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MYLESTITLE'S ADVISORY COUNCIL Breakfast & Seminar

Solutions to Key Maryland Real Estate Issues

EDWARD J. LEVIN, ESQ.
Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC

SEARLE E. MITNICK, ESQ.
Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC

I.D.O.T.'S IN 2010: UNDER ATTACK, BUT STILL STANDING:

- *Recordation tax on I.D.O.T.'s at recordation and upon maturity and/or default;*
- *Effect of the title insurance industries withdrawal of creditors rights protection;*
- *Practical suggestions for dealing with these challenges.*
- *Do you need to name an individual to serve as a Trustee under a Maryland Deed of Trust?*

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Chestnut Ridge Country Club
May 13, 2010

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MylesTitle Advisory Council

Breakfast Seminar

IDOTs In 2010: Under Attack, But Still Standing

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WHAT'S IN A NAME? OR, THE IMPORTANCE OF NAMING AN INDIVIDUAL AS TRUSTEE UNDER A MARYLAND DEED OF TRUST

By Edward J. Levin*

May 13, 2010

When drafting a deed of trust to secure real property in Maryland, in order to give the lender the full panoply of rights upon foreclosure, specifically name at least one individual as a trustee – at least until the end of this month.

An Individual Must Sell the Property at Foreclosure

Revisions to the Maryland Rules which became effective on May 1, 2009 emphasize that the person who sells a property at foreclosure must be an individual. Maryland Rule 14-214(a) now provides, "Only an individual may sell property pursuant to the Rules in this Chapter."

As revised in 2008, Section 7-105 of the Real Property Article of the Maryland Code (RP) provides statutory authority for mortgages and deeds of trust to include language authorizing individuals to sell property at foreclosure sales upon default under the applicable documents.[1] There is no requirement that the person who sells property at foreclosure must be a Maryland resident.

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* Edward J. Levin is a member of Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC. Prior versions of this article appeared in the *Daily Record, Maryland Lawyer* on September 28, 2009 and in the MSBA's Real Property Section's *Ground Rules*, Fall 2009.

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[1] Section 7-105 of the Real Property Article of the Maryland Code (2003 Replacement Volume, 2009 Supp.)("RP") provides:

(a) *Power of sale or assent to decree for sale.*- A provision may be inserted in a mortgage or deed of trust authorizing any natural person named in the instrument, including the secured party, to sell the property or declaring the borrower's assent to the passing of a decree for the sale of the property, on default in a condition on which the mortgage or deed of trust provides that a sale may be made.

(b) *Effect of sale.*- A sale made pursuant to this section, §§ 7-105.1 through 7-105.8 of this subtitle, or the Maryland Rules, after final ratification by the court and grant of the property to the purchaser on payment of the purchase money, has the same effect as if the sale and grant were made under decree between the proper parties in relation to the mortgage or deed of trust and in the usual course of the court, and operates to pass all the title which the borrower had in the property at the time of the recording of the mortgage or deed of trust.

Prior Case Law

Old Maryland cases have considered the validity of powers of sale granted to entities. In *Frostburg Mutual Building Association v. Lowdermilk*, 50 Md. 175 (1878), and in *Queen City Perpetual Building Association v. Price*, 53 Md. 397, 400 (1880), the Court of Appeals considered foreclosure sales under mortgages to corporate mortgagees that, in each case, gave the power of sale upon default to "the mortgagee or its agent or attorney." In neither case was the power given to the *assignees* of the mortgagee, and the agent or attorney of the mortgagee was not specifically named in either of the mortgages. The applicable statute at the time provided that "in all mortgages there may be inserted a clause authorizing the mortgagee or any other person to be named therein to sell the mortgaged premises." The statute also provided with respect to the seller that "*he shall* give bond," and it further provided that all sales need to be reported "under oath." The Court in *Lowdermilk* held that under the then applicable law, "All these sections import a natural, not an artificial person, (such as a corporation,) as the depositary of the power of sale." 50 Md. at 179. Two years later, in *Queen City* the Court held that that "the power of sale contained in the mortgage in this case is simply void." 53 Md. at 400.

In *Chilton v. Brooks*, 71 Md. 445, 18 A. 868 (1889), the Court of Appeals confirmed its earlier holdings in *Lowdermilk* and *Queen City,* but it held that that a power of sale given to a corporate mortgagee and its assignees was valid if an assignee, who was an individual, exercised the power.

Also of note is *Maslin v. Marshall*, 94 Md. 480, 486 (1902), in which the Court of Appeals held that a power of sale, which was originally granted to individuals, did not become void when it was transferred to a corporation. The mortgage was then assigned to another individual for foreclosure, and a sale was permitted. *See also Barroll v. Benton*, 121 Md. 174, 88 A. 101 (1913), which held that a power of sale exercised by a person who had multiple capacities under the mortgage, including a valid power of sale, was not objectionable even though the person purported to exercise the power in the wrong capacity.

For a discussion of these cases, *see* Ginsberg and Ginsberg, MORTGAGES AND OTHER LIENS IN MARYLAND (1936), *Who May Exercise Power of Sale*, at 388-389.

Although these principles were established in the Nineteenth Century, they have been more recently affirmed. In *Hardy v. Gibson*, 213 Md. 493, 133 A.2d 401 (1957), the Court of Appeals applied these concepts to deeds of trust. In *Whitworth v. Algonquin Associates, Inc.*, 75 Md. App. 479, 541 A.2d 1328 (1988), the Court of Special Appeals, cited *Lowdermilk* and *Queen City* as still being applicable when it held:

> Maryland case law makes clear that if the power to sell is given to a corporation and no other party, it is void. *Queen City Build. Asso v. Price*, 53 Md. 397 (1880); *Frostburg M.B.A. v. Lowdermilk*, 50 Md. 175 (1878). Someone capable of exercising the power must be named even if it merely means authorizing the assignees of the corporation to act where the assignor cannot, or naming a natural person other than the mortgagor. *Queen City*, 53 Md. At 401. (75 Md.App. at 483)

One case stands in opposition to this line. *Dollar, Inc. v. Paton, Trustee*, 236 Md. 94 (1964), involved foreclosure sales under seven deeds of trust which were challenged, in part, because the secured party (an entity) was also named as the trustee in each instrument. The sales were conducted by trustees appointed by the circuit court for the purpose of foreclosing the defaulted deeds of trust, under then applicable rules. The appellant, the purchaser at the foreclosure sales, excepted to the sales for a number of reasons. Among them, the appellant contended that because the trustee and beneficiary were the same, the security instrument -- in form as a deed of trust -- was actually a mortgage. The appellant further maintained that (a) mortgage foreclosures needed to be made by a natural person who is either the mortgagee or some other person designated by name in the mortgage to exercise the power of sale, and (b) the savings and loan (the beneficiary of the deed of trust) was not a natural person and the trustees who made the sales, although natural persons, were not named in the instrument, and therefore should not have been able to exercise a power of sale. The Court stated simply, "The chancellor thought, as do we, that these contentions are not meritorious." 236 Md. 96-97. The Court said that it chose to "deal[] with the procedural steps in the foreclosure process and not with the substantive rights in the trust property or in the proceeds of sale so that the principle of merger relied upon by the appellant has no application here." The Court cited two rules that permitted the substitution of trustees by the circuit court, and it held that the chancellor was authorized to make the substitutions. For purposes of this discussion, the bottom line on *Dollar* is that the court did not reject an otherwise good foreclosure sale for any of the technical reasons raised in the case, including that the savings and loan association was the originally named trustee of each deed of trust.

Effect of the Current Version of RP Section 7-105

Currently, RP Section 7-105 states, "A provision may be inserted in a mortgage or deed of trust authorizing *any natural person named in the instrument*, including the secured party, to sell the property . . . " [Emphasis added.] This permits a power of sale to be given to an individual trustee who is named in a deed of trust, a mortgagee who is a natural person, or an attorney who is named as having a power of sale. However, on its face the statute does not authorize a power of sale if it is granted only to an entity or to an entity and its successors or assigns. In light of the current statute and the prior cases, it is prudent to name an individual as an original trustee under a deed of trust in order to assure that the lender will have a power of sale upon default.

