# THE TITLE Examiner

TICOR TITLE INSURANCE™

An Informational Newsletter Provided Courtesy of Ticor Title Insurance Company

From the Editor. . .

As we look out over the cold waters of Lake Erie (or Lake Ontario or Onondaga Lake) it may be hard to picture a vibrant waterfront. But as you can see from our feature article submitted by Uniland Development, we do have entrepreneurs with development vision even when economic horizons appear bleak. There is still an open invitation to all of our readers to consider submitting an article to me for a future issue of The Title Examiner. Legal topics such as real estate title disputes are always welcome but personal interest stories, changes in legal and business practices in your region, etc will be considered.

In this issue you will find an article submitted by Ted Sprink about a relatively new title insurance product, UCC insurance policies. Ted recently gave several presentations to some of our customers across the State and his article is an excellent overview of a product that commercial lenders will be inquiring about- or perhaps you can pique their interest. Ted is readily accessible but you can also contact any of our branch managers with your questions.

We have also included an article from the *Los Angeles Business Journal* about forgery, fraud and title claims. It never ceases to amaze me how ingenious the devious can be. You must always be vigilant about protecting your clients' ownership

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Artist's rendering of Buffalo Lakefront Development Team master plan.

The Lake was Buffalo's History…and it will be its future.

By Carl Montante, Jr.

In January, 2005, the Niagara Frontier Transportation Authority concluded a vigorous public process to attract, evaluate, and select a group to develop Buffalo's long-neglected, 120-acre Outer Harbor. The winning Buffalo Lakefront Development Team (BLD Team), lead by Uniland Development Company of Buffalo and Opus East of Philadelphia, was awarded the project and praised for a plan that "is both economically sustainable and has the potential to generate significant long-term public benefits, increase the tax base and create jobs."

Carl Montante Jr., Uniland Vice President, stressed that "one of the most important aspects of the BLD Team master plan is our commitment of $350 million dollars in *private* investment to the Outer Harbor project. This is a significant distinction from past attempts to develop the lakefront."

The BLD Team vision centers on three main goals: increased revenue for Buffalo and Erie County; improved public access to the site; and the creation of a regional, four-season destination. To this end, BLD Team member VOA Associates of Chicago developed a master plan that incorporates a mix of waterfront housing, park land, a new public canal system, and a first class marina. In addition, an amateur sports facility, indoor water park, and Buffalo Heritage Cultural Center are envisioned for the destination portion of the expansive site.

Lack of public access to the Outer Harbor (located only one mile from the heart of downtown Buffalo) has been a primary rea-

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son the site has remained dormant for more than five decades. Throughout the past year, Uniland and the BLD Team have been in constant contact with city, county, state and federal leaders to gain support for sorely needed roadway improvements that will allow the site to become one of the region's leading economic engines. Since then, more than $22 million has been committed to access improvements. The Team continues to work on behalf of the Buffalo community to secure the remaining $10 million that would finally create public access to the Outer Harbor.

Targeted for mid 2007, Phase I of the BLD Team Outer Harbor master plan includes construction of a new 380-slip marina, and development of the first stage of a planned 1,000-unit townhouse, condominium, and apartment residential component. In addition, several national interests have contacted the BLD Team with potential entertainment and tourist venues that could expedite the development of the waterfront destination portion of the site.

The Buffalo Lakefront Development Team stands ready to make this new vision a reality for the Buffalo Niagara community, and is prepared to commit $350 million in private investment once public funds are secured for the critical roadway improvements. Buffalo's ability to take advantage of its vast waterfront was the backbone of its glorious past. Its redevelopment into a comprehensive mixed-use environment will usher in a bright future for the City by the Lake.

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rights in their most valuable property. We also have in this issues articles from Josephine Carra and Gil Hoffman, 2 of our 15 underwriters in our Northern New York offices. Isn't the mortgage discharge law long overdue? I know you will find these articles informative and helpful in your practice.

Finally, if the following sounds familiar it's because I wrote the same thing last year- but we all need to be reminded of what this season is really about. The Holiday Season which should be the time for family and friends. We've all recently lost family members and colleagues so now is the time to remind ourselves to enjoy good health and happiness- prioritize time to be with our family and friends- the clients are very important but are they taking time from their families to be with their lawyers? Pray for good health and for full recoveries for those who are not well. At this time of year remember your worthy charities and people who don't enjoy the comforts we take for granted. Thank your colleagues for helping you to do a good job. Enjoy your holidays and Best Wishes for a Healthy and Successful 2006.

