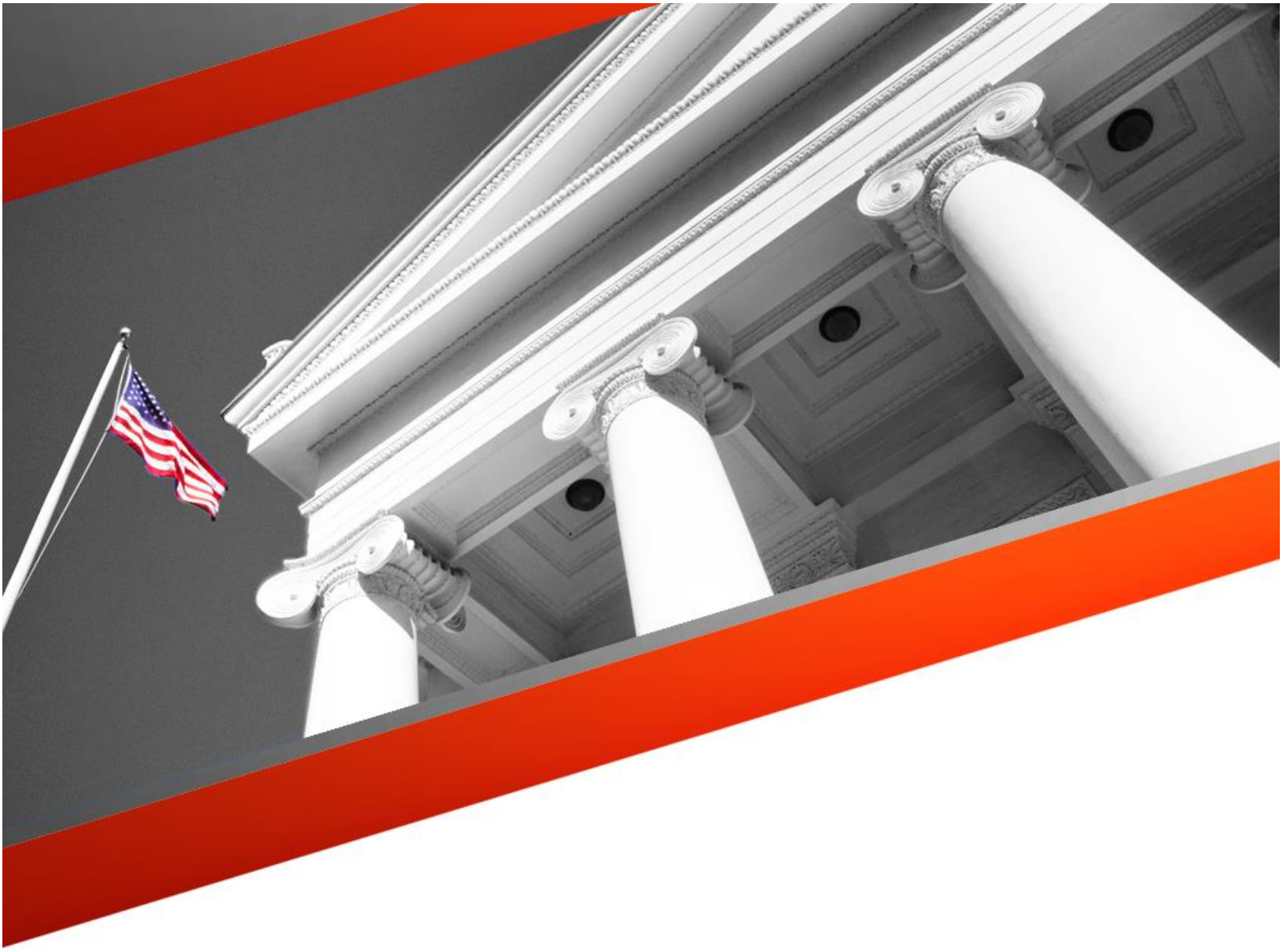

Title Insurance Case Law Update

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MERS – NOTICE OF FORECLOSURE