Many lenders like to name a title company or other entity as the trustee under their deeds of trust, recognizing that they must substitute an individual as trustee if the deed of trust goes into default and they want to foreclose. *See* Rule 14-214(a). Trustees may take certain action other than foreclose on the property, such as signing amendments to deeds of trust, executing releases, and appearing in condemnation proceedings. If a lender feels that it is important to have an entity serve as trustee before foreclosure, the lender could name both an individual trustee and a corporate trustee in the deed of trust. Under the holding in *Maslin v. Marshall* mentioned above, the lender could name an individual trustee originally and then replace that person with an entity. If the property goes to foreclosure, the lender could substitute the trustee again, naming an individual who could sell the property. Under current law, however, lenders who only name corporate trustees may have an invalid power of sale under their deeds of trust.

What if There is No Power of Sale?

Maryland real estate practitioners typically use the power of sale method to foreclose. In order to initiate a power of sale foreclosure, counsel for the lender files an order to docket suit in the circuit court where the property is located. *See* Rule 14-207(a)(1). A second summary foreclosure procedure under Maryland law exists when an "assent to decree" clause is included in the mortgage or deed of trust. "Assent to decree" means "consent to an order." Pursuant to Rule 14-207(a)(2), for an assent to decree foreclosure, instead of filing an order to docket suit, counsel for the lender files a complaint to foreclose. Under an assent to decree case, the circuit court will sign an order authorizing one or more individual trustees to sell the property at a public sale before affording the mortgagor notice or the opportunity to object. *See* Rule 14-207. After the initial pleadings are filed, power of sale and assent to decree foreclosures proceed in the same way. *See* Rules 14-210, 14-213, 14-214, and 14-215.

What if There is No Power of Sale or Assent to Decree?

If the security instrument does not contain a clause authorizing a power of sale (or if the power of sale is void) and does not contain an assent to decree clause, the lender may still foreclose the instrument. Such an action is commenced by filing a complaint to foreclose, but then the case proceeds in the same manner as any other civil action, unless, after a hearing, the court finds that the interests of justice require an immediate sale of the property. *See* Rules 14-207 and 14-208.

Opinion Letter Issues

Maryland counsel for borrowers are frequently requested to review loan documents for their clients and to give opinions to lenders concerning the enforceability of the loan documents. What should counsel do if a particular deed of trust does not name an individual as a trustee?

First, counsel should request that the deed of trust be amended to name an individual to serve as trustee, either alone or with an entity trustee. In any event, the deed of trust should provide that (a) the power of sale is granted to the named trustee and its successors, (b) the beneficiary of the deed of trust has the power to substitute trustees from time to time without consent of the mortgagor, and (c) the term "trustee" in the deed of trust means the originally named trustee and any substitute trustee.

Even if the deed of trust has these provisions, the opinion giver should not render an unqualified opinion because that would imply that each and every provision of the loan documents is enforceable. With respect to the validity of the power of sale clause, without a named individual trustee the issue is not free from doubt. Opinion letters always have qualifications, but they may be presented in different ways. Some lawyers explicitly identify all of the qualifications that are a part of the opinion letter. With this type of format, one of the qualifications should state that there is a question about the enforceability of the power of sale clause. Alternatively, the opinion may state that in the view of the opinion giver the power of sale clause is not enforceable.

An enforceability opinion may include the American College of Real Estate Lawyers (ACREL) form of generic qualification. That qualification has been adapted and included in the

2007 Report on Lawyers' Opinions in Business Transactions by the Special Joint Committee of the Section of Business Law and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc., as amended in 2009. *See* http://www.msba.org/docs/opinionmatters.asp. The generic qualification provides, in essence, that not every provision of the loan documents may be enforceable, but the lender will be able to foreclose upon a default by the borrower. If the security instrument contains an assent to decree clause, the generic qualification should provide a limitation to an enforceability opinion that is sufficient to give comfort to the opinion giver. As described above, the lender will be able to foreclose with a summary procedure. A generic qualification may provide a sufficient limitation to an enforceability opinion even if there is a defective power of sale clause and if there is no assent to decree clause because the lender would still be able to foreclose, although not in a summary fashion. This would be very unusual, and, to be careful, a lawyer rendering an opinion on a deed of trust without an individual trustee, should include a specific statement relating to the validity, or invalidity, of the power of sale clause, even if the letter contains a generic qualification.

Sometimes lenders ask for opinions from borrowers' counsel that the loan documents "contain all customary provisions and remedies." A Maryland deed of trust without a valid power of sale clause probably does not "contain all customary provisions and remedies"; a deed of trust that is also without an assent to decree clause certainly does not. In any event, this type of opinion is regarded as inappropriate, and should not be requested or given, because it involves giving legal advice to a third party that is not the client of the opinion giver. It differs from a normal third party legal opinion in which the opinion giver renders an evaluation of specific issues. *See* Section 1.01b of the *Real Estate Opinion Letter Guidelines* by the ACREL Attorneys' Opinion Committee and the ABA Section of Real Property, Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions, 38 *Real Prop. Prob. & Tr. J.* 241 (2003) (the "Guidelines").

A lender may ask a borrower's counsel to state that the loan documents do not omit essential remedies that in the opinion giver's experience are generally found in similar documents for comparable mortgage loan transactions in Maryland. According to the Guidelines, the giving of such a limited assurance does not raise ethical issues because it is not a legal opinion; instead, it constitutes a report of information based upon the experience of the opinion giver. However, a problem arises if such an assurance cannot be given, for example, if there is a defective power of sale clause. (Note that if there is an assent to decree clause in the deed of trust it can be argued that the essential remedy of a summary foreclosure action is in fact authorized by the security instrument.) If the opinion giver cannot give the assurance, the opinion giver may not provide a further response without obtaining the client's informed consent. *See* Maryland Lawyer's Rules of Professional Conduct, Rule 2.3(b). The inference created by refusal to provide such an assurance when it cannot be given places the opinion giver in an ethical quandary. For this reason many experienced opinion givers regard this type of opinion request as inappropriate. *See* Guidelines, Section 1.01b.

Anne Arundel County Cases Hold that Failure To Name An Individual Trustee in a Deed of Trust Prevents a Power of Sale Foreclosure

Judge Nancy Davis-Loomis of the Circuit Court for Anne Arundel County held in at least four Orders dated February 18, 2010 in *Bierman, et al. v. Peebles, et al.*, in the Circuit Court for Anne Arundel County, Case no.: C-10-148538 and in other cases, that a foreclosure could not proceed under a power of sale where the deed of trust named only a corporate trustee. The court cited only RP Section 7-105 and *Whitworth v. Algonquin* in its order. The court noted that if the deed of trust contained language authorizing an assent to decree, the foreclosure could proceed in that method, or, if it did not, a foreclosure could proceed pursuant to Rule 14-208. Thirty-one other similar cases were the subject of a Show Cause Order dated November 23, 2009, about which Judge Davis-Loomis wrote to Jacob Geesing on the same date. *See Geesing, et al. v. Paschke, et al.*, in the Circuit Court for Anne Arundel County, Case no.: C-09-142790.

Baltimore City Case Holds that Failure to Name any Trustee in a Deed of Trust Renders the Deed of Trust Ineffective

Jacob Geesing, et al., Substitute Trustees v. Jean E. English aka Jean Evans, in the Circuit Court for Baltimore City, Case no. 24-O-09-002493, was a routine foreclosure case in Baltimore City in which a power of sale foreclosure was held on August 7, 2009. The only problem was that in the deed of trust no name was inserted in the blank space where the name of the trustee was to have been added. On October 15, 2009, before the foreclosure sale was ratified, the plaintiffs filed a Substitute Trustees/Plaintiff's Supplemental Motion to Reform Deed of Trust, *Nunc Pro Tunc* for the purpose of correcting the "scrivener's error" and naming the plaintiffs as substitute trustees. The court denied the Motion.