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Up And Coming in the Financial Markets

By Ted Sprink

NEW COVERAGE EMERGES AS MAJOR FACTOR FOR LENDERS AND OUTSIDE COUNSEL

So called "UCC insurance" has become a checklist item for most major mezzanine investors and lenders, oftentimes driven by secondary market considerations. Blue chip law firms are familiar with the concept, and have become the primary source of business with their recommending UCC insurance to their lender clients. The recent introduction of Fidelity National Title Group's new and improved *UCCPlus* policy, available through direct operations and select agents, now provides investors, lenders and outside counsel the market's broadest coverages, narrowest exclusions and most flexible pricing.

UCCPlus is a lender title insurance product which insures the security interest in commercial loans secured by non-real estate assets for validity, insurability, attachment, perfection and priority. *UCCPlus* covers fraud, forgery, insures over documentation defects and filing office errors and omissions, insures the gap and provides cost of defense coverage in the event of a challenge to the lender's security interest.

Non-real estate assets are defined by Article 9 of the Uniform Commercial Code, and often referred to as "personal property", or "Article 9 collateral". Personal property includes inventory, furniture, fixtures, equipment, accounts receivables, deposit accounts, and uncertificated securities (often crucial to the mezzanine loan transaction).

UCCPlus also provides coverage with respect to those certificated transactions in which the borrower "opts in to" Article 8. *UCCPlus* policies include UCC search and filing services.

The policy was originally developed to expand coverages available to lenders, while at the same time complementing the traditional legal opinion, successfully relieving liability to outside counsel in connection to priority and perfection. *UCCPlus* waives the right of subrogation in connection to lender's counsel and frequently reduce loan origination costs to the borrower, while enhancing the value of loans sold into the secondary market.

An extremely important advantage of *UCCPlus* over our competitor's is that our policy presumes the debtor's rights in collateral, thereby overcoming a substantial exclusion found in competing products.

Policies are underwritten and produced by the UCC Insurance Division for the Alamo Title, Chicago Title, Fidelity National Title, Security Union and Ticor Title brands of Fidelity National Title Group, Inc. Collectively, FNTG (and its close relative Fidelity National Financial) are #261 in the Fortune 500 List of America's Top Corporations, and the nation's larg-

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est provider of real estate origination and closing services.

FNTG's UCC Insurance Division has developed a particular expertise in underwriting and insuring large mixed-collateral loan transactions (hotels, shopping centers, power plants, casinos and office buildings), major-market asset based loans, commercial loan work-outs and high yield mezzanine financing transactions.

UCCPlus underwriting staff consists of lawyers and paralegals specializing in commercial finance transactions. Opened orders for *UCCPlus* exceed $25 Billion. Our clients include Goldman Sachs, Morgan Stanley, Bear Stearns, Greenwich Capital, Credit Suisse First Boston, Deutsche Bank, JP Morgan Chase, Merrill Lynch, GMAC, BofA, Wachovia, Key Capital, Citigroup, TIAA-CREFF, Countrywide, ARCS, MONY, Prudential, RAIT, Wells Fargo, Column Financial .

Many of the nation's leading law firms, specializing in real estate and commercial finance transactions, rely on UCCPlus to reduce risk and enhance loan value for the benefit of their clients. These law firms include Cadwalader Wickersham & Taft; Sidley Austin Brown; Windels Marx; Holland & Knight, Strook & Strook; Baker McKenzie, Weil Gotshal; Cravath Swaine; Thatcher Profitt; Pircher Nichols; Sullivan & Cromwell; Kaye Scholer; Jones Day; Morrison & Foerster; Dechert; Quarles Brady; Pillsbury Winthrop Shaw Pittman; DLA Piper Rudnick; Dewey Ballantine; Shearman & Sterling; Brown Raysman; Proskauer Rose; Skadden Arps; Bingham McCutchen; Sonnenschein; Goodwin Proctor; Buchanan Ingersoll; Jenkens & Gilchrist; Solomon Weinberg; Hogan & Hartson; Gibson Dunn & Crutcher; Schulte Roth; Lewis & Roca; Paul Hastings; Latham & Watkins; Katten Muchin; Kirkland & Ellis; Heller Ehrman; Debevoise & Plimpton and Mayer Brown Rowe & Maw.

Technical information, promotional materials, order forms and an electronic rate calculator are located at our www.uccplus.com web site. Key published articles concerning mezzanine financing can be found at the "News" link.

Ted Sprink is Senior Vice President and National Marketing Director of the Fidelity National Title Group's UCC Insurance Division. Ted is one of the original architects of the UCC insurance value proposition, managing the industry's successful introduction of the concept in 2001. Ted can be reached at 619-744-4410 or tsprink@fnf.com.

