



# Title Insurance Case Law Update

Brad Jones, Vice President | Claims Counsel



# Agenda

## Title Insurance Case Law Update

1 Mortgage Electronic Registration Systems, Inc. (“MERS”)

2 Current Owner Search

3 Trusts and Trustees

4 Title to Property Held by Decedents

5 Powers of Attorney

6 Settlement Agent Duties



# Agenda

## Title Insurance Case Law Update

7 Legal Description Errors

8 Title Search Errors

9 Business Email Compromise Scheme

10 Adverse Possession v. Title by Prescription

11 Closing Protection Letters



A photograph of a row of classical stone columns, likely from a government building or courthouse. The columns are fluted and have a decorative base. A white semi-transparent rectangular box is overlaid on the lower left portion of the image, containing the text 'MERS' and 'Mortgage Electronic Registration Systems, Inc.'. The background is a light, overcast sky.

**MERS**

Mortgage Electronic Registration Systems, Inc.



# Mortgage Electronic Registration Systems, Inc.

## Overview of MERS Role in the Mortgage Industry



- The MERS® System is a national electronic registry system that tracks the changes in servicing rights and beneficial ownership interests in mortgage loans that are registered on the registry.
- MERS performs a service for lenders by purporting to function as the mortgagee of record and nominee of the beneficial owner of the mortgage loan.
- No mortgage rights are transferred on the MERS® System. The MERS® System only tracks the changes in servicing rights and beneficial ownership interests.
- MERS's system of registering and tracking mortgages over the life of the loans sought to address problems that arose from mortgage securitization.
- Deed of Trust will designate MERS as the beneficiary as nominee for the lender and the lender's assigns.

# MERS - Notice of Foreclosure

Everbank v. Henson, 2015 WL 129081 (Tenn. Ct. App. 2015)

## Bank of Bartlett Foreclosure

- 1<sup>st</sup> Priority – Bank of Bartlett Deed of Trust (\$50,000)
- 2<sup>nd</sup> Priority – MERS as beneficiary, acting as nominee for Plaza Mortgage Co., (EverBank was the current assignee) (\$160,000)
- Notice of Foreclosure was not provided to EverBank or MERS.
- Bank of Bartlett was the successful bidder at foreclosure (\$20,000 credit bid).

The Tennessee Court of Appeals declined to set the foreclosure sale aside finding that:

- the failure to provide MERS with notice of the foreclosure sale, and
- the price obtained at the foreclosure sale

were insufficient to state a claim to set the foreclosure aside.



# MERS Entitled to Restitution from Trustee

Tenn. Code Ann. § 35-5-107

## Criminal and Civil Liability

“Any officer, or other person, referenced in § 35-5-106 who fails to comply with this chapter commits a Class C misdemeanor and is, moreover, liable to the party insured by the noncompliance, for all damages resulting from the failure.”



# MERS – Tax Sale Title

MERS v. Ditto, 2015 WL 8488909 (Tenn. 2015)



## 2006 Delinquent Property Taxes

- 2008 – County filed a delinquent tax lawsuit.
- 2010 – Property was sold to Mr. Ditto at tax sale and was not redeemed.



## Notice of Tax Sale

MERS was not provided notice of the tax sale. MERS was described in the DOT as “the beneficiary” and was “a separate corporation that [was] acting solely as nominee” for the lender and its successors and assigns.



