THE ABSTRACT

SPRING 2009

AMERICAN COLLEGE OF MORTGAGE ATTORNEYS

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AMERICAN COLLEGE OF MORTGAGE ATTORNEYS

9707 Key West Avenue, Suite 100
Rockville, Maryland 20850

T (301) 990-9075
F (301) 990-9771
E acma@mgmtsol.com
W www.acmaatty.org

# PRESIDENT'S COLUMN

by Edward T. Bullard

As we prepare for the 2009 ACMA Regents' Spring Meeting in Del Mar, California, it is clear that the industry we serve is under pressure. It is also clear that many ACMA Fellows likewise suffer from the downturn in lending activity and lack of "deals" in general. Although the industry has been under pressure before, this current economic downturn somehow feels "different" from prior recessionary periods in both intensity and duration.

Rest assured, however, that ACMA remains relevant to the times and committed to supporting its Fellows in many ways. For example, last year when the Land America collapse became evident, ACMA's Title Insurance Committee teamed with ACREL's Title Insurance Committee to co-host a series of telephone conferences to become familiar with all the developments to better enable clients to evaluate the situation and develop appropriate responses. This joint effort quickly moved to an effort to co-sponsor with RPTE a webinar. In short order, "Dilemmas Dealing with Deposits, Disbursements, Escrows and Exchange Funds" was developed jointly by ACMA, ACREL, and the ABA Section of Real Property, Trust and Estate Law, and aired in February. It could not have happened without the considerable efforts of Scott Abney, Andrew Palmieri, John Hosack and Cheryl Kelly (wearing both ACMA and ACREL hats).

Other efforts to support our membership are evident. As part of the Spring Regent's Meeting, I have asked Dick Goldberg to return with an all-star panel to conduct an optional Roundtable on the morning of Friday, March 20, 2009 to bring us up to speed on TARP, TALF, the Stimulus Package, and related issues. A sub-committee of the Program Committee consisting of Nancy Little, Andrew Palmieri, and Dena Cruz are considering an ACMA-sponsored webinar based on what promises to be an outstanding Roundtable relevant to our daily practice.

An ad-hoc committee is busy at work evaluating what goals might be served and benefits provided by expansion of ACMA into countries south of our border.

The Strategic Planning Committee is working on a strategic planning effort in 2009. The effort will start in earnest with the first survey in 10 years. The survey will be conducted electronically and your participation is encouraged and would be greatly appreciated.

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# Editor's Notes

by Norman H. Roos

With this issue, *The Abstract* joins the age of online journalism. As someone who enjoys the tactile sensation of holding a newspaper or magazine, this is not a wholly welcome development for me. Nonetheless, the advantages of online publications are compelling—and I will adjust. Even though the delivery of *The Abstract* has changed, the content continues a long tradition of featuring a broad range of informative articles, timely reports and news of interest to ACMA members.

This edition of *The Abstract* includes articles relating to:

- *The Curious Case of Canadian Unlimited Liability Companies*—In this article, Jeff Lem describes a uniquely Canadian legal structure designed and built exclusively for export to Americans but whose days may be numbered due to an imminent change in the Tax Treaty between the United States and Canada.
- *Simultaneous Priorities of Construction Loans and "Construction Liens"*—Roger Bernhardt discusses the recent Nebraska Supreme Court decision of *Borrenpohl v. Dabeers Properties*, the UCLA (Uniform Construction Lien Act), and how it is that multiple documents that arrive in the recorder's office at the same time are not recorded simultaneously.
- *Class Actions for Failure to Timely Satisfy Mortgages*—Harris Ominsky analyzes the case of *Radath v. Federal National Mortgage Association,* an Ohio Appellate Court Case with significant implications for residential mortgage lenders throughout the U.S.
- *Title Insurer's Liability (or lack thereof) for Acts of its Agent in the Absence of a Closing Protection Letter*—Jack Murray demonstrates why it is important for both the insured and the insurer to understand the legal and regulatory restrictions and limitations on the use of CPLs and the nature and scope of the agency relationships that exist between title insurance companies, Issuing Agents and Approved Attorneys.
- *Environmental Risk Management—A Time to Reassess How to Avoid and Better Manage Toxic Assets*—Pamela Elkow, Richard Fil and Norm Roos discuss the need for real estate lenders to reinvigorate their approach to environmental risk assessment and outline some due diligence issues to allow lenders to limit environmental risks and maximize their real estate lending opportunities.

In addition to these articles, this *Abstract* also contains Ed Bullard's inaugural President's Report, Bev Levy's Executive Director's Report and Norma Williams Business Development Report featuring feedback from several ACMA members on their experience with the ACMA referral program.

Thanks to ACMA President Ed Bullard, Executive Director Bev Levy, Business Development Chair Norma Williams and ACMA Fellows Jeff Lem, Roger Bernhardt, Jack Murray, Harris Ominsky and to Pam Elkow and Rich Fil, my new partners at Robinson & Cole, for their contributions to this edition of *The Abstract*. ◆

I look forward to seeing you at the Regents' Meeting in San Diego.

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# Executive Director's Column

by Beverly I. Levy, CEBS, CAE, SPHR

The State of the Economy certainly has taken precedence over all other issues right now. I certainly don't need to focus on the specifics in this Column; however, the American College of Mortgage Attorneys and our Fellows are affected by it all.

ACMA took charge at its 2008 Annual Meeting in New Orleans by quickly changing some of its panel topics to address the issues of the moment. In addition, ACMA will once again address the issues of the moment in a "Liquidity Crisis Update" Roundtable during the Board of Regents Meeting, on March 20, 2009, in Del Mar, California.

The American College of Mortgage Attorneys is celebrating its thirty-fifth anniversary this year. When the College was first formed in 1974, the "founding fathers" focused on the issues of the day and how those issues affected the mortgage industry. Today, as we have for thirty-five years, we continue to address critical issues affecting the mortgage industry. The American College of Mortgage Attorneys continues to be crucial in today's world in providing our Fellows with up-to-date information affecting everyday business.

So many Fellows enjoy the camaraderie of the College, our system of referring business to and from other ACMA Fellows, attending the Annual Meeting CLE Program, and all of the other benefits being a Fellow of the College provides. However, ACMA is much more than that…

Now, more than ever, ACMA plays a timely and vital role by providing a forum for our Fellows to address the issues that affect our Country, our economy, and our professional responsibilities. Your participation in the American College of Mortgage Attorneys is now more important that it has ever been. ◆

## IN MEMORIAM

ACMA is shocked and deeply saddened by the sudden loss of Gregory A. Thorpe, a good friend and colleague and a Fellow of the American College of Mortgage Attorneys. Greg was a true gentleman and scholar. He was most generous and kind, and active in numerous legal and civic groups. Greg served as the ACMA State Chair for Illinois. He will be deeply missed by everyone who knew him. Our deepest sympathies go out to his wife Lynn and family and all of his colleagues.

**GENERAL** This Newsletter is a publication of the American College of Mortgage Attorneys for the benefit of the College's Fellows. Readers are welcomed and encouraged to send their corrections, comments, articles or news to the editor: Norman H. Roos, Robinson & Cole LLP, 280 Trumbull Street, Hartford, CT 06103-3597, Email: nroos@rc.com.

