

AVOIDING MALPRACTICE

Noted Chicago real estate attorney, Harold I. Levine, has agreed to run a regular column in the Fund Concept on suggestions he has for avoiding attorney malpractice. We hope that you find the articles helpful and we wish to thank Mr. Levine for his contribution. The following is the first such article.

HOW TO TURN DOWN A CASE

BY HAROLD I. LEVINE, ESQ.

A potential client consults you about a suit against a builder or developer based on a theory of express or implied warranty. You examine the facts carefully and tell the prospective client that based on your review of the facts you think he has no case. The prospective client goes to another lawyer who tells that prospective client that he has, in fact, an excellent case with the possibility of a large recovery; but that since he saw you his recovery is barred by the statute of limitations. He sues you for malpractice. How do you avoid this situation?

First, remember that every time you see a prospective or potential client, the attorney-client relationship may well exist. You may not think that the attorney-client relationship exists, but the potential client on the other side of the table has no doubt that it does and this can come back to haunt you unless you do the following:

Never let that potential client leave without following his visit up with a letter. In the above fact situation, the letter should state as follows:

1. That after the review and consideration, you are declining professional responsibility for the case.
2. That the statute of limitations or other relevant time period expires on a certain date (use the most restrictive statute).
3. That another attorney may reach a different conclusion or may wish to take the file and suggest that they seek such an additional opinion within the time allowed by the statute.

RULES FOR MEMBERS ISSUING POLICIES FOR PROPERTY SUBJECT TO I.R.C. § 2032A

Under certain conditions, real estate in a decedent's estate that consists of a family farm or a closely held business can be valued, for Federal Estate Tax purposes, on the basis of actual use rather than fair market value. However, an additional recapture tax is imposed if the property is no longer used for a qualified purpose or is transferred to someone other than a qualified heir. The potential liability for the recapture tax is secured by a lien imposed under Internal Revenue Code Section 6324B. 26 U.S.C. § 6324B.

Section 6324B(c)(1) incorporates the special rules of 6324A(d)(3) dealing with the priorities of the tax lien relative to certain other liens and encumbrances. That section provides that "Even though notice of a lien imposed by

this section has been filed . . . such lien shall not be valid . . . (c) as against any security interest set forth in paragraph (3) of Section 6323(c) (whether such security interest came into existence before or after tax lien filing)." Section 6323(c)(3) refers to a "real property construction or improvement financing agreement" and defines it as ". . . an agreement to make cash disbursements to finance—(i) the construction or improvement of real property, (ii) a contract to construct or improve real property, or (iii) the raising or harvesting of a farm crop or the raising of livestock or other animals."

Under this statutory analysis, therefore, the § 2032A lien will be subordinate to a mortgage lien arising before or after the filing of the § 2032A lien claim if the proceeds of the loan are used for one or more of the enumerated purposes. This statutory analysis is confirmed by IRS News Release 1823, dated June 2, 1977, which provides, in part:

Under Code Section 6324A(d)(3)(C) (relating to liens arising from extensions of time to pay tax in the case of decedents dying after 1976), this tax lien is not valid against financing agreements securing loans for construction or improvement of real property, raising or harvesting of farm crops, or raising livestock or other animals. This rule also applies to tax liens under Section 6324B(c) arising from election of the special valuation for farms and other closely held businesses.

Further, the rule is the same whether the financing agreements come into existence before or after the time the tax lien is filed. However, if the IRS files a notice that payment of a deferred amount has been accelerated, the tax lien has priority over subsequent financing agreements.

Fund members are frequently requested to insure mortgages to lenders in the situation where a § 2032A lien appears of record. This most typically involves the Federal Land Bank and the local Land Bank Association. Since these lenders generally require a first lien status, the Fund member must follow the procedure outlined to insure such mortgages as first liens.

The Fund member must require proof that the proceeds of the loan were or will be applied to one or more of the uses specified in Section 6323(c)(3). This will normally be supplied in the form of an affidavit by the borrower setting forth the use he or she intends to make of the loan proceeds. In addition, the affidavit must establish that the loan meets the IRS requirement that the loan proceeds be applied to the same property that is the subject of the § 2032A lien. The Fund member must verify with the lender that the loan was being made under the conditions that would give it priority over the § 2032A lien.

In order to more fully protect the Fund from loss, the member must obtain a personal undertaking from the borrower to insure over the § 2032A lien. The Fund member must ob-

tain financial statements from the borrower and examine the statements to determine whether or not the borrower has sufficient financial ability to hold the Fund harmless under the personal undertaking. In case of any doubt, submit this information to Fund Headquarters for examination.

In issuing the policy to the lender, do not waive the exception for the § 2032A lien. Rather, divide Schedule B into two parts. The first part will include all matters superior to the lien of the insured mortgage, e.g., general real estate taxes, prior easements, etc. The second part of Schedule B should list the § 2032A lien and all other matters subordinate to the lien of the insured mortgage. The second part must be prefaced by the following language:

SCHEDULE B PART II

In addition to the matters set forth in Part I of this Schedule, the title to the estate or interest described or referred to in Schedule A is subject to the following matters, but the Fund insures that such matters are subordinate to the lien or charge of the insured mortgage upon said estate or interest:

The description of the § 2032A lien claim must be typed in following the above language.

In addition to all of the procedures described in this article, the Fund member must contact Fund Headquarters each time he or she is requested to insure title to real estate which is subject to § 2032A liens. In this period of declining farm values and rising farm loan delinquencies, the risk involved in this type of insurance is increased. Accordingly, advance authority from a Fund staff attorney is a prerequisite to the issuance of the mortgage policy.

CORPORATE OFFICERS LIABLE FOR RETAILER'S TAX

The Illinois Supreme Court held that corporate officers were personally liable for failing to pay, on the corporation's behalf, Retailer's Occupation Tax. According to the court the officers' failure was "wilful" since it was committed knowingly, voluntarily and intentionally. Furthermore, in construing section 13½ of the Retailer's Occupation Tax Act (*Ill. Rev.Stat.*, C. 120, ¶452½), the court noted that wilful conduct need not involve bad purpose or intent to defraud the government.

Section 13½ of the Act provides that where a corporation is unable to pay the occupation tax, the corporate officers may be liable if they have wilfully failed to file returns or make payments to the Department of Revenue. Furthermore, the personal liability of the officers survives the dissolution of the corporation.

The defendants in this consolidated appeal argued that the Act did not impose a trust or lien upon collected sales taxes. Therefore, they posited their use of the receipts, to pay off other creditors in order to keep the business opera-