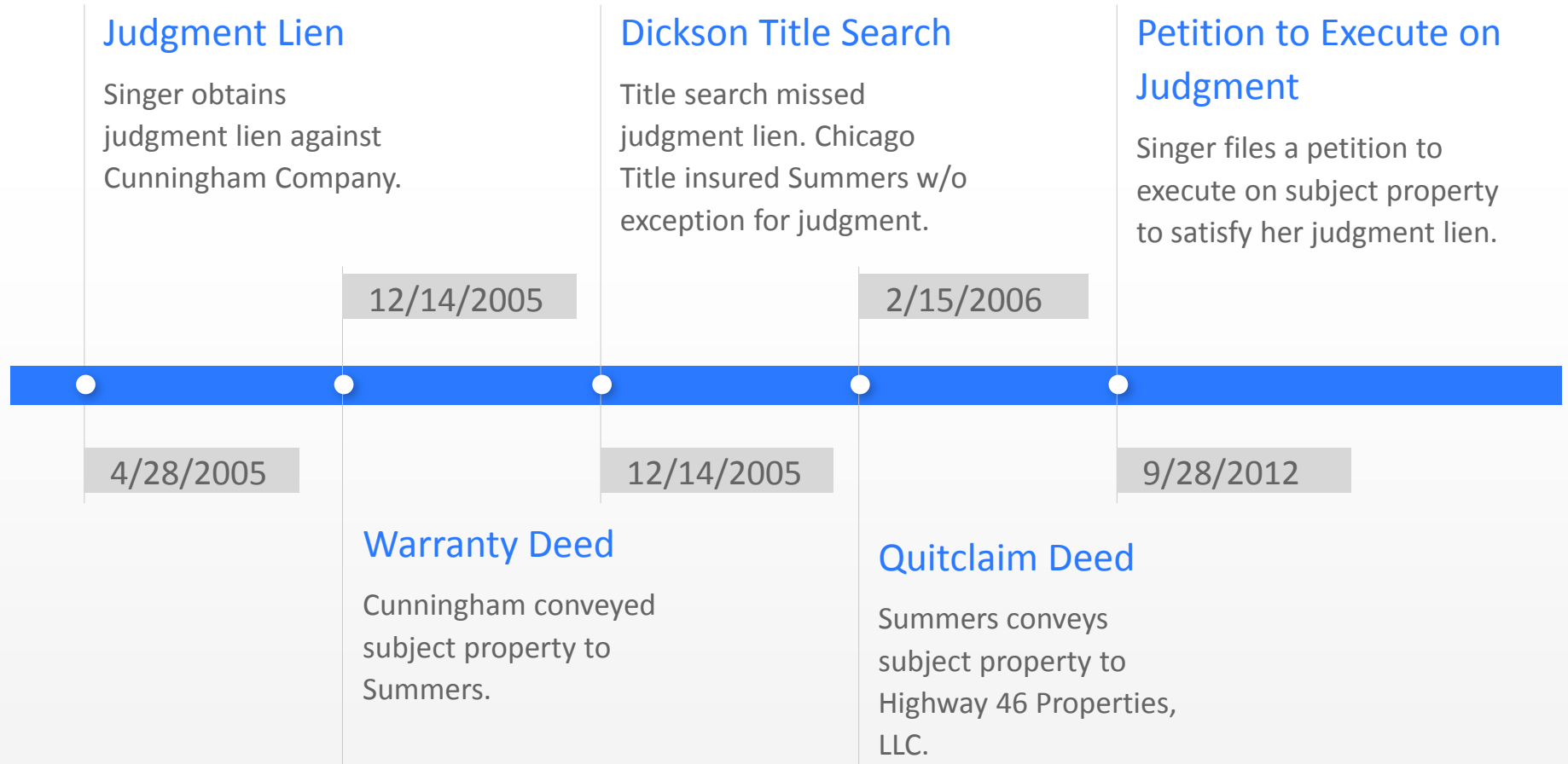
## MERS Petitions to Set Aside the Tax Sale

The Tennessee Supreme Court found that MERS did not have a property interest in the subject property that was protected under the Due Process Clause.



# Current Owner Search

Singer v. Highway 46 Properties, LLC, 2014 WL 4725247 (Tenn. Ct. App. 2014)



# Continuation of Insurance under Title Policy

2006 ALTA Owner's Policy



## Paragraph 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 (Tenn. Ct. App. 2016)

- Mrs. Elam acquired title to subject property.
- Mr. and Mrs. Elam created the “L & F Irrevocable Trust,” with Mr. Elam as the trustee.
- Mrs. Elam conveys subject property to “L & F Irrevocable Trust.”
- In their individual capacities, Mr. and Mrs. Elam executed a deed of trust pledging the subject property as collateral for a loan.



# Underwriting Guidelines

## Conveyances to and from Trusts



A Trust is not a legal entity.

A trust itself is not a legal entity that is able to acquire title to real property in its own name.

### Legal Title v. Equitable Title

Title to property should be conveyed to the trustee. For example, to “John Doe, Trustee of the Richard Roe Family Trust.”

### Underwriting Guidelines

- Trust is a valid and existing trust.
- Identity of the current trustee.
- Trustee has the authority to take the contemplated action.



