Cincinnati Bar Association

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Real Property Law Institute

Presented by the Cincinnati Bar Association Real Property Law Practice Group

Friday, December 14, 2018

Real Property Law Institute
December 14, 2018

8:25 a.m. **Welcome & Opening Remarks**
M. Zack Hohl, Esq., *Graydon Head & Ritchey LLP;*
Chair, Real Property Law Practice Group

8:30 a.m. **Updates to Cincinnati Board of Realtors Contract** **TAB A**
Cindy Henninger, *Cincinnati Area Board of Realtors*
Roccina Niehaus, Esq., *Wood & Lamping*
Gregory Tassone, J.D., *Coldwell Banker*

9:30 a.m. **Retail Leasing in Downtown Cincinnati** **TAB B**
Moderator: M. Zack Hohl, Esq.*, Graydon Head & Ritchey LLP*
Panelists: Aine M. Baldwin, Esq.*, Kroger Co.,*
Amanda J. Penick, Esq.*, Graydon Head & Ritchey LLP,*
Richard Tranter, Esq.*, Phillips Edison & Company*

10:45 a.m. **Break**

11 a.m. **Case Law Update** **TAB C**
J. Michael Debbeler, Esq., *Graydon Head & Ritchey LLP*

12:15 p.m. **Group Luncheon** (included in your registration fee)

Afternoon Breakout Sessions/1:15-4:45 p.m.
You are welcome to move among sessions during breaks.

Session One

1:15 p.m. **Foreclosure in a Strong Economy: 2018 Trends** **TAB D**
William L. Purtell, Esq. *Lerner Sampson & Rothfuss LPA*

2:15 **Break**

2:30 p.m. **1031 Like-Kind Exchanges** **TAB E**
Stephen L. Robison, Esq., *Robison Law Firm*

3:30 p.m. **Break**

3:45 p.m. **Title Insurance Basics** **TAB F**
Paul A.DePascale Esq., *First American Title Insurance Company*

Session Two

1:15 p.m.	**Attorney Conduct: Navigating the Challenges of Law Practice While Maintaining Balance** Dr. Julia King, *Root to Flourish*	**TAB G**
2:15 pm.	**Break**	
2:30 p.m.	**Attorney Conduct: The Impact of the Opioid Crisis on the Legal System** Chad Smith, *CEO, BrightView*	**TAB H**
3:30 p.m.	**Break**	
3:45 p.m.	**Professional Conduct: Conflicts of Interest (video replay)** Carl J. Stich, Jr., Esq. *White Getgey & Meyer Co. LPA*	**TAB I**
4:45 p.m.	**Adjourn**	

TAB
A

Cindy Henninger
Director of Professional Services
Cincinnati Area Board of REALTORS®
1989 – Present (29 years)

Affiliations

- Cincinnati Area Board of REALTORS®
- Ohio Association of REALTORS®
- National Association of REALTORS®

Experience

Over twenty years of experience in trade association management and development of professionals in real estate business practices. Board of Directors Staff Liaison or member for the following CABR Committees:

Arbitration, Contracts and Forms, Grievance Advisory, Housing Needs, Joint CABR/DABR Purchase Contract, REALTOR®/Allied Services, REALTOR®/Lawyer, REALTOR®/Lender, REALTOR®/Inspector, Professional Standards, Strategic Planning.

- Train members on ethics, procuring cause, standards of practice, etc.
- Provide technical assistance to members and answer questions from members and the public on real estate procedures (excluding license law or legal matters) including agency, disclosure, contracts, shorts sales, bank-owned property, offers/multiple offers, earnest money, procuring cause.
- Field phone calls/email contacts regarding member activity and screen for potential violations of the NAR Code of Ethics.
- Write articles for publication on real estate-related issues.
- Work with a committee of member volunteers and legal counsel to review, develop and make recommendations for changes to contracts and forms for use in real estate transactions.
- Development and revision of the CABR/DABR regional purchase contract.
- Process formal complaints for resolution via citation system, mediation or formal hearings.
- Work with a committee of REALTORS® and attorneys to address issues of mutual concern in the real estate industry.
- Develop and conduct seminars, forums and roundtables for REALTORS® and attorneys.
- Process arbitration requests related to commission and earnest money disputes.
- Serve as Ombudsman for real estate-related concerns involving REALTOR® members.

Roccina S. Niehaus is a member of Wood & Lamping's Real Estate Department. Roccina graduated with honors and summa cum laude from Xavier University, with a bachelor of arts degree in political science, and received her JD from the University of Cincinnati College of Law. She has been a licensed title insurance agent in the State of Ohio since 1985 and in the State of Indiana since 2001.

She has practiced in the title insurance industry, specializing in residential and commercial real estate law for 33 years. Roccina's practice experience includes title review and underwriting, including risk assessment and curative measures; preparation and closing of residential and commercial transactions, as well as subdivision development, and the preparation of all types of real estate documents. Her experience also includes representation of several local municipalities and governmental entities in various real estate acquisitions and sales. In addition, Roccina has served as an expert witness regarding title insurance and escrow claims both privately and on behalf of national underwriters.

Roccina is well versed in the title and closing process, having lectured extensively on these topics. She has served on the Ohio Land Title Association Task Force commenting on the Consumer Financial Protection Bureau, for the Ohio Land Title Association, and presented the new 2015 TRID regulations promulgated by the CPFB to the several Cincinnati Bar Association Committees and to the Joint Committee and Affiliates Committee of the Cincinnati Board of Realtors. She has made presentations at the University of Cincinnati Communiversity, at Salmon P. Chase College of Law, at the Southwest Ohio Land Title Association, at the Ohio Land Title Association, at the Northeast Lawyers Club, and on behalf of PESI. Roccina is active in the Cincinnati Bar Association having spoken at the CBA Real Property Institute, Joint Bar/Board of Realtors Committee, and Bankruptcy Committee seminars, at the Solo and Small Practitioner's Committee, and at the Brown Bag Lecture Series and having served eight years on the Real Property Committee as Seminar Chairperson, Secretary, Vice-Chair and Chair. In addition, recently and for several years she has served as Chairperson of the Joint Committee between the Cincinnati Bar Association and the Cincinnati Area Board of Realtors. Also, she served from 2014-2017 as the Chairperson of the Education Committee for the Ohio Land Title Association, and she currently serves on the Board of Trustees for OLTA.

Greg Tassone is passionate about real estate. Clients of Greg Tassone say he is always available and that professionalism, competency, and integrity are his strong traits. Greg offers a valuable range of real estate knowledge and experience unsurpassed in the industry. His career in real estate began in 1988 as a real estate and environmental attorney assisting clients with land acquisitions, leasing, and financing transactions. In 1995, Greg became the in-house legal counsel for West Shell Realtors.

Within three years Coldwell Banker and West Shell merged to form a leading real estate company in the Tri-State area and the rest, as they say, is history. Greg works for the Montgomery Regional Office of Coldwell Banker West Shell, serving clients throughout Greater Cincinnati's Northeast and East corridors. His client base is particularly strong and he loves the excitement of working with sellers and buyers. His background enables him to frequently assist clients with their entire real estate portfolio from traditional buying and selling activities including new home construction to small commercial acquisitions, investment properties, and second homes in resort communities.

A graduate of Vanderbilt University and The University of Toledo College of Law, Greg and his wife, Molly, have joined the category known as "empty nesters" and make their home in Mount Lookout.

Contract to Purchase

Adopted by the
CINCINNATI AREA BOARD OF REALTORS®
DAYTON AREA BOARD OF REALTORS®
For exclusive use by REALTORS®.
This is a legally binding contract. If not understood, seek legal advice.
For real estate advice, consult a REALTOR®.

_____ (date).

1. PROPERTY DESCRIPTION: I/We ("Buyer") offer to purchase from Seller ("Seller") the following described property:

Address _____ City/Township _____,
Ohio, Zip Code _____, County _____, Further described as: _____
_____ ("Real Estate").

2. PRICE AND TERMS: Buyer hereby agrees to pay $_____
("Purchase Price") for the Real Estate, payable as follows:

a) **EARNEST MONEY: For purposes of this clause, time is of the essence.** $_____
("Earnest Money") shall be submitted for deposit with _____
within _____ calendar days of the Contract Acceptance Date, as hereinafter defined ("Contract"), in a trust account pending the final settlement and conveyance of the purchase and sale of the Real Estate contemplated in this Contract ("Closing"), or returned to the Buyer if this offer is not accepted in writing. Written acknowledgement of Earnest Money Deposit ❑ is included ❑ shall be provided to Listing REALTOR® or Seller within _____ calendar days of the Contract Acceptance Date. If acknowledgement of Earnest Money is not provided as stated herein, then Seller, by Seller's sole option, may, by written notice to selling REALTOR® or Buyer, terminate this Contract. Any disbursement of Earnest Money shall be in compliance with Ohio R.C. 4735.24, which includes the following stipulations: The Earnest Money shall be disbursed as follows: (i) if the transaction is closed, the Earnest Money shall be applied to Purchase Price (may be retained by brokerage and credited toward brokerage commission owed) or as directed by Buyer or (ii) if either party fails or refuses to perform, or if any contingency is not satisfied or waived, the Earnest Money shall be (a) disbursed in accordance with a release of earnest money ("Release") signed by all parties to the Contract or (b) in the event of a dispute between the Seller and Buyer regarding the disbursement of the Earnest Money, the broker is required by law to maintain such funds in his trust account until the broker receives (a) written instructions signed by the parties specifying how the Earnest Money is to be disbursed or (b) a final court order that specifies to whom the Earnest Money is to be awarded. If the Real Estate is located in Ohio, and if within two years from the date the Earnest Money was deposited in the broker's trust account, the parties have not provided the broker with such signed instructions or written notice that such legal action to resolve the dispute has been filed, the broker shall return the Earnest Money to the Buyer with no further notice to the Seller. Both Buyer and Seller acknowledge and agree that, in the event of a dispute between Buyer and Seller as to entitlement of the Earnest Money, the REALTORS® will not make a determination as to which party is entitled to the Earnest Money.

b) **BALANCE:** The balance of the Purchase Price shall be paid by wire transfer, certified, cashier's, official bank, attorney or title company trust account check on date of Closing, subject to the terms of applicable law.

3. FINANCING CONTINGENCY: Buyer intends to use the Real Estate for the following purpose: ❑ Owner-occupied ❑ Rental ❑ Other: _____.

❑ **CASH:** Buyer shall provide written confirmation of available funds on verifiable document from funding source within _____ calendar days of the Contract Acceptance Date. If Buyer fails to provide such documentation, then Seller may, by written notice to selling REALTOR® or Buyer, terminate this Contract. Buyer has the right to obtain an appraisal of the Real Estate by a licensed appraiser within _____ calendar days beginning the day following the Contract Acceptance Date.

❑ **CONVENTIONAL LOAN:** The Buyer's obligation to close this transaction is contingent upon Buyer applying for and obtaining: (a) ❑ fixed ❑ adjustable or ❑ other first mortgage loan on the Real Estate, (b) in an amount not to exceed _____% of the Purchase Price, (c) at an interest rate ❑ at prevailing rates and terms ❑ not to exceed _____%, (d) for a term of not less than _____ years or at a higher rate or shorter term agreeable to Buyer.

❑ **FHA/VA**: The Buyer's obligation to close this transaction is contingent upon Buyer applying for and obtaining (a) ❑ FHA, [(1) ❑ fixed or (2) ❑ adjustable] (including FHA closing costs) or ❑ VA (including VA funding fee) first mortgage loan in the maximum allowable amount (b) at an interest rate ❑ at prevailing rates and terms ❑ not to exceed _____%, (c) for a term of not less than _____ years or at a higher rate or shorter term agreeable to Buyer. ❑ Buyer has been provided the FHA **For Your Protection: Get a Home Inspection** disclosure. *When the Buyer is financing through FHA or VA, the Seller may be required to pay for certain fees. Check with your lending institution. Whole house inspection fees may be paid by the VA Buyer, but must be paid outside of the Closing. On FHA/VA contracts, the appraiser is not deemed to be a whole house inspector.*

❑ **OTHER FINANCING: SEE ATTACHED ADDENDUM** _____
_____
_____.

Settlement Charges: In addition to costs incurred in order for the Seller to fulfill the terms of the Contract and to provide marketable title, Seller agrees to pay actual settlement charges on behalf of the Buyer, including, but not limited to, discount points, closing costs, pre-paids and any other fees allowed by Buyer's lender in an amount not to exceed, _____.

Financing Timeframe: IF BUYER FAILS TO PROVIDE CONFIRMATION THAT BUYER HAS COMPLETED ANY OF THE REQUIREMENTS OF THE FINANCING TIMEFRAME, AS SET FORTH IN SUBSECTIONS (a) THROUGH (c) below, THEN SELLER MAY, AT SELLER'S SOLE DISCRETION, BY WRITTEN NOTICE TO SELLING REALTOR® OR BUYER, TERMINATE THIS CONTRACT.

(a) Buyer financing qualification letter based upon initial credit check and preliminary information provided by Buyer stating that such qualification ❑ is ❑ is not contingent upon the closing of Buyer's other real estate and ❑ is attached ❑ is not attached ❑ shall be provided within _____ calendar days of the Contract Acceptance Date.

(b) Buyer shall complete a loan application, which shall include providing selected lender, with *"intent to proceed"*, including payment for appraisal (if necessary), within _____ calendar days of the Contract Acceptance Date and will make a diligent effort to obtain financing.

(c) Buyer or Buyer's lender shall notify Listing REALTOR® or Seller, in writing, that a loan approval has been obtained or waived within _____ calendar days of the Contract Acceptance Date.

BUYER IS RELYING ON BUYER'S OWN UNDERSTANDING OF FINANCING TO BE OBTAINED AND PROCESSES REQUIRED BY A LENDER AS WELL AS THE LEGAL AND TAX CONSEQUENCES THEREOF, IF ANY.

4. APPRAISAL CONTINGENCY: Buyer's obligation to close this transaction is contingent upon Real Estate appraising at or above final sales price of the Real Estate. Buyer has the right to obtain, at Buyer's expense, an independent appraisal performed by an appraiser licensed in Ohio. In the event the Real Estate does not obtain an appraised value (by either Buyer's or Lender's appraiser) equal to or greater than the Purchase Price, Buyer shall have the right to terminate this Contract by delivering written notice to Seller on or before the expiration of (i) the time-frame set forth in Section 3 above for obtaining an appraisal in connection with a cash sale or (ii) the time-frame set forth in Section 3 above for obtaining a loan approval (such applicable time period being referred to as the "Appraisal Contingency Period"). If Buyer does not deliver written notice to Seller that Buyer is terminating the Contract prior to the expiration of the Appraisal Contingency Period, then Buyer's right to terminate this Contract due to appraised value shall be deemed waived. **Seller shall have ALL utilities servicing the Real Estate on during the appraisal inspection.**

5. INCLUSIONS/EXCLUSIONS OF SALE: The Real Estate shall include the land, together with all improvements thereon, all appurtenant rights, privileges, easements, fixtures, and all of, but not limited to, the following items if they are now located on the Real Estate and used in connection therewith: electrical; plumbing; heating and air conditioning equipment, including window units; bathroom mirrors and fixtures; shades; blinds; awnings; window rods; window/door screens, storm windows/doors; shrubbery/landscaping; affixed mirrors/floor covering; wall-to-wall, inlaid and stair carpeting (attached or otherwise); fireplace inserts/grates; fireplace screens/glass doors; wood stove; gas logs and starters; television and/or sound system mounting brackets (excluding televisions and/or sound system), aerials/rotor operating boxes/satellite dishes (including non-leased components); water softeners; water purifiers; central vacuum systems and equipment; garage door openers/operating devices; the following **built-in** appliances: ranges/ovens/microwaves/refrigerators/dishwashers/garbage disposers/trash compactors/humidifiers; all security alarm systems and controls; all affixed furniture/fixtures; utility/storage buildings/structures; inground/above ground swimming pools and equipment; swing sets/play sets; affixed basketball backboard/pole; propane tank/oil tank and contents thereof; electronic underground fencing transmitter and receiver collars; and parking space(s) number(s) _____ and storage unit number _____ (where applicable); **except the following: which are leased in whole or in part** (please check appropriate boxes); ❑ water softener; ❑ security/alarm system; ❑ propane tank; ❑ satellite dish; ❑ satellite dish components: _____. **THE FOLLOWING ITEMS (WHICH ADD NO ADDITIONAL VALUE TO THE REAL ESTATE) ARE SPECIFICALLY INCLUDED WITH THE REAL ESTATE:** _____. _____. **THE FOLLOWING ITEMS ARE SPECIFICALLY EXCLUDED FROM THE REAL ESTATE:** _____ _____.

6. CERTIFICATION OF OWNERSHIP: Seller certifies that Seller owns all of the items listed in Section 5 and that they will be free and clear of any debt, lien or encumbrances at closing (except as listed in Section 20 of this Contract). Seller also represents that those signing this Contract constitute all of the owners of the title to the real property and other items as listed in Section 5, together with their respective spouses.

7. SELLER'S CERTIFICATION: Seller certifies to Buyer that **to the best of Seller's knowledge**: The Real Estate (a) ❑ is ❑ is not located in a Historic District, (b) ❑ is ❑ is not subject to a maintenance agreement, (c) ❑ is ❑ is not located in a flood plain requiring insurance, (d) ❑ is ❑ is not subject to a municipal pre-sale inspection, disclosure, and/or certification of occupancy; if the Real Estate is located in a jurisdiction requiring housing inspection before transfer, Seller shall be responsible for completing and submitting the necessary application and will furnish to Buyer or Buyer's agent a copy of the resulting unconditional certificate on or before the date of Closing, (e) no orders of any public authority are pending, (f) no work has been performed or improvement constructed that may result in future assessments, (g) no notices have been received from any public agency with respect to condemnation or appropriation, change in zoning, proposed future assessments, correction of conditions or other similar matters, and (h) to the best of Seller's knowledge, no toxic, explosive or other hazardous substances have been stored, disposed of, concealed within or released on or from the Real Estate and no other adverse environmental conditions within the boundaries of the Real Estate affect the Real Estate except _____. Seller further certifies that, to the best of Seller's knowledge, there are no encroachments, shared driveways, party walls, property tax abatements or homestead exemptions affecting the Real Estate except: _____ and

that no improvements or services (site or area) have been installed or furnished, nor notification received from public authority or owner's association of future improvements of which any part of the costs may be assessed against the Real Estate, except: _____.

8. HOMEOWNER ASSOCIATION/CONDOMINIUM DECLARATIONS, BYLAWS AND ARTICLES: Real Estate (a) ❑ is ❑ is not subject to a homeowner association established by recorded declaration with mandatory membership, (b) ❑ is ❑ is not subject to a homeowner association assessment (separate from HOA fees) (c) ❑ is ❑ is not subject to mandatory fees imposed on the real estate [❑ pool, ❑ golf course, ❑ other_____] (separate from HOA fees). Seller further certifies that, to the best of Seller's knowledge, there are no Homeowner Association violations (current or outstanding) affecting the Real Estate except: _____.

If the Real Estate is subject to a Homeowner Association Declaration or is a Condominium, Seller will, at Seller's expense, provide Buyer with a current copy of documents affecting the real estate including, but not limited to, documents recorded with the county, the Association Declaration, the Association's financial statements, Rules and Restrictions, schedule of monthly, annual and special assessments/fees, architectural standards (to the extent not included in the Rules and Restrictions), the Bylaws and the Articles of Incorporation and other pertinent documents ("Documents") within _____ calendar days beginning the day following the Contract Acceptance Date. Buyer shall have the right to disapprove of the Documents by delivering written notice of Buyer's disapproval to Seller within _____ calendar days beginning the day following receipt of Documents ("Disapproval Date"). If written notice of disapproval is delivered by the Disapproval Date, then this Contract shall become null and void. Unless written notice is delivered by the Disapproval Date, Buyer shall be deemed to have approved the Documents and waives the right to terminate the Contract based upon the terms and conditions of same. If Seller fails to provide Documents as required, Buyer has the right to terminate the Contract. Seller agrees, as a condition to Closing, to secure, at Seller's expense, written approval for this sale if required by the Documents. Seller, at Seller's expense, shall provide any letter of assessment required at Closing by the lender and/or title company. Seller certifies that the current HOA fees are: $ _____ ❑ Monthly ❑ Quarterly ❑ Annually and/ or ❑ Other _____.

9. MAINTENANCE: Until physical possession is delivered to the Buyer, Seller shall continue to maintain the Real Estate, as described in Section 5, including the grounds and improvements thereon. Seller shall repair or replace any appliances, equipment or systems currently in normal operating condition that fail prior to possession except: _____. Seller further agrees that until physical possession is delivered to the Buyer, the Real Estate will be in as good condition as it is presently, except for normal wear and casualty damage from perils insurable under a standard all risk policy. If, prior to Closing, the Real Estate is damaged or destroyed by fire or other casualty, Buyer shall have the option to (a) proceed with the Closing, or (b) terminate this Contract. While this Contract is pending, Seller shall not change any existing lease or enter into any new lease, nor make any substantial alterations or repairs without the written consent of the Buyer. **Buyer and Seller agree that Buyer shall be provided the opportunity to conduct a walk-through inspection of the Real Estate within 48 hours prior to Closing, solely for the purpose of ascertaining that the Seller has maintained the Real Estate as required herein and has met all other contractual obligations**. Upon Closing, Buyer shall become responsible for any risk of loss and for insurance for the Real Estate.

10. HOME WARRANTY PROGRAM: Buyer has been informed that home warranty programs may be available to provide potential additional benefits to Buyer. Buyer ❑ selects ❑ does not select a home warranty to be provided by a company to be chosen by _____ and paid for by _____ at an amount not to exceed _____.

11. INSURANCE: Buyer's right to terminate this Contract due to property and flood insurance availability and/or cost must be satisfied during the **Real Estate Inspection Contingency Period (as defined in Section 14 below)**. Buyer(s) acknowledges that it is Buyer's sole responsibility to make inquiries with regard to insurance, including, but not limited to, real, flood and personal property insurance availability and cost. **BUYER(S) IS RELYING ON BUYER'S OWN UNDERSTANDING OF INSURANCE TO BE OBTAINED.**

12. PROPERTY DISCLOSURE FORM: Buyer ❑ has ❑ has not received the Ohio Residential Property Disclosure form or ❑ Seller represents and warrants that Seller is exempt from providing the Ohio Residential Property Disclosure.

13. BUYER'S OFF-SITE ACKNOWLEDGEMENT: Buyer acknowledges that Buyer has conducted investigations with regard to the municipality, zoning, school district, and use of the Real Estate and conditions outside of the boundaries of the Real Estate, including but not limited to, crime statistics, registration of sex offenders, noise levels (i.e., airports, interstates, environmental), local regulations/development or any other issues of relevance to the Buyer and has verified that the Real Estate is suitable for Buyer's intended use. Buyer assumes sole responsibility for researching such conditions. Notwithstanding anything to the contrary, Seller makes no representations or warranties with regard to these conditions and the use of the Real Estate. Buyer acknowledges that Buyer has been given the opportunity to conduct research pertaining to any and all of the foregoing prior to execution of this Contract. Buyer is relying solely on Buyer's own research, assessment and inquiry with local agencies and is not relying, and has not relied, on Seller or any REALTOR® involved in this transaction.

14. REAL ESTATE INSPECTION CONTINGENCY: **For purposes of this clause, time is of the essence.** The Buyer has the option to have the Real Estate inspected, at Buyer's expense. Buyer shall have up to _____ calendar days ("Inspection Period") beginning the day following Contract Acceptance Date to conduct all inspections related to the Real Estate. Inspections regarding the physical material condition, insurability and cost of a casualty insurance policy, boundaries, and use of the Real Estate shall be the sole responsibility of the Buyer. **Buyer is relying solely upon Buyer's examination of the Real**

Estate, the Seller's certification herein, and inspections herein requested by the Buyer or otherwise required, if any, for its physical condition and overall character, and not upon any representation by the REALTORS® involved. During the Inspection Period, Buyer and Buyer's inspectors and contractors shall be permitted access to the Real Estate at reasonable times and upon reasonable notice. Buyer shall be responsible for any damage to the real estate caused by Buyer or Buyer's inspectors or contractors, which repairs shall be completed in a timely and workmanlike manner at Buyer's expense.

a) If Buyer is not satisfied with the condition of the Real Estate as revealed by the inspection(s) and desires corrections to material defect(s), Buyer shall provide written notification of any material defect(s) and the portion(s) of the inspection report which describe the basis for the Buyer's dissatisfaction to the Listing Firm or Seller with a request for corrections desired within the Inspection Period. Buyer and Seller shall have _____ calendar days beginning the day following the date of delivery of the Post-Inspection Agreement or other written notice requesting corrections ("Settlement Period") to negotiate to reach a written agreement in settlement of the condition of the Real Estate. Delivery of the Post-Inspection Agreement or other written notice requesting corrections to material defects will designate the end of the Inspection Period, if provided prior to the end of the Inspection Period identified above.

If written settlement of the condition of the Real Estate is not reached within the Settlement Period, Buyer shall have the option to withdraw the written request for corrections within the Settlement Period and accept the Real Estate in "as is" condition. If written settlement is not reached, with signed copies of settlement agreement physically delivered to the parties or their respective agents within the Settlement Period, and Buyer has not withdrawn the request for corrections in writing, this Contract shall be terminated. Buyer shall have the right to terminate the Contract, prior to reaching written agreement with signed copies physically delivered to the parties or their respective agents, during the Settlement Period. Buyer agrees that minor repairs and routine maintenance items are not to be considered material defects with regard to this contingency.

OR

b) If Buyer is not satisfied with the condition of the Real Estate, as revealed by the inspection(s) and desires to terminate this Contract, Buyer shall provide written notification to Listing Firm or Seller that Buyer is exercising Buyer's right to terminate this Contract within the Inspection Period, and this Contract shall be terminated.

If Buyer is satisfied with the results of the inspection(s), Buyer shall deliver written notification to Listing Firm or Seller within the Inspection Period stating Buyer's satisfaction and waiver of the contingency. **IF BUYER DOES NOT DELIVER SUCH NOTIFICATION OF SATISFACTION AND WAIVER OF THIS CONTINGENCY OR WRITTEN NOTIFICATION AS IDENTIFIED IN (a) OR (b) ABOVE, WITHIN THE INSPECTION PERIOD, THEN BUYER SHALL BE DEEMED TO BE SATISFIED WITH ALL INSPECTIONS AND THE CONTINGENCY SHALL BE CONSIDERED WAIVED. IF BUYER DOES NOT COMPLETE REAL ESTATE INSPECTION(S) DURING THE INSPECTION PERIOD, BUYER'S RIGHT TO INSPECT SHALL BE DEEMED WAIVED.**

A. ❑ **BUYER ELECTS TO CONDUCT INSPECTION(S) OF THE REAL ESTATE** to determine the material physical condition of the house, land, improvements, fixtures, equipment, any additional structures, and any hazardous conditions on the Real Estate. *(The inspection(s) may include, but are not limited to, the following inspections which may or may not be performed by the same or different inspectors on the same or different dates.)*

Air Conditioning	Heating	Roofing	Water Quality / Quantity	Structural	Well / Septic System	
Plumbing	Fireplace	Mold	Electrical	Asbestos	Radon	Infestations	Any other desired by Buyer

B. ❑ **BUYER WAIVES THE REAL ESTATE INSPECTIONS** in A above with the following exception(s): _____.

Buyer acknowledges that Buyer has been advised by REALTOR® to conduct inspections of the Real Estate and has been provided the opportunity to make this Contract contingent upon the results of such inspections.

C. ❑ **BUYER SELECTS A TERMITE AND WOOD-BORING INSECT INSPECTION** (required by some lenders/types of financing).

❑ **BUYER WAIVES A TERMITE AND WOOD-BORING INSECT INSPECTION.**

D. **LEAD-BASED PAINT INSPECTION:** Buyer ❑ has ❑ has not received the Seller's disclosure of any lead-based paint or lead-based paint hazards known to Seller on the Real Estate. Buyer ❑ has ❑ has not received the pamphlet *"Protect Your Family From Lead in Your Home"*.

❑ **BUYER SELECTS THE LEAD-BASED PAINT INSPECTION** pursuant to the attached Lead-Based Paint Inspection Addendum, which provides rights and responsibilities that supersede those of the general inspection contingency of this Contract.

❑ **BUYER WAIVES THE LEAD-BASED PAINT INSPECTION.**

❑ **NOT APPLICABLE.**

SELLER(S) AND REALTORS® SHALL NOT BE RESPONSIBLE FOR ANY UNKNOWN AND/OR DISCLOSED DEFECTS IN THE REAL ESTATE. BUYER ACKNOWLEDGES THAT BUYER HAS BEEN ADVISED BY REALTOR® TO CONDUCT INSPECTIONS OF THE REAL ESTATE THAT ARE OF CONCERN TO BUYER AND HAS BEEN PROVIDED THE OPPORTUNITY TO MAKE THIS CONTRACT CONTINGENT UPON THE RESULTS OF SUCH INSPECTION(S).

15. PROPERTY SURVEY: Buyer(s) acknowledges that surveys obtained by the lender are not for the benefit of the Buyer. If Buyer elects to have the property surveyed for his benefit, it shall be at Buyer's expense.

16. OTHER CONTINGENCIES/AGREEMENTS: ❑ See attached Addenda which are signed by all parties and incorporated into this Contract: _____
_____
_____
_____
_____
_____.

17. TITLE INSURANCE: Title insurance is designed to protect the policyholder of such title insurance for covered losses caused by defects in title (ownership) to the Real Estate that are in existence on the date and time the policy of title insurance is issued. Title insurance is different from casualty or liability insurance. **Buyer is encouraged to inquire about the benefits of owner's title insurance from a title insurance agency or provider**. **An Owner's Policy of Title Insurance, while not required, is recommended. A Lender's Policy of Title Insurance, if required by the mortgage lender, does not provide protection to the Buyer**. **Buyer acknowledges that it is Buyer's sole responsibility to make inquiries with regard to owner's title insurance prior to Closing.**

❑ Buyer selects an Owner's Policy of Title Insurance.

❑ Buyer selects an Owner's Policy of Title Insurance at Buyer's expense.

❑ **Seller shall pay an amount not to exceed $300 towards the purchase of an Owner's Policy of Title Insurance and Buyer shall be responsible for payment of the balance of the Owner's Policy of Title Insurance premium**

❑ **Seller shall pay the entire cost of an Owner's Policy of Title Insurance premium.**
Seller's contribution is payable only if Buyer has selected to obtain the Owner's Policy of Title Insurance at Closing, so that Seller's contribution may be deducted from the proceeds paid to Seller at Closing. This amount shall be in addition to Seller-paid settlement charges stated in Section 3, if any.

18. TAXES AND ASSESSMENTS: At Closing, Seller shall pay or credit on the purchase price (a) all real estate taxes and assessments, including penalties and interest, which became due and payable prior to the Closing, (b) a pro rata share, calculated as of the closing date in the manner set forth below, of the taxes and assessments becoming due and payable after the closing, and (c) the amount of any agricultural tax savings accrued as of the Closing date which would be subject to recoupment if the Real Estate were converted to a non-agricultural use (whether or not such conversion actually occurs), unless Buyer has indicated that Buyer is acquiring the Real Estate for agricultural purposes. ❑ If checked, Buyer hereby states that Buyer will use Real Estate for agricultural purposes and expressly waives Sellers payment to Buyer of the estimated agricultural tax savings subject to CAUV recoupment.

TAX PRORATIONS: All prorations shall be based upon the most recent available tax rates, assessments and valuations. It is the intent of the Seller and Buyer that each shall pay the real estate expenses as follows:

Seller's share is based upon the taxes and assessments which are a lien for the year of the Closing. Long Proration Method - Seller pays entire taxes due which cover the tax period(s) up to the date of Closing. If new construction, Long Proration method shall apply.

❑ Short Proration Method: ONLY CHECK THIS BOX IF THE SHORT PRORATION METHOD IS TO BE USED - Seller's share shall be calculated as of the date of Closing, based upon the amount of the annual taxes (as determined by the most recently assessed tax amounts) to establish a daily rate of taxes and then multiplying the daily rate by the number of days from the first day of the current, semi-annual tax period to the date of Closing. If checked, the Short Proration Method shall be applicable and shall supersede the provision to use the Long Proration Method.

ASSESSMENTS: Any special assessments are payable in a single annual installment and shall be prorated on the long proration method. Seller and Buyer acknowledge that actual bills received by Buyer after Closing for real estate taxes and assessments may differ from the amounts prorated at Closing; however, all Closing prorations shall be final, except for the following (if applicable): (i.e., tax abated property, new construction, etc.) _____ Buyer shall assume responsibility for above items upon Closing. The Real Estate may contain a newly-constructed residence which at the time of Closing does not yet appear on the most recent official tax duplicate available, so that the tax bill prorated at the Closing shows taxes for only the vacant or partially improved land. Seller agrees that Seller is responsible for the amount of all real estate taxes assessed for the land and the residence through the date of Closing, regardless of when assessed, and if one or more tax bills are issued after the Closing which show taxes which were not prorated by Seller and Buyer at the Closing, Seller shall immediately pay the additional appropriate prorated amount to Buyer upon delivery by Buyer of the new tax bill(s). This provision shall survive the Closing and delivery of the deed, and the REALTOR® shall not be responsible for enforcement of this provision. Buyer shall be solely responsible for inquiring about and determining any tax credits or abatements available to the Real Estate.

19. OTHER PRORATIONS: It is the intent of the Seller and Buyer that each shall pay the real estate expenses listed in (a) and (b) below due for the period of time that each owns the Real Estate. There shall be prorated between Seller and Buyer as of Closing: (a) homeowner/condominium association assessments and other charges imposed by the association under the terms of the Association/Condominium Documents, if applicable, as shown on the most recent official Association statement available as

of the date of Closing, and/or, (b) rents and operating expenses if the Real Estate is rented to tenants. Security and/or damage deposits held by Seller shall be transferred to Buyer at Closing without proration. Seller and Buyer acknowledge that prorations are based on the information provided at closing and that actual amounts charged and/or collected for prorated items may differ; however all Closing prorations shall be final.

20. CONVEYANCE AND CLOSING: Closing services will be provided by title company designated by Buyer: _____ (name of title company, if known). Both Buyer and Seller agree to execute all documents required by the closing/escrow agent. At Closing, Seller shall be responsible for transfer taxes, Condominium or HOA transfer fees, conveyance fees, deed preparation, settlement fees chargeable to Seller, the cost of removing or discharging any defect, lien or encumbrance required for conveyance of the Real Estate as required by this Contract; and shall convey marketable title (as determined with reference to the Ohio State Bar Association Standards of Title Examination) to the Real Estate by recordable and transferable deed of general warranty or fiduciary deed, if applicable, in fee simple absolute, with release of dower. Date of Closing will be _____, or earlier as mutually agreed by the parties. Title shall be free, clear and unencumbered as of Closing, with the exception of the following, if applicable: (1) covenants, conditions, restrictions and easements of record, (2) legal highways, (3) any mortgage expressly assumed by Buyer and agreed to by Seller's current lender in writing, (4) all installments of taxes and assessments becoming due and payable after Closing, (5) zoning and other laws, (6) homeowner/condominium association fees becoming due and payable after Closing, and (7) the following assessments (certified or otherwise): _____. Seller shall have the right at Closing to pay out of the Purchase Price any and all encumbrances or liens. Make deed to: _____.

21. POSSESSION AND OCCUPANCY: For purposes of this clause, time is of the essence. Subject to rights of tenants, possession/occupancy shall be given ❑ at Closing ❑ on or before _____ o'clock ❑ (A.M.) ❑ (P.M.) ❑ (Noon) EASTERN/DAYLIGHT STANDARD TIME on _____, or such earlier date that the Seller so notifies the Buyer. Until such time, Seller shall have the right of possession/occupancy free of rent, unless otherwise specified, but shall pay for all utilities used. Seller shall order final meter readings to be made as of the occupancy date for all utilities serving the Real Estate and Seller shall pay for all final bills rendered from such meter readings. Seller acknowledges and agrees that prior to Buyer taking possession of the Real Estate, Seller shall remove all personal possessions not included in this Contract and shall remove all debris**. If Seller fails to vacate as agreed in this Contract or any attached post-closing occupancy agreement, Seller shall be responsible for all additional expenses, including attorney's fees, incurred by Buyer to take possession as a result of Seller's failure to vacate.**

22. AGENCY DISCLOSURES: Buyer and Seller acknowledge having reviewed the attached state-mandated agency disclosure statement(s).

23. COMPANY SPECIFIC PROVISIONS: _____
_____
_____
_____.

24. M.L.S. AND PUBLIC RECORD ACKNOWLEDGEMENT: Seller and Buyer acknowledge that REALTOR® shall disclose this sales information to any Multiple Listing Service to which REALTOR® is a member and that disclosure by M.L.S. to other M.L.S. participants, affiliates, governmental agencies or other sources authorized to receive M.L.S. information shall be made. Seller and Buyer acknowledge that sales information is public record and may be accessed and used by entities, both public and private, without the consent of the parties. Seller and Buyer authorize REALTOR® to disclose financing settlement charges paid by Seller and other concession data upon inquiry and to the M.L.S. sold database, as applicable, to the extent necessary to adjust price to accurately reflect market value.

25. SOLE CONTRACT: The parties agree that this Contract constitutes their entire agreement and no oral or implied agreement exists. **Any acceptance of, amendments and/or extensions to this Contract shall be in writing, signed by all parties and copies shall be included with all copies of the original Contract.** This Contract shall be binding upon the parties, their heirs, administrators, executors, successors and assigns. Faxes and Internet transmissions are an acceptable method of communication for physical delivery of the Contract in this transaction and shall be binding upon the parties.

26. ELECTRONIC SIGNATURES: Manual or electronic signatures on contract documents, transmitted in original, facsimile or electronic format shall be valid for purposes of this Contract and any amendments, addendums or notices to be delivered in connection with this Contract.

27. INDEMNITY: Seller and Buyer recognize that the REALTORS® involved in the sale are relying on all information provided herein or supplied by Seller or Seller's sources and Buyer and Buyer's sources in connection with the Real Estate, and agree to indemnify and hold harmless the REALTORS®, their agents and employees from any claims, demands, damages, lawsuits, liabilities, costs and expenses (including reasonable attorney's fees) arising out of any referrals, misrepresentation or concealment of facts by Seller or Seller's sources and/or Buyer and Buyer's sources.

28. ELECTRONIC/WIRE FRAUD: Email is **not** always secure or confidential. Never respond to a request that you send funds or nonpublic personal information, such as credit card or debit card numbers or bank account and/or routing numbers, by email. If you receive an email message concerning a transaction and the email requests that you send funds or provide nonpublic personal information, **do not respond** to the email and immediately contact the known individual/entity with whom you have an established relationship using a separate verified method of communication to determine/notify of suspected email fraud.

29. ACKNOWLEDGMENT: Buyer and Seller acknowledge that any questions regarding legal liability with regard to any provision in this Contract, accompanying disclosure forms and addendums or with regard to Buyer's/Seller's obligations as set forth in this Contract must be directed to Buyer's/Seller's attorney. In the event the Broker provides to Buyer or Seller names of companies or sources for such advice and assistance, the parties additionally acknowledge and agree that the Broker does not warrant, guarantee, or endorse the services and/or products of such companies or sources.

30. CONTRACT ACCEPTANCE DATE: As used herein, the Contract Acceptance Date shall be defined as the date on which all provisions of the Contract have been accepted and agreed by all parties to the Contract, and the document reflecting the final signatures of acceptance has been physically delivered to the other party ("Contract Acceptance Date").

31. EXPIRATION AND APPROVAL: This offer is void if not accepted in writing on this Contract form, with this form physically delivered to Buyer or Buyer's agent on or before _____ o'clock ❑ (A.M.) ❑ (P.M.) ❑ (Noon) EASTERN/DAYLIGHT STANDARD TIME _____. The Buyer has read, fully understands and approves the foregoing offer and acknowledges receipt of a signed copy. Buyer certifies that the signatory(ies) below has/have full authority to enter into this agreement and that no additional signatories, spouse or otherwise, are necessary in order to purchase the property.

_____	_____	_____
Print Buyer's Name	Buyer's Signature	Date/Time
_____	_____	_____
Print Buyer's Name	Buyer's Signature	Date/Time

Buyer's Address _____

32. ACTION BY SELLER: The undersigned Seller has read and fully understands the foregoing offer. Seller certifies that the signatory(ies) below has/have full authority to enter into this Contract and that no additional signatories, spouse or otherwise, are necessary in order to convey the Real Estate. Seller hereby: ❑ accepts said offer and agrees to convey the Real Estate according to the above terms and conditions, ❑ rejects said offer, or ❑ counteroffers according to the above modifications initialed and dated by Seller, which counteroffer shall become null and void if not accepted in writing on this Contract form, with this form physically delivered to Seller or Seller's agent on or before _____ o'clock ❑ (A.M.) ❑ (P.M.) ❑ (Noon) EASTERN/DAYLIGHT STANDARD TIME _____.

_____	_____	_____
Print Seller's Name	Seller's Signature	Date/Time
_____	_____	_____
Print Seller's Name	Seller's Signature	Date/Time

Seller's Address _____

[ALL OWNERS AND SPOUSES OF OWNERS MUST SIGN.]

COMPLETE THE SECTIONS BELOW FOR ADMINISTRATIVE PROCESSING

CONTRACT ACCEPTANCE DATE: Contract terms dictate that physical delivery of final signature(s) on this contract form to the other party constitutes contract acceptance. Delivery of final contract to other party is to be made on the date of final signature(s).

DATE OF FINAL SIGNATURE ON _____.
(Date/Time)

RECEIPT OF EARNEST MONEY DEPOSIT: Failure to provide written verification as provided in Section 2 of the Contract to Purchase may result in Seller's termination of the Contract.

I hereby certify receipt of Earnest Money (❑ check/money order # _____, ❑ wire/electronic transfer # _____, ❑ cash, ❑ other _____) in the amount of $_____.

I further certify that the funds shall be submitted for deposit in accordance with Ohio law and acknowledge that failure to deposit in a timely manner is a violation of license law.

_____	_____	_____
Print REALTOR®'s Name/Firm	REALTOR®'s Signature	Date/Time

THIS INFORMATION IS REQUIRED FOR TITLE, LENDER AND ADMINISTRATIVE PROCESSING

The signatories below grant permission to the settlement agent to provide to their respective Real Estate Broker or their authorized Sales Associates, copies of the Closing Disclosure and the Settlement Statement for review prior to Closing.

_____		_____	
Seller's Signature	Date/Time	Seller's Signature	Date/Time
_____		_____	
Buyer's Signature	Date/Time	Buyer's Signature	Date/Time

SELLING/BUYER'S REALTOR® Firm: _____

Address _____

Broker Firm State License Number _____ Broker Firm MLS ID _____

Contact (Agent) Name _____

Contact (Agent) State License Number _____ Agent MLS Number _____

Contact (Agent) Email and Phone _____

(Principal) Broker Name _____

LISTING/SELLER'S REALTOR® Firm: _____

Address _____

Broker Firm State License Number _____ Broker Firm MLS ID _____

Contact (Agent) Name _____

Contact (Agent) State License Number _____ Agent MLS Number _____

Contact (Agent) Email and Phone _____

(Principal) Broker Name _____

Notice of Termination of the Contract to Purchase

A product of the
CINCINNATI AREA BOARD OF REALTORS®, INC.
Approved by Board Legal Counsel for exclusive use by REALTORS®.
This is a legally binding document. If not understood, seek legal advice. For real estate advice, consult a REALTOR®.

Whereas _____ ("Buyer") and _____ ("Seller") have entered into a Purchase Contract ("Contract") dated _____, for the real estate located at _____ ("Real Estate"), which contains provisions for termination of said Contract in the event certain contingencies or obligations are not met or waived.

The ❑ Buyer ❑ Seller is exercising their right, as established in the Contract, to terminate the Contract for the following reason and the parties are hereby released from any and all obligations, rights and privileges arising out of the Contract:

- ❑ NON-PAYMENT OF EARNEST MONEY (Seller termination)
- ❑ FINANCING CONTINGENCY (Seller termination)
- ❑ APPRAISAL CONTINGENCY (Buyer termination)
- ❑ HOMEOWNER ASSOCIATION/CONDOMINIUM DECLARATIONS, BYLAWS AND ARTICLES (Buyer termination)
- ❑ REAL ESTATE INSPECTION (Buyer termination)
- ❑ PROPERTY INSURANCE AVAILABILITY AND/OR COST (Buyer termination)
- ❑ MAINTENANCE (Buyer termination)
- ❑ OTHER CONTINGENCY: _____.

_____	_____	_____
Terminating Party's Name	Signature	Date/Time
_____	_____	_____
Terminating Party's Name	Signature	Date/Time

Release of Earnest Money

Buyer and Seller agree that the earnest money deposit of _____ Dollars ($_____), which is being held by _____, shall be distributed as follows:

To the Buyer $_____

To the Buyer's Broker: _____ $_____

To the Seller $_____

To the Seller's Broker: _____ $_____

All parties to the Contract instruct that the Earnest Money be disbursed as indicated above. The parties do hereby release the listing and selling REALTOR® firms, their agents and employees, from any and all claims and demands whatsoever of any nature, kind or description, arising out of or connected with, directly and indirectly, the Contract, the Notice of Termination of the Contract to Purchase and the Release of Earnest Money. **Failure of a party to sign below for the purpose of authorizing the release of earnest money does not invalidate the above Notice of Termination of the Contract to Purchase, which requires only the signature(s) of the terminating party.**

_____	_____	_____
Print Buyer's Name	Buyer's Signature	Date/Time
_____	_____	_____
Print Buyer's Name	Buyer's Signature	Date/Time
_____	_____	_____
Print Seller's Name	Seller's Signature	Date/Time
_____	_____	_____
Print Seller's Name	Seller's Signature	Date/Time

RECEIPT OF EARNEST MONEY DEPOSIT

A product of the
CINCINNATI AREA BOARD OF REALTORS®, INC.

With regard to the Contract to Purchase Real Estate for the property located at _____
_____

between _____ (Buyer) and _____ (Seller)

dated _____ (“Contract”).

I hereby certify receipt of Earnest Money (❑ check/money order # _____, ❑ wire/electronic transfer # _____, ❑ cash, ❑ other _____) in the amount of

$_____.

I further certify that the funds have been submitted for deposit as required by the Contract.

_____
Print Name/Firm

_____
Signature Date/Time

Condominium and Homeowner Association Information Guide

A product of the
CINCINNATI AREA BOARD OF REALTORS®, INC.
Approved for exclusive use by REALTORS®

EQUAL HOUSING OPPORTUNITY

This guide is to be used to assist sellers and/or buyers of real estate subject to homeowner association regulations in identifying general information related to those regulations. This document is not represented as being all-encompassing, does not constitute an agreement between parties to a real estate contract, nor is it to be construed as a warranty of any of the information provided in conjunction with this guide. Most purchase contracts require a seller to provide the most current available information. Any expenses incurred in the procurement of the information is the sole responsibility of the seller. Buyers are advised to confirm all information provided by the seller with the association and make additional inquiries of the association with regard to matters not addressed by this guide that are relevant to buyer prior to waiving any contingency in the purchase contract related to the association or its regulations.

Real Estate known as _____ (address) Unit Number _____ ("Real Estate"),

County of _____, State of _____, Zip code _____

- **Name of Unit Owners Association** _____
- **Condominium Board Contact** (officer-name-phone) _____
- **Management Company Contact** (company-name-phone) _____
- **Declaration & Bylaws** which submit the property to the provisions of the Ohio Condominium Statute (Chapter 5311 of the Ohio Revised Code).
- **Condominium Drawings** showing this unit, buildings, easements and limited common areas specific to this unit.
- **Amendments to the Declaration**, specifically those affecting this unit or affecting changes in the common or limited common areas.
- **Articles of Incorporation of the Unit Owners' Association** (assuming that the association has been incorporated).
- **Rules and Regulations of the Unit Owners' Association**, addressing such issues as number and designation of officers, meetings, quorums, voting rights, etc.
- **Financial Statements** showing the nature of the association's assets.
  1. Most current balance sheet
  2. Most current income and expense statement
  3. Current budget
  4. A statement of the amount of any assessment against this unit
  5. Most recent bank statement of Reserve Account with certification from the management company that unencumbered reserves are adequate to repair and replace major capital items in the normal course of operations without the necessity of special assessments
  6. Five year history of dues increases and assessments
- **Occupancy Rate:** A statement from the association showing the percentage of Owner Occupied units vs. Rental units.
- **Lawsuits, Legal Actions or Judgments:** A statement from the association indicating the nature and status of any pending law suits, legal actions or judgments in which the unit owners' association is a party.
- **Rights of Refusal:** A statement from the association of any rights of first refusal given to a person or the association to preemptively purchase the unit.
- **Insurance:** A certificate of insurance from the association insurance provider.
- **Minutes:** A copy of the minutes of the three most recent board meetings and the minutes of the most recent annual meeting.
- **Payment of Dues and Other Financial Obligations:** A statement from the association confirming when the next (assessment) payment is due, the amount of such payment and that dues are current. Include Association Initiation fee, Reserve Contribution, Association Transfer Fee and statement of amount of any unpaid fees, penalties, arrearages, etc., if applicable.
- **Community Development Charge:** Documentation of community development charge, if any, applicable to the premises which was created by a covenant in a recorded instrument. Include the following information: recorded at (county) _____, Vol._____, Page number_____, or Instrument number_____. **(Note: If the foregoing information is not provided and a community development charge affects the premises, the contract may not be enforceable by the Seller or binding upon the Buyer pursuant to Section 349.07 of the Ohio Revised Code.)**
- **Other Documentation:** _____

BUYER INVESTIGATIONS OF OFF-SITE CONDITIONS CONTINGENCY

Buyer's obligation to close this transaction is contingent upon Buyer's satisfactory investigations into the items described in the "BUYER'S INSPECTIONS" clause of this Contract. Buyer shall have _____ calendar days (Investigation Period) to conduct such investigations. If Buyer is not satisfied with the result(s) of the investigation(s), and desires to terminate this Contract, Buyer shall provide written notification that Buyer is exercising his/her right to terminate this Contract, along with the reason for termination, to the Listing Firm or Seller, within the Investigation Period, and this Contract shall be null and void. If Buyer does not deliver written notification as specified above, within the Investigation Period, then Buyer shall be deemed to be satisfied with all investigations and the contingency shall be considered waived. If Buyer does not complete real estate investigation(s) during the Investigation Period, Buyer's right to investigate shall be deemed waived.

Post-Inspection Agreement

A product of the
CINCINNATI AREA BOARD OF REALTORS®, INC.
Approved by Board Legal Counsel
for exclusive use by REALTORS®
(If not understood, seek legal advice. For real estate advice, consult your REALTOR®.)

In reference to the purchase contract between _____ (Seller),

and _____ (Buyer), dated _____

for the Real Estate commonly known as, _____
("Real Estate"), Buyer hereby notifies Seller of the following defects in the Real Estate and requests Seller to make the repairs described below at Seller's expense. Buyer has included relevant sections of the inspection report(s). Buyer waives the inspection contingency except for the items described below (provide a concise description of the defect(s) and corrective measure(s) to be conducted; including any available written estimates for the work):

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

All work is to be completed in a professional workmanlike manner by a company specializing in the area of repairs to be conducted.

Buyer shall have the right to inspect the Real Estate _____ days prior to closing to verify that the items described above have been completed as agreed. Seller shall provide copies of all work orders, warranties, receipts, paid bills and any other documentation related to the repairs at this time. This inspection is in addition to any right to "walk through" the real estate as provided in a purchase contract.

This addendum, upon execution by the parties, becomes an integral part of the purchase contract. Except as amended or modified by this addendum, the purchase contract, in all other respects, remains binding upon the parties.

_____ _____ Date/Time: _____
Buyer Buyer

- ❑ (a) Seller agrees to complete the repairs as set forth above.
- ❑ (b) Seller agrees to complete some, but not all of the repairs, as amended and initialed above, which becomes a counter-offer to the Buyer.

_____ _____ Date/Time: _____
Seller Seller

Back-Up Contract Addendum

A product of the
CINCINNATI AREA BOARD OF REALTORS®, INC.
Approved by Board Legal Counsel, except for underlined items,
for exclusive use by REALTORS®.
This is a legally binding contract. If not understood, seek legal advice. For real estate advice, consult a REALTOR®.