In a Memorandum Opinion dated December 30, 2009, Judge Pamela J. White held that "the failure to name a trustee in the deed of trust renders the instrument as a trust deed ineffective.... [B]ecause the Deed of Trust neglected to name a trustee, the Deed of Appointment of Substitute Trustee must also be invalid." The court explained that a substitute trustee could not take the place of a trustee if a trustee was not originally named.

The court declined to reform the deed of trust because it found that the mere fact that the defendant executed the deed of trust and other loan documents did not establish "clearly and beyond doubt that there has been a mistake . . . [and] with equal clearness and certainty the exact and precise form and import that the instrument ought to be made to assume, in order that it may express and effectuate what was really intended by the parties." [*Citing Housing Equity Corp. v. Joyce*, 265 Md. 570, 580 (1972.)]

The court stated that the instrument would be an equitable mortgage if the plaintiffs could prove that even though there was a defect in the document, the mortgagor intended that the instrument be a mortgage on specific property to serve as security for a particular debt. *See Lubin v. Klein*, 232 Md. 369, 371 (1963). However, the court noted that the plaintiffs had not filed a motion to establish the existence of an equitable mortgage. The court further pointed out that a defective mortgage is subordinate to the claims of creditors who extended credit subsequent to the mortgage without actual knowledge of the existence of the mortgage. *Compare Chicago Title Insurance Company v. Mary B.*, 190 Md. App. 305; 988 A.2d 1044

(decided January 4, 2010, reconsideration denied March 11, 2010). The court would only grant equitable relief if it determined that it would not result in harm to interested persons.

Senate Bill 562 and House Bill 633

The Maryland General Assembly passed two identical bills -- Senate Bill 562 and House Bill 633 -- during the recent legislative session in order to provide assurance that a deed of trust can be foreclosed under a power of sale if it does not name an individual trustee or even if it does not name any trustee at all, and Governor O'Malley signed them into law on May 4, 2010 as Chapters 322 and 323, respectively. To deal with the issue of having a corporation originally named as the trustee, the bills change RP Section 7-105 to delete the requirement that the deed of trust name a natural person in order for there to be a power of sale. Instead, the new law will state that a mortgage or deed of trust may allow for power of sale or assent to decree upon default under the security instrument, that the power of sale or assent to decree may be exercised only by an individual, that the individual who sells the property need not be named in the mortgage or deed of trust, and that appointments or substitutions of trustee may be made from time to time if the security instrument provides for any appointments or substitutions. RP Section 7-105(b)(5). Note that the term "appointment" is relevant if no trustee is named originally.

The bills fix the failure to add the name of a trustee to a deed of trust in two ways in addition to RP Section 7-105(b)(5). New RP Section 7-105(b)(4) will provide that failure to name a trustee under a deed of trust will not invalidate a deed of trust or the ability of the lender to appoint a trustee to exercise a power of sale. Also the bills add "a failure to name any trustee in a deed of trust" to the list in RP Section 4-109 of formal requisites of instruments that are deemed to be cured if not challenged within six months after recordation.

The bills provide for an effective date of June 1, 2010. Moreover, they provide that they are to be construed retroactively and applied to any mortgage or deed of trust on record as of that date.

Summary

Prior to June 1, 2010, deeds of trust that do not name individual trustees may not enable lenders to use the power of sale procedure when they foreclose. A borrower's lawyer may render an enforceability opinion about such a deed of trust if the opinion letter includes a generic qualification, although the opining lawyer may want to specifically note that an issue exists about the lender's right to have a power of sale foreclosure. Counsel should consider that a deed of trust with an invalid power of sale clause does not contain all customary provisions and remedies that are typically included in a Maryland deed of trust.

On or after June 1, 2010, do not worry about whom or what you name as trustee – and do not even worry if you forget to name any trustee at all!

SENATE BILL 562

N1 0lr2542
CF HB 633 - Ch. 323

By: **Senator Raskin**
Introduced and read first time: February 4, 2010
Assigned to: Judicial Proceedings

Committee Report: Favorable with amendments
Senate action: Adopted
Read second time: March 16, 2010

CHAPTER 323

AN ACT concerning

Real Property – Mortgages and Deeds of Trust – Authority to Exercise a Power of Sale

FOR the purpose of providing that failure to name any trustee in a deed of trust does not have any effect on an instrument under certain circumstances; clarifying that a mortgage or deed of trust may authorize the sale of property or declare a borrower's assent to the passing of a decree for the sale of the property under certain circumstances; clarifying that a power of sale or assent to decree authorized in a mortgage or deed of trust may be exercised only by an individual; providing that the individual selling the property under a power of sale need not be named in the mortgage or deed of trust; providing that an error or omission in a mortgage or deed of trust concerning the designation of the trustee or individual authorized to exercise a power of sale does not invalidate the instrument or the ability of the mortgagee or beneficiary of the deed of trust to appoint an individual to exercise the power of sale; authorizing the holder of a mortgage or deed of trust to make ~~in any foreclosure proceeding a substitution~~ appointments or substitutions of ~~the~~ a trustee or an individual authorized to exercise a power of sale under certain circumstances; defining a certain term; providing for the application of this Act; and generally relating to the authority to exercise a power of sale in mortgages and deeds of trust.

BY repealing and reenacting, with amendments,
Article – Real Property
Section 4–109 and 7–105
Annotated Code of Maryland

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter deleted from existing law.
Underlining indicates amendments to bill.
~~Strike-out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.

(2003 Replacement Volume and 2009 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – Real Property

4–109.

(a) If an instrument was recorded before January 1, 1973, any failure of the instrument to comply with the formal requisites listed in this section has no effect, unless the defect was challenged in a judicial proceeding commenced by July 1, 1973.

(b) If an instrument is recorded on or after January 1, 1973, whether or not the instrument is executed on or after that date, any failure to comply with the formal requisites listed in this section has no effect unless it is challenged in a judicial proceeding commenced within six months after it is recorded.

(c) For the purposes of this section, the failures in the formal requisites of an instrument are:

(1) A defective acknowledgment;

(2) A failure to attach any clerk's certificate;

(3) An omission of a notary seal or other seal;

(4) A lack of or improper acknowledgment or affidavit of consideration, agency, or disbursement; [or]

(5) An omission of an attestation; OR

(6) A FAILURE TO NAME ANY TRUSTEE IN A DEED OF TRUST.

7–105.

(a) IN THIS SECTION, "INDIVIDUAL" MEANS A NATURAL PERSON.

(B) (1) A [provision may be inserted in a] mortgage or deed of trust [authorizing any natural person named in the instrument, including the secured party, to sell] **MAY AUTHORIZE THE SALE OF** the property or [declaring] **DECLARE** the borrower's assent to the passing of a decree for the sale of the property, on default in a condition on which the mortgage or deed of trust provides that a sale may be made.

(2) **A POWER OF SALE** OR ASSENT TO DECREE **AUTHORIZED IN A MORTGAGE OR DEED OF TRUST MAY BE EXERCISED ONLY BY AN INDIVIDUAL.**

(3) THE INDIVIDUAL SELLING THE PROPERTY UNDER A POWER OF SALE NEED NOT BE NAMED IN THE MORTGAGE OR DEED OF TRUST.

~~(3)~~ (4) AN ERROR OR OMISSION IN A MORTGAGE OR DEED OF TRUST CONCERNING THE DESIGNATION OF THE TRUSTEE OR THE INDIVIDUAL AUTHORIZED TO EXERCISE A POWER OF SALE DOES NOT INVALIDATE THE INSTRUMENT OR THE ABILITY OF THE MORTGAGEE OR BENEFICIARY OF THE DEED OF TRUST TO APPOINT AN INDIVIDUAL TO EXERCISE THE POWER OF SALE.

