CONFLICTS IN TITLE INSURANCE— WHAT IS THE BEST APPROACH?

By: Marc W. Brown

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You are about to sit down after finishing up an appellate brief when, lo and behold, you receive a call from the title insurance company about a new matter. After putting down your coffee, you e-mail your conflicts department hoping that no current, prior, and/or future business relationship stands in your way from representing the potential client. Upon receiving a voluminous conflicts report cross-checking the potential client, adversary, and other related and unrelated entities, you hope that you are ready to proceed.

Title insurance litigators face conflicts on a regular basis. These conflicts generally develop in the context of representing an insured either under an owner’s or lender’s policy, representing the title insurance company or insured on a coverage matter, and representing the title insurance company or the title agent and/or title examiner on a recoupment action. In each of these scenarios, the lawyer presented with an opportunity to handle a new matter must analyze whether a conflict of interest exists that could preclude his or her representation.

This article will address the conflict situation under New York law and will preview the Continuing Legal Education course titled Conflicts in Title Insurance—What Is the Best Approach? The course will cover the current state of New York law in this area and provide practical guidance for the title insurance litigator. The course will be held on Tuesday, May 12, 2015.

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A NEW YEAR’S GREETING FROM THE CHAIR

Friends:

We have three exciting events planned over the next several months.

Our Spring meeting will be in Hilton Head, SC from May 14-17. Bush Nielsen will be our headline speaker. We will also have an all-star panel of in-house counsel, who will discuss how to get retained and stay retained. You don’t want to miss this. Please visit our committee’s website or LinkedIn page for more details. Use this link to access the registration form.

On June 2, we will be presenting a webinar concerning the Consumer Finance Protection Board (CFPB) and its impact on title, escrow, and settlement services. We have a fantastic panel of speakers from across the country. More information to follow in the comings weeks.

Our annual meeting and CLE will, as usual, coincide with the ABA’s annual meeting in Chicago, July 30, 31, and August 1. We once again have a fantastic CLE panel of speakers, this year presenting on ethics in title insurance cases, civility, professionalism, and case law updates. Our CLE will be held from 8am to 12pm on Friday, July 31. We will be at the Swissotel, Chicago, IL -- http://www.swissotel.com/hotels/chicago/. More details to follow in the coming weeks.

Sincerely,

Ryan Squire
Chair, Title Insurance Litigation Committee

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Volunteers Needed!

Laura Wheeler Waring Elementary School

Education Awareness Project

* April 30, 2015 * 11 AM - 1 PM *

Philadelphia, PA

Join the ABA TIPS Diversity Committee, Staff Counsel Committee and Law in Public Service Committee for a youth outreach program with Laura Wheeler Waring School students during the ABA TIPS Spring Section Conference. Volunteers will meet with students for the Committee’s “A Day in the Life of an Attorney” program. Attorneys will discuss their professional experience in the legal industry and encourage students to explore the possibility of a law-related career.

Participants should meet in the lobby of the Philadelphia Ritz-Carlton on Thursday, April 30, 2015 at 10:15 AM for transportation to the school. Also, please contact Staff Liaison Jennifer LaChance at (312)988-5463 or jennifer.lachance@americanbar.org to sign-up for the project prior to the Spring Section Conference.

Laura Wheeler Waring School is located at 18th and Green Street in Philadelphia, PA.
TACIT RATIFICATION: A TITLE ATTORNEY’S BEST FRIEND

By: Natalie Don Tarnosky

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Picture a man walking into his local bank. He approaches the teller and asks to apply for a home loan. The teller smiles politely and directs the man’s attention to one of the bank’s lending agents sitting in the corner of the room. After several weeks of paperwork and phone calls, the man finally purchases the home of his dreams. For years, he submits his monthly mortgage payment to the bank and all is right in the world. Now imagine that those payments suddenly stop. The bank sends notice after notice, but the man is never heard from again. So the bank begins the process of foreclosing on his home. They pay an attorney to draft the pleadings, a sheriff to serve the notices, and a local paper to advertise the sale. But before the sale can take place, a defect in title is discovered. As it turns out, the man was married and for whatever reason, the mortgage fails to mention that fact. Worst of all, the wife failed to execute or otherwise concur in the mortgage. Since this is a community property state and the property was purchased during the couple’s marriage, the wife owns a half unencumbered interest in the home. What is the bank to do?

