

TITLE ISSUES

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UNDERWRITING COURT ORDERS AND APPEALS:

A GUIDE FOR THE ATTORNEY AND TITLE INSURER

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Issues concerning civil litigation are a constant in the life of the real estate attorney and the title insurer. Although some matters can be fairly simple and straightforward, others can be complex and even daunting. Court orders and appeals surely fall in the latter category. Indeed, two commentators did not exaggerate when they described one issue concerning appeals as “A Deadly Trap for the Unwary.”ⁱ This article is intended to guide the real estate attorney and the title insurer as they cautiously navigate the labyrinth of pending proceedings, court orders, and appeals.

Supreme Court Rule 304(a)

Example: Seller hires Broker to help him find a buyer for his house. The home is fairly unique in that there is an elaborate machine shop in a separate outbuilding. Broker spends considerable time looking for a buyer and eventually finds one. As the house is rather expensive, Seller and Buyer enter into an installment agreement to purchase the home, and a memorandum of the agreement is recorded. Seller refuses to pay Broker for his services, and Broker sues Seller. Broker’s complaint includes two claims for relief. The first is for breach of contract; the second is for the enforcement of a commercial real estate broker’s lien.ⁱⁱ After Broker files her complaint, she records both her lien and lis pendens against the property.ⁱⁱⁱ The two documents are recorded after the recording date of the memorandum of installment contract. The circuit court eventually issues a one-sentence order declaring that “the commercial broker’s lien of Broker is subordinate to the lien of the installment agreement executed by and between Seller and Buyer.” Five weeks later, the title examiner is asked to issue an owner’s title policy insuring buyer’s contract purchaser’s interest in the land. The examiner is asked to date the policy after the recording date of the broker’s lien and lis pendens, thereby covering the most recent installment payment. He is also asked to waive the lien and court proceeding from the title policy. The examiner vaguely remembers that orders can be waived if there is no appeal filed within thirty days. Can he now safely waive the lien and proceeding?

No, the examiner should not waive the lien and proceeding from the title policy. See Supreme Court Rule 304(a), which states that

if multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both. . . . In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties.

When the court issues an order appropriately containing the so-called “magic language” of Rule 304(a) (no just reason . . .), the court starts the judicial clock running for a thirty-day appeal period.^{iv} But the one-sentence order in the Example does not contain the magic language. Thus, there is no thirty-day appeal period at all. The opposing party could file a motion to reconsider or other challenge to the order at any time. The court would be free to reexamine the facts and issue a revised order.

Note, however, that Rule 304(a) is applicable to multiple parties or multiple claims for relief. If Broker had sued solely to enforce her broker’s lien, the court’s order would have been a final order that would have been subject to the thirty-day appeal period. (See summary below.)^v

Example: Adam lives in a home with a large yard. Adam hires Ben to mow his grass for the summer while he is away in Europe. When Adam comes back, he refuses to pay Ben. Ben files a cause of action for enforcement of an “equitable lien” and records a lis pendens.^{vi} Meanwhile, Adam contracts to sell his home to Charlene. The court issues an order of summary judgment in favor of Adam, dismissing the entire cause of action “with prejudice.”^{vii} Two months later, Adam and Charlene sit down at the closing table. During the closing the title underwriter is asked to waive the lis pendens from the title commitment. Can she do this?

Yes, the underwriter may be able to waive the lis pendens. If an order disposes of all the issues, then it is by definition an appealable final order, even if it does not contain the 304(a) language “that there is no just reason for delaying either enforcement or appeal or both.” In fact, this order is almost overkill in terms of appeal. It is an order that disposes of all the issues, and it is with prejudice, which means that the plaintiff is barred from bringing another action on the same claim. It is clearly a final order for appeal purposes.^{viii}

Before the underwriter can waive the lis pendens, she must first check to see if the order has been appealed. If thirty days have elapsed from the date of the entry of the order and no appeal has been taken, the order may be waived. But this does not mean that the underwriter merely has to wait thirty days, date down the title file, and, finding nothing, waive the exception. First, there is the Recorder’s Office or title plant “gap” problem. That is, there is a gap of days, weeks, and possibly even months from the date the documents are recorded at the Recorder’s Office to the date when they are posted in the appropriate indices and available for examination by a title searcher. Second, remember that the notice of appeal is filed in the court file and not recorded at the Recorder’s Office. The title company must bring down its search at the circuit clerk’s office in the courthouse to cover the possible filing of a notice of appeal within the thirty-day period.