Although an earnest effort has been made to ensure the accuracy of the matters contained herein, no representation is made that the contents are without error. Summaries of cases or statutes are intended to bring selected current developments to the attention of the College's Fellows for their further study and are not intended to be and should not be relied upon by readers as authority for their own or their clients' matters. Readers should review the full text of the cases or statutes referred to herein before relying on these cases or statutes in their own matters or in advising clients. All commentary reflects only the opinion of the editor and does not represent a position of the American College of Mortgage Attorneys.

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# The Curious Case of the Canadian Unlimited Liability Companies

by Jeffrey W. Lem

Imagine, if you will, a Canadian-made product designed and built exclusively for export to Americans and for which no Canadian could ever have any use. As peculiar as this may sound, Canada "produces," for want of a better term, a special kind of corporate vehicle that is only used by Americans. These specialty corporations, known throughout Canada as "Unlimited Liability Companies" ("ULCs"), have been an increasingly popular choice with Americans since the introduction of the "check-the-box" regulations by the U.S. Treasury in 1997. ULCs are easy-to-use corporate entities that, unlike regular corporations, actually expose shareholders to unlimited liability for debts and other financial obligations incurred by the company. Until recently, Canadian ULCs could only be formed out of the Province of Nova Scotia, but recently other provinces have joined the bandwagon. However, at the very same time that Canadian provinces have dramatically increased the availability and convenience of ULCs for American investors, U.S. and Canadian lawmakers have made concurrent tax treaty amendments which could seriously eviscerate the continued viability of the Canadian ULC.

Up until now, the ULC has been an attractive vehicle for American investors because of its unique hybrid tax treatment back in the United States. In Canada, the ULC is treated exactly as any other Canadian corporation for tax purposes. However, in the United States, a Canadian ULC qualifies as an "eligible entity" according to the U.S. Treasury's "check-the-box" regulations. The fact that a ULC's shareholders have unlimited liability for the debts and obligations of the ULC makes the ULC, for U.S. tax purposes, not a corporation at all, but rather, a "flow-through" entity. As such, the ULC pays U.S. taxes on a Canadian-source income not at a corporate level, but rather, at the stockholder level. All of the income, losses and foreign tax credits generated by the ULC in Canada are considered to be the U.S. investor's income, losses and foreign tax credits. Domestic Canadian income taxes remain payable in Canada in the ordinary course and are then claimed as foreign tax credits against any U.S. income taxes owing. In effect, a wholly-owned Canadian ULC becomes a tax "nothing" in the eyes of the IRS, such that the U.S. parent is treated as if it is directly owning the assets in Canada, without actually having to do so. The end result of using the ULC structure for Canadian investments is the creation of a vehicle that can flow its source profits and losses from Canadian real estate investments through to its U.S. stockholders.

ULCs are rarely if ever owned by Canadian shareholders. For Canadian taxpayers, a ULC is taxed like any other corporation, yet provides none of the liability protection that other corporations provide.

Prior to 2005, Canadian ULCs could only be formed in the Province of Nova Scotia (the "NSULC"). In 2005, the Province of Alberta cracked the Nova Scotia monopoly with its own unique version of the ULC (the "AULC"). British Columbia then joined the ULC bandwagon in 2007 (the "BCULC"), bringing to three the total number of Canadian provinces currently providing ULCs for American investors. Up until the end of 2008, the prevalence of ULCs in the Canadian corporate landscape was a direct reflection of the breadth and depth of American direct investment in the Canadian economy.

There are slight differences in the costs, formation procedures and shareholder liability features of the traditional NSULC, and the newer AULC and BCULC. The fees involved in incorporating and maintaining a Canadian ULC have fallen substantially in recent years. Along with Alberta's introduction of its version of the ULC in 2005 came a much more competitive pricing structure for Canadian ULCs. Initially, NSULC incorporation fees were exponentially greater than those in Alberta, to the tune of at least $5,500 *more* per ULC! Presumably in direct response to the price competition introduced by the AULC, Nova Scotia has recently lowered its NSULC incorporation fees to far more palatable levels. For a current NSULC, there is a $1,000 incorporation/registration fee (significantly less than the previous $6,000 incorporation fee) which is also, co-incidentally, the price of ULC registration for a BCULC. Alberta remains the runaway price leader with AULCs costing only

a nominal $100 corporate filing fee. Although incorporation fees are now largely harmonized, NSULCs continue to be the most expensive ULCs to maintain, as they are subject to an annual fee of $2,750, compared with relatively negligible annual fees for both BCULCs ($45) and AULCs (none).

Canadian ULCs can also be distinguished from one another by the slight nuances in how shareholders get exposed to unlimited liability. For instance, the unlimited liability of the shareholders of an NSULC may only be enforced by its creditors upon a winding-up of the NSULC. In other words, day-to-day liability does not accrue to NSULC shareholders until dissolution. It is only after the NSULC is wound up that any residual liability is assumed by its shareholders. Likewise, BCULC shareholders attract liability only after the BCULC liquidates or is dissolved. In contrast, an AULC's shareholders do not enjoy the luxury of deferring liability until the end of the ULC's existence. Instead, AULC shareholders become immediately jointly and severally liable for all obligations of the AULC as and when such liabilities arise. Of course, the differences in these risk profiles is probably moot, since single purpose ULCs are usually structured with deliberately impecunious intermediary stockholders in any event, and, besides, practically speaking, creditors rarely find it worthwhile to pursue litigation against American ULC stockholders before first exhausting recourse against the ULC's assets.

Despite their surge in popularity in recent years (or perhaps, because of it), the use of ULCs by American investors may have already crested. The adoption of the Fifth Protocol to the 1980 Canada-U.S. Tax Convention in the waning days of the Bush Administration made tremendous strides in simplifying and clarifying the income tax cross-border transactions between the two countries, the passage of the Fifth Protocol also sounded the death knell for Canadian ULCs. The Fifth Protocol contained certain "anti-hybrid" tax rules which purport to curb what was seen by U.S. federal authorities as abusive cross-border tax schemes. For quite some time after the initial release of the draft Fifth Protocol, there was some optimism in the cross-border tax community that ULCs would be exempted from the "anti-hybrid" withholding tax rules contained in the Fifth Protocol, but the Technical Explanation published by the U.S. Treasury Department in July of 2008 (the governing document explaining the U.S. government's official interpretation of the Fifth Protocol) offered no relief whatsoever to ULCs from the proposed new withholding taxes, now set to come into effect in 2010.

It is hard to imagine that Canadian ULCs of any jurisdiction will be created now that the Fifth Protocol has been ratified in its current form with no hint of administrative lenience in the Treasury Department's Technical Report. That said, very few American investors will be crying losing sleep over the loss of this particular flow-through structure because the very same tax treaty amendments that will arguably prove lethal to the popularity of Canadian ULCs also permit, for the first time, the tax efficient use of U.S. limited liability companies ("LLCs") in the holding of Canadian property. Before the passage of the Fifth Protocol, members of U.S. LLCs were routinely denied the benefit of the U.S.-Canada Tax Treaty because LLCs were not domestically recognized as tax-paying entities. From a practical perspective, that meant that very few US LLCs were ever used to hold Canadian properties directly. With the adoption and ratification of the Fifth Protocol, however, all of that is about to change, with U.S. LLC members being now fully entitled to treat LLC income from Canada as directly earned by their constituent American members.

