The Risk Manager

Lawyers Mutual Insurance Co. of Kentucky

Winter 2008 Newsletter

Volume 19 Issue 1

Contact us

1-800-800-6101

or visit

our web site at

www.lmick.com

"There are lots of people who mistake their imagination for their memory."

Josh Billings

"Exceptions spread word of the rule."

Wieslaw Brudzinski

Computation of Time Deadlines and Leap Year 2008

What follows is an update of a heads-up item we print in our newsletter in leap years:

What does the extra day, February 29, in 2008 mean to Kentucky lawyers when computing time deadlines? At least one state (Oregon) stung a lawyer by using 365 days as the measure of a one year limitation period even though the year in issue was a leap year with 366 days.

KRS 446.010, Construction of Statutes, Definitions, provides that "Year" means calendar year. The Kentucky case we located which considered the Leap Year question reasoned that since "Year" means calendar year it is immaterial that Leap Year includes an extra day. Proceedings were, therefore, not barred because a party got the benefit of an extra day to get to court (*Rice v. Blair*, 158 Ky. 680, 166 S.W. 180, (1914)).

What about when the 28th and 29th of February occur during a limitations period to be computed of less than one year? We are unaware of consideration of this question by Kentucky legal authority. One secondary authority provides that when these two days occur in any period of days less than one year they must be computed as two days (Sec. 10. Day, 74 Am Jur 2d. Time).

The key is to be safe, not sorry. When calendaring a deadline, count a year time limitation as 365 days and the 28th and 29th of February 2008 as two days. That way you can't go wrong.

The Subprime Mortgage Mess Heightens the Risk of Malpractice Claims

It appears that we are headed for an economic slowdown and many experts are predicting that the subprime mortgage disaster that is unfolding, with the worst to come, foreshadows a deluge of home foreclosures. In fact, home foreclosures are already increasing at an alarming rate with Kentucky experiencing as many as most states. This has both retrospective and prospective malpractice risks for lawyers engaged in real estate and bankruptcy practice.

Retrospectively, what this means for lawyers is to expect some of the real estate matters they handled to come under close scrutiny in foreclosure and bankruptcy actions. If an error was made in any aspect of a real estate transaction, it figures to be found and a claim made against the responsible lawyer. Now is the time to review any real estate matter that is at risk of foreclosure to assure that it was error-free, or correct, if possible, any problems discovered before a claim is made.

Prospectively, it appears there will be a significant increase in bankruptcy and foreclosure actions. A recent *Wall Street Journal* article, 'Foreclosure Mills' Encounter the Wrath of Judges (*The Wall Street Journal*, B6, 11/30/2007) gave the following examples of problems courts are encountering with sloppy and predatory legal work in foreclosure and bankruptcy actions. Not only does this lead to judge-imposed sanctions, but it can result in malpractice and wrongful use of civil proceedings claims:

- Lawyers in the mortgage-banking industry routinely initiate foreclosure proceedings without proper documentation included with the complaint.
  - "Judges have become more aggressive in holding firms accountable for what is a common practice: filing suit without showing proof that the plaintiff actually holds the mortgage and has the right to foreclose."
  - One bank filed a foreclosure action before it had acquired the mortgage. The judge, after dismissing the suit with prejudice, noted that the plaintiff and its counsel had filed the lawsuit with no basis whatsoever, and ordered that the firm must in all future foreclosure complaints include "proof that their client is, in fact, the real party in interest."
- Lawyers are being fined by judges for filing motions in court on behalf of creditors that contain inaccurate claims about what debtors owe.

continued

- A bankruptcy judge in Texas fined a firm $75,000 "for filing pleadings that were 'grossly erroneous' and 'gibberish,' the result of the firm's computer-generated pleadings. The judge wrote the firm has 'become over reliant' on the computer system and its attorneys are 'allowing their signatures to become affixed to pleadings that they have not adequately reviewed.'"
- Another Texas judge is considering sanctioning the same firm for misstating what a debtor owed by thousands of dollars.

- A bankruptcy judge in New Jersey fined a firm $125,000 for using pre-signed certificates hundreds of times vouching for the accuracy of filings. He discovered this practice after the firm filed a default notice for a client that wrongly certified that the debtor was over $15,000 in arrears. The judge was singularly unimpressed with the firm's explanation that pre-signed certifications were necessary because of its high workload.

In view of the severity of this developing situation it is timely to recapitulate the risk management information that we have provided in this letter for preventing real estate malpractice. We urge careful review of your practice with these guidelines in mind.

Know Who Your Client Is

Since real estate transactions involve many individuals and entities, it is essential that the lawyer clearly identifies with the client represented and that all other parties are on notice that they are not the lawyer's client. If this is not implicit from the circumstances, make it explicit. Client identification confusion often arises when:

- Working through a broker.
- Representing the mortgagee as the only lawyer at a closing.
- Working through a representative of a business group client.
- Real estate transactions involving family, elderly, and divorce.

