benefit consumers and industry alike by providing greater clarity for implementation going forward. As stated in the proposal, the bureau did not reopen any major policy decisions with this rulemaking."

It states, "Under this final rule, the same tolerances apply to the total of payments as apply, by statute, to the finance charge and disclosures affected by the finance charge. Because the 425 existing rule does not provide for a tolerance for the total of payments, other than to the extent a total of payments misdisclosure results from a misdisclosure of the finance charge, under the existing rule, any misdisclosure of the total of payments that does not result from a misdisclosure of the finance charge could potentially subject a creditor to liability under TILA.

"Under this final rule, recording fees and transfer taxes will be excluded from the calculation of the 1-percent threshold (as specified in § 1026.3(h)(5)). As a result, the § 1026.3(h) partial exemption will be available for some loans that currently do not satisfy § 1026.3(h)(5) but satisfy the other provisions of § 1026.3(h). Additionally, under this final rule, creditors issuing loans that satisfy the criteria in § 1026.3(h), and thus qualify for the partial exemption in Regulation X § 1024.5(d)(2), will be exempted from providing the RESPA disclosures and will have the choice to provide either a TILA disclosure (described in § 1026.18) or a Loan Estimate and Closing Disclosure (described in § 1026.19(e) and (f), respectively). 426 These revisions benefit creditors by allowing them to provide the more streamlined disclosures described in § 1026.18 or the Loan Estimate and Closing

Disclosure described in § 1026.19(e) and (f), respectively (without also having to provide the special information booklet described in § 1026.19(g)), in connection with loans that satisfy the criteria for the partial exemption at § 1026.3(h).

"In particular, more housing assistance loans originated by HFAs and others will qualify for the partial exemption, thereby reducing costs incurred under the baseline (described above), and increasing the wiliness of creditors to work with HFAs and other organizations in providing housing assistance loans. The bureau does not believe that creditors would bear any associated costs from the adopted amendments to § 1026.3(h).

The rule notes that "Regulation Z requires the use of the Closing Disclosure by the creditor to provide the required disclosures concerning the transaction to the consumer under § 1026.19(f)(1)(i) and requires the settlement agent to provide a copy of the Closing Disclosure to the seller under § 1026.19(f)(4)(i). Under § 1026.38(t)(5)(vi), the creditor or settlement agent is permitted to provide a separate Closing Disclosure to the seller that contains limited consumer information. The settlement agent must provide to the seller either a copy of the Closing Disclosure or a permissible separate Closing Disclosure, under § 1026.19(f)(4)(iv).

"The bureau proposed to add comment 38(t)(5)(v)-1 to clarify that, at its discretion, the creditor may make modifications to 355 the Closing Disclosure form to accommodate the provision of separate Closing Disclosure forms to the consumer and the seller and the three methods by which a creditor can separate such information. The Bureau also proposed to add comments 38(t)(5)(v)-2 and -3 to provide examples where the creditor may choose to provide separate Closing Disclosure forms to the consumer and seller."

It noted that it received comments from several different entitles in support of the proposed changes.

"Since commenters generally supported the proposed additional provisions, the bureau is adopting comments 38(t)(5)(v)-1 and -2 and comment 38(t)(5)(vi)-1 as proposed. The bureau is adopting comment 38(t)(5)(v)-3 with minor modifications clarifying the circumstances in which a creditor may be providing a Closing Disclosure to a seller.

"In response to the commenter requesting that the bureau cross-reference the exact regulatory provisions expressly permitted to be left blank under § 1026.38(t)(5)(v)(A), (B), and (C), the bureau believes that the additions to comments 38(t)(5)(v)-1, -2, and -3, and comment 38(t)(5)(vi)-1 are adequately specific and should allow creditors sufficient flexibility to modify the Closing Disclosure form for the consumer and the seller in a way that facilitates the transaction."

The rule later states "The Closing Disclosure, whether provided as a combined form containing consumer and seller information or separate forms reflecting each side of the real estate transaction conveying the real property from the seller to the consumer, is a record of the transaction (among other things), both for the consumer and the creditor, of the transactions between the consumer, seller, and creditor, as required by both TILA and RESPA. Such records may be informative to real estate agents and others representing both the consumer credit and real estate portions of residential real estate sales transactions, as they provide the consumer or the consumer's agent with a record of the transaction. The bureau in the preamble to the proposal stated that, based on its understanding of the real estate settlement process, it understands that it is usual, appropriate, and accepted for creditors and settlement agents to provide the combined or separate Closing Disclosure to consumers, sellers, and their agents as a confirmation, statement, or other record of the transaction, or to provide information on the status or value of the financial service or financial product to their customers or their customers' agents or brokers."

"The bureau included discussion of GLBA and Regulation P in the preamble in response to inquiries from creditors, settlement agents, and real estate agents about the sharing of the Closing Disclosure with third parties. One commenter correctly noted that GLBA sections 502(e)(1) and 509(7)(A) would apply only to the provision of the consumer's Closing Disclosure to the consumer's agent or broker and to the provision of the seller's Closing Disclosure to the seller's agent or broker."

The rule goes into effect 60 days after its publication in the *Federal Register*, but the mandatory compliance date is Oct. 1, 2018.

The CFPB is establishing an optional early compliance period from the time the rule takes effect through Oct. 1, 2018.

In addition to the final rule, the CFPB is issuing a proposal addressing when a creditor may use a Closing Disclosure, instead of a Loan Estimate, to determine if an estimated closing cost was disclosed in good faith and within tolerance.

Comments are due 60 days after the proposal's publication in the *Federal Register* and will be weighed carefully before a final regulation is issued.

Insurer sues agent over account shortfall

First American Title Insurance Co. v. National Title Agency LLC, William Rowley, National Title Agency of Utah Inc., Spencer Rowley (U.S. District Court for the District of Utah, No. 2:13CV1055DAK)

A national title insurer sued a Utah agent after a shortage was discovered in its trust account due to garnishments from default judgments against the agent.