The undersigned Buyer and Seller, having executed a purchase contract dated _____, (the "Contract") covering the real property known as _____, further agree as follows:

The Contract is accepted only as a Back-Up Contract. As used herein, the term "Back-Up Contract" shall mean a binding contract between Buyer and Seller that is contingent upon Seller failing to sell the Real Estate to a third party pursuant to a separate contract previously entered into by and between Seller and a third party (the "Initial Contract"). Buyer expressly acknowledges that Seller has previously executed the Initial Contract with a third party, and that Buyer's right to purchase the Property and Seller's obligation to sell the Real Estate pursuant to the Contract vests only upon Seller failing to sell the Real Estate to the original buyer pursuant to the terms and conditions of the Initial Contract, or any previously executed Back-Up Contracts. This is Back-Up Contract # _____ concerning the sale of the Real Estate, which is subject to any pre-existing back-up contracts entered into by Seller. Any change in Back-Up Contract position(s) shall be promptly communicated to all parties.

Seller shall promptly notify Buyer, in writing, by signing the **Initial Contract Termination Notice** below, upon the termination of the Initial Contract, or any previously executed Back-Up Contract which became an Initial Contract. This Contract shall be deemed a primary contract upon Seller's delivery of the Initial Contract Termination Notice. Commencement of time periods for performance of the Contract, including the deposit of Earnest Money, shall begin the day after the date Seller delivers the Initial Contract Termination Notice.

Notwithstanding anything to the contrary contained herein, Buyer shall have the right to terminate the Contract, in writing, at any time prior to receiving the Initial Contract Termination Notice.

This Back-Up Contract Addendum, upon execution by the parties, becomes an integral part of the Contract. Except as amended or modified by this addendum, the Contract, in all other respects, remains the same.

_____	_____
Date / Time	Date / Time
_____	_____
Buyer	Seller
_____	_____
Buyer	Seller

<u>This section to be used to notify Buyer that the Back-Up Contract has become the Primary Contract</u>

<u>Initial Contract Termination Notice:</u> Seller hereby notifies Buyer that the Initial Contract has been terminated. The Contract is now the primary contract and commencement of time periods for performance of the Contract, including the deposit of Earnest Money, shall commence as stated above.

_____	_____
Date / Time	Date / Time
_____	_____
Seller	Seller

This section to be used to notify Seller that the Buyer is Exercising Buyer's Right to Terminate the Contract
Note: Must be Delivered to Seller Prior to Buyer Receiving Initial Contract Termination Notice Above

Contract Termination Notice: Buyer hereby notifies Seller that Buyer is exercising Buyer's right, as established in the Back-Up Contract Addendum, to terminate the Contract. The parties are hereby released from any and all obligations, rights and privileges arising out of the Contract.

_____	_____
Date / Time	Date / Time
_____	_____
Buyer	Buyer

Escalation Addendum

A product of the
CINCINNATI AREA BOARD OF REALTORS®, INC.
Approved by Board Legal Counsel
(If not understood, seek legal advice. For real estate advice, consult your REALTOR®.)

This Escalation Addendum is made as an integral part of the Contract to Purchase Real Estate dated as of _____ (the "Contract") from _____ ("Buyer") to _____ ("Seller") with respect to the property located at _____ (the "Real Estate") and supersedes any conflicting provisions in the Contract. Except as expressly amended or modified by this Escalation Addendum, the Contract in all other respects remains the same.

Buyer and Seller further agree as follows:

1. **Escalation of Purchase Price**. In the event Seller receives other written, bona fide offers to purchase the Real Estate prior to the Contract Acceptance Date which exceed Buyer's net offer* under the Contract, with terms acceptable to Seller, then the Purchase Price under Section 2 of the Contract shall automatically increase to an amount equal to the highest net offer* received by Seller, plus an additional $ _____.

2. **Cap**. Notwithstanding Section 1 of this Escalation Addendum, the Purchase Price under the Contract shall in no event exceed $ _____.

In order for this Escalation Addendum to be effective, Seller/Seller's Agent shall provide the Buyer/Buyer's Agent with the following: (1) a copy of the bona fide offer, in its entirety, signed by the third party who is ready, willing and able to perform on the terms of their offer, and (2) a copy of the Contract signed by Seller with only the Purchase Price under Section 2 revised according to this Escalation Addendum.

*Net offer means the purchase price for the Real Estate minus any Seller-paid contributions, including, but not limited to settlement charges, home warranty and title insurance.

Date: _____ Date: _____

_____ _____
Buyer Seller

_____ _____
Buyer Seller

TAB
B

Aine M. Baldwin joined The Kroger Co. Law Department in 2014. She practices real estate law and works with her internal clients on the acquisition, disposition, and leasing of retail and industrial properties.

Aine is a native of Cincinnati and returned to Cincinnati after completing her clerkship with Chief United States District Court Judge R. Allan Edgar in the Eastern District of Tennessee at Chattanooga. She is a 2002 graduate of the University of Cincinnati College of Law where she served as the Student Articles Chair of the Law Review. Aine received a B.A. in History from Davidson College. Prior to joining The Kroger Co., Aine practiced real estate law at the Graydon Head law firm. She served at the Chair of the Cincinnati Bar Association's Real Property Law Committee from 2012-2014.

Zack Hohl has been an Associate at Graydon based out of Cincinnati since 2012. Zack practices in the areas of real estate and environmental law and is a member of Graydon's Commercial Real Estate Group. He primarily assists clients with commercial leasing, commercial and industrial acquisitions and dispositions, asset purchases, due diligence work, title and zoning disputes, and environmental compliance.

GRAYDON

Amanda J. Penick

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EDUCATION

Hanover College, B.A., magna cum laude, English Literature, 2006 - Lily Trustee for Merit Scholarship - Alpha Lambda Delta Honors Society

LAW SCHOOL

University of Cincinnati College of Law, J.D., magna cum laude, 2009 - College of Law Honors Scholarship - William Worthington Prize for Best Case Note

BAR ADMISSIONS

State of Ohio
State of New York

AREAS OF PRACTICE

Acquisitions, Sales, and Exchanges
Business
Commercial Leasing and Property Management
Easement, Covenants, and Licenses
Intellectual Property
Media & Marketing
Real Estate
Real Estate Financing and Incentives
Real Estate Taxation
Site Acquisition & Financing
Zoning Approvals and Permitting

COMMUNITY OUTREACH

St. Joseph Home Quality of Life Committee Member
YWCA Rising Star Committee Member – 2015 - present
YWCA Rising Star Leadership - 2014 Graduate
Cincinnati Youth Collaborative Volunteer Committee Member

Amanda practices in the areas of real estate law and corporate law and is a member of the Firm's Real Estate Group and Media and Marketing Industry Group.

Amanda's real estate practice focuses on assisting clients with the acquisition, sale, and leasing of real property. She has extensive experience negotiating and drafting purchase contracts, leases, easements, title cure documents, and a variety of other instruments connected with the transfer and use of commercial real estate. She also advises clients in all aspects of real estate due diligence, including title and survey review, site plan approval, and use and development considerations.

In her corporate practice, she counsels clients, including large public and private companies, start-ups, and financial institutions, on general legal matters, including commercial and intellectual property law. She regularly advises clients on intellectual property matters, including strategy, portfolio management, licensing and monetization, vetting, and protection for trademark and copyright assets.

Amanda earned a B.A. in English Literature from Hanover College and returned to her hometown to study law at the University of Cincinnati. She lives a charmed life in a blissfully chaotic home in Covington with her husband, David, and kids, Jonah and Hazel.

Richard L. Tranter, Esq. is Associate General Counsel, Leasing at Phillips Edison & Company, a Cincinnati based REIT that is one of the nation's largest owners and operators of market-leading, grocery-anchored shopping centers. Mr. Tranter manages a team of attorneys and staff that are responsible for drafting, negotiating, and managing all leases at the company. Prior to his current role, Mr. Tranter was a real estate attorney at Phillips Edison, working on dispositions, acquisitions, financing, joint ventures, property management, and ADA matters. Mr. Tranter is a member of ICSC and its Legal Advisory Council. Mr. Tranter obtained his B.S. in Marketing from Boston College, and his J.D. from the University of Dayton School of Law.

Welcome

December 14, 2018

Retail Leasing

Amanda J. Penick, Esq.
Aine M. Baldwin, Esq.
Richard Tranter, Esq.

1

Why There's No Such Thing as a "Standard" Lease

2

All Leases Raise Common Issues, But Every Deal is Different

- Details matter.
- Standard lease form may be a valuable starting point, but it's only the beginning.
- Lease is a contract between the landlord and tenant, and should reflect their particular intent and expectations.
- At least two perspectives to every provision.

3

What type of property is it?

- Office
- Restaurant/retail
- Warehouse/industrial
- Medical
- Residential
- Mixed use
- School
- Farm
- Ground
- Other . . .

4

Premises

- Is the leased premises described as "___ square feet"? Size matters!
- How was the square footage calculated?
- Rentable vs. usable.
- Mezzanines, patios and corridors . . . Oh my!
- Tenant may want a right to re-measure new construction.

5

Commencement Date

- When does the term commence?
  - Issuance of a certificate of occupancy?
  - Upon "substantial completion"?
  - Stipulated date?
  - ___ days after lease execution?
  - First day the tenant opens for business?
  - Some other formula?
  - Need to document the actual commencement date.
- Pre-commencement access rights.
  - Need to address insurance, indemnity, coordinated buildout, utility expense.

6

Initial Term and Renewal Terms

- Terms should reflect parties' business goals.
- Renewal terms.
  - Automatic renewal versus affirmative election.
  - How much notice required?
  - Rent calculation – Don't agree to agree.
    - Stipulated amount
    - CPI
    - Fair market value

7

Rental Structure: Not All Rent Is Created Equal

- Gross Lease
- Triple Net Lease
  - Taxes
  - Insurance
  - Operating Expenses/CAM
    - Exclusions
    - Tenant audit rights
  - Caps
- Percentage Rent
  - Definition of Gross Sales
  - Breakpoint

8

Permitted Uses and Exclusive Uses

- What is the tenant's intended use? Description is important.
- Consider the impact of use on other tenants.
- Zoning, REAs, and pre-existing leases could limit uses.
- Exclusive uses are critical in retail/restaurant leasing.
  - How is exclusive use defined?
  - Are there any exceptions (anchor tenants, outparcels, etc.)?
  - What about existing leases?
  - What are the penalties if the exclusive use provision is violated?

9

Alterations

- What initial construction does tenant require?
- Which party – landlord or tenant – will do the work?
- Which party – landlord or tenant – will pay for the work?
- How does construction timing impact commencement date, rent commencement, etc.?
- Later alterations – when is landlord approval required?
- Do alterations remain in the premises when lease ends, or must they be removed?
- Mechanics lien risk.
- Signage.

10

Insurance and Indemnification

- Landlords generally want to control casualty insurance (landlord buys/tenant reimburses).
- Landlord wants tenant to carry commercial general liability insurance.
- Tenant insures its furniture, fixtures and equipment.
- Consider liquor liability insurance and other specialty insurance.
- Consider whether to allow for blanket/umbrella policies and/or self insurance.
- Waiver of Subrogation
- Indemnification

11

Default

- Critical to understand the default provisions.
- What is typical . . . reasonable . . . practical . . . legal?
- Susan Argo will discuss in detail, after our presentation.

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SNDAs (Subordination, Nondisturbance and Attornment Agreements)

- Subordination provision in lease should be closely reviewed.
- SNDA is typically a 3 party document.
  - Tenant subordinates its leasehold rights to mortgage lien.
  - Lender agrees not to terminate tenant's lease if lender forecloses on the property if tenant is not in default under Lease.
  - Tenant agrees to attorn to Lender or successor purchaser.
- Like leases, there is no standard SNDA.
- Provide a reasonable time to review and execute.

13

Estoppel Certificates

- Typically signed by tenant, at the request of landlord, in connection with a sale or refinance of the property.
- Tenant may want landlord to execute an estoppel also – e.g., in connection with a lease assignment or sale of tenant's business.
- The party executing the estoppel certificate certifies as to the status of the lease – e.g., non-existence of defaults, term expiration date, current rent amount.
- Relied upon by third parties (purchaser, lender or assignee).
- Provide a reasonable time to review and execute.

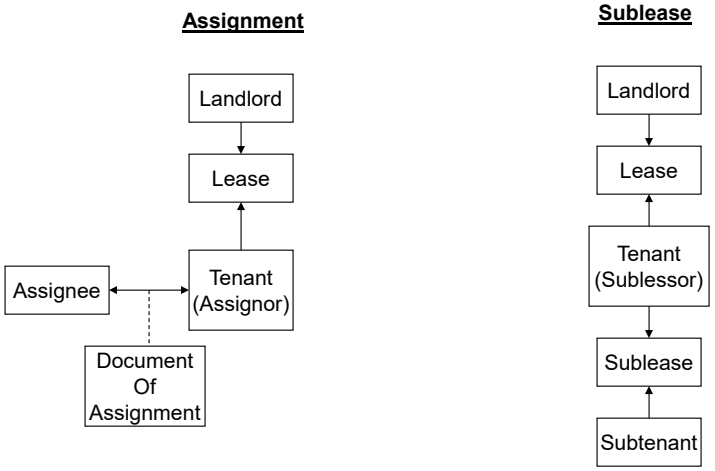
14

Assignment and Subleasing

- General rule is that a commercial lease is freely assignable/subleasable unless restricted by the terms of the lease.
- Difference between an assignment and sublease
  - "Less than the whole" lease (term or sq. ft.) – sublease
  - Privity of contract lacking in sublease
    - Landlord cannot evict subtenant
    - Subtenant does not have rights against Landlord

15

Assignment and Subleasing



16

Assignment and Subleasing

- When is consent required?
  - What documentation must tenant provide.
  - Mergers, sales, change in control.
  - Affiliates
- Sole discretion versus not unreasonably withheld, conditioned or delayed.
- Any cost to tenant for sublease or assignment?
- Who gets profits?
- Is tenant released from liability if lease is assigned?

17

Credit Enhancements (Guaranties, Security Deposits & Letters of Credit)

- Security Deposit
  - Prepaid amount (often 1 month's rent) held by landlord to secure tenant's performance.
  - May be at risk in a tenant bankruptcy.
- Letter of Credit
  - Promise by bank to pay to third party upon condition satisfied and proper presentment
  - Expensive (1% or more issuing fee) and typically 100% collateralized
  - May be better security for landlord in a tenant bankruptcy.
- Guaranty
  - Promise to pay another's obligation by third party
  - Limited vs. unlimited (amount or duration)
  - Joint vs. Several

18

RELOCATION

- Landlord wants to maximize flexibility.
- Tenant wants to minimize risk.
- Critical issue, particularly in retail/restaurant leases.
- Need sufficient advance notice.
- Minimize interruption to tenant's business.
- Landlord pays all costs associated with relocation.
- Parameters on size, location, cost and finishes of new space.
- If retail/restaurant space, consider requiring similar visibility, parking and access.
- Tenant right to terminate?

19

Execution

- Under Ohio law, landlord's signature is required to be notarized, in a lease with a term of three years or more (and also certain amendments).
- Best practice to always have both parties' signatures notarized.
- Pursuant to ORC 5301.251, a Memorandum of Lease ("MOL") may be recorded in lieu of the Lease. MOL must contain:
  - Names and addresses of Landlord and Tenant
  - Reference to the Lease with its date of execution
  - Description of the leased premises
  - Term of the Lease, including any renewal options
  - Date of commencement of the term or the manner of determining the commencement of the term
  - May contain other provisions

20

Memorandum of Lease

- Tenant wants to record MOL because it puts others on notice of Tenant's interest in the leased premises.
- Tenant wants to include any provisions that are particularly important to Tenant.
  - Purchase option, Right of first refusal, Exclusive uses, Reserved parking, Signage rights, Expansion option, etc.
- Landlords prefer not to have MOL recorded. It may be difficult to satisfy future tenants, buyers and Lender that prior tenant's rights have terminated.

21

Many Other Important Provisions to Consider

- Casualty and condemnation
- Environmental (particularly for warehouse/industrial leases)
- Rights of first refusal
- Expansion options
- Purchase options
- Landlord access (particularly for medical, financial and other sensitive uses)
- Parking
- Holdover
- Continuous Operations, "Go Dark" and Co-Tenancy (in shopping center leases)
- Permit contingencies
- Restrictions on changes to common areas
- Kickout provisions

22

When Leases Go Bad

Susan M. Argo, Esq.
March 9, 2016
Graydon Head & Ritchey LLP

23

Commercial Evictions

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Residential Evictions

24

Landlord v. Tenant

25

Right to Evict

- When Tenant Defaults
  - Rent
  - Other Provisions
- The Contract Matters

26

Default Provision

- What is a default?
- Damages
- Notice
- Other Provisions / Protections

27

Process

- Default Notice
- 3 Day Notice (O.R.C. 1923.04)
- Filing Complaint for Eviction (and Damages)
- Hearing
- Writ of Possession
- Eviction Date

28

Tenant's Possessions

- No right to take any of tenant's possessions- no "Landlord lien" in Ohio
- Bailee/Conversion
- Set-out by a sheriff is the safest solution
- Security Agreement
- Landlord Waiver

29

Claim for Damages

- Contract Damages
- Duty to Mitigate
- Attorneys' Fees
- Typical Litigation Track
- Guarantee
- Consider the Costs

30

Enforcing a Judgment

- Judgment/Debtor Exam
- Discovery
- Garnishment/Lien

31

Bankruptcy

- 11 U.S.C. § 362 Stays all proceedings – one exception is if the lease expired by its stated term prior to the petition date
- If a Landlord files Bankruptcy- If in a Chapter 11 watch for the landlord assuming and assigning the lease in the context of a 363 sale

32

Bankruptcy

- Tenant files Bankruptcy
  - Landlord entitled to post-petition payment of rent
  - "2010 Rule" for commercial property – Tenant must assume the lease within 120 days plus one 90 day extension. In order to assume must a) cure default and b) provide adequate assurance of future performance
  - For residential tenant has 60 days

33

Settlement

- Surrender Agreement
- Tenant Incentives
  - No eviction on credit record
- Landlord Incentives
  - Speed
  - Cost

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Questions?

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Thank You

Amanda J. Penick, Esq.
Aine M. Baldwin, Esq.
Richard Tranter, Esq.

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TAB
C

J. Michael Debbeler is a partner with the Cincinnati law firm of Graydon Head & Ritchey LLP where he serves on the firm's Executive Committee. Mr. Debbeler received his B.A. degree, cum laude, from the University of Kentucky and his J.D. degree from the University of Cincinnati College of Law, where he was a member of Order of the Barrister. Mr. Debbeler served as a Visiting Instructor in Law at the College of Law for the year following his graduation. Mr. Debbeler is admitted to practice in Ohio and Kentucky, all U.S. District Courts in Ohio, Kentucky, Indiana and Michigan, and in the Sixth, Seventh and Federal Circuit Courts of Appeal Mr. Debbeler represents lenders in all facets of real estate and asset-based liquidations and workouts. He also represents a wide array of clients with other real estate, banking, bankruptcy, debtor/creditor and commercial litigation issues. He has lectured to various groups on a variety of bankruptcy, real estate, and creditors' rights issues. He is a member of the Cincinnati, Ohio State, Kentucky and Northern Kentucky bar associations. He is past Chair of the Bankruptcy Committee of the Cincinnati Bar Association where he remains a member. He also serves as a member in the American Bankruptcy Law Forum, is currently serving on the Board of Advisors of the Midwest Regional Bankruptcy Seminar, is a member of the American Bankruptcy Institute, is a member of the Tri-State Association for Corporate Renewal, is a member of the Indiana Association for Corporate Renewal, is a Fellow of the Ohio State Bar Foundation, and is Vice-President and Board Chair of Parkinson's Support and Wellness, Inc.

CINCINNATI BAR ASSOCIATION

REAL PROPERTY LAW INSTITUTE

Real Property Case Law Update

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Simran A. Magowan, Esq.

GRAYDON HEAD & RITCHEY LLP

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1

Koprivec v. Rails-to-Trails, 2018-Ohio-465

- In Ohio, the first rule of deed construction is that when the parties' intentions are clear from the four corners of the deed, the Court will give effect to that intention. Further, with respect to adverse possession, the location of utilities on the adversely possessed property does not necessarily interfere with the adverse possessor's "exclusive" possession.

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2

Alford v. Collins-McGregor Operating Co., 2018-Ohio-8

- Under Ohio law pertaining to oil and gas leases, there is no implied covenant to explore further separate and apart from the implied covenant of reasonable development.

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3

Roberts v. Jones Lang LaSalle Ams., Inc., 2018-Ohio-1039

- An individual real estate broker was not entitled to receive a commission which was never received by his former employer, Jones Lang LaSalle Americas, Inc.

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4

Flemco, LLC v. 12307 St. Clair, Ltd., 2018-Ohio-588

- Under Ohio law, there is no authority for the proposition that the admission into evidence of the mechanics' lien affidavit is *per se* proof of the facts alleged in the affidavit. Additional evidence, such as receipts for labor and materials provided, is necessary to prove the existence of a valid, legally enforceable debt underlying the lien.

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5

Bayview Loan Servicing, LLC v. Vasko, 2018-Ohio-38

- Where two parties enter into a loan modification which does not involve additional funds or an increased interest rate, the "effective/priority date" of the modification of the mortgage lien relates back to the "effective/priority date" of the original mortgage lien, such that it will retain priority over an intervening second mortgage.

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6

Wal-Mart Realty Co. v. Tri-County Commons Assocs., LLC, 2017-Ohio-9280

- A valid sublease does not change the relationship between the lessor and the original lessee, and creates no relationship between the lessor and the sublessee. Just as a lessor cannot maintain an action against a sublessee for breach of contract, a sublessee cannot maintain an action against the lessor on the original lease.

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7

Bank of Am. v. Stevens, 2017-Ohio-9040

- Where a mortgage grants a lender an interest in property and "all easements" in existence or arising, the lender has standing in an action to determine whether there is an implied easement by prior use.

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8

Ohio N. Univ. v Charles Constr. Servs., Inc., **Ohio Supreme Court, 10/9/18, 2018-Ohio-4057**

- A subcontractors faulty workmanship was not fortuitous and not an "occurrence" under a CGL policy.

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9

Hilliard City Schs. Bd. Of Educ. v. Franklin Cty. Bd. Of Revision**, Ohio Supreme Court, 5/31/18, 2018-Ohio-2046**

- Conveyance statement filed seven years after quitclaim deed was executed prevails for determining value for BOR purposes over hearsay appraisal testimony about a related party transaction.

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10

Williams v. Brockway, Ohio Court of Appeals, 9/28/18, 2018-Ohio 3969

- An "as is" clause in a real estate contract relieves a seller of any duty to disclose latent defects. Realtor under dual agency agreement does not have apparent authority to bind a party to the contract.

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Mezher v. Schrand, Ohio Court of Appeals, 9/21/18, 2018-Ohio-3787

- Court found an issue of fact precluding summary judgment where emails between potential buyer and seller on terms of real estate purchase contract were not clear on whether the parties agree to be bound without a formal written contract.

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12

Carapellotti v. Breisch & Crowley, Ohio Court of Appeals, 9/19/18, 2018-Ohio-3977

- A written construction contract containing an arbitration clause was not signed by contractor and purchaser. Construction started and purchaser made three payments. The payments did not constitute an acceptance of all of the contractual terms so the arbitration provision was ineffective as it required arbitration in W.V. (ORC §4113.62(D)

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13

Dahmen v. Black, Ohio Court of Appeals, 9/4/18, 2018-Ohio-3538

- The use of property need only be inconsistent with the rights of the owner in order to show adversity or hostility as an element of an easement by prescription. No heated controversy or manifestation of ill will is needed.

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14

Holloway v. Bucher, Ohio Court of Appeals, 8/17/18, 2018-Ohio-3301

- An oral loan agreement is unenforceable under the statute of frauds (ORC §1335.05) if it cannot be completed within one year. The doctrine of partial performance does not apply to save the oral agreement.

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15

Kraynak v. Whitacre, Ohio Court of Appeals, 7/3/18, 2018-Ohio-2784

- The term "paying quantities" in an oil and gas lease means "quantities of oil or gas sufficient to yield a profit, even small, to the lessees over operating expenses, even though drilling costs, or equipping costs, are not recovered, and even though the undertaking as a whole may thus result in a loss."

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16

Bavis v. Deimling, Ohio Court of Appeals, 6/11/18, 2018-Ohio-2259

- A portion of an easement may be terminated by necessity for which it was created if the access needed is later provided. Future development of property can change the character of property such that an easement would be implausible.

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17

E.G. Licata, LLC v. E.G.L., Inc., Ohio Court of Appeals, 5/25/18, 2018-Ohio-2032

- A "capital improvement" provision in a lease is different than a duty to make repairs. A promise to make repairs, additions or alterations does not include a promise to make capital improvements.

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18

Klossner v. Burr, Ohio Court of Appeals, 4/30/18, 2018-Ohio-1663

- Court granted specific performance of a purchase contract based on emails between the parties which were used to prove intent. A condition precedent can be implicitly waived by conduct.

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19

Ellington v. Becraft, Kentucky Supreme Court, 12/14/17, 534 S.W.3d 785

- Plaintiff was entitled to a prescriptive easement for ingress and egress by prior use in a manner that was hostile, open, notorious, exclusive and continuous for 15 years. Abandonment of such an easement can only be established by 15 years of non-use.

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Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC, Kentucky Supreme Court, 12/14/17, 2017 Ky. LEXIS 570

- Owner of residential condominium tower was liable in unjust enrichment for the material and work provided by subcontractors since the owner was aware of and accepted the work. A construction manager was not liable for attorneys fees for delay in payment to the subcontractors as the contract contained a "pay when paid" clause.

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21

City of Wilmore v. Snowden, Court of Appeals of Kentucky, 9/7/18, 2018 Ky. App. Unpub. LEXIS 663

- A conservation easement may be established even without a definite statement as to its dimensions or exact location – a description that allows one to identify the land upon which the easement is located is sufficient.

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22

Prows v. Bame, Court of Appeals of Kentucky, 6/15/18, 2018 Ky. App. Unpub. LEXIS 424

- Adverse possession requires possession must be hostile under a claim of right, actual, open, notorious, exclusive and continuous for 15 years.

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Berke v. Brown Suburban Condo. Homes Council of Co-Owners, Inc., Court of Appeals of Kentucky, 6/8/18, 2018 Ky. App. Unpub. LEXIS 406

- Court upheld strict guidelines in Master Deed which controlled how it could be amended (size of dog!).

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***Jad Farhat Irrevocable GSST Trust #1 v. TTM Grp., LLC*, Court of Appeals of Kentucky, 4/27/18, 2018 Ky. App. Unpub. LEXIS 245**

- Joint tenancy, tenancy in common, tenancy by the entirety, joint property, common property, or part ownership do not, of itself, establish a partnership.

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***Abbott, Inc. v. Guirguis*, Court of Appeals of Kentucky, 3/23/18, 2018 Ky. App. LEXIS 106**

- Kentucky law prefers affording railroads with easements rather than ownership interests. This may be a conclusive presumption in favor of a right-of-way easement if there are no deeds of original conveyance.

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***Foursome Props., LLC v Rite Aid of Ky., Inc.*, Kentucky Court of Appeals, 3/23/18, 2018 Ky. App. LEXIS 105**

- A lease's radius restriction provisions are limited to the party subject to the exclusivity obligation.

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***Scanlon v. Scanlon*, Kentucky Court of Appeals, 2/2/18, 2018 Ky. App. LEXIS 71**

- To become a fixture, there must be:
  (1) annexation to the realty, actual or constructive,
  (2) adoption or application to the use or purpose that the part of the realty to which it is connected or appropriated,
  (3) intention of the parties to make the article a permanent accession to the freehold.

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REAL PROPERTY LAW INSTITUTE

December 14, 2018

REAL PROPERTY CASE LAW UPDATE

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Lexis Nexis Search Terms and Results 10/1/2017 – 9/30/2018

SEARCH TERMS	USSC CASES	OH CASES	OH PUBLISHED	KY CASES	KY PUBLISHED
real estate or real property	8	1,136	430	121	18
title /2 (company OR agent OR insurer)	0	85	21	4	1
escrow agent	1	12	7	0	0
prescriptive	0	9	9	6	2
easement	0	227	58	22	4
eminent domain	1	15	15	5	1
equitable subrogation	0	1	1	0	0
negligent misrepresentation	0	20	16	5	1
foreclosure	4	824	198	35	7
subprime OR sub-prime	0	1	1	0	0
mortgage	33	920	227	69	7
broker	2	51	30	5	1
realtor	0	34	31	13	3
developer	2	37	37	13	4
lease	5	293	261	58	10
deed	4	855	186	71	9
quiet title	2	46	42	10	2
specific performance	2	56	34	5	0
environmental /75 real estate	0	5	2	1	1
mineral right	0	21	18	0	0
construction contract	0	67	65	5	3
Home association OR condo association	0	26	19	0	0
mechanic lien	0	20	15	0	0

Koprivec v. Rails-to-Trails
Ohio Supreme Court
January 24, 2018
2018-Ohio-465

Facts & Procedural Posture: In 2009, Rails-to-Trails purchased an old railroad corridor with the intention of converting the land into a public multipurpose trail. Three owners of adjacent properties, the Koprivecs, the Bilinoviches, and the Koontzes (collectively, the "Landowners") challenged Rails-to-Trails' ownership of parts of the corridor.

The Bilinoviches and the Koontzes trace ownership of the sections of the corridor next to their properties back to an 1882 conveyance to the Akron Branch Rail Road Company. The deed granted the property to the railroad company "and to its assigns forever." In the habendum clause, the deed provided that the grant was "forever for the purpose of constructing and using thereon a Rail Road." The Bilinoviches and Koontzes construe the deed as creating a fee simple determinable, and argue that when the land stopped being used as a railroad, the sections adjacent to the properties they now own reverted back to them as the successors-in-interest of the original grantors.

Additionally, the Landowners assert that they adversely possessed their portions of the rail corridor. While there is some question about when the 21-year period began to run – the Landowners maintain that the period commenced in 1987 when, they claim, the corridor's then owner, Consolidated Rail Corporation ("Conrail"), completed removal of its rails and wooden ties from the corridor. Rails-to-Trails countered that the removal of the rails and ties from the corridor was not completed until 1989, and that the Landowners have not had exclusive possession of their portions of the corridor (as evidenced by license agreements and other activities in the corridor).

The trial court found that under another Ohio Supreme Court case, *In re Petition of Copps Chapel Methodist Episcopal Church*, 120 Ohio St. 309, 166 N.E. 218 (1929), the 1882 deed did not create a determinable fee because it did not contain reversionary language. Stated differently, because the deed did not explicitly say that the property would revert to the grantors when it ceased being used as a railroad, the deed created a fee simple absolute.

Additionally, the trial court found that the landowners could not meet the exclusivity element for their adverse possession claim because their possession had been interrupted by (i) the license agreements with the telecommunications companies, (ii) the activities of the telecommunications companies on the land, and (iii) the inspection of the corridor by a railroad-company employee.

The Court of Appeals for the Ninth Appellate District affirmed in part and reversed in part. The court affirmed the trial court's judgment with respect to the deed and the trial court's determination that the deed created a fee simple absolute. The Court of Appeals, however, reversed the trial court's summary judgment in favor of Rails-to-Trails on the adverse possession claims, finding that the license agreements were insufficient as a matter of law to defeat the exclusivity elements of the Landowners' adverse possession claims, and there were genuine issues of material fact about the activities of the railroad-company employee.

The Ohio Supreme Court accepted Rails-to-Trails' discretionary appeal challenging the reversal of the trial court's summary judgment on the adverse-possession issues. The Court also accepted jurisdiction over the cross-appeal of the Bilinoviches and the Koontzes challenging the Court of Appeals' decision on the deed issue.

Analysis: In analyzing the deed issue, the Ohio Supreme Court held that while *Copps Chapel* has never been explicitly overturned, its underpinnings, subsequent case law, its diminishment by Ohio courts, and its unnecessariness in determining the intent of the parties to a deed make it unsuitable precedent on which to decide the present case.

The Ohio Supreme Court further observed that the first rule of deed construction in Ohio is that when the parties' intentions are clear from the four corners of the deed, the Court will give effect to that intention. The Court determined that the 1882 deed does not contain any language that limits the conveyance or words that suggest termination, and that the habendum clause, "for the purpose of constructing and using thereon a Rail Road," merely describes the reason for the conveyance. Therefore, within the four corners of the deed, the parties made clear their intention to create a fee simple absolute.

With respect to the adverse possession claims, the Court noted that a claim of exclusive possession is not defeated by one who uses the land with the permission of the adverse-possession claimant and without "asserting, by word or act, any right of ownership or possession."

The Ohio Supreme Court determined that there were genuine issues of material fact as to whether the activities of the telecommunication companies interfered with the Bilinoviches' exclusive possession. Further, the Court held that it could not determine as a matter of law that the telecommunications companies performed any acts sufficient to interfere with the exclusivity of the Koontzes' and the Koprivecs' possession.

However, in regard to the Bilinovich section of the corridor, it was undisputed that an employee named Solomon Jackson engaged in extensive discussions with Bilinovich, on behalf of the railroad company, about a sale or lease of the corridor to Bilinovich. Such actions, the Court determined, were sufficient to defeat the Bilinoviches' adverse possession claim.

In summary, the Ohio Supreme Court concluded that the 1882 deed granted an interest in fee simple to the grantee, and that there was no reversion of the property to the successors-in-interest of the grantors as argued by the Bilinoviches and Koontzes. Additionally, the Court held that the trial court correctly entered summary judgment in favor of Rails-to-Trails on the Bilinoviches' claim, but not on the claims of the Koontzes or Koprivecs.

Alford v. Collins-McGregor Operating Co.
Ohio Supreme Court
January 3, 2018
2018-Ohio-8

Facts & Procedural Posture: Appellants, Linda Griffith Alford, George Alford Jr., Bershelle Alford Giambattista, Joseph Alford, Judith Hanlon Farnsworth, Donna R. Hanlon, and James C. Eutzler (collectively, "Landowners"), hold interests in approximately 74 acres of land in Washington County, Ohio, not far from the Ohio River. The land is subject to an oil and gas lease entered into on September 16, 1980 between the owners of the property at that time and Collins-McGregor Operating Company and Winston Oil Company (collectively, "Collins-McGregor"). The agreement provides that the "sole and only purpose [of the lease] is to permit mining and operating for oil and gas and laying pipe lines, and building tanks, power stations, and structures thereon, to produce, save and take care of said products."

In exchange for permission to mine the land, Collins-McGregor committed to make royalty payments based on the amount of gas produced from the land and to deliver a portion of the oil produced from the land to the lessors.

Additionally, the lease provides that it "shall remain in force for a term of one (1) year from [the effective] date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee." Notably, the lease is silent as to certain aspects of drilling and production, and the lease fails to disclaim the application of any implied covenants.
A well was drilled on the land in 1981 and has produced oil and gas in paying quantities since then from a formation called the Gordan Sand. To date there has not been any production from the land at any depths below the Gordan Sand. The Landowners claim that exploration and production of oil and gas have been occurring near their property from below the Gordan Sand – specifically, from the Marcellus and Utica formations – but that Collins-McGregor has failed to explore whether production can be obtained from those formations, presumably due to a lack of necessary equipment and financial resources.

On November 20, 2015, the Landowners filed an amended complaint against Collins-McGregor alleging that it has improperly failed to explore or drill for oil at depths below the Gordan Sand. Specifically, they sought judgment that the portion of the lease covering depths below the Gordan Sand has terminated because it has either expired or been abandoned and that Collins-McGregor has breached numerous implied covenants. Further, the Landowners sought judgment quieting title in their favor as to the depths below the Gordan Sand.

The Landowners claimed that Collins-McGregor breached the implied covenant of reasonable development and the implied covenant to explore further, and sought partial forfeiture of Collins-McGregor's rights under the lease such that all rights to explore for, develop, and exploit resources from depths below the Gordan Sand revert to the Landowners ("horizontal forfeiture").

Collins-McGregor moved to dismiss under Rule 12(B)(6) of the Ohio Rules of Civil Procedure, arguing that Ohio law does not recognize the remedy of horizontal forfeiture. The trial court agreed with Collins-McGregor and dismissed the case, holding that under the plain terms of the

lease, the still-productive well drilled in 1981 was sufficient to hold the lease across all acres and at all depths. The Fourth District Court of Appeals affirmed, holding that Ohio law does not recognize partial horizontal forfeiture of oil and gas rights as an available form of relief.

The Landowners appealed, and the Supreme Court of Ohio accepted Landowners' discretionary appeal.

Analysis: The Ohio Supreme Court held that under Ohio law concerning oil and gas leases, there is no implied covenant to explore further separate and apart from the implied covenant of reasonable development. The Court noted that the purpose of the implied covenant of reasonable development is to protect the lessor's interest in the lease (i.e. to obtain production and profits once the right to drill has been granted to the lessee).

Further, the implied covenant of reasonable development is needed because oil and gas leases typically provide that the lessor's compensation is a royalty payment based on the production of oil from the land. The Court observed that lessees face various risks in any oil and gas lease, including substantial upfront investments with an uncertain potential for returns. For that reason, the covenant imposes on the lessee only the obligation to act as a reasonably prudent operator would as it develops the land under the lease.

Here, the Landowners' interests in exploration of deep formations below the Gordan Sand are sufficiently protected by the implied covenant of reasonable development, and therefore, the Supreme Court of Ohio declined to recognize a separate covenant to explore further.

Roberts v. Jones Lang Lasalle Ams., Inc.
Ohio Court of Appeals
March 21, 2018
2018-Ohio-1039

Facts & Procedural Posture: In September 1996, Craig Roberts ("Roberts") was a real estate broker for CB Commercial Real Estate Group, Inc. ("CB Commercial"). During that time, he entered into an exclusive agency agreement with tenant Andersen Consulting Solutions Center, LLP ("Andersen"), which provided that Roberts would locate office space for Andersen to lease.

The agreement between Roberts and Andersen began on September 19, 1996, and continued on a month-to-month basis until a lease agreement was executed or closed. Shortly thereafter, Roberts left CB Commercial and joined Jones Lang LaSalle Americas, Inc. ("JLL"), taking the Andersen contract with him.

CB Commercial and JLL agreed that they would split the Andersen commission, and Roberts and JLL agreed that they would split the net commissions that JLL received.

Roberts located office space for Andersen in the Atrium One building, and in anticipation of the lease closing, JLL and Atrium One entered into a commission agreement, effective from July 18,

1997 to December 31, 1997. The commission agreement provided that JLL, as exclusive agent for Andersen, would be paid a commission if the lease were renewed.

Roberts' employment with JLL ended before the Andersen lease closed. Roberts and JLL entered into a severance agreement (the "Agreement"), which provided that JLL would pay Roberts his commission on transactions that closed after his employment ended, provided that Roberts had "actively developed and consummated the transaction." Further, the Agreement defined the term "closed" as "(1) tenant and landlord have entered into a binding lease contract …; and (2) the invoice for the Commission … has been sent out by Company."

Importantly, the Agreement contained language providing that no commissions were due and payable to Roberts if the commissions had not been received by JLL. Moreover, the Agreement contained the following clause:

> Roberts agrees that JLL may waive, reduce, adjust, compromise, or settle with third parties any commission in which Roberts is or claims to be entitled to share, **with the exception of commissions due to Roberts per the terms of the Agreement between JLL and CB Commercial Real Estate, a copy of which is attached hereto as part of Attachment One.**

The portion in bold and underlined was a handwritten addition, initialed by Roberts and a representative of JLL.

On August 7, 1997, the Andersen lease for space on the 15th and 16th floors of Atrium One, with a term of ten years, closed. The lease included two renewal options for five years each. To qualify as a "renewal," the lease had to be upon the same terms and conditions as the initial lease, with the exception of the rent. JLL paid Roberts his commission from the Andersen lease.

Between January 31, 1998 and December 2012, the Andersen lease underwent numerous amendments and modifications, including changes to the tenant and landlord, and adjustments to the leased space and renewal options. When the Andersen lease was amended on January 31, 1998, the amendment included a broker's clause which stated that the landlord would pay JLL a commission if the tenant subsequently renewed or leased additional space, "all to be provided in a separate written agreement between Landlord and JLL." Notably, JLL never entered into a separate written agreement with the landlord, Property Ohio OBJLW, who had purchased the building from Atrium One.

In 2015, Roberts filed a breach of contract action against JLL, claiming that the 2007 and 2012 leases were renewals as contemplated in the severance agreement, and that JLL breached the agreement by not paying him commissions on the renewals. Both parties moved for summary judgment, which were denied, and the trial court held a bench trial on September 30, 2016.

The evidence at trial established that Accenture (formerly Andersen) (i) renewed the lease in 2007 and 2012, (ii) neither Roberts nor JLL did any work on these renewals, (iii) Studley, Inc. and Cassidy Turley were the brokers who had the sole claim for commissions, (iv) JLL was not

paid any commissions for the renewals, (v) JLL never sought or received any commissions, and (vi) JLL never paid Roberts any commissions on the leases.

The trial court determined that under the terms of the contract, JLL had the sole discretion to determine whether to collect commissions. Further, the trial court held that if no commission was collected, Roberts was not entitled to a commission. The trial court entered judgment for JLL, and Roberts timely appealed.

Analysis: The Court of Appeals for the First Appellate District affirmed the judgment of the Court of Common Pleas, holding that Roberts was not entitled to receive commissions that JLL never collected.

The Court noted that "[u]nder the plain language of the severance agreement, Roberts was entitled to a post-termination commission if a transaction closed, and he had actively developed and consummated the transaction." However, the transaction did not close until JLL sent an invoice for the commission.

While JLL was prohibited from waiving, reducing, adjusting, compromising, or settling any Accenture commissions, it did retain the "exclusive right to determine what steps or procedures, if any, should be undertaken to collect or enforce any claim for commission." Since no commission was collected, Roberts was not entitled to a commission.

Flemco, LLC v. 12307 St. Clair, Ltd.
Ohio Court of Appeals
February 15, 2018
2018-Ohio-588

Facts & Procedural Posture: Appellant 12307 St. Clair Ltd. a.k.a. Express Gas and Food ("St. Clair") appealed the trial court's judgment that adopted and approved the magistrate's decision granting summary judgment to Appellees Flemco, LLC ("Flemco") and Carter Jones Lumber Company ("Carter Lumber") on their mechanics' liens.

In August 2011, St. Clair and Flemco entered into a construction contract whereby Flemco agreed to construct an addition to St. Clair's existing commercial property in Cleveland. Under the contract, Flemco was to construct a foundation, install a concrete slab and concrete blocks, install framing, insulation, drywall, roof trusses, a roof, a steel door, gutters, and downspouts, provide framing for two new restrooms in the existing building, relocate existing electric and gas services, and remove and haul away all debris from the site upon completion.

The work was to be performed in conformance with drawings and plans provided by architect Kevin Moran. Additionally, the agreed contract price was $43,000, and St. Clair made an advance payment of $12,000 to Flemco.

Flemco began work at the site in December 2011. Shortly thereafter, St. Clair terminated the contract, asserting that Flemco had deviated from the architect's plans, thereby breaching the contract. St. Clair also claimed that it was forced to complete the project with other contractors.

In June 2012, Flemco filed an affidavit for mechanics' lien with the Cuyahoga County recorder, asserting that St. Clair owed it $26,750 for labor and materials furnished from December 18, 2011 through April 12, 2012 pursuant to the contract.

In May 2015, Flemco filed a complaint against St. Clair for foreclosure of its mechanics' lien. It also asserted claims for breach of contract and unjust enrichment. St. Clair answered the complaint, and asserted counterclaims for breach of contract and unjust enrichment.

In February 2016, the trial court dismissed Flemco's complaint without prejudice for Flemco's failure to prosecute its claims. The Court subsequently granted Flemco's motion for reconsideration and reinstated the case. The Court ordered Flemco to file an amended complaint since its original complaint failed to name all lien holders as defendants.

Thereafter, in March 2016, Flemco filed an amended complaint for declaratory judgment and foreclosure of its lien. Then, in July 2016, Flemco filed a motion for summary judgment for foreclosure of its lien against St. Clair. In August, St. Clair filed a motion to dismiss Flemco's amended complaint, noting that Flemco had failed to name Carter Lumber as a defendant, even though Carter Lumber was named on the preliminary judicial report as a lien holder. Then, the Court subsequently granted Flemco's motion to file a second amended complaint.

Eventually, the magistrate entered judgment for Flemco and Carter Lumber, dismissed St. Clair's counterclaims, and ordered a sheriff's sale of St. Clair's property. St. Clair filed objections to the magistrate's decision, and the trial court then issued a judgment overruling St. Clair's objections and adopting the magistrate's decision granting summary judgment to Flemco and Carter Lumber. St. Clair appealed.

Analysis: On appeal, St. Clair presented three assignments of error. Notably, St. Clair argued that the trial court erred in adopting the magistrate's decision that granted summary judgment to Flemco and Carter Lumber because there were genuine issues of material fact regarding the validity of both liens.

Addressing the first assignment of error, the Appellate Court noted that "[t]he purpose of the mechanics' lien law is to provide a contractor or materialmen with a means of obtaining a lien on real estate to secure a claim for labor performed or material supplied." Additionally, the Court observed, "[c]ompliance with the statutory requirements for filing a lien is a prerequisite to obtaining a valid lien but the existence of a valid, legally enforceable claim is fundamental to the existence of the lien."

Under Ohio law, "there is no authority for the proposition that the admission into evidence of the mechanics' lien affidavit is per se proof of the facts alleged in the affidavit." Here, St. Clair submitted a number of interrogatories to Flemco requesting that Flemco describe the labor and materials it provided with respect to each contract element, and provide receipts documenting the same. The record makes clear that Flemco did not provide labor or materials for a large part of the improvement specified in the contract. Further, Flemco's failure to otherwise prove damages demonstrated a genuine issue of material fact regarding whether Flemco was entitled to recover the full value of its mechanics' lien. Accordingly, the trial court erred in adopting the magistrate's decision that awarded summary judgment to Flemco for the full value of its lien.

Similarly, Carter Lumber offered no evidence proving the existence of a valid, legally enforceable debt underlying the lien. Therefore, there was a genuine issue of material fact regarding the validity of Carter Lumber's lien as well.

Bayview Loan Servicing, LLC v. Vasko
Ohio Court of Appeals
January 5, 2018
2018-Ohio-38

Facts & Procedural Posture: On February 25, 2008, Dane Vasko executed a promissory note ("Note") in the amount of $157,391.00 in favor of Realty Mortgage Corporation ("Realty") to finance the purchase of property in Millbury, Ohio. The loan's interest rate was 5.875% and the maturity date was March 1, 2028. The Note was secured with a mortgage signed by Vasko which was recorded with the Wood County Recorder on March 4, 2008. Further, an undated allonge, contained the indorsement "Pay to the Order of" BAC Home Loans Servicing, L.P., fka, Countrywide Home Loans Servicing, L.P. ("BAC") signed by Realty's vice president, was attached to the Note.

A complaint in foreclosure was filed by BAC against Vasko and others on June 14, 2010, and was subsequently dismissed without prejudice in May 2011. Then, on May 14, 2012, Bank of America, N.A., Successor by Merger to BAC ("BOA") filed a complaint in foreclosure against Vasko and others in the Wood County Court of Common Pleas.

In July 2013, summary judgment was granted to BOA. A joint motion to vacate judgment was filed in December 2014, and an order was entered by the Court of Common Pleas dismissing the complaint without prejudice.

Vasko executed a Revolving Promissory Note ("Revolving Note") in the amount of $180,000.00 in favor of Ballenger & Moore, Co., L.P.A. ("Appellant") in August 2012. An Open-End Mortgage on the property was given by Vasko to Appellant to secure the Revolving Note, and on October 19, 2012, this mortgage was recorded.

Then, on September 1, 2014, Vasko and BOA entered into a Loan Modification Agreement (the "Modification") which reference the Note and the mortgage previously recorded on March 4,

2008. The principal amount of the Modification was $141,923.11, the interest rate was 4.625%, the new maturity date was August 1, 2044, and the monthly mortgage payments were lowered from $995.63 to $815.92. The Modification was recorded on October 2, 2014. In April 2016, BOA filed a complaint for money judgment and foreclosure against Vasko, Appellant, and others in the Court of Common Pleas, and Appellant filed a counterclaim against BOA seeking a declaration that Appellant had the first valid lien on the property.

On March 22, 2017, the Court granted summary judgment to BOA and found that the recording of the Modification did not affect the priority of the original mortgage. BOA filed a motion to substitute party plaintiff requesting that Bayview Loan Servicing, LLC ("Bayview") be substituted for BOA on the basis that the mortgage loan was transferred to Bayview, and Bayview was now the holder of the Note and the mortgage. The Court of Common Pleas granted the motion on April 14, 2017.

On April 27, 2017, the Court of Common Pleas issued a Final Judgment Entry for Foreclosure, and in so doing made the following findings: (i) Vasko was in default, (ii) the United State of America may have a right, title, interest or claim upon the property, (iii) the Treasurer of Wood County, Ohio was due taxes and assessments on the property, (iv) there was due to Bayview on the Note $136,341.62 plus interest, and there may be due to Bayview any monies advanced for real estate taxes, insurance and property protection, (v) to secure payment on the note, Vasko execute a mortgage, recorded on March 4, 2008, (vi) there was no just reason for delay, (vii) and, the property shall be foreclosed and sold and the proceeds distributed (a) first to the Wood County Clerk of Courts, (b) then the Treasurer of Wood County, (c) then Bayview, and (d) any balance to the clerk pending further court order.

Thereafter, Appellant appealed the judgment of the Wood County Court of Common Pleas.

Analysis: The Appellate Court affirmed the trial court's judgment that the "effective/priority date" of a modification of a mortgage lien pursuant to Ohio Revised Code Section 5301.231 related back to the "effective/priority date" of the original mortgage lien pursuant to Ohio Revised Code Section 5301.23, such that it retained priority over a second mortgage, because the modification did not involve additional funds or a changed interest rate.

In reviewing Appellant's appeal, the Court cited case law and treatise pertaining to mortgages and lien priorities. Specifically, in *Community Action Commt. of Pike Cty., Inc. v. Maynard*, 4th Dist. Pike No. 02CA695, 2003-Ohio-4321, the court rejected the argument that a modification invalidated the original mortgage, emphasizing that the modification of the promissory note in that case did not provide additional funds or raise the interest rate established in the original note.

Further, the Court in *Community Action Commt. of Pike Cty., Inc. v. Maynard* cited an Ohio real property law treatise which provided "[a]n extension that merely alters the time period for the payment of the obligation generally has no effect on the priority position of the extended mortgage as against intervening junior encumbrances."

Therefore, the Appellate Court held that the recording of the Modification did not affect the priority of the original mortgage, and Bayview's lien retained priority over Appellant's lien.

Wal-Mart Realty Co. v. Tri-County Commons Assocs., LLC
Ohio Court of Appeals
December 29, 2017
2017-Ohio-9280

Facts & Procedural Posture: Wal-Mart Realty Co. ("Wal-Mart") filed a complaint for breach of contract seeking reimbursement for repairs to and/or replacement of 28 vandalized rooftop HVAC units on commercial property it had leased from Tri-County Commons Associates, Inc. ("TCCA").

The property was occupied at the time by 2NDS in Building Materials, Inc. d/b/a Home Emporium ("2NDS"), which had subleased the property from Wal-Mart. The trial court dismissed all of Wal-Mart's claims against TCCA for failure to state a claim upon which relief could be granted.

In the sublease between Wal-Mart, as sublessor, and 2NDS, as sublessee, TCCA was referred to as the "Prime Landlord." Additionally, the sublease contained Section 11.2 which provided that it was the Prime Landlord's "responsibility at all times to maintain and keep in good repair the roof and all structural portions of the building, the exterior of the building, to make such interior repairs and replacements that may be necessary as a result of damage or destruction by fire, the elements, or casualty and for HVAC unit replacement."

The trial court found this provision to be unenforceable, stating "[t]wo parties simply cannot bind a 3rd party to responsibilities for which the 3rd party does not expressly agree." The trial court also relied upon Section 11.1 of the sublease, which required that 2NDS maintain and replace the component parts of the HVAC units, in granting summary judgment in favor of Wal-Mart. The court determined that 2NDS was in breach of the sublease for failing to replace the vandalized HVAC units, and ordered 2NDS to reimburse Wal-Mart for the repair and replacement costs of the HVAC units, plus prejudgment and post-judgment interest.

