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## PUT OUT THAT CIGARETTE...

### *As of next January 1<sup>st</sup>*

**A** newly enacted law penalizing smokers, the Smoke Free Illinois Act, takes effect next New Year's Day. 30 ILCS 805/8.31. This law will severely restrict public places within which people may smoke throughout the entire State.

Smoking will be banned in Illinois beginning January 1, 2008 in all hospitals, restaurants, retail stores, offices, commercial establishments, elevators, indoor theaters, libraries, museums, concert halls, public conveyances, educational facilities, nursing homes, auditoriums, enclosed and partially enclosed sports arenas, meeting rooms, schools, exhibition halls, convention facilities, polling places, private clubs, gaming facilities, government owned vehicles and facilities, healthcare facilities and clinics, enclosed shopping centers, retail service establishments, financial institutions, educational facilities, ticket areas, public hearing facilities, public restrooms, waiting areas, lobbies, bars, taverns, bowling alleys, skating rinks, reception areas, and no less than 75% of the sleeping quarters within a hotel, motel, resort, bed and breakfast, inn and lodge. Ash trays must be removed from all nonsmoking areas.

Smoking will not be banned in private residences, student dormitories owned or operated by a public or private institution of higher education, retail tobacco stores, and private and semi-private rooms in nursing homes and long-term care facilities that are occupied by one or more persons if all are smokers and all have requested in writing to be placed in a smoking room.

The arguments that were made in support of the smoking ban related mostly to public health issues and the effects of second hand smoke on nonsmokers. On the other hand, the pro smokers argued that America is the land of the free and that they have a right to smoke wherever and whenever they please. Does the government have the right to control the locations in which

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individuals may smoke if second hand smoke comes in contact with people who choose not to smoke?

Smokers argue that if nonsmokers don't want to be exposed to second hand smoke, they should stay away from areas that smokers frequent, like bars. On the other hand, nonsmokers argue that they should have the right to go where they want without fear of being exposed to the dangers of second hand smoke. For some, this is really a quandary.

Bar owners argued that the marketplace should dictate who will frequent their establishments. They contended that people that don't want to smoke will stop coming, and the people that do smoke will continue to go to those bars that allow smoking. The problem, the owners argued, is one of economics. If one owner restricts smoking and another owner allows smoking, business may drift to towns that do allow smoking. On the other hand, the nonsmokers argued that the restrictions on smoking will actually increase the customer base. Each faction probably has a point.

This debate has been resolved by the passage of the new Smoke Free Illinois Act. The nonsmokers won.

Will the American ideal of complete freedom of choice ever prevail? Absolutely not. Government has the right – indeed, the obligation – to protect its citizens' health, safety and welfare. Government already regulates substantial aspects of our daily lives, by mandating the wearing of seat belts, prescribing the content of the food we eat, the medicine we take, the paint we use in our homes and the air we breathe (clean or unclean as it may be). We are all controlled by government regulations, some good and some not so good, depending on our respective points of view. But compared to other governments throughout the world, we are basically a free society. As Winston Churchill once said: *"Democracy is the worst form of government there is – except compared to all others."*

One final caveat: As we go to press, the Governor has not yet signed the Smoke Free Illinois Act into law, but is expected to do so.

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## THE ILLINOIS SAFE HOMES ACT *A tenant's right to break a lease.*

If a tenant moves out of an apartment, he still owes the landlord the future rent until the end of the lease. On the other hand, the Safe Homes Act, 765 ILCS 750/1, provides a defense to tenants sued by a landlord for rent if the tenant or a member of the tenant's household was under a credible imminent threat of domestic or sexual violence at the premises and the tenant gave the landlord written notice of that threat prior to moving out or within three days after moving out.

If the tenant's affirmative defense is successful in court, the tenant is not responsible for rent after vacating the premises.

This law provides the same defense (so that no rent is owed) if the tenant or a member of the household was a victim of sexual violence on the premises and the tenant moved out as a result; the tenant gave the landlord written notice of this reason for moving out before moving or within three days of moving; and the sexual violence

occurred not more than sixty days before giving notice. Evidence that a tenant is allowed to use to support the claim of sexual violence includes: medical, court or police evidence or a statement from an employee of a victim services organization or rape crisis organization.

This law also has a change-the-locks provision. Normally, tenants do not have the right to change the locks on an apartment. But, under the Safe Homes Act, if a tenant request a landlord in writing to change the locks with the belief that there is a risk of sexual or domestic violence and the tenant provides evidence of violence, the landlord must change the locks or give the tenant permission to change the locks. If the landlord fails to change the locks within two days, the tenant may change the locks without the landlord's permission – but must give a key to the landlord.