EVERBANK V. HENSON, 2015 WL 129081 (TN COA 2015)

Bank of Bartlett foreclosed on a first-priority deed of trust. EverBank was the assignee and current owner of a promissory note secured by a second-priority deed of trust, in the original principal amount of $160,000. Mortgage Electronic Registration Systems, Inc. ("MERS"), was identified in the second-priority deed of trust as the beneficiary of record and "nominee for Lender and Lender's successors and assigns." Relying on the fact MERS was identified as beneficiary and nominee for the lender and its successors and assigns, EverBank did not record an assignment of its interest in the second-priority deed of trust.

The trustee foreclosed the first-priority Bank of Bartlett deed of trust. The trustee did not provide notice of the foreclosure to either EverBank or MERS. Bank of Bartlett was the successful bidder and purchased the subject property for approximately $20,000.

The Tennessee Court of Appeals found that (1) the failure to provide MERS with notice of foreclosure sale, and (2) the price obtained at the sale were grossly inadequate or unfair, were insufficient to state a claim to set aside the foreclosure sale.

However, the court found MERS was entitled to seek restitution from the trustee pursuant to Tenn. Code Ann. § 35-5-107, which provides that any person referenced in Tenn. Code Ann. § 35-5-106 who fails to comply with this chapter is "liable to the party injured by the noncompliance, for all damages resulting from the failure."

MERS - TAX SALE TITLE

MERS V. DITTO, 2015 WL 8488909 (TN S. CT. 2015)

The homeowners (the "Dossetts") failed to pay the 2006 property taxes on the subject property. In 2008, the county filed a delinquent tax lawsuit. In June 2010 the subject property was sold at a tax sale to Mr. Carlton J. Ditto for $10,000. The property was not redeemed within one year after the trial court confirmed the sale. As a result, Mr. Ditto was presumed to have "perfect title" in the property. Tenn. Code Ann. § 67-5-2504(b) (2011).

The Dossetts received notice of the delinquent tax lawsuit by certified mail. The clerk's office attempted to serve notice of the tax sale on Choice Capital, but the certified envelope was returned as "Not Deliverable as Addressed, Unable to Forward." A copy of the summons was later served on Choice Capital through its registered agent. Despite the fact that MERS was referenced in the deed of trust for the property, the County did not attempt to give notice of the delinquent tax lawsuit to MERS. As a result, MERS had no knowledge of the lawsuit. The subject deed of trust described MERS as "the beneficiary" under the deed of trust and provided that MERS was "a separate corporation that [was] acting solely as nominee for [Choice Capital] and [Choice Capital's] successors and assigns."

In January 2012, about a year and a half after the tax sale was confirmed, MERS filed a petition against Mr. Ditto in Hamilton County Chancery Court seeking to set aside the tax sale. MERS alleged that the tax sale and trial court's decree confirming the tax sale were void *ab initio* because the county failed to give notice of the tax sale to MERS as was constitutionally required. MERS argued that the county's failure to provide it with notice of the tax sale violated its rights under the Due Process Clause of the United States Constitution.

Mr. Ditto, *pro se*, filed a motion for judgment on the pleadings, arguing that MERS did not have an interest in the subject property that was protected under the Due Process Clause. The Harrison County Chancery Court granted Mr. Ditto's motion for judgment on the pleadings. The Tennessee Court of Appeals and the Tennessee Supreme Court upheld the Chancery Court's decision finding that MERS acquired no protected interest in the subject property. Because MERS had no protected interest in the subject property, its due process rights were not violated by the county's failure to notify it of the tax foreclosure proceedings or the tax sale.

UNDERWRITING GUIDELINES FOR TAX SALES

Title through a tax deed is not insurable unless or until there is a decree or judgment of a court of competent jurisdiction adjudging that title is vested in the plaintiff to the land in question.

Title through a tax deed is considered an Extra Hazardous Risk and should not be insured without approval from our home office in Madison, Mississippi.