Document the Scope of the Engagement

Always use a letter of engagement to document the work to be done. The majority of real estate malpractice claims concern title searches. Is the lawyer to prepare an abstract of title indicating only what land records contain or a title opinion on validity of ownership? Is the search for liens only? Is the lawyer responsible for accuracy through the date and time of the completion of the title search or required to bring the search current to the time of closing? Be precise, detailed, and exclusive in the scope description.

Use Real Property Transaction Checklists

A good checklist for sale of real estate should cover in detail at a minimum: 1) the parties; 2) description of property; 3) condition of title; 4) construction status; 5) purchase and loan terms; 6) warranties of seller; 7) conditions of buyer's obligation; 8) escrow; and 9) closing.

Manage Title Search Abstracts and Opinions Carefully

1. Specify in the abstract or opinion the scope of the search, its purpose, authorized uses, and restrictions.
2. If others are preparing evaluations on some parts of the transaction, clearly exclude those parts. If there is reliance on an expert opinion as part of the analysis (e.g., an environmental assessment), show that in detail.
3. Be complete. Advise of any doubts or potential title defects no matter how remote. Taking risks on defects is the client's decision – not the lawyer's.
4. Establish office procedures for quality control of title search documents. Procedures should indicate who is authorized to sign and release them for the firm and provide for a formal and cold review before release.

"The strongest brakes fail on the path of least resistance."

Stanislaw Lec

Foreclosure Sale Representation is Not Easy Money

- ***The Risk:*** A few law firms handle a large volume of foreclosure suits in Kentucky. Rather than appear at foreclosure sales, these firms employ local lawyers to appear and bid on their behalf — often for a fee of $100. They make malpractice claims against local lawyers if the sale is missed, the bid is not in exact accordance with instructions, or the representation is in any way unsatisfactory. Damages claimed are the fair market value of the property determined by the amount the client was willing to bid.

- ***Malpractice Avoidance:*** The fee of the local lawyer is small and the malpractice exposure large. Is a $100 fee worth the risk of suffering a malpractice claim and paying a deductible of several thousand dollars – or is this business better avoided?

- ***Malpractice Prevention:*** Docket carefully — have at least a dual calendaring system (manual or computer) with your secretary keeping a matching calendar. Establish a third party tickler system as an additional safeguard. Calendar all critical dates with adequate lead times for preparation. Conduct a personal, monthly review of all foreclosure sales matters.

REAL ESTATE MALPRACTICE ERRORS

- Erroneous description in deed of property to be conveyed
- Misstated date to which interest was to be computed
- Failure to fill in blank on form
- Improper acknowledgement
- Failure to reserve mineral rights
- Failure to advise on impending change in law
- Unauthorized delay or failure to strictly enforce closing time limits
- Failure to discover encumbrances on the property:
  - mortgage lien
  - vendor's lien
  - tax lien

continued

- mechanic's lien
- contract for deed
- right-of-way
- mineral lease

- Failure to assure that clients received or conveyed title as represented:
  - remainder
  - dower
  - outstanding life estate
  - lease
- Errors in the description of the property
- Failure to perfect security interest:
  - failure to prepare mortgage document
  - failure to update title search at time of closing
  - failure to record or timely record a mortgage
  - filing in the wrong county
  - failure to obtain releases of other encumbrances
- Failure to collect or protect security interest
- Failure to attend commissioner's sale
- Failure to know other applicable law, e.g., probate, tax
- Failure to disburse sale proceeds properly

Avoid Appellate Malpractice by Specifically Identifying the Issues

By Retired Judge Stan Billingsley

Editor's Note: This article is one of a series that LawReader.com has agreed to provide for Lawyers Mutual's newsletter as a bar service. LawReader.com provides Internet legal research service specializing in Kentucky law. For more about LawReader go to www.LawReader.com.

"The early bird gets the worm, but the second mouse gets the cheese."

Steven Wright

A recent unpublished Kentucky Court of Appeals decision dismissed an appeal from a ruling by an Administrative Law Judge because of the failure of the appellant to clearly state what issues were being appealed. The appellant filed a dozen exceptions to the ALJ's findings, but only in general terms. The following examples show just how general they were:

- The findings of fact are defective in that they are without the support of substantial evidence on the whole record.
- The ALJ's conclusions of law do not accurately reflect the applicable legal principles involved.
- The action of the Cabinet was in excess of its statutory authority.
- The appellant was deprived of its right to due process.
- The findings of fact, conclusions of law and recommended decision defy reasonable business practice standards.
- The decision is in violation of federal and state constitutional, statutory and regulatory provisions.
- The decision is arbitrary, capricious and represents an abuse of discretion.