The facts

National Title Agency LLC was a licensed escrow and title agent formed by **William Rowely** in 2006. The company entered into an agency agreement with First American Title Insurance Co. on March 31, 2009. The agreement required National Title to deposit all money it received in trust for others in a separate escrow account and stated that National Title and its principals would be liable for any shortages in the account. Rowley executed the agreement as president of National Title and set up the account with JP Morgan Chase on Feb. 4, 2008.

On April 6, 2010, a Utah state court entered a default judgment against National Title in *Bell et al. v. Hemsley, et al.*, for failure to appear at a court status conference. The judgment was in the amount of $95,000 and was satisfied through a writ of garnishment served on Chase. Chase released $89,783.84 to satisfy the judgment.

On May 7, 2010, a Utah state court entered a default judgment against National Title in *Hill, et al. v. Tibbits et al.*, for failure to appear and answer the complaint. The judgment was in the amount of $387,510.72 and satisfied through a writ of garnishment served on Chase.

Rowley learned that the Chase trust account was short in October 2013 and promptly contacted First American as well as his outside bookkeeping service. A forensic accounting team determined that the two state court garnishments had been paid from the trust accounts and were the cause of the shortfall. First American terminated the agency agreement on Nov. 25, 2013, and filed suit for breach of the agency agreement and indemnification. It has paid out $188,508.40 to customers of National Title and still is litigating claims for $177,000.

In addition, the insurer claims that it should have been paid $775.28 in premiums for title insurance policies issued by National Title.

Two years after the suit began, National Title filed a third party suit against Chase for improperly releasing the money from the trust accounts in response to the garnishment. The court dismissed that suit, holding that National Title needed to bring its claims against Chase in the state court actions that issued the writs of garnishments.

Two months after the shortfall was discovered, National Title stopped providing escrow and title services. It remains an ongoing Utah limited liability company. On Nov. 15, 2013, Rowley created National Title Agency of Utah (NTAU) as a limited liability company with himself as a managing member. He later amended the articles of incorporation, removing himself as director and president and made his son, Spencer Rowley, vice president and director.

NTAU entered into an agency agreement with Chicago Title and began doing business in the same location as National Title and using the same employees, fixtures and equipment.

On March 27, 2014, Rowly transferred all of National Title's assets to NTAU, a total of $96,000. First American's expert argued, however, that National Title's assets actually were worth $620,000.

First American filed a motion for partial summary judgment, as did NTAU, William Rowley and Spencer Rowley.

Court decision

U.S. District Judge **Dale Kimball** granted in part and denied in part First American's motion for partial summary judgment and granted in part and found moot in part the defendants' motion for partial summary judgment.

First addressing First American's motion for summary judgment on National Title's breach of the agency agreement, Kimball noted that the defendants argued that Chase was the party that was at fault for the shortage because of how it handled the writs of garnishment.

"However, National Title's complaint with its bank does not overcome National Title's contract with First American," he stated. "National Title's trust account was garnished – whether because of its own errors or the errors of its agent

Chase Bank – and the agency agreement makes National Title liable for the resulting shortage. First American has no contract with Chase Bank, and National Title does not articulate any theory under which First American could recover from Chase. National Title's argument is that First American cannot recover from National Title despite the plain language of the agency agreement because a party First American cannot recover from is liable. National Title contractually agreed to protect First American from such a situation.

"The facts in the record establish causation for purposes of First American's breach of contract damages against National Title," Kimball continued. "National Title and First American have a contract that states that National Title is liable to First American for shortfalls in National Title's trust account. National Title does not dispute there was a shortfall in its trust account. National Title does not dispute that First American has had to make payments to third parties as a result of the shortfalls in National Title's trust account. National Title, therefore, has admitted all of the elements of First American's breach of contract claim."

He went on to state that "Causation in this case is simple. National Title promised to be liable for all trust monies and shortfalls in the trust account and breached that promise by failing to pay for those shortfalls. First American had to pay for the shortfalls as a result of National Title's breach. First American is entitled to be put in the place it would have been in if National Title had honored its promises under the agency agreement. Chase was not a party to National Title's obligations to First American. Although National Title may have a right of indemnity against Chase if Chase breached its obligations to National Title, Chase's potential indemnity obligation to National Title does not impact First American's rights under the agency agreement."

First American also sought summary judgment for breach of the agency agreement against Rowley individually in relation to the trust account shortage and for breach of personal guaranty. Kimball noted that the paragraphs of the agency agreement were ambiguous on this matter and that he was unable to harmonize the conflicting paragraphs with the plain language of the agreement.

"The only apparent way to harmonize the two provisions is to read Paragraph 3.f as a provision intended to provide a lien in favor of First American," Kimball stated. "However, if both National Title and its principals are liable for shortfalls in the trust account, it is unclear why the agreement would provide for a lien only against National Title and not both National Title and its principals. However, reading Paragraph 3.f to mean that a principal is not liable for trust account shortfalls makes Paragraph 3.e meaningless. Because the plain language of these provisions creates ambiguity, parole evidence is necessary to fully understand the scope of the provisions. At trial, the parties will need to introduce parole evidence regarding these provisions. Accordingly, the court finds it would be inappropriate to enter summary judgment as a matter of law on this issue prior to trial.

"Next, First American seeks premium payments from William Rowley under his personal guaranty. The personal guaranty makes Rowley liable for 'the obligations of the agent under Section 6 of the agency agreement to remit the company's share of the title insurance premiums received.' National Title has failed to remit premiums in the amount of $775.28. Defendants, however, argue that First American is not entitled to the premiums because it failed to identify this unpaid premium in response to document requests," Kimball continued.