Thereafter, 2NDS appealed, arguing that under the plain language of the sublease, it was not responsible for replacing the HVAC system.

Analysis: On appeal, the First Appellate District agreed with the Court of Common Pleas that Section 11.2 of the sublease, which contemplates that TCCA would be responsible for repair or replacement of the HVAC system in the event of damage or destruction "by fire, or the elements or casualty" was unenforceable. A valid sublease does not change the relationship between the lessor and the original lessee, and creates no relationship between the lessor and the sublessee. Just as a lessor cannot maintain an action against a sublessee for breach of contract, a sublessee cannot maintain an action against the lessor on the original lease. Therefore, the trial court correctly held that Section 11.2 is severable from the rest of the contract.

The Court of Appeals further held that with Section 11.2 severed, the remainder of the contract is ambiguous as to which party would be responsible for the replacement of the HVAC units in the event of vandalism. While the trial court relied upon Section 11.1 in imputing replacement obligations onto 2NDS, the language does not refer to total replacement of the units but only

repair and replacement of component parts. Additionally, the parties clearly intended for casualty losses and replacement of the units as a whole to be treated separately from maintenance because they discussed it in a separate section of the contract. The Appellate Court determined that the contract contains no indication of the parties' intentions as to which party would be responsible for casualty loss to the HVAC units if TCCA was not responsible.

Accordingly, Appellate Court held that the trial court erred in granting Wal-Mart's motion for summary judgment, and remanded the case to the trial court for further proceedings.

Bank of Am. v. Stevens
Ohio Court of Appeals
November 27, 2017
2017-Ohio-9040

Facts & Procedural Posture: In 2005, Gerald D. Stevens ("Dean") granted a mortgage in his 2.0467-acre property to Countrywide Home Loans, which subsequently assigned it to Bank of America ("BOA"). The terms of the mortgage provided that Dean Stevens "does hereby mortgage, grant and convey" to the mortgagee his 2.0467-acre Property "together with … all easements … now or hereafter a part of the property."

In 2014, BOA filed a complaint seeking a judgment declaring that Dean's 2.0467-acre Property includes an easement by implication by prior use and an easement by necessity over the driveway on Gerald A. Stevens's ("Gerald") property. BOA alleged that Dean's 2.0467-acre Property is landlocked and that access to the Property prior to the severance was over land owned by Gerald Stevens. BOA further alleged that the declaratory judgment relief was necessary so that it could complete a foreclosure action then pending.

The record indicates that Gerald Stevens owned 34 acres along Goose Creek Road in Hocking County, Ohio. Gerald uses a driveway on his property as access to Goose Creek Road. On July 10, 1999, Gerald severed a 2.0467-acre rectangular Property from his 34-acre tract and conveyed it to his son, Dean Stevens. The deed conveyed the Property and "all privileges and appurtenances belonging thereto," but did not include a specific easement to use the driveway across Gerald's land.

Dean uses the driveway on Gerald's property for access to Goose Creek Road. At the time of the severance and conveyance, the 2.0467-acre parcel was bordered on the east, south, and west sides by Gerald Stevens's remaining 32 acres. The north side of the Property was bordered by land owned by Harry and Stella Howard, whose property had frontage on Goose Creek Road. In July 1999, at the time of severance, Dean's 2.0467-acre Property had no frontage on Goose Creek Road or access to any other public road.

In 2000, Dean Stevens acquired the Howard property, which has frontage to Goose Creek Road, and borders the north boundary of his Property. Dean placed a manufactured home on the Property in 2001.

During the trial before the Court of Common Pleas, the Stevenses' attorney orally sought dismissal on the ground that BOA lacked standing. BOA's counsel responded that the motion to dismiss was untimely, and that it had standing by virtue of the mortgage interest, which included all easements.

Also during the trial, Gerald Franklin Hinkle II, a real estate appraiser, testified that he inspected the 2.0467-acre Property and surrounding land prior to preparing a written report. Hinkle's report gave an appraised value of the Property with the easement and without it. Without an easement the appraised property value declined by approximately 45%.

Further, Gerald Stevens testified that he built the existing driveway approximately 50 years ago and it has been in continuous use during the 50 years he has owned the property. Gerald also testified that his son Dean uses the driveway to access the 2.0467-acre Property and that Dean's guests also use the driveway for access. Moreover, Gerald testified that he does not want Dean to stop using the driveway.

With respect to the Stevenses' standing argument, the trial court found that BOA did have standing because it had a personal stake in the matter since it held a mortgage on the Property, and its mortgage interest would be substantially impaired if there was no easement. Moreover, the trial court found that BOA had established an implied easement by prior use by clear and convincing evidence. Alternatively, the trial court found that BOA had established an implied easement by necessity and an easement by license coupled with an interest. Thereafter, the Stevenses appealed.

Analysis: The Court of Appeals for the Fourth Appellate District affirmed the trial court's judgment. On appeal, the Court first addressed the Stevenses' standing argument. The Stevenses argued that since BOA's mortgage interest is not possessory, the bank does not have standing to bring a declaratory judgment action to determine the existence and scope of the easement Dean granted to BOA.

The Court of Appeals reviewed the underlying mortgage, and determined that as the mortgagee, BOA has an interest in the Property and "all easements" in existence when Dean granted the mortgage and arising thereafter. Contrary to the Stevenses' contention, the mortgage gives BOA the right to step in and protect and preserve the Property, which includes easements, when abandoned by the borrower. The trial court correctly found that BOA had standing and properly denied the motion to dismiss on substantive grounds.

Additionally, the Stevenses challenged the trial court's finding that BOA established an implied easement by prior use and necessity by the requisite clear and convincing evidence. Here, BOA presented clear and convincing evidence that when Gerald severed the Property and conveyed it to Dean, the new tract was landlocked. Therefore, Dean could only access the Property by crossing property owned by others, and to avoid trespassing, Gerald granted him an authorized use of the driveway. The record contains competent and credible evidence that an easement was and is reasonably necessary to the beneficial enjoyment of the Property.

Ohio N. Univ. v. Charles Constr. Servs., Inc.
Ohio Supreme Court
October 9, 2018
2018-Ohio-4057

Facts & Procedural Posture: The construction industry has long relied upon Commercial General Liability ("CGL") policies to protect against personal injury or property damage losses, including those flowing from construction defects. Large premiums are paid every year to the insurance industry to attempt to insure against risk.

In 2008, Plaintiff-Ohio Northern University ("ONU") contracted with Co-Defendant-Charles Construction Services, Inc. ("Charles", the general contractor), to build The University Inn and Conference Center, a new luxury hotel and conference center on ONU's campus. Charles promised to perform all the work itself or through subcontractors. The contract required Charles to maintain a CGL policy that included a products-completed operations-hazard ("PCOH") clause. The project's estimated cost was $8 million. Charles obtained a CGL policy from Co-Defendant, Cincinnati Insurance Company ("CIC") that included a PCOH clause and terms specifically related to work performed by subcontractors. The general liability maximum payout under the CGL policy was $2 million. The separate maximum payout for the PCOH clause was also $2 million. Charles paid an additional premium for the PCOH coverage.

In 2011, after the project was completed, ONU discovered extensive water damage to the inn from hidden leaks that it believed were caused by the defective work of Charles and its subcontractors. In the course of repairing the water damage, ONU discovered other serious structural defects and estimated the repair costs to be approximately $6 million.

In 2012, ONU sued Charles for breach of contract and other claims related to the inn's damage. Charles answered and filed third-party complaints against several of its subcontractors. Charles submitted to CIC a CGL-policy claim and asked CIC to defend Charles in court and indemnify it against any damages. CIC intervened in order to pursue a declaratory judgment against Charles and explained that it would defend Charles while reserving its right to argue that the CGL policy did not cover ONU's claims.

In a separate case decided in 2012, the Ohio Supreme Court ruled in *Westfield Ins. Co. v. Custom Agri Sys.*, 133 Ohio St. 3d 476, that owners, contractors and subcontractors in Ohio have little protection from construction defects. That decision turned on the CGL policy's definition of

"occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." Because the CGL policy did not define "accident," the Court looked to the word's common meaning and concluded that an "accident" involves "fortuity." The Court in *Custom Agri Sys.* held that under the language of the CGL policy, property damage caused by a ***contractor's*** own faulty work was not fortuitous or accidental and therefore was ***not*** covered under the policy.

In this case, in 2015 CIC filed a motion for summary judgment relying on *Custom Agri*, which it characterized as holding that "claims for defective workmanship are not claims for 'property damage' caused by an 'occurrence.'" ONU filed a cross-motion for summary judgment arguing, in part, that the PCOH clause and subcontractor-specific terms distinguished this case from *Custom Agri*. So, the issue in this case was whether the general contractor's CGL policy covered claims for property damage caused by a ***subcontractor's*** faulty work. The trial court issued judgments in favor of CIC, reasoning that *Custom Agri* "constrained" it and that consequently, CIC could deny Charles's claim and it had no duty to defend Charles.

Charles and ONU appealed. The appellate court determined that *Custom Agri* applied but that its holding was narrow so it only applied to construction defects caused by the insured's own work, but that it did not address any PCOH or subcontractor-specific CGL-policy terms. The appellate court found the CGL policy language was ambiguous if it covered claims for property damage caused by ***subcontractors'*** defective work, and because ambiguous language is construed against the insurer, it reversed the judgment of the trial court. However, the Ohio Supreme Court reversed the judgment of the court of appeals and reinstated the judgment of the trial court.

Analysis: The Court applied the holding of *Custom Agri*. By its terms, the CGL policy emphasized that only "an occurrence" could trigger coverage for property damage. An occurrence was defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. There was no question that the water-related damage to the inn was "property damage" and was discovered after work had been completed. But unless there was an "occurrence," the products-completed operations-hazard (PCOH) and subcontractor language in the policy had no effect, despite the fact that the policy holder had paid additional money for it. The Court held that the subcontractors' faulty workmanship was not "fortuitous" and therefore not an "occurrence" under the CGL policy. CIC was not required to defend Charles against suit by ONU or indemnify Charles against any damage caused by Charles' subcontractors. Therefore, the subcontractors' faulty work was not covered as an insured risk under a typical CGL policy like Charles obtained.

Additionally, the Court stated that if this decision was a problem for the industry and the citizens of this state, the legislature could change the law and state that a CGL policy in Ohio shall define "occurrence" to include "property damage resulting from faulty workmanship." This case means that all players in the construction process relying upon a CGL policy to provide protection from faulty workmanship may have only illusory protection and they run the risk that construction defects are uninsured.

Hilliard City Schs. Bd. of Educ. v. Franklin Cty. Bd. of Revision
Ohio Supreme Court
May 31, 2018
2018-Ohio-2046

Facts & Procedural Posture: The subject property at issue in this case consisted of 2 parcels located on the west side of Columbus, Ohio. The first parcel consisted of 3.160 acres of unimproved land. The second parcel consisted of 24.710 acres, part of which was improved with a 9,600-square-foot industrial warehouse used for servicing semitrailers. For tax year 2011, the Franklin County, Ohio auditor valued the first parcel at $132,700 and the second parcel at $1,717,300, for a total valuation of $1,850,000. Plaintiff-Hilliard City Schools Board of Education ("BOE") and Plaintiff-Universal Truckload Services, Inc. ("UTSI," the taxpayer) each filed original and countercomplaints against these tax-year-2011 valuations, and the two cases were consolidated for a hearing before the Franklin County Board of Revision ("BOR").

At the BOR hearing, the BOE presented a quitclaim deed memorializing a transfer of the subject property from Lakeshore Ventures, L.L.C., to UTSI signed and notarized in September 2002, but it contained a stamp from the auditor's office dated March 2009. The BOE also presented the conveyance-fee statement that was filed with the county auditor in March 2009, showing the property sold for $2,313,489. Relying on these two documents, the BOE argued that the subject property should be valued according to the sale price.

In contrast, UTSI presented the testimony of a certified appraiser to support the property valuation should be lower than the sale price. She appraised only the second parcel (the one improved with the industrial warehouse) as of the January 1, 2011 tax-lien date, relying on both a sales-comparison and an income approach to value to arrive at a reconciled valuation of $1,470,000 (instead of the auditor's prior determination of $1,717,300). The appraiser justified the lower property value based on market trends, stating that there was limited demand for similar properties due to an excess supply of space in the area. The appraiser also noted that the property transfer in March 2009 from Lakeshore Ventures L.L.C. to Universal Trucking, an affiliate of UTSI, for $2.3 million was allegedly between related entities. The majority owner of UTSI also owned Lakeshore Ventures and there was an additional transfer in 2009 from Universal Trucking to UTSI for no consideration in what was considered to be a non-arm's-length transfer.

The BOR assigned a total value to the subject property of $1,602,700 for tax years 2011, 2012, and 2013 (instead of the auditor's previous valuation of $1,850,000). For the first parcel, the BOR retained the auditor's valuation of $132,700. However, for the second parcel, it used the appraiser's value of $1,470,000. The BOR rejected the BOE's argument that the March 2009 sale price established the subject property's value, explaining that changes in market conditions rendered the sale too remote.

The BOE appealed to the Ohio Board of Tax Appeals ("BTA"), who determined that the property's value should be $2,313,490 for tax years 2011, 2012, and 2013. The BTA stated that the sale price presumptively established the subject property's value and that UTSI failed to rebut that presumption by showing that the sale was not a recent arm's-length transaction. The

BTA held that it could not rely on the appraiser's statement that the sale was between related parties, because in its view, that statement was hearsay and rejected the appraiser's analysis of changed market conditions as empirically unsupported. The BTA rejected UTSI's argument that the sale took effect in September 2002, ruling instead that the sale took effect for *real-property-valuation purposes* in March 2009, the date the conveyance-fee statement was filed so the valuation should be the $2,313,490 amount on the statement. UTSI filed an appeal but the Ohio Supreme Court affirmed the BTA.

Analysis: In this real-property-valuation case, the Court agreed with the BTA's determination that UTSI's appraisal evidence and claim that the sale was not an arm's length transaction did not negate the presumption that the sale of the property was characteristic of true value at the highest value of $2,313,490.

Williams v. Brockway
Ohio Court of Appeals
September 28, 2018
2018-Ohio-3969

Facts & Procedural Posture: In 2011, Defendant-seller was appointed the executor for his father's estate, which included a 96-acre property located in Ashtabula County, Ohio. Defendant obtained a realtor, who noted that the property included a Current Agricultural Use Valuation ("CAUV") tax designation and the property was then in the midst of a 5-year lease agreement with Aloterra Farms to grow grasses for biofuels on the property, all of which were established while the property was still owned by Defendant's father. While neither Plaintiff-buyer nor Defendant had any formal discussions between themselves concerning the purchase of the land, both agreed to be represented by the realtor in a dual agency relationship throughout the transaction.

In 2014, Plaintiff and Defendant entered into a purchase agreement for the sale of the property, which was described on the agreement as a "3-bedroom house." The agreement provided that the property was being sold "as-is," that Plaintiff had the right to inspect the property prior to purchase (which Plaintiff waived), and that Plaintiff had "not relied upon any representations, warranties, or statements about the property, including but not limited to, its condition or use unless otherwise disclosed in this Agreement or the Residential Disclosure Form." The purchase agreement also included an addendum that both parties agreed to that stipulated that the Plaintiff "[understood] that [the] Property disclosure [was] not valid because this property is an estate and any knowledge by the Executor (Defendant) is not binding; only as seen from his position having been on the property periodically." Plaintiff still opted to not request to inspect the property prior to signing the purchase agreement. Plaintiff and Defendant finalized the sale and Plaintiff subsequently took possession of the property.

While it is unknown how Plaintiff used the property upon taking possession in 2014, he apparently had no issues with the property until 2016, when he was informed that Aloterra Farms was neither renewing its lease with the land nor making any further payments on its current

lease. In 2016, it was discovered the land was unsuitable for farming Aloterra's crops due a stripping of the topsoil.

In 2018, Plaintiff sued Defendant, alleging breach of contract, fraud and rescission arising from the purchase agreement made between them for the sale of the property. Plaintiff's fraudulent misrepresentation claim was based upon the allegation that Defendant had purposely made false representations in the purchase agreement by not disclosing (to either the dual real estate agent or Plaintiff) that he was aware of a latent defect. Specifically, that Defendant knew that an amount of topsoil was removed from the property prior to 2005 and that removal caused the property to be unfarmable. Further, Plaintiff argued that the ground being unfarmable was inconsistent with statements allegedly made by the realtor who indicated that the property had tillable farm land. The trial court ruled in favor of the Defendant, stating that the Plaintiff's claims were barred by caveat emptor and the "as is" clause outlined in the purchase agreement. Appellate court affirmed.

Analysis: The appellate court ruled that Defendant was entitled to summary judgment in Plaintiff's fraudulent misrepresentation claim, regarding the property's unsuitability for farming, because the Defendant described the property as a "3-bedroom house" and didn't represent the land as being farmable. The real estate contract contained an "as-is" clause and when a buyer agrees to accept property "as-is," the seller is relieved of any duty to disclose latent defects (a fault in the property that could <u>not</u> have been discovered by a reasonably thorough inspection before the sale). An "as is" clause, however, does not preclude causes of action for fraudulent representation or fraudulent concealment.

"The elements which constitute the basis for a claim of fraudulent misrepresentation are: (1) a representation, or where there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying on it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance."

The court ruled that despite the Defendant knowing about the topsoil removal, he had no actual knowledge of the consequences of the dirt being removed and how that would affect potential farming or agricultural uses. So the Plaintiff failed to show that the Defendant concealed a fact which he had a duty to disclose.

Further, Plaintiff could not reasonably conclude the realtor, who was representing both parties and allegedly represented to the Plaintiff that the land was farmable, had the apparent authority to bind the Defendant. Pursuant to the Agency Disclosure Statement, the realtors involved in the sale worked for the same brokerage firm and operated as dual agents for the buyer and seller. Defendant stated that he never represented that the land was tillable, arable, and/or farmable to the real estate agents with whom both parties associated during the sale of the property. Therefore, the realtors did not have either express or implied authority to make such a representation about the property on the Defendant's behalf. Moreover, because the realtors were acting on behalf of <u>both</u> Plaintiff and Defendant, and the purchase agreement did not include any mention of the property being farmable, Plaintiff could not reasonably conclude the

realtor who allegedly made the representation to him had the apparent authority to bind Defendant. (The test for apparent authority is whether the complaining party acting as a reasonable person, would believe the agent had authority based on all the circumstances). Here, with no express, implied or apparent authority to bind Defendant, the representation could not be imputed to Defendant.

Mezher v. Schrand
Ohio Court of Appeals
September 21, 2018
2018-Ohio-3787

Facts & Procedural Posture: Plaintiffs-buyers (father and son) owned property in Mt. Adams (Cincinnati, Ohio). In 2016, Plaintiff (son) received a building permit from the City of Cincinnati to build a new home on his property. Defendants-neighbors (husband and wife) purchased the property next door to Plaintiffs in 2017. Plaintiff (father) spoke with the Defendants regarding the new-home construction plans, and he proposed renting a sidewalk on the Defendants' property to aid in the construction. Defendants responded by offering to sell their property to Plaintiffs. Plaintiffs and Defendants then negotiated through email about purchasing the Defendants' property.

On September 29, 2017, Defendant (wife) sent an email to Plaintiff (father), stating, "Mike: We would like to wrap this up if there is still a conversation going regarding your potential purchase of our home. As you are aware your offer of $960,000 was way too low. We are countering with $1,000,000. We would appreciate a quick response. Karri and Jeff Schrand." Plaintiff responded, "Hi Karrie [sic], The max that I can do is $980,000 as Cash closing with inspection contingency. (split the difference between us and call it a day). Let me know. Thanks, Mike." Defendant responded, "Mike we have an agreement if we are at $985,000." Mike responded: "I starched [sic] the amount it to go [sic] to 980K. However, will split it again with you because I want to be flexible. I am good at $982,500 for a purchase price Based on inception [sic] and customary closing. we can get a simple contract drafted Monday and have it signed by us Tuesday with the earnest money cashier check to you upon acceptance of contract by Tuesday. Please let me know, Mike[.]" The next morning, Defendant responded to Plaintiff, "We accept." Plaintiff responded, in part, "Great, I agree too. Do you have some one [sic] to draw a simple contract (neutral contract). I am willing to do one if you like."

The parties further discussed drafting a formal document, as well as inspection and closing timing, and earnest money. On October 5, Plaintiff (father), his wife, and the home builder for Plaintiffs' (son) property next door went to the Defendants' home. At this meeting, Plaintiff gave Defendant a document titled "Contract to Purchase Real Estate" and Plaintiff's wife signed the document as the buyer. The document stated that "[t]his offer expires Monday October 9, 2017 at 4:00 p.m. if not signed by the Buyer and Sellers." The parties have differing accounts as to exactly what happened at this October 5 meeting, but both parties agree that an argument ensued and Defendant asked the group to leave the home. Defendants never signed the document.

Plaintiffs sued Defendants, requesting specific performance of the real estate contract to sell the property, a preliminary injunction, and pecuniary and punitive damages. The Defendants filed an answer, asserting that no agreement had been reached, because the parties had merely been negotiating a potential purchase via email and never signed the October 5 document. Defendant argued that any email "agreement" was barred by the statute of frauds, and that no meeting of the minds occurred. Plaintiffs argued that the September 29-30 email exchange constituted a contract and satisfied the statute of frauds.

The trial court granted summary judgment in favor of the Defendants, finding that the September 29-30 email exchange between the parties did not satisfy the statute of frauds, because the emails did not describe the subject property with particularity. The Plaintiffs appealed and the appellate court reversed and remanded.

Analysis: The appellate court ruled that given the circumstances surrounding the parties' e-mail exchange and later discussions, including that other terms of the real property sale had yet to be agreed upon, an issue of fact existed as to whether the parties intended to be bound at the time of the e-mail exchange, or whether the parties did not intend to be bound until execution of the more formal contract. Thus, the trial court erred in granting summary judgment to the sellers because a genuine issue of material fact existed as to whether a contract had been made.

Carapellotti v. Breisch & Crowley
Ohio Court of Appeals
September 19, 2018
2018-Ohio-3977

Facts & Procedural Posture: Plaintiff-homeowner was building a home in Jefferson County, Ohio and engaged Defendant-builder to design and supply a timber frame for the house. Defendant presented a 9-page purchase agreement to Plaintiff that was dated November 4, 2016, was labeled "Purchase Agreement," indicated it was project #1659, contained a progress and payment summary and schedule, and contained an arbitration clause. However, Plaintiff never signed the agreement.

The Purchase Agreement contained various sections regarding specific project progress and payment schedules. The Purchase Agreement also contained General Conditions, such as paragraph 10 which stated the agreement was not binding unless it was signed by both parties. Further, paragraph 15 was an arbitration clause which stated that all disputes arising out of the contract shall be decided in Kanawha County, West Virginia, in accordance with the construction industry arbitration rules of the American Arbitration Association, unless the parties mutually agree otherwise.

The Defendant also provided Plaintiff with a quote and deposit summary around the same time Defendant provided the Purchase Agreement, and the quote contained the same progress payments as stated in the agreement. The quote was not incorporated by reference into the Purchase Agreement and was not labeled as part of the agreement.

On November 15, 2016, Plaintiff wrote 2 checks to Defendant. The first check was for $18,896.50 and written on the memo line of the check was "10% Down, $188,965.00 project cost, Purchase Agreement dated 11/4/16, Project #1659, Timber Frame/SIP Roof & Tongue & Groove Ceiling." The second check was for $56,689.50 and written on the memo line was "30% payment, $188,965.00 project cost, Purchase Agreement dated 11/4/16, Project # 1659, Timber Frame/SIP Roof & Tongue & Groove ceiling." On January 18, 2017, Plaintiff wrote another check to Defendant for $56,689.50 and written on the memo line was "30% production payment, $188,965.00 project total cost, Purchase Agreement dated: 11/4/16, Project # 1659, Timber Frame/SIP Roof & Tongue & Groove ceilings."

Prior to the January 18, 2017 payment, Plaintiff was notified there were changes to the design since the November 4, 2016 Purchase Agreement and there was an increase in the cost. The increase was $6,500 and there were negotiations regarding this increase. However, an additional agreement was not reached and Plaintiff decided not to use the timber frame from Defendant. Plaintiff then filed suit against Defendant and others alleging general negligence, architectural professional negligence, engineering professional negligence, deceptive consumer sales practices, products liability, and implied warranties. In its 17th affirmative defense, Defendant stated, "The claims set forth in Plaintiff's Complaint are subject to arbitration as set forth in the Motion to Compel Arbitration" and Defendant asserted that the claims were subject to arbitration per the Purchase Agreement.

In response, Plaintiff argued, among other things, that there was no agreement to arbitrate because he hadn't signed the contract requiring arbitration, and instead of creating a contract, there were just ongoing negotiations and he had rejected the Defendant's offers. Plaintiff argued that a non-signatory could not be bound to an arbitration agreement when it's related to real estate and that the arbitration agreement was not enforceable because it denied him an adequate remedy since his tort claims under UCC implied warranty and the Consumer Sales Practices Act (O.R.C. §1345) claims are not arbitrable. Lastly, Plaintiff argued that O.R.C. §4113.62(D) - *Provisions of construction contract or subcontract that are void as against public policy,* voided the arbitration clause in the Purchase Agreement because the statute precludes arbitration for construction contracts concerning real estate located in Ohio to occur in any other state than Ohio.

The issue was whether a signature on checks that included specific notations to an unsigned contract constituted the signature for the unsigned contract to bind Plaintiff to the arbitration provision in the contract. The trial court ruled that arbitration could not be compelled because there was no contract to arbitrate. Appellate court affirmed.

Analysis: The appellate court held that although the Plaintiff signed 3 checks relating to the construction of the home and the checks contained very specific notations, the signatures on the checks did not constitute signature for the entire Purchase Agreement, which included the arbitration clause because arbitration was not specifically noted on the checks. There was no indication that the parties discussed or agreed to arbitrate or that Plaintiff agreed to all of the terms of the Purchase Agreement since he didn't sign it so Plaintiff could not be compelled to arbitrate the claims, pursuant to O.R.C. § 2711.02 - *Court may stay trial*.

Dahmen v. Black
Ohio Court of Appeals
September 4, 2018
2018-Ohio-3538

Facts & Procedural Posture: In 2012, Plaintiffs-landowners sued Defendants-neighbors seeking a declaration that an express and/or prescriptive easement had been created for the perpetual existence and maintenance of a 15-inch plastic, culvert pipe on Defendants' property, compensatory and punitive damages for the destruction of the culvert pipe, and a mandatory injunction ordering the Defendants to re-install the 15-inch pipe and to take all other action necessary to alleviate and eliminate the surface water flooding problem on Plaintiffs' property.

The Defendants answered and counterclaimed, seeking compensatory, punitive, and statutory (O.R.C. §901.51 - *Injuring vines, bushes, trees, or crops*) damages for crop damage caused by the Plaintiffs discharging water onto the Defendants' property.

The Magistrate found that in 1986, Plaintiff constructed a separate, 18-inch concrete pipe from the Plaintiffs' property across the Defendants' property and into a watercourse located on the Defendants' lands for drainage purposes. The 18-inch concrete pipe was installed pursuant to an oral agreement with Elkins Hardesty, who was the late spouse of one of the Defendants and, at one time, Elkins Hardesty was an operator of the Defendants' farm. The installation of the pipe was adverse to the property rights of the owners of the Defendants' lands because, although Plaintiff received permission from Elkins Hardesty to install the pipe, Plaintiff did not have permission from the <u>owner</u> of the property to install the pipe across the Defendants' property. As to the Defendants' claim that the use was permissive, the Magistrate was not persuaded. The only permission given to Plaintiffs was from Elkins Hardesty, who was <u>not</u> the owner of the land. The Defendants offered no testimony that they as the landowners were aware of or acquiesced in Elkins Hardesty's permission. To the contrary, one Defendant disingenuously testified not to have known about the pipe, even though it was not hidden or obscured in any way, until 2009 or 2010, and even though he testified that he had explicitly not given Plaintiff permission to build the pipe.

The Magistrate held that the existence of a prescriptive easement had been established and that the Defendant "interfered with Plaintiffs' use and enjoyment of the prescriptive easement when he intentionally crushed the 18-inch concrete pipe, interrupting the flow of water through it." The Defendants were ordered to repair the 18-inch concrete pipe and restore the flow of water across the property to Mosquito Creek Reservoir and "be forever enjoined from interfering with Plaintiffs' use and enjoyment of this prescriptive easement." The Magistrate also found that the Defendants were entitled to compensatory damages in the amount of $5,246.00 for "crop losses" and for "time and equipment to restore their property and remove and replace saturated soil" in addition to statutory damages pursuant to O.R.C. §901.51.

The trial court reduced the amount of the Defendants' damages but the Defendants appealed that the Plaintiff had established a prescriptive easement across the Defendants' property. The Defendants contended that the Plaintiffs failed to establish all the elements for an easement by

prescription. Specifically, the Plaintiffs did not establish that their use was under a "claim of right." The Defendants maintain that, by Plaintiff first seeking the permission of Hardesty, who Plaintiff presumed was the owner of the Defendants' property, Plaintiff never installed his pipe under a "claim of right."

The issue was whether the element of adversity in a claim for easement by prescription may be established when the claimant is under the mistaken belief that he is using the land permissively. The appellate court affirmed.

Analysis: An easement by prescription may be acquired by open, notorious, continuous, and adverse use for a period of 21 years. The appellate court held that with respect to the requirement that the use be adverse (or hostile), "it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate; the facts which prove hostility might greatly differ in different cases, and it has been held in many cases that it is sufficient if the use is inconsistent with the rights of the title owner and not subordinate or subservient thereto. Such use never ripens into a prescriptive right unless the use is adverse and not merely permissive. Where the owner of the servient estate claims that the use was permissive, he has the burden of showing it."

Here, the undisputed evidence was that Defendant, the actual owner of the servient estate, never gave permission for the Plaintiffs to construct a pipe across the Defendants' lands, and with respect to the Plaintiffs' mistaken belief that they had been granted permission, the Defendants cited no law for the proposition that the use of the property must be intentionally adverse so the Plaintiff's easement was upheld.

Holloway v. Bucher
Ohio Court of Appeals
August 17, 2018
2018-Ohio-3301

Facts & Procedural Posture: In February 2017, Plaintiff-lender sued Defendants-borrowers, alleging Defendants owed Plaintiff $60,059.70 stemming from a loan that Plaintiff made to Defendants on January 1, 2004. According to the complaint, Plaintiff orally agreed to loan Defendants a total of $163,800 at an annual interest rate of 1.5%. The loan was provided to Defendants in two installments. The first installment of $6,800 was provided to Defendants on January 15, 2004 to pay off a home equity loan in order to facilitate the sale of Defendants' residence (the "old residence"). Two weeks later, Plaintiff loaned Defendants the remaining $157,000 to fund Defendants' purchase of another residence (the "new residence").

Pursuant to the terms of the oral agreement, Defendants were obligated to make monthly payments in the amount of $300 until they sold their old residence. Once the old residence was sold, the monthly payments increased to $500. Pursuant to the agreement, Defendants made monthly payments of $300 until they sold the old residence in August 2004. The $63,025.50 that Defendants profited from the sale of the old residence was applied to the balance of the loan, and Defendants subsequently commenced making monthly payments of $500.

However, beginning in February 2013, Defendants ceased making the $500 monthly payments. Plaintiff allegedly granted Defendant, her daughter, a forbearance from making monthly payments due to the daughter losing her job. The parties disagree as to the nature of this forbearance. Defendant-daughter believed that the remaining balance of the loan was forgiven. Plaintiff insisted that the forbearance was temporary, and that payments were to resume once Defendants' financial condition improved. When Defendants failed to resume monthly payments on the oral agreement, Plaintiff sued the Defendants, alleging breach of contract.

Defendants filed a motion to dismiss, arguing the agreement was unenforceable under O.R.C. § 1335.05 - *Certain agreements to be in writing*, Ohio's statute of frauds law, because the monthly payments contemplated by the parties were not minimum payments and that early payoff of the loan was not a term of the oral agreement so it could not be completed within 1 year. In response, Plaintiff alleged that the $300 and $500 monthly payments were minimum payments, and Plaintiff's acceptance of Defendants' lump sum payment of $63,025.50 was evidence of the possibility of an early payoff so the loan could have been completed within 1 year. Plaintiff also contended that the statute of frauds should not be applied given the parties' partial performance under the agreement.

The trial court ruled that the parties' oral agreement could not be completed within 1 year because the parties only agreed to monthly payments of $300 and $500, and did not contemplate increasing or decreasing the required monthly payments during the repayment period. Therefore, the court held that the agreement was unenforceable under the statute of frauds. Appellate court affirmed.

Analysis: The appellate court ruled that the trial court did not err in dismissing Plaintiff's breach of contract claim because the oral loan agreement was unenforceable since it was barred by the statute of frauds, O.R.C. § 1335.05. The parties only agreed to monthly payments of $300 and $500, and did not contemplate increasing or decreasing the required monthly payments, and at a rate of $500 per month, the balance of the loan would not have been repaid within 1 year of the date of the oral agreement. The doctrine of partial performance was inapplicable because the agreement involved the lending of money, not the sale or leasing of real estate or a settlement made upon consideration of marriage, where partial performance would have supported contract formation.

Kraynak v. Whitacre
Ohio Court of Appeals
July 3, 2018
2018-Ohio-2784

Facts & Procedural Posture: Plaintiff-landowner owned about 99 acres of property in Wayne Township (north of Cincinnati, Ohio). In 2006, Plaintiff entered into an oil and gas lease with Co-Defendant-Whitacre Enterprises ("Whitacre"). During the lease, Whitacre was represented by its sole owner, Co-Defendant-Koy Whitacre ("Koy"). The lease contained two duration terms under its habendum clause. The primary term provided that the lease would last for 15 months.

The secondary term provided that the lease would continue "as much longer as oil or gas is found in paying quantities." Throughout the duration of this lease, Defendant operated one well on Plaintiff's property, the K. Kraynak No. 1 well (the "well").

In addition to Whitacre Enterprises, Koy wholly owned and operated Whitacre Store, LLC ("Whitacre Store"), who was responsible for servicing the well. All of Whitacre's employees and equipment were housed under Whitacre Store and Whitacre transferred $300/month to Whitacre Store as operating expenses for the well. The payments were allegedly structured this way by Whitacre for accounting simplicity. The oil and gas lease between Plaintiff and Co-Defendant-Whitacre also contained a sublease agreement which allowed Whitacre to sublet the well. Co-Defendant-Gulfport Energy Corporation was a sub-lessee of the deep rights to the well and Co-Defendant-American Energy — Utica Minerals owned an overriding royalty interest in the well.

In 2015, Plaintiff filed a declaratory judgment that the well was no longer producing in paying quantities and an order quieting Plaintiff's title to all oil and gas rights in and under the property against all Defendants. The years at issue concerning the well's profitability were 2012-2015. Whitacre's analysis showed the well produced a net profit each year while Plaintiff's analysis showed net losses each year. The trial court found that the operating expenses of $300/month exceeded the well's revenue for the year's 2012-2015. As a result, the trial court granted the Plaintiff's quiet title action and deemed the lease terminated due to the well's failure to produce in paying quantities. The issue was whether the well was producing in paying quantities to justify terminating the lease term. The appellate court affirmed the trial court.

Analysis: The appellate court ruled that the trial court properly ruled in favor of the Plaintiff in his quiet title action and deemed the oil and gas lease terminated due to the well's failure to produce in paying quantities. The court stated that the term "paying quantities" when used in the habendum clause of an oil and gas lease, has been construed by the weight of authority to mean "quantities of oil or gas sufficient to yield a profit, even small, to the lessee over operating expenses, even though the drilling costs, or equipping costs, are not recovered, and even though the undertaking as a whole may thus result in a loss." When the court conducted its paying quantities analysis, it reviewed the direct operating costs and excluded any indirect operating costs that did not contribute to the production of oil or gas.

Because the Defendant's business records were ambiguous and did not itemize the operating expenses the $300 paid for, the trial court made a conclusion of fact based on the testimony and exhibits presented at trial that the $300 a month constituted a direct operating expense. The well's failure to produce an annual profit that exceeded these operating expenses meant the lease terminated on its own terms due to the well's failure to produce in "paying quantities."

Bavis v. Deimling
Ohio Court of Appeals
June 11, 2018
2018-Ohio-2259

Facts & Procedural Posture: This case involves a disputed road easement created prior to residential development in Clermont County, Ohio. The easement was granted in 1934 as an express easement appurtenant which benefitted the Plaintiff-homeowner's dominant property now referred to as 467 Auxier Drive. The easement was described as a "15 foot strip of ground for road purposes only." The easement consisted of a paved road that extended north and east to the county road, which is now known as Mt. Carmel Tobasco Road, and also an unpaved gravel portion.

Over the following decades after the easement was initially granted, there was substantial residential development in the area. In 1989, construction commenced on Auxier Drive in conjunction with further developments to a housing subdivision nearby. The Plaintiff's property was located south of Auxier Drive and the homes were constructed along that roadway. However, the Plaintiff's property had direct access to Auxier Drive through the small unpaved portion of the easement that ran between two homes on the south side of Auxier. In turn, Auxier Drive, a paved roadway, directly intersected with Mt. Carmel Tobasco Road.

A second public road was constructed north of Auxier and was developed into the Park Place Subdivision. In 2012, Plaintiff purchased the Property and was unaware of the Property's easement prior to closing. In 2015, Plaintiff filed a declaratory judgment, injunctive relief, breach of easement, trespass, and nuisance against various other property owners who owned real estate which were the servient estates to an easement held by Plaintiff. Plaintiff argued that the easement ran north from the Plaintiff's property, across Auxier Drive "traveling northwards until it reached the approximate centerline of Harrison Lane, at which point the easement made a 90 degree turn and traveled nearly due east to Mt. Carmel Tobasco Road, directly through many of the Park Place Subdivision properties subsequently constructed." The trial court granted summary judgment for the Defendants. Appellate court affirmed.

Analysis: The appellate court ruled that Defendants' homes did not interfere with an easement originally granted to Plaintiff's property in 1934 to allow the owner of Plaintiff's property access to the county road when the area was substantially undeveloped. Since that time, housing divisions were built and Auxier Drive was constructed to allow Plaintiff direct access from her property to Mt. Carmel Tobasco Road. As a result, a portion of the easement was terminated by necessity for which it was created once Plaintiff had access to the county road. The remainder of the easement had since been obstructed or closed off by the subdivision construction and the entire character of the property had changed so dramatically that it was completely implausible to imagine that a 15-foot private roadway could exist in the present circumstances. However, the portion of the easement required for Plaintiff to access Auxier Drive was still in effect.

E.G. Licata, LLC v. E.G.L., Inc.
Ohio Court of Appeals
May 25, 2018
2018-Ohio-2032

Facts & Procedural Posture: In 1984, the Defendant-tenant bought two retail businesses in Toledo, Ohio from Ernest G. Licata (the deceased husband of Co-Plaintiff-landlord). The businesses were defined as "sexually-oriented businesses," under Chapter 767 of the Toledo Municipal Code. The Plaintiffs sold only the businesses, not the real property where the stores were located. The Plaintiffs then leased the property to the Defendant in two separate leases, both dated June 8, 1984, for a period of 5 years. Since then, the parties have extended the lease multiple times, although the ownership of the premises has changed twice over the years. The most recent 5-year extension occurred July 16, 2014.

The two lease agreements are nearly identical, except for the rental amounts. Both agreements called for the Defendant to pay the property taxes, utilities, and costs of insurance. They also required the Defendant "to make all repairs of the premises" and to keep the premises in "good repair." In the most recent lease extension, the Defendant agreed to pay $2,040.99 per month for the one property and $3,091.62 for the other property. The lease also stated, "That said [tenant] will permit said [landlord] and the agents of said [landlord] to enter upon said premises at all reasonable times, to examine the condition thereof, or make such *repairs, additions or alterations* therein as may be necessary for the safety, preservation or improvement, thereof, and of said building, or to exhibit the same." (Emphasis added).

Chad Thompson has served as the Defendant's property manager since 1988. Thompson testified that the Defendant consistently maintained the properties, as required under the leases, such as routine maintenance on the heating, ventilation, air conditioning (HVAC) systems, patching parking lots, repairing rooftops and other "general tenant responsibilities." The Plaintiff was responsible for making capital improvements to the properties, but Thompson could not recall a time that Plaintiff ever did so in his 32 years of operating the properties. Therefore, before 2010, if the premises required the type of work that the Plaintiff was contractually responsible to provide, the Defendant would pay for the work to be performed and then deduct its expense from its monthly rental payment. Defendant "started to enforce the lease in 2010" and discontinued fronting capital improvement expenses. However, once Defendant stopped fronting the capital expenditures, both buildings fell into serious disrepair.

As an example, Defendant said that both buildings were infested with pests and rodents because the roofs had not been properly kept up over the years and were no longer repairable, despite the Defendant's efforts to extend their lives with patches. Thompson raised the issue of capital improvements with the Plaintiff over the years but no agreement was reached. Although the issue remained unresolved at the time the parties negotiated the 2014 lease extension, Defendant agreed to another 5 year term.

In 2015, the Defendant unilaterally decided to reduce its rental payment to $1,525 for each property to reflect the current condition of the property and the capital improvements that were

not being done. After accepting 3 months of partial payments, the Plaintiff refused to accept anymore. In 2016, Plaintiff filed complaints for restitution of the properties and damages.

The parties resolved the dispute except as to the issue of damages. The trial court awarded the Plaintiff $125,692.77, which included $100,148.34 for past due rent, $20,544.43 in unpaid property taxes and a $5,000 contempt-of-court sanction for Defendant failing to abide by a previous order to place disputed rental amounts into an escrow fund. The Defendant appealed, alleging the Plaintiff had failed to substantially perform all of its contractual obligations. Appellate court affirmed.

Analysis: The appellate court held that the Defendant was not entitled to offset any amount against the judgment of $125,692.77 because although the Defendant claimed the Plaintiffs failed to make capital improvements, under the leases the expenditures cited by the Defendant, including HVAC replacement, septic tank maintenance, and pest control service fees, all fell under the category of ***repairs*** which were Defendant's responsibility, not capital improvements. The lease sections cited by the Defendant that allegedly set forth the Plaintiffs' responsibilities make no reference to "capital improvements" despite the Defendant adding that term to Plaintiffs' obligations to make all "repairs, additions or alterations." The court held that a "capital improvement" was distinguishable from a repair. Since the Plaintiff's promises to make repairs, additions or alterations did not include a promise to make capital improvements, hence why Plaintiffs didn't make any, there was no evidence indicating the parties intended to contractually bind Plaintiffs to make capital improvements.

Klossner v. Burr
Ohio Court of Appeals
April 30, 2018
2018-Ohio-1663

Facts & Procedural Posture: In 2014, Plaintiff-buyer entered into a real estate purchase agreement with Defendant-seller concerning 6 acres of land on which Plaintiff wanted to build a manufacturing facility. Since the land was not next to the road, the agreement also granted Plaintiff a permanent easement on more of Defendant's land so that Plaintiff could build an entrance to the facility. The agreement was contingent on the parties obtaining the zoning variances needed for the facility from the township where the land is located.

After the parties signed the agreement, Plaintiff started seeking the zoning variances. During the process, he learned that the driveway would have to be 100 feet wide, instead of the 60 feet provided for in the purchase agreement. Also, the township wanted the facility moved 75 feet farther away from nearby housing. The parties agreed to both changes.

A couple of weeks after the second amendment to the agreement, Plaintiff learned that there was a leach field that was part of the septic system for an adjacent property under some of the land where Plaintiff intended to build his driveway. Although no one was exactly sure of the leach field's layout, the county health department was concerned that Plaintiff's project would damage it in constructing his driveway. Defendant granted Plaintiff a temporary, 15-foot easement to the

south side of the permanent easement, so that Plaintiff could begin construction of the facility before the leach-field issue was resolved.

Plaintiff continued working on the project through February 2015. On March 7, 2015, Plaintiff emailed Defendant, explaining that he could not get a septic permit for his facility because the health department feared that the temporary easement might expire before the leach-field issue was resolved. Therefore, Plaintiff asked Defendant if the temporary easement could become permanent if the neighboring landowner ended up being able to keep the leach field in place. Defendant did not reply. A couple of days later, the health department approved the construction of the Plaintiff's driveway based on additional assurances from Plaintiff about the leach field issue.

Plaintiff continued to send updates to Defendant with no replies. On March 17, Plaintiff emailed Defendant that there was a good chance that they would be able to close their deal on March 20. However, Defendant responded that he thought Plaintiff had "jumped the gun" because they still had not worked out the terms of the temporary easement on Defendant's property. After Defendant received a letter from Plaintiff's lawyer on March 20 that threatened Defendant with legal action if he did not proceed to closing, Defendant stopped communicating with Plaintiff.

In 2015, Plaintiff filed a complaint for specific performance against Defendant. The trial court entered a judgment in favor of Plaintiff that conveyed title of the property to him along with a permanent and temporary easement. Defendant appealed the trial court's order of specific performance of the agreement. Appellate court affirmed.

Analysis: The appellate court held that specific performance of the agreement was proper. The Defendant failed to object to the admission of emails during the bench trial, which the Plaintiff used to prove the intent of the parties as to the original agreement and the changes to it, Defendant's claim that the use of parol evidence was improper was forfeited on appeal. The Defendant failed to argue that the agreement was voidable due to mutual mistake. Also, the agreement was not voidable due to the failure of a condition precedent, since the Plaintiff had implicitly waived the zoning variance condition when he indicated he was ready to close the deal.

Ellington v. Becraft
Kentucky Supreme Court
December 14, 2017
534 S.W.3d 785

Facts & Procedural Posture: Plaintiff-neighbor obtained full interest to his property on what is known as Smokey Hollow Road in Bath County in 1995. Prior to that, the property was initially purchased by Plaintiff's uncle in 1954, passed to his aunt and mother by will, and then passed partially to him by will after the passing of his mother and then he obtained full interest in the property by will after his aunt's death in 1995. Plaintiff visited the property one to two times a year until 2004. In 2004, Defendant-land owner purchased his property on Smokey Hollow Road and built a gate across the road, limiting Plaintiff's access to his property. Plaintiff testified that, before Defendant built the gate, he had never been denied access across the road by any other previous owner.

Plaintiff sued Defendant in 2010 alleging that Defendant had no right to limit Plaintiff's access to this road. Plaintiff stated that Smokey Hollow Road was either a county road, public road or passway, or that he had acquired an easement of some kind over the pathway.

The trial court entered judgment for the Plaintiff, finding that Smokey Hollow Road was a county road, a public passway, and that Plaintiff had acquired an easement by prescription. The appellate court reversed, holding that Plaintiff had failed to meet his burden in proving the existence of any county road, public passway, or easement. The Kentucky Supreme Court affirmed in part and reversed in part.

Analysis: The appellate court properly held that Plaintiff failed to prove the existence of any county road, public passway, or easement across an owner's property because the road was never officially adopted by the county under Ky. Rev. Stat. § 178.010 (Definitions - Construction of chapter - Minimum requirement for gift.), and the Plaintiff's evidence was insufficient to establish adverse use of the road by the public by estoppel or prescription. However, the appellate court erred in holding that the Plaintiff failed to prove a prescriptive easement for ingress and egress over the Defendant's property because the Plaintiff and his predecessors-in-interest had used the road in a hostile, open, notorious, exclusive, and continuous manner for at least 15 years under Ky. Rev. Stat. Ann. § 413.010 (Action for recovery of real property — Fifteen year limitation.) and abandonment of the easement could only be established by 15 years of non-use which the Defendant could not show so Plaintiff was permitted such prescriptive easement.

Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC
Kentucky Supreme Court
December 14, 2017
2017 Ky. LEXIS 570

Facts & Procedural Posture: In November 2005, Defendant-The Ascent at Roebling Bridge, LLC (the "Ascent") hired co-Defendant-Corporex ("Corporex") to be the design builder for The

Ascent at Roebling Bridge, a 21-floor luxury condominium building in downtown Covington, KY (the "Project"). In March 2006, Corporex hired co-Defendant Dugan & Myers Construction Company ("D&M") as the construction manager/general contractor for the Project. D&M solicited bids for the Project, however, the architectural and structural drawings that D&M provided to potential subcontractors did not include a forces table (a chart which identifies the forces acting upon each piece of steel to be used on the Project) or designs for the steel connections. D&M received a bid from the Plaintiff-Superior Steel, Inc. ("Superior") for the structural steel work.

D&M asked Superior to modify its bid proposal so Superior would fabricate the steel and have co-Plaintiff Ben Hur Construction Company, Inc. ("Ben Hur") complete the construction and installation work. Prior to Superior submitting its modified bid, the Project's architect issued a revised set of drawings but D&M instructed Superior to not acknowledge the revised drawings in making its bid; D&M wanted to be able to evaluate each of the bids it had received on an equal basis. Superior's modified bid was accepted by D&M and the party's contract had a fixed price of $1,814,000. In turn, Superior contracted with Ben Hur to build the steel and metal decking for $444,000. As structured, payment for all of the steel work flowed from Corporex to D&M and then from D&M to Superior. Superior would then pay Ben Hur what it was owed for construction and installation of the steel fabricated by Superior.

After Superior and Ben Hur were retained, further alterations were made to the structural design drawings issued by Ascent/Corporex. Corporex alerted D&M to the changes, and D&M in turn informed Superior and Ben Hur. Superior and Ben Hur expressed concern that design changes would require additional work beyond the original scope of the contract. With Ascent and Corporex's approval, D&M separately directed both Superior and Ben Hur to perform the extra work, while keeping track of the time and costs.

While Ascent/Corporex did pay for some of the extra work performed, they failed to pay for additional work performed on the forces table/design load increase, the roof edge condition, and the roof tip. Eventually, Ascent/Corporex refused to provide any additional compensation to Ben Hur and Superior because they believed that the amounts requested by Superior and Ben Hur were excessive and that those claims were due to D&M's mismanagement of the Project. Ultimately, in addition to not being paid for additional work performed on the forces table/design load increase, the roof edge condition, and the roof tip, Superior also was not paid the $195,143.40 owed in retainage earned on the base contract work.

Superior and Ben Hur filed mechanics' liens on the Project to secure payment of the amounts owed. Subsequently, Ascent purchased lien discharge bonds from Westchester Fire Insurance Company ("Westchester") to remove the liens and enable Ascent to begin selling condominium units. In April 2008, Superior and Ben Hur filed suit naming Ascent, Corporex, D&M, and Westchester as defendants. Superior and Ben Hur asserted many claims against Ascent, Corporex, and D&M, including for breach of contract, unjust enrichment and promissory estoppel. D&M then filed a crossclaim against Ascent/Corporex for breach of contract and indemnification for all monies owed to Superior and Ben Hur. Ascent/Corporex also filed a crossclaim against D&M alleging breach of contract, negligent performance of contract, constructive fraud and indemnification.

At trial, D&M disputed whether a written contract with Superior had been agreed upon, and if so, which version of the contract would be enforced. Further, while D&M and Ascent admitted at trial that Superior and Ben Hur had performed extra work, they asserted that the work was within the original scope of the contract. Additionally, D&M argued that the retainage was not owed due to Superior's alleged failure to comply with certain contract provisions. The trial court found for Superior against Ascent and D&M for the unpaid retainage under the contract and the extra work. Also, since there was an implied contract between D&M and Ben Hur, it could recover for the extra work authorized by D&M. The jury decided other issues and found that a contract existed between Superior and D&M to fabricate and construct the steel and that Superior and Ben Hur performed the extra work. Ascent/Corporex were liable to D&M for all sums D&M was required to pay Superior ($319,160.66) and Ben Hur ($284.295.53) on their contract judgments (including attorneys' fees of $349,241.70 for Superior) by virtue of indemnification. The appellate court reversed the judgment in its entirety and remanded for a new trial. The Kentucky Supreme Court affirmed the appellate court in part, reversed in part and remanded.

Analysis: The appellate court erred in reversing the trial court's judgment against Ascent for unjust enrichment since Ascent failed to pay D&M, which was a continuing impediment to the Superior's recovery from D&M. Ascent approved all subcontracts and additional work, and Superior and Ben Hur performed such additional work fell within the scope of the original contract. However, the appellate court properly reversed the trial court's judgment against D&M for breach of contract and payment of attorneys' fees since the contract between D&M and Superior clearly made D&M's payment contingent upon payment from Ascent, such provisions did not violate public policy and the D&M/Superior contract did not provide a basis for an award of attorneys' fees against D&M under those circumstances.

