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The World of Title Insurance in 2010

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It seemed 2010 required title companies to have the equivalent of Noah's ark to ride the waves crashing at them this past year.

On the legislative front, the industry had to defend its very existence against proposed legislation where the state government would create its own public title insurance industry. At the same time, the title industry had to guide their way through all of the new federal and state foreclosure laws and regulations making insuring title a very risky endeavor. Insurers earned their premiums as title litigators battled the remnants of the financial crisis through massive mortgage fraud and foreclosure litigation, complex lien cases, and new adverse possession laws. The only bright side for the industry was the universal recognition in the popular press that title insurance is important.

The so-called "robo-signing crisis" emerged in 2010 to remove foreclosure procedures from an almost sure win for lenders, to a drawn out process with the results so uncertain as to make thousands of post-foreclosure titles possibly uninsurable. In good news the Legislature repaired its horrible gaff in the 2009 power of attorney law.

Complicated Foreclosures

The year began with the effectiveness of 2009 legislation designed to slow down the entire foreclosure process,1 including notices to occupants, 90 day pre-foreclosure notices in all privately owned housing, leases to survive foreclosure, and court conferencing. Also included were various procedural requirements designed solely to establish procedural traps for mortgagees' counsel. This includes filing information with the banking department, serving additional notices, and complying with more technical physical requirements on foreclosure papers. The resultant consumer's downside is that if the collector does all that is required, the legal fees, interest, and disbursements, having been inflated by the statute, become the additional burden of the consumer.

This same legislation also effectively makes residential tenancies, even oral ones and very long term ones, junior to the mortgage survive the foreclosure process, a result of dubious constitutionality since it essentially legislates away a valuable right of the mortgagee, which may have arisen decades before the law came into effect. It also provides an enormous incentive for fraud minded defaulting mortgagors to sell long term tenancies. These new procedures may raise interest rates for all borrowers, regardless of their personal reliability.

The mandatory judicial conferencing of foreclosure cases requires "good faith" on the part of the parties, but lack of such good faith is not a basis to void the underlying lien.2

Many of the new procedures lend themselves readily to "his word against mine" kinds of defenses, including procedures that do not even directly affect the lender or the borrower—such as the procedures that need to be carried out with regard to tenants in residential premises.

The complexity of these foreclosure procedures presents a problem not only for lenders. Since the goal of these foreclosures is to convey title, the title insuring industry must also examine the files of these proceedings to determine if the title rendered by a foreclosure sale is insurable. The presence of affidavits in the court files attesting to the various new procedures does not guarantee the absence of a later battle.

Attorney's Fees

Finishing off 2010, is the new RPL §282 giving successful defendants in residential foreclosure proceedings a reciprocal right to attorney's fees when the foreclosure proceedings fail for any reason and the original documents give such a right to the mortgagee. While failed foreclosure proceedings are rarely reported, such as in Silver, infra, such proceedings do fail for a variety of reasons, including failure by the banks to properly credit payments, incorrect servicing by banks, and defective supporting affidavits. This law is still too young to have any of its own case law. However, RPL §234, giving tenants similar rights in landlord-tenant proceedings, has not necessarily awarded tenants fees on purely technical victories when the landlord has ultimately prevailed in the overall controversy.

Power of Attorney

The best thing to happen to the title industry in 2010 was the drastic overhaul of the atrocious 2009 Power of Attorney Law that had introduced an array of uncertainties into chains of title involving such powers. The 2010 amendment rolled back the worst aspects of the 2009 law, leaving in place an unwieldy new form power of attorney that is relatively innocuous for title examiners. Among some of the worst features of the repealed statutory terms was that the issuance of a power of attorney revoked all other powers of attorney the power giver had made, upon which there has been no reported case law. There are still some completely inscrutable sections of the new statute, but compared to the earlier version of the statute, these are mild.

Death in the Committee

Title stability in New York did see good news with the death in committee of proposals for New York to take over the title insurance industry. Due to large scale outcry from bar associations and commentators who saw the proposal as disastrous for New York, the bills died in committee, but have been reintroduced in 2011.

HETPA

The most important case to come down was in the field of procedural HETPA.3 This was First National Bank of Chicago v. Silver 4 which held that the law's special procedural protections could be raised "at any time" without making clear just how "any" the court meant. It ruled that defendants could raise the lack of the special foreclosure warnings after the time to interpose an answer had expired. Thus title insurers must examine the court files of foreclosure proceedings in the chain of title in order to ascertain if HETPA's requirements had been met even if some of those requirements won't normally appear in the Supreme Court file.

Adverse Possession

2010 saw the chaos predicted for the 2008 amendments to New York's adverse possession law erupt into full flower. While the 2008 amendments were well intentioned and even made sense insofar as it took de minimis acts like mowing a piece of one's neighbor's lawn out of the doctrine of adverse possession, where they introduced a "reasonable basis for the belief that the property belongs to the adverse possessor" into the law of adverse possession, they transformed adverse possession law from purely objective to largely subjective. This is particularly dangerous for the title industry as the title of a person down the string of title now relies on what someone was thinking up the string of title, perhaps decades earlier.

