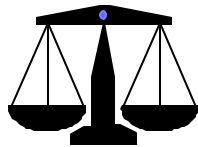


REAL PROPERTY SECTION NEWS

Utah State Bar Real Property Section

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October 1999



Letter from the Chair

I am honored to act as Chairman of the Real Property Section for this millennium year. Our membership continues to grow, and this year is at 503. Welcome to the activities the section has planned as we move into the 21st century!

We are pleased that Blake Heiner has joined the leadership as Treasurer and look forward to working with him in the coming year. At the same time, we will miss Scott Sabey's guidance as immediate past chair and thank him once again for his contributions to the section. As you all know, he initiated the upcoming Thomas and Backman treatise on Utah Real Property Law which we anticipate will be published later this month. We hope you will all take advantage of ordering this text at a discount of 30% off the retail price. The order form is included with this newsletter.

In addition to the section's regular representation on various bar committees during 1999, we have been active in other projects. Larry Moore, now secretary of the section, arranged a three hour real property seminar for new lawyers in February. At our annual meeting in 1999, the section awarded its second annual Distinguished Real Property Practitioner of the Year award to George D. Melling of Fabian and Clendenin. We have received rave reviews on many of the

luncheon presentations from the last year and the presentation by Nick Colessides and John Martinez at the annual bar meeting in Sun Valley was especially well done. The section also co-sponsored the Private Property and Public Good seminar on October 6, 1999.

During the coming year we plan to get the Real Property Section website up and running. If you have any interest in working on the website please give me a call. We could use some help. The section is also frequently asked for volunteers for pro bono service. Please let any of the leaders know if you are interested in pro bono work, and we will pass your name along. And the leadership always welcomes input from section members as part of our input to the Governmental Affairs Committee.

Many thanks to all of you for your participation in section activities and continuing input as to suggested topics and events. Special thanks to all of you who have given presentations. As leaders of the section, we are anxious to receive your comments or concerns. Please give us a call at the numbers listed above. Most of all, please join us at the events we have planned for the coming year.

Diane Banks,
Chair



Scheduled Meetings

You may want to put the upcoming section meeting dates on your calendar:

DATE	TOPIC
October 21	Mechanic's Liens
November 18	Title Issues
December	No Meeting
January 20	Sale of Water Rights
February 17	Easements
March 16	Subdivisions
April 20	Section Annual Meeting Supreme Court Update Appellate Court Update Legislative Update Topic of Interest (Utah Law & Justice Center)
May 18	To Be Determined
July 12-15	Utah State Bar Annual Meeting (Del Coronado, San Diego)

Summary of Utah Real Property Law Update

Attached are order forms for the newly updated Summary of Utah Real Property Law. Section members ordering now will receive a 30% discount off the list price. The Section has taken an active role in encouraging the updating of this often used reference. Professors David A. Thomas and James H. Backman, at BYU, have taken on the project of rewriting the 1978 Summary of Utah Real Property Law reference book. They divided the chapters between them, and over the course of the last two years and have rewritten each of the chapters, and included some new chapters. The treatise itself is approximately 1,000 pages, not including tables indexes or cases.

Conference on Private Property and the Public Good

On October 6, 1999 the Real Property Section co-sponsored a day long conference on issues related to achieving a balance in Utah between private property rights and the public good. The conference was at Cavanaugh's Olympus Hotel, Salt Lake City, and provided seven CLE credits.

Pro Bono Opportunity

Low Maintenance Pro Bono: Possession Bond Project. Give two hours a month and make a real difference in low-income families' lives. Utah Legal Services' Possession Bond Project needs attorney volunteers to cover one two-hour shift once a month (as your schedule permits) on the possession bond calendar at Third District Court in Salt Lake. Volunteers receive a free one-hour CLE training to prepare them for participation in the project and user-friendly materials. Times available for volunteering are 1:30-3:30 p.m. Mondays, Wednesdays and Fridays. Possession bonds are a critical part of the landlord-tenant eviction process. Representation at this stage often helps poor families stay together and avoid the devastating costs of eviction. No prior experience necessary; your involvement in the case ends at the end of your shift. Please call Margaret Ganyo at 328-8891, ext. 326 to learn more. *Thank you*

Legislation

The Section leadership is contacted each year by the Governmental Affairs Committee at the Bar to review any legislation involving real property. The Section makes recommendations to the Committee which in turn may take a position on behalf of the Bar. If there is a strong position

for or against a bill, the Section will recommend accordingly, but most often there are potentially opposing view points among members of the Section or the issues are not of sufficient significance for a recommendation of a position either way. If you are in a position to assist in reviewing proposed legislation on behalf of the Section, or if you have any proposed legislation or wish to see a change to present legislation as it relates to real property, please contact Vice Chair Read Hellewell who serves on the Governmental Affairs Committee.

Section Annual Meeting

At the Real Property Section Annual meeting on April 20, 2000, the Section will make an award to the Distinguished Real Property Practitioner for 1999. This award was initiated in 1998 and promises throughout the years to honor the many fine real property lawyers who have contributed to the development of the practice of real property law in the state of Utah. Please submit all nominations by March 15, 2000. Nominations can be submitted to any of the section officers.