CURRENT OWNER SEARCH

SINGER V. HIGHWAY 46 PROPERTIES, LLC, 2014 WL 4725247 (TN COA 2014)

The chain of title for the subject property is as follows:

4/28/2005	Cunningham Company, Judgment Debtor	Donna Singer, Judgment Creditor	Judgment Lien
12/14/2005	Cunningham Company, Grantor	W.H. Summers, Grantee	Warranty Deed
2/15/2006	W.H. Summers, Grantor	Highway 46 Properties, LLC, Grantee	Quitclaim Deed
9/28/2012	Donna Singer, Petitioner	Highway 46 Properties, LLC, Respondent	Petition to Execute on Judgment

Chicago Title Insurance Company issued an owner's title insurance policy listing W.H. Summers as the insured and insuring fee simple title was vested in him. The policy did not contain an exception for the

judgment against the Cunningham Company in favor of Donna Singer ("Ms. Singer") which was recorded in the Register's Office. The subject title insurance policy was issued by "Dickson Title, LLC, Authorized Agent for Chicago Title."

When Ms. Singer filed her petition to execute on the subject property, she named Highway 46 Properties, LLC ("Highway 46") as the respondent. Highway 46 filed a third-party complaint, naming Dickson Title, LLC ("Dickson Title") and Fidelity National Title Group, Inc. d/b/a Chicago Title Insurance Company ("Chicago") as third-party defendants. Highway 46 asserted causes of action against Dickson for negligence and breach of "express or implied contractual obligations" relative to the pre-closing title search.

Chicago filed a motion to dismiss the third-party complaint on grounds that Highway 46 was not an insured under the title policy. Dickson Title filed a motion to dismiss on grounds that the negligence and breach of contract claims were barred by the statute of limitations and that Dickson Title was not in privity with Highway 46 and owed it no duty of care. Dickson Title also argued that it, as agent for Chicago, was not liable on the title policy.

The Chancery Court granted both Dickson's and Chicago's motion to dismiss. The Chancery Court also granted summary judgment in favor of Ms. Singer on her petition to enforce the judgment lien and direct the sale of the property.

Highway 46 filed a notice appealing the dismissal of its complaint. While the appeal was pending, Highway 46 settled its claims with Chicago and Chicago was dismissed as a party to the appeal. It is unclear from the opinion why Chicago did not include Dickson Title, its policy issuing agent, in its settlement with Highway 46. The Tennessee Court of Appeals affirmed the Chancery Court's order dismissing the complaint against Dickson Title.

CONTINUATION OF INSURANCE UNDER TITLE INSURANCE POLICY

Paragraph 2 of the Conditions of the 2006 ALTA Owner's Policy establishes that the policy terminates when the insured conveys the property, but continues in effect to protect the insured as long as the insured "retains an interest" in the property, or remains liable under covenants of warranty. Paragraph 2 of the Conditions provides as follows:

> **2. CONTINUATION OF INSURANCE**
>
> The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an

estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

TRUSTS AND TRUSTEES

AURORA LOAN SERVICES, LLC V. LINDA S. ELAM, 2016 WL 659821 (TN COA 2016)

Linda Elam acquired title to the subject property. Subsequently, Linda and Fred Elam (collectively the "Elams") filed a Certificate of Trust creating the "L & F Irrevocable Trust." The Certificate of Trust named Fred Elam as the trustee. Linda Elam conveyed the subject property, owned by her individually, to the "L & F Irrevocable Trust" by quitclaim deed. In their individual capacities, Mr. and Mrs. Elam executed a deed of trust pledging the property as collateral for a loan. When the loan went into foreclosure, Mr. and Mrs. Elam alleged that the trust owned the property and that the deed of trust signed by them individually did not convey any interest in the subject property to the foreclosing lender.

The lender then filed a declaratory judgment action seeking to declare the deed conveying the property from Linda Elam to the L & F Irrevocable Trust void. In its motion for summary judgment, the lender argued that because Linda Elam deeded the property to the trust instead of its trustee, the conveyance was void under Tennessee law. The Chancery Court declined to grant summary judgment declaring the conveyance to the trust void. The court held that it was obvious the property was being conveyed for trust purposes. The court also relied on the rule of construction that documents should be given constructions that render them valid instead of void. This issue was not appealed or addressed by the Tennessee Court of Appeals.