When an appeal is filed, notice has to be given to all the parties. Both Adam and Charlene offer to give the title company written statements, indicating that they have received no notice of any appeal. The underwriter may rely on these statements and waive the lis pendens. The underwriter, however, must remember that on occasion an appellant may neglect to give notice to a party upon filing an appeal. It is usually better to check the court file and not just rely on a statement from the parties or their attorneys indicating that no one has received notice of an appeal within the thirty day period.

What if the court dismissed the above cause of action “without prejudice?” Because an order of dismissal without prejudice would allow the plaintiff to file another suit concerning the same claim, such an order is ordinarily not deemed final for purposes of appeal. Realistically, though, it is more likely that the plaintiff would simply file a new complaint in the same proceeding and not appeal or prepare and file an entirely new lawsuit. Consequently, if in the above Example, the order entered is

a dismissal without prejudice, the title company should not waive the lis pendens.^{ix} The case is not resolved, and the title risk remains.

Example: David owns a home. David wants to sell his home to Edward, and he hires Frank to remove trash from his property. After Frank finishes, David refuses to pay him. Frank sues David on three counts: breach of contract, unjust enrichment, and foreclosure of a mechanics lien.^x Frank prepares his lien and lis pendens and records them against David's home. The title examiner is asked to prepare a title commitment for the property, and he shows both items in Schedule B. Later, when the examiner is told that the sale will close soon, he goes to the courthouse to check the court case. He discovers that the court has issued an order of summary judgment six weeks ago, dismissing only count three. The order does not contain the Supreme Court Rule 304(a) "no just reason for delaying appeal" language. At the closing David's attorney tells the closer that she should be able to waive the mechanics lien from the title commitment because the court has ruled as to the "lien portion" of the cause of action and the order was not appealed within the thirty-day period. Can the title company waive the lien?

No, the title company cannot waive the lien. Even though the court's order was one of summary judgment, the order disposed of only one of Frank's three causes of action. Because this order did not address all three counts of Frank's complaint, it is not a final order for appeal purposes. The order can be challenged at any time, not just within the thirty days after it was entered. An order that does not dispose of all legal issues must contain the Supreme Court Rule 304(a) magic language in order to be a final order for appeal purposes. Then, after thirty days, it is non-appealable.

Summary: Any order that does not address all of the issues raised in a complaint is a final order that starts the thirty day appeal period if it contains the Supreme Court Rule 304(a) magic language. Otherwise, an order that does not contain the Rule 304(a) magic language must be dispositive of all the issues raised in the complaint to be a final order that triggers the appeal period.

Agreed Order of Dismissal

Example: George contracts to sell his home to Harold. But Ida sues George a week before closing, arguing that she has a prior contract with George to purchase the home. Ida records a lis pendens against the land. She delivers a copy of the lis pendens to every title company in town. At closing, however, the closer is given an *agreed order* signed by both the attorneys for George and Ida. The order indicates that the cause of action is dismissed. Does the closer have to wait thirty days before she can close the transaction and waive the lis pendens from the title commitment?

No, she does not have to wait thirty days; the title company may waive the exception at the closing table. An agreed order is an order signed by all the parties to the litigation. Because both the plaintiff and the defendant agree to the dismissal of the case, the closer does not have to wait thirty days.