City of Wilmore v. Snowden
Court of Appeals of Kentucky
September 7, 2018
2018 Ky. App. Unpub. LEXIS 663

Facts & Procedural Posture: Hal Snowden, Jr. owns a 175-acre parcel of land referred to as "Roseglade Farm." The northeast portion of the tract lies near the "Y" intersection of U.S. Highway 29 in Jessamine County, Kentucky.

In 1997, Snowden submitted an application for a zone change for the farm from agricultural to residential. Members of the public aggressively contested this application, expressing concerns that the greenspace would be lost across that part of Roseglade Farm lying between two historic homes on the northern part of the farm near the Y-intersection of U.S. Highway 29 and Kentucky 29.

In December 1997, the Wilmore City Council approved a zone change of the farm from A-1 to R-5 as consistent with the Wilmore Comprehensive Plan. "R-5" is designated a rural transition zone. According to the zoning ordinance, the R-5 zone "shall provide a permanent green space/buffer area to the growing areas of Wilmore and allow a compatible transition into the

active agricultural areas of the surrounding County." Further, as a condition to development in this zone, "an undeveloped portion of the parent tract … will remain in permanent green space."

In December 1998, Snowden dedicated 100 acres of Roseglade Farm to the City of Wilmore through a conservation easement. The deed of the conservation easement contained the following provision: "[t]he Property includes a designated area of permanent greenspace, as shown on Exhibit "B" and described on Exhibit "C" attached hereto and incorporated herein by this reference, and such area shall be maintained perpetually subject to the terms and restrictions of this Conservation Easement (hereinafter referred to as the "Protected Property")."

Although the conservation deed was recorded, Exhibits B and C were not attached (and there is no indication that those Exhibits were ever prepared since the farm was not developed into residential lots as planned). The deed did, however, contain language describing the "Protected Property" as (i) containing approximately 100 acres of farmland, pastures, and grasslands, (ii) containing approximately 4,100 feet of frontage along U.S. Highway 68, a federal highway which has been designated as a Kentucky Scenic Byway, and approximately 3,000 feet of frontage along Kentucky Highway 29, and (iii) located at the beginning of the Kentucky Highway 29 scenic entry corridor to the City of Wilmore.

In 2016, Snowden applied again to the planning commission for a new consideration of a plan to develop Roseglade Farm into 174 residential lots of approximately 0.25 acres each. This plant for the property reconfigured the preliminary development plan prepared in August 1997 (and approved in December 1997) by inverting the proposed residential area as platted and the greenspace area referred to in the conservation easement.

The revised preliminary plat and amended development plan indicated that Snowden would grant to the City of Wilmore a substitute conservation easement to include the newly envisioned permanent greenspace areas identified on the revised preliminary plat.

Because the property Snowden proposed to develop encompassed the conservation easement, the planning commission advised that it would not approve the amended development plan absent the agreement of the town council to release or modify the easement recorded in January 1999. The town council denied Snowden's request to modify or release the 1999 conservation easement. Thereafter, Snowden sought to void any arguable binding effect of the 1999 conservation/agreement.

Snowden argued that the portion of Roseglade Farm that the parties intended to subject to the conservation easement would and could only be identified with specificity at a future date when the planning commission approved "final construction plans," and consequently, the easement failed to sufficiently identify the dimensions and boundaries of the property with reasonable certainty.

Following a hearing, the circuit court concluded that the conservation easement was facially void and unenforceable for want of an adequate description of the encumbered property. Summary judgment was entered in Snowden's favor. The City of Wilmore appealed.

Analysis: The Court of Appeals reversed the trial court's judgment, holding that the portion of Roseglade Farm referred to in the conservation easement as "Protected Property" is sufficiently identified so that its location is readily ascertainable.

The Appellate Court noted that as with any other written easement, a conservation easement may be established even without a definite statement as to its dimensions or exact location. Instead, a description that allows one to identify the land upon which the easement is located is sufficient.

Despite the absence of Exhibits B and C identified in the written conservation easement, the dimensions and boundaries of the easement can be physically located with reasonable certainty. The Roseglade Farm is bounded by U.S. Highway 68 to the north and Kentucky Highway 29 to the southeast. These highways intersect at a point just northeast of the farm. The description of the encumbered property indicates that it forms a quadrilateral. The location of two of its sides are defined by the location of the two highways bordering the farm; the third side is defined by its intersection with the first two; the fourth is, therefore, readily ascertainable. Furthermore, the "Protected Property" is described as consisting of approximately 100 acres lying between the Betty Bryan House and the Ashbrook House and "located at the beginning of the Kentucky Highway 29 scenic entry corridor to the City of Wilmore."

Given that the dimensions and boundaries of the conservation easement are fairly delineated and the situs is clear, the easement was not void as a matter of law but was, instead, susceptible of enforcement.

Prows v. Bame
Court of Appeals of Kentucky
June 15, 2018
2018 Ky. App. Unpub. LEXIS 424

Facts & Procedural Posture: Lois Prows purchased two adjoining tracts of land from her parents in 1980. In 1993, Lois and her husband conveyed part of one tract to Lois' brother, Floyd Spencer. At the time of the sale, the property was not surveyed and rough measurements of directional lines comprised the deed description.

Shortly thereafter, Floyd built a home on his property. Floyd made improvements on his land and on portions of the adjoining land belonging to the Prowses. Floyd paid taxes on a much larger acreage than described in the deed, but which he used, maintained, and claimed as his own.

In 1997, Floyd built a garage which extended onto the Prowses' property. Although the Prowses were aware of the construction, no further actions were taken. Later that same year, Floyd filed for divorce. In an effort to drive down the value of Floyd's land to deter potential bidders, Lois Prows and Floyd fabricated a boundary dispute. In 1999, a deed was generated with a different agreed upon boundary description. Eventually, Floyd was the highest bidder at the commissioner's sale of the property, and he continued to use and pay taxes on the land, as he had before the divorce, until his death.

In 2013, Floyd's daughter Jackie Bame inherited his property, and a year later, Lois filed a quiet title action. A bench trial was conducted and the Court entered judgment establishing boundary lines and prescriptive easements on Lois' property. On appeal, Lois argued, in pertinent part, the trial court erred by (i) finding the Bames acquired title to property by adverse possession and (ii) finding the Bames have prescriptive easements on Lois' property.

Analysis: The Court of Appeals affirmed the trial court's judgment, holding that the trial court's findings were supported by *substantial evidence*.

The Appellate Court noted that it is well-established that to acquire title by adverse possession under Kentucky law, the possession must be hostile and under claim of right, actual, open, notorious, exclusive, and continuous for at least fifteen years. Although Lois testified that she gave Floyd permission to use her land, thereby preventing acquisition of title by adverse possession, the trial court found Lois' testimony not credible.

Second, to obtain a right to a prescriptive easement, a claimant's adverse use must be actual, open, notorious, forcible, exclusive, and hostile, and must continue in full force for a at least fifteen years. Once again, Lois asserted that she gave Floyd permission to use portions of her land, thereby preventing him (and his successors) from obtaining rights to a prescriptive easement. Again, the trial court heard Lois's testimony and found it not credible.

Summarizing, since the trial court's judgment was supported by *substantial evidence*, the Court of Appeals affirmed.

Berke v. Brown Suburban Condo. Homes Council of Co-Owners, Inc.
Court of Appeals of Kentucky
June 8, 2018
2018 Ky. App. Unpub. LEXIS 406

Facts & Procedural Posture: Roger Berke is an owner of three units in the Brown Suburban Condominium Homes Council of Co-Owners, Inc.'s (the "Brown") premises. The Brown has a Master Deed to which all unit owners are signatories, which states that dogs over sixteen pounds are not allowed to be kept on the premises by owners.

Berke owns a large dog that does not comply with the terms of the Master Deed. Berke claimed that that a 2008 action of the Board of Directors allowed for dogs currently on the premises to be allowed to remain with their owners, despite the fact that their presence violated the terms of the Master Deed. The Brown argued that the Board's actions in 2008 were not allowed, given that an amendment to the Master Deed requires a vote of 85% of the owners.

The trial court held that the action attempted by the Board to allow already-present dogs to remain in the premises could only be effective if a proper amendment of the Master Deed was completed. Finding that such an amendment had not been undertaken, the trial court determined

that the Board's action was ineffective and, by maintaining a dog over sixteen pounds on the premises, Berke was in violation of the Master Deed.

Berke appealed the trial court's decision.

Analysis: On appeal, Berke argued that the Board's affirmative vote to allow large dogs constituted the permissible "making and amending reasonable rules and regulations" sufficient to override the express provision to the contrary contained in the Master Deed. Berke further argued that amendment of the Master Deed was not required as a simple majority vote of the Board was all that was necessary to effectuate the change in pet policy.

The Brown argued that while the Board may adopt rules and regulations, if such rule or regulation contradicts the plain language of the Master Deed, amendment of the Master Deed is required.

The Appellate Court agreed with this reasoning, and held that the Master Deed set forth strict guidelines by which the Master Deed can be amended. Because no member of the Board followed those strict guidelines for amending the Master Deed, the Master Deed was not amended. Accordingly, Berke was in violation of the Master Deed by maintaining a dog weighing over sixteen pounds.

Jad Farhat Irrevocable GSST Trust #1 v. TTM Grp., LLC
Court of Appeals of Kentucky
April 27, 2018
2018 Ky. App. Unpub. LEXIS 245

Facts & Procedural Posture: In 2002, TTM Group, LLC ("TTM") was formed as a limited liability company by Marc King, Todd Darland, and Tara Darland. TTM subsequently purchased real property located at 1506 Ring Road, Elizabethtown, Kentucky, and constructed a commercial building for use as a fitness center. In January 2009, TTM leased the building to Energy Sports and Fitness of Elizabethtown, LLC ("Energy Sports"), a company also owned by the Kings and the Darlands. Under the Lease, Energy Sports would pay $24,000 per month in rent to TTM.

On July 7, 2009, TTM entered into a Purchase Agreement with Jad Farhat Irrevocable GSTT Trust #1 ("Farhat Trust"). Pursuant to the Purchase Agreement, TTM agreed to convey an undivided one-fifth interest in the real property to the Farhat Trust for a purchase price of $118,000. Under the Purchase Agreement, TTM also agreed to pay the Farhat Trust twenty percent (20%) of the net rental proceeds on a monthly basis.

Accordingly, the parties executed a general warranty deed conveying the undivided one-fifth interest in the real property from TTM to the Farhat Trust ("2009 Deed"). The 2009 Deed, however, contained no reference to the payment of future rents.

TTM was initially managed by King, and under King's management, TTM paid the Farhat Trust in substantial compliance with the terms of the Purchase Agreement. In the spring of 2010, King and the Darlands sold 70.833% of their interest in TTM to DJD, LLC ("DJD"). A member of DJD, James Foster, M.D., subsequently took over as manager of TTM in August 2010.

In a previous decision on the first appeal, the Appellate Court held the terms of the Purchase Agreement setting the payment of future rents was unenforceable. However, the Court also held that as a matter of law, the Farhat Trust legally owns an undivided one-fifth interest in the real property, and as such, is legally a co-tenant with TTM in the joint ownership of the real property. Further, as a co-tenant, the Farhat Trust was entitled to any rents and profits collected from the joint property. The Court of Appeals remanded the matter to the circuit court for "an accounting and allocation of all rents and profits from the property among the joint owners."

At the time the Farhat Trust gained its twenty percent (20%) interest, the property was encumbered by two mortgages: (i) the first owned by Bank of the Bluegrass, and (ii) the second owned by First Federal Savings Bank. Farhat Trust was not a party on the mortgages and instead, TTM managed the property, paid the mortgages, and distributed profits to the owners.

At some point after DJD took control of TTM and began managing the property, TTM started having difficulty making regular payments on the mortgages. In August 2012, First Federal Savings Bank filed a petition to foreclose on the property. Bank of the Bluegrass filed responsive pleadings asserting its position as the first mortgage holder. The property was foreclosed upon and sold through a master commissioner sale on December 19, 2013. Bank of the Bluegrass purchased the property for $1.4 million, and sold the property to EAC Property Holding, LLC (a company owned by Dr. Foster) for $1,461,344.00. All co-owners of the property – the Farhat Trust, TTM, and DJD – lost their equity in the property due to the foreclosure.

Farhat Trust filed a complaint against TTM alleging a variety of claims relating to the foreclosure and EAC Property Holding, LLC's subsequent purchase of the property from Bank of the Bluegrass. Specifically, the Farhat Trust alleged fraud, conspiracy, unjust enrichment, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and conversion. The Farhat Trust also sought the imposition of a constructive trust.

The trial court issued a written summary judgment in favor of TTM on all counts, and the Farhat Trust appealed.

Analysis: The Court of Appeals affirmed the trial court's holding. First, the Appellate Court examined the Farhat Trust's claim that TTM owed it a fiduciary duty on one of three theories: (i) TTM was in partnership with the Farhat Trust, (ii) TTM acted as Farhat Trust's agents by

managing the property, and (iii) the Farhat Trust bestowed special confidence in TTM to act in its best interests.

Under Kentucky law, "[j]oint tenancy, tenancy in common, tenancy by the entirety, joint property, common property, or part ownership does not of itself establish a partnership." Given that the Appellate Court had previously determined that TTM and the Farhat Trust were co-tenants holding joint ownership in property, the Farhat Trust could not claim TTM owed fiduciary duties on the basis of partnership.

Second, the Court noted that "[a]n individual is the agent of another if the principal has the power or responsibility to control the method, manner, and details of the agent's work." Here, the Farhat Trust was content acting as a passive co-owner and collecting its portion of monthly rent, and as such, the evidence was insufficient to support a finding of agency.

Lastly, the Farhat Trust could not claim fiduciary duty through a special confidence placed in TTM, as there was no evidence in the record to support such a finding.

To prevail on its unjust enrichment claim, the Farhat Trust had to prove three elements: (i) benefit conferred upon defendant at plaintiff's expense; (ii) a resulting appreciation of benefit by defendant, and (iii) inequitable retention of benefit without payment for its value. The Farhat Trust could not prove any of the aforementioned elements, and so its claim was unavailing.

Abbott, Inc. v. Guirguis
Court of Appeals of Kentucky
March 23, 2018
2018 Ky. App. LEXIS 106

Facts & Procedural Posture: Abbott, Inc. ("Abbott") and Samuel Guirguis ("Guirguis") both claimed ownership of an elevated strip of land approximately 66 feet wide and 1,500-2,000 feet long, which runs west-to-east and divides 1,066 acres of land owned by Guirguis into northern and southern portions, which had been used as a railway line from its construction in the late 19th Century until 2001.

The rail line across the property was constructed in the late 1800s by the Illinois Central Gulf Railroad ("Illinois Central"). Although no one knows definitively how Illinois Central came into possession of the land which became the railroad bed, Tom Garrett, former general counsel and current president of Paducah & Louisville Railroad, Inc. ("P&L"), stated in deposition testimony that business records indicated that Illinois Central acquired title by adverse possession sometime prior to the creation of a plat map in 1915.

Illinois Central only used the land for transportation, and lined its northern and southern boundaries with fences to prevent trespassing by people and wildlife. P&L purchased the line from Illinois Central in 1986. Thereafter, P&L transmitted freight on the subject property until 2001. P&L shipped commodities over the line, conducted inspections of the line twice weekly, performed maintenance on the rails and any related equipment, and performed vegetation control

actions annually or semi-annually. Further, P&L paid the *ad valorem* taxes on the property and carried insurance thereon.

In 2001, P&L stopped maintaining the line. P&L sought permission from the Surface Transportation Board to abandon the operation of the line in 2003. The Surface Transportation Board approved the abandonment and P&L removed the track. However, P&L continued to pay *ad valorem* taxes assessed on the property, and take actions to prevent trespassing. P&L completed the abandonment procedures in November 2004.

In October 2005, P&L executed a quitclaim deed conveying its interest in the entire stretch of rail bed, 66 feet wide and four miles in length (of which the disputed portion is a part), to Abbott. Abbott has maintained the property, including the disputed portion, since then.

Guirguis is the current owner of 12 parcels of real estate, totaling 1,066 acres, which abut the rail bed to the north and south. The deed descriptions of several of these tracts use the edges of the rail bed as boundaries. Guirguis filed action in 2008 against the prior owners (and other parties related in the purchase and sale of the property) related to the parcels included in the sale (specifically whether the Guirguis had acquired title to the rail bed as part of the conveyance).

The trial court entered an order granting summary judgment, awarding quiet title of the rail bed to Guirguis. In ruling for Guirguis, the trial court drew the following conclusions: (i) that Illinois Central had never acquired fee simple title to the land which they used as a rail bed, but rather held a prescriptive easement, (ii) that P&L's abandonment of the rail line constituted abandonment of any interest in the realty, (iii) that P&L's quitclaim deed to Abbott conveyed absolutely no interest in the property, because it lacked any interest to convey, (iv) Abbott has no valid claim of adverse possession, (v) the doctrine of champerty cannot apply in this case because the possessor's interest could not ripen into title, and (vi) the 2014 deed from the Russell Appellees to Abbott had no effect, as Johnny Brown Russell, Harry Russell, and their respective heirs had no interest to convey.

Abbott appealed the trial court's order granting summary judgment and quieting title in favor of Guirguis.

Analysis: The Court of Appeals began its analysis with the nature of P&L's possession of the property. Abbott argued that Illinois Central obtained fee simple title to the rail bed by adverse possession at some unknown point prior to the 1915 creation of the plat map. However, "where the origin of the authority to construct the rail line is not readily ascertainable from the evidence of record, Kentucky law prefers affording railroads easements rather than ownership interests." Kentucky courts view a conclusive presumption in favor of a right-of-way easement as being more tenable where there are no deeds of original conveyance or any other evidence bearing upon the initial authorization to lay the rail line.

When P&L abandoned its right to operate the railway, it manifested an intent to relinquish its easement. Further, since P&L abandoned its easement, the right to possess and use the land reverted to the owners of the tracts representing the servient estate.

The conveyance from P&L to Abbott occurred in October 2005, nearly a year after the abandonment occurred. The reversion that came with P&L's abandonment of operation of the

railway had the effect of interrupting the continuity of P&L's possession. For that reason, Abbott could not claim adverse possession of the disputed property.

As such, the Appellate Court determined that the trial court properly granted judgment as a matter of law to quiet title of the former rail bed to Guirguis.

Foursome Props., LLC v. Rite Aid of Ky., Inc.
Kentucky Court of Appeals
March 23, 2018
2018 Ky. App. LEXIS 105

Facts & Procedural Posture: In 1996, Plaintiff-landlord executed a 21-year commercial lease with Defendant-tenant whereby Defendant would operate a Rite-Aid pharmacy and retail store in Morehead, Kentucky. The Plaintiff's members also owned a few other businesses together named Rowan Restaurants and Downtown BP. The Defendant's lease named "Foursome Properties, LLC" as the landlord and contained the following exclusivity provision in Article 9: "In the Property and within three (3) miles of the Property, the Landlord shall not, either directly or indirectly, during the term of this Lease and any renewals thereof, lease to or otherwise authorize or permit the operation of any other health and/or beauty aids store or pharmacy or authorize or permit the sale of health and/or beauty aids or prescription drugs by any other parties or entities under the control of Landlord, either directly or indirectly, Landlord further represents to Tenant that it has not heretofore granted the above rights prior hereto nor will it permit the same in any operation within the above area. Except as to the sale of prescription drugs, the provisions of the foregoing paragraph shall not be applicable to the operation of, and sales from, the BP Service Center/convenient type store premises located across U.S. 60/West Main Street from the Premises.

"The provisions of the foregoing paragraph shall be a covenant which shall run with the land, and in the event of a breach thereof, Tenant shall be entitled, in addition to any other remedy available to it, to withhold rent, sue for damages, terminate the Lease and/or to obtain injunctive or other equitable relief."

In 2007, Rowan Restaurants negotiated the sale of commercial property it owned near Rite Aid to Rowan Pharmacists, LLC, which planned to open a pharmacy on the site. Also, one of the Plaintiff's owners leased property he owned near Rite Aid to Hogan Development Company for the purpose of operating a Walgreens drug store. Defendant sent cease and desist letters to the Plaintiff's owners, citing the exclusivity provision in the lease between the Plaintiff and Defendant.

In June 2008, Plaintiff filed a petition for a declaration of rights to determine the parties' rights under the exclusivity provision in the lease. Plaintiff argued the exclusivity provision applied solely to the actions of Foursome Properties, not its individual members and their related companies, since it is a distinct business entity from Downtown BP, Rowan Restaurants and the individual members. Defendant argued the Article 9 language "directly or indirectly" served to broaden the scope of the provision and include Foursome's individual members and their related

companies. Defendant also argued that the lease included a specific exclusion for one Plaintiff-related entity, Downtown BP, indicating intent to otherwise bind the members of Plaintiff and their related companies, except Downtown BP, under Article 9.

Meanwhile, the Plaintiff sold the leased property to 2 Rent Partnership (owned by daughters of the Plaintiff). As part of that transaction, the lease between Plaintiff and Defendant was assigned to 2 Rent Partnership as lessor. Plaintiff argued that because the leased property was sold and the lease assigned to 2 Rent Partnership, Plaintiff's group and individual members were no longer affected by the radius restriction in Article 9. Plaintiff argued that the provisions of the Defendant's lease run with the land and are thus binding on 2 Rent Partnership but not Plaintiff and its members.

The trial court granted summary judgment to Plaintiff on the interpretation of the exclusivity issue in Article 9. The trial court concluded that, because only Foursome Properties was specified in the lease, it was the only entity bound by Article 9. The court did not find the lease ambiguous and emphasized that Defendant, as the drafter of the lease, should have included more specific terms if it sought to bind the individual members and their related companies. The trial court granted injunctive relief to Defendant on the assignment issue, finding that Plaintiff was still bound by the lease terms until in expired on October 24, 2016. Appellate court affirmed.

Analysis: The trial court correctly construed the lease's radius restriction provisions as only being limited to the Plaintiff since it was the only entity subject to the exclusivity obligation stated in the lease and both parties were represented by counsel throughout the lease negotiation process. Also, the trial court properly granted the Defendant injunctive relief where the lease specifically stated that it applied to the Plaintiff's successors and assigns, and thus, the Plaintiff could not avoid its obligation to prohibit the operation of another health store within three miles of the leased property by assigning the lease to another entity.

Scanlon v. Scanlon
Kentucky Court of Appeals
February 2, 2018
2018 Ky. App. LEXIS 71

Facts & Procedural Posture: Plaintiff-wife and Defendant-husband were divorced on May 5, 2014. Prior to the decree of dissolution being entered, Plaintiff and Defendant executed a separation agreement, which divided the parties' assets. The separation agreement indicated that Plaintiff would retain the real property located at 535, 540 and 561 E. Second Street in Lexington, Kentucky (the "Fleetwood Garage"), which had a stated fair market value of $1.585 million. The agreement further provided that "unless otherwise noted herein, everything located in the Fleetwood Garage" would go to Defendant. Items specifically excluded were certain vehicles and furniture from the parties' marital residence that were being stored in the Fleetwood Garage. However, among the items that Defendant took with him when vacating the Fleetwood Garage was a free-standing canopy bar (the "Bar").

In February 2015, Plaintiff moved the trial court for an order requiring Defendant to return the Bar to her because one of the appraisal reports on the Fleetwood Garage described the Bar as a built-in wet bar in its description of improvements to the real estate. Accordingly, Plaintiff argued that the Bar was a fixture to the Fleetwood Garage and should not have been removed by Defendant. Defendant responded that a different appraisal report included the Bar as personal property and that the Bar was free-standing and had not been bolted to the floor or walls.

At the trial court's request, Defendant submitted a memorandum on the issue of whether the Bar was a fixture, personalty, or a trade fixture. In that memorandum, Defendant argued that the Bar was personalty by maintaining that the Bar was free-standing and that its only connection to the structure of the Fleetwood Garage was a cold-water line used to provide water to a sink built in to the Bar. In the alternative, Defendant argued that if the trial court found the Bar to be a fixture, it must be considered a trade fixture because he had used the Bar to promote his auto business and other business ventures and so he was still entitled to remove it from the real property. The Bar was comprised of multiple pieces so that it could be disassembled and relocated when desired. When Defendant removed the Bar, it left no damage to the walls or floor of the Fleetwood Garage. Further, the Plaintiff acknowledged that purpose of the Fleetwood Garage was to store automobiles and collectibles and to host wedding receptions, political fundraisers, and charitable events.

The trial court entered an order for the Plaintiff finding that the Bar was a fixture that should stay with the real property she owned. The trial court saw the Bar as similar to a pedestal sink on real property, where the sink is only plumbed in. For a pedestal sink, no one would think of removing it even though removal would not likely cause any damage. The trial court also didn't find that the Bar was a trade fixture even if the parties used the bar for receptions and other functions because the primary purpose of the warehouse building was to house and repair Defendant's antique car collection. The appellate court reversed and awarded the Bar to the Defendant.

Analysis: The trial court erred by holding that the freestanding bar in the garage was a fixture because the bar was not a fixture or a trade fixture since the garage's purpose was to store and repair vehicles. The appellate court applied a 3-part test that Kentucky courts use to determine whether an article is a permanent fixture: (1) annexation to the realty, either actual or constructive; (2) adaptation or application to the use or purpose that the part of the realty to which it is connected is appropriated; and (3) the intention of the parties to make the article a permanent accession to freehold. Under this test, the controlling factor is the intention of the parties. Here, the appellate court determined that the bar was not an ordinary fixture because (i) it could be easily removed; (ii) it was not unfit for use outside the garage; (iii) its presence did not enhance the garage's purpose, nor did its removal diminish that purpose; (iv) it was not custom made for the garage; and (v) the evidence did not show an intent to make the Bar a permanent attachment to the garage.

TAB
D

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Foreclosure in A Strong Economy

CBA Real Property Law Institute 2018

Lerner Sampson & Rothfuss

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Presentation Overview

- Statutory Updates
- Caselaw Updates
- Foreclosure Trends
- Predictions for 2019

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Overview of Statutory/Regulatory Changes

- Power of Attorney Update (KY)
- Ohio Residential Mortgage Lending Act
- HB 407: Abolition of Dower
- HB 489: Demand Letters
- Protecting Tenants at Foreclosure

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Power of Attorney Update (KY)

- KRS 457.010, et seq. is now the Uniform Power of Attorney Act.
- Effective July 14, 2018. Not retroactive.
- All POA's are now durable. 457.040
- Witness Requirement 457.050
- Notary Presumptions 457.050

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Ohio Residential Mortgage Lending Act

- 104 pages of changes
- No application to state of federal chartered banks. 1322.04(A)
- Renumbers many of the existing rules.
- Failure to obtain a necessary certificate is a strict liability offense. 1322.99(B).

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HB 407: Abolition of Dower

- Passed the House and Senate as of December 3, 2018.
- The estate of dower is abolished.
- Grandfathers vested dower rights.

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HB 489: Demand Letters

- Passed the House and Senate as of December 3, 2018.
- Creates mandatory pre-suit demand letter for 2nd mortgages and junior liens secured by residential real property. 1349.72.
- Removed probate claim extensions.
- Contains Credit Union governance rules

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Protecting Tenants at Foreclosure

- Effective June 23, 2018 as part of the Economic Growth, Regulatory Relief, and Consumer Protection Act.
- This Act was designed to *reduce* regulation.
- Repealed the Sunsent provision of the PTFA, making it permanent.
- No new definitions or changes – just as ambiguous as before.

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Honorable Mention: CFPB Regulations

- Mostly quiet in 2018.
- Kathy Kraninger confirmed as permanent director on December 6, 2018.
- Set to review prior "significant" rulemaking in early 2019.

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Overview of Caselaw Developments

- *Bayview Loan Servicing, LLC v. Vasko*, 2018-Ohio-38, 102 N.E.3d 1204 (6th District)
- *Ocwen Loan Servicing, LLC v. Malish*, 2018-Ohio-1056, 109 N.E.3d 659 (2nd District)
- *Mid Am. Mtge., Inc. v. Scott*, 8th Dist. Cuyahoga No. 106099, 2018-Ohio-1403
- *Wells Fargo Bank, N.A. v. Burd*, 2018-Ohio-3891
- *Huntington Natl. Bank v. Anderson*, 9th Dist. Lorain No. 17CA011223, 2018-Ohio-3936

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Bayview Loan Servicing, LLC v. Vasko, 2018-Ohio-38, 102 N.E.3d 1204 (6th District)

- Priority dispute between a modification of a prior 1st mortgage, and a junior lienholder.
- Contrasts R.C. 5301.23 and 5301.231.
- Modification relates back to the priority of the original mortgage.
- Distinguishes caselaw where the modification would have added additional real estate or terms not known in the prior mortgage.

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Ocwen Loan Servicing, LLC v. Malish, 2018-Ohio-1056, 109 N.E.3d 659 (2nd District)

- Adopted Business Records doctrine.
- GMAC filed bankruptcy and transferred the servicing rights to Ocwen.
- Mortgage-foreclosure cases are treated differently than debt-collection cases. *P23.
- The circumstances in which the prior servicer of the mortgage created the records need not be expressly known. Overlapping servicing systems in the same industry are good enough. *P25.

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Mid Am. Mtge., Inc. v. Scott, 8th Dist. Cuyahoga No. 106099, 2018-Ohio-1403

- Non-obligor spouse challenged ex-husband's default on the Note.
- Court would not allow a third-party challenge the Note, as the ex-wife was not a party to the underlying debt, just the mortgage. *P8
- Default judgment against the notemaker is therefore binding on all third parties.*P10

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Wells Fargo Bank, N.A. v. Burd, 2018-Ohio-3891

- FHA Face-to-Face timing issue.
- Supreme Court dismissed the fully briefed and argued appeal "as being improvidently accepted".
- Dissent clarifies the need for state-wide uniformity on the interpretation of 24 C.F.R 203.604.
- Allows 10th District decision to stand. Timing requirements of F2F are mandatory.

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Huntington Natl. Bank v. Anderson, 9th Dist. Lorain No. 17CA011223, 2018-Ohio-3936

- FHA Face-to-Face timing issue.
- Allows F2F meeting to be pre-foreclosure, even if outside the strict timeframe in 24 C.F.R. 203.604. *P30.
- 9th District reverses any implied requirements in *Liberty Savs. Bank, F.S.B. v. Bowie*, 9th Dist. Summit No. 27126, 2014-Ohio-1208.
- Creates additional split with 10th District.

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Foreclosure Trends

- Foreclosure starts are down nationwide
- Total foreclosures are down nationwide
- Nationwide first mortgage default rate hovering around 0.63%
  - (Mortgage Bankers Association, 11/20/18)
- During 2009 this first mortgage default rate was 6.3% - 10x higher than a decade ago.
  - (FHFA Housing and Mortgage Marker Report, December 2012)

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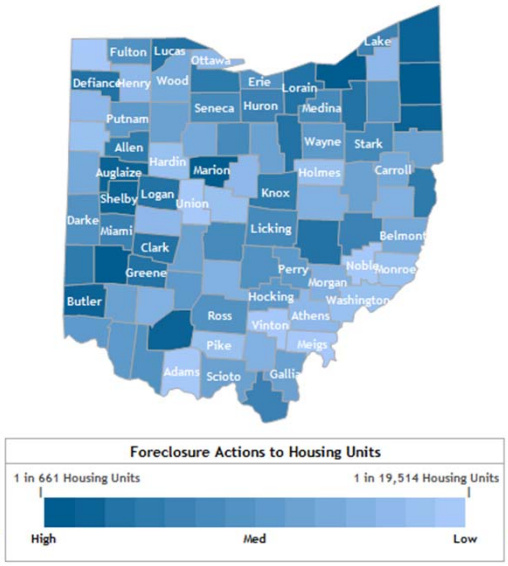
Foreclosure Activity in Ohio



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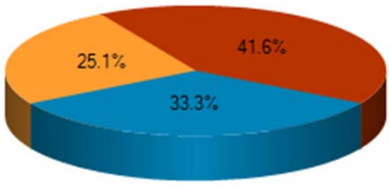
Foreclosure Activity in Ohio

Pre-Foreclosure
Prior Year ↓18.5%

Auction
Prior Year ↓25.9%

Bank Owned
Prior Year ↑52.2%



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Ohio Firms Going Regional

- Since 2009 many major Ohio foreclosure firms have either merged with other firms or expanded their practice to other states.
- Lower volumes make it difficult to support a single-jurisdiction practice.
- Outside firms from Florida, Illinois, and Missouri are moving in.

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Online Sheriff Sales

- Franklin County launched its online Sheriff Sale platform on October 5, 2018.
- Starts 5-year clock under R.C. 2329.153(E)(1)(a) to have *all* sales be online.
- Collaborative group of foreclosure firms are working closely with the State to iron out the bugs in the system.
- Other Counties to roll out the system once the kinks are worked out.

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Predictions for 2019

- 2nd Mortgage Foreclosure to Resume
  - With a rise in equity comes the viability of a junior lien foreclosure
- Home Equity Lending to Increase
  - $14.4 trillion in available equity compared to $13.2 trillion in 2005. (source: TransUnion, 2018)
  - Largest number of originations in five years

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Predictions for 2019

- Online Auctions to Go Mainstream
  - Online Sheriff Sales to spread to more counties.
  - Private Sale Officers still competing for business
- Emphasis will be back on timeframes.
  - Expectation that quality and compliance will finally merge with efficiency.

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Predictions for 2020 and beyond

- Rescissions Happen Cyclically
  - 59% of Economist expect a recession by 2020. (Wall Street Journal, 5/10/18).
- Regulations are loosening
  - Riskier loans lead to higher defaults
- Home Equity Tapped out
  - See prior slide. Depletes equity or reserves.

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Open Forum

- Questions?

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Foreclosure Update 2018

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Real Property Law Institute CLE

Presented by the Real Property Law Practice Group

December 14, 2018

Cincinnati Bar Association

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Biography of Stephen L Robison, J.D., LLM

Stephen L. Robison, J.D., LL.M., President of Strategic Property Exchanges, LLC and owner of the Robison Law Firm, is a tax attorney with more than 32 years of legal experience and over 28 years of exchange experience. Qualified as a Board Certified Specialist in Federal Taxation Law by the Ohio State Bar Association, Steve is the only Tax Specialist who is a full-time practicing Qualified Intermediary and is one of only 18 Ohio attorneys who is certified by the Ohio State Bar Association as a federal taxation law specialist.

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Section 1031 Exchanges and Qualified Opportunity Funds

Presented by: Steve Robison, J.D., LL.M. Taxation

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Key Learning Objectives

1. Why should a taxpayer consider exchanges and what are the financial advantages of exchanging.
2. How to recognize and avoid unplanned tax consequences of improperly executed exchanges.
3. What are the current tax rates on exchanges.
4. How the gains can be split between various tax years.
5. How to calculate the tax basis and taxable gain involved in an exchange
6. Understand what types of real estate and non real estate property qualifies or does not qualify for a 1031 exchange.
7. Understand what will cause an exchange to be taxable.

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Identifying your Exchange Strategy

- Which is the best type of exchange for you
- Which is the best type of replacement property
- Changing the Capital Structure
  - Midstream new investors
  - Exiting owners
  - Liquidating and Non Liquidating Property Distributions
- Changing the Debt structure
- Section 754 Elections

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Why Exchange

- Tax Deferral can now be eliminated under recent Estate and Gift tax changes
- Liberal rules
- Recent changes
- Invest in Passive Investments
- Invest in Vacation Homes

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Recent Changes

- Section 1031 eliminated the exclusions from the statute and provides that only real estate may be exchanged. This does not mean that partnership interests are now exchangeable. Look to prior law for guidance.
- Bonus Depreciation permits expensing for new construction, including exchanged basis and excess purchase amounts. If a used building, then only bonus on the excess purchase price.
- Repeal of Section 708 termination of partnership upon transfer of 50% or more alleviates the concern that a transfer of partnership will violate qualified use.
- New Section 199A provides deduction up to 20% of qualified business income for noncorporate taxpayers. This permits a 2.5% deduction of unadjusted basis of qualified property, so this needs to be calculated to determine which is the better way to go.

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Recent Changes

• Proposed Regs under Section 1.199A-2(c)(3) limuits the adjusted basis to net carryover exchanged basis plus excess, though comments have been proposed to change this.

• Likely that passive income properties do not qualify for this deduction. Question whether Qualified Opportunity Funds would qualify since the taxpayers tax basis is zero and they do not actively manage the property.

• PLR 2018250245. Taxpayer received proceeds in year 2 and failed to treat as installment sale, IRS permitted an amended to correct mistake.

• PLR 201834010 in Related Party transaction A received two properties from B, subsequently A sold Property 1 in a later 1031 exchange and transferred Property 2 into a Partnership in a tax free Section 721 transaction. IRS ruled favorably.

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Recent Changes

- Malulani Group Ltd. c. CIR on facts similar to Teruya Brotheres Ltd, 9th Circuit affirmed that NOL's cannot be used to offset taxable gain and exchange failed. Taxpayers are appealing.
- Appeal of Sharon Mitchell (California August 2018) in a newly constituted Board of Appeals, the California Court permitted a drop and swap case. Under appeal by the BTA.

Recent Changes

- Expanded Section 179 Expensing
  - Qualified Real Property (QRP) can be expensed to $1,000,000.
    - Category #1:
      - Roofs, HVAC, fire protection and alarm systems and security systems
    - Category #2:
      - Interior improvements other than enlargement of the building; elevators or escalators; structural frameworks.
      - Interior improvements to office tenants, retail and other commercial properties

1. What is a 1031 Exchange?

- Section 1031 provides an exception to the recognition of taxable gain on sale of property, provided the seller reinvest in similar or like kind property.
- Any entity or individual that is subject to tax may exchange assets they own.
- This taxable gain is:
  - Deferred until the property exchanged into is later sold in a taxable transaction or
  - Eliminated if the property exchanged , or subsequent replacement property is held until death. The assets pass to the heirs at the then fair market value on the date of death. The deferred gain is eliminated.

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1. What is a 1031 Exchange?

- Section 1031 four requirements:
  - Qualified investment in
  - Real Property
    - Defined under state law
    - Must own a direct interest in real estate
    - TIC, DST, own 100% of Partnership under Rev. Rul. 99-5; 99-6
    - Leases, short term and long term, option contracts
  - Like kind to like kind
    - Eg domestic to foreign not like kind.
  - Qualified Use
    - Same Taxpayer, unless DRE, grantor trust, estate,

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1031 Exchange Requirements

- Section 1031 timing requirements:
  - Identify potential replacement properties within 45 days.
  - Acquire one or more properties within 180 days of the exchange.
  - Extend tax return if the 180th day is after due date for tax return.
  - If 180th day occurs in the next taxable year and excess proceeds are received, may treat the receipt of funds as taxable in subsequent year. Section 453.

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Key Deadlines for a 1031 Exchange

- Time limits:
  - Identification Rules
    - Within 45 days
    - In writing
    - Three rules: 3 property/ 200%/ 95%
    - Who must receive ID
    - 200% can be a trap where non real estate assets are received or fractional interests are identified.
  - 180 days to complete unless Combo exchange (360 days); Series exchanges or Parking Exchanges (no limit).

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1031 Exchange Requirements

- Multi asset sales
  - Incidental personal property.
  - Pre 2018, personal property could be exchanged, so no problem provided the amount of personal property bought was at least equal to the property sold.
  - Now, no personal property Exchanges.
    - The question becomes, are the items of property depreciated under Section 1245 real property or personal property under state law. Is the lighting considered part of the build or a separate asset?
    - Has the client cost segregated the cost of the building sold in the exchange.
    - Will the client purchase a replacement property that contains the similar type of property treated as real estate.

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1031 Exchange Requirements

- Multi asset sales
- Allocation of Purchase Price
  - To allocate or not to allocate purchase price and debt
  - Does the inclusion of proceeds allocable to non real estate assets jeopardize the exchange
    - Define excluded assets?
    - Offset with bonus depreciation
  - Consistency for other purposes
    - GAAP
    - Sales tax
    - Personal property tax
    - Realty transfer tax

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1031 Exchange Requirements

- Multi asset sales
- Is Section 1245 Property Real Property for 1031 purposes?
  - QRP or 1245(a)(3) real property
    - Eg. If RL Roof was written off under Section 1245, need to match with roof asset in RP.
  - Are fixtures classified as personal property for cost seg real estate for state law purposes.
- If so, is it like kind to other real property?
- If so, then what about depreciation recapture in the exchange?
- If RP is DST, then no personal property, so recapture all Section 1245 when switching from commercial to DST.
- Bonus depreciation not available if electing real estate business to avoid restriction on deductibility of interest. Section 179 can still be used.

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1031 Exchange Requirements

- Multi asset sales
- Section 1250 recapture property is all depreciable property that is not Section 1245.
- RP must have Section 1250 property at least equal to RL.
- Non Straight line Section 1250 Property
  - Land improvements depreciated either
    - bonus depreciation or MACRS 15 year
  - Qualified Improvement Property, erroneously treated as 39 year rather then 15 years. Needs technical correction in order to apply bonus depreciation.

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Types of Sell first Exchange Structures

Most Common Type of Exchange

Forward Exchange where the taxpayer sells first and buys later

Must be completed within 180 days

The taxpayer can also construct improvements on the replacement property within the 180 day time period.

But what if the client needs to acquire first?

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Types of Buy First Exchange Structures

In a **Reverse Exchange**, the taxpayer can Buy First and sell later within 180 days

Or

In the following example of a **Combination Exchange** we handled, the taxpayer was able to Buy/ Sell/ Buy/ Sell over a maximum period of 720 days.

For example, A is selling a Big Box for 16 million dollars but realizes that it might be tough to find another single property within 45 days.

1. A looks around and buys Little Box for 8 million and then within 180 days sells Big Box for 16 million
2. A has another 180 days for find another building. A buys Black Box for 12 million.
3. A has another 180 days after the purchase of Black Box to sell Green Box for 6 million dollars.
4. A applies 4 million purchase price against Black Box purchase and has another 180 days to apply 2 million sale price against Red Box.

- **Parking Exchange** allows the taxpayer to buy and or build a property for an indefinite time period until a relinquished property is later sold.
- In all these exchanges, the taxpayer can construct improvements on the property.

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Types of Exchange Structures

- Related Party Exchanges. When you want to buy property from a related or affiliated entity or when you need more time to find the property you really want.
  - A, B, C and D are all related Parties and all own properties worth 100k.
  - A sells property A and cannot find a property he wants so he buys B's property.
  - B sells property B to A and cannot find a property he wants so he buys C's property.
  - C sells property C to B and cannot find a property he wants so he buys D's property.
  - D sells property D to C and finds property E that A wants. Once he has the property he simultaneously exchanges Property E with C for Property D. C exchanges property E with B for property C; B exchanges property E with A for Property B and A receives Property E.

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Types of Exchange Structures

- Building on land you already own. Leasehold improvements.
- Partnership Restructuring where one or more partners do not want to do an exchange and the remaining partners do not want to exchange the gross sales price.
- Entity Restructuring. In the case of a C Corporation or am S Corporation where the taxpayer wants to get the appreciated property out of the corporation.
- Foreign Assets Overseas or Foreign Owners of US Realty
- Multi Asset Exchanges
- Series Exchanges

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Impact of Debt repayment in context of failed Partnerships 1031 Exchanges

- In the case of a partial taxable Exchange or a failed 1031 exchange, the repayment of debt at the time of the initial sale is treated as a deemed distribution. To the extent that the taxpayer's outside is basis is less than the amount of the deemed cash distribution, the taxpayer is taxable in the year of the exchange.
- In the case of an exchange that is completed, whether or not the exchange straddles the end of year, the satisfactory conclusion of the 1031 exchange permits the reborrowing of debt to restore the partner's basis in debt. Treasury Reg 1.752. ; Revenue Ruling 2003-56

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Installment Sales and Section 1031

- Sale of Relinquished Property (RL) 1,000,000.00
- Purchase of Replacement Property 800,000.00
- What was the required reinvestment amount?
- Did the taxpayer reinvest the proper amount?
- Did the taxpayer receive any cash after the exchange?
- Did the taxpayer receive a note for the balance?
  - To be taxed over the term of the note, the note can only be issued by the Buyer to the QI, who in turn, distributes the installment note after the end of 180 day period, or end of exchange. The Maker on the note cannot be the QI, not a Deferred Sale Trust, or any other party.

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3. Today's Tax Rates

- Capital Gains
  - 0%
  - 15%
  - 20%
- Depreciation Recapture
  - 25%
- NIIT
  - 3.8%
- Related Party
- Carried Interests ordinary income versus capital gain
- Section 1245 tangible property recapture ordinary income

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Partially Taxable Exchanges

- Partially taxable versus a fully deferred Exchange.
- A partially taxable exchange may result from:
  - Intentional Failure to cause partial taxation to offset capital losses, passive losses,
  - Failure to purchase enough replacement properties
  - Borrowing too much (mortgage boot)
  - Payment of monies on behalf of the taxpayer that does not qualify as replacement property. E.g. security deposits, prepaid rents, payment of expenses on the HUD, taking cash from the closing table.

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Process Overview and Pitfalls to Avoid

- Depreciation Computations
- Installment Sales
- Related Party Sales
- Improperly designed Sales
- Held for Requirement
- Poor Communication
- Transactional documents do not match transaction
- 45 day ID
- Bad Advice
- Personal Use
- Use of Escrow funds

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Tax and Financial Issues

1. Excess debt. Borrowing too much, specifically to pay for non real estate costs, such as escrow accounts, loan expenses, operating expenses or personal expenses.
2. Payment of taxable items in exchange. Payment of items not specifically connected to the sale, such as security deposits and prepaid rents, personal expenses.
3. Loan prepayment penalties treated as interest are taxable but maybe offset by the interest deduction on their tax return.
4. Change of title due to Financing Requirements. Typically where the spouse is brought in for loan purposes.
5. Same Entity Rule
6. Disregarded Entities

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Filling out the documents and forms

- Exchange Agreement
- Assignment
- Notice of Assignment
- Purchase and Sale Agreement
- Closing Statement
- Form 8824
- Resolutions
- Loan Agreements
- Operating Agreements
- Same Taxpayer Rule
- Fanny Mae/ Freddy Mac
- TIC Agreements
- Management Agreements

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Strategy: Entity Restructuring

- Entity restructuring in 1031 exchanges usually involves:
  - The current owners of a property to be sold do not wish to continue to invest and manage their assets together;
  - New investors investing in a future project;
  - Lending constraints require restructuring of the business entity;
  - The type of future investment, such as a building on property owned by the taxpayer or related party, may involve a long term strategies or construction or a particular type of exchange structure.
  - Series Exchanges or Leasehold Exchanges

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Strategy: Entity Restructuring

- Partnerships
  - DROP and SWAP
  - Partnership Division
  - Partnership Spin off property in redemption of partners
  - Conversion to DST (in the short term)
  - Exchange and distribute installment note to cash out partners
  - Conversion to a Series LLC

Testamentary Trust terminate under its own terms

Revocation of Irrevocable Trust if the grantor is still alive

Section 355 split up Corporations

Tenancy in Commons: How many of the 15 factors can be altered or eliminated without causing the structure to fail?

State Law Issues

- Interstate Tax Issues
  - Purchase of Replacement in different states subjects taxpayers to the tax laws of various states.
  - Seven states have no income taxes
  - Tax rates range from a low of 2.9% to 13.3%
  - Some states have different rates for individuals and entities. Eg Ohio has no franchise taxes and taxes individuals at a top rate of 4.99%
  - Taxation based on residency and nonresident taxes based on income earned in that state.
  - Some states do not provide a credit for taxes paid in the other state.
  - 4 states Claw Back deferred gains when later sold: CA, Mass, MT, OR. Is the claw back based on historic deferred gain or current gain?
  - Annual reporting for claw back for CA and OR.

State Law Issues

- Interstate Tax Issues
- Conformity Issues
  - PA. no state level exclusion for 1031 exchanges
  - VT. Separate tax on land only if held less than 6 years.
  - Multistate filing issues
- Basis/ depreciation
  - State tax laws vary considerably on whether they accept federal depreciation and Section 179 rules, which change frequently. Different taxable gain based on different depreciation.
- Withholding
- Recent Developments

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State Law Issues

- Interstate Tax Issues
- Withholding
  - 17 states require withholding withheld by closing agents, which, unless exemptions for 1031 exchanges, cause taxable boot in the exchange. Many times the time required to obtain consent is less than the time it is to the closing and may also require annual licensing for the QI, which must be obtained in advance.
  - In CA, withholding on individuals, trusts and DRE's owned by them. If boot released in the subsequent year, tax on the boot released. Penalties are assessed against the QI's for failure to withhold.
  - The use of DRE's causes additional taxes in TN and CA.

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Form 8824 Computation of Gain

A	**Computation of Boot on sale of Relinquished Property**		
	Sales Price of Relinquished:	$	152,500.00
	Total Exchange Expenses (RQ, RP & QI expenses)	$	(15,409.40)
	Required Replacement Amount**	**$**	**137,090.60**
	Replacement property actual purchase price	$	135,000.00
	Subtotal: Excess Purchase ***if positive then overall boot, if negative* then no tax effect	$	2,090.60
	*Negative numbers are indicated by parenthesis ***Required Replacement* Amount (not actual replacement amount) goes on Line 16 of 8824		

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Computation of Gain

B	Computation of Excess Debt on Purchase		
	Excess Purchase Price	$	(2,090.60)
	Debt on Relinquished Property (Mort. Payoff)	$	96,209.59
	amount of Real Estate Taxes treated as Liability	$	1,501.52
	total liability on relinquished property	$	97,711.11
	the amount of allowable debt on the replacement prop	$	95,620.51
	Actual Amount borrowed on Replacement Property	$	100,000.00
	Real Estate Taxes on Replacement Property		
	subtotal actual liability	$	100,000.00
	Excess debt incurred: if positive number, then Excess Debt taxed as boot. If negative no tax effect	$	4,379.49
	*Negative numbers are indicated by parenthesis		

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Computation of Gain

C	Boot from sale/purchase	
	Sales Price:	$ 152,500.00
	Gross Proceeds:	$ 42,692.89
	Allowable Exchange expenses:	$ 11,252.40
	Liabilities:	$ 97,711.11
	Excess = Boot; 0.00 = no boot*	$ 843.60
	Amount pd into acct by client:	
	Boot remaining:	$ 843.60
	*Negative numbers are indicated by parenthesis	

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Form **8824** — **Like-Kind Exchanges**
(and section 1043 conflict-of-interest sales)
► Attach to your tax return.
► Information about Form 8824 and its separate instructions is at www.irs.gov/form8824.
OMB No. 1545-1190
2015
Attachment Sequence No. 109
Name(s) shown on tax return. Identifying number

Part I Information on the Like-Kind Exchange

Note: *If the property described on line 1 or line 2 is real or personal property located outside the United States, indicate the country.*

1 Description of like-kind property given up:

2 Description of like-kind property received:

3 Date like-kind property given up was originally acquired (month, day, year) . . . . . 3 MM/DD/YYYY

4 Date you actually transferred your property to other party (month, day, year) . . . . . 4 MM/DD/YYYY

5 Date like-kind property you received was identified by written notice to another party (month, day, year). See instructions for 45-day written identification requirement . . . . . 5 MM/DD/YYYY

6 Date you actually received the like-kind property from other party (month, day, year). See instructions 6 MM/DD/YYYY

7 Was the exchange of the property given up or received made with a related party, either directly or indirectly (such as through an intermediary)? See instructions. If "Yes," complete Part II. If "No," go to Part III . . . ☐ Yes ☐ No

Note: *Do not file this form if a related party sold property into the exchange, directly or indirectly (such as through an intermediary); that property became your replacement property; and none of the exceptions in line 11 applies to the exchange. Instead, report the disposition of the property as if the exchange had been a sale. If one of the exceptions on line 11 applies to the exchange, complete Part II.*

Part II Related Party Exchange Information

8 Name of related party | Relationship to you | Related party's identifying number

Address (no., street, and apt., room, or suite no., city or town, state, and ZIP code)

9 During this tax year (and before the date that is 2 years after the last transfer of property that was part of the exchange), did the related party sell or dispose of any part of the like-kind property received from you (or an intermediary) in the exchange? . . . . . ☐ Yes ☐ No

10 During this tax year (and before the date that is 2 years after the last transfer of property that was part of the exchange), did you sell or dispose of any part of the like-kind property you received? . . . . . ☐ Yes ☐ No

If both lines 9 and 10 are "No" and this is the year of the exchange, go to Part III. If both lines 9 and 10 are "No" and this is **not** *the year of the exchange, stop here. If either line 9 or line 10 is "Yes," complete Part III and report on this year's tax return the deferred gain or (loss) from line 24* **unless** *one of the exceptions on line 11 applies.*

11 If one of the exceptions below applies to the disposition, check the applicable box:

a ☐ The disposition was after the death of either of the related parties.

b ☐ The disposition was an involuntary conversion, and the threat of conversion occurred after the exchange.

c ☐ You can establish to the satisfaction of the IRS that neither the exchange nor the disposition had tax avoidance as one of its principal purposes. If this box is checked, attach an explanation (see instructions).