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## THE REAL ESTATE SETTLEMENT PROCEDURES ACT: *Does it really work?*

In the wake of the tragedy of September 11, 2001, the Federal Reserve Board substantially cut interest rates to assist the nation in its economic recovery. That resulted in very low interest rates for both investments and residential mortgage loans. The market for new home purchases and mortgage refinancing boomed. First time home buyers and serious investors alike flocked to the real estate market.

In the years since 2001, mortgage interest rates have remained low. As a result, even folks with modest incomes have continued to buy real estate. With interest rates at their lowest in over 40 years, an enormous amount of institutional capital has been chasing real estate as a long term investment. Analysts marveled at the housing boom and were certain that the market would only continue such growth as long as interest rates continued at record low numbers.

What the analysts in 2001 could not have predicted, however, was that mortgage interest rates would remain low for such a long period of time and that home ownership, in certain areas, would be as affordable as renting and would become an affordable investment. Thus, new residential property owners have continued to enter the market in droves. That may now be changing as price increases are slowing or reversing in many parts of the country.

Low interest rates have undoubtedly been great for the consumer, allowing first time homeowners to purchase property and forego renting, allowing current homeowners to refinance their mortgages, lower their payments and take out some of their new-found home equity, and allowing even small residential real estate investors to “flip” properties and realize a solid return on their investment. But with the influx of so many novices into the real estate arena, many first-time buyers, small real estate investors and even long-time homeowners have had difficulty understanding the requirements of the mortgage loan process and have not found adequate resources to protect themselves while purchasing real estate, resulting in unscrupulous sellers and lenders taking advantage of many purchasers and borrowers.

Well known to real estate professionals, the federal Real Estate Settlement Procedures Act (“RESPA”) is supposed

to protect consumers during the mortgage loan process and provide them with greater and more timely information on the nature and costs of the settlement process. Under RESPA, fees and interest rate information may not be withheld from the buyer – as they once were – until it is too late for the buyer to go elsewhere to make his or her loan. RESPA provided for more effective advance disclosure to consumers of settlement costs; a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; elimination of kickbacks or referral fees that unnecessarily increased the costs of certain settlement services; and substantial reform and modernization of local record keeping and land title information.

The RESPA law requires the mortgage lender to provide the following information to a potential borrower within three business days from the date that the lender receives a loan application from the consumer:

- *A loan booklet that details the cost elements of the proposed loan and details the nature and purpose of escrow accounts; that explains the choices available to buyers in selecting parties for settlement services; that explains the unfair practices and unreasonable or unnecessary charges to be avoided by the prospective buyer; and that gives a sample of the standard real estate settlement form.*
- *A good faith estimate of the amount or range of charges for specific settlement services that the borrower is likely to incur in connection with the purchase.*

After the booklet and the estimate are provided, the lender is required to also give the consumer, prior to closing:

- *A disclosure regarding the likelihood of whether the loan is to be assigned, sold or transferred to another lender.*
- *A Truth-in-Lending disclosure statement, with a clear determination of the annual percentage rate and the finance charges associated with the loan.*
- *One document that discloses all dollars changing hands in a residential real estate transaction, whether between the buyer and seller or between the buyer and its lender. The result of this requirement has been the use of a uniform closing statement which itemizes all costs and*

*credits in the transaction. The document is commonly known in the real estate industry as the "HUD-1," the "settlement statement" or the "RESPA statement." In theory, no charges are to be hidden. Rather, every dollar in a residential real estate transaction must appear and be clearly identifiable on this document. Any amount not so disclosed would be a violation of the law.*

Has this law worked? Some say yes, but others say it has just multiplied the bewildering number of forms heaped upon the buyer at a residential closing. The United States Court of Appeals recently saw it thusly: "As anyone who has taken out a mortgage loan is doubtless aware, [a mortgage loan] transaction requires a strong wrist and a good pen to sign a bevy of forms and documents." *Handy vs. Anchor Mortgage*, 464 F.3d 760.

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## THE NEW ALTA TITLE INSURANCE POLICY: *Boring but important.*

If you ever purchased real estate in Illinois, there is a 99.998% chance (actual statistic) that the insurance policy that insured your title to the property was an American Land Title Association (ALTA) form owner's policy of title insurance. Virtually every parcel of real estate in Illinois is insured by an ALTA form. In 2006, ALTA revamped its prior 1992 form of title insurance policy. Incredibly, most of the changes are for the benefit of the insured, not the insurer.