"However, First American properly disclosed its claim for the $775.28 payment in response to Interrogatory No. 7 in discovery," he stated. First American provided this information over a year before discovery closed in this case. The documents showing the debt were produced with the responses to the discovery requests at FA00030 to 00035. Admittedly there is an inconsistency in the interrogatory response and document request response. But, Rowley cannot claim to be unaware of the claim or surprised. Moreover, he had more than a year before the close of discovery to clarify the discrepancy. Accordingly, the court grants First American's motion for summary judgment against William Rowley with respect to the insurance premium remittance claim."

The court also addressed the defendants' motion for partial summary judgment on First American's claim for fraudulent transfer against the Rowleys. The defendants argued that First American's fraudulent transfer claim fails because the Fraudulent Transfer Act provides no cause of action against individual directors or shareholders of a corporate entity and First American did not bring a claim to pierce the corporate veil.

"In this case, the only 'debtor' or 'transferee' identified in the complaint is National Title and NTAU," Kimball stated. "National Title is the only entity that dealt with First American and NTAU is the only entity that received assets from National Title. None of the remedies provided for in the Fraudulent Transfer Act includes an independent tort action against persons who did not personally transfer or receive assets in a fraudulent transfer. Thus, the act does not authorize First American to seek relief from the individual directors or shareholders absent a piercing of the corporate veil."

OCTOBER RESEARCH, LLC

Subscription Order Form

Our market intelligence publications are there when --and how --you need them: on your desk every month, in your inbox every week and on the web every day.

Subscribe now to unlock breaking news, features and analysis, plus a library of exclusive special reports and other educational tools.

Save with a 2 year subscription

4 EASY WAYS TO ORDER:

- **Web** www.OctoberStore.com
- **Call** 330.659.6101 x 806
- **Fax** 330.659.6102
- **Mail** October Research, LLC
  3046 Brecksville Rd., STE. D
  Richfield, OH 44286

	Digital Subscriptions			Digital + Print Subscriptions	
	2 YEAR	1 YEAR	6 MONTH	1 YEAR	6 MONTH
The Title Report	☐ $1,074	☐ $565	☐ $312	☐ $629	☐ $349
The Legal Description	☐ $978	☐ $515	☐ $282	☐ $579	☐ $319
RESPA News	☐ $530	☐ $279	☐ $152	☐ $319	☐ $179
Dodd Frank Update	☐ $492	☐ $259	☐ $142	☐ $299	☐ $169
Valuation Review	☐ $454	☐ $239	☐ $132	☐ $299	☐ $169

All listed options include complete digital access to all publication content, email news updates and full website access. Digital + Print options also include print issues delivered either bi-weekly or monthly (RESPA News and Dodd Frank Update) via USPS. To subscribe, visit OctoberStore.com or check all that apply and return this form to the address on the form.

SUBSCRIBER INFORMATION

Name: _____

Title: _____

Company: _____

Address: _____

City: _____ State: _____ Zip Code: _____

Phone: _____ Email: _____

PAYMENT INFORMATION

○ Visa ○ American Express ○ Mastercard ○ Discover ○ Check enclosed (Payable to October Research, LLC)

Billing address on credit card (Required only if different than above address)

Address: _____

City: _____ State: _____ Zip Code: _____

Name on card: _____

Account number: _____ Exp: _____ CCV number: _____

Signature: _____

CCV are the last 3 digits printed over the signature on the back of your card. American Express cards show the 4-digit CCV printed above and to the right of the imprinted card number on the front of the card.

FREE EDITION

"For fast breaking stories, in-depth reports or solid background pieces, I turn to RESPA News. If you live in the RESPA world, and need to be up to date, it's a must."

Phil Schulman
Partner
Mayer Brown, LLP

"The reported cases and analysis, as well as the insightful forward-looking editorial perspective and contributor articles, make The Legal Description my No. 1 "go-to" source to help me in critical business decisions. The leading industry publication without comparison!!"

Christopher Gulotta
Founder and CEO
Real Estate Data Shield

"The Title Report is recognized as the leading independent news source dedicated to the title industry for current and relevant information. The quality of content is a valuable tool for the latest market intelligence, industry knowledge and educational events pertinent to our industry."

Mary O'Donnell
President and CEO
Westcor Land Title Insurance Company

Ninth Circuit upholds bankruptcy panel's ruling

In Re Rosanna Mac Turner; David Turner Rosanna Mac Turner v. Wells Fargo Bank NA; Citigroup Global Markets Realty Corp. U.S. Bank, CitiMortgage Inc. (9th U.S. Circuit Court of Appeals, No. 15-60046)

The Ninth Circuit Court of Appeals upheld a Bankruptcy Appellate Panel's decision affirming a bankruptcy court dismissal of an adversary proceeding brought by homeowners against parties to the deed of trust after their home was foreclosed upon.

The facts

David and **Rosanna Turner** owned property in Livermore, Calif. As part of their purchase they recorded a deed of trust on May 16, 2005 naming Fidelity National Title Insurance Co. as trustee and Wells Fargo N.A. as lender and beneficiary. In August 2005, the bank sold the deed and the Turners' promissory note to Citigroup Global Markets Realty Corp., which deposited them into a mortgage-backed security trust. The trust was securitized pursuant to a pooling and servicing agreement and named U.S. Bank N.A. as trustee. The trust required the transfer of all assets to the trust within 90 days of the trust pool's Aug. 29, 2005, start date. The deed was transferred by Wells Fargo to Citigroup on May 12, 2011, and by Citigroup to U.S. Bank on Sept. 19, 2012.

NBS Default services recorded a notice of default on the property on Feb. 10, 2012. Citigroup recorded a substitution of trustee naming NBS as trustee on May 2, 2012. NBS then recorded a notice of trustee's sale on May 16, 2012.