# Title to Property Held by Decedents

In re Estate of Schubert, 2015 WL 4272192 (Tenn. Ct. App. 2015)



## Tenn. Code Ann. § 31-2-103

“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 . . .”



## Language of the Will

- The Will provided 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 words ***“devise”*** or ***“bequeath.”***
- The Tennessee Court of Appeals found that the subject wording required further action before title can vest in the beneficiary.

# Power of Attorney – Authority to Make Gifts

In re Conservatorship of Patton, 2014 WL 4803146 (Tenn. Ct. App. 2014)

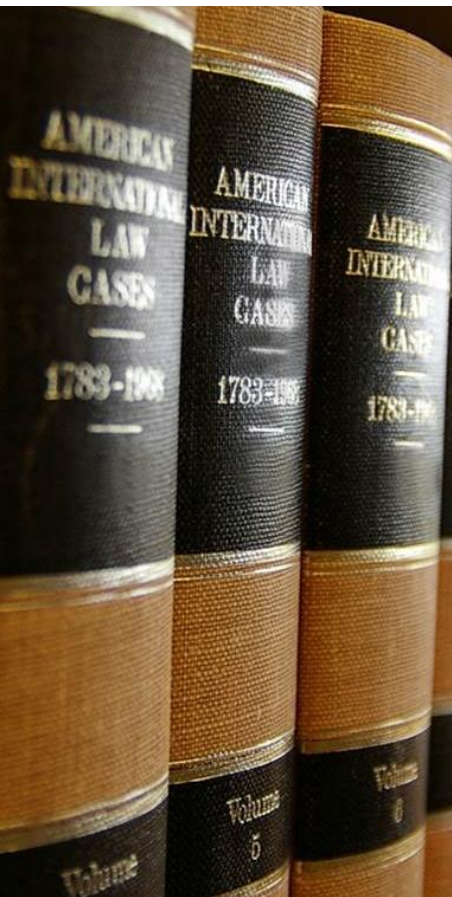


- Mr. Patton executed a durable power of attorney appointing his daughter as his attorney-in-fact.
- The daughter transferred over a million dollars worth of her father's money and real estate to herself and her husband.
- Mr. Patton's conservators filed a petition against the daughter for the recovery of property and for damages.
- The Probate Court entered an order granting the conservator's motion for summary judgment finding that the power of attorney did not authorize the daughter to make gifts.
- Relying on Tenn. Code Ann. § 34-6-110, the Tennessee Court of Appeals affirmed the Probate Court's order granting the conservator's motion for summary judgment.



# Power of Attorney – Authority to Make Gifts

Tenn. Code Ann. § 34-6-110(a)



(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 POA

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

- 1 Record the Power of Attorney in the land records.
- 2 Confirm the Power of Attorney has not been revoked or terminated.
- 3 Review the Power of Attorney to determine the attorney-in-fact has authority.
- 4 Determine if the principal is competent or incompetent.
- 5 If the principal is incompetent, make sure the POA is a Durable Power of Attorney.
- 6 Obtain a doctor's affidavit that the principal was competent when POA was executed.



# Settlement Agent Duties

The Peoples Bank v. Conrad Mark Troutman, 2015 WL 4511540 (Tenn. Ct. App. 2015)

- Peoples Bank made a \$765,000 loan secured by the subject real estate.
- The bank requested certain legal documents and a “full title insurance policy” from the closing attorney.
- The title commitment included a requirement for the release or subordination of a \$4.5 million deed of trust.
- The closing attorney represented to the bank that the deed of trust had been subordinated.
- The title policy included an exception for the subject prior deed of trust.



# Errors in Legal Description

Bank of America v. Meyer, 2015 WL 1275394 (Tenn. Ct. App. 2015)

## Reformation of Legal Description in Deed of Trust and Substitute Trustee's Deed

- Borrower acquired title to two parcels of land totaling 18 acres in size in 2005.
- In 2007, believing the land was described as being one parcel, the borrower executed a deed of trust that covered only one parcel that was 16 acres in size and was unimproved.
- The property address in the subject deed of trust was a 2 acre parcel that included the house.
- The Tennessee Court of Appeals affirmed the Chancery Court's order granting summary judgment in favor of the lender reforming the legal description of the deed of trust and substitute trustee's deed.