Most title attorneys have encountered this situation in one form or another and unfortunately, it is not limited to community property states. The failure of a necessary party to concur in the alienation of immovable property can arise from almost limitless scenarios, whether it be like the situation described above or simply a co-owner attempting to sell property without the agreement of his fellow co-owners. Certainly, the non-concurring party can always agree to the transaction after it occurs, but what if that is not an option? What if they refuse to budge and all you are left with is a relatively null mortgage or act of sale? Luckily, many states allow lenders to enforce their interest in property based on the non-concurring party’s “tacit ratification” of the obligation.

In Louisiana, this theory has actually been codified into law. The Louisiana Civil Code provides that tacit ratification results when a person, with knowledge of an obligation incurred on his behalf by another, accepts the benefit of that obligation. Although it is not specifically discussed within the Code itself, tacit ratification requires that the intention to ratify be shown through the acts of the ratifying party. Thus, tacit ratification requires both knowledge of the act to be ratified and an intent to ratify that act, although intent may be inferred from the underlying circumstances, including the party’s failure to object after becoming aware of the transaction.

For example, in Zeller v. Webre, a husband and wife attempted to invalidate a “rent to own” agreement to sell community real estate based on the fact that the wife did not sign the agreement. Both the Fifth Circuit and the trial court rejected the couple’s argument, finding that the wife had tacitly ratified the agreement since she acknowledged that she knew of the agreement but failed to raise any objections for fourteen years after it was signed. Furthermore, evidence at trial revealed that the wife had personally received 38 “rent” payments over the term of the agreement, thus receiving a benefit from the transaction that she now sought to challenge.

Likewise, in First Federal Sav. & Loan Ass’n of Warner Robins, Ga. v. Delta Towers, Ltd., a wife accepted the benefit of an act of subordination of a vendor’s lien

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1 LSA-C.C. Art. 2338.
2 LSA-C.C. Art. 1843.
3 Id.
6 Id.
Introduction

As everyone knows, the enactment of the Statute of Westminster II in 1285 ushered the concept of a “judgment lien” into English law. The statute – for the first time in English legal history – authorized a judgment creditor to obtain a \textit{writ of elegit} (as opposed to a \textit{writ of fieri facias}) to take possession of the judgment debtor’s land to pay for the judgment debtor’s debts. 1285 was indeed a very good year for judgment creditors. Nearly three-quarters of a millennium later, the judgment lien remains an important remedy for judgment creditors.

Judgment Liens in Arizona

Although Arizona law has (for the most part) abandoned the use of fanciful Latin phraseology, Arizona does provide for a “judgment lien” – which (despite the plain, uninspired name) creates a lien against all of the real property then owned or later acquired by the judgment debtor. In Arizona, judgment creditors create a judgment lien simply by recording a certified copy of a judgment in the county recorder’s office. The judgment creditor can foreclose on its judgment lien and force the sale of the judgment debtor’s property to satisfy the judgment – even if the judgment debtor transfers the property to a third-person. See \textit{Byers v. Wik}, 169 Ariz. 215 (Ct. App. 1991). Thus, the judgment lien is a pretty powerful tool in the judgment creditor’s arsenal. That tool just got a little bit harder to use.

\textbf{Lewis v. DeBord}

In \textit{Lewis v. DeBord}, a judgment creditor recorded a judgment without attaching an “information statement” as technically required by \textit{A.R.S. § 33-967}. The Arizona Court of Appeals held that the judgment creditor’s failure to attach this “information statement” effectively rendered the judgment lien worthless vis-à-vis third-party purchasers.

The “information statement” provides very basic information (such as the last known address) about the judgment debtor. Although a judgment lien is valid even if all of the information is unknown, the statute provides that the judgment lien “has as its priority the date” that the judgment creditor records the aforementioned “information statement”.

In \textit{Lewis}, a judgment creditor obtained a judgment against the judgment debtor in 2006, and recorded its judgment to create the judgment lien. The judgment debtor bought some real property in 2008, and the judgment lien automatically attached to that real property as a matter of law. Before the judgment creditor could execute, however, the judgment debtor sold the property to a third-party. Only then – after the real property was sold – did the judgment creditor record its “information statement”.