The Turners filed for bankruptcy on June 4, 2012. They did not pay Wells Fargo as required by their approved bankruptcy plan, so U.S. Bank was granted relief from the automatic stay to proceed with the foreclosure. The Turners filed an adversary proceeding, alleging that the transfer of the deed to the trust is void and is a breach of the pooling and servicing agreement because it was not effectuated within the 90-day period established by the agreement. They also asserted breach of the deed and violations of California law.

The bankruptcy panel held that the Turners failed to state a claim for wrongful foreclosure under California law, noting that the fact that the assignments were made after the 90-day timeframe merely rendered the transfer voidable not void under *Yvanova v. New Century Mortgage Corp*. They also found that the Turners did not properly allege a claim for breach of contract or breach of the implied covenant of good faith and fair dealing because they were not third-party beneficiaries of the pooling and servicing agreement.

Court decision

The appellate court affirmed the bankruptcy courts' decision, noting first that the assignments were voidable and not void.

"Here, the Turners argue that the DOT assignments are void and not voidable. They primarily rely on the California Court of Appeal's decision in *Glaski v Bank of America*, in which it interpreted New York Law. The Second Circuit and New York state courts, however, have rejected Glaski's interpretation of New York law. Following these decisions, three California Courts of Appeal have held that 'such an assignment is merely voidable.' The Turners' argument to the contrary is unavailing: the fact that the assignments of the DOT were made well after the 90-day timeframe, merely rendered the transfer voidable, not void. As a result, the district court properly dismissed the Turners' wrongful foreclosure claim for failure to state a claim."

The Turners also argued that they are third-party beneficiaries of the pooling and servicing agreement, and therefore properly alleged a claim for breach of contract or breach of the implied covenant of good faith and fair dealing under the agreement.

"But, as numerous California appellate courts have held, borrowers, like the Turners, are not third-parties beneficiaries of the PSA. As a result, the district correctly ruled that the Turners failed to state a claim for either breach of the express agreement or the related breach of the implied covenant of good faith and fair dealing under the PSA," the court stated.

"The Turners next argue that Wells Fargo breached the express terms of the DOT because it did not execute the notice of default, and that NBS could not record the notice of default because the notice was issued three months before NBS was substituted as trustee," the court continued. "This argument, however, lacks merit. Wells Fargo was not required by the express terms of the DOT to execute the notice of default, but rather, it can cause the trustee to execute a written notice of default. Here, a substitution of trustee was recorded naming NBS as trustee. Therefore, NBS had the authority to issue the notice of default."

They also argued that Citigroup and NBS violated Section 2923.5 of the California Civil Code, which requires mortgage

servicers to wait 30 days after initial contact with a borrower or 30 days after satisfying the due diligence requirement before recording a notice of default.

"The notice of default was signed by NBS as trustee or agent of the beneficiary, Wells Fargo. A substitution of trustee naming NBS as trustee was later recorded," the court stated. "The recorded documents conclusively show compliance before the notice of trustee's sale was recorded because the Turners received timely notice from NBS. And, even if NBS was ineligible to give notice at the time, Section 2923.5 provides no remedy to borrowers, like the Turners. The district court properly dismissed their claim under Section 2923.5.

"Finally, the Turners argue that appellees violated the UCL by executing and recording 'invalid and void assignments of deed of trust on May 12, 2011 and Sept. 19, 2012; an invalid notice of default on Feb. 10, 2012; and an invalid notice of trustee's sale on May 16, 2012, despite knowing that they were not the legal trustees or holders of beneficial interest' under the DOT. The UCL prohibits unlawful, unfair or fraudulent business acts or practices and unfair, deceptive, untrue or misleading advertising. The Turners, however, failed to establish standing to bring a claim under the UCL," the court stated.

Bank seeks reversal of foreclosure

JPMorgan Chase Bank N.A. v. Kenneth Bickham and Mary Brumfield Bickham (First Circuit Court of Appeal of Louisiana, No. 2016 CA 0946)

The First Circuit Court of Appeals of Louisiana recently decided a case on appeal where the trial court handed down a judgment to set aside a bank's claims in a foreclosure action due to abandonment. The trial court had originally issued a writ of seizure and sale as to the property in 2007, but the sheriff's sale had never taken place due to title defects. The bank did not make any official action after the notice of writ of seizure until six years later when it moved to substitute counsel.

The facts

The successor of JPMorgan Chase Bank, Bank of New York Mellon Trust Co., N.A., originally filed a petition to enforce its security interest by executory process against **Kenneth** and **Mary Bickham** on June 19, 2007. The bank sought to enforce a note and mortgage the Bickhams had executed on Oct. 31, 2003, in favor of Homecoming Financial Network for $73,000. The trial court signed an order issuing a writ of seizure and sale as to the property on June 21, 2007, and the sheriff's office issued a notice of seizure four days later. Bank of New York Mellon filed affidavits of notice to lienholders on July 31, 2007 and Aug. 3, 2007, but a sheriff's sale never took place because of title defects on the property.

The title insurer, the Bickhams and Bank of New York corresponded and engaged in various lawsuits to resolve the title issues after the notices were filed, however no further actions were taken in the record of the executory foreclosure proceeding until Dec. 20, 2013 when the bank filed a motion to substitute counsel. The Bickhams filed an ex parte motion to dismiss the executory foreclosure proceeding on grounds of abandonment, which was granted by the trial court on Oct. 8, 2015.

Bank of New York then filed a motion to set aside the dismissal, which the trial court denied on Feb. 17, 2016. The bank appealed, arguing that the trial court erred in dismissing the foreclosure action because the bank had been actively working through the title insurer to correct the underlying title defect that precluded the foreclosure sale.

Court decision

The appellate court affirmed the trial court's motion, noting that it was undisputed that prior to the motion to substitute counsel, no action had been taken of record since the affidavit of the notice to lienholders was filed six years earlier. In addition, the court noted that there was no formal discovery served on all parties.