The lender then filed a second motion for summary judgment asking the court to declare that the property was pledged as collateral to secure the loan it made to the Elams. The court granted this motion and ordered that the subject deed of trust be reformed to reflect that the interest of the trust was effectively conveyed in said deed of trust through its trustee, Fred Elam. The Tennessee Court of Appeals dismissed Mr. Elam's appeal on procedural grounds.

UNDERWRITING GUIDELINES ON CONVEYANCES BY TRUSTS AND TRUSTEES

Generally a trust itself is not a legal entity that is able to acquire real property in its own name. Rather, title to property is conveyed to the trustee. For example, title should be conveyed to "John Doe, Trustee of the Richard Roe Family Trust." The Trustee holds legal title to trust property for the benefit of the beneficiary who holds equitable title to the trust property.

When insuring property being conveyed or encumbered by a Trust, or title which is dependent upon a conveyance by a Trust, you should determine: (1) that the Trust is a valid and existing Trust; (2) the identity of the Trustee; and (3) that the Trustee has the authority to take the contemplated action. A Trustee only has the powers granted by the Trust Agreement.

TITLE TO PROPERTY HELD BY DECEDENTS

IN RE ESTATE OF SCHUBERT, 2015 WL 4272192 (TN COA 2015)

This case involved the interpretation of a Will, and the point in time in which title to real property vests. The Chancery Court upheld the Clerk and Master's Report finding that title to the subject property vested in Mr. John Schubert at the moment of his mother's death. The court relied on Tenn. Code Ann. § 31-2-103, which provides, *inter alia*, as follows:

> 31-2-103. **Vesting of estate-Net estate. –** The real property of an intestate decedent shall vest immediately upon death of the decedent in the heirs as provided in §31-2-104. The real property of a testate decedent vests immediately upon death in the beneficiaries named in the will, ***unless the will contains a specific provision directing the real property to be administered as part of the estate subject to the control of the personal representative*** . . .

Emphasis added. The Tennessee Court of Appeals reversed the ruling of the Chancery Court and found that the Will contained a specific provision directing the real property be administered as a part of the estate of the decedent. The court focused on language in the Will providing that the subject property **"be *given"*** to her son "***as a part of his share of the estate."*** The specific phrase did not use the word ***"devise"*** or ***"bequeath."*** The court found that the phrase ***"be given"*** indicates the property was to be administered as a part of the estate and be given to her son "as a part of his share" of the deceased's estate. The words "be given" without words such as "devise" or "bequeath" show further action is necessary before the title to the property can vest in beneficiary. The Will also granted the personal representative the authority to liquidate the estate's assets to make an equal division of the assets between the deceased's two sons.

POWER OF ATTORNEY – AUTHORITY TO MAKE GIFTS

IN RE CONSERVATORSHIP OF PATTON, 2014 WL 4803146 (TENN. COA 2014)

This case involves the authority of an attorney-in-fact to make gifts pursuant to a power of attorney. In 2008, Mr. Patton executed a durable power of attorney appointing his daughter as his attorney-in-fact. The daughter then transferred substantial amounts (over a million dollars' worth) of her father's money and real estate to herself and her husband.

In 2010, the conservators of the person and property of Mr. Patton, filed a petition against the daughter for the recovery of property and for damages. The conservators alleged that the daughter used the power of attorney to convey property to herself and her husband for no consideration. The conservators also alleged that the daughter was guilty of conversion, exploitation and civil conspiracy.

In finding that the subject power of attorney did not authorize the daughter to make gifts, the Probate Court entered an order granting the conservator's motion for summary judgment. The Tennessee Court of Appeals affirmed the Probate Court's order granting summary judgment to the conservator.