The Court found this approach to preserving error so disturbing that it went out of its way to raise the issue of non-specific exceptions in appeals. In dismissing the appeal the Court found that these exceptions were of such a general nature that they failed to inform the Court of any specific issues being raised by the appellant and were of little benefit to anyone. In the decision the Court cited other instances when appellants had appeals dismissed over this same issue: "[I]n administrative law cases, a party who disagrees with the hearing officer's recommended order must bring that disagreement to the attention of the agency head or be precluded from raising the issue in court." *Herndon v. Herndon,* 139 S.W.3d 822, 825 (Ky. 2004); and *Rapier v. Philpot,* 130 S.W.3d 560, 563 (Ky. 2004).

The federal courts have likewise required specific facts to be cited in exceptions to ALJ reports. In *Howard v. Secretary of Health and Human Services,* 932 F.2d 505, 509 (6th Cir. 1991) the Court wrote: "A general objection to the entirety of the magistrate's report has the same effects as would a failure to object." …. "[O]bjection stating only 'I object' preserves no issue for review." …. "A judge should not have to guess what arguments an objecting party depends on when reviewing a magistrate's report."

To avoid a claim of malpractice, an appellant filing exceptions to an ALJ's report should, as in all other appeals, cite specific facts and circumstances within the record that support general claims. The failure to cite the record and identify the specific errors risks a dismissal of the appeal.

Editor's Note: *If you would like to further consider risk managing appellate practice read the KBA Bench & Bar article "Appealing Ethics" available on our web site at www.lmick.com – go to the Risk Management/Bench &Bar Articles page. The article includes the following Appellate Practice Risk Management Guidelines:*

1. Client Screening: Declining to represent difficult clients is one of the best ways to avoid a malpractice claim. As part of the client screening process consider whether the potential client will be difficult to work with on appeal. Remember that filing an appeal means the case was lost in whole or part at the trial level. Client relations are often strained from this point forward with accusations of malpractice not infrequent.

2. Matter Screening: Screen a new matter to assure firm competence in both applicable substantive law and appellate practice prior

continued

Lawyers Mutual Insurance Co.
of Kentucky

Waterfront Plaza
323 West Main Street, Suite 600
Louisville, KY 40202

Malpractice Avoidance Update

Member National Association of Bar Related Insurance Companies

For more information about Lawyers Mutual, call **(502) 568-6100** or KY wats **1-800-800-6101**
or visit our web site at **www.lmick.com**

continued from page 3

to accepting the representation. Accepting close or novel cases requires trial advocacy skills and appellate skills of record review, brief writing, and oral argument. In some cases it may be appropriate to represent the client at trial, but refer any appeal to an experienced appellate lawyer.

3. Conflicts of Interest: Include in the firm's conflict check system positional conflicts of interest. Periodically check for positional conflicts as a case progresses to appeal.

4. Letters of Engagement: Cover appeals in letters of engagement so there is no doubt whether there is a duty to represent a client on appeal. Fees for appellate representation should be specifically addressed. Remember that RPC 1.5(c) Fees requires that fees for appeals be covered in writing in contingency fee representations.

5. Time Limits: Most appellate malpractice claims arise because of late post-judgment motions, late notices of appeal, and other missed appellate deadlines. Unlike trial practice where missing the statute of limitations is the major time limit cause of malpractice claims, appellate practice involves numerous deadlines any one of which can be fatal to the appeal. The appellate lawyer must be expert in state and federal time limit rules on post-judgment motions, notice of appeal fillings, brief filings, exceptions to filing requirements, and whether an extension of time or motion for enlargement tolls other appellate deadlines. There is no substitute for knowing what you are doing.

6. Client Communication: It is the client's decision whether to appeal – be sure the client understands this. Be clear on what the client wants appealed so there is no later accusation that the lawyer omitted appellate issues. The short time limits on post-trial motions and notices of appeal require a prompt decision by the client. Document the file.

7. Preparation: Procrastination is the appellate lawyer's greatest enemy. Last minute preparation leads to inadequate review of the record and a hasty and poorly researched brief. A five or six page appellate brief with sparse legal authority in a complex appeal screams procrastination or incompetence and raises the question of malpractice. There is no substitute for doing your homework in appellate practice.

8. Withdrawal: The most likely reason for an appellate lawyer to withdraw is because the lawyer believes an appeal lacks merit. Other reasons include strained client relations, lack of appellate practice experience, and when the client discharges the lawyer. The withdrawing or discharged lawyer must take action to protect the client's interest. These steps include giving reasonable notice of withdrawal, allowing time for retention of another lawyer, and promptly returning papers and property to which the client is entitled. The short time limits on post-trial motions and notices of appeal mandate that the withdrawing lawyer move expeditiously. The client should be urged to retain another lawyer immediately. Avoid the accusation that delay in making a decision to withdraw and complying with withdrawal duties caused the client to miss appeal deadlines.