In support of its appeal, the bank cited *Nationstar Mortgage LLC v. Harris*, in which the Fourth Circuit found that in executory proceedings, title-clearing actions constitute a step in the prosecution for purposes of precluding a dismissal due to abandonment. The court disagreed.

"Other than *Nationstar*, we have found no precedent, statutory or jurisprudential, for the proposition that filing a document into the mortgage records constitutes a 'step' in furtherance of the prosecution of an executory proceeding," the court stated. "Moreover, this court is not bound by a decision of another circuit. More importantly, the facts of this case are distinguishable from those before the court in *Nationstar*.

"Here, the Bank of New York is not relying on a document filed into the public conveyance or mortgage records in support of its argument that there was a 'step' in furtherance of the prosecution of the executory foreclosure proceeding," the court continued. "Rather, the Bank of New York is relying on correspondence between the title insurer and various involved parties and separate lawsuits involving the title insurer and various involved parties to negate the abandonment rule. Moreover, while the Bank of New York did introduce two mortgage distinctions in support of its motion to set aside the judgment of dismissal, these documents were filed into the public records on July 27, 2007, and Oct. 5, 2007, and thus, were filed well beyond three years prior to the filing of the motion to substitute counsel on Dec. 20, 2013. Thus, even if we were to apply the rationale of the Fourth Circuit in *Nationstar*, the Bank of New York's claims in the executory foreclosure proceeding at issue herein would still be abandoned. For these reasons, we disagree with the Bank of New York that the '*Nationstar* exception,' as recognized by the Fourth Circuit only, applies herein to preclude the abandonment of the bank's executory foreclosure proceeding."

The bank also argued that another exception, based on the concept of contra non valentem, applied. This exception applies when the trial judge orders briefs to be filed after the submission of a transcript, and the transcript is then not submitted, and cannot be submitted because of the death or other inability of the initial reporter to transcribe it, as the matter is out of the plaintiff's control.

"Here, however, the Bank of New York was not prevented, by circumstances beyond its control, from taking steps in this action," the court stated. "The Bank of New York could have converted this proceeding to an ordinary proceeding, and the trial court could have then resolved the title defects that prevented the advancement of the executory proceeding and the sheriff's sale. Instead, the Bank of New York has maintained the suit as an executory proceeding, and the suit has lingered without a sheriff's sale for ten years, with no action in the record for at least six years.

"Lastly, the Bank of New York relies on an exception to the abandonment rule, wherein the courts have recognized that a defendant may waive the right to assert abandonment by taking actions inconsistent with the intent to treat the case as abandoned. In *Clark*, the Supreme Court found that an unconditional tender by the defendant automobile insurer was an 'acknowledgment and thus within the waiver exception,' resulting in an interruption of prescription and a recommencement of the abandonment period from the date of the tender. Here, there is no evidence in the record that the Bickhams waived their right to assert abandonment by taking inconsistent actions during the three-year period. Rather, the Bank of New York contends that the Bickhams' actions in refusing to participate in the title curative process supports a finding of waiver. We disagree. There is no evidence in the record of bad faith on behalf of the Bickhams concerning the deed, the execution of the mortgage, or the resulting title defect. Moreover, we are unable to find that the Bickhams had a 'duty' to participate in the title curative process for the Bank of New York's benefit. Accordingly, we disagree with the Bank of New York that the Bickhams' alleged failure to participate in the title – curative process supports a finding of waiver of abandonment."

Federal legislation would improve cybersecurity

House Small Business Committee Chairman **Steve Chabot** (R-Ohio) joined Senate Small Business Committee Chairman **Jim Risch** (R-Idaho) to introduce bipartisan, bicameral legislation to improve cybersecurity resources for small businesses. The Small Business Development Center (SBDC) Cyber Training Act will be a priority in each respective committee. Rep. **Dwight Evans** (D-Pa.) and Sen. **Gary Peters** (D-Mich.) are original co-sponsors of the bills.

"Many small business owners lack the capital and expertise they need to prevent a cybersecurity attack. Unfortunately, one simple hit can destroy everything a small business owner has created. That's why we need to ensure small businesses have access to the best cybersecurity resources and information possible. Providing cybersecurity training to lead small business development center employees will broaden their expertise to help more small businesses prevent an attack and potentially help save their companies," Chabot said in a release.

"Entrepreneurs – particularly in rural areas – depend on online sales and marketing to commercialize their businesses, leaving them incredibly vulnerable to cyber risks," Risch said. "With many small businesses unable to recover after suffering a cyber-attack, it is incredibly important that we address this threat head on."

"Our small business owners and entrepreneurs are the engines that drive people to live, grow and succeed in our neighborhoods. We know that our small business community faces increasing cyber threats in our ever changing and evolving global economy. I am proud to join with my colleagues in the House and Senate to introduce bipartisan legislation that equips our small business owners and

entrepreneurs with the resources they need to keep their businesses safe, secure and protected. Our small businesses depend on the essential resources that our Small Business Development Centers (SBDC) provide and I will continue to set forth legislation that allows our small businesses and SBDC's to continue to thrive and prosper," Evans said.

"Small businesses create two out of every three new jobs in our country each year, and they need the right tools and skills to identify cyber threats and protect their customers and their livelihoods," Peters said. "I'm pleased to support this bipartisan bill, which builds on efforts to educate business owners on ways to improve cyber defenses so that small businesses can focus on what they do best: creating jobs, fostering economic growth and driving innovation."

The SBDC Cyber Training Act would require a percentage of SBDC employees to become certified in cyberstrategy counseling, a method proven effective for export trade counseling. Without costing taxpayers more money, the Act would utilize already existing Small Business Administration (SBA) conferences to provide cyberstrategy training to at least 20 percent of SBDC employees. Relying on the SBA's expertise in training small businesses, the Act allows that agency to come up with new programming and to certify existing cyber education at SBDCs.