Leading doctors have been known to prescribe that their patients with sleeping disorders read the ALTA policy cover to cover to cure their insomnia. At the risk of inducing narcolepsy in our readers, we shall nevertheless discuss the 2006 changes in the ALTA policy. If you plan to purchase real estate in the future you should immediately caffeinate as you will undoubtedly be insured by the new ALTA 2006 form. Here are the most significant changes:

### Definitions

A big advantage for the insured under the 2006 policy is the expanded definition of "insured." Previously, if the named insured purchased property and bought title insurance, and then conveyed the property for no value into a wholly owned entity or trust created by the named insured, that conveyance would require new title insurance with another premium. The new 2006 definition of "insured" includes entities that are wholly owned by, or that wholly own, the named insured, as well as a trustee or beneficiary of a trust created by the named insured.

The 2006 policy also simplifies the standard by which coverage is triggered under the policy by revising the definition of "unmarketable title." The old policy limited

the notion of unmarketability of title to a prospective purchaser of the land who, by reason of a covered matter, could terminate without liability a contract requiring the seller to deliver marketable title. The 2006 policy now includes other parties in interest to the real estate, including lessees and lenders.

The "amount of insurance" as defined in the new policy includes the amount in Schedule A (usually the purchase price) and also could increase based upon the conditions in Section 8(b) of the 2006 policy. This change eliminates a requirement of the old policy that mandated coinsurance if the insured made improvements to the land after the date of purchase/date of the policy.

### Private Ownership or Control.

In the old policy, there were exclusions from coverage and then something called "exceptions to the exclusions." Some courts read this language as the logical postulate of double negative equals positive. Some courts did not. Confusion reigned. The 2006 policy removes all exceptions to exclusions and includes them as affirmative statements of covered risks.

The policy also increases the number of covered risks from four risks to ten. The new covered risks include matters that were traditionally implied or considered covered by the old policy but were never enumerated. Four of the more significant new covered risks are:

- **Fraud, Forgery or Non-Authority:** *For the first time, an ALTA policy uses the terms "fraud" and "forgery" as expressly covered under the policy. The new policy covers an insured if the transferor does not have the authority from the entity holding title to convey title to the parcel in question.*

- **Prior Title Coverage:** There is now coverage for fraudulent transfers occurring prior to the transaction creating the interest being insured by the policy. This is sometimes called “back title” coverage and is now expressly stated as covered in the 2006 version.
- **Gap Coverage:** Under the old policy, purchasers would be required to obtain a GAP endorsement or additional GAP coverage covering title for the time between the date the title policy issued and the date on which the deed was recorded. That coverage is now expressly stated in the 2006 policy. Hence, insureds will no longer need to continually request GAP coverage.
- **Survey Coverage:** An ongoing issue under the old policy was whether encroachments of improvements onto adjoining land rendered the title unmarketable, thereby triggering title coverage. Some courts have held that the old form policy did not cover the land or improvements as depicted on the survey; instead, the policy only covered the legally described parcel. The new policy eliminates court-imposed interpretation of the policy and covers the insured’s parcel as depicted on the survey.
- **Proof of Loss:** Under the old policy, the insured was required to submit a proof of loss within ninety days of receiving the facts giving rise to the loss. The 2006 policy eliminates the ninety-day requirement.
- **Apportionment:** The 2006 policy deletes the apportionment provision found in the old policy. In the 1992 policy, if the policy insured two or more parcels, any loss on one parcel would be paid on a pro rata basis of the total insured land. By eliminating this provision, the 2006 policy affords the insured the total amount of the policy on only one of parcels.
- **Endorsements:** One of the complaints voiced by title insureds under the old policy was that often the all-important endorsements to the policy were not attached to the final policy. The 2006 policy has an endorsement “check the box” to eliminate attaching the form title endorsements and to ease concern if any endorsements are not attached.

#### Policy Conditions and Endorsements

Some changes in policy conditions in the 2006 policy are:

- **Litigate at the Insurer’s Risk:** If the title insurer decides to litigate the insured’s claim and is unsuccessful in its defense, i.e. the insurer loses, the insurer must pay the policy amount plus a ten percent bonus.

Assuming you have now regained consciousness and actually want to read more on this enthralling topic, the old 1992 and new 2006 policies are available online under the forms and standards link at [www.alt.org](http://www.alt.org).