This article is not an ideal venue for a detailed treatment of the tax treaty amendments that affect the Canadian ULCs and the U.S. LLCs, but it does provide an opportunity to showcase how Canadian government sometimes works. As it turns out, while the Canadian provincial governments were rushing forward to introduce new legislation permitting the creation and maintenance of ever more Canadian ULCs, their federal government counterparts were literally working backwards, negotiating with the U.S. Treasury officials to do away with the very *raison d'etre* of these Canadian ULCs…a curious case indeed. ◆

# Environmental Risk Management in Real Estate Lending:
## *A Time to Reassess How to Avoid or Better Manage Toxic Assets*

by Pamela K. Elkow, Richard M. Fil and Norman H. Roos*

Over the last several years, largely as a result of a lending environment in which banks vigorously competed for borrowers, real property was ever increasing in value, and statutory limits on lender's liability provided banks protection from the long arm of the environmental statutes, environmental issues became significantly less important to many lenders. That has changed. Recent economic conditions have forced renewed attention to environmental matters. A borrower's operational noncompliance may require costly upgrades or cleanups or result in enforcement actions, any of which may significantly threaten its ability to repay a loan. In the event of a default, foreclosing on contaminated real property may result in a loss of collateral or, in certain circumstances, potential direct lender liability. Appropriate strategies going forward will allow lenders to better recognize and quantify risk and limit asset impairment.

### Background

The 1996 revisions to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA," more commonly known as "Superfund") helped to limit the potential liability of lenders under many circumstances. States with environmental statutes analogous to CERCLA enacted similar protections. Lenders have generally been exempted from liability under those statutes unless they were negligent or engaged in certain management activities. Other CERCLA revisions created or clarified foreclosure safe harbors. These protections and other developments (such as protections for "innocent" landowners) allowed real estate lenders to become more comfortable lending to borrowers with potential environmental issues.

More recently, however, the flood of cheap money beginning in the late 1990s through the recent credit crisis significantly enhanced the position of borrowers. In many cases, lenders' environmental due diligence was severely curtailed or eliminated, and underwriting requirements and environmental covenants were significantly loosened. Less attention was also paid to compliance issues, such as those required for hazardous waste handling under the Resource Conservation and Recovery Act, permitting requirements under the Clean Water Act or Clean Air Act, or safe workplace requirements under the Occupational Safety and Health Act. With the expansion of competitive funding sources, borrowers avoided the need to address or even quantify their environmental liabilities. In other cases, assets with known or probable liabilities were bundled with other property to "even out" a portfolio's overall risk. The significant decline in environmental enforcement actions, particularly at the federal level, also contributed to this de-emphasis on environmental issues.

These factors, alone or in combination, contributed to a sense that environmental liabilities may no longer warrant a high level of scrutiny. However, in the wake of the recent economic downturn, many lenders may find themselves holding loans secured by real property or other assets significantly impaired by environmental liabilities. In other cases, borrowers may be forced to default in the face of significant operational compliance costs or enforcement actions. With severely diminished funds to loan, lenders are reinvigorating their due diligence efforts and loan documents with the goal of limiting loans to more reliable borrowers. Given this new environment, we have outlined below the relevant issues and some strategic options for performing appropriate, but not overly burdensome, due diligence, and evaluating and protecting collateral.

### Basic Considerations

While there is a general recognition of the potential liability posed by pollution conditions, such as historic spills or underground storage tanks, that is only one element of environmental risk assessment. A borrower's compliance with environmental law may be as or more important than the presence of contamination. This is because a failure to comply may result in costly enforcement actions or business disruptions. Resulting capital expenditures, operating costs, penalties, stigma or loss of goodwill, and/or reduced income may seriously diminish a borrower's ability to repay. Examples of compliance requirements may include obtaining and complying with air emissions and wastewater discharge permits, adhering to relevant hazardous waste regulations, or providing a safe workplace.

Recent events have also shown that a company's proud history or previously solid financial standing may have no bearing on its future health. Because it is not uncommon for compliance efforts to be cut back in response to fiscal stress, a borrower's environmental compliance, or lack thereof, may be an indication of its diminishing financial health. These considerations amplify the need to periodically reevaluate borrowers, even if the initial due diligence was acceptable.

### Due Diligence Issues

The basic goals of environmental due diligence are to protect collateral and avoid liabilities. Given the complexity of the subject matter and the variations inherent in federal and state law, there is no simple rule for what to do or avoid, nor can the risks be illustrated by providing one or two examples of "poor" due diligence. Rather, due diligence is a series of questions, the point of which are to ensure that that borrower will be around to pay back the loan, and that if the borrower is not available, the collateral will be available and worth enough to fund repayment of the loan. Appropriate due diligence not only helps to prevent avoidable risks, but also to more accurately quantify potential costs so that lending opportunities can actually be expanded. These are the types of questions we ask, to assist a lending client when making this evaluation:

- Is the borrower in compliance with law, including all its permits, or could an enforcement action threaten its ability to continue operating or repay the loan?

- Is there sufficient information to reasonably estimate potential liabilities arising from the borrower's property and off-site disposal locations? If not, what is needed to obtain that information? After reviewing that information, what are those potential liabilities?

- What are the available options and associated costs to address compliance issues and/or pollution conditions?

- Are there threats to workplace safety, such as building materials (e.g., mold, asbestos, lead paint) or the local environment (e.g., vapor intrusion from a leaking tank on neighboring property)?

- Are the loan documents sufficiently protective to require relevant notices, inspections, sampling and compliance reviews during the term of the loan?

- If the borrower defaults, is there sufficient information to make a reliable decision on whether to foreclose while avoiding potential environmental liabilities?

- If foreclosure is to occur, which entity would hold title, and how and when could the property be conveyed to a third party to preserve the lender's statutory protections?

- If foreclosure would not be a preferred option, is there sufficient security in other assets of the borrower?

- If the lender has other real estate owned or special asset property, are the operations and ownership structure appropriate for limiting potential liabilities?

- What other forms of protection may be available for the lender (e.g., specialized environmental insurance products, governmental protections, indemnifications or guarantees by reliable third parties, escrow accounts, etc.)?

- Would the lender have a viable claim against a bankruptcy estate, and if so, what steps would be needed to preserve the claim?

- Have any changes in law or other developments occurred that may affect any of the above?

It should be noted that some of the foregoing questions are focused on the potential liabilities of the borrower and its ability to repay, while other questions address liabilities that may extend to or be triggered by the lender. Again, it may be appropriate to revisit these questions over time, based on such factors as the activities and financial health of the borrower, the economic climate of the relevant industry, region or broader economy, and changes to law and political climate.

### Importance of Using Environmental Counsel

An environmental consultant is an important member of the due diligence team, and lenders reasonably rely on technical consultants to assist them with environmental due diligence. While consultants serve an important role, they are not a substitute for experienced environmental counsel. Outside environmental counsel provide valuable services distinct from those of an environmental consultant, including: (1) developing broader strategic options based on applicable law and the lender's objectives; (2) protecting documents and communications under the attorney-client privilege and the work product doctrine; (3) providing interpretations of relevant law, contracts and insurance policies; and (4) negotiating agreements with the consultant to be protective of the lender, most notably

*continued on page 20*

# Simultaneous Priority

by Roger Bernhardt

This is a comment on an odd recording decision, but in order to make the point I need to tell the story in a roundabout way.