Supreme Court Rule 305

Example: The title company prepares a commitment for "necessary parties for mortgage foreclosure."^{xi} The attorney for the lender calls the title examiner and tells her that the court has issued an order, confirming the judicial sale of the land.^{xii} He also tells the examiner that the sheriff has just issued a sheriff's deed to the lender and that the lender will be conveying the land immediately to a third party purchaser. The closing is set for the following day. The examiner goes to the courthouse to examine the mortgage foreclosure file and discovers that the mortgagor has

appealed the circuit court's order of confirmation. The examiner returns to the office and amends the commitment by merely inserting the words "appeal filed" and the filing date after the Schedule B exception for the mortgage foreclosure proceeding. The following day, the closer begins to prepare for the closing. As he reviews the title commitment, he sees the revised exception. The examiner has not indicated how the appeal might be waived, if at all. What does the closer do? How can this exception be underwritten?

Supreme Court Rule 305 relates to the staying of the enforcement of a judgment pending an appeal. Specifically, see Supreme Court Rule 305(b) and 305(k):

(b) Except in cases [concerning the appeal of the termination of parental rights], on notice and motion, and an opportunity for opposing parties to be heard, the court may also stay the enforcement of any judgment, other than a judgment, or portion of a judgment, for money, or the enforcement, force and effect of appealable interlocutory orders or any other appealable judicial or administrative order. The stay shall be conditioned upon such terms as are just. A bond or other form of security may be required in any case, and shall be required to protect an appellee's interest in property.

(k) If a stay is not perfected within the time for filing the notice of appeal, or within any extension of time granted under subparagraph (c) of this rule, the reversal or modification of the judgment does not affect the right, title, or interest of any person who is not a party to the action in or to any real or personal property that is acquired after the judgment becomes final and before the judgment is stayed; nor shall the reversal or modification affect any right of any person who is not a party to the action under or by virtue of any certificate of sale issued pursuant to a sale based on the judgment and before the judgment is stayed.

In the Example, the title underwriter wants to be sure that there has been no *stay* of the order confirming the foreclosure sale. A "stay" is a judicial order, a temporary "halting" of the contemplated action. If a stay order is entered in the Example, the enforcement of the decision to confirm the sale is held in abeyance, pending the appeal. A stay can be filed in either the circuit court or the appellate court.

Rule 305(b) refers to a bond, but the underwriter does not have to be too concerned about the bond. The posting of a bond can be excused. The stay is the important item that the underwriter must consider.

Rule 305(k) refers to the "time for filing the notice of appeal." Rule 303(a) states that the notice of appeal must be filed with the clerk of the circuit court within thirty days after the entry of the final judgment appealed from, or within thirty days after the entry of the order disposing of the last pending post-judgment motion. Note, though, that the time for filing the notice of appeal may be extended by a motion made within the time for filing the notice of appeal. In this regard, see Rule 305(c).

What do these various provisions of the Supreme Court Rules mean to the title underwriter? Simply this: if there is an appeal filed but no stay requested or entered during the appeal period, then a later reversal of the judgment order does not affect the right, title, and interest of someone who acquired the land who was not a party to the original action. The underwriter does not have to wait until the expiration of the time for filing the notice of appeal before waiving the proceeding. Rule 305(k) indicates that a reversal or modification of the judgment or order does not affect the rights of a person

not a party to the action who acquires the property after the judgment or order becomes final but before the filing of a stay.^{xiii}

The underwriter must remember that the “if there is no stay, then reversal is okay” provisions of Rule 305 are only applicable to one who was not a party to the original action. Thus, these provisions would *not* be applicable to the foreclosing lender, as the lender was the plaintiff in the foreclosure proceeding. However, the provisions would be applicable to a third party purchaser at the judicial sale or a purchaser from the foreclosing lender.

Consider, then, a more appropriate title exception for a pending appeal than the one raised by the examiner:

Note: Appeal filed _____ in the appellate court, case number _____.

Pursuant to Supreme Court Rule 305(k), the above exception will be waived upon receipt of evidence that there has been no stay entered in either the trial court or the appellate court and upon the recording of a deed to a grantee that is not a party to this action.