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## BE CAREFUL IF YOU WANT YOUR CHILD WHO HAS FINANCIAL PROBLEMS TO INHERIT YOUR IRA ACCOUNT.

The Illinois General Assembly, the Congress of the United States and the Supreme Court of the United States have tried to make all individual retirement accounts – commonly known as IRA’s – exempt from creditors. 735 ILCS 5/12-1006; 11 U.S.C. 541(b); *Rousey v. Jacoway*, 125 S.Ct. 1568. Notwithstanding these efforts, the U.S. Bankruptcy Court in central Illinois has held that an IRA inherited from someone other than a spouse is not exempt from the claims of creditors. *In re Taylor*, 2006 WL 1275400.

In the *Taylor* case, Janice Taylor declared bankruptcy and then inherited an IRA account from her aunt. Ms. Taylor thought that with that inheritance her financial troubles were over, but they were just beginning. The creditors in the Bankruptcy Court claimed the IRA account for themselves. Ms. Taylor argued that the IRA was exempt

from creditors and she cited the Illinois statute, the Federal statute and the U.S. Supreme Court case. Despite those persuasive authorities, the bankruptcy judge ruled against Ms. Taylor, holding that an IRA account which the beneficiary inherited from someone who was not her spouse, is *not* exempt from creditors of the beneficiary.

This ruling creates potential problems for people with financial difficulties who inherit IRA accounts from anyone but a spouse. Sometimes an IRA account is a large asset left to the children of a decedent. The *Taylor* case illustrates the need of parents to plan for the worst and protect IRA assets from the claims of their children’s creditors, particularly for children who are having financial difficulties.

✦ *Alan J. Wolf*



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GREAT URBAN LEGENDS OF THE LAW

**Fact or Fiction?** The "reading of the will" to the assembled heirs and legatees at the lawyer's office.

**A: Fiction.** *The scene of the family gathering at the lawyer's stately, wood paneled office to hear the lawyer read to them a recently deceased relative's will is a trite mainstay of many bad movies and even a few very good movies. Nevertheless, it is pure fiction and never happens.*

**Fact or Fiction?** If there is a terrible miscarriage of justice, the Supreme Court of the United States is there to make it right.

**A: Fiction.** *The U.S. Supreme Court is a court of very limited appellate jurisdiction. It has no general power to fix mistakes that occurred in lower courts. Its power is narrowly limited to appellate review of cases involving federal questions or federal jurisdiction. In the vast majority of all litigation there is neither a federal question nor federal jurisdiction.*

*Also, the statistical probability that the Supreme Court will agree to review any case, even if it involves a federal question or federal jurisdiction, is unbelievably small. With a few minor exceptions, the Supreme Court has no obligation to hear any case of any kind. It picks and chooses the cases it will review. The Court is inundated with nearly 10,000 requests for review every year and it accepts around 70, meaning that no matter how meritorious, the odds are over 100 to 1 against the Supreme Court hearing your case. So when someone says on television that he intends to "take his case to the U.S. Supreme Court," most lawyers have a good laugh.*

## RECENT ANNOUNCEMENTS

**All the news you can use...**

ACHIEVEMENTS OF NOTE

**Andrés Gallegos** recently addressed Chicago Medical School's Department of Psychiatry on physician recruitment and employment.

**Michael Schlesinger** has been appointed to the College of Business and Management Advisory Council of Northeastern Illinois University. Michael is a member of the adjunct faculty of that university. He teaches business law in the College of Business and Management. Michael is also a member of the adjunct faculty of John Marshall School of Law where he teaches corporation law.

**Alan Wolf, Tracy Stevenson** and **Michael Hriljac** recently conducted a workshop on tort reform, medical malpractice and asset protection at the Chicago Medical School.

**Tracey Salinski** and **Andrés Gallegos** conducted a workshop on physician recruitment and employment at Chicago Medical School's Department of Medicine.

**Alan Wolf** is the new grandfather of a bouncing, bubbly, baby girl, Isabel Maeve Perkins, 7 lbs. 7 oz.

COURT CASES WE CITE ARE NOT OUR CLIENTS' CASES

Attorneys and judges refer to cases that establish precedent by the names of the litigants. For example: *Bush vs. Gore*. Such cases are published and thereby become part of the legal community public domain. The litigants thus sometimes achieve fame and immortality. For example: *Marbury vs. Madison*.

In the *RSP Quarterly*, we frequently cite such cases, but to preserve client confidentiality, we try not to mention any case where we represented a litigant, unless our client gives us permission to do so.

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