Tenn. Code Ann. § 34-6-110 addresses gift-giving under a power of attorney. Subsection (a) of Tenn. Code Ann. § 34-6-110 provides as follows:

> (a) If any power of attorney or other writing:
>
> (1) Authorizes an attorney-in-fact or other agent to do, execute or perform any act that the principal might or could do; or
>
> (2) Evidences the principal's intent to give the attorney-in-fact or agent full power to handle the principal's affairs or to deal with the principal's property; then the attorney in fact or agent shall have the power and authority to make gifts, in any amount, of any of the principal's property, to any individuals ... in accordance with the principal's personal history of making or joining in the making of lifetime gifts. This section shall not in any way limit the right or power of any principal, by express words in the power of attorney or other writing, to authorize, or limit the authority of, any attorney-in-fact or other agent to make gifts of the principal's property.

UNDERWRITING STANDARDS FOR TITLES DEPENDENT ON A POWER OF ATTORNEY

When insuring a conveyance or encumbrance executed under a Power of Attorney, or a title which is dependent on an instrument executed under a Power of Attorney:

- Record the Power of Attorney in the land records in the county in which the property is located, or confirm it is already recorded.
- Confirm the Power of Attorney has not been revoked or terminated.
- Review the Power of Attorney to determine that the attorney-in-fact has the authority to convey or encumber real property.
    - The attorney-in-fact only has the authority granted to him or her in the Power of Attorney.
- Determine if the Principal is competent or incompetent.
    - If incompetent:
        - Review the Power of Attorney to determine that it is a Durable Power of Attorney.

- Obtain an affidavit from a doctor that the Principal was competent at the time of execution of the Power of Attorney.

SETTLEMENT AGENT DUTIES

THE PEOPLES BANK V. CONRAD MARK TROUTMAN, 2015 WL 4511540 (TN COA 2015)

The plaintiff, The Peoples Bank (the "Bank"), made a loan in the amount of $765,000 to a borrower. The loan was secured by certain parcels of real estate. The closing attorney, a policy issuing agent for Old Republic National Title Insurance Company ("Old Republic"), was requested to provide the Bank with certain legal documents and a "full title insurance policy." The closing attorney provided the Bank with a commitment for title insurance that included a requirement that a deed of trust in the amount of $4,500,000 be released or subordinated.

The closing attorney represented to the Bank that the deed of trust had been subordinated. The closing attorney admitted that he assumed a subordination agreement existed because the borrower told him there was a subordination agreement or one would be forthcoming. The closing attorney provided the Bank with a final certificate of title that failed to make exception for the prior mortgage.

After learning that it did not hold a first lien on the property, the Bank filed suit against the closing attorney and its law firm for legal malpractice and negligent misrepresentation. The Bank also sued Old Republic for breach of contract.

The Tennessee Court of Appeals upheld the Circuit Court's order granting summary judgment in favor of Old Republic. The subject title insurance policy, which was delivered two years after closing, made exception for the prior deed of trust. The exception provided as follows.

> 3. A Deed of Trust to secure an indebtedness of $4,500,000.00 and other amounts payable under the terms thereof . . . for the benefit of . . ., ***subordinated by Subordination Agreement."***

The court found that the policy expressly excepted the prior deed of trust and that the phrase ***"subordinated by Subordination Agreement"*** did not render the title insurance policy ambiguous.

Underwriting Note – Never rely on a payoff statement, release or subordination agreement provided to you by the borrower.

ERRORS IN LEGAL DESCRIPTION

BANK OF AMERICA V. MEYER, 2015 WL 1275394 (TENN. COA 2015)

This case was filed by a lender seeking to reform the legal description in the deed of trust and a substitute trustee's deed foreclosing the subject deed of trust. The borrower acquired title to two

parcels of land totaling 18 acres in size in 2005. In 2007, the borrower, believing the land was described as being one parcel, executed a deed of trust that covered only one parcel that was 16 acres in size and was unimproved. The property address in the deed of trust was a 2 acre parcel that included the house.