The National Conference of Uniform Law Commissioners has not been notably successful in enacting national real estate legislation. The Uniform Land Transactions Act (ULTA), The Uniform Simplification of Land Transactions Act (USOLTA), and the Uniform Land Security Interest Act (ULSIA) have all quietly passed away with little or no impact on state legislation. However, one set of provisions of USOLTA was given a second wind and subsequently reappeared as the Uniform Construction Lien Act (UCLA), which has had some slight success in piecemeal enactments in some states. (UCLA refers to what the rest of the profession call mechanic's liens as "construction liens," which phrase I will use for the rest of this article.)

An issue that UCLA seeks to solve is the uncertainty inherent in construction liens relating back to the uncertain time at which a work of improvement first commenced, by permitting the filing of a "notice of commencement," which sets that date in a fixed and public way. That allows a construction lender to assure itself of priority over construction lienors by having its deed of trust be recorded before any such notice of commencement is put on the records. That is the system operative in the State of Nebraska, where *Borrenpohl v. Dabeers Properties*, 755 N.W.2d 39, was decided by its state Supreme Court last year.

In *Borrenpohl*, the Bank of Bennington had loaned DaBeers $66,000 to improve its property and had taken a deed of trust on that property as security, which document it mailed to the county register of deeds office for recording. The trouble is that the bank also included in the same envelope the notice of commencement form in use in Nebraska, and it failed to include any cover letter containing any filing instructions in the envelope.

The county clerk's recording policy in cases where multiple documents are received in one envelope without instructions is to copy them into the record in the order received, *from the top.* And since the notice of commencement was the top document inside the envelope, it was stamped at 2:15 p.m., with the deed of trust not being stamped until 2:20 p.m. (perhaps a coffee break in between?). This sequence led to the legal consequence of two subsequent construction liens, which were recorded nine months later, relating back to a point in time five minutes earlier than the bank's deed of trust, putting those construction lienors prior to the bank's construction loan deed of trust.

At least that is the outcome one might expect if recording consists of copying documents into the official records. But that is not how every jurisdiction defines recording: some statutes, including Nebraska's, treat the presenting of the document to the recorder's office as the significant act. Under that definition, it is not the moment that an instrument is copied into the records that determines its priority but rather the moment that an envelope containing the instrument is opened by the recorder. That makes any time stamps on documents misleading, at least insofar as they are taken to convey relevant information as to when those documents were recorded.

The two instruments in this case were, according to the Nebraska Supreme Court, recorded *simultaneously*, because they arrived at the recorder's office in the same envelope and without filing instructions. In a previous column I complained about the vice of treating recording as consisting of delivery of a document to the recorder's office instead of as its being properly located in the indexes, *Misindexed Documents, ACMA Abstract, Fall 2006;* this ruling gives me another ground for complaint. A statute that provides that an instrument "shall take effect and be in force from and after the time of delivering such instrument to the register of deeds for recording" such as the Nebraska act does, simply invites trouble for future conveyancers when it is read literally. Instruments take effect as to the parties on "delivery" between them, and should take effect as to the rest of the world only when they are placed in the public records in a way that others in the world can find them, not when they are simply delivered to the recorder. Had that more functional concept of delivery been employed, two documents could be deemed simultaneously recorded in the impossible case where they bore not only the same time stamp but also the same serial number; there would really not be any such thing as a simultaneous recording for a court to have to deal with.

To avoid having its concept of simultaneous recording producing an unsatisfactory tie between the parties in this

case, the Nebraska Supreme Court adverted to its old rule that in such situations, priority is resolved according to the "intention of the parties." The principle of having priorities be controlled by intention is novel. Intent is a subjective fact, which makes it easy to fabricate post facto. (The court's opinion sought to avoid that obvious risk, by calling for the intention of "all parties in interest." The bank filed an affidavit declaring that it intended its deed of trust to be first; the borrower declared the same (probably to avoid being accused of fraud by the bank); and the construction lienors could produce no contrary evidence). Therefore, under this rule, the deed of trust had recording act priority over the notice of commencement and, therefore, also over the construction liens despite their relation back to the notice of commencement.

Intent is not only a subjective fact, it is an offrecord "secret" fact. No examination of the records, nor even of the extrinsic facts surrounding delivery of the original documents to the records office—date on the envelope or instructions in the cover letter, assuming that could be found—would tell a searcher which instrument was intended to have priority over the other, or even to make a prudent searcher suspicious and thereby trigger further inquiry about them. The fact that a document stamped after another document in the records might be deemed to have been recorded before it is an outcome that even cautious counsel might be unlikely to worry or warn a client about. (Dale Whitman, to whom I spoke about the case, thought that counsel for an apprehensive contractor might well search the records to ascertain just what priority any future construction lien his or her client might later obtain would have, but that only makes reliance on the time stamped records even more dangerous.)

There is a temptation to view the actual result as harmless, because it merely denied a construction lienor—who probably came long afterwards on the scene—the opportunity of gaining a windfall leap in priority over a construction lender who had been financing the very improvements that were made. However, the court's rule that intention controls in cases of simultaneous recordation derived from an earlier decision by the same tribunal, in a case involving two different mortgages, with two different lenders, and, obviously, no relation back as in the case of construction liens. So the rule can bite innocent lenders as well as contractors.

Of course, where parties have actual knowledge of each other, recording act principles need not control; other factors, such as the time of execution or the time of delivery of the documents, or even the shared or unilateral intents of those parties can come into play and legitimately affect an outcome. But where priority situations involve parties who do not know one another, or even know of one another, there are only the records to go on, and these are somewhat shaky in Nebraska.

There are goods and bads in making construction loans in Nebraska. On the one hand, the concept of a notice of commencement may be a helpful way of reducing uncertainties. But on the other hand, the definition of recording as consisting of handing instruments to clerks in the recorder's office rather than looking at whether they are properly entered in the records or indexes creates dangerous priority risks; and that danger exists in other jurisdictions besides Nebraska. Finally, the notions of simultaneous recording and the determining of outcomes for uninvolved third parties by reference to offrecord intentions is enough to make me more contented with the idiosyncracies of my own California legal system!

*PS. After I had submitted this column to ACMA, I got curious as to why Article 9 so proudly goes the other way, defining filing as simply communicating a financing statement to the filing office, so I went on to the UCC list serve and asked. Here is a sprinkling of some very thoughtful responses:*

- The real estate system is not a lien-recording system. It is a title recording system that has accepted lien recording as an adjunct, subject to its other rules. With minor exceptions, we do not record titles to personal property and this has clearly not been an impediment to commerce. The UCC filing system is not a title system; no one would consider the UCC filing system as proving who had title to a particular asset. The characteristics of the filing system for security interests take nearly all the opposite choices from the real estate system: no signatures, filing indexed by debtor only, no need to list a particular loan instrument, descriptions by category or even "all assets." So it would not be preposterous to say that the presumption would be that if the real estate system had a particular rule, say, that the risk of filing office error was on the initial filer, the opposite rule should obtain for personal property. The filing system is not static, and errors can appear and disappear without anyone knowing. It is only a backup system. The real due diligence takes place at the level of the relationship between the debtor and the secured party.