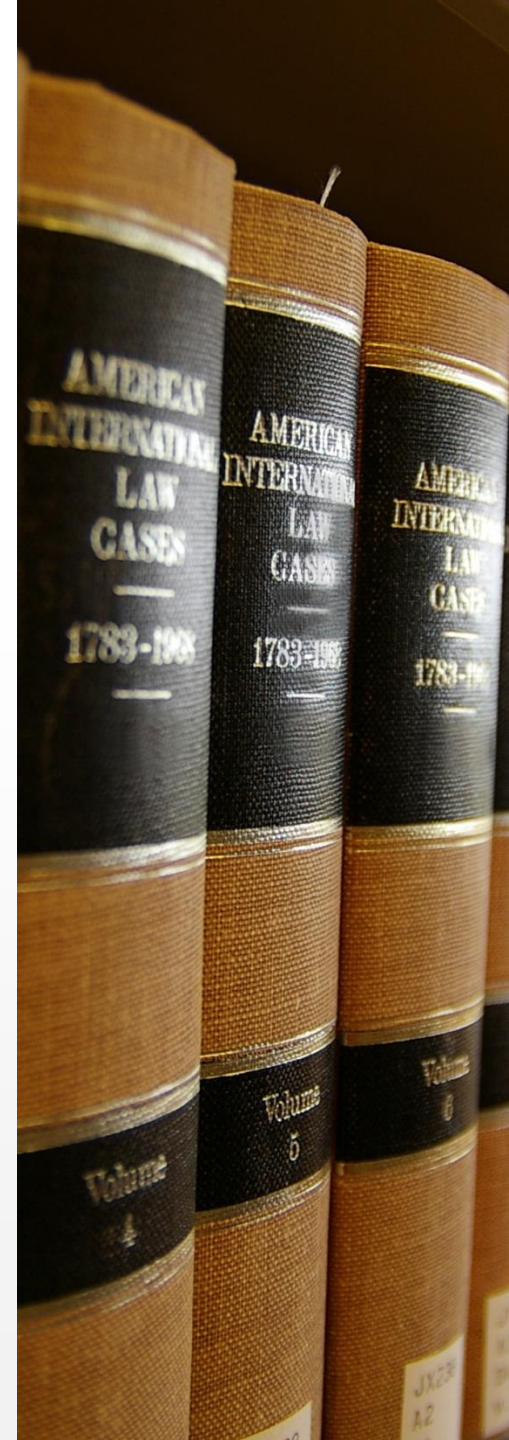
“[A] court of chancery has the power to reform and correct errors in deeds produced by fraud or mistake. To be subject of reformation, a mistake in a deed must have been mutual or there must have been a unilateral mistake coupled with fraud by the other party, such that the deed does not embody the actual intention of the parties.”

# Title Search Error

Hines v. Holland, 334 Ga. App. 292 (Ga. Ct. App. 2015)