For Paperwork Reduction Act Notice, see the instructions. Cat. No. 12311A Form **8824** (2015)

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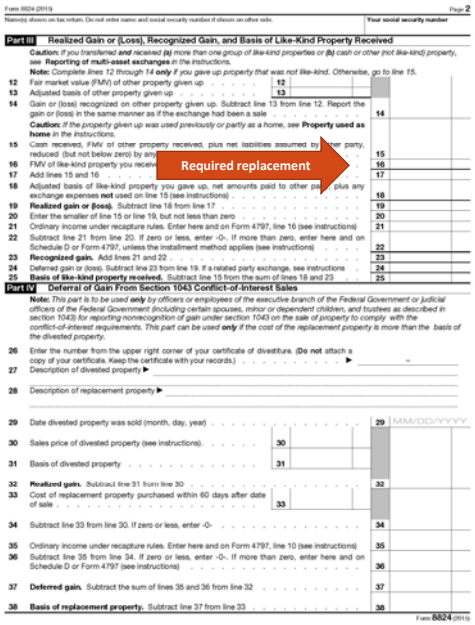

Form 8824 (2013) Page 2

Name(s) shown on tax return. Do not enter name and social security number if shown on other side. Your social security number

Part III Realized Gain or (Loss), Recognized Gain, and Basis of Like-Kind Property Received

Caution: *If you transferred and received* **(a)** *more than one group of like-kind properties or* **(b)** *cash or other (not like-kind) property, see* **Reporting of multi-asset exchanges** *in the instructions.*

Note: *Complete lines 12 through 14* ***only*** *if you gave up property that was not like-kind. Otherwise, go to line 15.*

12	Fair market value (FMV) of other property given up	12		
13	Adjusted basis of other property given up	13		
14	Gain or (loss) recognized on other property given up. Subtract line 13 from line 12. Report the gain or (loss) in the same manner as if the exchange had been a sale		14	
	Caution: *If the property given up was used previously or partly as a home, see* **Property used as home** *in the instructions.*			
15	Cash received, FMV of other property received, plus net liabilities assumed by other party, reduced (but not below zero) by any		15	
16	FMV of like-kind property you receive		16	
17	Add lines 15 and 16		17	
18	Adjusted basis of like-kind property you gave up, net amounts paid to other party, plus any exchange expenses **not** used on line 15 (see instructions)		18	
19	**Realized gain or (loss).** Subtract line 18 from line 17		19	
20	Enter the smaller of line 15 or line 19, but not less than zero		20	
21	Ordinary income under recapture rules. Enter here and on Form 4797, line 16 (see instructions)		21	
22	Subtract line 21 from line 20. If zero or less, enter -0-. If more than zero, enter here and on Schedule D or Form 4797, unless the installment method applies (see instructions)		22	
23	**Recognized gain.** Add lines 21 and 22		23	
24	Deferred gain or (loss). Subtract line 23 from line 19. If a related party exchange, see instructions		24	
25	**Basis of like-kind property received.** Subtract line 15 from the sum of lines 18 and 23		25	

Part IV Deferral of Gain From Section 1043 Conflict-of-Interest Sales

Note: *This part is to be used* ***only*** *by officers or employees of the executive branch of the Federal Government or judicial officers of the Federal Government (including certain spouses, minor or dependent children, and trustees as described in section 1043) for reporting nonrecognition of gain under section 1043 on the sale of property to comply with the conflict-of-interest requirements. This part can be used* ***only*** *if the cost of the replacement property is more than the basis of the divested property.*

26	Enter the number from the upper right corner of your certificate of divestiture. (**Do not** attach a copy of your certificate. Keep the certificate with your records.) ▶			
27	Description of divested property ▶			
28	Description of replacement property ▶			
29	Date divested property was sold (month, day, year)		29	MM/DD/YYYY
30	Sales price of divested property (see instructions)	30		
31	Basis of divested property	31		
32	**Realized gain.** Subtract line 31 from line 30		32	
33	Cost of replacement property purchased within 60 days after date of sale	33		
34	Subtract line 33 from line 30. If zero or less, enter -0-		34	
35	Ordinary income under recapture rules. Enter here and on Form 4797, line 10 (see instructions)		35	
36	Subtract line 35 from line 34. If zero or less, enter -0-. If more than zero, enter here and on Schedule D or Form 4797 (see instructions)		36	
37	**Deferred gain.** Subtract the sum of lines 35 and 36 from line 32		37	
38	**Basis of replacement property.** Subtract line 37 from line 33		38	

Form 8824 (2013)

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Critical Analysis of DST's

- Demand for customized Replacement Properties which permit taxpayers to move from Active management to passive ownership.
- RP must be an interest in real estate and not an entity.
- Deeded interest.
- Joint ownership
- Tenancy in Common
  - IRS created safe harbor Revenue Procedure 2002-22. 15 factors.
  - Unanimous consent requirements
  - Lender requirements
- Delaware Statutory Trusts

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Critical Analysis of DST's

- Delaware Statutory Trusts
  - Revenue Ruling 2004-86, 2004-2 CB 191
  - Investment Trust
    - No power to alter the investment
    - No power to accept investments after set up
    - No power to renegotiate loans
    - No capital expenditures except normal repairs and maintenance. No structural improvements.
    - No investment of cash except short term debt
    - Must distribute cash, except necessary reserves
    - No power to renegotiate leases

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Critical Analysis of DST's

- Delaware Statutory Trusts
- Pros
  - Centralized management
  - Preferred by lenders
- Cons
  - Very inflexible, cannot respond to changes in market
  - Drastically limits rights of investors
  - No fiduciary duties between the sponsor, trustee and master lessee.
  - Does not work well with buildings that require tenant improvements.

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Critical Analysis of DST's

- Delaware Statutory Trusts
- Current offerings pre-wired cash out
  - Provide cash out refinancing to DST holders after purchase.
  - Violates 2 of 7 deadly sin
  - The Revenue Ruling is all or nothing. If the Trustee has any proscribed powers, even if they do not use them, then fails as investment trust.
- DST with REIT (Manager)Purchase Options
  - REIT manager has option to transfer beneficial interests in return for OP units (section 721 contribution)
  - Lack of fiduciary duty. No duty to be fair.

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Ethics

- Duty to fulfill your duties as QI competently.
- Duty to not advise against the application of a current statute, reg, or ruling unless you believe in good faith that it is invalid.
- Duty to Advise Clients as to the proper application of the Law
- Applying Rules of Professional Code
- Avoid conflicts of interest

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Ethics

- Qualified Use Requirement
  - Taxpayer uses a property personally. Moore v. Comm.
  - Taxpayer allows a family member to use the property personally
    - Does not Pay rent?
    - Pays rent but does not report Income?
    - How many days personal use?
    - Circular 230 Requirement to conduct due diligence and ask the same kind of questions that the IRS agent would.
    - Did t/p meet Revenue Proc 2008-16 safe harbor
    - Retroactive amended tax return is fraudulent if no income was actually rec'
- In the Matter of the Appeal of Cheryl A Savage. Realtor served 14 months in jail for federal tax evasion where she moved into RP and rented her personal residence.

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Ethics

- QI Responsibility of 3rd Party Fraud
  - Should the QI document the file if client states he intends to move into the RP?
  - Should you send the client a copy of a recent tax case?
  - Make notes of the conversation?
  - Do nothing?

  What if the attorney demands that the QI wire funds to an account without the proper documentation in place?
  - What consequence if the RP is never deeded to the client?
  - What consequence if the funds are directed to acquire a property that was not identified?
  - What If client provides a backdated Identification letter?

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Ethics

- Escrow Account
  - Taxpayer requests funds from the 1031 escrow account on day 170. what result if:
    - To invest money in an opportunity Fund?
    - The taxpayer did not purchase any properties?
    - The taxpayer bought two of the three properties he identified?
    - To pay off debts?
    - Day 170 is April 16th
    - Taxpayer acquired all the properties they identified
    - Taxpayer states that other QI's he knows regularly turn over funds when requested.

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Ten ways to Mess up 1031 Exchange

1. Transaction documents
2. Identification
3. Related party
4. Partnership issues
5. Tenant in Common
6. Investment Intent
7. Ownership Structure
8. Personal Use
9. Debt
10. Constructive Receipt

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Questions?

Qualified Opportunity Zone Funds

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Qualified Opportunity Zones

- Caveat: A portion of this presentation is based on PROPOSED and/or DRAFT documents issued by the IRS and are subject to change without notice by the IRS.
- Further, this presentation is based on my interpretation of the applicability of these rules as well as conversations with colleagues. Any errors are mine.

Qualified Opportunity Zones

- Purpose.
  - New Code Section 1400Z, added by Tax Cuts and Jobs Act, offers four specific tax benefits to investors that invest in certain designated low income communities.
  - The intent of Congress is to provide much needed investment in designated low income / economically distressed geographic areas.
  - A list of all 8700 + Opportunity Zones can be found on the Department of Treasury Website.
  - For purposes of this presentation I will be focusing on Real Estate Investments and not businesses.

Qualified Opportunity Zones

- Four Tax Benefits

  1. Deferral of taxable capital gain incurred by an individual between 7/6/2017 to 12/31/2026 for those gains invested in QOF investing in qualifying OZ property. Gains incurred by a flow thru entity are treated as incurred on 12/31/2017. In 2026, such deferred gains are taxable and taxes are paid.
     - Capital gain includes short term and long term capital gains, Section 1231gains, Section 1250 depreciation recapture, as defined under the IRC.
     - Ordinary gains do not qualify, including 1245 gains.
     - Capital gains reported from flow thru entities is reported as of the last day of the taxable year.

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Qualified Opportunity Zones

2. 10% Exclusion of Gain: 10% tax basis step up for QOF investments held for 5 years through the date of sale or 12/31/2026, whichever is earlier.

3. 15% Exclusion of Gain: An additional 5% tax basis step up for QOF investments held for 7 years through the date of sale or 12/31/2026, whichever is earlier.

4. Permanent elimination of future appreciation earned on the QOF investment held for at least 10 years.

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Qualified Opportunity Zones

- Other Items:
  - The investment window to defer taxes on future appreciation extends until December 31, 2047.
  - No Tracing Rules under Section 1400Z. The funds invested do not need to come from the sale proceeds. Note, that if the funds are borrowed, the interest tracing rules under Section 163 may limit the interest deduction because the source of cash maybe tax exempt or passive.
  - Investors tax basis in QOF is zero. Further, if the Partnership borrows additional funds, the partners do not receive an allocation of tax basis attributable to debt incurred.

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Qualified Opportunity Zones

- Other Items continued:
  - Any additional funds (non capital gain) invested are treated like a taxable investment.
  - When the investment in the QOF is sold after the 10 year holding period, the taxpayer's tax basis is increased to fair market value, so any suspended losses or deductions may be utilized.
  - QOF can utilize other federal, state and local incentives, including Low Income Housing Credits, Historic Tax Credits and New Markets Tax Credits.

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Qualified Opportunity Zones

- Scope of current authority
  - Statute 1400Z-2
  - Proposed Treasury Regulations issued October 19, 2018. Treasury has requested comments be made to the Proposed Regs within 60 days of the issuance.
  - Revenue Ruling 2018-29
  - Draft Form 8996 and related Instructions
  - IRS FAQ
  - It is anticipated that at least two more sets of regulations will be released, with the first possibly in November, 2018.

Qualified Opportunity Zones

- Permitted QOF Entities
  - A Corporation, including a corporation electing S Corporation status.
  - A Partnership
  - A Limited Liability Company if it is taxed as a partnership for tax purposes (default rule) or elects to be taxed as a corporation.
    - A single member LLC would not qualify as a partnership, but could qualify as a corporation.
  - A REIT or a RIC can be used as a QOF.
  - All entities must meet the statutory and regulatory requirements as well.
  - An eligible QOF may not own another QOF.

Qualified Opportunity Zones

- Formation
  - The governing documents, eg articles of incorporation, articles of organization, certificate of limited partnership should include a statement indicating its purpose to:
    - invest in Qualified Opportunity Zone Property;
    - description of its expected scope of investments; and
    - plan to adhere to the statutory and regulatory requirements, including annual filing of Form 8996 on a timely filed tax return.
    - Form 8996 cannot be filed with an amended return.

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Qualified Opportunity Zones

- Formation
  - An Entity can elect the initial month and tax year it becomes a QOF.
  - Note that only Funds invested after that date qualify for the OZ incentives.
    - For example, an entity is formed on January 5, 2018 and receives its first qualifying capital gain investment in April 2018. The entity can choose any month from January to April 2018 as its certification date.

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Qualified Opportunity Zones

- Conversion of Existing Entities
  - An existing entity can become a QOF by amending its governing documents and providing such change to the governing documents in Form 8996.
  - An Entity can elect the initial month and tax year it becomes a QOF.
  - Note that only Funds invested after that date qualify for the OZ incentives.

Qualified Opportunity Zones

- Certification Process
  - Form 8996 must be filed annually and attached to the entity tax return.
  - Verify 90% Asset Test.
    - Use the cost basis of the property purchased as of the date of acquisition.
    - If using U.S. GAAP, use the amount on the financial statements.
    - You may exclude reasonable amounts of working capital from the value of the property treated as nonqualifying financial property for a qualifying property in the QOF.

Qualified Opportunity Zones

- Certification Process continued
  - opportunity zone business provided:
    - Where the QOF intends to invest over a period of time, the QOF should use a two tier structure, wherein the lower tier structure qualifies as a QOZB in and of itself because direct ownership does not qualify for the working capital exception.
    - The working capital is designated in writing for the acquisition, construction and/or substantial improvement of tangible property in the opportunity zone.

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Qualified Opportunity Zones

Certification Process continued

- There is a reasonable written schedule for the utilization of the working capital outlined in the plan above; and
- The funds are completely consumed within 31 months after the date the amounts were first invested in the qualifying property in the QOF.

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Qualified Opportunity Zones

- Qualified and non qualified Investment in the QOF
  - Capital Gains. The portion of the cash investment in the QOF attributable to capital gains is treated as a qualifying investment in the underlying qualified property.
  - Ordinary Income, such as Section 1245 recapture and hot assets, Section 1239 gain, do not qualify.
  - Other investments of cash or debt. Additional funds invested, such as return of principal and additional debt investment is treated as not qualifying for the tax benefits and is subject to tax on later sale.

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Qualified Opportunity Zones

- Qualified and non qualified Investment in the QOF
  - For example, the QOF invests 2,000,000 in an existing land and building. The land value is 800,000 and the building value is 1,200,000. In order to qualify under the substantial improvement exception, the QOF must invest an additional 1,200,001 in the building over a time period not to exceed 30 months. If the QOF borrows the cash to meet this requirement, these funds are treated as a separate taxable investment.

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Qualified Opportunity Zones

- Qualified Opportunity Zone stock. Any stock, common or preferred, in a domestic corporation that a QOF acquires after 12/31/2017 from the corporation in exchange for cash.
  - The corporation must be a qualified opportunity zone business at the time the stock is acquired.
  - The corporation must be organized for the purpose of being a qualified opportunity zone business and remain a qualified opportunity zone business while the QOF owns the stock.

Qualified Opportunity Zones

- Qualified Opportunity Zone Partnership Interest. Any capital or profits interest, including special allocations, in a domestic partnership or an limited liability company that a QOF acquires after 12/31/2017 from the partnership in exchange for cash.
  - The partnership must be a qualified opportunity zone business at the time the partnership interest is acquired.
- The partnership must be organized for the purpose of being a qualified opportunity zone business and remain a qualified opportunity zone business while the QOF owns the partnership interest.

Qualified Opportunity Zones

- Qualified Opportunity Zone Business. A trade or business where
  - substantially all of its owned or leased tangible property is Qualified Opportunity Zone Property (acquired after 12/31/2017) and
  - the business generates at least 50% of its total gross income from the active conduct of a trade or business and
  - the business uses a substantial part of its intangible property in the active conduct of its trade or business.
  - Less than 5% of its original tax basis in business property is nonqualified financial property.

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Qualified Opportunity Zones

- Qualified Opportunity Zone Property.(QOZP) Tangible property that the QOF acquired after 12/31/2017 and meets the following additional qualifications:
  - The original use of the property originates with the QOF, or the QOF substantially improves the property, and
  - During substantially all of the QOF's holding period, substantially all of the use of the property was in the qualified opportunity zone.
  - In the case of real estate, that should not be an issue.

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Qualified Opportunity Zones

- The Regs confirm that substantially all, in this context, means 70% of the tangible property is QOZP. This gives the QOF more leeway in investing in lower tier entities.
- Example. If a QOF has 50,000,000 to invest, it must invest at least 45 million directly in qualified business property or, if it invests through a lower tier subsidiary, only 31.5 million of the 45 million invested needs to be qualified business property. The remaining assets can be nonqualified assets.

- Equity. All funds invested must be treated as an equity investment.

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Qualified Opportunity Zones

- Debt. Capital gains invested in the QOF cannot be treated as debt. However, there is no restriction against borrowing against the value of the QOF interest.
- Original Use.
  - The use of the qualifying property (real estate) must begin with the QOF. Used property does not qualify, except that property which is substantially improved, below.
  - Land is not considered new, so the cost of land does not qualify as a qualifying investment in QOF for purposes of the substantial improvement test.

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Qualified Opportunity Zones

- If the land is treated as part of an active trade or business owned, directly or indirectly, by the QOF, then the cost of land acquired in connection with the acquisition of a new original use property may be treated as part of the qualifying cost for the QOF for purposes of the 90% test, though the Treasury Regulations have not confirmed this.
- However, if the land is not treated as active conduct of trade or business, such as a passive activity, like a ground lease, this probably will not qualify and may need to be owned by another unrelated entity.
- Land may be acquired by the sponsor, subject to a ground lease.

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Qualified Opportunity Zones

- Substantial Improvement.
  - Two Tier structure recommended, see above.
  - 30 month time period. The QOF has 30 months to substantially improve used property acquired in an Opportunity Zone.
  - Land. Land is excluded from the qualifying investment.
  - Working capital. The QOF may hold, as a qualifying investment, cash on hand to substantially improve the property acquired in an Opportunity Zone, provide the requirements of the working capital provision are met.

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Qualified Opportunity Zones

- Sin businesses do not qualify. The qualifying business is not farmland, a private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, race track or other facility used in gambling, or any store the principal business of which is the sale of alcohol beverages for consumption offsite.

Qualified Opportunity Zones

- Eligible Investors
  - Individuals, C Corporations, REITS, partnerships, partners in a partnership, S Corporations, trusts and estates

Qualified Opportunity Zones

- Timing of Investment. The investor must invest the funds within 180 days of the date of the recognition of the sale. For example, in a partnership, that date is the end of the date year.

Qualified Opportunity Zones

- 90% test.
  - In order that the QOF be an eligible entity in which to invest, at least 90% of its assets must constitute qualified Opportunity Zone Business Property. This includes a direct investment in the underlying property or through a lower tier corporate or partnership interest.
  - There is no explicit reference, either way, as to whether the cost of land is included in the 90% value test.
  - It is not included for purposes of the substantial improvement test.

Qualified Opportunity Zones

- Exiting from QOF. The designations of all the Opportunity Zones ends on 12/31/2028.

However, provided the QOF continues to qualify and the funds are held at least for 10 years, they may be held until 12/31/2047 and still enjoy the exclusion of gain from the sale.

If it is held longer, than 1/1/2048, the exclusion expires.

Qualified Opportunity Zones

- Related Party Transactions. Owners of existing properties are precluded from selling their current investments to a QOF and reinvesting those gains into the same QOF where they will own 20% or more of the QOF.

Qualified Opportunity Zones

- Securities Law Requirements. Sales of interests in QOF's constitute the sale of securities. Care should be taken to comply with all applicable federal and state securities law requires, including Reg D.

Qualified Opportunity Zones

- Open Issues
  - What is the amount of tax due if the value of the QOF investment falls in value on or before 12/31/2016?
  - Since the QOF receives an adjusted tax basis in the property, it would appear that the QOF is entitled to depreciation on the amount of the adjusted basis in the property.
  - Since the investor's tax basis in the investment is zero, it would appear that, for QOF's that are organized as a flow thru entity, the investor would not be able to utilize any depreciation deductions during the pendency of the investment, unless or until the step up in tax basis or the payment of taxes in 2026.
  - Can the suspended losses offset any of the deferred gain? Does that defeat the purpose of the tax?

Qualified Opportunity Zones

- Can QOF Funds merge or divide?
- The Regulations indicate that Treasury anticipates issuing additional guidance prior to the end of this year. Those additional regulations are expected to address the following issues:
  - The meaning of "substantially all" in each of the various places where it appears in the statute (other than with respect to QOZ Business Property held by an QOZ Business);
  - The transactions that may trigger the inclusion of gain that has been deferred under an QOZ Fund election

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Qualified Opportunity Zones

- The "reasonable period" for a QOZ Fund to reinvest proceeds from the sale of qualifying assets without paying a penalty;
- Administrative rules for when an QOZ Fund fails to meet the 90% Asset Test;
- As raised in the Regulations, whether tangible property that has been abandoned or underused, or that will be adaptively repurposed in an OZ, be included within the meaning of the phrase "original use;" and
- Additional information reporting requirements?

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Qualified Opportunity Zones

- How are carried interests taxed in a QOZ Fund?
- What happens if extenuating, unforeseeable circumstances (i.e., force majeure) cause delays in the deployment of working capital or in meeting the substantial improvement test?
- Will Treasury provide additional safe harbors for funds that are making good faith efforts to complete a project?
- In light of the Revenue Ruling and the fact that undeveloped land is not taken into account for purposes of the substantial improvement test, does undeveloped land constitute QOZ Property for purposes of the 90% Asset Test or the 70% Test?

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Qualified Opportunity Zones

- Must undeveloped land owned by a QOZ Fund be developed in order to constitute QOZ Property (i.e., so that it is directly or indirectly actively used by the QOZ Fund in its trade or business)?
- How detailed must the written "working capital" plan be to satisfy the "working capital safe harbor requirement?"

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Comparison to Section 1031 Exchanges

- Investment Amount to obtain deferral
  - Section 1031. Gross sales price less direct sales costs. May purchase additional investment.
  - Section 1400Z-2. Capital gains recognized. Does not exclude Section 1245 recapture. Investment in excess of capital gains amount is taxable transaction.
- Depreciation and tax losses
  - Section 1031. Taxpayers receive tax depreciation and flow thru tax losses. Not limited on interest expense.
  - Section 1400Z-2. No tax depreciation or tax losses. Interest may be limited under Section 163 interest tracing rules.

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Comparison to Section 1031 Exchanges

- Refinancing
  - Section 1031. Can refinance and pull out equity.
  - Section 1400Z-2. No
- Timing of Investment
  - Section 1031. Within 180 days prior to or 180 days after sale. In the case of Combination Exchange, 360 days or in the case of Combination Exchange, 360 days or in the as case of Parking, unlimited time period.
  - Section 1400Z-2. Invest within 180 days after the sale date, or if partnership, within 180 days after year end.

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Comparison to Section 1031 Exchanges

- Impact of debt at closing
  - Section 1031. None
  - Section 1400Z-2. None
- Tracing Rules
  - Section 1031. Must deposit funds from closing into escrow to be used for new investment.
  - Section 1400Z-2. Funds can come from any source.

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Comparison to Section 1031 Exchanges

- Type of Investment
  - Section 1031. Real Estate of any kind anywhere in the US, or if foreign, overseas.
  - Section 1400Z-2.Real Estate or certain qualified Business located in Opportunity Zone Only. Undeveloped land held for passive use does not qualify. Where substantial renovation, land cost does not qualify.
- Foreign Source.
  - Section 1031. Can reinvest foreign real estate into foreign real estate
  - Section 1400Z-2. Domestic only.

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Comparison to Section 1031 Exchanges

- Construct Improvements
  - Section 1031. Yes. Within 180 days, 360 days or unlimited time periods, based on the type of exchange.
  - Section 1400Z-2. Yes, within 30 months.
- Construct Improvements on land you already own
  - Section 1031. Yes
  - Section 1400Z-2. No
- Acquire property before the sale of investment.
  - Section 1031. Yes
  - Section 1400Z-2. No

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Comparison to Section 1031 Exchanges

- Length of Deferral
  - Section 1031. For as long as you own your property(ies), including future 1031 Exchanges, or if held until death, all gains are forgiven. Future appreciation may be deferred or forgiven if future 1031 exchange is done.
  - Section 1400Z-2. All deferred gains are taxed on or before 2026. Ordinary gains are taxed upon sale currently. Future appreciation is not taxed if asset held for 10 years but not longer than 2047.

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Comparison to Section 1031 Exchanges

- Tax Basis in Debt
  - Section 1031. Taxpayer may borrow funds in the future for any purpose without current taxation. Taxpayer may borrow funds to buy larger investment.
  - Section 1400Z-2. Taxpayer may not borrow funds against QOF. Debt incurred against the value of QOF investment is taxable upon receipt.
- Related party transactions
  - Section 1031. Yes
  - Section 1400Z-2. No

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Comparison to Section 1031 Exchanges

- Subsequent Sales within 10 years
  - Section 1031. Can be deferred
  - Section 1400Z-2. Taxable.
- Switch from Active Trade or Business to Passive
  - Section 1031. Yes
  - Section 1400Z-2. No
- Convert Exchange Property to Personal use
  - Section 1031. Yes after 2 years
  - Section 1400Z-2. No

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Comparison to Section 1031 Exchanges

- Annual Certification
  - Section 1031. No
  - Section 1400Z-2. Yes.
- Defers Gain Indefinitely
  - Section 1031. Yes
  - Section 1400Z-2. No, only deferred once.
- Loss in Value in Future
  - Section 1031. Lowers future taxable gains.
  - Section 1400Z-2. Lowers future taxable gains.

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Comparison to Section 1031 Exchanges

- Investment Restrictions
  - Section 1031. Any kind of real estate as defined under state or federal law, including farmland mineral interests, timber rights, cell towers. No restrictions on type of real estate. Can be passive investment.
  - Section 1400Z-2. Real estate located in low income opportunity zones. Must be either newly constructed or substantially improved. Cannot be passive investment. Cannot be farmland.
- Source of funds for Investment
  - Section 1031. Real estate sale.
  - Section 1400Z-2. Any type of capital gain sale.

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Comparison to Section 1031 Exchanges

- Use of Section 199A
- Section 1031 Yes
- Section 1400Z-2 No or unlikely, because no tax basis

Questions?

TAB
F

BASIC TITLE INSURANCE CONCEPTS

Paul A. DePascale
Underwriting Counsel
First American Title Insurance Company

I. TITLE INSURANCE GENERALLY

A. CONCEPTUALLY

Title insurance arose as a reaction to a decision by a Pennsylvania court, Watson v. Muirhead, 57 Pa. 161 (1868), that failed to adequately compensate a buyer after title was lost due to a lien. It was created to: (1) compensate losses previous title assurance products, such as abstracts or title certificates, would or could not cover; (2) provide a product that was based on contract law and not legal misrepresentation or negligence; (3) provide a product backed by a financially secure company and not an individual susceptible to death or insufficient financial backing; and, (4) national uniformity. Uniform policies and endorsements are now created and provided by the American Land Title Association (ALTA).

Title insurance is both similar and dissimilar to other forms of insurance, such as casualty insurance. The policy can be defined as,

> "…a contract whereby the insurer is paid one sum in consideration for agreeing to indemnify the insured up to a specified amount against loss caused by encumbrances upon or defects in the title to real property in which the insured has an interest."

All insurance policies have various exceptions or exclusions from coverage as well as rules related to presenting claims and interacting with the insurer. Title insurance is no different.

Unlike casualty insurance that covers property damage or bodily injury, title insurance policies insure a stated real estate interest (fee, leasehold, etc.) related to a particular piece of real estate against damage as defined in the policy under the "Covered Risks" enumerated in Schedule A. If a loss is suffered related to these matters, the policy may provide a remedy. Damages are usually related to some defect or encumbrance in title. Because rights under the policy are derived from contract law, damages are related to loss as defined, and do not cover pain and suffering or other non-economic damages.

An additional difference involves the concept of risk. The most common insurance products cover risk that cannot be changed or altered by the company. This type of insurance, such as casualty insurance, involves "risk assumption." These policies generally insure from a given date into the future—it is prospective.

Title insurance, on the other hand, looks back from a specified date—the Date of Policy (generally the date and time of recordation of the insured instrument). It is retrospective, and you may say it insures history. Title insurers are able to examine or review this history by searching the chain of title prior to Date of Policy.

Title insurance is based on "risk elimination." Although there are certain unforeseen risks covered by the policy, a great deal of risk is eliminated. Because the chain of ownership and encumbrance documents is searchable—and therefore knowable—at the time of policy issuance, the insurer is able to review the documents in the chain of title. Any interest posing a potential risk is: (a) satisfied or otherwise resolved (mortgages/liens/adverse interests); (b) considered too inherently or potentially risky and shown as an exception to coverage; or (c) deemed acceptable and removed as an exception. What's left, the other ways the title may be affected by rights and claims of others that could limit the ownership and enjoyment of the property, is what is insured.

Finally remember that policies of title insurance are basic indemnity contracts that attempt to restore the insured's financial position to that held prior to the loss. The title company does not have the duty to correct defects if there is no threat of loss from the third parties.

B. PRACTICALLY

Abstracted information from county recorders, county auditors and the county clerk's office, or public record databases/document storage, is condensed into a standard format known as a Commitment. The information contained in the Commitment constitutes the minimal standard of diligence in the majority of real estate transactions in Ohio in relation to title assurance, liens, taxes and other matters affecting the title to real property. It is important to keep in mind the Commitment is also a contractual offer to provide a title insurance policy in the future, when certain have been met.

Once the transaction has closed, appropriate lien matters have been satisfied and the insured documents are recorded, a policy is created based upon the Commitment as well as decision-making generally called "underwriting." The policy forms are certified by a national trade group, the American Land Title Association.[1] The policy provides indemnity coverage as to the accuracy of the information and associated rights. This indemnification as to accuracy of reported information, coupled with additional coverage against some off-record matters (forgery, fraud, etc.), provides the primary basis for title assurances in the American market today.

Particularly with reference to mortgage markets (both in Ohio and throughout North America), the uniformity and standardization of the title insurance product insuring the priority of a real estate-secured loan plays a prominent role in the analysis of a typical real estate transaction.

[1] All policy forms and endorsements offered in the State are subject to filing with, and approval by, the Ohio Department of Insurance.

C. FEES AND PREMIUM

The current rate structure related to title insurance premium follows. Note that endorsement coverage is priced separately and not included in this structure.

OWNER POLICIES

$ 0	to	150,000	$5.75 per $1,000 (862.50)
$150,001	to	250,000	$4.50 per $1,000 (450)
$250,001	to	500,000	$3.50 per $1,000 (875)
$500,001	to	10,000,000	$2.75 per $1,000
Over $ 10,000,000			$2.25 per $1,000

MORTGAGEE POLICIES

$ 0	to	150,000	$4.00 per $1,000 (600)
$150,001	to	250,000	$3.25 per $1,000 (325)
$250,001	to	500,000	$2.50 per $1,000 (625)
$500,001	to	10,000,000	$2.25 per $1,000
Over $10,000,000			$2.00 per $1,000

Various credits are available under this rate structure:

- Reissue credit rates reducing full rates by 30% based upon prior policy issuance <10 years old in the name of the seller
- Refinance rates partially reducing full rates by 30% based upon payoff amount of prior loan policy<10 years old
- Simultaneous issuance of two or more policies at the same time (i.e. owners and lender)

Sample premium calculation for $600,000 owner policy:

$ -0- to 150,000=150 X $5.75 per $1,000=	$862.50
$150,001 to 250,000=100 X $4.50 per $1,000=	450.00
$250,001 to 500,000=250 X $3.50 per $1,000=	875.00
$500,001 to 600,000=100 X $2.75 per $1,000=	275.00
	$2,462.50

Endorsements to the policy add some additional level of coverage ("affirmative coverage"). Availability depends upon the facts of the subject transaction and the level of increased risk associated with the requested coverage.

Endorsements are charged in a variety of ways. The charge is related to the risk associated with the additional coverage. The fee or premium charged is usually stated in one of three ways:

1. An amount per thousand dollars of coverage, such as $0.10/thousand, meaning for every thousand dollars (or portion thereof) of coverage provided, the cost is ten cents.
2. A percentage, such as 15%, indicating that the cost is 15% of the full premium for the policy being issued.
3. A flat rate, meaning the endorsement is one fee irrespective of the amount of coverage issued or premium charged, such as $250.

II. COMMITMENTS TO ISSUE COVERAGE

Prior to the closing of the transaction, and well in advance of the issuance of the title insurance policy, a title Commitment and Jacket (Exhibit A) are produced and sent to the appropriate parties. The Commitment contains information related to current ownership and coverage (Schedule A) as well as requirements that must be satisfied before a final policy can be issued (Schedule B(I)) and exceptions to title matters both general and specific to the subject piece of property (Schedule B(II)).[2]

A. SCHEDULE A

- Effective Date
- Owner Policy version and Insured Amount (A)(1)(a)
  - Proposed Insured
    - Conveyancing (below)
    - Parties to the contract
- Loan Policy version and Insured Amount (A)(1)(b)
- Estate to be insured (A)(2)
- Title currently vested in (A)(3)
  - Parties to the contract
- Legal Description (A)(4)
  - New legals
  - Surveys
  - Taking/Leaving < 5 acres
  - Contract characterization of property

B. SCHEDULE B

- Requirements contained in B(I)
  - Entity Documentation
  - Authority to act
  - Instruments required to be recorded to create the insured interest
  - Mortgages-payoffs, contacts
  - Matters needed in order to insure
- General and Special Exceptions contained in B(II)
  - Taxes
  - Liens

[2] It is important to note that the ALTA has certified a new Commitment form and Jacket required for all transactions closing after August 2018.

- Mortgages
- Easements
- Restrictions
- Other encumbrances

III. CONVEYANCING

Various issues may arise in the transaction related to persons or parties conveying title or parties in which title is being vested.

A. INDIVIDUALS

The most likely grantee candidate is the human being. Most obvious limitations here are that the human must be alive at the time of the conveyance.[3] There are additional limitations that do not technically affect a conveyance into an individual, but will affect the individual's ability to convey out, including being a minor or a person under a mental disability. In either situation, a fiduciary may need to be appointed through court involvement in order to accomplish a conveyance out of the individual.

Because Ohio continues to recognize the concept of dower, the marital status of all grantors of an interest in real estate must be indicated on the instrument, verifying marital status at the time of the conveyance.

B. LIMITED LIABILITY COMPANIES

Limited liability companies ("LLCs") are governed by Chapter 1705 of the Ohio Revised Code. This form of entity is a blend between corporation and partnership. Upon adoption in Ohio in 1994, they rapidly gained popularity and in the realm of commercial transactions they are used frequently and widely.

1. Formation

   Under O.R.C. §1705 a limited liability company is created by the filing of articles of organization with the Secretary of State. As a grantee, formation of the entity prior to conveyance is mandatory since it cannot receive title where it is not in existence.

   Note that if the LLC is properly formed and in existence in another jurisdiction (not Ohio) it need not necessarily make a separate filing here.

2. Powers To Transfer

   The actual authority of the LLC is similar to corporations:

[3] By "alive" we mean born.

- powers similar to corporation or partnership with respect to title, may own, transfer, mortgage property, lease, etc. O.R.C. §1705.03
  - title should be held, owned and transferred in name of entity. O.R.C. §1705.34
- powers not otherwise affected by law are delineated in the operating agreement. Note that under O.R.C. §1705.081(A) "…an operating agreement governs relations among members and between members, any managers, and the limited liability company. A limited liability company IS BOUND by the operating agreement of its member or members…."
- The operating agreement is essential when attempting to determine whether a manager or managing member has been appointed and whether such managers are required to also be members.

The apparent authority of members or officers is:

- parties dealing with the entity may rely on apparent authority of the member or manager with whom they are dealing in transactions within the ordinary course of business. O.R.C. §1705.25 Notwithstanding, most title providers will require documentary evidence of authority.
- "Instruments and documents providing for the acquisition, mortgage, or disposition of a limited liability company are valid and binding upon the company if the instruments or documents are executed by one or more members of the company or, if the management of the company has not been reserved to its members, by one or more of its managers." O.R.C. §1705.35

Therefore, it seems imperative that the operating agreement be obtained and reviewed to verify authority of signatories.

3. Execution:

Lilly-Livered Consultants, L.L.C.

_____

By: Lawrence Lilly, Managing Member

C. CORPORATIONS

Corporations have been relegated to the role of grantor in most transactions.

1. Formation

Creation of the corporation is achieved with the filing of articles of incorporation with the secretary of state.

- As a grantor, the corporation should be in good standing. If that is not the case, then additional investigation is required to determine why it has been canceled, dissolved or terminated. Consider the potential us of "winding up" described below.
- As a grantee, formation of the entity prior to conveyance is mandatory since it cannot receive title where it is not in existence. Note that if the corporation is properly formed and in existence in another jurisdiction (not Ohio) it need not necessarily make a separate filing here.

2. Apparent Authority

   A sound rule on apparent authority is found in OSBA Title Standard 3.11(A), c.f. 55 OBR 734, 746 (1982): authority and identity should not be questioned when the deed is executed by an officer, in the absence of known facts creating a doubt."

3. Actual Authority

   As a matter of law, the board of directors usually grants the power to enter into transactions and convey. The board has power to cause the corporation to convey unless a dissolution of the entire corporation is pending. O.R.C. §1701.59

   Additionally, resolutions or an incumbency certificate indicating the authority of certain officers to execute may be used and are generally required by the title agent.

4. Corporate Powers of Transfer

   The corporation may sell and transfer property to carry out its articles, subject to limitations from law or the articles. This usually means transactions made in the usual and regular course of business performed by officers of the corporation.[4] (O.R.C. §1701.13(F)(01)) If the transaction is not in the usual and regular course of business, additional approval is required under O.R.C. §1701.76(A)(1):
   - by directors with or without approval of shareholders
   - by shareholders at a meeting held for such purpose

   Individuals claiming to dispute the transfer who have not filed an action to set aside such a transfer within 90 days after the transaction will be barred. O.R.C. §1701.76(D)

[4] Shareholders cannot convey. *In re Leviton Construction Co.*, 122 Bankr 530 (SD Ohio 1991)

5. Execution

It is good drafting practice to craft the execution line as follows:

GENCO OLIVE OIL, INC.

_____
By: Vito Corleone, Pres.

This form of signature block will verify the grantor as well as the officer signing for the corporation. The use of the corporate seal is not essential. O.R.C. §1701.13(B)

6. Dissolution

Corporations may be dissolved on a voluntary or involuntary basis. Voluntary dissolution is governed by O.R.C. §1701.86. An involuntary dissolution may occur:

- by court order under O.R.C. §1701.91
- due to the failure to provide agent or maintain an accurate address. O.R.C. §1701.07(N)
- due to failure to pay franchise tax. O.R.C. §5733.20

7. Winding Up

The process of liquidating the assets of the corporation and resolution of the accounts, etc., upon liquidation is known as "winding up." The winding up process as such is important, since O.R.C. §1701.97 generally prohibits utilization of the rights and authorities granted by the Corporation Act upon dissolution.

No person shall exercise … any rights, privileges, immunities, powers, franchises, or authority under the articles of a domestic corporation after such articles have been canceled or after such corporation has been dissolved ……, except such acts as are <u>incident to the winding up of the affairs of such corporation, or are required to obtain reinstatement of the articles</u> …. O.R.C. §1701.97

Procedures necessary to transfer assets subsequent to dissolution are provided in O.R.C. §1701.88. The board continues to complete its business transactions and continues to appoint officers to complete acts of corporation. If it is clear that a transaction is part of winding up process, the granting clause should indicate this fact in a clause similar to the following, "…Smith Brothers, Inc., pursuant to the winding-up process under O.R.C. §1701.88…".

As a cautionary note, be aware of the following language appearing in O.R.C. §1701.88(A): "…(A)When a corporation is dissolved voluntarily, when the articles of a corporation have been canceled, or when the period of existence of the corporation specified in its articles has expired, the corporation shall cease to carry on business and shall do only such acts as are required to wind up its affairs, or to obtain reinstatement of the articles in accordance with section 1701.07, 1701.921, 1785.06, or 5733.22 of the Revised Code, or are permitted upon reinstatement by division (C) of section 1701.922 of the Revised Code, and for such purposes it shall continue as a corporation for a period of five years from the dissolution, expiration, or cancellation. A court acting pursuant to section 1701.89 of the Revised Code may extend the five-year period allowed under this division.

10. Winding Up Language:

"…, pursuant to winding up under O.R.C. §1701.88 …"

11. Reinstatement

Where dissolution is caused by cancellation of articles for failure to maintain a corporation agent, or failure to pay franchise taxes, reinstatement is possible under O.R.C. §1701.07(N). This is a curative statute of sorts since it vests all the rights and powers back to the corporation at the time of cancellation. (O.R.C. §1701.922) This means it is retroactive, and a deed given in the intervening period that might otherwise be improper or voidable would be validated.

D. TRUSTS

Since a conveyance must be to an individual or entity in existence at the time of transfer, and a trust is incapable of taking title itself, a conveyance to a trust is void (although it may pass an equitable interest), unless it is to one of the trusts existing by statutory exception. Therefore, pay attention to conveyances into trusts:

- NOT "…[grantor] to the David Copperfield Trust…"
- BUT "…[grantor] to David Copperfield, Trustee of the David Copperfield Trust"

Conveyances to the trust, instead of a fiduciary of the trust, continue to be counter to current legal thinking, but a curative statute provides a potential cure to this apparent defect. See O.R.C. §5301.071, paraphrased as follows:

No recorded instrument conveying an interest in real property shall be considered defective or invalid because the grantor or grantee of the instrument is a trust rather than the trustee(s) of the trust if:

a) the trust named as grantor or grantee has been duly created under the laws of the state of its existence at the time of the conveyance; and,
b) a memorandum of trust is recorded (not necessarily at the time of the conveyance) complying with O.R.C. §5301.255 and containing a legal description of the property conveyed by that instrument.

If these conditions are met, a conveyance to a trust shall be deemed a conveyance to the trustee(s) of the trust in furtherance of the manifest intention of the parties.

Note further that this rule (effective 3/22/2012) is given retroactive effect to the fullest extent permitted under the Ohio Constitution, unless to do so would invalidate or supersede any instrument that conveys any interest in real property recorded prior to the date of recording of a curative memorandum of trust or the effective date of this section, whichever event occurs later.

1. Forms of Trustee

In the world of title insurance trustees are generally of two varieties: undisclosed and disclosed.

a. Undisclosed, or, naked, trustees are considered in O.R.C. §5301.03:
   - defined as "Trustees," "as trustee," or "agent," or words of similar import, following the name of the grantee in any deed of conveyance or mortgage of land executed and recorded, without other language showing a trust or expressly limiting the grantee's or mortgagee's powers, or for whose benefit the same is made, or other recorded instrument showing such trust and its terms.
   - such terms do not give notice to or put upon inquiry any person dealing with said land that a trust or agency exists, or that there are beneficiaries of said conveyance or mortgage other than the grantee and those persons disclosed by the record, or that there are any limitations on the power of the grantee to convey or mortgage said land, or to assign or release any mortgage held by such grantee. Therefore, conveyances out of the naked trustee do not require any evidence of the trusts agreement, a memorandum of trust or trust certificate.
   - Usage of the naked trustee is common, unfortunately without consideration of the effect of the death of such a trustee. When confronted with a dead undisclosed trustee there should be a determination of whether the trustee was holding the property for personal use and interest or for others. An investigation into the status of the property in the deceased trustee's estate should also be made—was the property listed in the inventory, etc.

b. Disclosed trustees are fiduciaries of trusts evidenced by other language indicating that a trust document exists, such as, "Nick Carraway,

Trustee of the Jay Gatsby Unified Trust dated January 12, 1924". Examiners and purchasers are placed on notice that a trust document exists and an obligation arises to investigate this document and determine the authority of the fiduciary. OSBA Standards of Examination, 3.18 indicates that if such a trust appears to exist and is not of record, then an objection should be made unless either of the following is placed of record:

- the operative provisions of the trust agreement together with an affidavit that it is a true copy of the text in the trust agreement; or,
- a Memorandum of Trust in conformity with the requirements of O.R.C. §5301.255

2. Memorandum of Trust

The Memorandum of Trust created under O.R.C. §5301.255, when recorded, constitutes notice that a trust exists without putting the entire trust document of record. Many grantors of trusts are reticent to have private information made public. The Memorandum of Trust allows general information to be given to the examiner and exposure of solely pertinent portions of the trust.

A Memorandum of Trust must be recorded in the county of the situs of the property and contain both of the following:

- The memorandum shall be executed by the trustee of the trust and acknowledged in accordance with O.R.C. §5301.01.
- The memorandum shall state all the following:
  (a) The name and address of the trustee of the trust;
  (b) The date of execution of the trust;
  (c) The powers specified in the trust relative to the acquisition, sale, or encumbering of real property by the trustee or the conveyance of real property by the trustee, and any restrictions upon those powers.

A Memorandum of Trust may also set forth the substance or actual text of provisions of the trust that are not already described therein.

3. Trustees Ceasing to Act

What is the effect of trustees who cease to act as such either by death or resignation? Under O.R.C. §5302.171, upon the death, resignation, removal, or other event terminating the appointment of a trustee of a trust, which trustee holds title to real property, the successor trustee or any co-trustee of the trust shall file with the county auditor and the county recorder of the county in which the real property is located, as soon as is practical, an affidavit of successor trustee reciting:

- the name of the immediately preceding trustee and any co-trustees
- the addresses of all trustees

- a reference to the deed or other instrument vesting title in the trustees; and,
- a legal description of the real property.

The affidavit is not required if the original trust instrument naming the trustees and successors and containing relevant facts pertaining to the succession of trustees, or if a Memorandum of Trust in compliance with O.R.C. §5301.255 that contains relevant facts pertaining to the succession of trustees, is recorded in the office of the county recorder. Failure to file the affidavit required by this section does not affect title to real property in the one or more trustees.

4. Certification of Trust

The recipient of a Certification of Trust prepared under O.R.C. §5810.13 may rely on it and assume the facts contained therein (O.R.C. §5810.13(G)) and a person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct. (O.R.C. §5810.13(H))

E. SOLE PROPRIETORSHIPS & JOINT VENTURES

Title must vest in an individual or one of the statutory entities—a deed to a fictitious entity is a nullity. Therefore, since sole proprietorships and joint venture are not legal entities capable of holding or transferring title and should be given particular scrutiny.

When title is held in the name of a company that is not in the form of one of the statutory entities, it is held in the name of the individual. Therefore, "Giosseppi Abbandando d/b/a Abbandando Groceria" is held in the name of Giosseppi Abbandando. What happens where title has purportedly vested in "Abbandando Groceria" or worse, "Italia Groceria"? Unfortunately, the deeds are void.

Joint Ventures are relationships between two other business entities for some common purpose. Not popular in the Ohio real estate community, an extensive review of the code will elicit no mention of the ability to hold or convey real property. Therefore, where someone would attempt to vest title in Nakatomi Enterprises, a joint venture, they have actually vested title in no one, and probably have not transferred title at all, since if title does not vest in an individual or one of the statutory entities, the deed is void.[5]

F. ATTORNEYS IN FACT

The Attorney in Fact is one of the most common fiduciaries. Because his or her duties and powers arise from the instrument granting those rights—the Power of

[5] Note the distinction between a deed to a fictitious entity and one made to an individual operating a business under a fictitious name, see Thomas v. Columbus, 39 Ohio App. 3d 53, 528 N.E. 2d 1274 (10th Dist., Franklin Co. 1987)

Attorney—the document must be reviewed to determine the rights and obligations of the Attorney in Fact. Note that a "POA" is the instrument dictating the rights and responsibilities of the fiduciary. The POA is not the person acting as the fiduciary. That person is called the Attorney in Fact.[6]

1. Important factors related to the POA include:

    - The Power of Attorney must be signed, attested, acknowledged and certified as provided in O.R.C §5301.01 and contain the name of the grantor. (O.R.C §1337.02)
    - It must be effective on the date the power is exercised by the attorney in fact, not having been previously revoked by the principal/grantor or terminated by the grantor's death or incapacity.
    - If being relied upon for the execution of documents to be recorded, the POA must also be recorded in the office of the county recorder of the county in which such property is situated, prior to the recording of the deed, mortgage or lease executed by virtue of such Power of Attorney.
        - The power(s) granted to the Attorney in Fact (e.g. powers to sell, mortgage, deliver and convey) will be strictly construed; therefore, the acts to be performed must be specifically authorized. You may not assume that the attorney in fact has additional powers by implication. For example, the power to sell land does not include the power to mortgage or convey the title to the land, nor does it include the power to convey the title as a gift
        - Because the POA is only effective during the lifetime of the principal/grantor, it is essential to determine that the principal is alive at the time the Attorney in Fact signs the documents.
        - Durability of the Power of Attorney, as described in O.R.C. §1337.22, means a Power of Attorney may not be affected by the principal's incapacity. Note that as of 2012, O.R.C. §1337.24 provides that a power of attorney created under the Uniform Power of Attorney Act (O.R.C. §§1337.21 to 1337.64) is durable unless it expressly provides that it is terminated by the incapacity of the principal—meaning that it is <u>presumed to have a durability provision unless the instrument states otherwise</u>.

2. Execution
    - Execution must be by the principal or in the principal's conscious presence by another individual directed by the principal to sign the Power of Attorney. The signature is presumed genuine if properly acknowledged. (O.R.C. §1337.25)
    - Validity of Execution (O.R.C. §1337.26)

[6] It is important to note that Chapter 1337 of the Revised Code entitled "Power of Attorney" was widely modified in 2012, and various code sections previously referenced in a POA instrument may now be repealed and therefore inapplicable—so review of your forms may be in order. Further O.R.C. §§1337.21 to 1337.64 are collectively referred to as the "Uniform Power of Attorney Act."

- A Power of Attorney that is executed in Ohio on or after March 22, 2012 is valid if executed in compliance with O.R.C. §1337.25.
- A Power of Attorney that is executed in Ohio prior to March 22, 2012 is valid if executed in compliance with the laws of execution at the time of execution, meaning essentially that it must comply with the standard rules of acknowledgement.
- A Power of Attorney that is executed outside Ohio is valid in Ohio if:
  - when executed it complied with the laws of the place indicated in the power of attorney as the jurisdiction to be relied upon for such purposes; or, where signed in the absence of an indication of jurisdiction in the power of attorney; or,
  - executed in compliance with the requirements of a military power of attorney under 10 U.S.C §1044b.

3. Acknowledgement

   "The foregoing instrument was acknowledged before me this __ day of ____, 20__ by Sam Smith as Attorney in Fact on behalf of John Doe."

4. The following potential defects do NOT invalidate or make a deed defective under O.R.C. §1337.03:

   i. The Attorney in Fact, instead of the principal, is named in the deed as grantor.

      "Sam Smith, Attorney in Fact for John Doe, hereby grants…"

   ii. The Attorney in Fact's name is subscribed (signed) to such deed instead of the principal.

      /s/ *Sam Smith*_____
      Sam Smith, Attorney in Fact for John Doe

   iii. The acknowledgement sets forth that it was acknowledged by the Attorney in Fact instead of being acknowledged by the principal by its Attorney in Fact.

      "….personally came Sam Smith, Attorney in Fact for John Doe…"

5. Termination occurs under any of the following (note this is a partial list of the items enumerated in O.R.C §1337.30(A)):
   i. Death of the principal
   ii. Principal becomes incapacitated (as defined in O.R.C §1337.22(E) and power is not durable.
   iii. Revocation by principal

iv. Principal revokes Attorney in Fact's authority or Attorney in Fact dies, becomes incapacitated or resigns and the Power of Attorney fails to provide for another agent to act under the Power of Attorney.

