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BANKING LAW ALERT

Winter 2009 Issue

I. Foreclosure Notice Requirements

Last year, we sent out a Banking Alert and then followed up with a subsequent Banking Alert that addressed the time period in which a notice to a debtor must be sent when the property that was being foreclosed upon was different than the debtor's residential address. Due to the potential for different interpretations of this notice statute, we requested a legal opinion from the Tennessee Attorney General on this issue.

The Tennessee Attorney General issued an opinion that there were two different time periods for the notice of sale. The opinion stated that if the debtor resided at the property to be foreclosed, then the notice must be sent at least twenty (20) days before the sale. If the debtor does not reside at the property to be foreclosed, then the opinion stated that the notice must be sent to the debtor's last known residence at least thirty (30) days prior to the date of publication, or at least fifty (50) days before the sale. However, in a rare turn of events, the Attorney General's Office vacated its opinion a day later. It is believed that this was a result of the negative feedback from lenders and attorneys across the state. Unfortunately, the Tennessee Attorney General's Office failed to advise why it pulled its opinion and what the proper interpretation of this foreclosure statute is at this time.

Thus, we have since requested a second opinion from the Tennessee Attorney General's Office. It is possible that the Tennessee Legislature will take action to clarify the statute prior to an official opinion being issued by the Tennessee Attorney General. In any event, we anticipate, and we are still advising our clients, that the notice of sale will have to be provided to the debtor, even if the debtor does not reside at the property to be foreclosed upon, at least twenty (20) days prior to the date of sale. Once we do have a final resolution on this issue, then we will be sure to promptly send an update in a future newsletter.

II. Notice to Insurance Company of Foreclosure

Last spring, we sent you an article regarding a Tennessee case, U.S. Bank v. Tennessee Farmers Mutual Insurance Company. In this case, the Tennessee Court of Appeals decided the commencement of foreclosure proceedings by a lender was an "increase in hazard" under the standard mortgage clause and also pursuant to a Tennessee statute. The standard mortgage clause in the fire insurance policy required that the lender notify the insurance company of any "increase in hazard." The practical problem with this rule is that when the lender notifies the insurance company of a default and pending foreclosure sale, the insurance will usually be cancelled.

In this case, once the homeowner defaulted on her loan, the lender initiated foreclosure proceedings, but did not give any notice to the insurance company. Before the foreclosure was completed, the house was destroyed by fire. The lender attempted to collect under the fire insurance policy, but the insurance company refused to pay. The insurance company's position was that the lender did not strictly adhere to the language in the policy and that notice of the foreclosure was required by a Tennessee statute.

The trial court ruled for the lender. On December 21, 2007, the Court of Appeals reversed the lower court and ruled for the insurance company.

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The latest development is that on January 29, 2009, the Tennessee Supreme Court reversed the Court of Appeals' ruling. The Supreme Court did not find that the plain meaning of the language in the standard mortgage clause, regarding "increase in hazard," required notice to the insurance company when foreclosure proceedings were initiated. Since the insurance policy did not specifically state that notice had to be given, the Supreme Court reasoned that it was not going to rewrite the policy for the parties. Also, the Supreme Court did not believe that the mere commencement of a foreclosure automatically constituted an "increase in hazard."

The Supreme Court also stated that the Tennessee statute does not specifically list commencement of a foreclosure as an "increase in hazard." If the Tennessee legislature wants to require notice to be provided to insurance companies when foreclosure proceedings are started, then the Supreme Court reasoned that the legislature could make such a requirement by specifically listing the same in the statute. Look for future legislative action or changes in policy language by insurance companies as a result of this decision. However, for now, notice to an insurance company of a foreclosure is not required.

Please contact Laura Williams, Chuck Exum, or Adam Crider with our Business Group for any questions regarding these foreclosure and notice issues.

Introducing the Healthcare Practice Group

The Healthcare Practice Group of Rainey, Kizer, Reviere & Bell, P.L.C., provides healthcare advice to broad segments of the healthcare marketplace, including physicians, physician clinics, hospitals and hospital systems, dentists and dental practices, nursing homes, pharmacies, nurse practitioner clinics, physician and medical billing companies, physician consulting companies, physician practice management companies, ambulatory surgery centers, medical supply and durable medical equipment companies, and medical device companies.

The Firm's Healthcare Practice Group handles transactions and counsels clients on matters including:

- Negotiating and Drafting Contracts Among Healthcare Providers
- Acquisitions, Joint Ventures, and Mergers
- New Practice Formations
- Stark Law, Anti-Kickback Law, False Claims Act, HIPAA
- Billing/Coding, Medicare/Medicaid Compliance
- Responding to Medicare/Medicaid/Payor Investigations
- Corporate Practice of Medicine and Fee-Splitting Prohibitions
- Non-Competes
- Non-Profit Organization Matters
- Real Estate Matters involving Healthcare Entities
- Certificate of Need Issues

Members of the Healthcare Practice Group are Angela Youngberg, William Bell, Mary Petrinjak, and Todd Siroky.

Rainey, Kizer, Reviere & Bell, P.L.C., Announces Two New Partners

The Firm is pleased to announce that Michelle Greenway Sellers and Keely N. Wilson have been named partner.

Michelle represents physicians, nurses, hospitals, and clinics in medical malpractice litigation. In addition, she practices in the areas of professional malpractice and automobile accident litigation.

Keely's practice focuses in the areas of tort litigation. Specifically, she deals with arson fraud from a defense perspective, automobile liability litigation, premises liability, and insurance coverage.