MANOS, MARTIN & PERGRAM CO., LPA

50 North Sandusky Street
Delaware, Ohio 43015

Phone: 740-363-1313

Caring Counseling and Sophisticated Solutions Since 1951

We are always grateful for your trust in recommending us to others. A referral from you and your continued business are the highest compliments we could ever receive.

Inside this issue:

Client Bulletin

Volume XXXVII, No. 7 **July 31, 2020**

Ohio Supreme Court - Breach of Warranty/Misrepresentation in Application Voids Insurance Policy

In an application for auto insurance with Nationwide Mutual Fire Insurance Company ("Nationwide"), the car owner/applicant ("Ms. Lapaze") indicated that she was the only member of her household and did not disclose that her sister lived with her. The auto insurance policy issued by Nationwide stated that the application was part of the policy, that answers provided to questions in the application are warranties, that the information provided regarding "other operators in the household" was a warranty, and that answers provided in the application "if incorrect, could void the policy from the beginning."

After the auto policy was issued to Ms. Lapaze, while her sister was driving the car covered under the policy, the sister struck a pedestrian, who died as a result of the accident.

Nationwide filed a complaint for declaratory judgment in the Mahoning County Court of Common Pleas claiming that it had issued the policy in reliance on the information in the application and that based upon Ms. Lapaze's misstatements in the application, the policy was "void *ab initio*" (void from the beginning). The Common Pleas Court granted summary judgment to Nationwide, determining that the policy was "void *ab initio*" due to the breach of warranty in the policy and policy application because of the failure of Ms. Lapaze to disclose other operators in her household. The Seventh District Court of Appeals reversed on the basis that the policy's terms did not "clearly and unambiguously" indicate that Ms. Lapaze's misstatements as to a warranty could render the policy "void *ab initio*."

Nationwide appealed to the Ohio Supreme Court which, in Nationwide Mut. Fire Ins. Co. v. Pusser, Slip Opinion No. 2020-Ohio-2778, held that Nationwide "plainly incorporated the application into the policy," that information provided regarding "other operators in the household" is a warranty and that the use of "could" in the policy language "Warranties which, if incorrect *could* void the policy from the beginning" was sufficient to plainly warn Ms. Lapaze as the non-mandatory nature of the word "could" did not change the fact that the policy boldly states that a misstatement renders the policy subject to being "void *ab initio*."

This case illustrates the importance that answers to questions in an insurance application, which sometimes are actually completed by the insurance agent verbally asking the questions and the agent checking boxes or writing in the answers and then having the applicant/customer sign the application, are vitally important and must be accurate.

Ohio Supreme Court – Absent an Express Reservation, the Right to Receive Rents Runs With the Land and Follows Legal Title to a Property

In 1994 B.E.B. Properties leased a part of its three acre commercial property for a cell tower and granted an easement for the erection of the cell tower on the property. Both the lease and the easement were recorded in the county recorder's office. In 1995 B.E.B. Properties sold the real property to two individuals, Keith Baker and Joseph Cyvas, who were two of the three partners in B.E.B. Properties. The deed from B.E.B. Properties set forth the recording information for the recorded lease and easement and in the warranty portion of the deed set forth that "B.E.B. Properties . . . for itself and its successors and assigns, covenant . . . that it will warrant and

(Continued on page 2)

defend said premises . . . against all lawful claims and demands whatsoever such premises further to be subject to the subject encumbrances on the premises set forth above." Shortly after they bought the real property, Messrs. Baker and Cyvas sold their interest in B.E.B. Properties to Bruce and Sheila Bird, the other partners, who understood that transaction to include an assignment of the right to receive all future rental payments for the cell tower. While Baker and Cyvas owned the property the Birds received the annual rental payments from the cell tower company. The cell tower company continued to send the Birds the annual rental payments even after 112 Parker Court, LLC purchased the property from the Baker's and Cyvas's successors in interest. In 2013, LRC Realty, Inc. acquired the property from 112 Parker Court, LLC and shortly thereafter asked about its rights to receive the annual rent payments.

A short time later LRC Realty, Inc. commenced litigation regarding rights to the annual rent payments. The trial court ruled in favor of LRC Realty, Inc., but on an appeal the Eleventh District Court of Appeals believed that the reference to "specific encumbrances on the premises as set forth above" language in the deed constituted an exception to the deed's warranties of title and a reservation, to the grantor B.E.B. Properties, for it to receive the future rent payments.

However, in LRC Realty, Inc. v. B.E.B. Properties, et al., Slip Opinion No. 2020-Ohio-3196, the Ohio Supreme Court, in a 7-0 decision, reversed the Eleventh District. The Supreme Court's opinion set forth that under the common law a covenant to pay rent ran with the land, which meant that the right to receive rents and profits would ordinarily follow the legal title, but that one exception to that general rule was when the grantor in a deed included a specific provision reserving to the grantor the right to receive rents and profits. The Supreme Court then set forth that the legislature codified those common law rules in Ohio Rev. Code § 5302.04, which provides that "In a conveyance of real estate or any interest therein, all rights, easements, privileges, and appurtenances belonging to the granted estate shall be included in the conveyance, unless the contrary is stated in the deed . . . ." The Supreme Court then stated that it held that the right to receive rents runs with the land and follows the legal title unless rents are expressly reserved by the grantor in the deed conveying the property.

Interestingly, however, notwithstanding that holding by the Supreme Court, the Supreme Court remanded the case to the Eleventh District to determine whether there were any equitable defenses, such as estoppel, based on the course of conduct (such as the apparent fact that for about 17 years during the ownerships of Baker and Cyvas and 112 Parker Court, LLC, the annual rent payments had been paid to the Birds rather than to the record title owner of the property without any objection by the record title owner).

State of Ohio Extends Due Date for Payment of Real Property Taxes and Assessments for Certain Counties

The Ohio Department of Taxation has extended deadlines for the collection of real property taxes for several counties in Ohio, including Delaware and Franklin. Delaware County's deadline was extended from July 20, 2020 to August 20, 2020 and Franklin County's deadline was extended from July 20, 2020 to August 5, 2020.

This bulletin provides general information and is not legal advice. Please contact us if you need legal advice.

If you have friends or associates who you think would enjoy receiving a copy of this Client Bulletin, please feel free to forward it on. Thank you.

MANOS, MARTIN & PERGRAM CO., LPA

50 North Sandusky Street
Delaware, Ohio 43015

Phone: 740-363-1313