What kind of evidence would the underwriter need in order to waive this exception? As noted above, the title company must check the court file to be sure that no stay has been entered in the proceeding. But if necessary, the underwriter might consider a letter from the attorney for the lender. A stay would require a hearing, and all attorneys would be notified of a pending hearing concerning a party's request for a stay. Therefore, as a last resort the underwriter could waive the exception for the appeal with a letter from one of the attorneys, stating that he or she has not received any notice of a hearing concerning a motion for a stay.

Title company personnel should remember that the use of Supreme Court Rule 305 is not limited to mortgage foreclosures.

Example: Jack claims an interest in Karen's home. Karen files a quiet title action in hopes of eliminating Jack's alleged interest. The court enters a final order that quiets title in favor of Karen. Jack appeals. Karen, tired of the litigation, now wants to sell her home and enters into a real estate sales contract with Larry. Assuming there is no stay entered in the proceeding, the title company can insure the sale from Karen to Larry and not worry that Larry will be evicted from the home by reason of a later reversal of the order.

As noted in the first paragraph of this article, appeals can be a deadly trap for the unwary. It is certainly true that to the uninitiated, court proceedings can be imposing, court orders can be daunting, and appeals can be intimidating. But they do not have to be. It is hoped that this article will be an effective map that can guide the attorney and the title company through the judicial proceeding maze and out of harm's way.

ⁱ W. Dudley McCarter and Christopher L. Kanzler, “Dismissal Without Prejudice: A Deadly Trap For the Unwary!,” *Journal of the Missouri Bar* (July-August 2000), online edition, www.mobar.org.

ⁱⁱ See 770 ILCS 15/1 *et. seq.*

ⁱⁱⁱ A *lis pendens* is a notice of pending litigation. Once recorded, it puts third parties on notice of the proceeding. See 735 ILCS 5/2-1901; *Town of Libertyville v. Moran*, 179 Ill.App.3d 880, 535 N.E.2d 82, 128 Ill. Dec. 868 (2d Dist. 1989).

^{iv} See Supreme Court Rule 303(a); generally speaking, the notice of appeal must be filed with the clerk of the circuit court within thirty days after the entry of the final judgment.

^v A final judgment or order is “a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit.” See *In Re Tiona W.*, 341 Ill.App.3d 615, 619, 793 N.E.2d 105, 109, 275 Ill. Dec. 625, 629 (1st Dist. 2003), citing *Towns v. Yellow Cab Co.*, 73 Ill.2d 113, 382 N.E.2d 1217, 22 Ill. Dec. 519 (1978).

^{vi} For a case concerning an equitable lien, see *First Bank of Roscoe v. Rinaldi*, 262 Ill.App.3d 179, 634 N.E.2d 1204, 199 Ill. Dec. 850 (2nd Dist. 1994).

^{vii} A court will issue an order of summary judgment when the pleadings, depositions, admissions, and affidavits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment in its favor as a matter of law. See 735 ILCS 5/2-1005(c).

^{viii} One can petition the court for relief from the enforcement of a judgment after thirty days have elapsed. See 735 ILCS 5/2-1401. However, unless the record affirmatively discloses a lack of jurisdiction, a vacation or modification of an order or judgment will not affect the right, title, or interest in or to any real estate that a person who is not a party to the original action acquires for value after the entry of the order or judgment but before the filing of the petition for relief.

^{ix} See *Flores v. Dugan*, 91 Ill.2d 108, 435 N.E.2d 480, 61 Ill. Dec. 783 (1982).

^x Those parties entitled to a mechanics lien are set forth in 770 ILCS 60/1.

^{xi} See 735 ILCS 5/15-1101 *et seq.*

^{xii} See 735 ILCS 5/15-1508.

^{xiii} See *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 759 N.E.2d 509, 259 Ill. Dec. 729 (2001). For an article discussing this case, see Carolyn Quinn, *Appeal Bonds and Illinois Supreme Court Rule 305*, 90 Ill. B.J. 199-202, 210 (April 2002). See also *Cosmopolitan National Bank of Chicago v. Nunez*, 265 Ill.App.3d 1012, 639 N.E.2d 636, 203 Ill.Dec. 316 (1st Dist. 1994).