- The vast majority of UCC filings is for deals under $50k, e.g., personal property equipment financing. The business model pricing and overhead

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# Class Action Approved for Failure to Satisfy Mortgages

by Harris Ominsky*

A recent case spells danger for mortgage lenders that do not promptly satisfy paid off mortgages. That case certified a class action for mortgage borrowers who sued Fannie Mae (FNMA) for a violation of Ohio's mortgage satisfaction statute. *Radath v. Federal National Mortgage Association,* 891 N.E. 2d (Ohio App. 6th Dist. 2008). The Ohio Appellate Court confirmed the lower court's decision to certify a class of mortgage borrowers with similar claims against FNMA. The proposed class consisted of all borrowers going back a little more than five years where FNMA had not recorded the satisfaction within the required statutory period.

The borrower had paid the mortgage in full but FNMA did not file the mortgage satisfaction until after ninety days from the mortgage payoff. The Ohio statute, which is similar to many other state statutes, provides a statutory penalty of $250 unless the lenders file satisfactions within ninety days. Apparently, in this case FNMA filed the satisfaction only one or two days late, but that didn't mitigate the statutory penalty.

## Defenses

FNMA's appeal asserted three issues that were labeled, "superiority, identifiability, and predominance," but the Court rejected each of these assertions without specifically defining them in the opinion. FNMA argued that the element of superiority was not satisfied, because the trial court failed to recognize the existence of parallel pending suits against mortgage servicers that cover half of the putative FNMA class members. It maintained that it had hired servicers to manage the mortgages and to file entries of satisfaction. Thus, FNMA argues that a superior method for fair and efficient adjudication would require the proposed class members to recover in pending class actions against the mortgage servicers.

The Court rejected that argument and held that the class action requirements of both superiority and predominance were met. It explained that the class certification is a superior method for fair and efficient adjudication for the following three reasons:

1. A class action is a feasible way for class members to file and litigate a $250 claim, and would also "avoid duplication of the courts' time and resources;"

2. There are no known similar cases against FNMA; and

3. Class actions would be more manageable because each violation can be objectively shown, and damages are set by statute. The Court also rejected the idea that the class action was not suitable because class members had already started cases against mortgage servicers. It pointed out that under the statute, borrowers may recover only from the mortgagee; and in this case that's FNMA, and not the mortgage servicers. Therefore, there are no known parallel lawsuits to militate against this class.

In dealing with what appears to be the issue of "identification," the Court pointed out that the management of the proposed class action should be easy because FNMA should have documentation of all final payments that were made. Therefore it would be highly desirable to concentrate the litigation in a particular forum. Apparently, FNMA had acted as mortgagee to 981,861 mortgages that were satisfied during the applicable time frame. Therefore, the certification of the class in one action could avoid duplication of a court's time, effort and resources.

FNMA also argued that individualized issues would predominate over the common issues of members in the proposed class. The Court also rejected that argument and held the common question with all of the class members is whether FNMA violated the statute by missing the required satisfaction date. It stated: "the mere existence of different facts … is not by itself a bar to certification of that class. If it were, then a great majority of motions for class certification would be denied…"

## Implications

This case has implications well beyond FNMA, and could reverberate throughout the United States. Many states have similar statutes and some lenders are careless about satisfying mortgages on time under these statutes. Some of the statutory penalties are substantially more severe than $250. For example, Pennsylvania requires that if a mortgage holder fails to satisfy a paid

mortgage within 60 days of notice, the lender may have to pay the borrower a sum "not exceeding the original loan amount"! (21 P.S. §682, as amended in 2002.)

This case should serve as a warning that lenders and servicers should proceed promptly to satisfy paid mortgages. If servicers fail to do this, they may subject themselves to liability to the lenders they represent.

There are apparent policy reasons behind this kind of punishment. If borrowers cannot demand timely satisfaction, their credit worthiness could be impaired, and worse, they may not be able to complete refinancing or sale of their properties when needed. One of the most frustrating things for an owner is to pay off a mortgage and not be able to clear up the record.

### Title Company Practices

In addition, there are other lurking issues behind failure to satisfy. Since it is customary for title companies to handle mortgage payoffs without actually entering satisfactions of record, the Philadelphia dockets still show thousands of mortgages that have been paid off, but never satisfied of record. Few people ever know about this because there is what might be called an "underground system" of handling these encumbrances. For example, if you buy a house and the seller uses proceeds to pay off its mortgage, the title company simply insures over the mortgage as though the property were free and clear—even though it does not officially satisfy that paid mortgage. The new purchase-money mortgage is recorded, but a search of the record will reveal that the new mortgage is junior to the mortgage that has been paid off. For most purposes, this doesn't make any difference because the title company insures the purchase-money lender as a first mortgagee. When the property is sold at a later date, since the title company has insured the title, it again removes the unsatisfied mortgage as an exception to title in the title policy.

If another title company is called upon to issue title clearance, it goes back to the first title company and gets assurance from it that it is okay to remove the exception of the old mortgage that was paid off, but never satisfied. This procedure is sometimes repeated in subsequent transactions.

To make matters worse, if the owners ever wanted to clear up these titles, it might not be easy to do. The original mortgage holders may have merged into other companies—or simply have gone out of business (particularly, in light of our current financial crisis). Years later they may be difficult to track down.

### Potential Precedents and Procedures

It may be that Pennsylvania courts will not certify class actions in a similar manner to the Ohio courts. Much more than $250 is at stake in each case, and in Pennsylvania the penalty is triggered only after notice. Also, the Pennsylvania penalty depends on the circumstances, such as whether the lender's failure was reckless or influenced by malice. Therefore courts may reject the proposed class entirely, because of concern that these individualized issues may dominate over the common issues.

Despite these possible distinctions, if the FNMA case is argued as precedent in Pennsylvania and other states, lenders will not rest easy. Just imagine the effect on a lender of hundreds of Pennsylvania cases involving late satisfactions where each case could involve a sum equal to the whole mortgage debt. ◆

**Harris Ominsky is a retired Partner at Blank Rome LLC. He is a former President of the Pennsylvania Bar Institute and has authored four books and over one thousand articles.*

# Title Insurer Not Liable for Acts of Agent at Closing in Absence of Closing Protection Letter

by John C. Murray

## Introduction

Title agents are customarily authorized, through agency agreements, to sell policies for one or more title insurance underwriters. These agency agreements normally provide that the agent is an agent solely for the purpose of issuing title insurance commitments and policies, and explicitly state that the agent is not the title company's agent for the purpose of conducting settlements or performing escrow services. Authorized title agents also often act separately as the agent for the lender, buyer and/or seller, pursuant to instructions from such "principals" (that only such principals can enforce), in connection with the escrow closing of the transaction that is the subject of the title insurance. A lender who also wants the title insurer to be responsible for the agent's acts in connection with escrow closing activities and services must separately contract with the title insurer for such additional protection by entering into an "insured closing letter" or "closing protection letter" ("CPL"). CPLs have been available since the 1960s. They originally were not title-industry approved forms but, rather, were forms requested by mortgage lenders that were concerned they had no protection against unauthorized or fraudulent actions, or failure to comply with the lender's closing instructions, by the title company's approved closing agent or attorney. Lenders require CPLs because the agency-principal relationship between a title underwriter and a policy-issuing agent or approved attorney is limited to the issuance of a title-insurance policy, and such relationship does not extend to escrow or closing functions. CPLs specifically apply to escrow closing activities and services performed for title underwriters by approved attorneys or agents who are not employees of the title companies; as a general rule they are not issued on behalf of independent closers over whom the title company has no control. (An "Approved Attorney" is defined in the standard forms of CPLs as "an attorney upon whose certification of title the title insurance company issues title insurance"; an "Issuing Agent" is defined as "an agent authorized to issue title insurance for the title insurance company"). These letters are standardized indemnity agreements given to individually named lenders and recite the specific conditions under, and the extent to which, title insurers will accept liability for the acts or omissions of such parties.