The Chancery Court granted summary judgment in favor of the lender reforming the legal description of the deed of trust and substitute trustee's deed. The Tennessee Court of Appeals affirmed the decision. In Tennessee, the law is stated as follows:

> [A] court of chancery has the power to reform and correct errors in deeds produced by fraud or mistake. To be subject of reformation, a mistake in a deed must have been mutual or there must have been a unilateral mistake coupled with fraud by the other party, such that the deed does not embody the actual intention of the parties. Reformation may be granted against the original parties, their privies, those claiming under them with notice, and third persons who will suffer no prejudices thereby.

TITLE ABSTRACTING ERROR

HINES V. HOLLAND, 334 GA. APP. 292 (GA COA 2015)

A closing attorney hired an abstractor to examine the title to a parcel of property. The abstractor failed to locate a deed of trust in her search. The closing attorney subsequently conducted a loan closing but did not pay off the missed deed of trust. The closing attorney rendered a legal opinion to First American, who then issued lender's and owner's title insurance policies on the property, without exception for the missed mortgage.

The property owner learned of the impending foreclosure and provided notice of a claim to First American. First American paid off the outstanding loan amount of $144,985.17 and obtained a release of the deed of trust to prevent the foreclosure sale and protect the owner's and lender's interest in the property.

First American subsequently filed a legal malpractice and indemnity claim against the closing attorney. The closing attorney filed a third-party complaint against the abstractor seeking contribution and indemnification for any damages he would be liable to pay First American, asserting that the abstractor breached the standard of care it owed to the closing attorney in performing the title search.

First American and the closing attorney entered into a consent judgment pursuant to which the closing attorney agreed to pay First American the full amount paid out under the title insurance policy.

The abstractor filed a motion to dismiss the closing attorney's third-party complaint alleging that a third-party complaint is only procedurally proper where the third-party defendant is secondarily liable on the plaintiff's claim. The defendant cannot assert an entirely separate claim against the third-party defendant even though it arises out of the same general set of facts. Here, First American sued the

closing attorney for legal malpractice and indemnity. The closing attorney was attempting to file a third-party complaint based on theories of contribution and indemnification.

The Georgia Court of Appeals affirmed the trial court order granting the abstractor's motion to dismiss the third-party complaint.

BUSINESS EMAIL COMPROMISE SCHEME

LUAN V. ADVANCED TITLE INS. AGENCY, L.C., 2015 WL 4560383 (D. UTAH 2015)

This case is related to an email hacking scheme that has become common in the last few years. Ms. Luan, a citizen of China, hired Advanced Title Insurance Agency, L.C. ("Advanced") to close on the purchase of a home in Utah for the price of $205,000.

Ms. Luan wired the money to Advanced's trust account in four $50,000 installments. Unbeknownst to Ms. Luan, hackers impersonating Ms. Luan emailed Advanced instructing them to immediately wire the funds back to China. Based on these instructions, $150,000 of the funds were wired from Advanced's trust account back to China.

Ms. Luan sued Advanced and its title insurance underwriter, Westcor Land Title Insurance Company ("Westcor"), to recover her loss of settlement funds. Ms. Luan alleged that Westcor was vicariously liable for Advanced's handling of the escrow funds based on language in the Agency Contract between Advanced and Westcor. Ms. Luan also alleged that Westcor was liable based on a statute making the title insurer strictly liable for thefts when they occur in relation to a transaction in which the agent has issued a policy on behalf of the insurer.

The United States District Court denied Westcor's Motion for Summary Judgment, rejecting Westcor's argument that Advanced was not acting as its agent with respect to any of the matters that form the basis for Ms. Luan's claim and that the prerequisites did not exist for liability of Westcor under Utah's strict liability statute.

