The Fund
CONCEPT
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Title Insurance Policy Surcharge Delayed to Feb. 4, 2013

BY W. THEODORE CONNER, FUND SENIOR VICE PRESIDENT, GENERAL COUNSEL

The Florida Office of Insurance Regulation has issued a letter delaying implementation of the title insurance policy surcharge to Feb. 4, 2013. The letter, addressed to the Florida Land Title Association, acknowledges the efforts of the title insurance industry to seek an alternative to the surcharge. As The Fund has previously alerted you, the Florida Office of Insurance Regulation (OIR) has ordered a surcharge of twenty-eight cents ($0.28) to be collected on each title insurance policy issued in Florida. Originally the order applied to policies with effective dates of Dec. 3, 2012. The order now applies to policies with effective dates of Feb. 4, 2013, and thereafter until further notice by OIR.

The surcharge is authorized by Sec. 631.401, F.S. The section provides protection for insureds of title insurers that have been placed into receivership. In 2009 OIR placed National Title Insurance Company into receivership. OIR has now determined the reserves of National Title are insufficient to pay the claims and continuing claims administration costs on title insurance policies of National Title. OIR has ordered the surcharge to fund an assessment of $212,478. It is anticipated the surcharge will continue for one year and may be amended or extended if additional funds are required.

Collection and Payment

The surcharge is not title premium, therefore the following instructions apply:

- The surcharge should be charged in the 1300 series, Additional Settlement Charges, of the HUD-1 if a HUD-1 settlement statement is used.
- The entire surcharge is payable to the title insurer (Old Republic National Title Insurance Company) the policy is written on.
- The surcharge is not subject to the agent/insurer split.
- The surcharge is only charged for title insurance policies and is not charged for endorsements to prior policies.
- The surcharge does not apply to mortgagee policies issued at simultaneous policy rates.
- When remitting, the surcharge may be added to Old Republic's portion of the title insurance premium and remitted in the same check.
- A statement that the remittance to Old Republic includes the surcharge should be added to the "Note" box at the bottom of the Policy Calculation

(Continues on page 109)

in this issue:

RESPA does not provide for Successor Liability

Good v. Deutsche Bank Nat. Trust Co.,
37 Fla. L. Weekly D2440
(Fla. 4th DCA 2012)

A mortgagee's assignee brought a mortgage foreclosure action. The mortgagor asserted the affirmative defense of recoupment under the federal RESPA. The mortgagor alleged that the mortgagee paid a yield spread premium to the mortgage broker in the amount of $84,000 even though they paid the broker a broker's fee of $5,600. The trial court granted summary judgment of foreclosure.

On appeal the Fourth District Court on rehearing affirmed the trial court's judgment, holding that the assignee was not the party who had committed the alleged RESPA violations and RESPA imposes no liability on a holder of a note merely by virtue of being a successor to the person or entity who allegedly engaged in a prohibited act under RESPA.

Lesser Interest Included in Mortgage of Greater Interest

Bank of New York Mellon v. P2D2, LLC,
37 Fla. L. Weekly D2535
(Fla. 2d DCA 2012)

The owner of certain property leased the property for a term of 100 years. Several years later on the same day and handled by the same title agency, the following documents were signed: a lease assignment from the lessee to Jorgensen, a consent to the assignment by the owner, and a mortgage from Jorgensen to a bank. The mortgage described the property being encumbered by simply listing the land's address and legal description. Nowhere in the mortgage is there any indication that Jorgensen did not actually own the land described in the mortgage documents or that her only interest in that land was a lease. The owner deeded the land and all of his rights and interest in the lease to P2D2.

Still later the bank sued Jorgensen to foreclose the mortgage, asserting that Jorgensen was the owner of the property. The bank did not name P2D2 as a defendant. Shortly thereafter, after Jorgensen failed to pay rent, P2D2 filed an action against Jorgensen, seeking eviction and to quiet title against the bank. The trial court ruled for P2D2, granting the eviction and granting summary judgment on the count to quiet title.