## The *Pal Properties* Case

The lack of a contractual relationship (absent a CPL) between the attorney-agent and the title underwriter regarding escrow-closing functions, and thus the lack of responsibility of the insurer with respect to such activities when conducted by the Approved Attorney or Issuing Agent, is demonstrated in a recent Michigan case. In *PAL Properties LLC v. Ticor Title Ins. Co.*, Case No. 06-073149-CK, (Oakland County, Mich. Circuit Court, June 4, 2007) (unreported), there was no closing protection letter ("CPL") issued to any party (it was a cash deal), and the issuing agent (acting in its separate capacity as an escrow closer) absconded with or diverted funds from the closing intended for a mortgage payoff. The Circuit Court, based on the language in the title commitment and the agency contract, and the lack of a CPL, ruled in favor of the defendant title company ("Ticor"). The plaintiff-purchaser argued that it should have the benefit of a CPL, even though it was a cash transaction and no CPL was issued to any party. Reasoning that because it was not Ticor's fault that the funds weren't used to pay off the mortgage, and the escrow agent subsequently was cut off as an issuing agent by Ticor (and subsequently went out of business), the court rejected the buyer's claims of breach of contract, fraud, agency liability, negligence, conversion, loss of profits, and fiduciary duty. The plaintiffs appealed the Circuit Court's decision to the Michigan Court of Appeals. The appellant-purchaser's brief (filed October 31, 2007) made the following highly unusual (at least to the court and to title insurers) statement, at page 14:

> Ticor wants this court to believe that it had *no duty* to insure that its agent properly disbursed the funds. However, it is of paramount importance that the Court understands that the vast majority of mortgage transactions are funded by commercial lenders. This is the realm in which CPLs have developed. Lenders have vast amounts of bargaining power and have

> therefore demanded these letters to *remove any ambiguities* as to whose responsibility it is in the event of an underwriter's agent failure to disburse. The real purpose of these letters is to make it *clear that underwriters, and not lenders are responsible*, *and thus to avoid costly litigation on these disputes*. Ticor wants this court to believe that since [the appellant-buyer] did not have a CPL, it is clear that Ticor is not responsible for this loss. This is simply not true. This issue presents a contingency that neither party contracted for, and is therefore, *subject to interpretation* as to who should bear the responsibility. The trial court committed reversible error by not addressing these issues. (Emphasis in text.)

On December 9, 2008, the Michigan Court of Appeals affirmed the trial court's decision. *See PAL Properties LLC v. Ticor Title Ins. Co.*, 2008 WL 5158894 (Mich. App., Dec. 9, 2008). The appellate court noted that a title policy was never issued in this matter and, and held that because only a title commitment was produced by Ticor and only an actual title insurance policy provides insurance, the commitment did not serve to impose a duty upon Ticor to protect the plaintiff from Consolidated's actions. The court noted that the contract entered into by the parties designated Ticor as principal and Consolidated as its "issuing agent," which limited the scope of Consolidated's agency to the purpose of issuing title insurance only. The court stated that "Plaintiff has provided no authority suggesting that conducting a closing is an inextricable or necessary part of transacting or promoting title insurance business." *Id.* at *2. Also, according to the court:

> Notably absent from the contract is any reference to Consolidated attending closings or performing any duties at closings for the benefit of Ticor. Nowhere in the document does it indicate that Ticor dictated how Consolidated was to proceed with any change.

*Id.* at *3. The court further noted that: Ticor's only recourse under the contract would be to terminate the same. Ticor has no contractual right to take over Consolidated's business, to take control of the escrow account, or to force Consolidated to take any action.

*Id.* The appellate court also rejected the plaintiff's argument that Consolidated acted as Ticor's apparent agent for purposes of the closing, noting that Consolidated was the only entity, other than the buyer and seller, to sign the closing statement and it alone prepared the necessary closing documents (collecting a fee from the plaintiff) and conducted the closing. The appellate court also noted that the plaintiff had no contact with Ticor until several months after the closing. The court also dismissed the plaintiff's claim of negligent supervision, noting in particular that Ticor had the right, but not the responsibility, to examine Consolidated's records and that "Nothing in the title insurance contract serves to impose a duty upon Ticor to protect plaintiff from Consolidated's actions." *Id*. at *5. The court also rejected the plaintiff's claim of fraud, because the plaintiff "had not alleged that Ticor made any misrepresentation to it whatsoever, at any time, with respect to the escrow monies or whether or not the mortgages would be paid out of the escrow funds." *Id*. at *6. Finally, the appellate court dismissed the plaintiff's claim that a material dispute existed with respect to whether Ticor breached the title insurance policy, because even though one of the mortgages mentioned in the title commitment was not discharged (albeit through no fault of the plaintiff), "no title insurance policy, under which plaintiff could make a claim of loss, was issued." *Id.* at *7.

The vast majority of existing case law supports the holding in the *PAL Properties* case, but a few cases have held for the purchaser, even where no CPL had been issued. *See, e.g.*, *Sears Mortgage Corp. v. Rose*, *134 N.J.* 326, 350-52 (1993). *In this case, the court held* that the buyer's attorney, who acted as the closing agent and was an "approved attorney" of the title company, was controlled to at least some extent by the title company. The court found that because the attorney failed to remit funds deposited to pay off a mortgage the title insurer would be responsible to the purchaser for the loss, even though the buyer had retained the closing attorney and no CPL had been issued to either the buyer or the lender. According to the court, "the title insurer had a duty either to give [the borrower] …an opportunity to insure himself against the risk or, at the very least, to inform him that he was not covered against such a risk." *Id.* at 347.

*See generally* Joyce D. Palomar, TITLE INS. LAW 2-12 (1994) ("Underwriting and agency agreements generally … limit the underwriter's responsibility for agents' activities as escrowees in real estate closings"); Richard J. Landau and Kristin M. Tsangaris, *The Mortgage Fraud Epidemic*, S & P's THE REVIEW OF BANKING AND FINANCIAL SERVICES, Vol. 22 No.4, April 1, 2006 ("In the absence of an insured closing letter… a majority of cases hold that…

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# ACMA Business Development Program: Experiences of the Fellows

by Norma J. Williams, Chair, Business Development Committee

As noted in my previous articles in *The Abstract*, the Business Development Committee has been engaged in an effort to make the Referral Program as beneficial as possible to Fellows and to determine what changes and improvements to the overall business development effort would be useful to Fellows. In this issue, I thought that it would be good to hear from other Fellows about their experiences with the Referral Program. This issue, therefore, will contain the input of three Fellows whose comments are not necessarily representative, but do reflect their experiences. I would urge all Fellows to (continue to) make referrals and to (continue to) report them via e-mail containing your name and the person to whom you referred to acmareferral@willassoc.com. I would also like to thank Fellows in the College for referrals made to me this past year and in prior years.