One major controversy in 2010 in adverse possession was whether the 2008 amendments could consistent with constitutional due process clauses apply to facts which arose prior to the amendments. The courts first determined whether the adverse possession amendments were procedural or substantive rights. Rarely does one have a due process claim to a particular procedure, but they do attach to the property the procedure affects.

Franza v. Olin 5 established that the 2008 amendments could not constitutionally be applied in 2010 to strip title by adverse possession from one whose rights had fully ripened under prior law. Thus the instabilities created under the 2008 amendments are mostly applicable to titles by adverse possession when the adverse act first occurred after 19986 because under the normal rules of adverse possession, it takes ten years to establish such a claim. However, for anything after 1998, the new unstable, untested, and hazardous rules control. Franza is being followed throughout the state.7

E-mail Contracts

In October, 2010, the First Department ruled in ***Naldi v. Grunberg*** 8 that an exchange of e-mails can satisfy statute of frauds requirements for contracts. Although inevitable, this ruling does mean that the courts will have to resolve authentication issues before one can understand its full implications.9 There will be questions whether real estate contracts can be tweeted, texted, posted on social network programs, or communicated via still unimagined electronic means.

Looking Ahead in Case Law

Frighteningly, two factors militate to make 2011 even more worrisome than 2010 in title related case law. First, normally new developments in the stare decisis of title law are considered bad ideas. Secondly, most of the new statutory developments in title law were too young in 2010 to generate their own body of case law, but will bloom fully in 2011.

Court Rules

Reacting to the "robo-signing crisis," whereby lenders' personnel were signing affidavits unread and attorneys were signing off on pleadings drafted by paralegals, during October, 2010, the Chief Administrative Judge promulgated a court rule requiring affirmations from plaintiffs' attorneys in foreclosure actions setting forth a personal conference between the attorneys and knowledgeable mortgagees' representatives and exacting requirements for the mortgagees' representatives' research, including checking that all notarizations were correct. While attorneys and the mortgagees' representatives suffer penalties for false documents, there is no case law to indicate what effect defects in these documents might have on strings of title depending on them.10

Courts' part rules throughout the state, show definite hostility to foreclosure actions continuing to manifest itself in new rules issued in 2010. There are now rules that require personal appearances on motions by attorneys representing the plaintiff in foreclosure actions, but not for any other kind of action.11 The Queens County foreclosure part includes a provision implying that if the court is not pleased with the plaintiff, it will adjourn the case forever, saying, "Plaintiff should be aware that a case may be adjourned numerous times at the Court's discretion in order for plaintiff to demonstrate compliance with the above."

While these rules may be designed to prevent fraud, by focusing on minutiae that could not possibly impact the fundamental fact that people borrowed money and pledged their property to secure it, the calendar length these rules add to foreclosures adds to their expense for both sides. To the extent they imperil the survivability of banks, it imperils the entire economy. We now know banks are not the bastions we once thought they were.

Conclusion

Across the full panoply of events that can happen during the course of a year in any field of law—legislation, case law, court rules—everything that can destabilize titles in this state has happened during 2010. While the common theme in all these changes has been an intended pro-consumerism, the actual effect of all these changes may be to make home ownership less safe and vastly more expensive.

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Endnotes:

1. RPAPL §§1303 et seq as amended, effective Jan. 14, 2010.
2. Indymac Bank v. Yano-Horoski, 78 A.D.3d 895 (2nd Dept.).
3. The Home Equity Theft Prevention Act.
4. 73 A.D.3d 162.
5. 73 AD3d 44, 8897 NYS2d 804 (4th Dept. 2010).
6. But see, Ziegler v. Serrano, 74 AD3d 1610, —NYS2d— (3d Dept. 2010) where, in dicta, the court left open the question of the propriety of applying the 2008 statute to older facts. Sawyer v. Prusky, 71 AD2d 1325, 896 NYS2d 536 (3d Dept. 2010) applied the 2008 law to older facts without hesitation, but it is questionable whether the Third Department in even this short span of time may not regard its own Sawyer decision as good law.
7. Barra v. Norfolk Southern Railway Company, 75 AD3d 821, —NYS2d— (3d Dept. 2010).
8. 2010 WL 3855189, 2010 N.Y. Slip Op 07079 (1st Dept.), Oct. 5, 2010.
9. They will also have to resolve whether a contract can be formed by an e-mail consisting solely of the letter "k."
10. The reader inclined to pooh-pooh the possibility that a mere court rule imposed document's defect can undo a title, should note that failure to comply with requirements only to be found in court rules has undone many evictions in Civil Court.
11. See, for example, rules of Queens County, Part 14: "The moving party must appear on all motions relating to actions for foreclosure. All other motions and applications may be submitted on papers only."