~~(4)~~ (5) IF A MORTGAGE OR DEED OF TRUST ALLOWS FOR THE APPOINTMENT OR SUBSTITUTION OF ~~THE~~ A TRUSTEE OR AN INDIVIDUAL AUTHORIZED TO EXERCISE A POWER OF SALE, THE HOLDER OF THE MORTGAGE OR DEED OF TRUST MAY MAKE ~~A SUBSTITUTION IN ANY FORECLOSURE PROCEEDING~~ THE APPOINTMENTS OR SUBSTITUTIONS FROM TIME TO TIME.

~~[~~(b)~~]~~ (C) A sale made pursuant to this section, §§ 7–105.1 through 7–105.8 of this subtitle, or the Maryland Rules, after final ratification by the court and grant of the property to the purchaser on payment of the purchase money, has the same effect as if the sale and grant were made under decree between the proper parties in relation to the mortgage or deed of trust and in the usual course of the court, and operates to pass all the title which the borrower had in the property at the time of the recording of the mortgage or deed of trust.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be construed to apply retroactively and shall be applied to and interpreted to affect any mortgage or deed of trust on record or recorded on or after June 1, 2010.

SECTION ~~2.~~ 3. AND BE IT FURTHER ENACTED, That this Act shall take effect ~~October~~ June 1, 2010.

Approved:

_____

Governor.

_____

President of the Senate.

_____

Speaker of the House of Delegates.

THE TITLE INSURANCE POLICY CREDITORS' RIGHTS ENDORSEMENT

IT'S GONE.

IS IT REALLY GONE?

WHY SHOULD WE CARE?

WHAT CAN WE DO ABOUT IT?

By Searle E. Mitnick*

May 13, 2010

I. Background

A. Purpose of the Creditors' Rights Endorsement

1. To protect the purchaser/lender against a fraudulent conveyance claim under Section 548 of the Bankruptcy Code or state law

2. To protect the purchaser/lender against a preference claim under Section 547 of the Bankruptcy Code

B. The approach of the title insurance industry

1. Pre-2006 form policies protected purchaser/lender

2. 2006 form polices removed this protection (See Attachment A)

3. ALTA endorsement 21-06 restored this protection (See Attachment B)

4. Effective March 8, 2010, ALTA decertified these forms

5. Why did they withdraw this protection?—the TOUSA case (Bankr. S.D. Fla. Oct. 13, 2009)

II. Why this especially matters in Maryland—IDOTs

A. Basic IDOT transaction structure (See Attachment C)

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* Searle E. Mitnick is a member of Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC.

B. The creditors' rights issues

III. The effects on the industry—shifting the risk burden

IV. Practical solutions

A. Persuade the title company to issue its own endorsement

B. Persuade the lender to waive the requirement

C. Persuade your attorney to give a creditors' rights opinion (See Attachment D)

Attachment A

If you want information about coverage or need assistance to resolve complaints, please call our toll free number 1-800-729-1902. If you make a claim under your policy, you must furnish written notice in accordance with Section 3 of the Conditions. Visit our World-Wide Web site at http://www.stewart.com

OWNER'S POLICY OF TITLE INSURANCE
ISSUED BY

stewart
title guaranty company

Any notice of claim and any other notice or statement in writing required to be given the Company under this Policy must be given to the Company at the address shown in Section 18 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS, STEWART TITLE GUARANTY COMPANY, a Texas 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 be 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.
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.

Countersigned:

stewart
title guaranty company

Authorized Countersignature

Company Name

Owings Mills, MD
City, State

Senior Chairman of the Board

Chairman of the Board

President

Policy Serial No. O-9301-000

COVERED RISKS (Continued)

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. 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
(b) 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.
(c) 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

the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was

(ii) 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.

v

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 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 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.

(c) 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 Claims Department at P.O. Box 2029, Houston, TX 77252-2029.

LOAN POLICY OF TITLE INSURANCE
ISSUED BY

stewart
title guaranty company

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.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, STEWART TITLE GUARANTY COMPANY, a Texas 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.
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

Countersigned:

stewart
title guaranty company

Authorized Countersignature

Company Name
Owings Mills, MD
City, State

Senior Chairman of the Board

Chairman of the Board

President

Policy Serial No. M-9302-000

Covered Risks – Cont.

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 isthe 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 an 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) n 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 Noninsured 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 Claims Department at P.O. Box 2029, Houston, TX 77252-2029.

Attachment B

ALTA Form 21-06 (Creditors' Rights)

ENDORSEMENT

ATTACHED TO POLICY NUMBER _____-_____-_____

ISSUED BY

stewart
title guaranty company

File No.: _____ **Charge:** _____

The Company insures against loss or damage sustained by the Insured by reason of the avoidance in whole or in part, or a court order providing some other remedy, based on the voidability of any estate, interest, or Insured Mortgage because of the occurrence on or before Date of Policy of a fraudulent transfer or a preference under federal bankruptcy, state insolvency, or similar creditors' rights laws.

The coverage provided by this endorsement shall include the payment of costs, attorneys' fees, and expenses necessary to defend the Insured against those counts, and no others, of any litigation seeking a court order, which will result in loss, or damage against which this endorsement provides insurance to the extent provided in the Conditions.

This endorsement does not insure against loss or damage if the Insured (a) knew when it acquired any estate, interest, or Insured Mortgage that the transfer, conveyance, or Insured Mortgage was intended to hinder, delay, or defraud any creditor, or (b) is found by a court not to be a transferee or purchaser in good faith.

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.

Signed under seal for the Company, but this endorsement is to be valid only when it bears an authorized countersignature.

stewart
title guaranty company

Chairman of the Board

STEWART TITLE GUARANTY CO. INCORPORATED 1908 TEXAS

President

Countersigned:

_____
Authorized Countersignature

_____
Company Name

_____
City, State

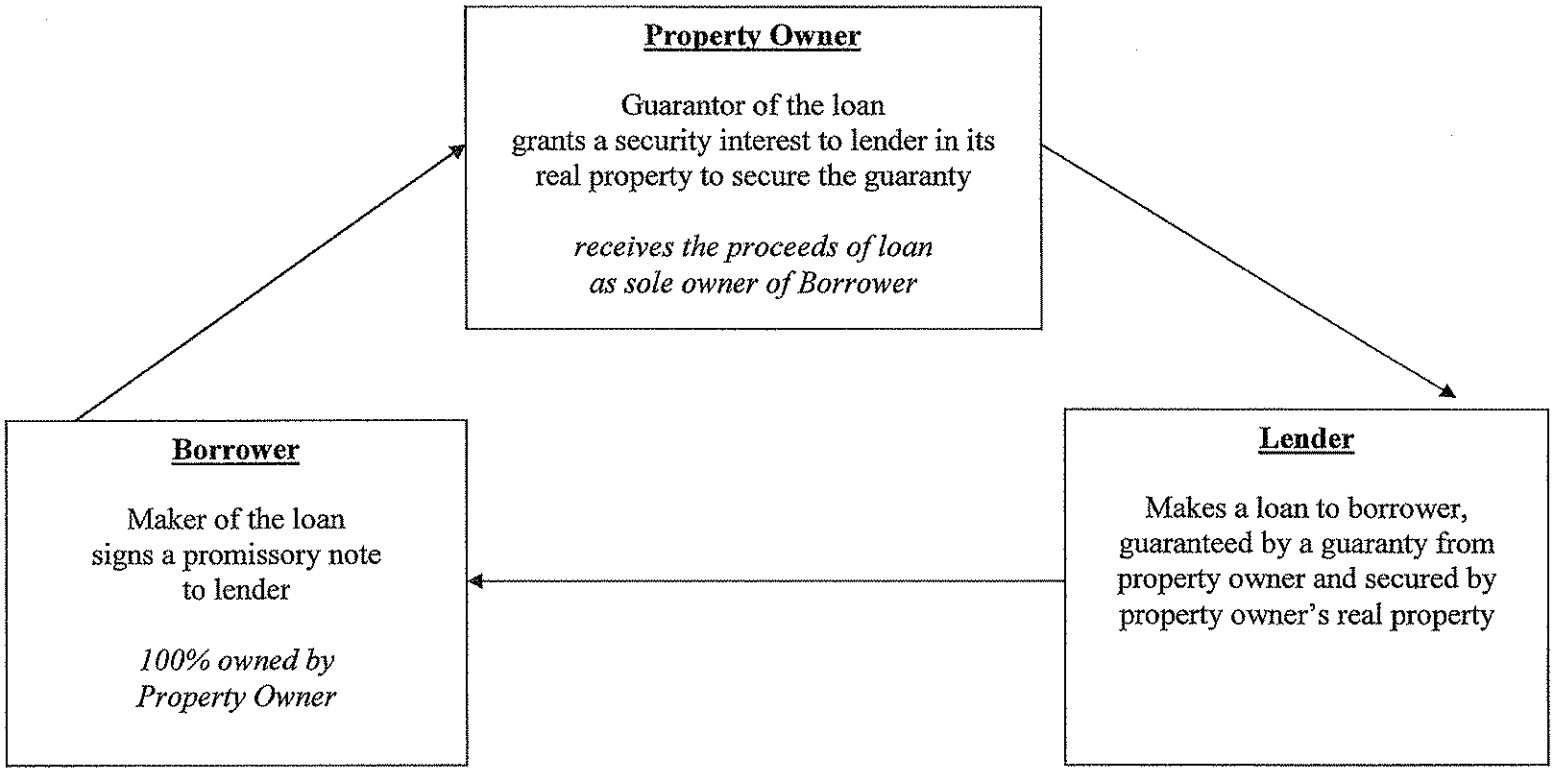
Endorsement Serial No.	**E-9368-**

File No.: _____

ALTA 21-06 Endorsement (6/17/06)

Attachment C

BASIC IDOT LOAN STRUCTURE



Attachment D

FRAUDULENT CONVEYANCE OPINION

26. Based on the facts represented in the Certificate, our knowledge of the facts in this transaction and our research of applicable law, and assuming that the Deed of Trust will be recorded promptly after it is executed, it is our further opinion that neither the Guaranty nor the Deed of Trust, nor the execution, delivery or recordation thereof, is subject to successful challenge as a fraudulent conveyance under Sections 544 or 548 of the Bankruptcy Code or the Maryland Uniform Fraudulent Conveyance Act, as amended.

CLOSING CERTIFICATE

[DATE]

Re: $_____ Loan (the "Loan") from _____ (the "Lender") to _____, which Loan is Guarantied by _____ in connection with [PROPERTY, Maryland] (the "Transaction")

The undersigned, being the authorized signatories of _____ (the "Borrower"), _____ (collectively, the 'IDOT Guarantors"), _____(the "Limited Guarantor"), and _____ (the "General Partner"; sometimes referred to with the Borrower, the IDOT Guarantors, and the Limited Guarantor collectively as the "Borrower Parties") do hereby certify that, to the best of the undersigned's knowledge, information, and belief:

1. The representations made by or on behalf of the Borrower parties in the following documents (collectively called the "Transaction Documents") are accurate and complete:

(a) the "Note";

(b) the "Deed of Trust";

(c) the "Guaranty";

(d) Guaranty from the Limited Guarantor for the benefit of the Lender

2. None of the Borrower Parties is subject to any governmental programs that require governmental consent prior to entering into the Transaction and executing, delivering and performing the Transaction Documents. None of the Borrower Parties is engaged in an industry or business activity that is specially regulated by any federal, state, or local governmental entity or agency.

3. There are no judicial, governmental, administrative or arbitral judgments, orders, injunctions, decrees or awards outstanding against any of the Borrower Parties, and there are no judicial or governmental or administrative actions, suits, or proceedings, or any arbitrations or mediations, pending or threatened against any of the Borrower Parties or any of their properties that (i) seek to affect the enforceability of the Transaction Documents, or (ii) come within the objective standard established in the Transaction Documents for disclosure of such matters.

4. The proceeds of the Transaction are to be used solely to make capital improvements to the Property described in the Transaction Documents.

5. No proceedings by or against any of the Borrower Parties or any member, partner, officer, director, or shareholder of any of the Borrower Parties have been commenced in bankruptcy or for reorganization, liquidation, or the readjustment of debts under the Bankruptcy Code or any other law, whether state or federal, nor has any Borrower Party or any member,

partner, officer, director, or shareholder of any of the Borrower Parties made an assignment for the benefit of creditors, admitted in writing an inability to pay debts generally as they become due, or filed or had filed against it or him any action seeking an order appointing a trustee or receiver of all or a substantial part of the property of any Borrower Party or any such member.

6. No judicial proceeding has been filed or is pending for the dissolution of any of the Borrower Parties, and no circumstances have occurred or exist that have triggered or will trigger a dissolution of any of the Borrower Parties under the organizational documents of any of them or under the applicable law of their formation, and no proceedings with a view to the liquidation of any of them are contemplated.

7. At the time of the consummation of the Loan, the IDOT Guarantors have no liability or creditors other than the Lender with regard to the existing $_____ loan that encumbers the Property (the "Exiting Loan"). After the closing of the loan, the IDOT Guarantors will have no liabilities or creditors, other than the liabilities arising under the Transaction Documents and the documents which evidence the Existing Loan.

8. At the time of the consummation of the Loan, neither the Borrower nor the IDOT Guarantors was insolvent, and neither the borrower nor the IDOT Guarantors will be rendered insolvent as a result or the execution and delivery of the Transaction Documents. Neither the Borrower nor the IDOT Guarantors has incurred liabilities in connection with the Loan and the Transaction Documents exceeding the Borrower's or the IDOT Guarantor's ability to pay such debts as they mature.

9. After giving effect to the Transaction, the value of the assets of each of the IDOT Guarantors exceeds all of the liabilities and obligations of each of the IDOT Guarantors, and each of the IDOT Guarantors is financially able to pay its debts, liabilities, and objections when and as the same are due.

10. The Transaction and the Transaction Documents are not undertaking in connection with an actual intent to defraud present or future creditors of the Borrower or either of the IDOT Guarantors.

This Certificate may be relied upon by [law firm] in issuing its opinion to the Lender in connection with the Transaction Documents.

[SIGNATURE PAGE TO FOLLOW]

IDOTs UNDER ATTACK IN TWO COUNTIES

By Edward J. Levin*

May 13, 2010

This is a discussion about how a county has ignored the rules of the game regarding IDOTs and has imposed its own guidelines in contradistinction to the other counties in this State, the opinions and advice of the Maryland Attorney General's office, and its own past practice. Unfortunately, it now seems that another county is going to follow this wayward path.

Structure of IDOTs

IDOTs have been used as financing devices in Maryland for decades. The structure for an IDOT transaction involves a loan to an entity (the "borrower") and the guaranty of that loan by a different entity (the "guarantor"). In order to secure the guaranty, the guarantor grants to the lender a mortgage or deed of trust (the IDOT) on property that it owns. The same entity is guarantor, landowner, and grantor of the IDOT (for simplicity, that entity in all of its roles is called the "guarantor"). Importantly for the IDOT structure, the guarantor cannot be primarily liable on the loan from the lender to the borrower at the time that the IDOT is recorded. This is because if the guarantor is not primarily liable on the loan, then as to the guarantor, the secured debt on which the recordation tax is based "has not been incurred" within the meaning of Section 12-105(f) of the Tax-Property Article of the Maryland Code (TP).[1]

An IDOT does not provide an exemption from the recordation tax. It provides only a deferral. The recordation tax will become due if and when the guarantor becomes liable on its guaranty.

Moreover, TP Section 12-105(f)(2) provides that the liability for payment of the recordation tax when it becomes due is that of the "debtor," which, in the case of an IDOT where the secured debt has become primary, is the guarantor.[2]

The consequences of this are as follows. If the loan documents are properly drafted, when an IDOT is recorded no recordation taxes are due. If the loan goes into default and the lender makes demand on the guarantor under the guaranty, the recordation tax becomes due. It is

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* Edward J. Levin is a member of Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC.