**From: Diana R. Palecek**
**Smith Moore Leatherwood LLP**
**Charlotte, NC**

My career has taken a somewhat nontraditional path. I spent the first 15 years of my law practice as in-house counsel—first with Wachovia Bank and then with Jefferson-Pilot Life Insurance Company. So, as a young attorney, I did not have to pay too much attention to "business development." I was with Jefferson-Pilot when I was invited to join ACMA. ACMA provided me with great CLE and the opportunity to get to know other attorneys from all over the country, which I found to be valuable to my practice. Though business development was clearly one of the key goals of ACMA, I appreciated that the culture of ACMA in this respect was relationship oriented and relaxed, not pushy. In mid-2007, my career path changed when I accepted an offer to join Smith Moore Leatherwood LLP. While I was fortunate to be in a position in which there was no immediate pressure on me to develop new business, I knew that inevitably this would come. This, I anticipated, would be one of my big challenges of transitioning from an in-house practice to a firm practice. At the 2007 ACMA Annual Meeting, I told people about my job change, solicited advice from others who had made similar job changes, took in good CLE, and enjoyed the Aspen activities. I was surprised when a month or so after that meeting I got my first call from another ACMA Fellow with a request that I serve as local counsel on a matter he was handling. This was the first of several engagements I was able to take on or place within my firm in the months following the 2007 Annual Meeting. I have also received referrals for myself or my firm from ACMA members that did not result in an engagement, but which I have nonetheless appreciated. Though so far none of these referrals have resulted in large projects, they have helped me get off to a good start in the arena of business development and have been a welcome bonus to me and to my colleagues at Smith Moore Leatherwood LLP. Having been the recipient of ACMA referrals, I have looked for every opportunity to refer other ACMA Fellows whom I have met at the meetings. It's easy to do—often only taking a few minutes to look up the person in the directory and send an email.

**From: W. Charles Rogers, III**
**Rogers, Moore & Rogers, LLP**
**Baltimore, MD**

I have met many people through the American College of Mortgage Attorneys who have become professional contacts, personal friends, or both. I met one such contact and friend when he attended his first Annual Meeting several years ago. I wanted to welcome him into the College with the same enthusiastic welcome I had received at my first meeting so I made sure he and his wife were introduced to as many members as possible and were always included in dinner plans and similar activities. In the intervening years, we have maintained contact and referred each other what work was appropriate for referral. Last year, I received referrals of 5 separate legal matters from this one friend. A lot of our practice involves real estate settlements and 2008 was a slow year for that area of practice so the 5 referrals were very welcome!!

**From: Donald A. Shindler**
**DLA Piper LLP (US)**
**Chicago, IL**

Since joining ACMA, I discovered an under-appreciated benefit to membership is the opportunity to develop a network of contacts and relationships with colleagues around the country.

An offshoot of this is using the referral network that exists within ACMA for assignments to and from ACMA Fellows around the country. Everyone likes getting a referral, or for that matter, any new business, but equally important is having confidence in a referral of a client to an experienced colleague who you know will have the skills and expertise that you want for your client's matter.

Another benefit is the development of relationships within ACMA and around the country on a closer, more informal basis. It provides the opportunity to call someone and inquire about state and local law and custom in handling a matter. Implicitly it may be that this is strictly a favor and not a referral opportunity, at least at that point in time. Without exception, I have found this to be very valuable for my practice. Being able to call on someone for an answer to a quick question, a form, or a further referral for a matter in a different jurisdiction that could be totally outside the realm of focus for a real estate or finance attorney, such as a domestic relations issue for a relative of a client is very useful.

Over the course of a fairly short period of time and some phone calls and mutual referrals, I have developed contacts with a number of ACMA Fellows around the country forming valuable personal referral networks. These resulted from a number of contacts, such as conversations at ACMA meetings, concurrent service on ACMA Committees, some initial referrals and, in some cases, just checking the ACMA directory for Fellows in a particular jurisdiction and making blind phone calls asking a favor and seeking some quick information re local law and practice from me or by me of an ACMA Fellow in another jurisdiction. As a result, these contacts have led me to refer work to these particular ACMA Fellows in their jurisdictions on multiple occasions and continue to refer work to them on a primary basis in those states as well as other locations in which they or their firms practice. Further, as they seem to appreciate the calls and my experience with their clients, I have received, and continue to receive, referrals from them as well, both in Illinois and in other states in which we may have offices.

These contacts and the referral network created are outgrowths of ACMA membership and also have led to gratifying relationships with colleagues one would otherwise not have an opportunity to get to know. In some cases they have led to personal family friendships by my wife and me with colleagues and their spouses. This is an added but important benefit to membership in ACMA and utilization of networking contacts developed through ACMA.

In conclusion, the way to develop a personal network is to use ACMA membership and contacts, reciprocate with inquiries and be willing to provide answers to questions, send current forms, or just directions even if it does not create an immediate business referral. In any event, take advantage of membership in ACMA. ◆

## Title Insurer Not Liable

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the title insurer has no liability for fraud or other misconduct in connection with a closing").

### Conclusion

The CPL serves to extend the liability of the (presumably) large and creditworthy title insurance company—which would otherwise be limited to the title insurance policy—to cover certain "bad acts" of the company's Issuing Agent or Approved Attorney. But this additional protection must be separately and specifically requested from the title insurer, and the scope of the coverage is defined solely by the contractual terms and provisions of the letter. Coverage under the CPL is also strictly limited to the parties designated therein, and generally applies only with respect to the particular transaction for which the letter is furnished. The ALTA has attempted to meet the needs of title insurance customers by expanding the types of CPLs (the latest being the 2008 ALTA CPLs) to cover varying factual situations and comply with state statutory and regulatory restrictions. It is important for both the insured and the insurer to understand the legal (both case law and statutory) and regulatory restrictions and limitations on the use of CPLs in certain jurisdictions, and the nature and scope of the agency relationships that exist between title insurance companies and their Issuing Agents and Approved Attorneys. ◆

# ACMA FELLOWS IN THE NEWS

### ACMA Fellows Named Real Estate Lawyers of the Year

*Best Lawyers*, the oldest peer-review publication in the legal profession, has named ACMA President-Elect Robert J. Krapf the 2009 Delaware Real Estate Lawyer of the Year.

ACMA Fellow Philip L. Bowman has been named the "2009 Wichita Real Estate Lawyer of the Year."

This is the first time in its more than 25-year history that *Best Lawyers* has designated Lawyers of the Year in high-profile legal specialties in large legal communities across the nation.

### Ajay Raju Recognized in NAPABA's Best Lawyers Under 40 2008 Edition: Asian Pacific American Portraits of Excellence

Ajay Raju, a fellow in the American College of Mortgage Attorneys, is a partner at Reed Smith and is vice chair of Reed Smith's business and finance department. Recognized by Leadership Philadelphia as one of the region's top 100 "connectors," Ajay also appears regularly as a panelist on Inside Story, a Sunday-morning roundtable debate show airing on Philadelphia's ABC station. A leading expert on doing business with India, Ajay is CEO and chairman of the Global Indian Chamber of Commerce, a nonprofit organization serving more than 20,000 members worldwide. He is also a trustee of Lincoln University and a founding board member on-LEAD, a community-based college degree program.