After recording its “information statement” the judgment creditor sued the third-party to foreclose its judgment lien, but the third-party objected – arguing that the judgment lien was invalid due to the failure to attach the “information statement”.

The Court of Appeals disagreed, holding that the failure to attach the “information statement” did not render the judgment lien invalid as a matter of law. However, the Court of Appeals determined that the absence of the “information statement” affected the “priority” of the judgment lien. Therefore, because the third-parties purchased the land before the “information statement” was recorded, the Court of Appeals concluded that the third-parties’ interests had “priority” over the judgment lien. Accordingly, the judgment creditor could not enforce its lien against the “senior” owner of the property.

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CALIFORNIA OPINION CONFIRMS EXISTENCE OF TRIPARTITE RELATIONSHIP BETWEEN TITLE INSURERS, THEIR INSUREDS AND THEIR RETAINED COUNSEL

By: Warren S. Fujimoto

Warren Fujimoto is an attorney at the Crafts Law Firm in Irvine, California. Admitted to the California Bar since 1997, his primary practice areas are real property and insurance litigation. This article is based on the winning appellate court brief he authored on the issue of the tripartite relationship where a title insurer retained counsel to prosecute an action on behalf of its insured. Warren can be reached at: e-mail - wsf@craftslawfirm.com; or Telephone: (949) 484-7405.

One aspect of title insurance that is different from other types of insurance is that title insurers are often required to retain counsel to prosecute actions on behalf of their insured, in addition to defending actions. California courts have long held that when an insurer hires counsel to defend its insured, a tripartite relationship exists between insurer, insured and counsel. See, American Mutual Liability Ins. Co. v. Superior Court (1974) 38 Cal.App.3d 579, 591-592. In this relationship, communications between counsel and insurer and counsel and insured are protected by the attorney-client privilege. State Farm Mutual Auto. Ins. Co. v. Federal Ins. Co. (1999) 72 Cal.App.4th 1422, 1428-1429. But all prior published opinions involved property and casualty insurance and cases where insurance carriers retained counsel to defend their insureds.

Our former firm was retained by Fidelity National Title Insurance Company (“Fidelity”) to prosecute an equitable subrogation action on behalf of its insured, Bank of America, pursuant to an ALTA lender’s policy from Transnation Title Insurance Company. Fidelity had accepted the claim and provided counsel under a reservation of rights.

During discovery, defense counsel issued business records subpoenas to Fidelity seeking all communications between Fidelity and our law firm. Bank of America moved to quash the subpoenas on the ground that the communication sought were protected by the attorney-client and attorney work product privileges. The defense opposed the motion, contending that Bank of America’s counsel was retained to prosecute an action, there was no tripartite attorney-client relationship.

Several California appellate opinions had held that the duty to defend under title insurance policies is governed by the same principles which define the duty to defend under general liability policies. See, Israelsky v. Title Ins. Co. (1989) 212 Cal.App.3d 611, 620. However, the prior opinions involved “bad faith” issues and did not specifically address whether a tripartite relationship exists when a title insurer hires counsel to prosecute a title action on behalf of its insured. The trial court acknowledged that a tripartite relationship would exist if Bank of America’s counsel was retained to defend the lender. But the trial court agreed with the defense that because Fidelity was prosecuting a title action on behalf of Bank of America under a reservation of rights, the appellate opinions recognizing a tripartite relationship when property and casualty insurers retain counsel to defend their insureds did not apply. Hence, the trial court denied Bank of America’s motion to quash, holding that based on the lack of controlling authority there was no attorney-client relationship between Fidelity and its retained counsel because counsel was retained to prosecute a title action.

Bank of America, joined by Fidelity, petitioned the California Court of Appeal for a Writ of Mandate to direct the trial court to grant Bank of America’s motions to quash. The appellate court granted the writ and issued a published opinion: Bank of America, N.A. v. Superior Court (2013) 212 Cal.App.4th 1076. The Court of Appeal noted that the ALTA policy gave Fidelity the right to initiate and prosecute litigation on behalf of its insured. Bank of America, at 1093. The Court of Appeal

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TOO LATE TO FORECLOSE IN FLORIDA?