GUIDANCE ON BUSINESS EMAIL COMPROMISE SCHEME (BEC)

The typical BEC scheme begins when the email account of a party to a real estate transaction is hacked and monitored without that party's knowledge. This allows the fraudster to identify the parties and learn the details of the transaction. The fraudster then sends an email that appears to be legitimate and from a proper party, directing an entity holding the funds to be used in the settlement of the real estate transaction to wire those funds to an account controlled by the fraudster. Since everything appears genuine, the funds are wired as instructed and then stolen by the fraudster. Other variations on the BEC scheme may include:

- The fraudster requesting an earlier release of funds than had been previously discussed;
- The fraudster providing new payment instructions just prior to the closing;

- The fraudster may create a new email address that closely resembles one involved in the transaction;
- The fraudster may impersonate not just a seller, but a realtor, a mortgage lender or other lien holder — in short, anyone who might receive funds in connection with the transaction; and
- The fraudster may impersonate an authorized individual inside the closing agency.

BEC scams can be difficult to detect and prevent, even with some important safeguards in place. Fraudsters who initiate a BEC scheme typically are hackers or work with them. The fraudster knows how to use social media and the web to gather information on the transaction and the parties involved. Thus, the fraudulent email and bad wire instructions appear legitimate and are accepted with little scrutiny.

To avoid a BAC scheme, you should:

1. Be wary of last-minute changes to wire instructions: You should (i) be suspicious of last-minute changes to wire instructions, especially if the sender emphasizes a need for secrecy or pressures you to act quickly; (ii) be particularly alert on Fridays and on days before holidays - fraudsters use the resulting delays to create openings for their scheme; and (iii) be very cautious if the email or wire instructions are sent outside normal business hours or direct the funds to be sent to a bank or account located outside the state where the subject property is located.

2. Know the transaction and know the parties: You should study the transaction carefully. The larger an outgoing wire, the more incentive a fraudster has to target it, and the more scrutiny you should apply. You should note the habits of the parties to a transaction and be mindful of any divergence from those habits.

3. Use two steps to verify wire instructions: You should use a two-step process to verify and confirm the wire transfer instructions. First, if a request for a transfer of funds comes in through email, the email directing the transfer of funds must be verified by using a valid phone number for the party from whom the e-mail was supposedly sent. Do not rely on the phone number or other contact information shown in the suspect email or its attachments. Second, do not reply to the suspect email. If the email is fraudulent, a reply to the email may give the fraudster valuable information needed to maintain the BEC scheme.

4. Confirm receipt: Immediately after the funds are disbursed, you should follow-up with the intended recipient of the wire to confirm receipt of the funds. As always, you should confirm that you are communicating with a legitimate party to the transaction. If a BEC scheme hits, the sooner the errant wire is detected, the more likely law enforcement can trace, or even recover, the funds.

5. Practice good "cyber hygiene": You should not click on links or attachments in suspicious emails. These links and attachments may be used to install malware on your computer system, which may allow the fraudster to monitor your communications, learn your business practices, and learn the details of upcoming transactions. As additional safety precautions, at a minimum, we

strongly recommend that you: (1) close your browser when your computer is not in use; (2) use strong passwords and change them frequently; (3) be aware of and report unusual situations or possible virus attacks; (4) install and keep anti-virus software on all your computers up-to-date; (5) install a firewall on all your computers; (6) avoid websites you do not trust; (7) not send wire information or other business sensitive data from a personal email account; and (8) encrypt all emails that contain wire instructions or other sensitive information.

DOCTRINE OF TITLE BY PRESCRIPTION

ROBERTS V. BAILEY, 470 S.W.3D 32 (TENN. 2015)

This case began as a boundary line dispute between two neighbors. The Baileys' title was based on a prior conveyance being a tenancy by the entirety with rights of survivorship. The subject conveyance was in 1918, which is between the "gap years" (i.e. 1914 – 1919) in which Tennessee did not recognize the estate of tenancy by the entirety and converted all such estates to tenancies in common.

During the boundary line litigation, the Baileys discovered the ambiguity and filed an action against the Littletons seeking to quiet the title to the property. The Littletons were the heirs that would inherit an undivided-half interest in the property as a result of the subject conveyance being converted to a tenancy in common.