1 TP Section 12-105(f)(1) provides as follows:
(1) Except as provided in paragraph (4) of this subsection, if the total amount of secured debt has not been incurred at the time of recording or filing the instrument of writing, the recordation tax applies only to the principal amount of the debt incurred at that time

2 TP Section 12-105(f)(2) provides as follows:
(2) Except as provided in paragraphs (3), (4), and (6) of this subsection, on or before 7 days after any additional debt is incurred after recording or filing an instrument of writing, a statement under oath of the amount of additional debt shall be filed with the clerk of the circuit court or with the Department, and **the recordation tax shall be paid** on the additional debt **by the debtor**. (Emphasis added.)

the guarantor's obligation to pay the recordation tax. If the lender forecloses and sells the property, recordation and transfer taxes will have to be paid on the deed from the trustees to the purchaser, but the clerk or the county cannot insist on collecting the recordation tax on the IDOT as a condition precedent to the recordation of the new deed.

The Attorney General's 1989 Opinion

These rules are consistent with the opinion of the Attorney General published at 58 Op. Att'y Gen. 792 (1973) (the "1973 Opinion"). For many years, Maryland court clerks, taxing authorities, and their counsel understood and followed the 1973 Opinion. However, in April, 1989, the Attorney General's office filed a Motion to Intervene and a Complaint for Damages and Injunctive Relief in a foreclosure case involving an IDOT, in an effort to collect the recordation tax on the IDOT before the lender received the proceeds of the foreclosure sale.

At the time, I was chair of the Maryland State Bar Association's Section of Real Property, Planning and Zoning. I appointed a committee to meet with Attorney General Joseph Curran and others in his office to explain why the Section felt that the Attorney General's Office was taking an improper action. Two important things happened as a result of the meeting. The Attorney General withdrew the Motion and the Complaint in the foreclosure case, and he issued a new opinion regarding taxation of IDOTs. The new opinion was published in 74 Op. Att'y Gen. 281 (1989) [Opinion No. 89-024 (July 28, 1989)] (the "1989 Opinion"). It re-expressed and expounded upon the 1973 Opinion, and it provides that under Maryland law, the State as tax collector does not have a lien for the unpaid recordation tax or a claim that is superior to the lender's priority position. The 1989 Opinion still serves as the basis for guidance about the imposition of recordation tax with respect to IDOTs, except apparently in Howard County and maybe in Montgomery County.

Last Fall I wrote an article in the MSBA's Real Property Section's *Ground Rules* entitled "*Liable – Not Just Primarily Liable, Or - Fixing An Attorney General's Opinion On IDOTs 20 Years Later.*" There were two points to that article. The first was that when the 1989 Opinion was released, it stated that the debtor was primarily liable for payment of the recordation tax when the guarantor's liability became primary. Upon my request, the Attorney General republished the 1989 Opinion to provide that the debtor became liable, not primarily liable. This removed the inference that the lender had (or has) any liability for payment of the recordation tax on an IDOT when it becomes due. The second point of the article was: keep your old files handy.

Howard County's Actions (and Failure to Respond)

To record instruments in Howard County, the procedure was recently changed. Before, you went to the State desk and then to the County desk. This order was reversed, and as a result the County now exercises more discretion about the recordation of instruments. Before, the recorder went to the Assistant Maryland Attorney General who is assigned to the clerks of court with legal issues. Now, the recording personnel look to the Howard County Solicitor.

In the summer of 2009, Howard County actively began to try to collect recordation taxes on matured IDOTs upon the occurrence of one of at least two instances – at foreclosure of the

IDOT and on refinances of the property and repayment of the IDOT after default. The Howard County Solicitor's office has offered two theories to serve as the basis for its right to hold up the recordation of the deed from trustees who sell at foreclosure to the purchaser of the property:

a. in addition to debtors (borrowers and grantors), lenders are liable for the payment of the recordation tax when it comes due (discussed above); and

b. under Real Property Article ("RP") §3-104, the unpaid recordation tax is a lien on the property, and its payment is a condition precedent to the recordation of other instruments regarding the property (discussed below)

A lawyer in private practice who had a client that was told that it could not record a deed before it paid recordation tax on an IDOT enlisted bar association support for his client's position. In September, in response to that request and with the knowledge that others were experiencing a change in position by Howard County, Terry Shea, Chair of the MSBA Section of Real Property, Planning and Zoning appointed a special committee consisted of Paul Rieger, Rick Harvey, and me to work on this issue. We met on October 2, 2009 in Columbia (in the temporary Howard County offices) with Margaret Ann Nolan, Howard County Solicitor; Sharon Griesz, the Howard County Director of the Department of Finance; and Lisa O'Brien, Senior Assistant Howard County Solicitor.

Immediately after the meeting, I summarized it in an e-mail to Terry Shea as follows:

> Paul, Rick, and I met for an hour and a half with the County Attorney Margaret Ann Nolan, Director of the Department of Finance Sharon Griesz, and Assistant County Solicitor Lisa O'Brien. I thought that the meeting went very well. We made the points that we wanted to make -- that Howard County should follow the interpretation of the law as set forth by the Maryland Attorney General and followed in the other Maryland jurisdictions.
>
> In order to demonstrate that it is only the landowner/guarantor that has liability for payment of the recordation tax if it becomes due, I pointed out that the LexisNexis and Westlaw versions of the 1989 Attorney General's opinion have some mistakes in them. Jack Schwartz, Chief Counsel for Opinions and Advice in the Attorney General's office, had agreed with me when I chaired the Section that the word "primary" (in "primary liability" for payment of the recordation tax if it becomes due) should be deleted in several places. I displayed the bound volume of Attorney General's opinions from 1989, which does not have the offending word.[3]
>
> The County employees listened to us and asked us questions, and we were able to respond well to each point that they raised. I can expand on this if you would like.
>
> We did not set a time for hearing from them. If they do not contact us by the end of next week, we will call Lisa O'Brien.

[3] I subsequently told Margaret Ann Nolan and Lisa O'Brien on the telephone and in writing that LexisNexis, Westlaw, and the Attorney General's office all changed the versions of the 1989 Opinion that they post on the internet to delete the word "primary" after I showed them the final version of the 1989 Opinion.

If we then thought that the representatives of Howard County would respond to our request, we were really wrong. Through the Fall and Winter, I had numerous conversations with Mss. Nolan and O'Brien and sent them numerous e-mails, all without any real response. In January, Searle Mitnick, having been newly appointed to the Special Committee, started writing and calling the Howard County Executive and his office. He has had the same lack of success in eliciting a proper response.

RP Section 3-104

As noted above, one of the theories of Howard County is that RP § 3-104 includes a basis to require that any outstanding recordation tax on an IDOT must be paid before a deed involving the same property can be recorded. RP § 3-104 provides as follows:

§ 3-104 **Prerequisites to recording.**

(b) Payment of taxes prior to transfer on assessment books or records; special provisions as to certain counties.-

(1) Except as provided in subsection (c) of this section, property may not be transferred on the assessment books or records until:

(i) **All public taxes, assessments, and charges currently due and owed on the property have been paid** to the treasurer, tax collector, or director of finance of the county in which the property is assessed; and

(ii) All taxes on personal property in the county due by the transferor have been paid when all land owned by him in the county is being transferred. (Emphasis added.)

However, recordation taxes are an excise tax on the privilege of recording documents among the land records and are not taxes on real property.[4] The 1989 Opinion makes it clear that unpaid recordation taxes are not liens on property encumbered by IDOT. Yet the Howard County Solicitor's office insists that this new theory entitles it to bar the door to the recording office if the recordation tax on a prior IDOT has not been paid.