By: Michael S. Provenzale and James E. Walson

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When defending the lien priority of an insured lender against competing claims or in representing an insured owner in defending against a foreclosing lender, one tool is Florida’s statute of limitations. Florida has a five year statute of limitations for mortgage foreclosures, which requires that a foreclosure action be filed within that time period following a borrower’s default. §95.11(2)(e), Fla. Stat. But what happens if a foreclosure is filed and then dismissed? Does the clock start again following the dismissal or does the lender still need to bring the second foreclosure suit within five years of the original default? At the moment, these appear to be open questions in Florida. Although the courts have provided some guidance, the question may not ultimately be answered until the Florida Supreme Court weighs in, which is expected to do in 2015.

In April of 2014 the Fifth District Court of Appeal in U.S. Bank v. Bartram, 140 So. 3d 1007 (Fla. 5th DCA 2014) held that after a foreclosure action was dismissed by the court, it could be re-filed based upon a new default that occurred after the dismissal of the suit, even if the original default which formed the basis of the first suit occurred more than five years ago. Under this “continuing default” theory, the dismissal nullified the acceleration of the loan such that payments would continue to come due each month after the dismissal and therefore the loan could be reaccelerated following a new default. Accordingly, the statute of limitations would then be five years from the new date of acceleration, allowing the lender ample time to bring a second foreclosure action.

Two months after Bartram, the Fourth District Court of Appeal in Evergrene Partners v. Citibank, 143 So. 3d 954 (Fla. 4th DCA 2014) appeared to agree and extended the law further as it found the same result when the initial foreclosure suit was voluntarily dismissed by the lender, noting that “the claims of acceleration and subsequent acts of default have never been adjudicated on their merits” so “any acts of default still within the statute of limitations may be raised in a subsequent suit.”

Finally, and most recently, the Third District Court of Appeal joined in the discussion with its December 2014 decision in Deutsche Bank v. Beauvais, No. 3D14-575, 2014 Fla. App. LEXIS 20422, 2014 WL 7156961 (Fla. 3d DCA 2014) (not yet final due to Motion for Rehearing), which sharply disagreed with both Bartram and Evergrene Partners. In Beauvais, like in Bartram, the first foreclosure action was dismissed by the court, however, this time the court held that the dismissal “did not by itself negate, invalidate or otherwise decelerate the lender’s acceleration of the debt in the initial action.” Since the lender took no affirmative steps to reinstate the loan following the dismissal, the second foreclosure action filed more than five years after the original default and acceleration was untimely and thus barred by the statute of limitations.

As referenced above, Bartram has been accepted for review by the Florida Supreme Court and is currently in the process of being briefed. Additionally, in its ruling in Beauvais, the court certified conflict with Evergrene Partners, likewise inviting the Florida Supreme Court to take up that case and make a final determination on the issue.

In the meantime, lenders who have dismissed a prior foreclosure action should carefully evaluate the original date of default and when the statute of limitations would run based upon that date. If a new lawsuit will not be filed within that time frame, taking affirmative steps to decelerate the loan appears to be prudent. While a mutual agreement with the borrower establishing new terms and tolling the limitations period would be ideal, even a unilateral “deceleration notice” may prove to be helpful in prosecuting a second foreclosure action. Title insurers and their insureds should be cautious in approaching this unresolved area of the law as a failure to decelerate may result in a foreclosure action being barred.

If you are interested in learning more about mortgage foreclosure and the statute of limitations, please contact Michael S. Provenzale, James E. Walson or any member of our Creditor’s Rights Group.
Education program to be presented on July 31, 2015 at this year’s ABA-TIPS Title Insurance Litigation Committee (the “Committee”) session at the ABA annual meeting in Chicago, Illinois. The CLE will not only address conflicts under New York law, but will also address the law in other states with a significant membership in the Committee. Overall, the conflict analysis is not black or white, and each attorney or law firm has its own interpretation of “gray.” This article should provide some guidance on this very important topic.

A common conflict exists between an insurer and an insured when the insurer undertakes the defense of the insured under a notice of reservation of rights or non-waiver agreement to preserve the insurer’s right to raise a defense that the claims are not covered by the insurance policy. See NY Ins. Law § 3340. A conflict of interest can exist where there are two or more causes of action against the insured - one within the coverage of the policy and others not covered under the policy. A conflict may arise when the lawyer’s personal interest diverges from the client’s interest, or when the interest of the lawyer’s current or former client diverges from another current or former client.