In the quiet title litigation, the Baileys alleged title to the property under the doctrine of title by prescription. The common law doctrine of prescription applies when a ***presumption*** of title arises when the following elements are met:

1. The prescriptive holder must have been in exclusive and uninterrupted possession of the land for a period of twenty years or more, claiming the land as his own without any accounting to his cotenants;

2. The prescriptive holder's cotenants must have been under no disability to assert their rights during the prescriptive period of twenty years; and

3. The prescriptive holder's occupancy must have been without permission, actual or implied, of the other cotenants.

The Tennessee Supreme Court also noted that the primary difference between the doctrine of title by prescription and the doctrine of adverse possession is that the adverse possession requires proof of an actual ouster of cotenants, whereas title by prescription does not.

The presumption of prescription can be rebutted by showing the (1) disability of the parties, or (2) that the possession was by indulgence, permission or as a tenant of the owner. The Baileys argued that their ignorance of their ownership operated as a disability preventing them from pursuing their interest. The Tennessee Supreme Court found that "disability" in the context of title by prescription, is either a

disability by minority or incapacity. The Baileys were awarded title by prescription because the Littletons failed to rebut the presumption.

UNDERWRITING GUIDELINES ON ADVERSE POSSESSION

The terms "adverse possession" and "prescriptive rights" both refer to a situation where a non-permissive, hostile non-title-holder obtains fee title, easement or other rights in another's land, after a statutory term of years.

A title or appurtenant right which is dependent on adverse possession or prescription is not insurable unless or until there is a decree or judgment of a court of competent jurisdiction adjudging that title is vested in the plaintiff or the appurtenant right is an existing valid appurtenance to the land in question.

Title by adverse possession or prescription is considered an Extra Hazardous Risk and should not be insured without approval from our home office, in Madison, Mississippi.

CLOSING PROTECTION LETTER

FIRST AMERICAN TITLE INS. CO. V. CITIZENS BANK, 466 S.W.3D 776 (TN COA 2015).

First American Title Insurance Company ("First American") issued closing protection letters ("CPLs") to Citizens Bank ("Citizens"). Citizens assigned the loans to SunTrust. In connection with the assignment, Citizens and SunTrust entered into a Correspondent Loan Purchase Agreement which assigned, *inter alia*, "all applicable insurance policies, and all other documentation and information collected by Seller in connection with the Mortgage Loan." After the loans were assigned to SunTrust, the borrowers defaulted, and SunTrust foreclosed on the properties in 2007. The properties were subsequently sold to third parties, but SunTrust claimed losses.

In 2012, almost five years after the foreclosures and almost four years after the properties had been sold to third parties, SunTrust sued Citizens for its losses. Citizens and SunTrust entered into a settlement agreement resolving SunTrust's claims against Citizens. In March 2013 after reaching the settlement with SunTrust, Citizens notified First American of its purported claim against First American under the CPLs for losses Citizens suffered in connection with its settlement with SunTrust.

First American filed a declaratory judgment action seeking a declaration that it had no liability to Citizens under the CPLs. Citizens counterclaimed alleging, *inter alia,*

> That the [alleged] losses on [the loans at issue] were due to misrepresentations, negligence, dishonesty and/or fraud by [First American's agent] and/or its owners, employers or agents. [First American's agent] engaged in a fraudulent scheme wherein borrowers were induced to obtain mortgage loans in their names based on promises that they would not have to make a down payment or mortgage payments for the property, would receive cash at closing, and would share in the profit following a resale of the property. As part of the conspiracy,

> materially false representations were made to Citizens Bank, which, among other things, included false representations related to the straw borrowers' source of funds for down payments and amounts recorded as "cash from borrower" on HUD–1 Settlement Statements and loan applications, for the purpose of inducing Citizens Bank to disburse the mortgage loan proceeds it had wired to and entrusted with [First American's agent].

The Chancery Court granted summary judgment in favor of First American and dismissing Citizens counterclaim after finding and holding, *inter alia*, that the CPLs were assigned by Citizens by the terms of the Correspondent Loan Purchase Agreement. The court also found that Citizens failed to provide First American with prompt notice of SunTrust's claim against Citizens and of the settlement between Citizens and SunTrust. The Tennessee Court of Appeals affirmed the Chancery Court's order granting summary judgment in favor of First American.