Senate Bill 1056 (2010)

A proposed amendment of RP § 3-104 by Senate Bill 1056[5] would have added RP § 3-104(b)(6), which would have provided as follows:

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[4] T-P § 12-102 provides as follows:
Except as otherwise provided in this title, recordation tax is imposed on an instrument of writing:
(1) recorded with the clerk of the circuit court for a county; or
(2) filed with the Department and described in § 12-103(d) of this title.

[5] Senate Bill 1056 entitled "Real Property – Indemnity Mortgage – Effect of Foreclosure on Payment of Recordation Tax." was sponsored by Senator Larry Haines (R., Baltimore Co. and Carroll Co.). The bill was drafted on behalf of the title industry. The bill was heard by the Senate Judicial Proceedings Committee on March 25, but it was never

> (6) the public taxes, assessments, and charges to be collected under subsection (b)(1) of this section do not include any recordation taxes imposed under Title 12 of the Tax-Property Article.

Senate Bill 1056 also would have amended RP Section 7-105 by adding a subsection (c) that would have provided that:

> . . . a purchaser of property secured by an indemnity mortgage at a sale made under this section, §§ 7-105.1 through 7-105.8 of this subtitle, or the Maryland Rules may not be required to pay the recordation tax on the indemnity mortgage.

The new rule would have had one exception. If the purchaser of the property is the grantor of the IDOT, the purchaser would remain liable for the recordation tax.

Montgomery County: Getting on Board the Wrong Ship?

A colleague who practices in Montgomery County wrote to me on April 28, 2010, after meeting with the Montgomery County Attorney, that an IDOT foreclosure that the lawyer's office had handled is apparently going to be the test case for this issue in Montgomery County. The County has written a demand letter to the foreclosing lender, stating that it now owes the recordation tax that was deferred on the foreclosed IDOT. (Incidentally, the trustees' deed after foreclosure for that case has already been recorded.) Also, my friend was told that the Montgomery County Treasury Division is to announce a new policy any day now, that henceforth, no IDOT foreclosure deed or deed in lieu will be accepted for recording until the deferred IDOT recordation tax is first paid.

Conclusion

There is long established law, practice, and guidance that stands against the current actions of Howard County and the announced future actions of Montgomery County. The officials in Howard County have refused to provide an adequate response to the MSBA on this issue. It may take a lawsuit by a taxpayer who is forced to pay the recordation tax on an old IDOT before a new instrument can be recorded, or by a county seeking to recover the recordation tax on an IDOT, before we will get a definitive answer to this. Alternatively, the Maryland General Assembly may clarify this issue, as Senate Bill 1056 tried to do, or it may go in the opposite different direction and do away with IDOTs altogether.[6]

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voted on. Chairman Frosh was not keen on SB 1056, or perhaps on Senator Haines. Senator Haines recently announced that he will not stand for re-election.

[6] I hesitate to even mention this possibility, but it is one of which we cannot be unmindful. There have been bills in the General Assembly for years that would have ended the recordation tax advantage of IDOTs. No such bill was introduced in 2010.

SENATE BILL 1056

N1, Q6 0lr3483

By: **Senator Haines**
Introduced and read first time: March 1, 2010
Assigned to: Rules

A BILL ENTITLED

AN ACT concerning

Real Property – Indemnity Mortgage – Effect of Foreclosure on Payment of Recordation Tax

FOR the purpose of establishing that the requirement for the payment of public taxes, assessments, and charges before property may be transferred on the assessment books or records does not apply to the payment of recordation taxes; clarifying that a purchaser of foreclosed residential property is not required to pay the recordation tax for a certain mortgage securing the foreclosed property except under certain circumstances; establishing that if the purchaser of the foreclosed property is the grantor of a certain mortgage, the purchaser is responsible to pay the recordation tax; defining a certain term; providing for the application of this Act; and generally relating to the effect of foreclosure on payment of the recordation tax on property secured by an indemnity mortgage.

BY repealing and reenacting, without amendments,
Article – Real Property
Section 3–104(b) and 7–102(a)
Annotated Code of Maryland
(2003 Replacement Volume and 2009 Supplement)

BY repealing and reenacting, with amendments,
Article – Real Property
Section 3–104(c) and 7–105
Annotated Code of Maryland
(2003 Replacement Volume and 2009 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – Real Property

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter deleted from existing law.

3–104.

(b) (1) Except as provided in subsection (c) of this section, property may not be transferred on the assessment books or records until:

(i) All public taxes, assessments, and charges currently due and owed on the property have been paid to the treasurer, tax collector, or director of finance of the county in which the property is assessed; and

(ii) All taxes on personal property in the county due by the transferor have been paid when all land owned by him in the county is being transferred.

(2) The certificate of the collecting agent designated by law, showing that all taxes, assessments, and charges have been paid, shall be endorsed on the deed, and the endorsement shall be sufficient authority for transfer on the assessment books.

(3) Except as provided in subsection (c) of this section, in Cecil, Charles, Dorchester, Harford, Howard, Kent, Queen Anne's, Somerset, and St. Mary's counties no property may be transferred on the assessment books or records until (1) all public taxes, assessments, any charges due a municipal corporation, and charges due on the property have been paid as required by law, and (2) all taxes on personal property in the county due by the transferor have been paid when all land owned by him in the county and municipal corporation is being transferred. The certificate of the collecting agent and municipal corporation designated by law showing that all taxes, assessments, and charges have been paid, shall be endorsed on the deed and the endorsement shall be sufficient authority for transfer on the assessment books.

(c) (1) (i) The requirements for prepayment of personal property taxes in subsection (b) of this section do not apply to grants of land made:

1. By or on behalf of any mortgagee, lien creditor, trustee of a deed of trust, judgment creditor, trustee in bankruptcy or receiver, and any other court–appointed officer in an insolvency or liquidation proceeding; or

2. By a deed in lieu of foreclosure to any holder of a mortgage or deed of trust or to the holder's assignee or designee.

(ii) Notwithstanding any other provision of law, and except as provided in subparagraph (iii) of this paragraph, after the recordation of a deed or other instrument that effects a grant of land described in subparagraph (i) of this paragraph, the land shall be free and clear of, and unencumbered by, any lien or claim of lien for any unpaid taxes on personal property.

(iii) Subparagraph (ii) of this paragraph does not apply to:

1. Any lien for unpaid taxes on personal property that attached to the land by recording and indexing a notice as provided in § 14–804(b) of the Tax – Property Article prior to the recording of the mortgage, lien, deed of trust, or other encumbrance giving rise to the grant of land described in subparagraph (i) of this paragraph; or

2. Unpaid taxes on personal property owned by the transferee or subsequent owner of the land after a grant of land described in subparagraph (i) of this paragraph.

(iv) This paragraph does not affect the rights of the personal property tax lienholder to make a claim to any surplus proceeds from a judicial sale of land resulting in a grant of land described in subparagraph (i) of this paragraph.

(2) Subsection (b) of this section does not apply in Charles, St. Mary's, Dorchester, Harford, Howard, Kent, Prince George's, Worcester, Carroll, Montgomery, Frederick and Washington counties to any deed executed as a mere conduit or for convenience in holding and passing title, known popularly as a straw deed or, as provided in § 4–108, a deed making a direct grant in lieu of a straw deed, or to a deed which is a supplementary instrument merely confirming, correcting, or modifying a previously recorded deed, if there is no actual consideration paid or to be paid for the execution of the supplementary instrument.

(3) Subsection (b) of this section does not apply in Baltimore City and Anne Arundel, Baltimore, Carroll, Frederick, or Washington counties to any deed transferring property to the county when the controller or treasurer of the county has certified that the conveyance does not impair the security for any public taxes, assessments, and charges due on the remaining property of the grantor.

(4) (i) Property may be transferred on the assessment books or records in July, August, or September if instead of paying the taxes required under subsection (b)(1) of this section on a property transfer by assumption, a lender or the attorney handling the transfer of title files with the county treasurer, tax collector, or director of finance of the county in which the property is assessed a statement that certifies that the lender maintains a real estate tax escrow account.