6. The Attorney in Fact's authority terminates when (note this is a partial list of the items enumerated in O.R.C §1337.30(B)):
   i. Principal revokes the authority
   ii. Attorney in Fact dies, becomes incapacitated or resigns
   iii. Action instituted for divorce, dissolution, or annulment of agent's marriage to principal, or their legal separation, unless the power of attorney indicates otherwise
   iv. Power of Attorney is terminated

7. Statutory Authority/Incorporation by reference
   i. Attorney in Fact authority may now be described in more general terms under O.R.C §1337.43:
      (A) An Attorney in Fact has authority described in O.R.C §§1337.42 to 1337.58 if the power of attorney refers to general authority with respect to the descriptive term for the subjects stated in O.R.C §§1337.45 to 1337.58 or cites the section of the Revised Code in which the authority is described.
      (B) A reference in a Power of Attorney to general authority with respect to the descriptive term for a subject in O.R.C §§1337.45 to 1337.58 or a citation to any of those sections <u>incorporates the entire section as if it were set out in full in the Power of Attorney</u>.
      (C) A principal may modify authority incorporated by reference.

   ii. The powers regarding real property are contained in O.R.C §1337.45, including the power to sell, convey, buy and mortgage.

8. Unless a section of the Uniform Power of Attorney Act expressly provides otherwise, the sections of the Uniform Power of Attorney Act apply to a Power of Attorney created <u>before</u> the effective date of the Uniform Power of Attorney Act, being March 22, 2012. (O.R.C §1337.64(A)(1))

9. There are many forms of POA and the manner with which documents are executed by the Attorney in Fact varies widely. It must be obvious that the Attorney in Fact is signing and acknowledging on behalf of the principal. There are, however, several rules followed by the title industry when presented with a POA:

   i. A fiduciary (executor, guardian, trustee, etc.) cannot delegate fiduciary powers by a Power of Attorney to another person or entity.
   ii. An officer of a corporation cannot grant by power of attorney officer authority to another to perform acts on behalf of the corporation. (The board of directors may designate an Attorney in Fact).

iii. A partner cannot generally grant partner authority by Power of Attorney to another to perform partnerships acts. (A partnership resolution may designate an attorney in fact).
iv. An attorney in fact is a fiduciary. This authority/responsibility cannot be delegated to another.
v. Further, a fiduciary cannot "self-deal." A conveyance from the principal by Attorney in Fact to the Attorney in Fact (or family members) is not valid. See Tewksbury v. Tewksbury, 2011-Ohio-3358.

G. FIDUCIARIES

Fiduciaries are those individuals acting in a capacity separate and apart from their own individual interest. They are performing acts for someone else. Fiduciaries are persons (agents, attorneys), sometimes appointed (trustees, executors, administrators, guardians), who are accountable to someone else, or sometimes a court, who are charged with duties in relation to (for our purposes) any property, interest, trust, escrow or estate for the benefit of another.

Rights, duties and obligations are dictated by the situation within which the fiduciary works or acts. The following are the more common fiduciary capacities.

1. Executors and Administrators

   Arise out of the proceeding generically called "probate." Executors are persons named in the will who are acting for the decedent through the decedent's estate. Administrators are persons named by the Court to act in that fiduciary capacity.

   The authority of executors and administrators to convey title to real estate is usually dictated by the will or by the court through land sale proceeding.

   Fiduciaries appointed by Probate Court are forbidden by O.R.C. §2109.44 from buying or selling to themselves or an immediate family member without specific court approval.

2. Guardians

   Arise out of the proceeding called a "guardianship." Also act in other court proceedings where minors need to be represented due to their age, such as a probate case or a foreclosure where the minor has been granted an interest in the real estate and a conveyance out of the minor is required.

IV. TITLE INSURANCE POLICIES

A. TWO-PART POLICY

The policy contains two component parts:

1. Cover or jacket containing (pre-printed):
   a. Covered Risks—what matters will be insured
   b. Exclusions from Coverage—what matters are not insured
   c. Conditions—terms, definitions and rules for calculating coverage and loss

2. Schedules (prepared for the particular transaction)
   a. Schedule A containing insuring information: effective date of the policy, the amount of insurance, the name of the insured, whom the insured interest is vested, the type of estate or interest insured, and the legal description of the property
   b. Schedule B containing the exceptions from coverage shown in the Commitment that have not been removed in the underwriting process or through release recordation

Note the differences among the terms "exclusions", "conditions and stipulations", and "exceptions." Exclusions from coverage and the Conditions and Stipulations are applicable to every transaction insured under the given policy (owner or lender); the Exceptions will change with each transaction and are dependent upon the particular property and condition of title.

B. OWNER POLICY

The current Owner policy is the ALTA "2006" form, the Jacket of which is attached as Exhibit B. The Owner policy is used to insure the fee interest in real estate as well as the leasehold interest when used in conjunction with the Leasehold Endorsement. The form is also used when easement and life estate interests are being insured.

The matters insured under the terms of the policy are called "Covered Risks," generally as follows:[7]

Covered Risk 1—Title being vested other than as stated in Schedule A.[8]
Covered Risk 2—Defects or encumbrances on the Title. This Covered Risk includes but is not limited to loss from

(a) A defect in the Title caused by

i. Forgery, fraud, undue influence, duress, incompetency, incapacity or impersonation—Covered Risk 2(a)(i)

[7] Note that they have capitalized terms that are later defined in the Policy. Some of the Covered Risks enumerated herein have been paraphrased from the Policy; therefore, seek the Policy itself for the exact language contained therein.

[8] "Title" is a defined word.

ii. Lack of authority of any person executing on behalf of the true owner-particularly entity owners—Covered Risk 2(a)(ii)

iii. Failure of proper creation, execution, witnessing, acknowledgement, notarization, or delivery of any document affecting title or of the insured mortgage—Covered Risk 2(a)(iii)

iv. Failure to properly create a document by electronic means authorized by law—Covered Risk 2(a)(iv)

v. Execution under a power of attorney that is invalid because it has expired or was falsified—Covered Risk 2(a)(v)

vi. Failure of documents to be properly filed, recorded or indexed in the Public Records including failure to perform those acts by electronic means authorized by law—Covered Risk 2(a)(vi)

vii. Any defect in any judicial or administrative proceeding—Covered Risk 2(a)(vii)

(b) The lien of real estate taxes or assessments imposed on the title by a governmental authority due or payable, but unpaid—Covered Risk 2(b)

(c) Any encroachment, encumbrance……. affecting the Title that would be disclosed by a survey. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land—Covered Risk 2(c)

Covered Risk 3—Unmarketable Title[9]

Covered Risk 4—No right of access to and from the Land[10]

Covered Risk 5—The violation or enforcement of any law….. (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to

(a) The occupancy, use, or enjoyment of the Land—Covered Risk 5(a)

(b) The character, dimensions, or location of any improvement erected on the Land—Covered Risk 5(b)

(c) The subdivision of the Land—Covered Risk 5(c)

(d) Environmental protection—Covered Risk 5(d)

If a notice, describing any part of the Land, is recorded in the public records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.

Covered Risk 6—Exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.

Covered Risk 7—The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.

[9] Unmarketable Title is defined.

[10] Access here means legal access and not physical access.

Covered Risk 8—Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.

Covered Risk 9—Avoidance of the transaction vesting Title due to creditor's rights laws because

(a) Fraudulent or preferential transfers occurring prior to the transaction vesting Title—Covered Risk 9(a)

(b) Transaction vesting Title constitutes a preferential transfer due to failure of the instrument to be timely recorded or impart notice—Covered Risk 9(b)

Covered Risk 10—Any lien or other matter included in Covered Risks 1-9 occurring during the Gap

Finally, the Covered Risks section contains a promise to pay defense costs, broadened to include "any matter insured against by this Policy…"

A review of the Exclusions from Coverage and Conditions would be much too exhaustive here. However, it is important to know definitions contained in the Conditions:

(a) Amount of Insurance—the amount stated in Schedule A as increased or decreased by endorsement or terms of the policy

(b) Entity—a corporation, partnership, trust, LLC or similar legal entity

(d) Insured—the insured named in schedule A

i. Insured also includes:

(A) Successors to Title by operation of law as distinguished from purchase such as heirs, devisees, survivors, personal representatives and next of kin

(B) Successors to an Insured by dissolution, merger, consolidation, distribution or reorganization

(C) Successors to an insured by its conversion to another kind of entity

(D) A grantee of an Insured under a deed delivered without consideration

i. If the stock, shares or other equity interests of the grantee are wholly-owned by the named Insured

ii. If the grantee wholly owns the named Insured

iii. If the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity

iv. If the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes

C. HOMEOWNER POLICY

The current Homeowner Policy Jacket is attached as Exhibit C. The Homeowner Policy is used to insure the fee interest in residential real estate in somewhat limited circumstances as follows: improved one-to-four family residences (including condominium units) on a residential lot when the intended insured is a natural person. This policy, intentionally devoid of legal or insurance jargon, contains language of a more consumer friendly nature.

The cost for the policy is the rate for the normal owner policy plus 15%.

The first obvious difference is the Owners Information Sheet. While this page is not part of the insurance cover itself, it does a nice job outlining some important policy features.

The Owner's Coverage Statement contains a very important phrase, containing some of the limitations of whom it will insure: "…if the Land is an improved residential lot on which there is located a one-to-four family residence and each insured named in Schedule A is a Natural Person."

Matters that are insured by the policy, contained in the Covered Risks, are more extensive than the current Owner Policy—in fact more extensive than any other policy form. Many of the early Covered Risks are merely plain explanations of coverage afforded in earlier versions of the Owner Policy. Others are new or expand previous coverage, as underlined below. Note that Items 14, 15, 16, and 18 include reference to a deductible as well as a maximum dollar limit. [Emphasis Added]

1. Someone else owns an interest in Your Title.
2. Someone else has rights affecting Your Title because of leases, contracts, or options.
3. Someone else claims to have rights affecting Your Title because of forgery or impersonation.
4. Someone else has an easement on the Land.
5. Someone else has a right to limit Your use of the Land.
6. Your Title is defective. Some of these defects are:
    a. Someone else's failure to have authorized a transfer or conveyance of Your Title;
    b. Someone else's failure to create a valid document by electronic means.
    c. A document upon which Your Title is based is invalid because it was not properly signed, sealed, acknowledged, delivered or recorded.
    d. A document upon which Your Title is based was signed using a falsified, expired, or otherwise invalid power of attorney.
    e. A document upon which Your Title is based was not properly

filed, recorded or indexed in the Public Records.

f. A defective judicial or administrative proceeding.

7. Any of Covered Risks 1 through 6 occurring after the Policy Date.

8. Someone else has a lien on Your Title, including a:

   a. lien of real estate taxes or assessments imposed on Your Title by a governmental authority that are due or payable, but unpaid;

   b. Mortgage

   c. judgment, state or federal tax lien;

   d. charge by a homeowner's or condominium association; or

   e. lien, occurring before or after the Policy Date, for labor and material furnished before the Policy Date.

9. Someone else has an encumbrance on Your Title.

10. Someone else claims to have rights affecting Your Title arising out of fraud, duress, incompetency or incapacity.

11. You do not have both actual vehicular and pedestrian access to and from the Land, based upon a legal right.

12. You are forced to correct or remove an existing violation of any covenant, condition or restriction affecting the Land, even if the covenant, condition or restriction is excepted in Schedule B. However, You are not covered for any violation that relates to any obligation to perform maintenance or repair on the Land, or relates to:

   a. any obligation to perform maintenance or repair on the Land; or,

   b. environmental protection of any kind, including hazardous or toxic conditions or substances, unless there is a notice recorded in the Public Records, describing any part of the Land, claiming the violation exists. Our liability for this Covered Risk is limited to the extent of the violation stated in that notice.

13. Your Title is lost or taken because of a violation of any covenant, condition or restriction, which occurred before You acquired Your Title, even if the covenant, condition or restriction is excepted in Schedule B.

14. The violation or enforcement of those portions of any law or government regulation concerning:

   a. building;

   b. zoning;

   c. Land use;

   d. Improvements on the Land;

   e. Land division; or,

   f. Environmental protection, if there is a notice recorded in the Public Records, describing any part of the Land, claiming a violation exists or declaring the intention to enforce the law or regulation. Our liability for this Covered Risk is limited to the extent of the violation stated in that notice.

15. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 14 if there is a notice recorded in the Public Records, describing any part of the Land, of the enforcement action or intention to bring an enforcement action. Our liability for this Covered

Risk is limited to the extent of the enforcement action stated in that notice.

16. Because of an existing violation of a subdivision law or regulation affecting the Land:
    a. You are unable to obtain a building permit;
    b. You are required to correct or remove a violation; or,
    c. someone else has a legal right to, and does, refuse to perform a contract to purchase the Land, lease it, or make a Mortgage loan on it.;

    The amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
17. You lose Your Title to any part of the Land because of the right to take the Land by condemning it, if:
    a. there is a notice of the exercise of the right recorded in the Public Records and the notice describes any part of the Land; or,
    b. the taking happened before the policy date and is binding on You if You bought the Land without knowledge of the taking.
18. You are forced to remove or remedy Your existing structures, or any part of them - other than boundary walls or fences - because any portion was built without obtaining a building permit from the proper government office. The amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
19. You are forced to remove or remedy Your existing structures, or any part of them, because they violate an existing zoning law or zoning regulation. If You are required to remedy any portion of Your existing structures, the amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
20. You cannot use the Land because use as a single-family residence violates an existing zoning law or zoning regulation.
21. You are forced to remove or remedy Your existing structures, or any part of them, because they encroach onto Your neighbor's land. If the encroaching structures are boundary walls or fences, the amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
22. Someone else has a legal right to, and does, refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it because Your neighbor's existing structures encroach onto the Land.
23. You are forced to remove Your existing structures which encroach onto an easement or over a building set-back line, even if the easement or building set-back line is excepted in Schedule B.
24. Your existing structures are damaged because of the exercise of a right to maintain or use any Easement affecting the Land, even if the easement is excepted in Schedule B.

25. Your existing improvements (or a replacement or modification made to them after the Policy Date), including lawns, shrubbery or trees, are damaged because of the future exercise of a right to use the surface of the Land for the extraction or development of minerals, water or any other substance, even if those rights are excepted or reserved from the description of the Land or excepted in Schedule B.
26. Someone else tries to enforce a discriminatory covenant, condition or restriction that they claim affects Your Title which is based upon race, color, religion, sex, handicap, familial status, or national origin.
27. A taxing authority assesses supplemental real estate taxes not previously assessed against the Land for any period before the Policy Date because of construction or a change of ownership or use that occurred before the Policy Date.
28. Your neighbor builds any structures after the Policy Date--other than boundary walls or fences--which encroach onto the Land.
29. Your Title is unmarketable, which allows someone else to refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it.
30. Someone else owns an interest in Your Title because a court order invalidates a prior transfer of the title under federal bankruptcy, state insolvency, or similar creditors' rights laws.
31. The residence with the address shown in Schedule A is not located on the Land at the Policy Date.
32. The map, if any, attached to this Policy does not show the correct location of the Land according to the Public Records.

A review of the Exclusions from Coverage and Conditions would be much too exhaustive here. However, it is important to know some of the Conditions:

Definitions

- Natural Person - a human being, not a commercial or legal organization or entity. Natural Person includes a trustee of a Trust even if the trustee is not a human being
- Land - the land or condominium unit described in paragraph 3 of Schedule A and any improvements on the Land which are real property.

Continuation of Coverage

- This Policy insures You forever, even after You no longer have Your Title. You cannot assign this Policy to anyone else.

This Policy also insures:

(1) anyone who inherits Your Title because of Your death;
(2) Your spouse who receives Your Title because of dissolution of Your marriage;
(3) the trustee or successor trustee of a Trust or any Estate

Planning Entity to whom You transfer Your Title after the Policy Date;

(4) the beneficiaries of Your Trust upon Your death.

(5) anyone who receives Your Title by a transfer effective on Your death as authorized by law.

D. LOAN POLICY

The current Loan Policy is the "2006" form, the Jacket of which is attached as Exhibit D. The Loan Policy is used to insure the validity, enforceability and priority of the mortgagee interest in real estate.

The matters insured as "Covered Risk" items expand upon those listed in the Owner Policy as follows:

Covered Risk 1—Title being vested other than as stated in Schedule A.

Covered Risk 2—Defects or encumbrances on the Title

This Covered Risk includes but is not limited to loss from

(a) A defect in the Title caused by

i. Forgery, fraud, undue influence, duress, incompetency, incapacity or impersonation—Covered Risk 2(a)(i)

ii. Lack of authority of any person executing on behalf of the true owner-particularly entity owners—Covered Risk 2(a)(ii)

iii. Failure of proper creation, execution, witnessing, acknowledgement, notarization, or delivery of any document affecting title or of the insured mortgage—Covered Risk 2(a)(iii)

iv. Failure to properly create a document by electronic means authorized by law—Covered Risk 2(a)(iv)

v. Execution under a power of attorney that is invalid because it has expired or was falsified—Covered Risk 2(a)(v)

vi. Failure of documents to be properly filed, recorded or indexed in the Public Records including failure to perform those acts by electronic means authorized by law—Covered Risk 2(a)(vi)

vii. Any defect in any judicial or administrative proceeding—Covered Risk 2(a)(vii)

(b) The lien of real estate taxes or assessments imposed on the title by a governmental authority due or payable, but unpaid—Covered Risk 2(b)

(c) Any encroachment…….. affecting the Title that would be disclosed by a survey. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land—Covered Risk 2(c)[11]

[11] This is expanded coverage beyond prior polices when it covers encroachments onto adjoining land, which was not previously covered because the definition of land meant within the insured premises. Seek assistance from your underwriter regarding how this language affects the survey exception in Schedule B if that is to remain.

Covered Risk 3—Unmarketable Title
Covered Risk 4—No right of access to and from the Land
Covered Risk 5—The violation or enforcement of any law….. (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to

(a) The occupancy, use, or enjoyment of the Land—Covered Risk 5(a)
(b) The character, dimensions, or location of any improvement erected on the Land—Covered Risk 5(b)
(c) The subdivision of the Land—Covered Risk 5(c)
(d) Environmental protection—Covered Risk 5(d)

If a notice, describing any part of the Land, is recorded in the public records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.

Covered Risk 6—Exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice
Covered Risk 7—The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records
Covered Risk 8—Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge
Covered Risk 9—Invalidity or unenforceability of the lien of the insured mortgage including but not limited to loss from

(a) Forgery, fraud, undue influence, duress, incompetency, incapacity or impersonation--Covered Risk 9(a)
(b) Failure of any person or Entity to have authorized a transfer opr conveyance—Covered Risk 9(b)
(c) The insured Mortgage not being properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered—Covered Risk 9(c)
(d) Failure to perform those acts necessary to create a document by electronic means authorized by law—Covered Risk 9(d)
(e) A document executed under a falsified, expired or otherwise invalid power of attorney—Covered Risk 9(e)
(f) A document not properly filed, recorded or indexed in the Public Records including failure to perform those acts by electronic means authorized by law—Covered Risk 9(f)
(g) A defective judicial or administrative proceeding—Covered Risk 9(g)

Covered Risk 10—Lack of priority of the lien of the Insured Mortgage over any other lien or encumbrance
Covered Risk 11—lack of priority of the lien of the insured Mortgage

(a) As security for each and every advance of proceeds of the loan over any statutory lien arising from construction of an improvement when the improvement is either
    i. Contracted or commenced on or before the Date of Policy—Covered Risk 11(a)(i)

ii. Contracted, commenced or continued after Date of Policy—Covered Risk 11(a)(ii)

(b) Over the lien of any assessments for street improvements under construction or completed at date of policy—Covered Risk 11(b)

Covered Risk 12—Invalidity or unenforceability of any assignment of the insured Mortgage

Covered Risk 13—invalidity, unenforceability, lack of priority or avoidance of the lien of the Insured Mortgage due to creditors' rights laws because of

(a) Fraudulent or preferential transfers occurring prior to the transaction creating the lien—Covered Risk 13(a)[12]

(b) Insured Mortgage constitutes a preferential transfer due to failure of the instrument to be timely recorded or impart notice—Covered Risk 13(b)

Covered Risk 14—Any lien or other matter included in Covered Risks 1-13 occurring during the Gap.

Finally, the Covered Risks section contains a promise to pay defense costs, broadened to include "any matter insured against by this Policy…"

Noteworthy in the Conditions portion of the 2006 Policy are some of the definitions contained in Definition of Terms:

(a) Amount of Insurance—the amount stated in Schedule A as increased or decreased by endorsement or terms of the policy

(c) Entity—a corporation, partnership, trust, LLC or similar legal entity

(d) Indebtedness—the obligation secured by the Insured Mortgage and if the obligation is payment of a debt, it is the sum of the amount of principal disbursed at date of Policy, the amount disbursed after date of policy, construction loan advances, interest, prepayment premiums, exit fees, expenses of foreclosure, amounts advanced to protect the lien, taxes, insurance and amounts to prevent deterioration, then reduced by total of all payments and amount forgiven by the Insured[13]

[12] Clarifies the fact that coverage is for transactions occurring prior in the chain of title as opposed to the transaction creating the lien of the Insured Mortgage as stated in Exclusion 6.

[13] The language clearly contemplates future advances for the purposes of calculating loss under the policy. Coverage for future advances in contained in Covered Risk 11.

V. ENDORSEMENTS

Affirmative coverage, or coverage added to the standard policy, is primarily accomplished by endorsement. There are many and varied endorsements certified by the American Land Tile Association. Much too many to cover completely here, the following are a sampling of some common current ALTA endorsements.[14]

ALTA 9-06 (Restrictions, Encroachments, Minerals—Loan Policy) (Exhibit E)
ALTA 9.3-06 (Covenants, Conditions and Restrictions—Loan Policy) (Exhibit F)
ALTA 17-06 (Access and Entry) (Exhibit G)
ALTA 17.1-06 (Indirect Access and Entry) (Exhibit H)
ALTA 18-06 (Single Tax Parcel) (Exhibit I)
ALTA 18.1-06 (Multiple Tax Parcel) (Exhibit J)
ALTA 19-06 (Contiguity) (Exhibit K)
ALTA 19.1-06 (Contiguity—Single Parcel) (Exhibit L)
ALTA 19.2-06 (Contiguity—Specified Parcels) (Exhibit M)
ALTA 25-06 (Same as Survey) (Exhibit N)

VI. EASEMENTS

A. DEFINITIONS OF THE TERM "EASEMENT":

Due to the use and applicability of easements in real property settings, definitions abound:

- A right of use over the property of another.
- A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property owner.
- An interest which one person has in land of another.
- A primary characteristic of an easement is that its burden falls upon the possessor of the land from which it issued and that characteristic is expressed in the statement that the land constitutes a servient tenement and the easement a dominant tenement. (*Potter v. Northern Natural Gas Co*., 201 Kan. 528, 441 P.2d 802, 805.)
- An interest in land in and over which it is to be enjoyed, and is distinguishable from a "license" which merely confers personal privilege to do some act on the land. (*Logan v. McGee*, Miss., 320 So.2d 792, 793.) (Black's Law Dictionary 12 (Sixth Edition 1990)).
- The parcel that benefits from the easement is known as the "Dominant Estate." The parcel that is burdened is the "Servient Estate.

B. LICENSES AND EASEMENTS DISTINGUISHED

[14] The ALTA 28-Series is discussed later in the materials.

License definitions are also quite plentiful; a personal favorite is, "the authority to do something on another's land which would otherwise be unlawful." Because licenses are not interests in land, they need not comply with the Statute of Frauds nor conform to the formalities in granting an interest in real estate.

While it may seem obvious that there is a difference between a license and an easement, various landmarks should be noted. The term "license" denotes an interest in land in the possession of another which:

- entitles the owner of the interest to a use of the land
- arises from the consent of the one whose interest in the land used is affected thereby
- is not incident to an estate in the land
- is not an easement

A license is a personal, revocable, and non-assignable privilege, conferred either by writing or parol, to do one or more acts upon land without possessing any interests in the land. At common law, an oral license to be exercised upon the land of another creates an interest in the land that is not necessarily an "interest in land" for purposes of the Statute of Frauds.[15]

Further, there are several distinguishing characteristics between an easement and a license:

- a license is terminable at the will of the licensor, an easement is not;
- a license cannot be assigned, and does not pass at death;
- a license terminates upon conveyance of the land;
- a license is an agreement, binding only on the parties to it;
- an easement is an interest in real property which runs with the land. [16]

C. CREATION OF AN EASEMENT

Typically, an appurtenant easement is created by a reference of a grant in a deed of conveyance from the grantor (owner of the Dominant estate) to the Grantee (owner of the Servient estate). Normal requisites for granting of interests in real property must be observed (acknowledgment and notarization).

Easements are also created by Agreement for Easement or Declaration of Easement. These separate instruments are used when a conveyance is not contemplated or when an easement in gross is created giving rights to a party outside of the chain of title, i.e. utility company.

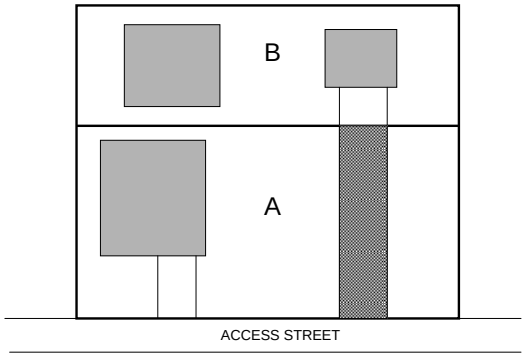
It is possible that the owner of dominant and servient estates is the same party and will wish to create an easement right—usually for the purposes of subdividing the property later. It is essential to note that the doctrine of merger in Ohio may destroy such

[15] *DePugh v. Mead Corp*. (1992), 79 Ohio App.3d 503
[16] *Weir v. Consolidated Rail Corp*. (1983), 12 Ohio App.3d 63

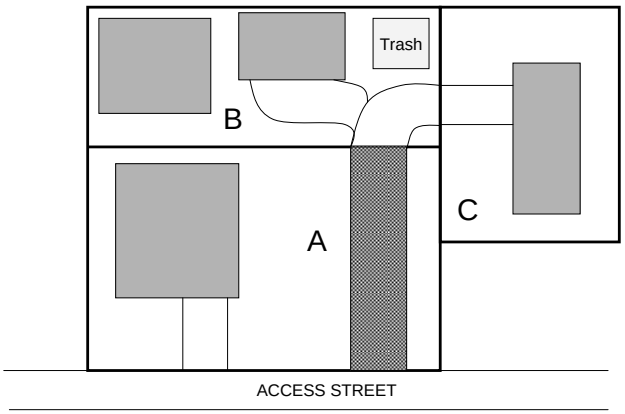
a grant since the fee interest will merge with the easement interest. Such outright grants will fail unless the document specifies the intention that merger not apply and that the easement right will continue as to successors/assigns of the affected estate. Similarly, if an easement holder will be taking a fee interest in the property, the deed should reflect this language in order for the easement rights to survive.

D. CHARACTERISTICS OF EASEMENTS:

A primary characteristic of an easement is that it contains aspects of benefit and burden. The burdened parcel is known as the "servient estate" or the servient tenement. The benefited parcel is known as the "dominant estate." Using an access easement as an example, as depicted in the diagram below, the driveway from the street to the garage on Lot B benefits Lot B and burdens Lot A. Lot A would be the servient parcel, while Lot B would be the dominant parcel.



Consider the following more complicated example:



The above illustration depicts three separate lots. Only one lot, Lot A, has road frontage, so various easement rights need to be considered for access to Access Street for Lots B and C. Assume Access Street is a publicly dedicated road. Once the proper easements rights have been created, it is apparent that Lot A is the servient property for Lots B and C. Note that Lot B is a servient tenement for Lot C. The access easement across Lot A is hopefully a non-exclusive easement because it serves several properties. Note also that Lot B is a servient property for the access easement and also may be a servient parcel where Lot C is the dominant parcel for use of the trash dumpster. Inquiry should also be made regarding Lot A's ability to use the dumpster.

E. CLASSES OF EASEMENTS:

Easements may be classified in several ways. Most commonly they are designated either "appurtenant" or "in gross."

- Appurtenant Easement: an easement created to benefit some other particular land, and therefore containing benefits and burdens that run with the land. It is usually created by a reference of a grant in a deed of conveyance from the grantor (owner of the Dominant estate) to the Grantee (owner of the Servient estate).
- Easement in Gross: involves a right to use the land in a certain stated way and is not dependent on the ownership of an adjacent parcel; it usually benefits some other party e.g. a utility company having the right to run a gas line over the property. Note that an easement in gross has no dominant estate *per se*.

F. TERMINATION OF AN EASEMENT

Easement rights may be terminated or extinguished in a variety of ways, including:

- Voluntarily by recording an instrument such as a Termination or Release executed by all parties with rights in or liens on the benefited land.
- By merger as discussed above when the easement holder acquires ownership of the servient estate. Advisable practice in this instance is to record written declaration of intent to terminate under concept of merger.
- Automatic termination in easement grant may be keyed to specific date or to occurrence of event on lack of necessity due to obviation of prior condition. In event of specific termination, prudent practice would advise making such event a matter of record by recitation in appropriate affidavit.

G. EASEMENTS AND THE TITLE INSURANCE POLICY

1. Easements as Exceptions

The insurer will show easements on the servient estate—that burden the subject parcel—as exceptions to title insurance in Schedule B. These easements are usually found in recordings, surveys or other transactional documents.

Easements found in legal descriptions that burden the subject property may use the following language: "Subject to an easement…" meaning the land is burdened by an easement in favor of another and burdening the land conveyed.

2. Easements as Part of the Insured Premises

Insurance of appurtenant easements as part of the insured estate in Schedule A of the policy is available for easements running with land that benefit the subject/insured land.

Easements that will be insured are usually found in the legal description of a deed in the chain of title, a separately recorded easement agreement or through an instrument created as part of the transaction (language in the deed or a separate easement agreement) that will be recorded.

Easements found in legal descriptions that benefit the subject premises usually use the following language: "Together with an easement…" meaning the land is benefitted by an easement in favor of the grantee, and burdening land kept by the grantor.

Whether the easement rights to be insured arise from "together with" language in the legal description, or are set out as a separate parcel or in a

separate instrument, any rights that encumber the easement rights or land that it crosses must be shown as exceptions in the policy, just as you would with respect to the subject land, as determined through an examination of title as to the easement premises being insured.

Insuring easement rights in Schedule A may be accomplished by either of the following:

- Naming it as a separate parcel appearing after the legal description of the subject premises, which might be designated "Parcel 1" such that the insured easement parcel would be labeled "Parcel 2" with typical language as follows:

  > Parcel 2: Rights constituting a real property interest as granted in that [titled document, e.g. "Access Easement" recorded as Instrument No. _____, for the purposes as described therein.

- Following the legal description of the subject premises, with the prefix "TOGETHER WITH."[17]

Apply the following criteria when you consider insuring an appurtenant easement:

- Easement grants must typically be by valid written recorded instrument. Non-specific, unrecorded easements or prescriptive/use easements are not typically insurable.
- Taxes, liens and other encumbrances of the easement premises will be excepted in Schedule B of policy. Expect separate examination fees for this.
- Inspection of easement premises/survey plat will be required to show location, unobstructed use, and benefit to the insured land. Survey work is critical if the use of the easement must be established independently of the record of conveyance. Frequently, contiguity of the easement parcel to the insured premises in the policy would be requested in the form of a Contiguity Endorsement.

3. Reciprocal Easement Agreements

For reciprocal easements—easements that both benefit and burden the land—the title policy will include both: a Schedule A insured parcel ("…together with…") and a Schedule B exception to title ("…subject to…"). The exception will show all matters which effect or take priority over the insured easement, such as taxes, mortgages, other easement rights, etc.

[17] Note that many conveyancing instruments will contain the term "Subject to," especially within the legal description. This phrase is usually interpreted to mean the matter following the phrase is one that encumbers the property and is not beneficial.

VII. ENCROACHMENTS

Encroachments do not generally arise from the examination at the courthouse. They are incorporated into the commitment either through a survey reading (having been depicted on the survey of the subject premises) or they are shown in prior title evidence. Encroachments are the subject of a Schedule B exception, arising from either:

- A structure situated on the insured premises encroaching onto adjoining property, building setback lines or easements; or,
- A structure situated on adjoining property encroaching onto the insured premises.

In the old days title providers would provide certain kinds of affirmative coverage directly below a stated encroachment in Schedule B. Because endorsements have been created and filed that deal with most of these issues, the old method of providing affirmative coverage is no longer necessary or available.

It goes without saying that resolution of encroachment issues involves a survey, and obviously encroachment coverage, when given, must be supported by a survey sufficient for that purpose. Affirmative coverage related to encroachments is generally provided through the ALTA 28-series, including the following. Note however that these are expensive endorsements (because the risk associated with this coverage is much greater than normal).

ALTA 28-06 (Easement-Damaged or Enforced Removal) (Exhibit O)
ALTA 28.1-06 (Encroachments-Boundaries and Easements) (Exhibit P)
ALTA 28.2-06 (Encroachments-Boundaries and Easements-Described Improvements) (Exhibit Q)
ALTA 28.3-06 (Encroachments-Boundaries and Easements-Described Improvements and Land Under Development) (Exhibit R)

VIII. APPROACHES TO SELECTED TITLE DEFECTS

A. PRIORITY, LOST PRIORITY AND CONSTRUCTION

Recent or contemplated construction on the property will complicate title issuance and review. The essential issue is priority of the mortgage and whether that priority is negatively impacted by mechanics' liens. Rights to mechanics' liens arise in conjunction with the construction of improvements on real property in favor of work and materials suppliers who contribute labor and materials. The lien is obviously a method of securing payment in favor of the contractor for the value of the labor and materials incorporated by the contractor into the improvements on the land.

What differentiates mechanics' liens from other liens or claims? Under the Ohio Mechanics' Lien Act ("Act") contained in Chapter 1311, a mechanics' lien, once recorded, relates back to a period prior to recordation, meaning it may enjoy a priority better than a prior-recorded deed or mortgage.

The Act contemplates two priority dates: the date of First Work or the date of the recording of a Notice of Commencement ("NOC"). The date of First Work concept is rather indistinct and was resolved to a large extent by the NOC, designed to create a known date upon which all priority of future mechanics' liens could be set. When the NOC is available for a given transaction (see O.R.C. §1311.04(O)), it is recorded immediately after the insured mortgage, creating a priority date that is, at best, immediately after the mortgage priority.

Availability of the NOC is complicated in relation to single- or double-family dwellings, or residential condominium units under O.R.C. §1311.04(O). You must first determine whether the transaction is:

- Home Construction Contract (HCC): Owner is not the contractor
- Home Purchase Contract (HPC): Owner is the contractor

This is an important distinction because the NOC is not supported in HCC transactions unless required by the lender. The NOC is available in all HPC transactions.

The lien claimant is required to diligently prosecute its claim, and a lien must be properly recorded within the required time period, being within sixty days from the date on which the last labor or work was performed or material was furnished by the person claiming the lien, if the lien arises in connection with a one- or two-family dwelling or in connection with a residential unit of condominium property under O.R.C §1311.06 (B).

Priority is most commonly lost when construction starts prior to the recordation of the insured mortgage, known as a "pre-start." If work has started, but the NOC has not been filed, the following steps may mitigate this situation:

- determine all potential lienholders (contractors, subcontractors, materials suppliers, etc.) and obtain lien waivers from them
- pay all invoices
- obtain lien releases from any current lien holder
- record the mortgage
- record the NOC

At worst, lien priority will be "bifurcated" causing two lien priority dates—work first started prior to the filing of the NOC, which may have a priority as of that date, and work started after the NOC, which will have a date as of the NOC. Loss of priority will be suffered only during the period between the start of work and the NOC filing.

Obviously, what is needed in order to properly underwrite mechanics' lien risk is dependent upon the title insurer, but will many times include the following:

- Indemnity from owner/contractor—including financials since an indemnity is only worth the person/entity backing it up.
- Affidavit of Owner indicating all the contractors who have worked on the site.
- Affidavit from Original Contractor that all subcontractors and material suppliers have been paid.
- Waiver of Right To Mechanic's Lien from every sub or material supplier involved in the project prior to the filing of the mortgage.

Mechanics' lien issues related to construction which has been paid in full may also be resolved with the affidavit contemplated in O.R.C. §1311.011(B)(1), created to protect consumers who have fully paid for the construction project.

- HCC: obtain an affidavit complying with O.R.C. §1311.011(B)(1) from the owner of the property (who will be living in the home when finished) and the builder.
- HPC: obtain an affidavit complying with O.R.C. §1311.011(B)(1) from the builder (who currently owns the property) and the purchaser (who will be living in the home when finished).

B. NOTICE TO COMMENCE SUIT & LIEN SUBSTITUTION

The Code provides a potential resolution when liens are being disputed. Two concepts under O.R.C. §1311.11, Notice to Commence Suit and Lien Substitution, provide procedures that would ultimately remove the lien for failure of prosecution or substitute the lien for a bond, respectively.

C. DECEDENTS AND ESTATE-RELATED ISSUES

Upon the death of the titleholder, title is vested in the heirs of the decedent. If a fee owner has died, it is essential to immediately start the process of determining if an estate has been opened, whether a fiduciary has been appointed and whether the decedent had a will. If an estate has been opened for the decedent, it will be necessary to work with the probate court in order to obtain title to proposed grantees. Obviously this topic is too broad to treat in any detail here.

D. MARITAL ISSUES

Multitudes of issues arise with property held during a marriage and/or brought into the marriage. It is essential to keep in mind when the spouse or spouses took title—before or during the marriage. Essentially, the question to be asked is, "Who is in title?"

Do not fail to consider the issue of dower under O.R.C. Chapter 5305. The concept of dower involves rights that vest in a surviving spouse in the land held during the marriage. This right exists in real estate held by the decedent, even if the surviving spouse was not in title.

Financing situations are probably the most common situation involving marital property. Remember that the entire fee interest in the property must be encumbered by the mortgage. While this is easy when both spouses are in title, it is trickier when title only vests in one. When only one spouse is vested with title, the other has dower during the pendency of the marriage, and the mortgage will need to include the dower interest in the property that is being encumbered.

It is important to consider the following concepts when dealing with real estate owned by persons who have been divorced, or whose marriage has been terminated by dissolution, annulment or legal separation.

1. Survivorship Tenancies

   If the fee interest is held by two survivorship tenants married to each other, and the marriage is terminated, the survivorship tenancy immediately becomes a tenancy in common. (O.R.C. §5302.20(c)(5)) However, this is not the result if there is an additional survivorship tenant in addition to the tenants married to each other.

2. Powers of Attorney

   If a Principal executes a POA designating the Principal's spouse as an Attorney in Fact, and the Principal and spouse's marriage is later terminated, the designation of the spouse as an Attorney in Fact is revoked. (O.R.C. §5815.32)

3. Trust Agreements

   Unless the trust agreement provides otherwise, if the marriage of the grantor is terminated, the spouse/former spouse shall be deemed to have predeceased the grantor, and any provision nominating the spouse as trustee is revoked, unless they remarry. (O.R.C. §5815.31)

E. PENDING LITIGATION−BANKRUPTCIES

When confronted with a seller that is a debtor in a bankruptcy proceeding, of primary importance is the fact that title to the property may be conveyed only by the trustee of the bankruptcy proceeding. Further investigation will be required in order to determine: (a) what type of bankruptcy case is involved?; (b) is the trustee vested with title?; (c) is an abandonment by the trustee in cases where the real estate is not an asset of any value to the creditors a possibility?; (d) will the bankruptcy court issue an order directing the title company to close the transaction and disburse funds per the order? Obviously this topic is too broad to treat in any detail here.

F. PENDING LITIGATION−FORECLOSURES

Of major importance here is the potential foreclosure sale that could occur while the sale of the property is pending. Work with counsel for the plaintiff, usually the foreclosing lender, to hold the case in abeyance until the closing can occur, at which time you should be able to get a dismissal of the case. Remember, if the foreclosure case fails to be completed, liens that may have otherwise been eliminated will need to be satisfied.

G. PENDING LITIGATION−DOMESTIC RELATIONS COURT

When litigation involving the marriage arises, several concepts should be kept in mind:

- The parties are not divorced until the judge signs the Final Decree and it is filed in the clerk's office.
- Dower exists until the parties are divorced.
- It is generally not possible to give, assign, sell, option or otherwise divest dower out of a spouse until the divorce is final.
- Use a warranty deed whenever possible. A quit-claim deed (even the faster "Quick-claim deed") is not required and generally not preferred.
- When searching involves a marital proceeding, be sure the complete order or separation agreement is reviewed. Many times, the resolution of real estate matters will be in a section titled other than "Real Estate."

H. ADVERSE POSSESSION

Unfortunately, not all ownership interests in real property are easily traced through the chain of title. Ohio law obviously recognizes other manners of obtaining an interest that may not be conveyed by a recorded instrument. Do the common theories of adverse possession and easements by implication, necessity, prescription and or estoppel arise? Yes, they do occasionally. Are those rights insurable? Most title insurers will be reluctant to insure an interest based upon one of these theories without a supporting judicial determination in favor of the insured or their successors. This position is most likely due to the risk of potential litigation associated with these types of interests, and exposure to the defense cost arising from that litigation that could be insured under that coverage.

I. VACATED ALLEYS

Evidence of a vacation of a road may be by ordinance, order or actual conveyance. It is most useful when the instrument describes the vacation and designates (or conveys) to whom the land will be titled.

If there is no particular instruction of record, or in the documentation of the proceedings the governmental entity, the doctrine of accretion may be helpful. Under *Taylor v. Carpenter* (1976), 45 Ohio St.2d 137,

> Upon vacation of an alley by a city, abutting lot owners, as to that portion of the alley abutting their properties, are vested with a fee simple interest in one-half of the width of the strip of land which formerly comprised the alley, irrespective of the fact that the original owner and dedicator of the land was not the predecessor in title to all such abutting lot owners; subject, however, to those rights which other owners may have in the alley as a necessary means of access to their properties.
>
> The underlying explanation for this concept has been expressed as follows:
>
> The reason that a street when vacated, becomes a part of the abutting lots, is not because the owners of the lot owned the fee of the street, but because it must go there by necessity, to preserve his easement of ingress and egress, which in many cases is a valuable property right, and without which the lots might be of little value. The street being vacated and abandoned, the public no longer owns it, and it must either revert to the original owner, or adhere to the abutting lots as by accretion. As the original owner is presumed to have received full value for the street when he sold the lots, there is no just reason why he should have the street, when vacated, restored to him. And as the lot owners and those in the line of title have paid an increased price for lots by reason of the easement in the street, it is only just that when the street becomes vacated, the easement should be preserved to them by adding the vacated street to the lots, and therefore this doctrine of accretion in such cases has been adopted in this state, and generally elsewhere.

It is important to note that a reference in a legal description to a vacated street or alley may trigger an exception in Schedule B(II) for easements or utilities that may have been created when the road or alley was used or owned by the municipality or other governmental entity.

First American Title™	ALTA Commitment for Title Insurance
	ISSUED BY **First American Title Insurance Company**
Commitment	

COMMITMENT FOR TITLE INSURANCE

Issued By

EXHIBIT A

FIRST AMERICAN TITLE INSURANCE COMPANY

NOTICE

IMPORTANT—READ CAREFULLY: THIS COMMITMENT IS AN OFFER TO ISSUE ONE OR MORE TITLE INSURANCE POLICIES. ALL CLAIMS OR REMEDIES SOUGHT AGAINST THE COMPANY INVOLVING THE CONTENT OF THIS COMMITMENT OR THE POLICY MUST BE BASED SOLELY IN CONTRACT.

THIS COMMITMENT IS NOT AN ABSTRACT OF TITLE, REPORT OF THE CONDITION OF TITLE, LEGAL OPINION, OPINION OF TITLE, OR OTHER REPRESENTATION OF THE STATUS OF TITLE. THE PROCEDURES USED BY THE COMPANY TO DETERMINE INSURABILITY OF THE TITLE, INCLUDING ANY SEARCH AND EXAMINATION, ARE PROPRIETARY TO THE COMPANY, WERE PERFORMED SOLELY FOR THE BENEFIT OF THE COMPANY, AND CREATE NO EXTRACONTRACTUAL LIABILITY TO ANY PERSON, INCLUDING A PROPOSED INSURED.

THE COMPANY'S OBLIGATION UNDER THIS COMMITMENT IS TO ISSUE A POLICY TO A PROPOSED INSURED IDENTIFIED IN SCHEDULE A IN ACCORDANCE WITH THE TERMS AND PROVISIONS OF THIS COMMITMENT. THE COMPANY HAS NO LIABILITY OR OBLIGATION INVOLVING THE CONTENT OF THIS COMMITMENT TO ANY OTHER PERSON.

COMMITMENT TO ISSUE POLICY

Subject to the Notice; Schedule B, Part I—Requirements; Schedule B, Part II—Exceptions; and the Commitment Conditions, ***First American Title Insurance Company***, a Nebraska Corporation (the "Company"), commits to issue the Policy according to the terms and provisions of this Commitment. This Commitment is effective as of the Commitment Date shown in Schedule A for each Policy described in Schedule A, only when the Company has entered in Schedule A both the specified dollar amount as the Proposed Policy Amount and the name of the Proposed Insured.

If all of the Schedule B, Part I—Requirements have not been met within six months after the Commitment Date, this Commitment terminates and the Company's liability and obligation end.

First American Title Insurance Company

Dennis J. Gilmore, President

SPECIMEN

Jeffrey S. Robinson, Secretary

INSURANCE FRAUD WARNING: ANY PERSON WHO, WITH INTENT TO DEFRAUD OR KNOWING THAT HE IS FACILITATING A FRAUD AGAINST AN INSURER, SUBMITS AN APPLICATION OR FILES A CLAIM CONTAINING A FALSE OR DECEPTIVE STATEMENT IS GUILTY OF FRAUD.

If this jacket was created electronically, it constitutes an original document.

This page is only a part of a 2016 ALTA® Commitment for Title Insurance issued by First American Title Insurance Company. This Commitment is not valid without the Notice; the Commitment to Issue Policy; the Commitment Conditions; Schedule A; Schedule B, Part I—Requirements; Schedule B, Part II—Exceptions; and a counter-signature by the Company or its issuing agent that may be in electronic form.

COMMITMENT CONDITIONS

1. **DEFINITIONS**
   (a) "Knowledge" or "Known": Actual or imputed knowledge, but not constructive notice imparted by the Public Records.
   (b) "Land": The land described in Schedule A and affixed improvements that by law constitute real property. The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is to be insured by the Policy.
   (c) "Mortgage": A mortgage, deed of trust, or other security instrument, including one evidenced by electronic means authorized by law.
   (d) "Policy": Each contract of title insurance, in a form adopted by the American Land Title Association, issued or to be issued by the Company pursuant to this Commitment.
   (e) "Proposed Insured": Each person identified in Schedule A as the Proposed Insured of each Policy to be issued pursuant to this Commitment.
   (f) "Proposed Policy Amount": Each dollar amount specified in Schedule A as the Proposed Policy Amount of each Policy to be issued pursuant to this Commitment.
   (g) "Public Records": Records established under state statutes at the Commitment Date for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge.
   (h) "Title": The estate or interest described in Schedule A.

2. If all of the Schedule B, Part I—Requirements have not been met within the time period specified in the Commitment to Issue Policy, this Commitment terminates and the Company's liability and obligation end.

3. The Company's liability and obligation is limited by and this Commitment is not valid without:
   (a) the Notice;
   (b) the Commitment to Issue Policy;
   (c) the Commitment Conditions;
   (d) Schedule A;
   (e) Schedule B, Part I—Requirements;
   (f) Schedule B, Part II—Exceptions; and
   (g) a counter-signature by the Company or its issuing agent that may be in electronic form.

4. **COMPANY'S RIGHT TO AMEND**
   The Company may amend this Commitment at any time. If the Company amends this Commitment to add a defect, lien, encumbrance, adverse claim, or other matter recorded in the Public Records prior to the Commitment Date, any liability of the Company is limited by Commitment Condition 5. The Company shall not be liable for any other amendment to this Commitment.

5. **LIMITATIONS OF LIABILITY**
   (a) The Company's liability under Commitment Condition 4 is limited to the Proposed Insured's actual expense incurred in the interval between the Company's delivery to the Proposed Insured of the Commitment and the delivery of the amended Commitment, resulting from the Proposed Insured's good faith reliance to:
      (i) comply with the Schedule B, Part I—Requirements;
      (ii) eliminate, with the Company's written consent, any Schedule B, Part II—Exceptions; or
      (iii) acquire the Title or create the Mortgage covered by this Commitment.
   (b) The Company shall not be liable under Commitment Condition 5(a) if the Proposed Insured requested the amendment or had Knowledge of the matter and did not notify the Company about it in writing.
   (c) The Company will only have liability under Commitment Condition 4 if the Proposed Insured would not have incurred the expense had the Commitment included the added matter when the Commitment was first delivered to the Proposed Insured.
   (d) The Company's liability shall not exceed the lesser of the Proposed Insured's actual expense incurred in good faith and described in Commitment Conditions 5(a)(i) through 5(a)(iii) or the Proposed Policy Amount.
   (e) The Company shall not be liable for the content of the Transaction Identification Data, if any.
   (f) In no event shall the Company be obligated to issue the Policy referred to in this Commitment unless all of the Schedule B, Part I—Requirements have been met to the satisfaction of the Company.

This page is only a part of a 2016 ALTA® Commitment for Title Insurance issued by First American Title Insurance Company. This Commitment is not valid without the Notice; the Commitment to Issue Policy; the Commitment Conditions; Schedule A; Schedule B, Part I—Requirements; Schedule B, Part II—Exceptions; and a counter-signature by the Company or its issuing agent that may be in electronic form.

(g) In any event, the Company's liability is limited by the terms and provisions of the Policy.

6. LIABILITY OF THE COMPANY MUST BE BASED ON THIS COMMITMENT

(a) Only a Proposed Insured identified in Schedule A, and no other person, may make a claim under this Commitment.
(b) Any claim must be based in contract and must be restricted solely to the terms and provisions of this Commitment.
(c) Until the Policy is issued, this Commitment, as last revised, is the exclusive and entire agreement between the parties with respect to the subject matter of this Commitment and supersedes all prior commitment negotiations, representations, and proposals of any kind, whether written or oral, express or implied, relating to the subject matter of this Commitment.
(d) The deletion or modification of any Schedule B, Part II—Exception does not constitute an agreement or obligation to provide coverage beyond the terms and provisions of this Commitment or the Policy.
(e) Any amendment or endorsement to this Commitment must be in writing and authenticated by a person authorized by the Company.
(f) When the Policy is issued, all liability and obligation under this Commitment will end and the Company's only liability will be under the Policy.

7. IF THIS COMMITMENT HAS BEEN ISSUED BY AN ISSUING AGENT

The issuing agent is the Company's agent only for the limited purpose of issuing title insurance commitments and policies. The issuing agent is not the Company's agent for the purpose of providing closing or settlement services.

8. PRO-FORMA POLICY

The Company may provide, at the request of a Proposed Insured, a pro-forma policy illustrating the coverage that the Company may provide. A pro-forma policy neither reflects the status of Title at the time that the pro-forma policy is delivered to a Proposed Insured, nor is it a commitment to insure.

9. ARBITRATION

The Policy contains an arbitration clause. All arbitrable matters when the Proposed Policy Amount is $2,000,000 or less shall be arbitrated at the option of either the Company or the Proposed Insured as the exclusive remedy of the parties. A Proposed Insured may review a copy of the arbitration rules at http://www.alta.org/arbitration.

