# FEDERAL STANDARD ABSTRACT
## TITLE NEWS

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### Legal Malpractice Insurance Coverage

Two lenders made mortgage loans to an LLC in the aggregate amount of $3 million. The lenders were represented at closing by an attorney who was also a principal of the borrower-LLC. The attorney closed the loan, but failed to procure title insurance for the lenders, or to record the mortgages. When the LLC defaulted on its loans, the lenders found their loans unsecured and sued their closing attorney for malpractice.

The attorney referred the claims to its malpractice insurer. The insurer, however, denied defense and coverage based on two policy exclusions. One exclusion was for claims based upon or arising out of the insured's capacity as principal or officer of a business entity. The other was for acts or omissions of the insured for any business enterprise in which he had a controlling interest. The lenders obtained a judgment against the attorney but, finding him insolvent, took an assignment of his claims on the malpractice policy and sued the insurer directly.

The court ruled that the cited exclusions were inapplicable. The lenders' claims did not arise from the attorney's capacity as a principal of the LLC. Rather, the lenders sued the attorney directly based on the duty that he owed the lenders as their attorney. In other words, ensuring that the mortgages were executed had nothing to do with his status as principal of the borrower-LLC, but everything to do with his status as attorney for the lenders. Therefore, the insurer was liable under its insurance policy. *K Investment Group LLC v. Amer. Guarant. & Liab, Ins. Co.*, 2012 WL 5746 (N.Y.A.D. 1st Dept., 01/03/2012).

### A Dating Oversight

Between 2006 and 2008 the developer of a luxury condominium building accepted $16 million in deposits toward the purchase of units. The offering plan stated that the buyers would have the right to rescind if closings did not occur by September 1, 2008. The first closing occurred in February 2009. Many buyers sought rescission of their contracts based on the September 1, 2008 date. The developer denied rescission alleging that the date was a typographical error, and the real date was supposed to be September 1, 2009.

In April 2010, the Attorney General issued a determination that the down payments should be released. The developer filed a Article 78 proceeding seeking to reverse the Attorney General's determination, and reformation of the purchase agreements and the offering plan. The court did find extrinsic evidence which would be inconsistent with the September 1, 2008 date. However, the September 1, 2008 date was not inconsistent with the offering plan. Under principles of contract law, if there is no inconsistency in the face of the document, the extrinsic evidence is ignored. The court upheld the determination of the Attorney General. *CPR/Extell Parcel I, LLP v. Cuomo*, Index No. 1139-2010 (New York Sup. Ct., 01/25/2012).

## Condominium Sponsor Liability

A recent case shows again the difficulty of suing the sponsor of a condominium. The purchasers of a penthouse condo unit suffered from a glycol (a liquid anti-freeze) leak and excessive noise from the cooling tower above their unit. As a preliminary matter, the warranty of habitability, an occupant's main thrust in residential leases and coops is inapplicable to condos because there is no landlord-tenant relationship. Seeking injunctive relief against the sponsor usually fails, too, because the sponsor does not own the common element that is causing the grievance. In our case, and as usual, the common elements are operated by the condo board of managers. Suing the board of managers alleging mismanagement tends to run afoul of the "business judgment rule", by which boards are afforded great latitude and immunity in their decision-making. Claims of fraud for failure to disclose conditions of the unit in the offering plan usually fail because of the Martin Act. In a nutshell, the Martin Act requires the sponsor to make a series of disclosures, and the purchaser may have an actual claim if any of the disclosures is false. But there is no action for failure to disclose. In other words, there may be an action based on a misrepresentation, but not one based on an omission. Only the Attorney General may sue for omissions. So the purchasers of condominium units are left only with actions for private nuisance caused by the noise and trespass caused by the leak. But that may not be the end of the story. local housing and building codes often contain several requirements regarding noise, leaks , pollution and other concerns. While they do not give rise to private causes of action, it may be possible to obtain the assistance of a local municipal enforcement agency to correct the situation. See Berenger v. 261 West LLC, 2012 WL 310499 (N.Y.A.D. 1st Dept., 02/02/2012).