On appeal the Second District Court:

- Affirmed the eviction.
- Held Jorgensen gave the bank a mortgage on her interest in the lease because where a mortgage purports to encumber a greater interest than the mortgagor owns it encumbers whatever interest the mortgagor has and in addition all the relevant documents executed by, on, or near the same time, by the same parties, and concerning the same subject matter should be construed together.
- Reversed on the quiet title count because a genuine issue of material fact as to whether the termination of the lease triggered certain notice obligations and certain protection to the bank precluded summary judgment for P2D2.

Defenses for Non-Payment of Rent

Plakhov v. Serova,
37 Fla. L. Weekly D2520
(Fla. 4th DCA 2012)

In November 2008, a landlord entered into a one-year residential lease of a condominium unit with a tenant. Shortly thereafter the tenant stopped paying rent because he was served as a defendant in a mortgage foreclosure action and received notice from the condominium association that the landlord had not paid association fees. The tenant moved out of the unit in April 2009. The landlord immediately listed the unit for rent but was unable to get a tenant until November 2009. The landlord sued the tenant, seeking rent which the tenant failed to pay. The trial court entered a judgment for the landlord.

On appeal to the Fourth District Court, the tenant asserted the following:

1. The lease was void at its inception because the landlord violated a rider to the mortgage that the unit was intended to be used as the landlord's second home. The court held the tenant was not an intended third-party beneficiary and could not use the rider to attack the validity of the lease.

2. The tenant was entitled to stop paying rents because of the foreclosure suit and the landlord's delinquency in paying association fees. The court held that these actions did not result in constructive eviction because the unit was not "rendered unsafe, unfit, or unsuitable for occupancy."

3. The tenant was relieved from paying rent by the landlord's failure to give the statutory notice of the manner in which the landlord was holding the security deposit. The court held that the statute itself provides that lack of notice "shall not be a defense to the payment of rent when due."

4. The tenant was entitled to return of his security deposit because the landlord failed to give a notice of intent to impose a claim on the security deposit. The court held that the landlord was excused

from this obligation by the tenant's failure to give the required seven-day notice before vacating the unit.

The Third District Court affirmed the trial court's judgment.

Strict Compliance Required for Service of Process

Walker v. Fifth Third Mortg. Co.,
37 Fla. L. Weekly D_____
(Fla. 5th DCA, Nov. 9, 2012)

A mortgage company filed a mortgage foreclosure action against the Walkers. A process server personally served the Walkers with a summons and a copy of the complaint. However, the process server failed to include the date and time of service, and his identification number on any of the documents served on the Walkers.

The Walkers filed a motion to quash service of process, asserting that the process server failed to comply with the terms of Sec. 48.031(5), F.S., which provides that a "person serving process shall place, on the first page of at least one of the processes served, the date and time of service and his or her identification number and initials for all service of process." The trial court denied the Walkers' motion.

On appeal the Fifth District reversed the trial court's order, holding that service of process must strictly comply with all relevant statutory provisions.