A conflict commonly develops when an attorney acts as title insurance agent. A purchaser or lender client expresses an interest in obtaining the broadest title insurance protection available and a lawyer representing the client may have to negotiate with the underwriter for special coverage or for the removal of exceptions from coverage. Notably, an agent who receives commission from the underwriter is obligated to protect the underwriter from taking on excessive risks. It is worth noting that whether the approved attorney’s interest in continuing to receive commissions from the underwriter might “temper the ardor” with which the approved attorney will fight for the client’s benefit. See Joyce D. Palomar, Title Insurance Law § 2:4 (2014-2015 ed.).

For firms who have other practice areas or handle multiple title claims matters, a conflict may develop when asked by a title insurance company to represent a lender surrounding a closing in one jurisdiction while currently be adverse to the same lender surrounding an unrelated closing in another jurisdiction. A firm’s approach to this conflict scenario will affect whether it accepts the matter.

There are two primary rules under the New York Rules of Professional Conduct that address the conflict situation. See 22 N.Y.C.R.R. § 1200. Rule 1.7 addresses the conflict of interest involving current clients and, notwithstanding the existence of a concurrent conflict of interest, determined that a lawyer shall not represent a client if a reasonable lawyer would conclude that either of the following conditions exist: (1) the representation will involve the lawyer representing differing interests, or (2) there is a significant risk that the lawyer’s professional judgment will be adversely affected by the lawyer’s own financial, business, property or other personal interests. See Rule 1.7(a) (1)-(2). Notwithstanding the existence of a concurrent conflict of interest, a lawyer may represent a client if the following conditions exist: (1) the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing. See Rule 1.7(b)(1)-(4).

With regard to former clients, a lawyer who previously represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person’s interest are materially adverse to the interest of the former client unless the former client gives informed consent, confirmed in writing. See Rule 1.9(a). Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or substantially related matter in which the firm or lawyer previously represented the former client whose interest are materially adverse to the potential clients and from whom the lawyer had acquired information protected by confidentiality. See Rule 1.9(b). In addition, a lawyer who formally represented a client in the matter shall not thereafter use protected confidential information of the former client to the former client’s disadvantage when that information has become generally known or when revealing protected confidential information would be permitted or required with respect to a current client. See Rule 1.9(c).

By applying the professional conduct rules in the insurance context, this summer’s CLE will address the types of conflicts that develop in the various areas handled by members of our committee. After focusing on the conflicts case law derived in the title insurance litigation context, which are few and far between, the CLE will apply general case law from the insurance
context to provide guidance when dealing with conflicts that develop in the following areas: (1) insurer v. insured, (2) insured v. insured, (3) past/present relationship, (4) joint representation, and (5) simultaneous representation. In addition, the CLE will focus on waivers and determine when they are appropriate. As a preview to the presentation, this article will address a few title insurance litigation conflict matters that arose in the “insurer v. insured” and the “simultaneous representation” areas.

A conflict of interest arose between a title insurer and its insured from the insured’s need for a quick resolution of a title challenge. See 69th St. & 2nd Ave. Garage Assn., LP v. Ticor Title Guar. Co., 207 A.D.2d 225 (1st Dep’t 1995). In 69th St., shareholders and unit owners wanted a quick resolution regarding a garage property held as a combination of condominium, cooperative, and fee simple ownership. The insurer and insured both had an interest of vigorously defending title, but the insured sought a quick resolution that would keep open the possibility of refinancing in order to retain customers and employees and to stay in business while the insurer felt that it could proceed leisurely. The First Department determined that a conflict of interest existed that would, in turn, allow the insured to obtain its own counsel of choice given the necessity for a quick resolution. Accordingly, the insured’s selection of counsel was upheld.

In Lawyers Title Ins. Corp. v. Bank of New York, No. 90-Civ-6529 (MBM), 1991 U.S. Dist. LEXIS 3997, 1991 WL 50267 (S.D.N.Y. Apr. 1, 1991), a motion was made to disqualify defendant’s counsel on the ground that he and his firm are de facto representatives of plaintiff title insurance company in a substantially related action, and became privy to confidential communications, including plaintiff’s strategies, with regard to issues involved in the lawsuit. Specifically, developer A negotiated a building loan and project loan from Bank of New York (“BONY”) to develop an area under the Queensboro Bridge. BONY, in turn, negotiated title insurance policies from plaintiff Lawyers Title. The lease between A and the City became void because the City had no authority to execute it. BONY notified the insurer that A was attacking the validity of the lease and that a ruling adverse to the validity of the lease would be adverse to the bank’s interest as the insured under the policies. The Court found that the title insurer’s motion for disqualification was unwarranted because counsel for BONY, although found and paid for by the title company, was counsel for the bank, not the title company. Accordingly, counsel could represent BONY in a subsequent declaratory judgment action brought by the title company.