(ii) Upon receipt of the statement required in subparagraph (i) of this paragraph, the county treasurer, tax collector, or director of finance shall endorse on the deed an appropriate certification and the endorsement shall be sufficient authority for transfer on the assessment books.

(5) At the time of transfer of real property subject to a semiannual payment schedule for the payment of property taxes, only those semiannual payments that are due for the current taxable year under § 10–204.3 of the Tax – Property Article must be paid prior to the transfer of the property.

(6) THE PUBLIC TAXES, ASSESSMENTS, AND CHARGES TO BE COLLECTED UNDER SUBSECTION (B)(1) OF THIS SECTION DO NOT INCLUDE ANY RECORDATION TAXES IMPOSED UNDER TITLE 12 OF THE TAX – PROPERTY ARTICLE.

7–102.

(a) (1) No mortgage or deed of trust may be a lien or charge on any property for any principal sum of money in excess of the aggregate principal sum appearing on the face of the mortgage or deed of trust and expressed to be secured by it, without regard to whether or when advanced or readvanced.

(2) Paragraph (1) of this subsection does not apply to a mortgage or deed of trust to:

(i) Guarantee the party secured against loss from being an obligee of a third party;

(ii) Indemnify the party secured against loss from being an endorser, guarantor, or surety; or

(iii) Secure a guarantee or indemnity agreement.

7–105.

(a) A provision may be inserted in a mortgage or deed of trust authorizing any natural person named in the instrument, including the secured party, to sell the property or declaring the borrower's assent to the passing of a decree for the sale of the property, on default in a condition on which the mortgage or deed of trust provides that a sale may be made.

(b) A sale made pursuant to this section, §§ 7–105.1 through 7–105.8 of this subtitle, or the Maryland Rules, after final ratification by the court and grant of the property to the purchaser on payment of the purchase money, has the same effect as if the sale and grant were made under decree between the proper parties in relation to the mortgage or deed of trust and in the usual course of the court, and operates to pass all the title which the borrower had in the property at the time of the recording of the mortgage or deed of trust.

(C) (1) IN THIS SUBSECTION, "INDEMNITY MORTGAGE" MEANS A MORTGAGE OR DEED OF TRUST DESCRIBED IN § 7–102(A)(2) OF THIS SUBTITLE.

(2) THIS SUBSECTION APPLIES TO AN INDEMNITY MORTGAGE ON WHICH THE RECORDATION TAX IMPOSED UNDER TITLE 12 OF THE TAX – PROPERTY ARTICLE WAS NOT PAID AT THE TIME OF RECORDING BECAUSE THE GRANTOR'S OBLIGATION AS GUARANTOR OR INDEMNITOR TO PAY THE DEBT SECURED HAD NOT BEEN INCURRED AT THE TIME OF RECORDING.

(3) EXCEPT AS PROVIDED IN PARAGRAPH (4) OF THIS SUBSECTION, A PURCHASER OF PROPERTY SECURED BY AN INDEMNITY MORTGAGE AT A SALE MADE UNDER THIS SECTION, §§ 7–105.1 THROUGH 7–105.8 OF THIS SUBTITLE, OR THE MARYLAND RULES MAY NOT BE REQUIRED TO PAY THE RECORDATION TAX ON THE INDEMNITY MORTGAGE.

(4) IF THE PURCHASER OF THE PROPERTY UNDER A SALE DESCRIBED IN PARAGRAPH (3) OF THIS SUBSECTION IS THE GRANTOR OF THE INDEMNITY MORTGAGE, THE PURCHASER SHALL REMAIN LIABLE FOR THE RECORDATION TAX.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any indemnity mortgage recorded before the effective date of this Act.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2010.

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ROTHMAN, HOFFBERGER & HOLLANDER, LLC

Edward J. Levin
Member, Real Estate Practice Group
410-576-1900
elevin@gfrlaw.com

Edward Levin focuses his practice in the area of real property law, including real estate financing, leasing, purchase and sale, workouts, and foreclosure.

Ed was selected as the Distinguished Maryland Real Property Practitioner for 2006-2007 by the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc. (MSBA). In 2007, Ed received the Maryland *Daily Record's* "Leadership in Law" honor in recognition of his professional accomplishments and his dedication to his profession and the community. He was selected as Mortgage Associate of the Year in 2004 by the Maryland Mortgage Bankers Association.

Ed has been listed in each edition of *The Best Lawyers in America* for real estate law since 1989. *Chambers USA: America's Leading Lawyers for Business*, cites Ed in the top tier of real estate attorneys in Maryland, calling him a "first-rate lawyer" and a "national leader." He is listed in the 2008 and 2009 editions of the *International Who's Who of Real Estate Lawyers*. Ed has been named a Maryland *Super Lawyer* annually since 2007, and in 2007 and 2008 he was cited among the top 50 *Super Lawyers* in Maryland.

Ed is a past chair of the MSBA's Section of Real Property, Planning and Zoning. He serves as chair of the Legal Opinions in Real Estate Transactions Committee of the Section of Real Property, Trust and Estate Law of the American Bar Association (ABA). Ed has been a member of the American College of Real Estate Lawyers (ACREL) since 1987, and he chaired ACREL's Attorneys' Opinions Committee from 1993 through 1999. He served as co-chairman of the Special Joint Committee on Lawyers' Opinions in Commercial Transactions of the MSBA and The Bar Association of Baltimore City that published a report in 1989. He is chair of the MSBA's committee that published an updated report on legal opinions in business transactions in 2007, which was revised in 2009. Ed has served as counsel to the Maryland Mortgage Bankers Association, Inc. since 1995.

Ed is co-author with Charles T. Albert of *Maryland Real Estate Leasing Forms—Practice*. He has lectured at and chaired seminars sponsored by the Maryland Institute for Continuing Professional Education of Lawyers, Inc. (MICPEL), the Section of Real Property, Planning and Zoning of the MSBA, the ABA, and ACREL. Ed is the author of numerous articles on matters related to real property law and rendering and receiving opinion letters.

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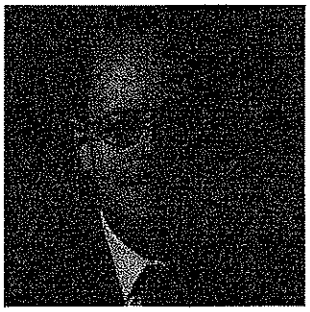

Searle E. Mitnick
Member, Real Estate Practice Group
410-576-4107
smitnick@gfrlaw.com

Since 1969, Searle Mitnick has gained a regional reputation providing legal counsel to real estate and business clients, including commercial real estate developers, residential apartment owners, including parties to syndications; and borrowers and lenders in loan transactions and workouts. He has formed entities such as partnerships, limited liability companies and corporations which own and operate real estate and other businesses and has handled major leasing transactions representing landlords and tenants in office buildings and retail centers.

Searle's experience includes handling matters involving bond financing and mortgage insurance and/or subsidies from HUD and agencies of the State of Maryland. He has completed transactions involving development and financing of many projects containing thousands of units. He has provided counsel in the creation of numerous condominium developments.

Searle has represented mortgage companies and banks with regard to acquisition, development and construction financing of real estate; represented sellers of real property to real estate investment trusts (REITS) and represented REITS. He has represented major institutional clients in the sale and acquisition of large mixed-use projects.

Searle has appeared in court as an expert witness on a number of occasions in cases involving real estate, business, and professional liability matters.

In 2010, Searle was elected to the American College of Real Estate Lawyers (ACREL). He is a member of the American Bar Association's Real Property Section, the Maryland State Bar Association's Real Property Section Council, the Bar Association of Baltimore City and was Past President of the Maryland Institute for Continuing Professional Education of Lawyers (MICPEL). He has authored numerous publications on real property law and related topics.

Searle has been named in the 2007-2010 editions of *The Best Lawyers in America* for Real Estate Law and in the 2007-2009 lists of Maryland's *Super Lawyers* for Real Estate Law.