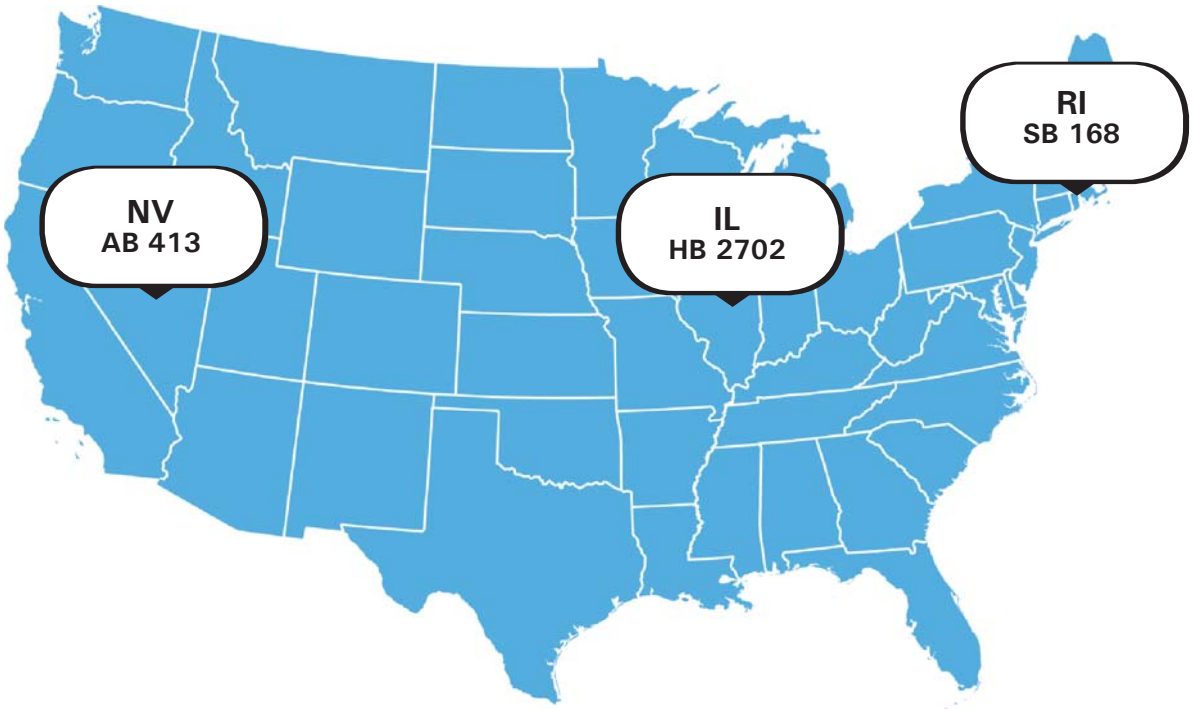
Illinois General Assembly passes CPL legislation

The Illinois General Assembly passed legislation that makes changes to the insured closing letter provision of the Title Insurance Act.

The bill now awaits the governor's signature.

The bill, **HB 2702**, was introduced by Rep. **Jay Hoffman**, D-Belleville.

It amends the definition of "insured closing letter" to mean "an indemnification or undertaking to a party to a real property transaction, from a principal such as a title insurance company, setting forth in writing the extent of the principal's responsibility for intentional misconduct or errors in closing the real property transaction on the part of a settlement agent, such as a title insurance agent or other settlement service provider, or a similar undertaking given by a title insurance company or an independent escrowee to a party to a real property transaction which indemnifies the party against the intentional misconduct or errors in closing the real property transaction on the part of the title insurance company or independent escrowee and includes protections afforded pursuant to subsections (f), (g), and (h) of Section 16, Section 16.1 and section 17.1 of this act even if



such protection is afforded by contract."

Under the legislation, "independent escrowees would be able issue insured closing letters if, in addition to complying with the same certification and deposit requirements that title insurance companies are subject to under Section 4 of the act, the independent escrowee:
• Satisfies the secretary that it has a minimum capital and surplus of $2 million. The secretary may provide the forms and standards for this purpose by rule.
• Files with and has approved by the secretary proof of a fidelity bond in the minimum amount of $2 million per occurrence.
• Establishes and maintains a statutory closing protection letter reserve for the protection of parties named in warranties of services consisting of a sum of 25 percent of the closing protection letter revenue received by the independent escrowee on or after the effective date of this amendatory act of the 100th General Assembly. The reserve shall be reported as a liability of the independent escrowee in its financial statements. Amounts placed in the statutory closing protection letter reserve shall be deducted in determining the net profit of the independent escrowee for the year. Except as provided for in this subsection, assets in value equal to the statutory closing protection letter reserve are not subject to distribution among creditors, stockholders or other owners of the independent escrowee until all claims of parties named in warranties of services have been paid in full and discharged.
• Releases from the statutory closing protection letter reserve a sum equal to 10 percent of the amount added to the reserve during a calendar year on July 1 of each of the five years following the year in which the sum was added and releases from the statutory closing protection letter reserve a sum equal to 3 1/3 percent of the amount added to the reserve on each succeeding July 1 until the entire amount for that year has been released."

It goes on to state, "The secretary shall adopt and amend rules as may be required for the proper administration and enforcement of this subsection consistent with the federal Real Estate Settlement and Procedures Act and Section 24 of this Act.

"Independent escrowees would not be authorized to act in a nonresidential real property transaction where the amount of settlement funds on deposit with the escrow agent is less than $2 million or in a residential real property transaction unless closing protection letters protecting the buyer's, lender's and seller's interests have been issued by the independent escrowee.

