Current Developments and Hot Tips

Mortgage Lending Institute of
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This paper is a collection of developments, cases and events which we think are relevant to lawyers who practice in the area of commercial real estate finance, transactions and development. Some are reports of new developments and some are reminders of law and practice that we think might be useful to you. We are certain that we have overlooked many developments that you would like to see covered, but we have picked those things to report which we think would be helpful to most of you and maybe even entertaining in some ways. We have tried not to step on the toes of the contributors to this seminar who so skillfully inform us of developments in Texas cases.

I. Agreements in electronic form are valid, but you have to prove up the contents and that might not be so easy….

A. Bujnoch v. Copano Energy

B. Aerotek v. Boyd

II. Developments in Bankruptcy Law – the Small Business Subchapter V within Chapter 11 and more

III. A Source of Perpetual Confusion – The Rule against Perpetuities Lives On and Applies to Modern Transactions

IV. CFIUS Developments – US Foreign Policy May Impact Texas Real Estate Transactions

V. The COVID Pandemic – Impacts Present and Future

A. Force Majeure Arguments About Rent Payments (Impact on Loans, Collateral and Bankruptcy Matters)

B. Lender and Borrower Issues Going Forward, Including Insurance.

C. Tenant Rent Payment and Eviction Relief

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I. Agreements in electronic form are valid, but you have to prove up the contents and that might not be so easy….

A. Bujnoch v. Copano Energy, et al

Last year we reported on Bujnoch v. Copano Energy at the Court of Appeals level. We reported that the case was on appeal to the Texas Supreme Court, and we predicted it would be affirmed. We were wrong.

Bujnoch v. Copano Energy LLC, 2017 WL 6616741 (Texas App – Corpus Christi, December 28, 2017) involves the impact of the Electronic Transactions Act on real estate transactions. The Bjunoch family owns property in Lavaca and DeWitt Counties in south Texas. In 2011 they granted a pipeline easement to Copano Energy. That document had a surveyed metes and bounds description of the easement and was recorded in the proper Deed Records. Some time later, Copano's Director of Right-of-Way contacted the family to request that the family sell Copano an easement for an additional 20 foot right-of-way for another pipeline parallel to and contiguous with the earlier easement. The negotiation over price took place between the family's attorney and the Copano executive in the form of an exchange of e-mails. The e-mails contained a sketch of the requested new easement showing it was adjacent and contiguous with the earlier easement. An agreement on price was made. But then a bigger pipeline company made a tender offer for Copano and the landowners started getting new and much lower price offers from different people within the Copano organization or its acquirer. The family lawyer e-mailed the executive he had been dealing with and received a return e-mail saying that "…our deal still stands." Some of the e-mails exchanged had the usual name and contact information kind of signature at the end.

When Copano was acquired, the new management did not close on the easement purchase that Copano had agreed to, and this lawsuit resulted. Copano said that the Statute of Frauds required a written agreement to bind a real estate deal and that there was none. The family cited the Electronic Transactions Act (Texas Business & Commerce Code, Chapter 322) and said that the exchange of e-mails satisfied the Statute of Frauds (Texas Business & Commerce Code Chapter 26). The Court of Appeals agreed, holding that:

1. An agreement can be made electronically by an exchange of e-mails and that agreement satisfies both the requirement that there be a "written" memo of the deal and that the memo be "signed".

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