UCCPlus Insurance Protection provides valuable insurance coverage to lenders funding:

- Mezzanine Financing
- Asset-Based Loans
- Mixed Collateral Transactions
- Loan Workouts
- Loan Portfolios & Securitization
- Mergers and Acquisition

Common Title Issues

By Josephine Carra

As title examiners, there are many basic title issues and questions that we are expected to know. We take for granted that all title examiners know these common issues, but for new title examiners, and even for more experienced attorneys, it might be helpful to review some of these matters.

Lien periods are some of the most obvious items to be concerned with. Here is a list of some of the most common:

Judgments, NYS tax warrants and federal tax liens	10 years
Mechanics Liens	1 year but may be renewed
NYS estate taxes	15 years
Federal Estate taxes	10 years
Financing statements	5 years but may be continued
Franchise taxes	10 years
Condominium Liens	6 years
Lis Pendens	3 years
Surety bail bonds	10 years

Another general title issue is how to handle a bankruptcy filed by a person in the chain of title. First, it needs to be determined whether the bankruptcy is opened or closed. If open, approval for the transaction, whether a mortgage or sale must be obtained from the trustee. If closed, it must be determined whether or not the real property was listed. If it was, then look to see if there was an order of abandonment which will allow us to omit the bankruptcy as an exception. If it was listed, and if there was no actual order, the property will be deemed abandoned once the case is closed so again it can be omitted. If the property was not listed before the title can be insured, the issue should be discussed with a Ticor underwriter to determine what can be done to insure the title.

A third issue often encountered is violations of restrictive covenants. The first question to be asked is how long has the violation existed? If it is less than two years, a release of the restriction will be required from all owners affected by the restriction, generally all the owners of the lots in a subdivision. If the violation has existed for more than two years, pursuant to RPAPL Section 2001 no action can be brought to enforce the restriction. An affidavit stating that the structure has existed in its present state for two years or more is enough to allow us to affirmatively insure over the violation.

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These are just a few of the basic title issues that title examiners encounter routinely. The Northern New York underwriters are available to answer any of your title questions on these and other issues. See Page 6 for a listing, including email addresses.

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Forgery, Fraud, and Sophisticated Scams

By Kate Berry, Los Angeles Business Journal—11/28/05

Title insurance companies are reporting an increase in forged deeds and fraudulent titles that have been used to commit mortgage fraud throughout Los Angeles County. All the major title insurers - Fidelity National Financial Title Group, First American Title Insurance Co., LandAmerica Financial Group Inc. and United Capital Title Insurance Co. - have each seen anywhere from a 25 percent to 100 percent jump in fraud cases in Southern California this year.

"There has definitely been an increase in real estate fraud and an organized attempt to pick high-dollar prospects," said Detective Erin Camphouse, who heads the Los Angeles Police Department's four-person real estate crimes unit.

Several factors are contributing to the increase, including a rise in identity theft, lax underwriting standards, and the availability of property information over the Internet.

It's been estimated that 20 percent of all title claims involve some element of fraud. "It's a common scam that's been around for many years, but the problem now is lax loan underwriting," said Jim Maher, executive vice president of the American Land Title Association, an industry trade group.

Title companies complain that lenders are at fault for cutting back on traditional methods of underwriting, the process that determines if a loan is inherently risky or not. Often, title companies and the victimized homeowners are the last to know when a fraud has been committed.

"Unfortunately, this is fairly prevalent all over Los Angeles County and it's only increasing," said Vicki Perkowitz, vice president and regional counsel at First American Title, who said there are not enough police officers to investigate all of the fraud claims.

Many cases turn out to be schemes that involve notary publics or former employees in the title industry. Often a vacant home will be singled out, preferably with out-of-state owners. Older homeowners also are at risk, some from unscrupulous family members who forge the titles on their homes and then claim they were given the property. Roughly one-third of all real estate fraud cases involve a family member.

Usually a forged deed or title to a property is signed by a notary public, although many of the signatures are forged as well. Fake Social Security numbers and W-2 forms are used to obtain a loan against the equity in the home.

When the loan gets approved, the money is wire-transferred to a bank account under a fictitious name. The loan funds are then withdrawn, leaving the title company on the hook. "We see homeowners and title insurers with their jaws on the ground because they've never faced this before," Camphouse said.

(All real estate fraud claims are investigated by the police department in the city where the property is located.)

Few of the cases actually go to trial since most are settled through plea agreements. But it can take anywhere from two to four years for a judge to declare the forged title on a property null and void.

Meanwhile, the title company has to pay out on the value of the loan, typically up to the maximum price of the property. The homeowner has to retain an attorney to freeze the title - during which time he or she cannot borrow against the house or sell it.