"The closing protection letter would indemnify all parties to a real property transaction when the losses arise out of:
• Failure of the independent escrowee to comply with written closing instructions to the extent that they relate to a) the status of the title to an interest in land or the validity, enforceability and priority of the lien of a mortgage on an interest in land, including the obtaining of documents and the disbursement of funds necessary to establish the status of title or lien or b) the obtaining of any other document specifically required by a party to the real property transaction, but only to the extent that the failure to obtain the other document affects the status of the title to an interest in land or the validity, enforceability and priority of the lien of a mortgage on an interest in land; or
• Fraud, dishonesty or negligence of the independent escrowees in handling funds or documents in connection with closings to the extent that the fraud, dishonesty or negligence relates to the status of the title to the interest in land or to the validity, enforceability and priority of the lien of a mortgage on an interest in land or, in the case of a seller, to the extent that the fraud, dishonesty or negligence relates to funds paid to or on behalf of, or which should have been paid to or on behalf of, the seller."

The bill states: "The indemnification under the closing protection letter could include limitations on the liability of the independent escrowee for any of the following:
• Failure of the independent escrowee to comply with closing instructions that require title insurance protection inconsistent with that set forth in the title insurance commitment for the real property transaction. Instructions that require the removal of specific exceptions to title or compliance with the requirements contained in the title insurance commitment shall not be deemed to be inconsistent.
• Loss or impairment of funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except as a result of the failure of the independent escrowee closer to comply with written closing instructions to deposit the funds in a bank that is designated by name by a party to the real property transaction.
• Mechanic's and materialmen's liens in connection with sale, purchase, lease or construction loan transactions, except to the extent that protection against such leans is afforded by a title insurance commitment or policy issued by the title insurance agent or title insurance company.
• Failure of the independent escrowee to comply with written closing instructions to the extent that such instructions require a determination by the independent escrowee of the validity, enforceability, or effectiveness of any document described in item (B) of paragraph (1) of subsection (b) of this section.
• Fraud, dishonesty, or negligence of an employee, agent, attorney, or broker, who is not also the independent escrowee or an independent contract closer of the independent escrowee, of the indemnified party to the real

property transaction.
• The settlement or release of any claim by the indemnified party to the real property transaction without the written consent of the independent escrowee.
• Any matters created, suffered, assumed, or agreed to by, or known to, the indemnified party to the real property transaction without the written consent of the independent escrowee."

The bill also states that the closing protection letter may include "reasonable additional provisions concerning the dollar amount of protection, provided the limit is no less than the amount deposited with the independent escrowee, arbitration, subrogation, claim notices, and other conditions and limitations that do not materially impair the protection required by this section."

Rhode Island adopts escrow release statute

The Rhode Island General Assembly adopted a bill that would require real estate brokers to release customer or client funds in an escrow account as instructed by the parties to a failed real estate transaction within 10 days of receipt of a written release that has been signed by all the parties.

The bill, **SB 168**, was introduced by Sen. **Frank Lombardi**, D-Cranston; **Michael McCaffrey**, D-Warwick; **Erin Lynch Prata**, D-Warwick/Cranston; **Stephen Archambault**, D-Smithfield; and **Paul Jabour**, D-Providence.

It states, "An escrow agent shall pay sums of money being held in an escrow account as instructed by the parties to a failed real estate transaction, within 10 days of receipt of a written release that has been signed by all the parties to the failed real estate transaction."

It continues, stating that "failure to pay sums of money being held in an escrow account, pursuant to Section 5-20.5-26, within 10 days of receipt of a written release that has been signed by all parties to a failed real estate transaction."

The bill will go into effect on Sept. 1, 2017.

Florida gets new CFO

Gov. **Rick Scott** appointed **Jimmy Patronis** as Florida's next chief financial officer. Patronis officially was sworn in June 30, 2017, to replace CFO **Jeff Atwater** who took a position at Florida Atlantic University.

The governor made the announcement at Captain Anderson's restaurant, which is owned and operated by the Patronis family.

"I am honored to appoint Jimmy Patronis as Florida's chief financial officer. As a small business owner, Jimmy has been a successful job creator and has helped grow Panama City's economy. I know that he will bring his wealth of private sector experience with him to Tallahassee," Gov. Scott said "Jimmy faithfully served Floridians in the Florida House of Representatives for four terms, and I was proud to appoint him to both the Constitution Revision Commission and the Public Service Commission. In each of these roles, Jimmy always put Florida families first. I am confident that he will add to our mission to cut even more taxes and create even more jobs."

"I would like to thank Jeff Atwater for his service to families and for his stewardship of tax dollars. I will miss working with Jeff, and I wish him the best as he continues to work to benefit Floridians," the governor added.

Patronis said: "I am honored to be appointed as Florida's next CFO. I would like to thank Gov. Scott, and I look forward to continuing his legacy of job growth and economic prosperity for our state.

"This year marks the 50th anniversary of my family starting a business in Florida, and it has been my honor to be a part of its growth and success for much of my life. I want every family in Florida to have the same opportunities that my family had."

Patronis was born and raised in Panama City, Fla.

He has helped run and operate Captain Anderson's restaurant in Bay County for most of his life.

Patronis served four terms in the Florida House of Representatives beginning in 2006. He attended Gulf State College and Florida State University.

Latest Defect Index shows increase

First American Financial Corp. released the First American Loan Application Defect Index for May 2017, which estimates the frequency of defects, fraudulence and misrepresentation in the information submitted in mortgage loan applications.

The index found:
• The frequency of defects, fraudulence and misrepresentation in the information submitted in mortgage loan applications increased 2.5 percent in May 2017 as compared with the previous month.
• Compared with May 2016, the Defect Index increased by 13.7 percent.
• The Defect Index is down 18.6 percent from the high point of risk in October 2013.
• The Defect Index for refinance transactions increased 3.0 percent month-over-month, and is 9.7 percent higher than a year ago.
• The Defect Index for purchase transactions increased 1.1 percent compared to last month, and is up 11.1 percent compared to a year ago.