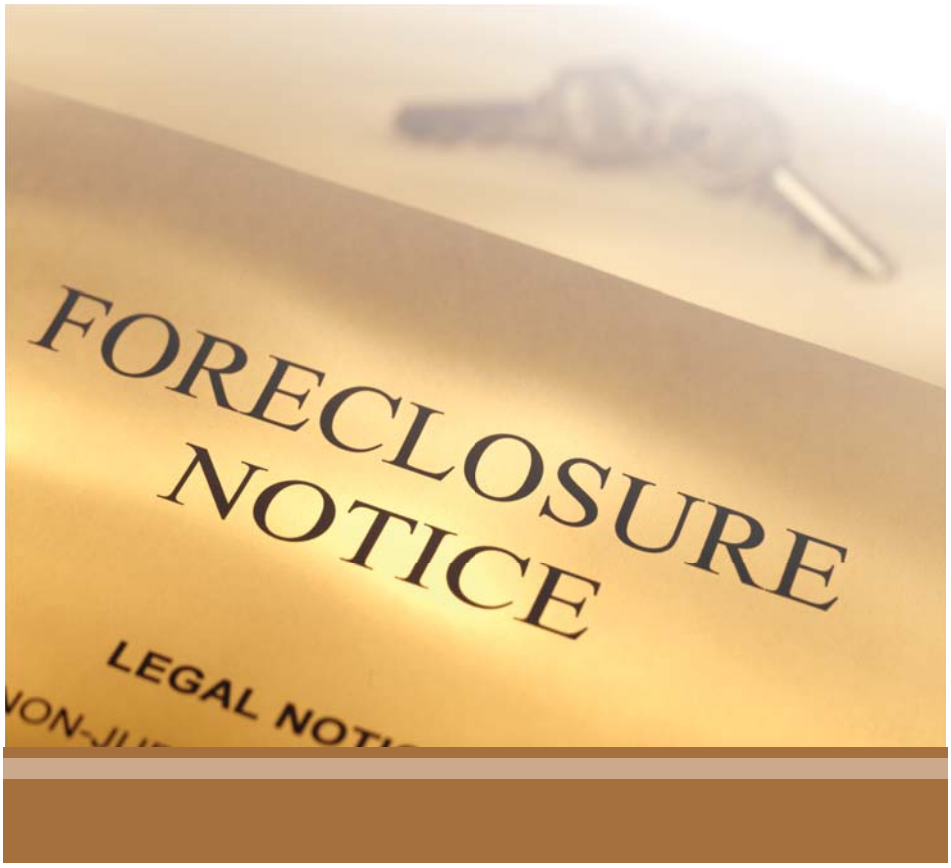
Standing and Affirmative Defenses of Fraud

Vidal v. Liquidation Props., Inc.,
37 Fla. L. Weekly D2552
(Fla. 4th DCA 2012)

A assignee of a mortgaged sued to foreclose on a note and mortgage. The mortgagors answered and raised several affirmative defenses. The trial court entered summary judgment in favor of the assignee.

On appeal the Fourth District Court ruled as follows on the affirmative defenses:

- To demonstrate standing, the assignee filed the original note and an allonge to the note endorsed in blank but not dated and the assignee did not file an affidavit demonstrating that the note was transferred prior to the filing of the complaint. The mortgage assignment was executed a day after the filing of the complaint with an effective date prior to the filing date. The appellate court reversed the trial court's summary judgment, holding that there was a question of fact as to whether the assignee had standing at the time it filed the complaint. The court commented that the assignment gave rise to two possible inferences—the note and mortgage were equitably transferred prior to the filing date or that the transfer had been backdated.
- The one-year statute of limitations for violations of the federal Truth in Lending Act did not apply in an action in which recoupment and setoff were raised as defenses.
- A mortgagor cannot raise as an affirmative defense the allegation of fraud that the mortgagee knew the mortgagors' income was not as stated; the mortgagors were in a position to know their own income and recipients who know a statement is fraudulent are not entitled to rely on the fraudulent statement.
- Oral misrepresentations as to the rate of a loan are likewise not a basis for fraud because the documents themselves (which state the rate) likewise precluded a party from properly relying on the oral statement.



Policy Surcharge Delayed...*continued from page 106*

Worksheet submitted to The Fund with the policy, included in the transmittal letter or indicated in the memo line of the remittance check.

- The surcharge should be charged to the party paying for the owner's policy if there is one.
- The surcharge applies to policies on all underwriters.
- The surcharge applies whether or not the transaction is subject to RESPA regulation.

The surcharge is a component of legislation that protects Florida citizens from a complete loss of the very important coverages title insurance provides. The steps we are taking to comply with the law provide very real and immediate benefits to Florida consumers. Fund Members should know that Attorneys' Title Insurance Fund, Inc. was not placed into receivership and this action by OIR is not related to The Fund in any way. ☐

Withdrawal of NFTL and Related Issues

BY: PHILIP HOLTSBERG, SR. UNDERWRITING COUNSEL

Benjamin Franklin's famous line that "… in this world nothing can be said to be certain, except death and taxes" was penned in 1789, more than 120 years before the 16th Amendment to the United States Constitution was ratified by the states. One of the important ways that the federal government assures to itself the certainty of collecting federal income tax revenue is through 26 U.S.C., Sec. 6321. This provision of the Internal Revenue Code states: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

