Randolph's Top Ten Little Noticed Real Estate Law Developments, January, 2010

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Speaker's Outline

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POOF!! NOW THERE'S AN EASEMENT; NOW THERE AIN'T: In the absence of a true implied easement, California court grants equitable easement to landlocked property owners. ***Linthicum v. Butterfield, 95 Cal. Rptr. 3d 538 (Ca. Ct. App. 2009); St. James Village, Inc. v. Cunningham, 210 P.3d 190 (Nev. 2009)***(adopts Restatment "judicial modification" position***) McGoey v. Brace, --- N.E.2d ----, 2009 WL 3351035 (Ill. Ct. App. Oct. 16, 2009)*** (*semble);* **: *Stonier v. Kronenberger, 230 Or. App. 11, 214 P.3d 41 (Or. App., 2009)*** (Oregon court more protective of granted easement, rejects modification, abandonment and prescriptive blockage theories).

BROKERS; PAY ME NOW *AND* PAY ME LATER: To incur liability to pay leasing commissions following its purchase of leased property, a buyer must have affirmatively assumed its seller's obligation to pay the commissions. Whether such assumption has occurred depends

upon whether: (1) there is a clear separate promise or (2) the entire record, taken as a whole, signals that the buyer agreed to assume the obligation despite the absence of a separate promise to do so. ***Pagano Company v. 48 South Franklin Turnpike, LLC, --- A.2d ----, 2009 WL 578563 (N.J. 2009)***

NO FORGIVENESS FOR "BAD BOYS" - EVEN WHEN NO HARM: Once a Non-Recourse Carve-Out is triggered, it doesn't matter that is cured or that its occurrence in the first place had no effect on the lender; the borrower and each guarantor otherwise protected from liability for the borrowed amount become liable for the entire outstanding loan; and the amount thus collectable will not be characterized as liquidated damages. ***CSFB 2001-CP-4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC, A-6307-07T2, 2009 WL 2431530. (N.J. Super. App. Div. 2009); August 11, 2009***

WHAT?? THE GUARANTOR GOT OFF??!! A guarantor of a lease is not obligated under a purported "extension" of such lease where the lease extension actually amounts to a new lease between the initial parties. ***Lo-Ho LLC v. Batista, 881 N.Y.S.2d 33 (A.D. 1 Dept. 2009). Fairway Mortgage Solutions, Inc. v. Locust Gardens, 988 So.2d 678 (Fl. App. 4th Dist. 2008); July 30, 2008.*** If a lease is intended to make the person signing on behalf of the tenant personally liable for the tenant's obligations, the lease must say so directly. Courts will not impose such liability just because the lease names the signatory as a guarantor without more.

INSTEAD OF DEFENDING YOUR TITLE CLAIM - HERE'S YOUR $10 IN DAMAGES: Although insurer may avoid duty to defend by tendering insured's actual damages to insured, even if they are less than the total amount of insurance, policy language is vague as to how that amount is to be determined. ***Fleishour v. Stewart Title Guaranty Co., 2009 Westlaw 2151154 (E.D. Mo. 7/16/09)***; *First American Title Insurance Co. v. Grafton Partners, LLC.*, 2009 Westlaw 792263 (3/20/09) (refusing to permit settlement for less than policy amount in order to avoid defense.)

SALE AGREEMENTS; CAN YOU "WAIVE" YOURSELF OUT OF A LIE? VENDOR/PURCHASER; MISREPRESENTATION; DISCLAIMERS: Broker and Seller may be liable for affirmative misrepresentations as to size of house notwithstanding disclaimers contained in sale agreement that state that there are no warranties by Broker as to size and that Seller or Buyer will hold Broker harmless with respect to defects, and notwithstanding acknowledgment at closing that Buyer had either inspected or waived inspection. ***Bowman v. Presley, 212 P.3d 1210 (Okla., 2009***)

OH WOE, MERS, OH WOE!! *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619 (Mo. Ct. App. 2009) (Because MERS did not own a secured note and did not have the lender's authority to transfer it, MERS could not transfer the deed of trust that secured it.); *Landmark National Bank v. Kesler*, 192 P.3d 177 (Kan. Ct. App. 2009) (MERS is not a necessary party to a foreclosure on a senior mortgage, because it has no property or ownership rights.). *Mortgage Electronic Registration System, Inc. v. Southwest Homes of Arkansas*, No. 08-1299, 2009 WL 723182 (Ark. Mar. 19, 2009), *rehearing denied*, Apr. 23, 2009 (Though named as the beneficiary of a deed of trust, MERS is not the beneficiary, has no interest in the secured land, and is not a

necessary party to a foreclosure action.); *But compare: Jackson v. Mortgage Electronic Registration Systems,* No. A08-397, 2009 WL 2461257 (Mn. Aug. 13, 2009). A Minnesota statute provides that, before a nonjudicial foreclosure, the mortgage and all mortgage assignments must be recorded. In this case of first impression, the Minnesota Supreme Court held that MERS still owns the legal title to a mortgage after the note it secures has been assigned. Therefore, MERS can foreclose the mortgage without recording any mortgage assignments.

"HELL OR HIGH WATER??" - HELL! ***Reliastar Life Insurance Company of New York v. Home Depot U.S.A., Inc., 570 F.3d 513 (2d Cir. 2009).*** Tenant may assert constructive eviction claim against landlord's mortgagee, rents assignee based upon defects caused by assignor landlord notwithstanding UCC 9-4039(c), tenant's estoppel certificate or "hell or high water" clause in the recognition agreement.

I'M SUBORDINATED BY ***HOW MUCH??!!! Yellowstone Mountain Club, LLC v. Credit Suisse, 2009 WL 1664449****, Bankr. L. Rep. P 81,522, Bkrtcy.D.Mont., June 11, 2009 (NO. ADV.09-00014, 08-61570-11).* $375 Million secured first lien lender subordinated by court to unsecured lender claims as a consequence of secured lender's "predatory lending" conduct in accepting inflated appraisal of property to support huge commercial securitized loan.

THE ECONOMY MADE ME DO IT - THE ECONOMIC CRISIS AS *FORCE MAJEURE: Hoosier Energy Rural Electric Cooperative, Inc., Plaintiff, v. John Hancock Life Insurance Company, Etc., 588 F. Supp. 2d 919 (D.S.D. Ind. 2008)*, aff'd on other grounds but criticized by *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.,* 582 F.3d 721 (7th Cir.(Ind.) Sep 17, 2009) Commercial creditor enjoined from pursuing remedies because debtor's non performance excused by "temporary financial impracticability caused by credit crisis. A New York lawyer's list of cases that do not provide for financial exigency as an excuse for default includes *Innomed Labs, LLC v. Alza Corp.*, No.01 Civ. 2763, 2001 WL 406211 (S.D.N.Y. Apr.19, 2001); *Monolith Portland Cement Co. v. Douglas Oil Co. of Cal*., 303 F.2d 176, 180 (9th Cir.1962); *Kennedy & Mitchell, Inc. v. Internorth,* Inc., 86 Civ. 404, 1989 WL 433016 (N.D. Okla. Apr. 10, 1989); . *Travel Wizard v. Clipper Cruise Lines,* No. 06 Civ. 2074, 2007 WL 29332 (S.D.N.Y. Jan. 2007)

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