> *Many cases turn out to be schemes that involve notary publics or former employees in the title industry.*

Kenneth Dzien, vice president and chief counsel at United Capital Title, said the company has implemented a system to catch frauds and forgeries by sending a letter to each homeowner thanking them for using the title company. Letters from title companies often are the first clue for a homeowner that a deed or title has been forged, and that some identity theft or fraud has taken place.

What to look for

Roger Therien, regional underwriting counsel at LandAmerica, said there are signals to look out for, including the re-conveyance of a deed of trust that has already been paid off or a deed that is not insured by any title company.

"If you're an ordinary homeowner, how often does your house burn down? Not often," he said. "But if you're in the claims department of an insurance company, it happens all the time, it's very typical. This is the kind of thing that comes across our desk daily and it's an uphill battle to detect it and catch it."

Title insurers claim that the widespread use of automated underwriting systems - as opposed to face-to-face encounters - and the introduction of new loan products

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aimed at stretching to get first time buyers into homes have caused an uptick in fraud and forgeries. Low documentation loans, often called "no doc" loans, allow borrowers to get a loan without listing their income or employer, making it more difficult to trace people when a fraud occurs. At the same time, speed and price have become the dictating forces behind the refinance and real estate boom.

Sophisticated criminals combine these elements to manipulate the system, using forged documents to push for a quick turnaround on a loan. Many fraudulent loans are processed at the end of the month, which is the busiest time for lenders.

"These days, there's never any face-to-face contact, nobody takes the time to go to the bank and make out a loan application," said Lore Hilburg, a lawyer who investigates frauds and forgeries for all of the major title insurers. "It seems to be more active now and on a much bigger scale partly because of the appreciation of property (values) and partly because there are so many transactions and everybody has cut back on personnel."

New Hope for Discharging Old Mortgages

By Gilbert M. Hoffman

While there is still no cure for the epidemic of old open mortgages, there is, at least, some hope. Chapter 467 of the 2005 Laws of New York was enacted on August 9, and became effective on November 8, 2005. Chapter 467 amends subdivision 1 of Section 275 of the Real Property Law, and subdivision 1 of Section 1921 of the Real Property Actions and Proceedings Law.

You may remember RPAPL Section 1921 fondly, because, as amended previously, it provided for a penalty of $500 for failure to discharge a paid-off mortgage, and it also provided a procedure by which an attorney could discharge such a mortgage. Now, however, RPL Section 275 and RPAPL Section 1921 have some real teeth—a penalty of up to $1,500 for failure of an institutional lender to provide or record a discharge.

These improvements will not solve the problem of not being able to obtain and record the discharge of all mortgages, but they certainly will provide a disincentive for institutional lenders to ignore the demands of attorneys and borrowers to clear the record as to satisfied but undischarged mortgages. Remember also, that the balance of RPAPL Section 1921 remains intact, so that an attorney can still proceed under subdivision 5, in the case of a one to-six-family residence. That subdivision permits an attorney to file an affidavit and pay the fees, and ultimately the affidavit serves as a discharge of mortgage.

The new language reads (almost identically in both sections) as below

As we wait for the ultimate cure, there are some other things we can do to ameliorate the disease. One reason many mortgages go undischarged, is because the County Clerk rejects the discharge as tendered. Make sure you send the correct recording fees. If you suspect the discharge will be difficult to get right, because of numerous assignments, changes of names of institutional lenders, or different owners and servicers, prepare the discharge yourself and send it to the lender to execute. When requesting a discharge of an old mortgage previously paid off, send as much proof of payoff as possible, and send the lender excerpts from the abstract to aid it in preparing a correct discharge.

Finally, if dealing with a lender known to have a bad track record for discharging mortgages, anticipate the problem, and convert your cover letter for the discharge check into a demand under Section 1921. Be sure to include the appropriate documentation. You're likely to shave a month or more off the process.

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Failure by a mortgagee to present a certificate of discharge for recording shall result in the mortgagee being liable to the mortgagor in the amount of five hundred dollars if he or she fails to present such certificate [of discharge] within thirty days, shall result in the mortgagee being liable to the mortgagor in the amount of one thousand dollars if he or she fails to present a certificate of discharge for recording within sixty days and shall result in the mortgagee being liable to the mortgagor in the amount of one thousand five hundred dollars if he or she fails to present a certificate of discharge for recording within ninety days. For the purposes of such liability under this subdivision, the term "mortgagee" shall not include a person, partnership, association, corporation or other entity which makes less than five mortgage loans in any calendar year.

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Happy Holidays

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