Cases similar to 69th St. and Lawyers Title will be addressed during the upcoming CLE with the hope that our committee members will become more familiar in the conflicts arena. The forthcoming discussion among the Committee members should help lawyers decide when it can and cannot represent a party in litigation, and feel comfortable that they are making the correct ethical decision.

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and mortgage, which was signed by her husband alone.\(^7\) In this case, the subordination allowed the couple to take advantage of certain tax benefits. Both the Fourth Circuit and the lower court agreed that the wife ratified the subordination by signing the couple’s joint tax returns since it allowed her to benefit from considerable tax breaks attributable to the subordination.

At the core of the theory of tacit ratification is the idea that it would be unfair to allow a party to accept the benefit of a transaction with one hand, but later avoid their counter-obligation under the contract with the other.\(^8\) This notion of fairness is discussed at great length in the court’s holding in *Garrett v. Walker*. There, the court found that a husband ratified his wife’s mortgage of community property by filing suit years later, claiming ownership of half the property. In this case, the husband had not consented to either the purchase of the property, or to the granting of a mortgage encumbering the same. Later, when the wife attempted to sell the land, the husband filed a quiet title action, claiming ownership of half the property. While seeking to benefit from the purchase, the husband denied his share of any indebtedness for the purchase price. The Third Circuit held that to grant the husband’s request would “undermine the whole concept of ratification” since the husband would be allowed to reap the benefits of property ownership without being responsible for the mortgage payments.

Applying the rationale set forth in *Garrett*, it is easy to see how an argument for ratification forms from the fact scenario outlined at the beginning of this article. In that example, the home loan obtained by the man was used to purchase the couple’s home. Even though the wife did not sign the mortgage, or otherwise concur in the encumbrance of the property, she accepted the benefit of the loan which financed the purchase of the property on which she lived with her husband for a number of years. Thus, she ratified the mortgage through her actions. If we consider the fact that she lived on the property for several years without challenging the validity of the mortgage, this argument grows even stronger.

Although the theory of tacit ratification is generally recognized and accepted in most jurisdictions, a finding of ratification is extremely fact-intensive and will depend on the particular circumstances of each case. Thus, it is the title attorney’s job to carefully examine the non-concurring party’s actions both before and after the transaction to determine what facts best demonstrate that party’s knowledge and acquiescence of the obligation. One example might be found in a situation where the non-concurring party signed an agreement in the capacity of a witness.\(^9\) Although not technically consenting to the agreement, their signature on the face of the document shows knowledge of its existence and an intention not to object to the transaction. In fact, in Louisiana, spouses whose signatures appear in a juridical act are estopped from contesting the statements made by the other spouse in that act.\(^10\) Another example could result from the non-concurring party’s signature appearing on a separate document that references the original transaction. For example, in *Tri-State Bank and Trust v. Moore*, the Second Circuit held that a wife tacitly ratified her husband’s mortgage when several years later, she executed an act of sale that referred to the earlier mortgage.\(^11\) Yet another example might be found where a spouse or a co-owner personally makes payments on a relatively null mortgage since this would evidence both knowledge of the act and the non-concurring party’s willingness to accept the validity of the encumbrance.

For all the reasons outlined above, tacit ratification remains an essential tool in the title attorney’s belt. If the facts permit, this theory can allow a procedurally defective act to be enforceable even after being challenged by the non-concurring party. Any title practitioner would be well served by examining what conduct constitutes ratification within their own jurisdiction, since they are likely to face a relatively null document at least once during their practice. \(^57\)
IT JUST GOT A LITTLE BIT…
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Take Away Points

In this author’s humble opinion, the Court of Appeals confused the concepts of “priority” and “perfection” in reaching its holding.