For Florida real estate attorneys, this lien most often rears its head when a title search and examination reveals that a **Notice of Federal Tax Lien (NFTL)** (IRS Form 668Y) has been recorded in the public records against someone in the chain of title. The validity and priority of a NFTL is governed by 26 U.S.C., Sec. 6323. The tax lien arises automatically on the date of assessment and continues until the tax liability is satisfied or becomes unenforceable by reason of lapse of time. 26 U.S.C., Sec. 6322; See *Berkery v. C.I.R., T.C. Memo*. 2011-57, 2011 WL 820834 (U.S.Tax Ct., 2011). As the *Berkery* court noted, the purpose of filing the NFTL in the official public records is to perfect the lien in favor of the government and thereby establish its priority relative to four classes of other creditors: purchasers, holders of security interests, mechanic's lienors, and judgment-lien creditors. This section of the Internal Revenue Code also provides for the release, withdrawal, nonattachment and subordination of an NFTL after it has been perfected. This article addresses ways in which a title issue caused by a NFTL may be resolved so that a title policy may be issued without exception for the NFTL.

Expiration via Self-Release. Interestingly, the Internal Revenue Service (IRS), describes the NFTL as a "self-releasing" lien because the NFTL "usually releases automatically 10 years after a tax is assessed, if the statutory period for collection has not been extended and the IRS does not extend the effect of the lien by refiling it. When a lien is self-released, the Notice of Federal Tax Lien itself is the release document. The lien is self-released if the: date for refiling has passed and the IRS has not refiled the original Notice of Federal Tax Lien. Taxpayers should check the column titled Last Day for Refiling on the Notice of Federal Tax Lien to determine if the lien is self-released." Guidelines for Notices of Federal Tax Liens and Centralized Lien Processing, IRS Publication 1468 (Rev. 3-2010),

p. 3. The refiling deadline for a NFTL expires 10 years and 30 days after the date of the assessment of the tax. 26 U.S.C., Sec. 6323(g)(3). The extra 30 days beyond the 10-year life of the lien is included by the IRS when it determines the last day for refiling shown on the NFTL; it is not necessary to add an additional 30 days to the date shown on the NFTL. See Guidelines for Notices of Federal Tax Liens and Centralized Lien Processing, IRS Publication 1468 (Rev. 3-2010).

As a result of this statutorily imposed limit to the life of a NFTL, TN 30.02.04(B) provides that: "Federal tax liens may be ignored for insuring purposes if the applicable refiling period has expired, without the lien being refiled,

provided a search of the records reveals no refiling, or subsequent filing of the lien beyond the refiling period." Caveat: It is common for an NFTL to list multiple assessments for varying tax periods. When relying upon the self-releasing feature to ignore an NFTL it is essential to confirm that all refiling periods listed thereon have expired without refiling or subsequent filing beyond the refiling period.

Expiration via Release/Satisfaction. When a taxpayer satisfies the taxes due including interest and other additions represented by the NFTL, the IRS shall issue a **Certificate of Release of Federal Tax Lien (CRFTL)** (IRS Form 668Z) within 30 days thereafter. 26 U.S.C., Sec. 6325(a). A mechanism is also included within this statutory provision for the issuance of a CRFTL in the event a taxpayer properly bonds off the NFTL. An NFTL may be ignored for insuring purposes provided a proper CRFTL of that NFTL appears in the chain of title or is obtained and recorded as part of the current transaction and the CRFTL reveals complete release of the taxpayer in the chain of title for all liabilities shown on the NFTL. Caveats: (1) It is common for an NFTL to list multiple taxpayers. When relying upon a CRFTL it is essential to confirm that all taxpayers listed on the NFTL are released from all the tax liabilities shown on the NFTL and that the CRFTL is not by its express terms only a partial release of some but not all of the listed taxpayers. Fund Members should not rely upon a partial CRFTL without obtaining approval from a Fund underwriting counsel. (2) Occasionally a title examiner may come across an instrument by which the IRS has revoked, in whole or in part, a CRFTL (IRS Forms 12474,12474-A). In that instance, the NFTL is revived, in whole or in part, as applicable. See TN 30.02.04(E).