"The Loan Application Defect Index is now reaching levels of risk not seen since 2015," First American Chief Economist **Mark Fleming** said in a press release. "While risk is growing in both purchase and refinance transactions, it is important to recognize that loan application defect, fraud and misrepresentation risk remains below the peak reached in 2013. Purchase transaction risk is 13 percent below the peak and refinance transaction risk is 32 percent below the peak. The purchase-pivot in the housing market continues to add fuel to the fire of the overall level of application, defect and fraud risk."

Fleming noted that the loan defect risks in McAllen, Texas, Charleston, S.C., Birmingham, Ala., Knoxville, Tenn., and Augusta, Ga. have been increasing.

New Mexico escrow company owner sentenced

The former owner of Mimbres Valley Escrow Services has been sentenced for embezzling more than $800,000 from 12 Luna County residents. The sentencing follows an investigation by the Tax Fraud Investigations Division of the New Mexico Taxation and Revenue Department and cooperation from the Financial Institutions Division of the Regulation and Licensing Department.

A complaint against Mimbres Valley Escrow Services was filed in 2012 with the New Mexico Regulation and Licensing Department's Financial Institutions Division, which placed the company into receivership following the discovery of unsafe activity and violations of the Escrow Company Act. The case then was referred to the Tax Fraud Investigations Division of the New Mexico Taxation and Revenue Department for investigation.

Anna Delgado, 48, was sentenced to 12 years of prison, two years of parole and five years of supervised probation. Delgado also was ordered to pay $659,848.81 in restitution to her victims. Delgado was sentenced in Luna County by District Court Judge **Jennifer Delaney**.

"This administration is committed to protecting New Mexico's taxpayers and hunting down those who would cheat the system," Acting Secretary **John Monforte** said. "Those who embezzle, commit fraud or steal taxpayer dollars will be caught and punished."

Former Alabama bank president sentenced

Anthony J. Atkins, 51, of Eufaula, Ala., was sentenced to 63 months in prison and ordered to pay more than $2.4 million in restitution for conspiracy to commit bank fraud, four counts of false statements to a federally insured financial institution, bank fraud, and mail fraud affecting a financial institution. Atkins was convicted by a jury on March 10, 2017. In 2007, an individual went to Atkins, the president of GulfSouth Private Bank, and notified Atkins that the individual's company, which had been loaned $3.4 million, was no longer able to make payments on the mortgage loans issued by GulfSouth Private Bank that had been secured by three condominiums. To conceal that the $3.4 million in loans were going into default, Atkins devised a scheme to conceal the bad debt.

Nevada adopts electronic notary law

The governor of Nevada has signed legislation that revises provisions of state law governing electronic notaries public. The bill, **AB 413**, was introduced by the Assembly Judiciary Committee.

The new law allows for an electronic notary public to notarize the signature or electronic signature "of a person who is not in the physical presence of the electronic notary public or other notarial officer if the person is in his or her presence via audio or visual method." It also states, "An electronic notary public may perform any of the acts set forth in NRS 240.196 using audio-video communication in accordance with NRS 240.181 to 240.206 and sections 30 to 38.7 of the act and any rules or regulations adopted by the secretary of state."

In addition, it states, "An electronic notary public who is registered with the secretary of state pursuant to NRS 240.192 may perform an electronic notarial act using audio-video communication in accordance with NRS 240.181 to 240.206, inclusive, and sections 30 to 38.7, inclusive, of this act and any rules or regulations adopted by the secretary of state if the electronic notary public is physically present in this state at the time of performing the electronic notarial act, regardless of whether the person who placed the electronic signature on the electronic document is physically located in another jurisdiction at the time of the electronic notarial act. The validity of the notarial act will be determined by applying the laws of this state."

A person will be considered to be in the presence of a notary if they are:
• In the same physical location as another person or
• In a different physical location but "able to see, hear and communicate with the person by means of audio-video communication that meets any rules or regulations adopted by the secretary of state."

The bill defines "audio-video communication" as "communication by which a person is able to see, hear and communicate with another person in real time using electronic means." Before performing an electronic notarial act using audio-video communication, the notary must register with the secretary of state and identify the technology that he or she intends to use. The technology used must allow the persons communicating to see and speak to each other simultaneously; the signal transmission must be in real time; and the electronic notarial act must be recorded in accordance with state law.

The notary public can perform an electronic notarial act using audio-video communication in accordance with state law for a person who is physically located:
• In Nevada;
• Inside the U.S.; or
• Outside the U.S. if the notary public has no actual knowledge of the electronic notarial act being prohibited in the jurisdiction in which the person is located and the person placing his or her electronic signature on the electronic document confirms that the requested electronic notarial act pertains to a matter to be filed in the U.S., relates to property in the U.S. or relates to a transaction substantially connected to the U.S.

The notary must record each electronic notarial act performed using audio-video communication and inform all parties involved that he or she will be recording the notarial act. If the person for whom the electronic notarial act is being performed is identified by personal knowledge, the recording must explain how he or she knows the person. If the identification is being done by a credible witness, the credible witness must appear before the electronic notary public. The recording must include a statement of how the electronic notary public identified the credible witness and an explanation of how the credible witness knows the person for whom the notarial act is being performed. The notary must keep recordings of these notarizations for at least seven years, regardless of whether the electronic notarial act was actually completed. The notary also will have to include language explicitly stating that the notarial act was performed using audio-video communication, if applicable.

The bill also states, "If an electronic document relating to real property located in this state contains an electronic acknowledgment ... upon the document being recorded with the county recorder
• The electronic document shall be deemed to be lawfully recorded or filed; and
• All persons, including, without limitation, any creditor, encumbrancer, mortgagee, subsequent purchaser for valuable consideration or any other subsequent transferee thereof or of any interest therein, are deemed to have notice of its contents.