Secured creditors generally have “priority” (i.e., take first) over owners. By holding that judgment liens are valid even in the absence of an “information statement”, the Court of Appeals should have held that the judgment creditor’s lien interest was superior to the third-party owners’ interest. This outcome would be similar to what would happen if a third-party purchased a house without obtaining a release of the mortgage. Logically, the mortgage would still constitute a lien against the house notwithstanding the sale, and the secured creditor could foreclose out the third-party purchaser’s newly acquired interest in the home. The logic of the Court of Appeals’ decision should have led to the same result as to the judgment lien.

The concept of “perfection,” however, deals with the procedure of making a lien enforceable against third-parties. Here, the holding concludes that the judgment lien was not enforceable (i.e., “perfected”) against the third-party purchaser’s interests. Thus, the Court of Appeals really decided the case based on the lack of “perfection” of the judgment lien, as opposed to the relative “priority” of the lien interest versus ownership interest. Indeed, even junior liens can be foreclosed, so the ruling (which prevents the judgment creditor from foreclosing) is actually based on a “perfection” type analysis.

At the end of the day, Lewis is a “bad-facts” case, where one innocent party was going to lose no matter what. Either the judgment creditor would win and take the property away from the unsuspecting third-party purchasers, or the third-parties would win and deprive the judgment creditor of a means of satisfying the judgment. Both outcomes present their own policy considerations, and the Court of Appeals cannot be faulted for siding with the third-party owner. They can be critiqued, however, for applying a seemingly flawed analysis to reach that result.

CALIFORNIA OPINION…
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stated that distinguishing between defending an action and prosecuting one would deny a tripartite attorney-client relationship from ever forming in many situations in which a title insurer takes action to protect its insured’s title. If a tripartite attorney-client relationship did not arise in such a situation, the title insurer would be unable to communicate with counsel retained to represent the insured without the risk of being forced to disclose confidential or privileged information. Bank of America, at 1093. Thus, the Court held that a tripartite attorney-client relationship arises when a title insurer retains counsel to prosecute an action on behalf of the insured pursuant to the title policy. Bank of America, at 1083.

The rule of law laid down by the Bank of America decision would appear plain to many in the title insurance industry. However, the lack of authority on even the most obvious points often results in unnecessary litigation and bad rulings. The Bank of America decision settles the law on the issue and protects the confidentiality of communications between title insurers, their retained counsel and their insureds.
## 2015 - 2016 TIPS CALENDAR

### April 2015
- **18-20** U.S. Supreme Court Admissions Weekend  
  Sofitel Hotel  
  Contact: Janet Hummons – 312/988-5656  
  Washington, DC
- **29-5/3** TIPS Section Spring CLE Conference  
  Ritz-Carlton, Philadelphia  
  Contact: Felisha A. Stewart – 312/988-5672  
  Philadelphia, PA  
  Speaker Contact: Donald Quarles – 312/988-5708

### May 2015
- **6-8** FSLC Spring Workshop  
  Estancia LaJolla Hotel  
  Contact: Donald Quarles – 312/988-5708  
  LaJolla, CA
- **7-9** Property Insurance Spring CLE Meeting  
  JW Marriott Hill Country  
  Contact: Ninah F. Moore – 312/988-5498  
  San Antonio, TX

### June 2015
- **11-15** ABA 2015 London Sessions  
  Grosvenor House  
  Registration information: americanbar.org  
  Park Lane London, UK

### July 2015
- **30-8/3** 2015 ABA Annual Meeting  
  Swissotel  
  Contact: Felisha A. Stewart – 312/988-5672  
  Chicago, IL  
  Speaker Contact: Donald Quarles – 312/988-5708

### October 2015
- **14-18** TIPS Fall Leadership Meeting  
  Westin Kierland Resort  
  Scottsdale, AZ
- **22-23** 2015 Aviation Litigation National Program  
  Ritz Carlton Hotel  
  Washington, DC

### November 2015
- **4-6** 2015 FSLC & FLA Fall Meeting  
  Liaison Capitol Hill  
  Washington, DC

### January 2016
- **20-22** Fidelity & Surety Committee Midwinter Meeting  
  Waldorf Astoria Hotel, New York, NY

### February 2016
- **3-9** ABA Midyear Meeting  
  Manchester Grand Hyatt  
  San Diego, CA