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First American Title™	ALTA Commitment for Title Insurance
	ISSUED BY **First American Title Insurance Company**
Schedule A	

Transaction Identification Data for reference only:
Issuing Agent: DePascale Title Agency
ALTA ® Universal ID: 678910
Commitment No.: 2018-5324
Property Address: 123 Main Street, Springfield, Ohio 43210
Revision No.: 1

Issuing Office: Springfield, Ohio
Loan ID No.: 12345-6789
Issuing Office File No.: 2018-5324

SCHEDULE A

1. Commitment Date: November 10, 2018

2. Policy to be issued:
   (a) ☐ ALTA® Owner's Policy of Title Insurance (6-17-06)
   ☐ ALTA ® Homeowner's Policy of Title Insurance (Rev. 12-2-13)
   Proposed Insured: Robert and Mary Smith
   Proposed Policy Amount: $500,000
   (b) ☐ ALTA® Loan Policy of Title Insurance (6-17-06)
   ☐ ALTA ® Expanded Coverage Residential Loan Policy (Rev. 12-2-13)
   Proposed Insured: Billington National Bank, NA
   Proposed Policy Amount: $450,000
   (c) ☐ ALTA ® Policy
   Proposed Insured:
   Proposed Policy Amount: $

3. The estate or interest in the Land described or referred to in this Commitment is Fee Simple

4. Title to the estate or interest in the Land is at the Commitment Date vested in: John Johnson

5. The Land is described as follows:
   Lot 6 (Six) of WONDERFUL ACRES I as it is numbered and delineated in the Plat recorded at Plat Book 7, page 23, of the Office of the Recorder, Clark County, Ohio.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____
Authorized Signatory

Issuing Agent: DePascale Title Agency
Agent ID No.: 12345
Address: 1 Capitol Square
City, State, Zip: Columbus, Ohio 43215
Telephone: 614.XXX.XXXX

INSURANCE FRAUD WARNING: ANY PERSON WHO, WITH INTENT TO DEFRAUD OR KNOWING THAT HE IS FACILITATING A FRAUD AGAINST AN INSURER, SUBMITS AN APPLICATION OR FILES A CLAIM CONTAINING A FALSE OR DECEPTIVE STATEMENT IS GUILTY OF FRAUD.

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First American Title™	ALTA Commitment for Title Insurance
	ISSUED BY **First American Title Insurance Company**
Schedule BI & BII	

Commitment No.:

SCHEDULE B, PART I

Requirements

All of the following Requirements must be met:

1. The Proposed Insured must notify the Company in writing of the name of any party not referred to in this Commitment who will obtain an interest in the Land or who will make a loan on the Land. The Company may then make additional Requirements or Exceptions.
2. Pay the agreed amount for the estate or interest to be insured.
3. Pay the premiums, fees, and charges for the Policy to the Company.
4. Documents satisfactory to the Company that convey the Title or create the Mortgage to be insured, or both, must be properly authorized, executed, delivered, and recorded in the Public Records.

   Warranty Deed from John Johnson with release of dower if necessary to Robert and Mary Smith.

   Mortgage from Robert and Mary Smith to Billington National Bank, NA.

5. Payment of county taxes and or special assessments if currently due and payable.

6. Owner's affidavit covering matters of title in a form acceptable to the Company.

7. Survey satisfactory to the Company to be provided if survey exception is to be deleted from the final policy.

8. Satisfaction and release of Item 11 of Schedule B(II).

9. File an Affidavit of Completion in relation to Item 20 of Schedule B(II).

10. Dismissal of the pending case referenced in Item 22 of Schedule B(II).

11. Termination of the Lease referenced in Item 19 of Schedule B(II).

SCHEDULE B, PART II

Exceptions

THIS COMMITMENT DOES NOT REPUBLISH ANY COVENANT, CONDITION, RESTRICTION, OR LIMITATION CONTAINED IN ANY DOCUMENT REFERRED TO IN THIS COMMITMENT TO THE EXTENT THAT THE SPECIFIC COVENANT, CONDITION, RESTRICTION, OR LIMITATION VIOLATES STATE OR FEDERAL LAW BASED ON RACE, COLOR, RELIGION, SEX, SEXUAL ORIENTATION, GENDER IDENTITY, HANDICAP, FAMILIAL STATUS, OR NATIONAL ORIGIN.

The Policy will not insure against loss or damage resulting from the terms and provisions of any lease or easement identified in Schedule A, and will include the following Exceptions unless cleared to the satisfaction of the Company:

1. Any defect, lien, encumbrance, adverse claim, or other matter that appears for the first time in the Public Records or is created, attaches, or is disclosed between the Commitment Date and the date on which all of the Schedule B, Part I—Requirements are met.

2. Any facts, rights, interests, or claims that are not shown in the Public Records but that could be ascertained by an inspection of the land or by making inquiry of persons in possession of the land.

3. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the title including discrepancies, conflicts in boundary lines, shortage in area, or any other facts that would be disclosed by an accurate and complete land survey of the land, and that are not shown in the Public Records.

4. Any lien or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown in the Public Records.

5. Rights of parties in possession of all or any part of the premises, including, but not limited to, easements, claims of easements or encumbrances that are not shown in the Public Records.

6. The lien of the real estate taxes or assessments imposed on the title by a governmental authority that are not shown as existing liens in the records of any taxing authority that levies taxes or assessments on real property or in the Public Records.

7. The following exception will appear in any loan policy to be issued pursuant to this commitment: Oil and gas leases, pipeline agreements, or any other instrument related to the production or sale of oil or natural gas which may arise subsequent to the Date of Policy.

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8. Coal, oil, natural gas, or other mineral interests and all rights incident thereto now or previously conveyed, transferred, leased, excepted or reserved.

9. *Taxes for the Second Half 2017, a lien NOW due and payable, and subsequent years.*

The County Treasurer's General Tax records for the year 2017 are as follows:
PIN: 66-09669-000
Taxes for the year 2017 are $41,225.58 ($4,612.79 per half).
Taxes for the year 2017 are a lien NOW due and Payable.

NOTE: CAUV applies to this parcel.

10. Pipeline easement granted to Ohio Cumberland Gas Company, recorded June 22, 1983 in Deed Book 249, page 667, Franklin County records.

11. Mortgage from John and Sally Johnson to Old Lender, NA, dated March 13, 2000, filed for record March 15, 2000, and recorded in Instrument No. 200003150008965.

12. Highway easement granted to the State of Ohio, recorded September 28, 1960, in Deed Book 742, page 698, Clark County records.

13. Easement granted to The Ohio Power Company, recorded February 26, 1950, in Deed Book 156, page 567, Clark County records.

14. Restrictions and conditions of record in Deed Book 564, page 105, Clark County records.

15. Any covenants, condition or restriction referred to herein indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status or national origin is omitted as provided in 42 U.S.C. Section 3604, unless and only to the extent that the restriction (a) is not in violation of state or federal law, (b) is exempt under 42 U.S.C. Section 3607, or (c) is related to a handicap, but does not discriminate against handicapped people.

16. Title to that portion of the insured premises within the bounds of any legal highways.

17. Any inaccuracy in the specific quantity of acreage contained on any survey if any or contained within the legal description of premises insured herein.

18. Memorandum of Lease between Seller, LLC and Starbucks Coffee, LLC, Lessee, of record in Instrument No. 200301230008956.

19. Memorandum of Lease between Way Old Owner, Inc. and Buggy Whips, Inc., Lessee, of record in Misc. Vol. 21, page 234.

20. Notice of Commencement executed on behalf of Old Lender, NA, dated March 13, 2000, filed for record March 15, 2000, and recorded in Instrument No. 200003150008966.

21. Common Pleas Case Number 04CV10-12345, Molly Falldown v. Seller, LLC—Complaint filed December 24, 2003—Action for personal injury—PENDING.

22. Common Pleas Case Number 04CV11-45465, Old Lender NA v. Seller, LLC—Complaint filed November 12, 2004—Action in foreclosure—PENDING.

23. Encroachment of the building into the building setback line depicted on the survey of the premises by EMH&T, dated November 29, 2004.

24. Encroachment of the building into the platted utility easement depicted on the survey of the premises by EMH&T, dated November 29, 2004.

First American Title

Owner's Policy of Title Insurance

ISSUED BY

First American Title Insurance Company

POLICY NUMBER

Owner's Policy

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at the address shown in Section 18 of the Conditions.

EXHIBIT B

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, **FIRST AMERICAN TITLE INSURANCE COMPANY**, a California corporation (the "Company") insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from
   (a) A defect in the Title caused by
      (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
      (ii) failure of any person or Entity to have authorized a transfer or conveyance;
      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
      (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
      (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
      (vii) a defective judicial or administrative proceeding.
   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.
3. Unmarketable Title.
4. No right of access to and from the Land.

(Covered Risks Continued on Page 2)

In Witness Whereof, First American Title Insurance Company has caused its corporate name to be hereunto affixed by its authorized officers as of Date of Policy shown in Schedule A.

First American Title Insurance Company

FIRST AMERICAN TITLE INSURANCE CO. INCORPORATED SEPTEMBER 24 1968 CALIFORNIA

SPECIMEN

Dennis J. Gilmore
President

Timothy Kemp
Secretary

For Reference:

File #: Sample FA 09/26/2013

(This Policy is valid only when Schedules A and B are attached)

This jacket was created electronically and constitutes an original document

INSURANCE FRAUD WARNING: ANY PERSON WHO, WITH INTENT TO DEFRAUD OR KNOWING THAT HE IS FACILITATING A FRAUD AGAINST AN INSURER, SUBMITS AN APPLICATION OR FILES A CLAIM CONTAINING A FALSE OR DECEPTIVE STATEMENT IS GUILTY OF FRAUD.

5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (a) the occupancy, use, or enjoyment of the Land;
   (b) the character, dimensions, or location of any improvement erected on the Land;
   (c) the subdivision of land; or
   (d) environmental protection
   if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.
6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.
7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.
8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.
9. Title being vested other than as stated in Schedule A or being defective
   (a) as a result of the avoidance in whole or in part, or from a court order providing an alternative remedy, of a transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction vesting Title as shown in Schedule A because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or
   (b) because the instrument of transfer vesting Title as shown in Schedule A constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records
      (i) to be timely, or
      (ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.
10. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
      (i) the occupancy, use, or enjoyment of the Land;
      (ii) the character, dimensions, or location of any improvement erected on the Land;
      (iii) the subdivision of land; or
      (iv) environmental protection;
      or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.
   (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
3. Defects, liens, encumbrances, adverse claims, or other matters
   (a) created, suffered, assumed, or agreed to by the Insured Claimant;
   (b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy.
   (c) resulting in no loss or damage to the Insured Claimant;
   (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 9 and 10); or
   (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title.
4. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction vesting the Title as shown in Schedule A, is
   (a) a fraudulent conveyance or fraudulent transfer; or
   (b) a preferential transfer for any reason not stated in Covered Risk 9 of this policy.
5. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

CONDITIONS

1. **DEFINITION OF TERMS**

The following terms when used in this policy mean:

(a) "Amount of Insurance": The amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b), or decreased by Sections 10 and 11 of these Conditions.

(b) "Date of Policy": The date designated as "Date of Policy" in Schedule A.

(c) "Entity": A corporation, partnership, trust, limited liability company, or other similar legal entity.

(d) "Insured": The Insured named in Schedule A.

(i) The term "Insured" also includes

(A) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives, or next of kin;

(B) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;

(C) successors to an Insured by its conversion to another kind of Entity;

(D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title

(1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,

(2) if the grantee wholly owns the named Insured,

(3) if the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity, or

(4) if the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes.

(ii) With regard to (A), (B), (C), and (D) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured.

(e) "Insured Claimant": An Insured claiming loss or damage.

(f) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.

(g) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

(h) "Mortgage": Mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.

(i) "Public Records": Records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge. With respect to Covered Risk 5(d), "Public Records" shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

(j) "Title": The estate or interest described in Schedule A.

(k) "Unmarketable Title": Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

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.

3. **NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT**

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) of these Conditions, (ii) in case Knowledge shall come to an Insured hereunder of any claim of title or interest that is adverse to the Title, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title, as insured, is rejected as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

4. **PROOF OF LOSS**

In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. **DEFENSE AND PROSECUTION OF ACTIONS**

(a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

(b) The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE

(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance. To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay.

Upon the exercise by the Company of this option, all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in this subsection, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.

(i) To pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or

(ii) To pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

8. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the lesser of

(i) the Amount of Insurance; or

(ii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy.

(b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title, as insured,

(i) the Amount of Insurance shall be increased by 10%, and

(ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

(c) In addition to the extent of liability under (a) and (b), the Company will also pay those costs, attorneys' fees, and expenses incurred in accordance with Sections 5 and 7 of these Conditions.

9. LIMITATION OF LIABILITY
   (a) If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.
   (b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title, as insured.
   (c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.
10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY
    All payments under this policy, except payments made for costs, attorneys' fees, and expenses, shall reduce the Amount of Insurance by the amount of the payment.
11. LIABILITY NONCUMULATIVE
    The Amount of Insurance shall be reduced by any amount the Company pays under any policy insuring a Mortgage to which exception is taken in Schedule B or to which the Insured has agreed, assumed, or taken subject, or which is executed by an Insured after Date of Policy and which is a charge or lien on the Title, and the amount so paid shall be deemed a payment to the Insured under this policy.
12. PAYMENT OF LOSS
    When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.
13. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT
    (a) Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.
    If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.
    (b) The Company's right of subrogation includes the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.
14. ARBITRATION
    Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is $2,000,000 or less shall be arbitrated at the option of either the Company or the Insured. All arbitrable matters when the Amount of Insurance is in excess of $2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.
15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT
    (a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.
    (b) Any claim of loss or damage that arises out of the status of the Title or by any action asserting such claim shall be restricted to this policy.
    (c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.
    (d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.
16. SEVERABILITY
    In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid, but all other provisions shall remain in full force and effect.
17. CHOICE OF LAW; FORUM
    (a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located. Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title that are adverse to the Insured and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law.
    (b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.
18. NOTICES, WHERE SENT
    Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at **First American Title Insurance Company, Attn: Claims National Intake Center, 1 First American Way; Santa Ana, CA 92707. Phone: 888-632-1642.**

First American Title™	Homeowner's Policy of Title Insurance For a One-to-Four Family Residence
	ISSUED BY **First American Title Insurance Company**
Eagle Policy	POLICY NUMBER

OWNER'S INFORMATION SHEET

EXHIBIT C

Your Title Insurance Policy is a legal contract between You and Us.
It applies only to a one-to-four family residence and only if each insured named in Schedule A is a Natural Person. If the Land described in Schedule A of the Policy is not an improved residential lot on which there is located a one-to-four family residence, or if each insured named in Schedule A is not a Natural Person, contact Us immediately.
The Policy insures You against actual loss resulting from certain Covered Risks. These Covered Risks are listed beginning on page 2 of the Policy. The Policy is limited by:

- Provisions of Schedule A
- Exceptions in Schedule B
- Our Duty To Defend Against Legal Actions On Page 3
- Exclusions on page 4
- Conditions on pages 4, 5 and 6.

You should keep the Policy even if You transfer Your Title to the Land. It may protect against claims made against You by someone else after You transfer Your Title.
IF YOU WANT TO MAKE A CLAIM, SEE SECTION 3 UNDER CONDITIONS ON PAGE 4.
The premium for this Policy is paid once. No additional premium is owed for the Policy.
This sheet is not Your insurance Policy. It is only a brief outline of some of the important Policy features. The Policy explains in detail Your rights and obligations and Our rights and obligations. Since the Policy – and not this sheet – is the legal document,

YOU SHOULD READ THE POLICY VERY CAREFULLY.

If You have any questions about Your Policy, contact:

FIRST AMERICAN TITLE INSURANCE COMPANY
1 First American Way
Santa Ana, California 92707

Homeowner's Policy of Title Insurance for a One-to-Four Family Residence

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First American Title™	Homeowner's Policy of Title Insurance For a One-to-Four Family Residence
	ISSUED BY **First American Title Insurance Company**
Eagle Policy	POLICY NUMBER

As soon as You Know of anything that might be covered by this Policy, You must notify Us promptly in writing at the address shown in Section 3 of the Conditions.

OWNER'S COVERAGE STATEMENT

This Policy insures You against actual loss, including any costs, attorneys' fees and expenses provided under this Policy. The loss must result from one or more of the Covered Risks set forth below. This Policy covers only Land that is an improved residential lot on which there is located a one-to-four family residence and only when each insured named in Schedule A is a Natural Person.
Your insurance is effective on the Policy Date. This Policy covers Your actual loss from any risk described under Covered Risks if the event creating the risk exists on the Policy Date or, to the extent expressly stated in Covered Risks, after the Policy Date.
Your insurance is limited by all of the following:

- The Policy Amount
- For Covered Risk 16, 18, 19 and 21, Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A
- The Exceptions in Schedule B
- Our Duty To Defend Against Legal Actions
- The Exclusions on page 4
- The Conditions on pages 4, 5 and 6.

COVERED RISKS

The Covered Risks are:

1. Someone else owns an interest in Your Title.
2. Someone else has rights affecting Your Title because of leases, contracts, or options.
3. Someone else claims to have rights affecting Your Title because of forgery or impersonation.
4. Someone else has an Easement on the Land.
5. Someone else has a right to limit Your use of the Land.
6. Your Title is defective. Some of these defects are:
   a. Someone else's failure to have authorized a transfer or conveyance of your Title.
   b. Someone else's failure to create a valid document by electronic means.
   c. A document upon which Your Title is based is invalid because it was not properly signed, sealed, acknowledged, delivered or recorded.
   d. A document upon which Your Title is based was signed using a falsified, expired, or otherwise invalid power of attorney.
   e. A document upon which Your Title is based was not properly filed, recorded, or indexed in the Public Records.
   f. A defective judicial or administrative proceeding.
7. Any of Covered Risks 1 through 6 occurring after the Policy Date.
8. Someone else has a lien on Your Title, including a:
   a. lien of real estate taxes or assessments imposed on Your Title by a governmental authority that are due or payable, but unpaid;
   b. Mortgage;
   c. judgment, state or federal tax lien;
   d. charge by a homeowner's or condominium association; or
   e. lien, occurring before or after the Policy Date, for labor and material furnished before the Policy Date.
9. Someone else has an encumbrance on Your Title.
10. Someone else claims to have rights affecting Your Title because of fraud, duress, incompetency or incapacity.
11. You do not have actual vehicular and pedestrian access to and from the Land, based upon a legal right.
12. You are forced to correct or remove an existing violation of any covenant, condition or restriction affecting the Land, even if the covenant, condition or restriction is excepted in Schedule B. However, You are not covered for any violation that relates to:
    a. any obligation to perform maintenance or repair on the Land; or
    b. environmental protection of any kind, including hazardous or toxic conditions or substances
    unless there is a notice recorded in the Public Records, describing any part of the Land, claiming a violation exists. Our liability for this Covered Risk is limited to the extent of the violation stated in that notice.

13. Your Title is lost or taken because of a violation of any covenant, condition or restriction, which occurred before You acquired Your Title, even if the covenant, condition or restriction is excepted in Schedule B.
14. The violation or enforcement of those portions of any law or government regulation concerning:
    a. building;
    b. zoning;
    c. land use;
    d. improvements on the Land;
    e. land division; or
    f. environmental protection,

    if there is a notice recorded in the Public Records, describing any part of the Land, claiming a violation exists or declaring the intention to enforce the law or regulation. Our liability for this Covered Risk is limited to the extent of the violation or enforcement stated in that notice.
15. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 14 if there is a notice recorded in the Public Records, describing any part of the Land, of the enforcement action or intention to bring an enforcement action. Our liability for this Covered Risk is limited to the extent of the enforcement action stated in that notice.
16. Because of an existing violation of a subdivision law or regulation affecting the Land:
    a. You are unable to obtain a building permit;
    b. You are required to correct or remove the violation; or
    c. someone else has a legal right to, and does, refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it.

    The amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
17. You lose Your Title to any part of the Land because of the right to take the Land by condemning it, if:
    a. there is a notice of the exercise of the right recorded in the Public Records and the notice describes any part of the Land; or
    b. the taking happened before the Policy Date and is binding on You if You bought the Land without Knowing of the taking.
18. You are forced to remove or remedy Your existing structures, or any part of them - other than boundary walls or fences - because any portion was built without obtaining a building permit from the proper government office. The amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
19. You are forced to remove or remedy Your existing structures, or any part of them, because they violate an existing zoning law or zoning regulation. If You are required to remedy any portion of Your existing structures, the amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
20. You cannot use the Land because use as a single-family residence violates an existing zoning law or zoning regulation.
21. You are forced to remove Your existing structures because they encroach onto Your neighbor's land. If the encroaching structures are boundary walls or fences, the amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
22. Someone else has a legal right to, and does, refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it because Your neighbor's existing structures encroach onto the Land.
23. You are forced to remove Your existing structures which encroach onto an Easement or over a building set-back line, even if the Easement or building set-back line is excepted in Schedule B.
24. Your existing structures are damaged because of the exercise of a right to maintain or use any Easement affecting the Land, even if the Easement is excepted in Schedule B.
25. Your existing improvements (or a replacement or modification made to them after the Policy Date), including lawns, shrubbery or trees, are damaged because of the future exercise of a right to use the surface of the Land for the extraction or development of minerals, water or any other substance, even if those rights are excepted or reserved from the description of the Land or excepted in Schedule B.
26. Someone else tries to enforce a discriminatory covenant, condition or restriction that they claim affects Your Title which is based upon race, color, religion, sex, handicap, familial status, or national origin.
27. A taxing authority assesses supplemental real estate taxes not previously assessed against the Land for any period before the Policy Date because of construction or a change of ownership or use that occurred before the Policy Date.
28. Your neighbor builds any structures after the Policy Date -- other than boundary walls or fences -- which encroach onto the Land.
29. Your Title is unmarketable, which allows someone else to refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it.
30. Someone else owns an interest in Your Title because a court order invalidates a prior transfer of the title under federal bankruptcy, state insolvency, or similar creditors' rights laws.
31. The residence with the address shown in Schedule A is not located on the Land at the Policy Date.
32. The map, if any, attached to this Policy does not show the correct location of the Land according to the Public Records.

OUR DUTY TO DEFEND AGAINST LEGAL ACTIONS

We will defend Your Title in any legal action only as to that part of the action which is based on a Covered Risk and which is not excepted or excluded from coverage in this Policy. We will pay the costs, attorneys' fees, and expenses We incur in that defense.
We will not pay for any part of the legal action which is not based on a Covered Risk or which is excepted or excluded from coverage in this Policy.
We can end Our duty to defend Your Title under Section 4 of the Conditions.

This policy is not complete without Schedules A and B.

EXCLUSIONS

In addition to the Exceptions in Schedule B, You are not insured against loss, costs, attorneys' fees, and expenses resulting from:

1. Governmental police power, and the existence or violation of those portions of any law or government regulation concerning:
   a. building;
   b. zoning;
   c. land use;
   d. improvements on the Land;
   e. land division; and
   f. environmental protection.

   This Exclusion does not limit the coverage described in Covered Risk 8.a., 14, 15, 16, 18, 19, 20, 23 or 27.
2. The failure of Your existing structures, or any part of them, to be constructed in accordance with applicable building codes. This Exclusion does not limit the coverage described in Covered Risk 14 or 15.
3. The right to take the Land by condemning it. This Exclusion does not limit the coverage described in Covered Risk 17.
4. Risks:
   a. that are created, allowed, or agreed to by You, whether or not they are recorded in the Public Records;
   b. that are Known to You at the Policy Date, but not to Us, unless they are recorded in the Public Records at the Policy Date;
   c. that result in no loss to You; or
   d. that first occur after the Policy Date - this does not limit the coverage described in Covered Risk 7, 8.e., 25, 26, 27 or 28.
5. Failure to pay value for Your Title.
6. Lack of a right:
   a. to any land outside the area specifically described and referred to in paragraph 3 of Schedule A; and
   b. in streets, alleys, or waterways that touch the Land.

   This Exclusion does not limit the coverage described in Covered Risk 11 or 21.
7. The transfer of the Title to You is invalid as a preferential transfer or as a fraudulent transfer or conveyance under federal bankruptcy, state insolvency, or similar creditors' rights laws.
8. Contamination, explosion, fire, flooding, vibration, fracturing, earthquake or subsidence.
9. Negligence by a person or an Entity exercising a right to extract or develop minerals, water, or any other substances.

CONDITIONS

1. DEFINITIONS

a. Easement – the right of someone else to use the Land for a special purpose.
b. Estate Planning Entity – a legal entity or Trust established by a Natural Person for estate planning.
c. Known – things about which You have actual knowledge. The words "Know" and "Knowing" have the same meaning as Known.
d. Land – the land or condominium unit described in paragraph 3 of Schedule A and any improvements on the Land which are real property.
e. Mortgage – a mortgage, deed of trust, trust deed or other security instrument.
f. Natural Person – a human being, not a commercial or legal organization or entity. Natural Person includes a trustee of a Trust even if the trustee is not a human being.
g. Policy Date – the date and time shown in Schedule A. If the insured named in Schedule A first acquires the interest shown in Schedule A by an instrument recorded in the Public Records later than the date and time shown in Schedule A, the Policy Date is the date and time the instrument is recorded.
h. Public Records – records that give constructive notice of matters affecting Your Title, according to the state statutes where the Land is located.
i. Title – the ownership of Your interest in the Land, as shown in Schedule A.
j. Trust – a living trust established by a Natural Person for estate planning.
k. We/Our/Us – First American Title Insurance Company.
l. You/Your – the insured named in Schedule A and also those identified in Section 2.b. of these Conditions.

2. CONTINUATION OF COVERAGE

a. This Policy insures You forever, even after You no longer have Your Title. You cannot assign this Policy to anyone else.
b. This Policy also insures:
   (1) anyone who inherits Your Title because of Your death;
   (2) Your spouse who receives Your Title because of dissolution of Your marriage;
   (3) the trustee or successor trustee of Your Trust or any Estate Planning Entity created for You to whom or to which You transfer Your Title after the Policy Date;
   (4) the beneficiaries of Your Trust upon Your death; or
   (5) anyone who receives Your Title by a transfer effective on Your death as authorized by law.
c. We may assert against the insureds identified in Section 2.b. any rights and defenses that We have against any previous insured under this Policy.

3. HOW TO MAKE A CLAIM

a. Prompt Notice Of Your Claim
   (1) As soon as You Know of anything that might be covered by this Policy, You must notify Us promptly in writing.
   (2) Send Your notice to **First American Title Insurance Company, Attn: Claims National Intake Center, 5 First American Way, Santa Ana, California 92707. Phone: 888-632-1642 (claims.nic@firstam.com).** Please include the Policy number shown in Schedule A, and the county and state where the Land is located. Please enclose a copy of Your policy, if available.
   (3) If You do not give Us prompt notice, Your coverage will be reduced or ended, but only to the extent Your failure affects Our ability to resolve the claim or defend You.

b. Proof Of Your Loss
   (1) We may require You to give Us a written statement signed by You describing Your loss which includes:
      (a) the basis of Your claim;
      (b) the Covered Risks which resulted in Your loss;
      (c) the dollar amount of Your loss; and
      (d) the method You used to compute the amount of Your loss.
   (2) We may require You to make available to Us records, checks, letters, contracts, insurance policies and other papers which relate to Your claim. We may make copies of these papers.
   (3) We may require You to answer questions about Your claim under oath.
   (4) If you fail or refuse to give Us a statement of loss, answer Our questions under oath, or make available to Us the papers We request, Your coverage will be reduced or ended, but only to the extent Your failure or refusal affects Our ability to resolve the claim or defend You.

4. OUR CHOICES WHEN WE LEARN OF A CLAIM

a. After We receive Your notice, or otherwise learn, of a claim that is covered by this Policy, Our choices include one or more of the following:
   (1) Pay the claim;
   (2) Negotiate a settlement;
   (3) Bring or defend a legal action related to the claim;
   (4) Pay You the amount required by this Policy;
   (5) End the coverage of this Policy for the claim by paying You Your actual loss resulting from the Covered Risk, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to pay;
   (6) End the coverage described in Covered Risk 16, 18, 19 or 21 by paying You the amount of Your insurance then in force for the particular Covered Risk, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to pay;
   (7) End all coverage of this Policy by paying You the Policy Amount then in force, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to pay;
   (8) Take other appropriate action.

b. When We choose the options in Sections 4.a. (5), (6) or (7), all Our obligations for the claim end, including Our obligation to defend, or continue to defend, any legal action.

c. Even if We do not think that the Policy covers the claim, We may choose one or more of the options above. By doing so, We do not give up any rights.

5. HANDLING A CLAIM OR LEGAL ACTION

a. You must cooperate with Us in handling any claim or legal action and give Us all relevant information.

b. If You fail or refuse to cooperate with Us, Your coverage will be reduced or ended, but only to the extent Your failure or refusal affects Our ability to resolve the claim or defend You.

c. We are required to repay You only for those settlement costs, attorneys' fees and expenses that We approve in advance.

d. We have the right to choose the attorney when We bring or defend a legal action on Your behalf. We can appeal any decision to the highest level. We do not have to pay Your claim until the legal action is finally decided.

e. Whether or not We agree there is coverage, We can bring or defend a legal action, or take other appropriate action under this Policy. By doing so, We do not give up any rights.

6. LIMITATION OF OUR LIABILITY

a. After subtracting Your Deductible Amount if it applies, We will pay no more than the least of:
   (1) Your actual loss;
   (2) Our Maximum Dollar Limit of Liability then in force for the particular Covered Risk, for claims covered only under Covered Risk 16, 18, 19 or 21; or
   (3) the Policy Amount then in force.

   and any costs, attorneys' fees and expenses that We are obligated to pay under this Policy.

b. If We pursue Our rights under Sections 4.a.(3) and 5.e. of these Conditions and are unsuccessful in establishing the Title, as insured:
   (1) the Policy Amount then in force will be increased by 10% of the Policy Amount shown in Schedule A, and
   (2) You shall have the right to have the actual loss determined on either the date the claim was made by You or the date it is settled and paid.

c. (1) If We remove the cause of the claim with reasonable diligence after receiving notice of it, all Our obligations for the claim end, including any obligation for loss You had while We were removing the cause of the claim.
   (2) Regardless of 6.c.(1) above, if You cannot use the Land because of a claim covered by this Policy:
      (a) You may rent a reasonably equivalent substitute residence and We will repay You for the actual rent You pay, until the earlier of:
         (i) the cause of the claim is removed; or
         (ii) We pay You the amount required by this Policy. If Your claim is covered only under Covered Risk 16, 18, 19 or 21, that payment is the amount of Your insurance then in force for the particular Covered Risk.
      (b) We will pay reasonable costs You pay to relocate any personal property You have the right to remove from the Land, including transportation of that personal property for up to twenty-five (25) miles from the Land, and repair of any damage to that personal property because of the relocation. The amount We will pay You under this paragraph is limited to the value of the personal property before You relocate it.

d. All payments We make under this Policy reduce the Policy Amount then in force, except for costs, attorneys' fees and expenses. All payments We make for claims which are covered only under Covered Risk 16, 18, 19 or 21 also reduce Our Maximum Dollar Limit of Liability for the particular Covered Risk, except for costs, attorneys' fees and expenses.

e. If We issue, or have issued, a Policy to the owner of a Mortgage that is on Your Title and We have not given You any coverage against the Mortgage, then:
   (1) We have the right to pay any amount due You under this Policy to the owner of the Mortgage, and any amount

paid shall be treated as a payment to You under this Policy, including under Section 4.a. of these Conditions;

(2) Any amount paid to the owner of the Mortgage shall be subtracted from the Policy Amount then in force; and

(3) If Your claim is covered only under Covered Risk 16, 18, 19 or 21, any amount paid to the owner of the Mortgage shall also be subtracted from Our Maximum Dollar Limit of Liability for the particular Covered Risk.

f. If You do anything to affect any right of recovery You may have against someone else, We can subtract from Our liability the amount by which You reduced the value of that right.

7. TRANSFER OF YOUR RIGHTS TO US

a. When We settle Your claim, We have all the rights and remedies You have against any person or property related to the claim. You must not do anything to affect these rights and remedies. When We ask, You must execute documents to evidence the transfer to Us of these rights and remedies. You must let Us use Your name in enforcing these rights and remedies.

b. We will not be liable to You if We do not pursue these rights and remedies or if We do not recover any amount that might be recoverable.

c. We will pay any money We collect from enforcing these rights and remedies in the following order:

(1) to Us for the costs, attorneys' fees and expenses We paid to enforce these rights and remedies;

(2) to You for Your loss that You have not already collected;

(3) to Us for any money We paid out under this Policy on account of Your claim; and

(4) to You whatever is left.

d. If You have rights and remedies under contracts (such as indemnities, guaranties, bonds or other policies of insurance) to recover all or part of Your loss, then We have all of those rights and remedies, even if those contracts provide that those obligated have all of Your rights and remedies under this Policy.

8. THIS POLICY IS THE ENTIRE CONTRACT

This Policy, with any endorsements, is the entire contract between You and Us. To determine the meaning of any part of this Policy, You must read the entire Policy and any endorsements. Any changes to this Policy must be agreed to in writing by Us. Any claim You make against Us must be made under this Policy and is subject to its terms.

9. INCREASED POLICY AMOUNT

The Policy Amount then in force will increase by ten percent (10%) of the Policy Amount shown in Schedule A each year for the first five years following the Policy Date shown in Schedule A, up to one hundred fifty percent (150%) of the Policy Amount shown in Schedule A. The increase each year will happen on the anniversary of the Policy Date shown in Schedule A.

10. SEVERABILITY

If any part of this Policy is held to be legally unenforceable, both You and We can still enforce the rest of this Policy.

11. ARBITRATION

a. If permitted in the state where the Land is located, You or We may demand arbitration.

b. The law used in the arbitration is the law of the state where the Land is located.

c. The arbitration shall be under the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). You can get a copy of the Rules from Us.

d. Except as provided in the Rules, You cannot join or consolidate Your claim or controversy with claims or controversies of other persons.

e. The arbitration shall be binding on both You and Us. The arbitration shall decide any matter in dispute between You and Us.

f. The arbitration award may be entered as a judgment in the proper court.

12. CHOICE OF LAW

The law of the state where the Land is located shall apply to this policy.

In Witness Whereof, First American Title Insurance Company has caused its corporate name to be hereunto affixed by its authorized officers as of Date of Policy shown in Schedule A.

First American Title Insurance Company

Dennis J. Gilmore
President

SPECIMEN

Jeffrey S. Robinson
Secretary

For Reference:

File #: HI LI Test

Issued By:

First American Title Insurance Company
8740 Orion Place, Suite 310
Columbus, OH 43240

(This Policy is valid only when Schedules A and B are attached)

This jacket was created electronically and constitutes an original document

INSURANCE FRAUD WARNING: ANY PERSON WHO, WITH INTENT TO DEFRAUD OR KNOWING THAT HE IS FACILITATING A FRAUD AGAINST AN INSURER, SUBMITS AN APPLICATION OR FILES A CLAIM CONTAINING A FALSE OR DECEPTIVE STATEMENT IS GUILTY OF FRAUD.

First American Title

Loan Policy of Title Insurance

ISSUED BY

First American Title Insurance Company

Loan Policy

POLICY NUMBER

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at the address shown in Section 17 of the Conditions.

EXHIBIT D

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation (the "Company") insures as of Date of Policy and, to the extent stated in Covered Risks 11, 13, and 14, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from
   (a) A defect in the Title caused by
      (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
      (ii) failure of any person or Entity to have authorized a transfer or conveyance;
      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
      (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
      (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
      (vii) a defective judicial or administrative proceeding.
   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.
3. Unmarketable Title.
4. No right of access to and from the Land.

(Covered Risks Continued on Page 2)

In Witness Whereof, First American Title Insurance Company has caused its corporate name to be hereunto affixed by its authorized officers as of Date of Policy shown in Schedule A.

First American Title Insurance Company

FIRST AMERICAN TITLE INSURANCE COMPANY INCORPORATED SEPTEMBER 24, 1968 CALIFORNIA

SPECIMEN

Dennis J. Gilmore
President

Timothy Kemp
Secretary

For Reference:

File #:

Loan #:

(This Policy is valid only when Schedules A and B are attached)

This jacket was created electronically and constitutes an original document

INSURANCE FRAUD WARNING: ANY PERSON WHO, WITH INTENT TO DEFRAUD OR KNOWING THAT HE IS FACILITATING A FRAUD AGAINST AN INSURER, SUBMITS AN APPLICATION OR FILES A CLAIM CONTAINING A FALSE OR DECEPTIVE STATEMENT IS GUILTY OF FRAUD.

5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (a) the occupancy, use, or enjoyment of the Land;
   (b) the character, dimensions, or location of any improvement erected on the Land;
   (c) the subdivision of land; or
   (d) environmental protection
   if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.
6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.
7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.
8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.
9. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title. This Covered Risk includes but is not limited to insurance against loss from any of the following impairing the lien of the Insured Mortgage
   (a) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
   (b) failure of any person or Entity to have authorized a transfer or conveyance;
   (c) the Insured Mortgage not being properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
   (d) failure to perform those acts necessary to create a document by electronic means authorized by law;
   (e) a document executed under a falsified, expired, or otherwise invalid power of attorney;
   (f) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
   (g) a defective judicial or administrative proceeding.
10. The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance.
11. The lack of priority of the lien of the Insured Mortgage upon the Title
    (a) as security for each and every advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for services, labor, or material arising from construction of an improvement or work related to the Land when the improvement or work is either
       (i) contracted for or commenced on or before Date of Policy; or
       (ii) contracted for, commenced, or continued after Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on Date of Policy to advance; and
    (b) over the lien of any assessments for street improvements under construction or completed at Date of Policy.
12. The invalidity or unenforceability of any assignment of the Insured Mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the Insured Mortgage in the named Insured assignee free and clear of all liens.
13. The invalidity, unenforceability, lack of priority, or avoidance of the lien of the Insured Mortgage upon the Title
    (a) resulting from the avoidance in whole or in part, or from a court order providing an alternative remedy, of any transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction creating the lien of the Insured Mortgage because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or
    (b) because the Insured Mortgage constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records
       (i) to be timely, or
       (ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.
14. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 13 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the Insured Mortgage in the Public Records.

The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (i) the occupancy, use, or enjoyment of the Land;
   (ii) the character, dimensions, or location of any improvement erected on the Land;
   (iii) the subdivision of land; or
   (iv) environmental protection;
   or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.
   (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.

3. Defects, liens, encumbrances, adverse claims, or other matters
(a) created, suffered, assumed, or agreed to by the Insured Claimant;
(b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
(c) resulting in no loss or damage to the Insured Claimant;
(d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 11, 13, or 14); or
(e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage.
4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business laws of the state where the Land is situated.
5. Invalidity or unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury or any consumer credit protection or truth-in-lending law.
6. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is
(a) a fraudulent conveyance or fraudulent transfer, or
(b) a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy.
7. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the Insured Mortgage in the Public Records. This Exclusion does not modify or limit the coverage provided under Covered Risk 11(b).

CONDITIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:
(a) "Amount of Insurance": The amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b) or decreased by Section 10 of these Conditions.
(b) "Date of Policy": The date designated as "Date of Policy" in Schedule A.
(c) "Entity": A corporation, partnership, trust, limited liability company, or other similar legal entity.
(d) "Indebtedness": The obligation secured by the Insured Mortgage including one evidenced by electronic means authorized by law, and if that obligation is the payment of a debt, the Indebtedness is the sum of
(i) the amount of the principal disbursed as of Date of Policy;
(ii) the amount of the principal disbursed subsequent to Date of Policy;
(iii) the construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the Land or related to the Land that the Insured was and continued to be obligated to advance at Date of Policy and at the date of the advance;
(iv) interest on the loan;
(v) the prepayment premiums, exit fees, and other similar fees or penalties allowed by law;
(vi) the expenses of foreclosure and any other costs of enforcement;
(vii) the amounts advanced to assure compliance with laws or to protect the lien or the priority of the lien of the Insured Mortgage before the acquisition of the estate or interest in the Title;
(viii) the amounts to pay taxes and insurance; and
(ix) the reasonable amounts expended to prevent deterioration of improvements;
But the Indebtedness is reduced by the total of all payments and by any amount forgiven by an Insured.
(e) "Insured": The Insured named in Schedule A.
(i) The term "Insured" also includes
(A) the owner of the Indebtedness and each successor in ownership of the Indebtedness, whether the owner or successor owns the Indebtedness for its own account or as a trustee or other fiduciary, except a successor who is obligor under the provisions of Section 12(c) of these Conditions;
(B) the person or Entity who has "control" of the "transferable record," if the Indebtedness is evidenced by a "transferable record," as these terms are defined by applicable electronic transactions law;
(C) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;
(D) successors to an Insured by its conversion to another kind of Entity;
(E) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title
(1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,
(2) if the grantee wholly owns the named Insured, or
(3) if the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity;
(F) any government agency or instrumentality that is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the Indebtedness secured by the Insured Mortgage, or any part of it, whether named as an Insured or not;
(ii) With regard to (A), (B), (C), (D), and (E) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured, unless the successor acquired the Indebtedness as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, or other matter insured against by this policy.
(f) "Insured Claimant": An Insured claiming loss or damage.
(g) "Insured Mortgage": The Mortgage described in paragraph 4 of Schedule A.
(h) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.
(i) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.
(j) "Mortgage": Mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.

(k) "Public Records": Records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge. With respect to Covered Risk 5(d), "Public Records" shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

(l) "Title": The estate or interest described in Schedule A.

(m) "Unmarketable Title": Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title or a prospective purchaser of the Insured Mortgage to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured after acquisition of the Title by an Insured or after conveyance by 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.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) of these Conditions, (ii) in case Knowledge shall come to an Insured of any claim of title or interest that is adverse to the Title or the lien of the Insured Mortgage, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title or the lien of the Insured Mortgage, as insured, is rejected as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

4. PROOF OF LOSS

In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS

(a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action.

It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

(b) The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title or the lien of the Insured Mortgage, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE

(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title, the lien of the Insured Mortgage, or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.

(i) To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the

Company up to the time of payment or tender of payment and that the Company is obligated to pay; or

(ii) To purchase the Indebtedness for the amount of the Indebtedness on the date of purchase, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of purchase and that the Company is obligated to pay.

When the Company purchases the Indebtedness, the Insured shall transfer, assign, and convey to the Company the Indebtedness and the Insured Mortgage, together with any collateral security.

Upon the exercise by the Company of either of the options provided for in subsections (a)(i) or (ii), all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in those subsections, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or

(ii) to pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

8. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the least of

(i) the Amount of Insurance,

(ii) the Indebtedness,

(iii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy, or

(iv) if a government agency or instrumentality is the Insured Claimant, the amount it paid in the acquisition of the Title or the Insured Mortgage in satisfaction of its insurance contract or guaranty.

(b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title or the lien of the Insured Mortgage, as insured,

(i) the Amount of Insurance shall be increased by 10%, and

(ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

(c) In the event the Insured has acquired the Title in the manner described in Section 2 of these Conditions or has conveyed the Title, then the extent of liability of the Company shall continue as set forth in Section 8(a) of these Conditions.

(d) In addition to the extent of liability under (a), (b), and (c), the Company will also pay those costs, attorneys' fees, and expenses incurred in accordance with Sections 5 and 7 of these Conditions.

9. LIMITATION OF LIABILITY

(a) If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, or establishes the lien of the Insured Mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title or to the lien of the Insured Mortgage, as insured.

(c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

(a) All payments under this policy, except payments made for costs, attorneys' fees, and expenses, shall reduce the Amount of Insurance by the amount of the payment. However, any payments made prior to the acquisition of Title as provided in Section 2 of these Conditions shall not reduce the Amount of Insurance afforded under this policy except to the extent that the payments reduce the Indebtedness.

(b) The voluntary satisfaction or release of the Insured Mortgage shall terminate all liability of the Company except as provided in Section 2 of these Conditions.

11. PAYMENT OF LOSS

When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

12. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT

(a) The Company's Right to Recover

Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title or Insured Mortgage and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.

If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

(b) The Insured's Rights and Limitations

(i) The owner of the Indebtedness may release or substitute the personal liability of any debtor or guarantor, extend or otherwise modify the terms of payment, release a portion of the Title from the lien of the Insured Mortgage, or release any collateral security for the Indebtedness, if it does not affect the enforceability or priority of the lien of the Insured Mortgage.

(ii) If the Insured exercises a right provided in (b)(i), but has Knowledge of any claim adverse to the Title or the lien of the Insured Mortgage insured against by this policy, the Company shall be required to pay only that part of any losses insured against by this policy that shall exceed the amount, if any, lost to the Company by reason of the impairment by the Insured Claimant of the Company's right of subrogation.

(c) The Company's Rights Against Non-insured Obligors

The Company's right of subrogation includes the Insured's rights against non-insured obligors including the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

The Company's right of subrogation shall not be avoided by acquisition of the Insured Mortgage by an obligor (except an obligor described in Section 1(e)(i)(F) of these Conditions) who acquires the Insured Mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond, and the obligor will not be an Insured under this policy.

13. ARBITRATION

Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is $2,000,000 or less shall be arbitrated at the option of either the Company or the Insured. All arbitrable matters when the Amount of Insurance is in excess of $2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.

14. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

(a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage that arises out of the status of the Title or lien of the Insured Mortgage or by any action asserting such claim shall be restricted to this policy.

(c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.

(d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.

15. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid, but all other provisions shall remain in full force and effect.

16. CHOICE OF LAW; FORUM

(a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefore in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located.

Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title or the lien of the Insured Mortgage that are adverse to the Insured and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law.

(b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

17. NOTICES, WHERE SENT

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at **First American Title Insurance Company, Attn: Claims National Intake Center, 1 First American Way; Santa Ana, CA 92707. Phone: 888-632-1642.**

First American Title™

EXHIBIT

RESTRICTIONS, ENCROACHMENTS, MINERALS – LOAN POLICY ENDORSEMENT

Issued by

First American Title Insurance Company

Attached to Policy No.: File No.:

1. The insurance provided by this endorsement is subject to the exclusions in Section 5 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For the purposes of this endorsement only:
   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy,
   b. "Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.
3. The Company insures against loss or damage sustained by the Insured by reason of:
   a. A violation of a Covenant that:
      i. divests, subordinates, or extinguishes the lien of the Insured Mortgage,
      ii. results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage,

      or

      iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness;
   b. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;
   c. Enforced removal of an Improvement located on the Land as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or
   d. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.
4. The Company insures against loss or damage sustained by reason of:
   a. An encroachment of:
      i. an Improvement located on the Land, at Date of Policy, onto adjoining land or onto that portion of the Land subject to an easement; or
      ii. an Improvement located on adjoining land onto the Land at Date of Policy,

   unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.;
   b. A final court order or judgment requiring the removal from any land adjoining the Land of an encroachment identified in Schedule B; or
   c. Damage to an Improvement located on the Land, at Date of Policy:

i. that is located on or encroaches onto that portion of the Land subject to an easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or

ii. resulting from the future exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.

5. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

a. any Covenant contained in an instrument creating a lease;

b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;

c. except as provided in Section 3.d, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances.

d. contamination, explosion, fire, flooding, vibration, fracturing, earthquake or subsidence; or

e. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

First American Title Insurance Company

Dennis J. Gilmore, President Jeffrey J. Robinson, Secretary

_____
Name of Agent

By: _____
Authorized Countersignature

First American Title™

EXHIBIT F

COVENANTS, CONDITIONS AND RESTRICTIONS – LOAN POLICY ENDORSEMENT

Issued by

First American Title Insurance Company

Attached to Policy No.:

File No.:

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For the purposes of this endorsement only:

   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
   b. "Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to the Land at Date of Policy that by law constitutes real property.

3. The Company insures against loss or damage sustained by the Insured by reason of:

   a. A violation of a Covenant that:
      i. divests, subordinates, or extinguishes the lien of the Insured Mortgage.
      ii. results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or
      iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness;
   b. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;
   c. Enforced removal of an Improvement as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or
   d. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

   a. any Covenant contained in an instrument creating a lease;
   b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land; or
   c. except as provided in Section 3.d., any Covenant pertaining to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Date:

First American Title Insurance Company

Dennis J. Gilmore, President — Jeffrey S. Robinson, Secretary

SPECIMEN

By: _____

Authorized Countersignature

First American Title™

EXHIBIT G

ACCESS AND ENTRY
ENDORSEMENT

Issued by

First American Title Insurance Company

Attached to Policy No.:

File No.:

The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the Land does not abut and have both actual vehicular and pedestrian access to and from (the "Street"), (ii) the Street is not physically open and publicly maintained, or (iii) the Insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Land.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Date:

First American Title Insurance Company

Dennis J. Gilmore, President — Jeffrey S. Robinson, Secretary

By: _____
Authorized Countersignature

First American Title™

EXHIBIT H

INDIRECT ACCESS AND ENTRY ENDORSEMENT

Issued by

First American Title Insurance Company

Attached to Policy No.:

File No.:

The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the easement identified [as Parcel] in Schedule A (the "Easement") does not provide that portion of the Land identified [as Parcel] in Schedule A both actual vehicular and pedestrian access to and from (the "Street"), (ii) the Street is not physically open and publicly maintained, or (iii) the Insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Easement.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Date:

First American Title Insurance Company

SPECIMEN

Dennis J. Gilmore, President Jeffrey S. Robinson, Secretary

By: _____

Authorized Countersignature

First American Title™

EXHIBIT 1

SINGLE TAX PARCEL ENDORSEMENT

Issued by

First American Title Insurance Company

Attached to Policy No.:

File No.:

The Company insures against loss or damage sustained by the Insured by reason of the Land being taxed as part of a larger parcel of land or failing to constitute a separate tax parcel for real estate taxes.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Date:

First American Title Insurance Company

Dennis J. Gilmore, President — Jeffrey S. Robinson, Secretary

SPECIMEN

By: _____
Authorized Countersignature

MULTIPLE TAX PARCEL – EASEMENTS ENDORSEMENT

EXHIBIT J

Issued by

First American Title Insurance Company

Attached to Policy No.: File No.:

The Company insures against loss or damage sustained by the Insured by reason of:

1. those portions of the Land identified below not being assessed for real estate taxes under the listed tax identification numbers or those tax identification numbers including any additional land:

   Parcel Tax Identification Numbers

2. the easements, if any, described in Schedule A being cut off or disturbed by the nonpayment of real estate taxes, assessments or other charges imposed on the servient estate by a governmental authority.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Date:

First American Title Insurance Company

Dennis J. Gilmore, President Jeffrey S. Robinson, Secretary

Name of Agent

By: _____
Authorized Countersignature

First American Title™

EXHIBIT K

CONTIGUITY – MULTIPLE PARCELS ENDORSEMENT

Issued by

First American Title Insurance Company

Attached to Policy No.:

File No.:

The Company insures against loss or damage sustained by the Insured by reason of:

1. the failure [of the _____ boundary line of parcel A] of the Land to be contiguous to [the _____boundary line of parcel B]

   [for more than two parcels, continue as follows: "of [the _____ boundary line of Parcel B] of the Land to be contiguous to [the _____ boundary line of Parcel C] and so on until all contiguous parcels described in the policy have been accounted for]; or

2. the presence of any gaps, strips, or gores separating any of the contiguous boundary lines described above.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Date:

First American Title Insurance Company

Dennis J. Gilmore, President Jeffrey S. Robinson, Secretary

By: _____
Authorized Countersignature

First American Title™

EXHIBIT L

CONTIGUITY – SINGLE PARCEL ENDORSEMENT

Issued by

First American Title Insurance Company

Attached to Policy No.:

File No.:

The Company insures against loss or damage sustained by the Insured by reason of:

1. the failure of the Land to be contiguous to

   along the boundary line[s]; or

2. the presence of any gaps, strips, or gores separating the contiguous boundary lines described above.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Date:

First American Title Insurance Company

SPECIMEN

Dennis J. Gilmore, President Jeffrey S. Robinson, Secretary

By: _____

Authorized Countersignature

First American Title™

EXHIBIT M

CONTIGUITY – SPECIFIED PARCELS ENDORSEMENT

Issued by

First American Title Insurance Company

Attached to Policy No.: File No.:

The Company insures against loss or damage sustained by the Insured by reason of there being any gaps, strips, or gores lying within or between *[Example: Parcel A, B, C or Tract 1,2,3]* of the Land[except as depicted on the survey made by _____ dated _____, and designated Job No. _____].

This endorsement is issued as part of the policy and is subject to the policy's (i) Exclusions from Coverage, (ii) Conditions, and (iii) Exceptions from Coverage contained in Schedule B, in addition to (iv) exceptions and exclusions, if any, in this endorsement. Except as expressly stated, this endorsement does not (i) modify the policy or any other endorsement to the policy, (ii) extend the Date of Policy, or (iii) increase the Amount of Insurance. To the extent the policy or any previously issued endorsement to the policy is inconsistent with this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any other endorsements.

Date:

First American Title Insurance Company

Dennis J. Gilmore, President — Jeffrey S. Robinson, Secretary

SPECIMEN

_____
Name of Agent

By: _____
Authorized Countersignature

First American Title™

SAME AS SURVEY ENDORSEMENT

Issued by

First American Title Insurance Company

EXHIBIT N

Attached to Policy No.:

File No.:

The Company insures against loss or damage sustained by the Insured by reason of the failure of the Land as described in Schedule A to be the same as that identified on the survey made by dated , and designated Job No. .