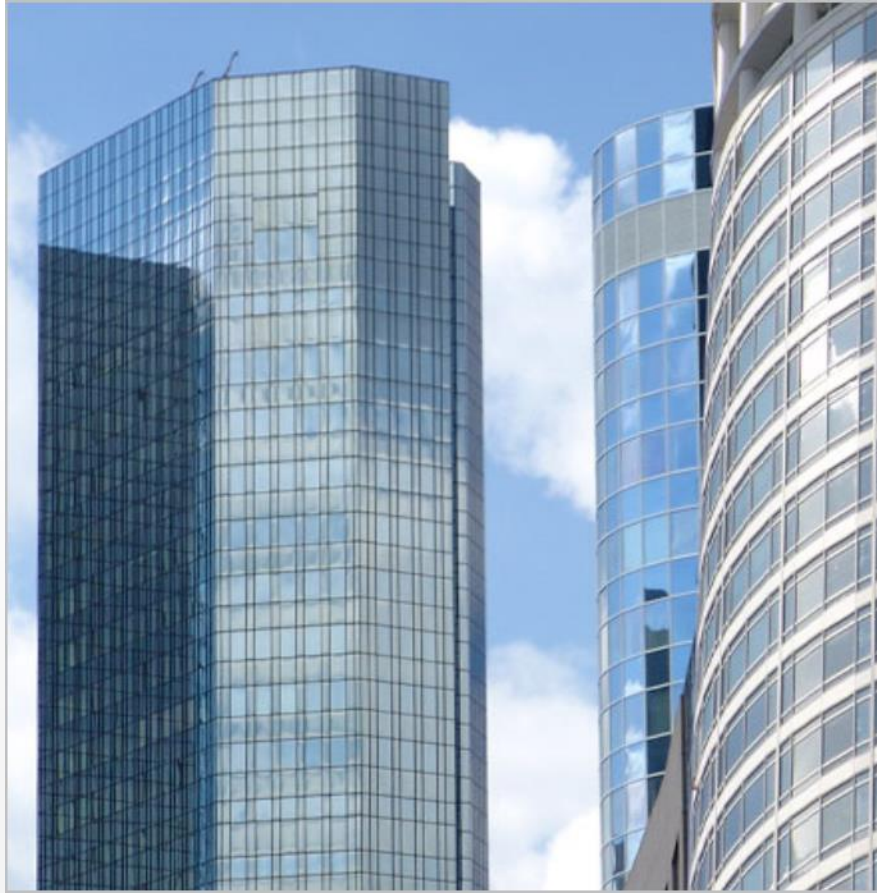
## Missed Deed of Trust in Title Search

- The abstractor failed to locate a deed of trust in her search.
- As a result, the closing attorney failed to pay off the deed of trust when he subsequently closed a loan on the property.
- The property owner learned of an impending foreclosure and notified its title insurer (i.e. First American).
- First American paid off the outstanding loan amount of \$144,985.17 to prevent the foreclosure of the missed deed of trust.
- First American 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 of any damages he would be liable to pay First American.



# Business Email Compromise Scheme

Luan v. Advanced Title Ins. Agency, L.C., 2015 WL 4560383 (D. Utah 2015)



## Email Hacking Scheme

- Ms. Luan, a citizen of China, hired Advanced Title to close on the purchase of a home for \$205,000.
- Ms. Luan wired the purchase price to Advanced Title in four \$50,000 installments.
- Unbeknownst to Ms. Luan, hackers impersonating Ms. Luan emailed Advanced Title 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.



# Doctrine of Title by Prescription

Roberts v. Bailey, 470 S.W.3D 32 (Tenn. 2015)



## Title by Prescription v. Adverse Possession

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 was in the “gap years” (i.e. 1914 – 1919) in which Tennessee did not recognize the estate by the entirety and converted all such estates to tenancies in common.

- The Baileys discovered this ambiguity and filed an action against the Littletons (i.e., the family that would own a half interest in the subject property as a result of the subject conveyance being converted to a tenancy in common).
- In the quiet title litigation, the Baileys alleged they had title to the property under the ***doctrine of title by prescription***.