Withdrawal of NFTL. The IRS may withdraw an NFTL as provided for in 26 U.S.C., Sec. 6323(j). There are four specific grounds specified in the withdrawal provision upon which the IRS may base its withdrawal decision. The document which officially withdraws the NFTL is the **Withdrawal of Filed Notice of Federal Tax Lien (WNFTL)** (IRS Form 10916). If the IRS withdraws an NFTL, the statute provides that "… this chapter shall be applied as if the withdrawn notice [NFTL] had not been filed." An NFTL may be ignored for insuring purposes provided a proper WNFTL of that NFTL appears in the chain of title or is obtained and recorded as part of the current transaction. Caveat: The IRS is empowered to issue a partial WNFTL. Fund Members should not rely upon a partial WNFTL without obtaining approval from a Fund underwriting counsel.

Discharge of NFTL. The IRS may discharge a specific parcel of real property from an NFTL upon specific statutory grounds. 26 U.S.C., Sec. 6325(b). The IRS grants a property specific discharge by its issuance of a **Certificate of Discharge of Property from Federal Tax Lien (DNFTL)** (IRS Forms 669A, 669B, 669C, 669G, 669H). In a title insurance transaction involving the real property described in the DNFTL, the NFTL described in the DNFTL may be ignored for insuring purposes provided a proper DNFTL of that NFTL appears in the chain of title or is obtained and recorded as part of the current transaction. Caveats: (1) The DNFTL should contain a sufficient legal description of the subject property to be insured. If the DNFTL contains only a street address, a truncated or abbreviated description, or tax folio number, Fund underwriting counsel approval should be obtained before relying on the DNFTL. (2) An NFTL may be issued against multiple taxpayers, more than one of whom may have an interest in the subject property. Carefully examine the DNFTL to confirm that the NFTL is discharged as to all taxpayers having

an interest in the subject property. (3) If a taxpayer reacquires any interest in the property which was made the subject of a DNFTL, the DNFTL becomes void and may no longer be relied upon to ignore the NFTL! See 26 U.S.C., Sec. 6325(f)(3).

Non Attachment of NFTL. When a filed NFTL creates a title problem for a person with a similar or identical name, the IRS may issue a **Certificate of Nonattachment of Federal Tax Lien (CNFTL)** (IRS Form Letter 1628). For example, imagine a Jorge Gonzalez who owns several pieces of real property. One of those pieces of real property is occupied by an unrelated tenant, whose

name also happens to be Jorge Gonzalez. A NFTL is recorded against the tenant, and recites the street address of the property to be sold because this is where the taxpayer lived when he filed his last tax return. Here, the name of the property owner is so similar or, perhaps, identical to the name of a taxpayer shown on a NFTL, and the NFTL also reflects the street address for the property. The best way to clear this particular parcel of real property from the title cloud created by the NFTL would be through the CNFTL. Although the CNFTL may not be required in all similar circumstances, it remains a valuable title clearance tool available should the need arise.

Subordination of NFTL. There may be circumstances in which a potential secured creditor of a taxpayer is willing to extend credit to the taxpayer, provided that an otherwise senior NFTL is expressly made subordinate to the lien in favor of the creditor. In limited circumstances, the IRS may agree to subordinate the NFTL on a property specific basis. 26 U.S.C., Sec. 6325(d). When the IRS agrees to do so, it will issue a **Certificate of Subordination of Federal Tax Lien (CSNFTL)** (IRS Form Numbers 669D, 669E, 669F). In a current transaction involving a NFTL where the taxpayer is seeking financing or refinancing, prior approval must be obtained from Fund underwriting counsel in order to rely upon a CSNFTL to show the NFTL as subordinate to the lien of a mortgage.