The Section will also elect a new Treasurer at the Annual Meeting on April 20, 1997. That person will serve as Treasurer for 2000-2001 and serve in successive years as Secretary, Vice Chair and eventually Chair in 2003. Please give serious thought to nominations for this position. Again, nominations can be made by submitting a name to any section officer before April 1, 2000.



The Double Contract Rears Its Head Again

(by Ted Boyer, Director, Division of Real Estate – Utah Department of Commerce)

The Division of Real Estate is once again receiving numerous complaints about the use of double contracts in real estate transactions. Perhaps it is a reflection of market conditions or perhaps this old device has been rediscovered.

In classic double contracting, two separate REPC's or purchase agreements are used for a single transaction. One REPC is disclosed to the lender and the other, which contains the actual terms of the transaction, is kept secretly between the buyer and seller. Sometimes the second contract is in the form of a side agreement or addendum to the REPC which is concealed from the lender.

The purpose of the scheme is usually to trick the lender into loaning 100% or more of the purchase price. Using an inflated appraisal, the buyer offers to purchase the property for more than the list price. The inflated offer typically shows a down payment which does not exist or which is refunded to the buyer immediately after closing. The buyer then obtains financing for 80% or 90% of the inflated price, which is in reality, 100% or more of the actual purchase. The Seller ends up with the original sales price paid from the buyer's loan proceeds, the buyer ends up with the property without putting any money down, the appraiser receives a fee for the inflated appraisal, and the lender ends up with a 100% loan to value (or greater) loan to a buyer who has invested nothing and has perpetrated a fraud.

We are now seeing interesting variations on this age-old scheme. For example, an offer is presented at more than the list price with the seller to carry back a portion of the sales price as seller financing, secured by a second deed of

trust. In a separate agreement, the seller agrees to forgive the second trust deed and deliver a reconveyance after closing or the second deed of trust is destroyed after closing without ever being recorded.

Another even more diabolical variation goes like this. An offer is made at more than asking price with a sizable down payment (say 25%) to be made in the form of tradable securities or other valuable personal property. The buyer retains an option to repurchase the securities or personal property after closing for a nominal amount, leaving the lender with a 100% or more loan to value.

We have seen another variation which I call the "sweat-less equity" program. The so-called "sweat equity" is shown as a credit on the offer and on the closing statement but the labor is not contributed until after closing, if it is provided at all, again resulting in a 100% or greater loan to value.

Did I forget to mention that all of the loan fees and closing costs are built into the loan amount?

Occasionally a purchase money mortgage is characterized as a refinance or a "purchase/refinance" to avoid payment of private mortgage insurance or to avoid other restrictions. A complicit lender, usually a mortgage broker rather than a financial institution, initiates a loan application prior to closing in the name of the seller and buyer. When the loan closes, the seller mysteriously does not appear on any of the loan documents. The loan is then sold in the secondary market to an unsuspecting purchaser who thinks he has purchased the refinance of a seasoned performing loan with a credit-worthy borrower and the lender has required no private mortgage insurance. The problem with this scenario is that it is fraudulent and misleading. In common usage and under federal law, refinancing means a transaction in which an existing obligation that

was subject to a secured lien on residential real property is satisfied and replaced by a new obligation undertaken by the same borrower.

One might ask, "What is wrong with that?" The buyer gets into a home; the seller has sold his home and the real estate agent, appraiser and mortgage broker all earn fees. Well, there are numerous problems and there is plenty of blame to go around.

The appraiser who has prepared the inflated appraisal has undoubtedly violated the Uniform Standards Of Professional Appraisal Practice ("USPAP") which govern appraisal work in Utah and throughout the United States, thus placing his or her license in jeopardy.

The agent or broker who suggests or utilizes these schemes is, at a minimum, in violation of Rule R162-6-1 which prohibits the use of double contracts; is in breach of fiduciary duties under Rule R162-6.2; and is in violation of Utah Code "61-2-11" for making a substantial misrepresentation, for making false promises, for being unworthy or incompetent and for being unprofessional. The actions of the agent or broker could also be the basis for a claim for civil damages.

Let us turn for a moment to federal law. While the Division does not enforce federal law, a brief review is instructive. First, the word "lender" means the person or entity who is actually providing the funding for the loan transaction. In the above situations this is usually the purchaser of the loan immediately after or simultaneously with the closing. It is this purchaser of the loan who has been deceived and who stands to lose on a loan that should never have been made. It is also possible the buyer may suffer financially if a job is lost or buyer is transferred and cannot sell the property for a high enough price to cover the 100% or greater mortgage, closing costs and commissions. If the loan becomes a federally

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related transaction by being sold to an insured institution or by other means, federal law applies.

The Real Estate Settlement Procedures Act requires that all material terms be disclosed. There can be no side deals in a federally related transaction. Furthermore, whoever makes any false statement or report or willfully overvalues any land property or security for the purpose of influencing in any way the action of a federal agency or a federally insured institution such as the FDIC, the Office of Thrift Supervision, the Resolution Trust Corporation, etc. is subject to a fine of not more than \$1,000,000.00 or a sentence of thirty years in prison, or both. This is serious business. (See 18 United States Code ?? 1007-1014) For your information, we have learned that the Federal Bureau of Investigation has assigned two special agents to investigate loan fraud in the State of Utah.

The old adage about a transaction which looks too good to be true usually is too good to be true is still good advice. Lets be honest and straightforward in our business dealings and in the way we treat our clients.