# Doctrine of Title by Prescription

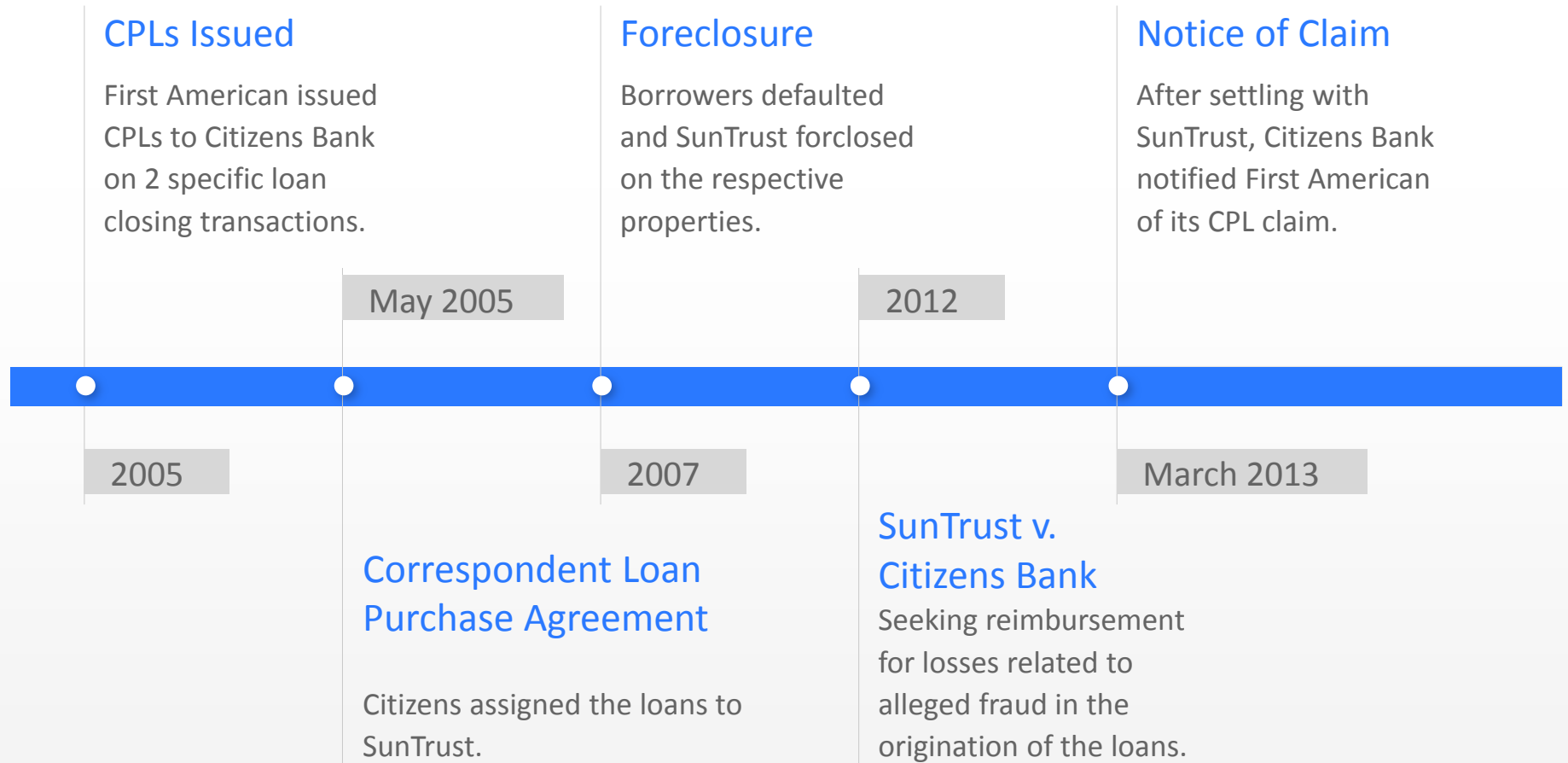
A *presumption* of title arises when the following elements are met:

- The prescriptive holder must have been in exclusive and uninterrupted possession of the land for a period of 20 years or more, claiming the land as his own without any accounting to his cotenants;
- The prescriptive holder's cotenants must have been under no disability to assert their rights during the prescriptive period; and
- The prescriptive holder's occupancy must have been without permission, actual or implied, of the other cotenants.



# Closing Protection Letter (“CPL”)

First American Title Ins. Co. v. Citizens Bank, 466 S.W.3D 776 (Tenn. Ct. App. 2015)



# Declaratory Judgment Action

First American Title Ins. Co. v. Citizens Bank, 466 S.W.3D 776 (Tenn. Ct. App. 2015)

## Citizens Bank Counterclaim for Recovery of Mortgage Fraud Losses – Allegations by Citizens Bank include:

- The mortgage fraud losses were due to the misrepresentations, negligence, dishonesty and/or fraud by First American’s agent.
- First American’s agent was engaged in a fraudulent scheme wherein borrowers were induced to obtain mortgage loans in their names based on promises they would:
  - not have to make down payments or mortgage payments for the property,
  - receive cash at closing, and
  - would share in the profit on resale of the property.
- Materially false representations were made to Citizens Bank, which among other things, included:
  - False representations related to straw borrowers’ source of funds for downpayments and amounts recorded for “cash from borrower” on HUD-1 Settlement Statements.







# Thank You

## Questions and Answers

# Brad Jones

Vice President | Claims Counsel

Mississippi Valley Title Services Company  
Old Republic National Title Insurance Company

124 One Madison Plaza, Suite 2100 (39110)  
P.O. Box 2901  
Madison, MS 39130-2901



[www.mvt.com](http://www.mvt.com)



[bjones@oldrepublictitle.com](mailto:bjones@oldrepublictitle.com)



601.961.4866