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Date:

First American Title Insurance Company

SPECIMEN

Dennis J. Gilmore, President — Jeffrey S. Robinson, Secretary

By: _____

Authorized Countersignature

First American Title™

EXHIBIT O

EASEMENT – DAMAGE OR ENFORCED REMOVAL ENDORSEMENT

Issued by

First American Title Insurance Company

Attached to Policy No.:

File No.:

The Company insures against loss or damage sustained by the Insured by reason of:

(1) damage to an existing building located on the Land, or

(2) enforced removal or alteration of an existing building located on the Land,

as a result of the exercise of the right of use or maintenance of the easement referred to in Exception of Schedule B for the purpose for which it was granted or reserved.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Date:

First American Title Insurance Company

SPECIMEN

Dennis J. Gilmore, President Jeffrey S. Robinson, Secretary

By: _____
Authorized Countersignature

First American Title™

EXHIBIT P

ENCROACHMENTS – BOUNDARIES AND EASEMENTS ENDORSEMENT

Issued by

First American Title Insurance Company

Attached to Policy No.:

File No.:

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For purposes of this endorsement only, "Improvement" means an existing building, located on either the Land or adjoining land at Date of Policy and that by law constitutes real property.
3. The Company insures against loss or damage sustained by the Insured by reason of:
   a. An encroachment of any Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an exception in Schedule B of the policy identifies the encroachment;
   b. An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;
   c. Enforced removal of any Improvement located on the Land as a result of an encroachment by the Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement; or
   d. Enforced removal of any Improvement located on the Land that encroaches onto adjoining land.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the encroachments listed as Exceptions of Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Date:

First American Title Insurance Company

SPECIMEN

Dennis J. Gilmore, President — Jeffrey S. Robinson, Secretary

By: _____
Authorized Countersignature

First American Title™

EXHIBIT Q

ENCROACHMENTS – BOUNDARIES AND EASEMENTS – DESCRIBED IMPROVEMENTS ENDORSEMENTS

Issued by

First American Title Insurance Company

Attached to Policy No.:

File No.:

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For purposes of this endorsement only, "Improvement" means each improvement on the Land or adjoining land at Date of Policy, itemized below:

3. The Company insures against loss or damage sustained by the Insured by reason of:
   a. An encroachment of any Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an exception in Schedule B of the policy identifies the encroachment;
   b. An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;
   c. Enforced removal of any Improvement located on the Land as a result of an encroachment by the Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement; or
   d. Enforced removal of any Improvement located on the Land that encroaches onto adjoining land.
4. Sections 3.c. and 3.d. of this endorsement do not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the following Exceptions, if any, listed in Schedule B:

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

IN WITNESS WHEREOF, the Company has caused this endorsement to be issued and become valid when signed by an authorized officer or licensed agent of the Company.

Date:

First American Title Insurance Company

SPECIMEN

Dennis J. Gilmore, President Jeffrey S. Robinson, Secretary

By: _____
Authorized Countersignature

First American Title™

EXHIBIT R

ENCROACHMENTS – BOUNDARIES AND EASEMENTS – LAND UNDER DEVELOPMENT ENDORSEMENT
Issued by
First American Title Insurance Company

Attached to Policy No.: File No.:

1. The insurance provided by this endorsement is subject to the exceptions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For purposes of this endorsement only:
   (a) "Improvement" means a building, structure, or paved area, including any road, walkway, parking area, driveway, or curb located on the surface of the Land or the surface of adjoining land at Date of Policy that by law constitutes real property.
   (b) "Future Improvement" means any of the following to be constructed on the Land after Date of Policy in the locations according to the Plans and that by law constitutes real property:
      (i) a building;
      (ii) a structure; or
      (iii) a paved area, including any road, walkway, parking area, driveway, or curb.
   (c) "Plans" mean the survey, site and elevation plans, or other depictions or drawings prepared by [Insert name of Architect or Engineer] dated [Insert date prepared], last revised [insert date last revised], designated as [insert name of project or project number] consisting of [insert number of sheets] sheets.
3. The Company insures against loss or damage sustained by the Insured by reason of:
   (a) An encroachment of any Improvement or Future Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an Exception in Schedule B of the policy identifies the encroachment;
   (b) An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an Exception in Schedule B of the policy identifies the encroachment;
   (c) Enforced removal of any Improvement or Future Improvement located on the Land as a result of an encroachment by the Improvement or Future Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement or Future Improvement; or
   (d) Enforced removal of any Improvement or Future Improvement located on the Land that encroaches onto adjoining land.
4. Sections 3(c) and 3(d) of this endorsement do not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the following Exceptions, if any, listed in Schedule B:
   (The Company may list any Exceptions appearing in Schedule B for which it will not provide insurance pursuant to Section 3(c) or Section 3(d). The Company may insert "None" if it does not intend to limit the coverage.)

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Date:

First American Title Insurance Company

Dennis J. Gilmore, President — Jeffrey S. Robinson, Secretary

SPECIMEN

_____
Name of Agent

By: _____
Authorized Countersignature

TAB
G

Dr. Julia King obtained Masters and Doctoral degrees in Clinical Psychology - as well as an MBA - from Widener University, and completed a post-doctoral fellowship in Forensic Psychology at the University of Cincinnati's Institute for Psychiatry and Law. For the next decade Dr. King practiced exclusively in the area of forensic psychology, being retained by attorneys and appointed by judges to provide psychological evaluations in a variety of legal contexts. However, she has since transitioned into a clinical therapeutic practice, now specializing in treating anxiety, depression, and stress management, as well as emotional eating and difficulties with body image. Dr. King empowers her clients with mindfulness-based and cognitive-behavioral therapy interventions to learn and obtain new skills in order to transform their lives. She is also a registered yoga teacher and incorporates meditation, breath work, and the physical practice of yoga into psychotherapy.

NAVIGATING THE CHALLENGES OF LAW PRACTICE WHILE MAINTAINING BALANCE

Julia A. King, Psy.D., MBA, RYT-200
Root to Flourish, LLC
Cincinnati Bar Association, Real Property Law Institute
12/14/2018

1

CAUSES OF WORK-RELATED STRESS, IN GENERAL

- Demanding schedules
- Heavy workloads
- Work-life balance
- Conflicts with co-workers, bosses
- Concerns regarding job security
- Tight deadlines
- Boring work
- Insufficient skills
- Over-supervision
- Lack of organizational support
- Changes within an organization
- Lack of resources
- Harassment, discrimination
- Crisis incidents

2

LAWYERING: UNIQUE STRESSES

- Adversarial system
- Alignment with clients
- Lawyers are excellent "worriers"

- Others

3

INDICATORS OF STRESS

- Poor sleep
- Ruminating thoughts
- Difficulty concentrating
- Difficulty learning new information
- Disorganization, forgetfulness
- Difficulty making decisions
- Feeling overwhelmed
- Suicidal thoughts
- Feelings of worthlessness
- Irritability
- Defensiveness, suspiciousness
- Weight gain / loss
- Physical health problems

4

ADVERSARIAL SYSTEM

- Marked by hostility and criticism
- Fosters fear of failure ("losing the case," performance anxiety)
- Fosters fear of rejection (losing the client, losing professional standing)
- Cultivates suspicion of ulterior motives and promotes cynicism (less accepting / trusting of others)
- Promotes taking every advantage (including manipulation and disrespectful behavior to opposing counsel / parties)

5

ALIGNMENT WITH CLIENTS

- Clients' expectations: You are expected to be perfect and a pillar of strength.
- Boundary setting with clients
  - When you like them …
    - Desire to help them
    - Willing to do more?
  - … and what about when you don't?
    - Unreasonable demands
    - Unwilling to accept advice that than risks the outcome and your reputation

6

ALIGNMENT WITH CLIENTS (CONT'D)

- Your own investment in the outcome
  - DO NOT WORK HARDER THAN YOUR CLIENT
  - Meaningful profession
  - Taking on the responsibility for the outcome / blaming yourself if things don't go as planned, didn't work hard enough, careless

7

"PAID WORRIERS"

- Your job requires you to anticipate what can go wrong and the job is extremely detail-oriented
- Pessimism is a strength in this profession – guards against mistakes and anticipates hidden motives
- Mistakes can be costly
  - Thousands or millions of dollars, custody of a child, a defendant's freedom
- Sense of urgency
- Leads to perfectionism and obsessive dedication to work
- Promotes tendency to appear invulnerable and not acknowledge "weaknesses"

8

LAWYERS AT GREATER RISK

- Depression / Suicide
- Anxiety
- Substance abuse

- Leads to physical health problems
- Contributes to deterioration of personal relationships (divorce, parenting difficulties)

9

FACTORS THAT PROMOTE HAPPINESS

- Social connection
- Optimism
- Kindness and compassion
- Gratitude
- Mindfulness
- Physical activity
- Sense of purpose

- Inconsistencies?

10

BUT … THERE'S HOPE!

- Many of these tendencies are LEARNED
  - And therefore can be UNLEARNED
- And … regarding determinants of wellbeing …
  - 50% genetics
    - Genetic set point
  - 10% life circumstances
    - I'll be happy when …
    - Psychological immune system
      - Back to baseline
  - which leaves 40% that is within our control … PRACTICE, PRACTICE, PRACTICE …

11

NEUROPLASTICITY

- Scientists once thought that the brain was formed within the first few years of life.
- We now know that the brain will continue to reorganize itself by forming new neural connections throughout life = **neuroplasticity**
- Our repeated experiences shape our brain
  - What we practice becomes stronger
- Superhighways of habit … what we automatically do
  - vs. the overgrown parallel road … the new pathway we want to create

12

MINDFULNESS

- Awareness that arises by:
  - paying attention
  - on purpose
  - in the present moment, and
  - non-judgmentally
- "It's about living your life as if it really mattered, moment by moment by moment by moment … " Jon Kabat-Zinn
- "Realize deeply that the present moment is all you ever have." Eckhart Tolle

13

HOW DOES MINDFULNESS WORK?

- Cultivates the observing Self … awareness and presence
- Allows for objective observation and assessment, and a choice for engagement, of the chattering of the mind
- You are NOT your mind
- Treat your thoughts (and your feelings) as hypotheses, not facts
- Cue into your breath, your body, and your senses

14

MINDFULNESS ≠ EMOTIONAL BLISS

- Rather you are likely to be *more* in touch with emotions and aware of feelings
  - Mindfulness does not suggest that you will not feel your bad feelings
  - On the contrary, you will likely experience them more richly and acutely
  - YET, you'll also be able to better recover from them as well (resilience)

15

INFORMAL MINDFULNESS

- Mindfulness can take place every second of the day
- It is simply focusing the mind on whatever is happening in the present moment

- *"Where are we to find the time to practice such mindfulness? If you spend all day practicing mindfulness, how will there ever be enough time to do all the work that needs to be done?" (Thich Nhat Hahn)*
  - Please read as if written in *Sarcasm* font …

16

… VS. FORMAL MINDFULNESS

- Regularly and consistently engaging in a basic mindfulness meditation practice
- Focused Attention Meditation
  - Instruct attention on a single object, object the physical sensations of breathing
    - Before long, attention will wander
    - Realize mind is no longer focused on the breath
    - With this awareness you disengage from the thought that has drawn your mind away
    - Steer attention back to the breath
    - Cycle will likely repeat a few moments later

17

COGNITIVE-BEHAVIORAL INTERVENTIONS

THOUGHTS → FEELINGS → BEHAVIORS

- Our thoughts have an enormous impact on how we feel
- And then, how we behaviorally respond to those feelings, can make us feel better or worse (AVOIDANCE)
- SO, if we target our THOUGHTS and BEHAVIORS, coming from the problem from both angles, we change how we FEEL
  - Even though our external circumstances (remember only 10%) don't change

18

PRAGMATICS … NOW WHAT?

- Mindfulness
- Observe thoughts / behaviors
  - Reframe / challenge
  - Refrain from avoidance behaviors
- Boundaries
  - With clients
  - Set limits on how work is present in your personal life and in your emotional management

19

RESOURCES

- The Resilient Lawyer podcast
  - inspired by those in the legal profession living with authenticity and courage
  - https://resilientlawyer.libsyn.com
- How lawyers can avoid burnout and debilitating anxiety
  - http://www.abajournal.com/magazine/article/how_lawyers_can_avoid_burnout_and_debilitating_anxiety
- Meditation app – Insight Timer
  - https://insighttimer.com

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HAVE A QUESTION? OR INTERESTED IN HAVING A CONVERSATION?

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TAB
H

THE IMPACT OF THE OPIOID CRISIS ON THE LEGAL FIELD

- Chad Smith- Chief Executive Officer, BrightView
- Cincinnati, OH

Every 12 minutes, a person in the United States dies from an opioid overdose.

1

INTRODUCTION: CHAD SMITH

- CHAD IS AN ATTORNEY AND CERTIFIED HIPAA SECURITY PROFESSIONAL WHO HAS FOCUSED HIS CAREER ON HEALTHCARE OPERATIONS, TECHNOLOGY, AND COMPLIANCE. PRIOR TO JOINING BRIGHTVIEW, HE CO-FOUNDED A SERIES OF HEALTHCARE TECHNOLOGY COMPANIES WHERE HE MANAGED TECHNICAL AND PROFESSIONAL SERVICE TEAMS, SUPERVISED BUSINESS DEVELOPMENT AND SALES, AND ACTED AS THE PRIVACY OFFICER. CHAD SERVES ON THE BOARD OF ADVISORS FOR THE NORTHERN KENTUCKY UNIVERSITY, COLLEGE OF HEALTH INFORMATICS, WHERE HE TEACHES COURSES FOCUSED ON THE INTERSECTION OF LAW AND HEALTHCARE TECHNOLOGY. HE OBTAINED HIS UNDERGRADUATE DEGREE FROM THE UNIVERSITY OF AKRON, MASTER OF SCIENCE IN HEALTH INFORMATICS FROM NORTHERN KENTUCKY UNIVERSITY, AND HIS JURIS DOCTOR FROM NORTHERN KENTUCKY UNIVERSITY'S CHASE COLLEGE OF LAW.
- CHAD IS ONE OF THE FOUNDERS OF BRIGHTVIEW AND IS RESPONSIBLE FOR DAILY OPERATIONS, CORPORATE COMPLIANCE, LEGAL REPRESENTATION, CORPORATE STRATEGY, ENTERPRISE TECHNOLOGY AND INFRASTRUCTURE. IF HE CALLS IN SICK, CHANCES ARE HE'S PROBABLY GOLFING.

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AGENDA

1. Opioid Crisis in America: Background
2. Medication-Assisted Treatment (MAT)
3. Impact on the Criminal Justice System
4. Representing Clients with Addiction Issues
5. Impact of Addiction on the Legal Field
6. Navigating Treatment Options

3

U.S. SURGEON GENERAL, VIVEK MURTHY MD

- AN ESTIMATED 20.8 MILLION PEOPLE IN OUR COUNTRY ARE LIVING WITH A SUBSTANCE USE DISORDER. THIS IS SIMILAR TO THE NUMBER OF PEOPLE WHO HAVE DIABETES, AND 1.5 TIMES THE NUMBER OF PEOPLE WHO HAVE ALL CANCERS COMBINED. THIS NUMBER DOES NOT INCLUDE THE MILLIONS OF PEOPLE WHO ARE MISUSING SUBSTANCES BUT MAY NOT YET HAVE A FULL-FLEDGED DISORDER. WE DON'T INVEST NEARLY THE SAME AMOUNT OF ATTENTION OR RESOURCES IN ADDRESSING SUBSTANCE USE DISORDERS THAT WE DO IN ADDRESSING DIABETES OR CANCER, DESPITE THE FACT THAT A SIMILAR NUMBER OF PEOPLE ARE IMPACTED. THAT HAS TO CHANGE.

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THE ISSUE

- Substance Use Disorder (SUD) is a chronic, relapsing disease, which has significant economic, personal, and public health consequences.
  - Abuse of and addiction to alcohol, nicotine, and illicit and prescription drugs cost Americans more than $700 billion a year in increased health care costs, crime, and lost productivity
  - Nationally, death rates from Rx Opioid overdoses QUADRUPLED during 1999–2016
    - MMWR (CDC)
  - CDC estimates over 42,000 people died in 2016 from overdoses involving opioid pain relievers.

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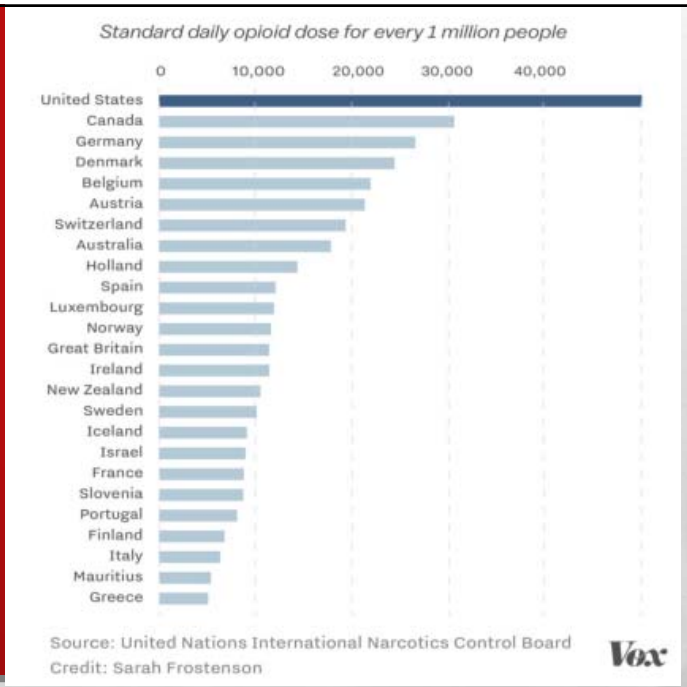
THE ISSUE

- **AMERICANS CONSUME MORE OPIOIDS THAN ANY OTHER COUNTRY IN THE WORLD**



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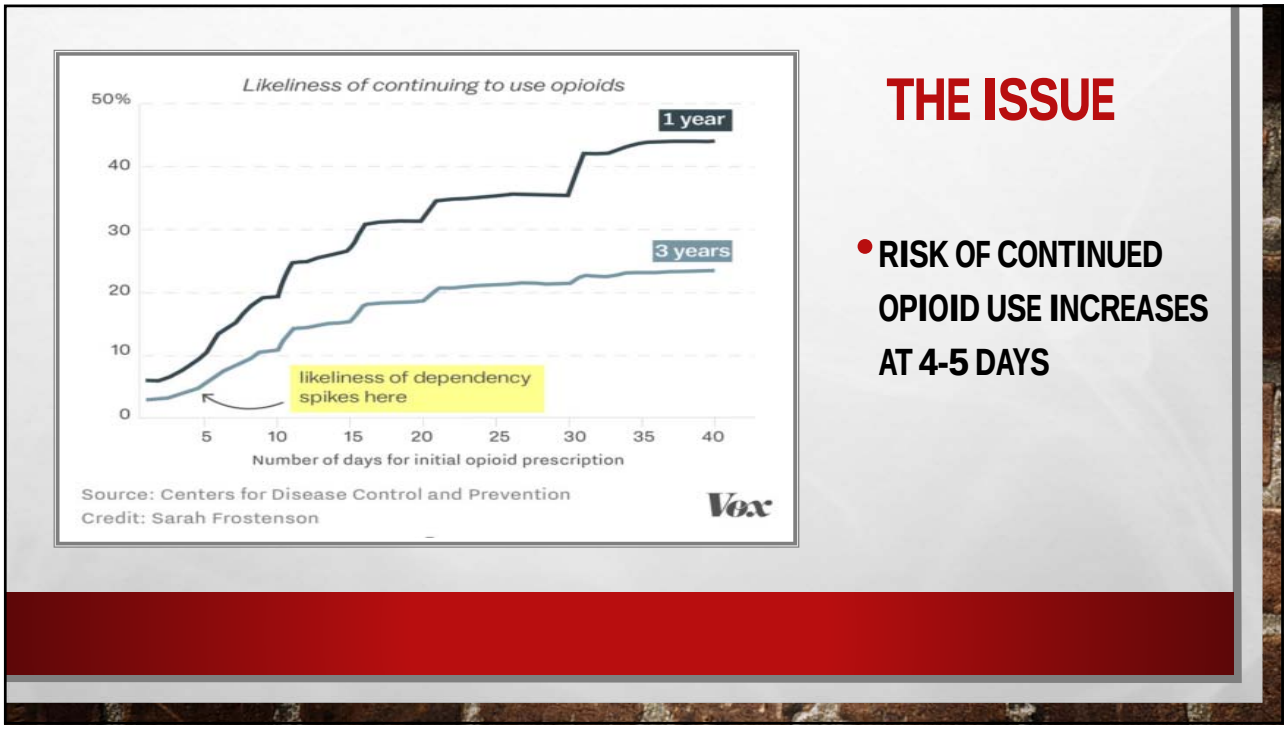
Likeliness of continuing to use opioids
50%
40
30
20
10
0
1 year
3 years
likeliness of dependency spikes here
5
10
15
20
25
30
35
40
Number of days for initial opioid prescription
Source: Centers for Disease Control and Prevention
Credit: Sarah Frostenson
Vox
THE ISSUE
RISK OF CONTINUED OPIOID USE INCREASES AT 4-5 DAYS

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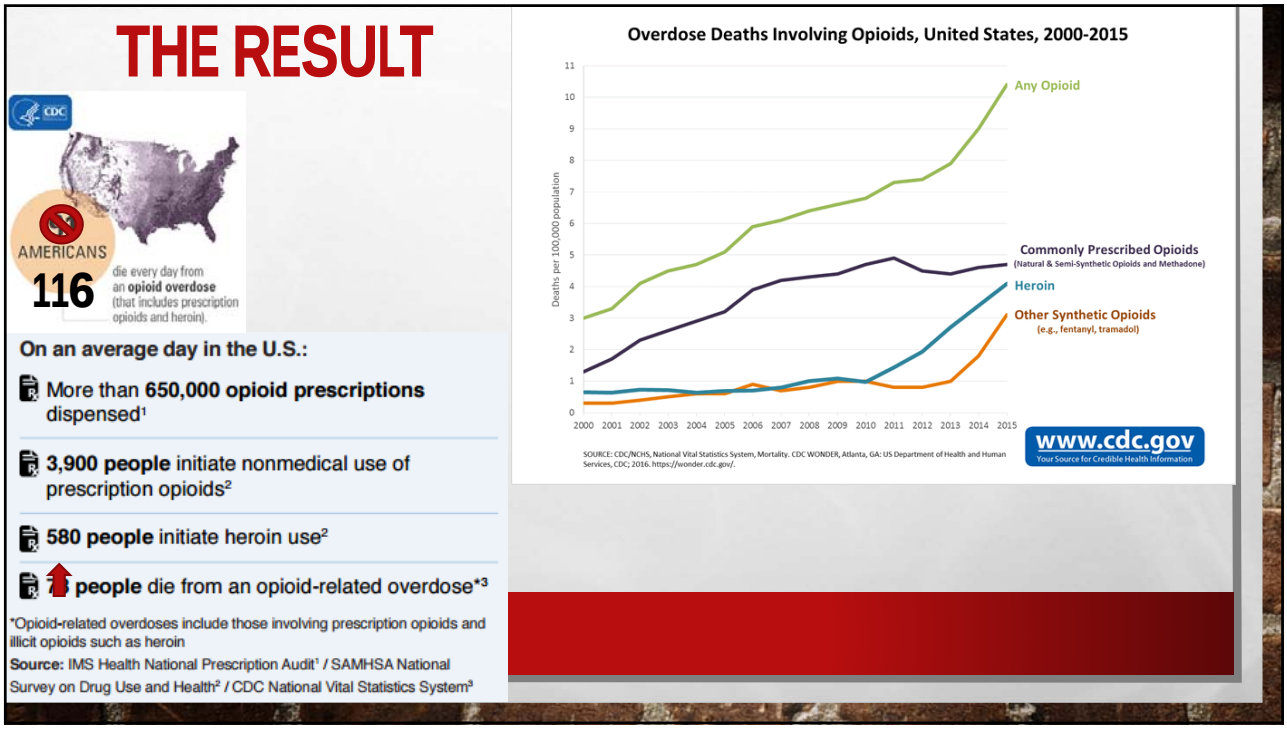
THE RESULT
CDC
AMERICANS
116
die every day from an opioid overdose (that includes prescription opioids and heroin).
On an average day in the U.S.:
More than 650,000 opioid prescriptions dispensed[1]
3,900 people initiate nonmedical use of prescription opioids[2]
580 people initiate heroin use[2]
people die from an opioid-related overdose*[3]
*Opioid-related overdoses include those involving prescription opioids and illicit opioids such as heroin
Source: IMS Health National Prescription Audit[1] / SAMHSA National Survey on Drug Use and Health[2] / CDC National Vital Statistics System[3]
Overdose Deaths Involving Opioids, United States, 2000-2015
Deaths per 100,000 population
11
10
9
8
7
6
5
4
3
2
1
0
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
Any Opioid
Commonly Prescribed Opioids
(Natural & Semi-Synthetic Opioids and Methadone)
Heroin
Other Synthetic Opioids
(e.g., fentanyl, tramadol)
SOURCE: CDC/NCHS, National Vital Statistics System, Mortality. CDC WONDER, Atlanta, GA: US Department of Health and Human Services, CDC; 2016. https://wonder.cdc.gov/.
www.cdc.gov
Your Source for Credible Health Information

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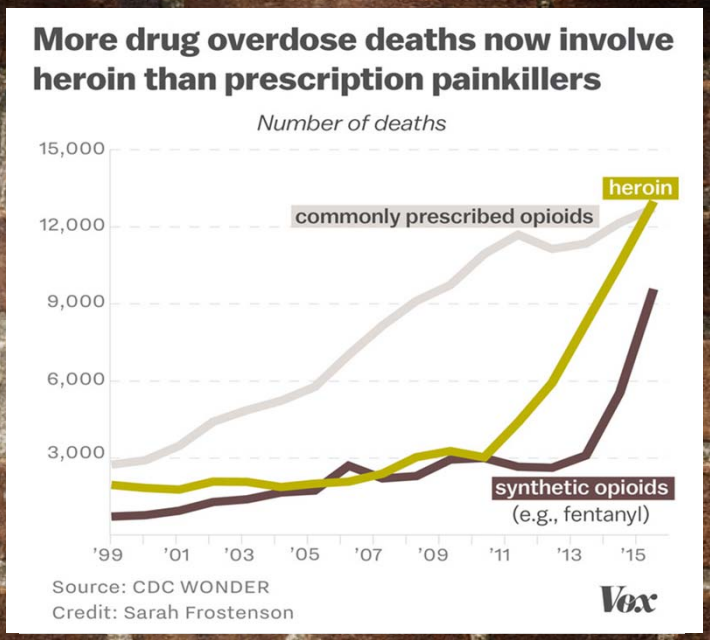
SHIFT TO HEROIN & FENTANYL



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THE DISEASE

- Definition of disease: Any deviation from or interruption of the normal structure or function of any body part, organ, or system that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown.
- ASAM definition of the disease of addiction: addiction is a primary, chronic disease of brain reward, motivation, memory and related circuitry. Dysfunction in these circuits leads to characteristic biological, psychological, social and spiritual manifestations.
- IT FITS THE DEFINITION; AND IT CAN BE FATAL WITHOUT TREATMENT.

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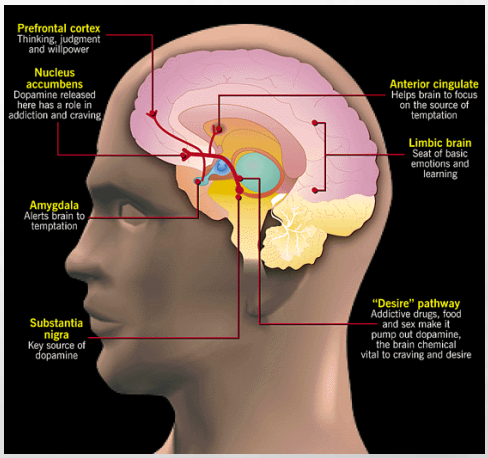
THE DISEASE OF ADDICTION

- Addiction affects neurotransmission and interactions within reward structures of the brain, such that motivational hierarchies are altered and addictive behaviors supplant healthy, self-care related behaviors.
  - However, the neurobiology of addiction encompasses more than the neurochemistry of reward.
- The connections between the frontal cortex and circuits of reward, motivation and memory are fundamental in the manifestations of altered impulse control.
  - The frontal lobes are still maturing during adolescence, and early exposure to substance use is another significant factor in the development of addiction**
- Genetic factors account for about half of the likelihood that an individual will develop addiction. Environmental factors interact with the person's biology and affect the extent to which genetic factors exert their influence.



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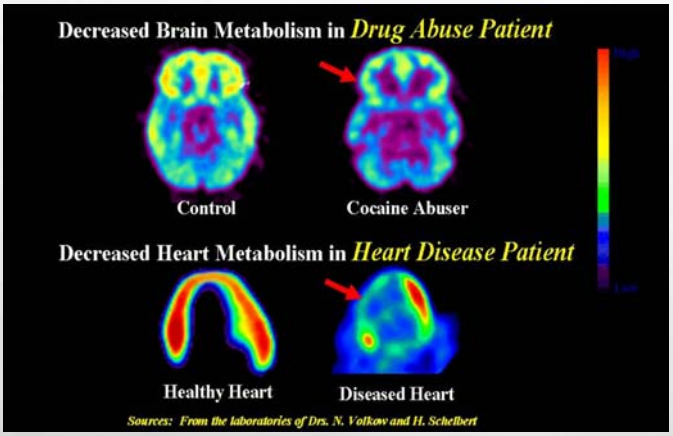
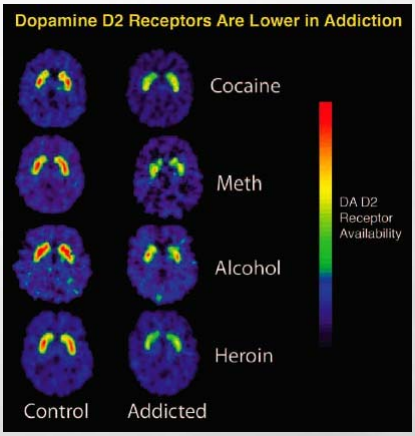
IMAGING EVIDENCE OF THE BRAIN DISEASE





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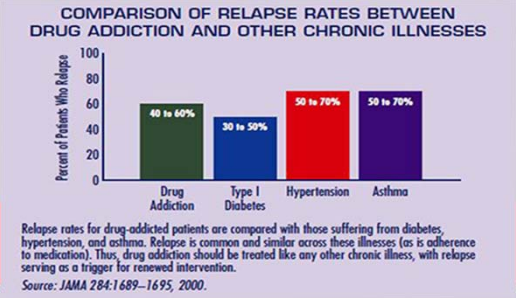
COMPARISON TO OTHER DISEASES

- WHO definition of diabetes type 2: Results from the body's ineffective use of insulin. This type of diabetes comprises the majority of people with diabetes around the world, and is largely the result of excess body weight and physical inactivity with some predisposing genetic factors.
- The disease of addiction is also a state of dysfunction contributed to by genetic factors (obviously not choice) as well as environmental ones such as abuse (mental or physical, again not a choice) and exposure (potentially a choice). Just like diabetes type 2, it is progressive without treatment and potentially life and limb threatening.
  - The approximate rate of relapse of both diseases is also very similar



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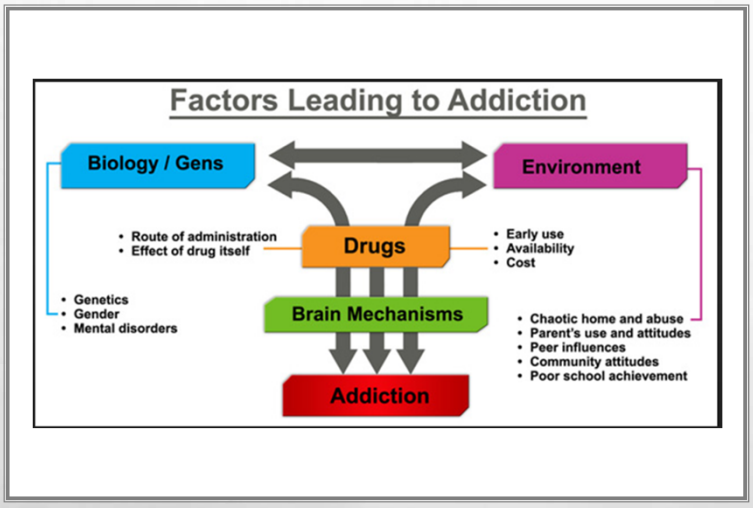

DEVELOPMENT OF ADDICTION

- BIOLOGY (GENETICS)
- ENVIRONMENT
- EXPOSURE

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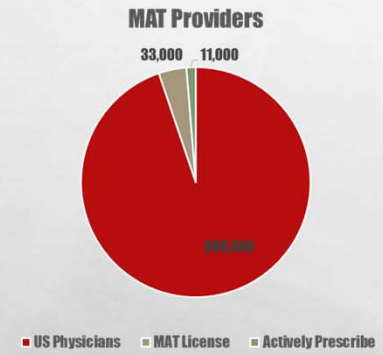
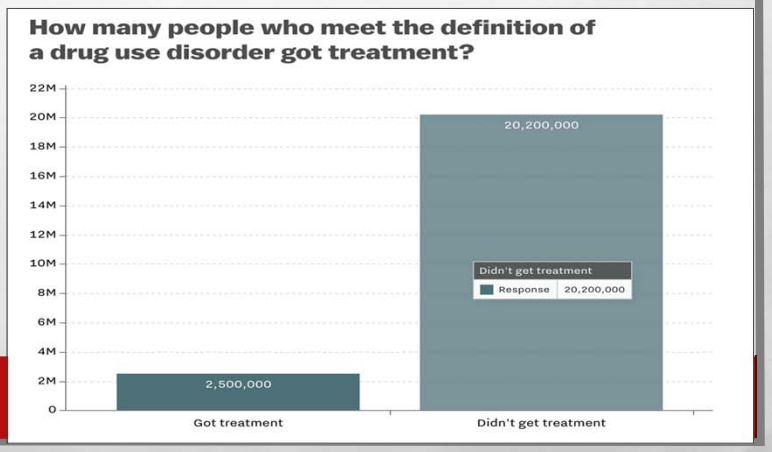
TREATMENT NEED

- Approx. 10-20% of patients with illicit drug use receive treatment
  - Estimated 5-10X increase in need for addiction treatment





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TREATMENT IMPACT

- For every $1.00 spent on treatment:
  - The costs of crime and lost productivity are reduced by $7.46
  - The total societal and medical costs are estimated to be reduced by as much as $18.54
- Patients with substance use disorder often use a disproportionate amount of healthcare in very inefficient ways.
  - Mean annual direct health care costs for opioid abusers were more than 8 times higher than for nonabusers ($15,884 versus $1,830, respectively) – White, 2010
- Reminder - patients receiving MAT (medically assisted treatment) plus addiction counseling had significantly lower total health care costs than patients with little or no addiction treatment ($13,578 vs. $31,055 = 56% reduction); As much as 90% reduction has been seen in other studies.

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IMPACT ON THE CRIMINAL JUSTICE SYSTEM

- IN THE MONTH OF JUNE 2018 ALONE , BASED ON DATA GATHERED FROM THE FEDERAL BUREAU OF PRISONS, THERE WERE 78,561 ARRESTS MADE FOR DRUG OFFENSES NATIONWIDE.

Chart Label	Offense	# of Inmates	% of Inmates
a	Banking and Insurance, Counterfeit, Embezziement	482	0.3%
b	Burglary, Larceny, Property Offenses	8,141	4.8%
c	Continuing Criminal Enterprise	370	0.2%
d	Courts or Corrections	759	0.4%
e	Drug Offenses	78,561	46.1%

https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

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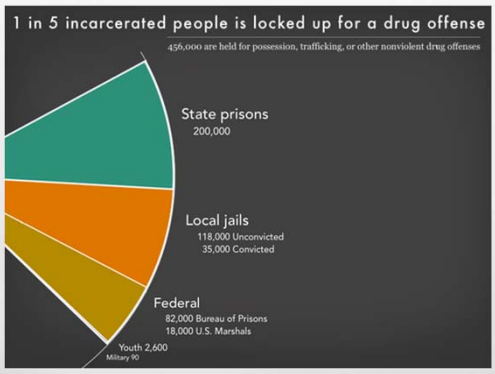
IMPACT ON THE CRIMINAL JUSTICE SYSTEM



https://www.prisonpolicy.org/reports/pie2018.html?gclid=EAIaIQobChMI_4_urf_x3AIVTBxpCh1IqgNTEAAYASAAEgLidvD_BwE

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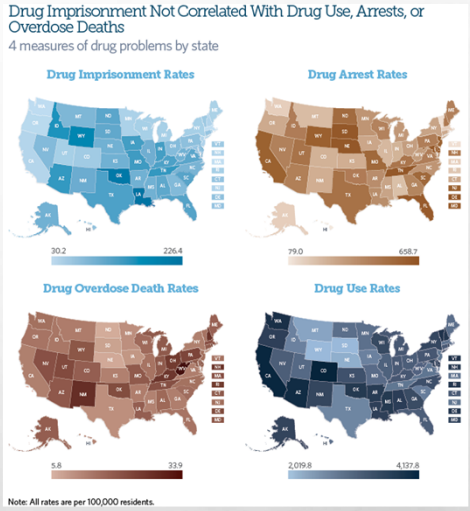
"If imprisonment were an effective deterrent to drug use and crime, then, all other things being equal, the extent to which a state sends drug offenders to prison should be correlated with certain drug-related problems in that state."



http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems#0-overview

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REPRESENTING CLIENTS WITH ADDICTION ISSUES

FEDERAL NON-DISCRIMINATION LAWS PROTECT PEOPLE IN MAT

It is illegal to discriminate against people because they are in MAT.

Americans with Disabilities Act (ADA)
Rehabilitation Act of 1973
Fair Housing Act (FHA)
Workforce Investment Act (WIA)

http://atforum.com/documents/Know_Your_Rights_Brochure_0110.pdf

20

OTHER RESOURCES FOR CLIENTS

- MEDICAL-LEGAL PARTNERSHIPS (MLPS) ARE FLEXIBLE, COLLABORATIVE ARRANGEMENTS IN WHICH LEGAL PROFESSIONALS ARE EMBEDDED IN A HEALTH CARE ORGANIZATION TO ADDRESS THE UNMET CIVIL LEGAL NEEDS OF PATIENTS. LEGAL SERVICES PROVIDERS FROM CIVIL LEGAL AID ORGANIZATIONS AND/OR LAW SCHOOLS ARE AVAILABLE ON-SITE TO ADDRESS UNMET SOCIAL NEEDS OF PATIENTS THAT DIRECTLY IMPACT HEALTH OUTCOMES, BUT THAT WOULD OTHERWISE NOT BE ADDRESSED WITHIN THE CLINICAL SETTING.
- THESE INCLUDE MANY ISSUES THAT INCREASE RECOVERY CAPITAL, INCLUDING:
- ESTABLISHING GUARDIANSHIPS FOR CHILDREN AND OTHER CUSTODY ISSUES
- ENFORCING WORKPLACE RIGHTS
- ENSURING PEOPLE ARE LEGALLY ABLE TO WORK
- PREVENTING HOUSING EVICTIONS

https://medical-legalpartnership.org/wp-content/uploads/2017/12/Health-Center-based-Medical-Legal-Partnerships.pdf

21

- LEGAL AID SOCIETY OF CINCINNATI CONDUCTS LEGAL WORK THROUGH FOUR PRACTICE GROUPS: CHILDREN AND EDUCATION, FAMILY AND IMMIGRATION, HOUSING AND CONSUMER AND INCOME, WORK AND HEALTH.
- FOR EXAMPLE, THEY HELP TO:
- PREVENT EVICTIONS AND FORECLOSURES
- ADDRESS DOMESTIC VIOLENCE AND DIVORCE
- FIX UNSAFE AND UNHEALTHY LIVING CONDITIONS
- OBTAIN MEDICAID AND OTHER HEALTH AND INCOME BENEFITS
- OVERCOME BARRIERS TO EMPLOYMENT
- RESOLVE SCHOOL PROBLEMS

MEDICAL-LEGAL PARTNERSHIPS

- GOOD SAMARITAN HOSPITAL FACULTY MEDICAL CENTER IS PART OF TRIHEALTH, A LARGE INTEGRATED HEALTH SYSTEM IN CINCINNATI, OHIO. THEIR HELPING OPIATE-ADDICTED PREGNANT WOMEN EVOLVE (HOPE) PROGRAM CONNECTS WITH MORE THAN 500 PREGNANT WOMEN WITH OPIOID-RELATED SUDS ANNUALLY, AND ABOUT 40 PERCENT DELIVER AT GOOD SAMARITAN HOSPITAL ANNUALLY.

22

ADDICTION AND THE LEGAL COMMUNITY

DRUG ABUSE AMONG LAWYERS

It may be surprising to learn that lawyers are more likely to abuse drugs and alcohol than any other profession. While some may joke about a lawyer drinking a giant under the table, this high incidence of addiction is no laughing matter. Addictions, when left untreated, can lead to malpractice, neglect, phantom settlements, client defaults and more. Why are lawyers at this high risk of addiction, and what is being done about it?

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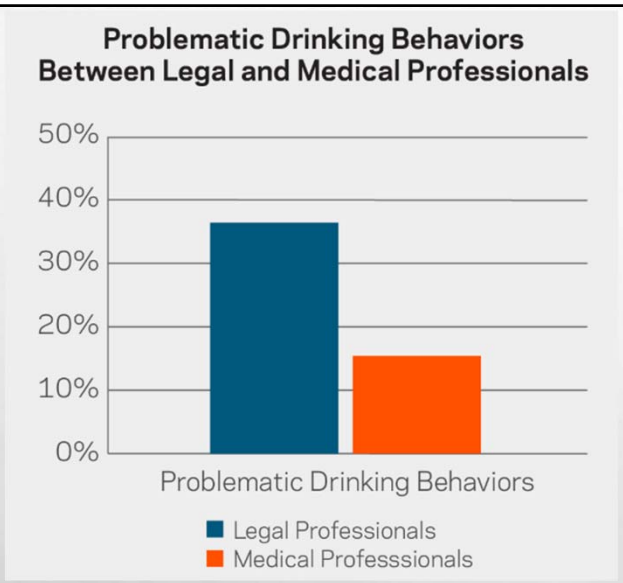

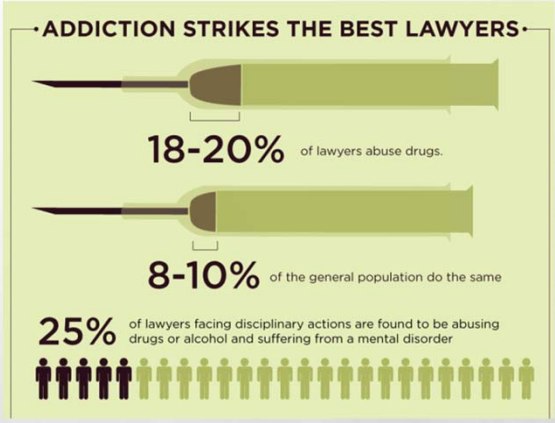

http://interventionstrategies.com/17-statistics-on-drug-abuse-among-lawyers/

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WHAT IS GETTING IN THE WAY OF TREATMENT?
70%
of drug and alcohol dependent lawyers believe they can handle the problem
40%
fear that getting treatment would have a negative impact on their reputation among peers, judges and clients

TAB
I

Conflicts of Interest Under the Ohio Rules of Professional Responsibility

Carl Stich Jr.
White, Getgey & Meyer Co., L.P.A.
December 7, 2016

1

At a holiday party neighbor Bob tells you about his bad experience with a local doctor. He later sues the doctor.

Can you represent the doctor?

2

Neighbor Bob came to your office discuss the case, but never hired you.

Does that change the answer?

3

Do you have a client?

An attorney-client relationship may be created by implication based upon the conduct of the parties and the reasonable expectations of the person seeking representation.

Cuyahoga Cty. Bar Assn. v. Hardiman, 100 Ohio St.3d 260, 2003-Ohio-5596, 798 N.E.2d 369, syllabus. *See Cincinnati Bar Assn. v. Hauck*, Slip Opinion No. 2016-Ohio-7826.

4

Avoiding unintended "clients"

- Cocktail party talk
- The interview that goes nowhere
- Let's talk to all the lawyers in town

5

One of your partners sits on the board of directors of Widget, Inc. She doesn't act as the corporation's attorney, nor does anyone else at your firm.

Can you sue Widget, Inc. on behalf of a client?

If there is a conflict, is it waivable?

6

Dual Capacity

- Lawyer who is board member (not attorney) of corporation cannot sue corporation – nor can anyone else in the firm. Adv. Op. 2008-2.
- Government lawyers – restrictions on representing private clients.

7

Your firm does patent work for a manufacturing corporation. A real estate client asks you to negotiate a lease with the manufacturing corporation.

Can you?

8

Rule 1.7 – Current Clients

- No representations adverse to another client
- "Substantial risk" that the lawyer will be compromised
- Some conflicts can be waived, others can't

9

One of your retail clients is thinking of opening a store in a suburban area where a real estate client owns a vacant lot that would meet the retail client's needs.

Can you share the retailer's plans with the real estate client?

10

Use of Client Information

- Rule 1.8(b):

  Except as permitted or required by these rules, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent.

11

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal **information relating to the representation of a client**, **including information protected by the attorney-client privilege** under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule. (Emphasis added.)

"This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person." Comment 4.

12

You share office space with a plaintiff's attorney.

You're hired to defend a case in which the plaintiff's attorney filed suit.

Does your office-sharing arrangement create a conflict?

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Office Sharing

- Duty to protect confidential information
  - See Adv. Ops. 89-5 (sharing office space with opposing counsel), 91-9 (sharing filing systems and staff), 92-13 & 94-14 (assistant prosecutor sharing space with defense attorney)
- Sharing space with non-attorneys
  - Same confidentiality rules
  - Care to avoid confusion

14

You're hired to defend Widget, Inc. and its treasurer in a fraud case.

Can you represent both?

If so, are there any steps you should take at the outset?

15

Representing Multiple Parties

- Confidentiality limits among the clients
- Informed consent, written waivers up front

16

Your investigation reveals that Widget, Inc.'s treasurer may have made material misrepresentations to the plaintiff, unbeknownst to other senior officers.

Can you continue to represent both?

If not, which one can you represent?

17

Rule 1.7 comment 25:

"Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails."

18

One of your other clients is a competitor of Widget, Inc. They are frequent opponents in regulatory matters in which they are represented by other counsel.

Does that pose a conflict?

19

It becomes apparent during the Widget, Inc. litigation that you will need to advocate for a new legal precedent that would damage the business interests of another client.

Can you do that?

20

Issue conflicts?

- Rule 1.7 comment 17
  - No automatic conflict from representing competitors or taking inconsistent legal positions between clients
  - Conflict arises is there is a substantial risk that lawyer's effectiveness will be impaired
    - E.g., advocating for new precedent to the detriment of another client

21

Can you get advance waivers of conflict?

- Rule 1.9 comment 33 – It depends.

22

You hire an associate from the firm representing the plaintiff in the Widget, Inc. case.

Can you still represent the Widget, Inc. defendants?

If so, under what circumstances?

23

Duties to Former Clients

- **New** firm's conflicts with attorney's clients at the **former** firm – Rule 1.9(b)
  - No representation in a *substantially related matter* without written consent if both:
    - interests of old and new clients are adverse
    - lawyer acquired confidential information
  - Bars using or revealing "information related to the representation to the disadvantage of the former client"
  - Waivers must be in writing, with informed consent

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Imputed Conflicts

- At a lawyer's **new** firm:
  - The entire firm has a conflict as to any matter in which the lawyer previously had *substantial* responsibility.
  - In all other cases the new firm may represent an adverse client if it:
    - Screens the new lawyer from the matter, and
    - Gives written notice to the former client.

25

Rule 1.10 – Imputation of Conflict

- General rule: Lawyers in the same firm have the same conflicts
  - Includes former firms and new firms
- New firm can often avoid conflict with screening and written notice to affected former client
- Waivers must be in writing, with informed consent

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Imputed Conflicts from Non-Lawyer Staff

- Secretarial staff – Conflict may arise, but is subject to modified *Kala* test.
  - *Green v. Toledo Hospital*, 94 Ohio St. 3d 480, 2002-Ohio-1482.
- Certified legal intern conflicts are imputed to firm with which the intern is simultaneously a law clerk, but conflict avoidable at a new firm if screening implemented.
  - Adv. Op. 2016-4.

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The partner in charge of the Widget, Inc. case leaves your firm and opens her own office. She takes the Widget, Inc. case, along with all other matters for the client.

Can your firm now represent clients adverse to Widget, Inc.?

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- At the lawyer's **old** firm:
  - After a lawyer leaves a firm, the remaining lawyers must avoid conflicts with clients of the former lawyer no longer represented by the firm:
    - In the same or a substantially related matter, or
    - Where lawyers in the firm possess confidential information

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Duties to Former Clients

- Rule 1.9(a)
  - No representation against former client on a *substantially related matter* without written consent. *See Kala v. Aluminum Smelting & Refining Co.*, 81 Ohio St. 3d 1 (1988)
  - "'Substantially related matter' . . . involves the **same transaction or legal dispute** or one in which there is a **substantial risk** that **confidential factual information** that would normally have been obtained in the prior representation of a client would materially advance the position of another client in a subsequent matter."
    Rule 1.0(n) (emphasis added.

30

Several years after the Widget, Inc. case is concluded, you're hired to represent a client suing Gadget, Inc. for fraud. The former treasurer of Widget, Inc. now works for Gadget, Inc., and he will be a key witness in the case.

Can you cross-examine the former treasurer?

31

- Adv. Op. 2013-4
  - Cross examination of prior criminal client (convicted).
  - Conflict exists if there is a "substantial risk" that prior representation would materially limit lawyer's responsibility to former client.
  - Limits on the use of information unless "generally known."
- Attorney cannot *reveal* information except as permitted by rules.

32

Rule 1.8 – Current Clients: Specific Rules

- Restrictions on business transactions with clients
- No use of "information" to client's disadvantage
- Restrictions on "gifts" from clients
- Restrictions on financial assistance to clients
- Restrictions on payments from third parties

33

Business transactions

- Lawyer engaged in transaction with client must comply with Rule 1.8(a)
  - Terms fair and reasonable, with full disclosure
  - Client advised *in writing* to get independent advice
  - Client gives informed consent *in writing*

34

"Substantial" gifts from clients

- Lawyer cannot solicit substantial gifts
- Cannot prepare will or other instrument benefiting lawyer, lawyer's family, partners, etc.
  - Unless lawyer and client are close family members

35

Financial Assistance to Clients

- Financial assistance to clients is prohibited. Rule 1.8(e), see *Toledo Bar Ass'n v. Pheils*, 129 Ohio St. 3d 279, 2011-Ohio-2906.
  - Exceptions for litigation expenses.

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Withdrawing from Representation

Rule 1.16(a) – Mandatory withdrawal

- Representation would violate Rules or law
- Lawyer's physical or mental condition impaired
- Lawyer discharged

37

Withdrawing from Representation

Rule 1.16(b) – Permissive withdrawal

- Broad authority to withdraw
  - E.g., 1.16(b)(4): "the client insists on taking action that the lawyer considers repugnant or with which the lawyer is in fundamental disagreement"

38

Withdrawing from Representation

Duties on withdrawal -- Rule 1.16(d)

- Take "reasonable" steps to protect client's interest
- Promptly deliver papers and property
  - Can make a copy at the attorney's expense
  - Bd. of Comm'rs on Grievances & Discipline Op. 2010-2 (lawyers notes may be deliverable to client)

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Resources

- The Rules of Professional Conduct
- Board of Professional Conduct – Rules & Advisory Opinions
  - http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/default.asp
- The Green Book – OBAR

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The Ethics Hotline

- A service of the CBA Ethics Committee
- 2 Attorneys on duty each month
  - Names on-line and in the *CBA Report*
- Advice on "hypothetical" ethics issues

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The Ethics Hotline

- Inquiries from attorneys only
- Confidential within Ethics Committee
- Hotline reports discussed at each meeting of the Ethics Committee

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The Ethics Hotline

- Not binding on Grievance authorities
- No substitute for Grievance process
- No attorney-client relationship created

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