In closing, The Beatles reminded us "Cause I'm the taxman, Yeah, I'm the taxman." We remind *Fund Members* that because it is the taxman, yeah the taxman, the following special exceptions to general principles apply: (1) federal tax liens can be enforced against homestead property (see TN 30.02.01); (2) federal tax liens against one spouse can be enforced against that spouse's interest in entirety property both during and after that spouse's lifetime (see TN 30.02.07); and (3) federal tax liens against a deceased joint tenants with rights of survivorship should be treated as surviving the death of the joint tenant (see TN 30.02.07). ☐

team education

Your Partner in Legal Education

In 2011, the ALTA Endorsement Form 9-06 (with Florida Modifications) replaced the Florida Form 9 in the suite of ALTA forms approved for use in Florida. It is a frequently requested endorsement to a loan policy and is among the series of so-called Form 9 endorsements which provide some affirmative coverage to lenders and owners. Fund Members know that these endorsements are not to be issued routinely, but are often confused as to the coverage they afford, the type of review required prior to issuance, and the manner in which, under appropriate circumstances, coverage must be modified prior to policy issuance.

Our new Fundinar, *Restrictions, Easements & Mineral Rights* and *the ALTA Form 9-06 Endorsement*, will examine this endorsement. Members will learn the extent of the coverage provided by the endorsement, the analysis requirements related to title examination and survey review, and the manner in which to properly issue a Form 9 endorsement in conjunction with a loan policy. Cursory attention will also be given to the other Form 9 endorsements which provide similar coverage and require comparable investigation. One hour of continuing legal education credit has been approved by The Florida Bar, the National Association of Legal Assistants, and the Florida Department of Financial Services.

Other informative and dynamic one hour live web-based Fundinars and three-hour seminars on timely legal topics are also available to Fund Members and their staffs. In December, the Fundinars, *Recent Changes to Florida's Homeowners' Association Law* and *The Quality Assurance Review*, will be presented as will the seminar *Distressed Residential Property Transactions, Short Sales, Deeds in Lieu, REOs*.

Make The Fund's Team Education your partner in legal education. Visit us on FundNet at *http://www.thefund.com/portal/services/education/seminars/index.jsp* to view course offerings, see content summaries, and register for a Fundinar or seminar today.

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The Fund's main website can be accessed at *www.thefund.com*. The Fund's website for consumers can be found at *www.fundhomeinfo.com*.

The Fund Closed for Holidays

The Fund will be closed
Monday, Dec. 24, and Tuesday, Dec. 25,
in observance of the holidays.
The Fund will reopen on
Wednesday, Dec. 26.
Regular hours are Monday through
Friday, 9 a.m. to 5 p.m.

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meet our staff

Meet Your Fund Underwriting Attorneys

Many of you are acquainted, at least by telephone, with the Fund attorney in your local branch. Often, when your local attorney is unavailable to take your call, your underwriting calls are routed to the next available underwriting attorney, and you might wonder, "who is Lynn?" or "I don't know where John is located, but…" To help you get to know us better, we will be introducing you to our underwriting attorneys. This month's spotlight is on John Benson and Jay Davis.

JOHN D. BENSON is a senior underwriting counsel in The Fund's Palm Beach Branch. He received his B.S. degree in business administration and economics from the University of Florida and his J.D. degree from Nova Southeastern University. Prior to joining The Fund, John was in private practice with a concentration in real estate transactions and closings. He has been a guest lecturer at Nova Southeastern Law School and an adjunct professor at Palm Beach College. John is a member of The Florida Bar's Real Property, Probate & Trust Law Section and the Palm Beach County Bar Association.

JALINDA B. DAVIS, also know as "Jay," serves as underwriting counsel in The Fund's Duval Branch. She earned her B.A. degree from the University of North Florida and her J.D. degree from Florida State University College of Law. Jay is a Florida board certified real estate lawyer and has practiced in the areas of corporate law, real property law and commercial law with an emphasis on title insurance defense work. As former owner of one of the first attorney owned and operated real estate title insurance agencies in the Duval County area, she has had extensive experience in the real estate title insurance industry. Prior to joining The Fund, Jay relocated to South Florida and was employed by a Stuart law firm which specializes in real estate. She served as underwriting counsel in The Fund's Palm Beach County Branch from 2004 to 2008 and is a member of The Florida Bar's Real Property, Probate & Trust Law Section.

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