### Michael Flynn Named HUD's Acting General Counsel

ACMA Fellow Michael Flynn has been named as HUD's Acting General Counsel. Flynn previously served as the General Deputy General Counsel to the Department. He will oversee approximately 370 attorneys and 320 staff at HUD. Flynn will serve as the chief legal advisor to the Secretary, Deputy Secretary, and other principal staff, providing advice on federal laws, regulations, and policies that affect HUD programs and families served by the Department. He will also maintain his position as Counselor to the HOPE for Homeowners Board of Directors.

Michael Flynn is a Fellow of the American College of Mortgage Attorneys and has served in leadership positions in a variety of professional associations. As a Metz Scholar, Flynn received his undergraduate degree at Indiana University and his law degree from Duke University School of Law, where he was a Reynolds Scholar.

The American College of Mortgage Attorneys is proud to congratulation Michael Flynn on this appointment

### ACMA Fellow and Friends Win Lotto with West Seattle Ticket

Three longtime friends are sharing in the Seattle Lotto jackpot! They took their winnings in cash and split $3.4 million dollars!

John Gose, a Fellow of the American College of Mortgage Attorneys, was having lunch with two friends, and they stopped at a 7-11 to purchase a ticket. The three, friends of 40 years, plan to pay off mortgages and contribute to grandchildren's education.

Congratulations to John and Friends!

# SAVE THE DATES

## 2009 ACMA Annual Meeting

**October 1-3, 2009**
The Boulders
Phoenix, AZ

**(866) 397-6520**

**Group Rate**
$360 Single/Double
(plus $29/night resort fee)

**Hotel Deadline**
Monday, August 31, 2009

The Boulders Resort & Golden Door Spa is located on 1,300 acres of pristine Sonoran desert and is just 12 miles from Scottsdale Airpark and only 33 miles from Phoenix Sky Harbor International Airport. Enjoy a round of golf with a choice of two Jay Morrish designed courses. Relax and repose in adobe casitas and houses expertly blended into the breathtaking landscape of ancient 12-million-year-old boulders.

**Awards & Accolades:**
**19 consecutive years recipient of the prestigious "AAA Five Diamond"*

**Ranked by Condé Nast Traveler as one of America's "Top 15 Golf Resorts"*

**U.S. Top 10 2007 Best Golf Resort by Travel and Leisure Golf*

**Golf Magazine's 2008 Platinum Medal award winner and named among the nation's Best Golf Resorts*

## 2010 ACMA Annual Meeting

**September 23-25, 2010**
Fairmont Le Château Frontenac
Québec City, Quebec Canada

**(866) 540-4460**

**Group Rate**
$259 CND Single/Double

**Hotel Deadline**
Monday, August 20, 2010

Standing high on a bluff overlooking the mighty St. Lawrence River, Fairmont Le Château Frontenac is not merely a hotel located in the heart of Old Québec—it is the heart of it. At Fairmont Le Château Frontenac, guests are guaranteed a memorable and inspiring stay in one of the most beautiful cities in the world with easy walking access to all of the wonderful sites and experiences that Old Québec has to offer.

Offering newly renovated luxurious guestrooms, exquisite dining experiences through renowned Chef Jean Soulard and a distinctive European charm, this stately hotel stands above historic Old Québec, designated a United Nations World Heritage Site.

**Awards & Accolades:**
**CAA/AAA Four Diamond Award*

**Five-star rating (Quebec Lodging)*

**2008 T+L 500 Best hotels in the world, Travel + Leisure magazine*

**2008 Condé Nast Traveler's Gold List*

## 2011 ACMA Annual Meeting

**October 13-15, 2011**
The Grand Del Mar
San Diego, California

**(858) 314-2000**

**Group Rate**
$295 Single/Double

**Hotel Deadline**
Friday, September 9, 2011

The Grand Del Mar is San Diego's newest resort destination that is surrounded by the pristine coastal communities of La Jolla, Del Mar and Rancho Santa Fe. From its Tom Fazio-designed golf course and The Villas to a luxurious spa and award-winning dining, The Grand Del Mar transcends the ordinary and delivers a world-class Southern California resort experience.

**Awards & Accolades:**
**CAA/AAA Five Diamond Award*

**Five-star rating (Quebec Lodging)*

**Ranked 4th among Top 75 Mainland U.S. Resorts by Condé Nast Traveler's "Reader's Choice Awards," November 2008*

**San Diego's first and only AAA Five Diamond restaurant, November 2008*

**Top New Spa, Condé Nast Traveler's coveted "2008 Hot List," May 2008*

**"Top 100 Golf Resorts" by Condé Nast Traveler, June 2008*

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## President's Column

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Despite the economic downturn, it is encouraging to note that the Business Development Committee reports referrals through February 19, 2009 comparable to referrals from the same period last year.

Finally, a personally difficult decision has been made with respect to the location for the 2011 Annual Meeting. When the sky fell in September 2008, I was ready to commit to a venue on Maui for 2011. After much consideration and valuable advice from many (including our Corporate Counsel Committee), I concluded that it would be in the best interests of the College not to select Maui. The good news, however, is that we have selected The Grand Del Mar in California. It is truly a remarkable resort and hopefully will prove to be host to a memorable Annual Meeting in 2011.

The Executive Committee and Regents truly value your input. Please feel free to call on any of us this coming year. I look forward to serving you in 2009. ◆

Edward T. Bullard, President

## Environmental Risk

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with respect to insurance coverage, indemnification and communication with third parties.

### Conclusion

Environmental issues are not as difficult for lenders as they were prior to the late 1990s. On the other hand, environmental issues now have a greater potential to affect lenders than one would expect, given their treatment over the last 10-plus years. Environmental issues are one important factor to consider when assessing and underwriting risks. Experienced legal counsel and technical consultants each play distinct roles in providing the necessary assistance for lenders to make informed inquiries and decisions related to environmental matters. An understanding and appreciation of these issues will help to expand opportunities and limit risks for lenders. ◆

** Pamela K. Elkow and Richard M. Fil are partners in the Environmental and Utilities Practice Group at Robinson & Cole LLP. Norman H. Roos is a partner in the Finance Group of Robinson & Cole LLP.*

### Endnotes

1 42 U.S.C. § 9601 et seq.

2 See, e.g., Small Business Liability Relief and Brownfields Revitalization Act – PL 107-118.

3 42 U.S.C. § 6901 et seq.

4 33 U.S.C. § 1251 et seq.

5 42 U.S.C. § 7401 et seq.

6 29 U.S.C. § 651 et seq.

## Simultaneous Priority

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simply can not support the level of inquiry necessary for a real estate loan, where typical values are probably 3-4 times that dollar amount.

- If a filing were not "good" until indexed, every filing would require a follow up search (and related cost) and consideration of a delayed funding. Indexed filings may not be available to check for a few weeks. The presumption is that the filing offices do a good job and that submitted documents in fact do get indexed.

- It took me about five minutes to check for filings against 5 debtors on the Illinois Secretary of State's website. Total out-of-pocket costs: $0

- We recommend to our clients that they always do a post-filing lien search to confirm that filings to perfect their security interest are properly indexed.

- The only way to know that no one else has filed in front of my filing is to wait for the certification date to catch up and reflect my filing. UCC Insurance solves this problem by insuring over the gap. With insurance a lender can search, file and fund on the same day without waiting for a post search reflecting the indexed filing.

- This string points up the benefit of pre-filing a financing statement so that the SP's filing will show up on a search made prior to funding the loan (at least in large transactions). The authorization is often contained in the lender's loan commitment or proposal letter signed by the Debtor. ◆