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COVID-19's effect on real property transactions and the title insurance industry - Edward Rosenblatt

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Our community of real estate professionals seems to share an understanding that, since the onset of the COVID-19 pandemic, the world of transacting real estate closings has changed dramatically and will probably never be the same. That assertion is no doubt true.

However, a review of those changes reveals that most of them were already inevitable and that the pandemic was an accelerator, rather than an initiator, of those changes. Let's take a look.

Execution and Acknowledgment of Documents: Even before COVID-19, many states enacted legislation enabling electronic signatures and/or remote acknowledgment. By 2009, 49 states, including all of the New England states, adopted the Uniform Electronic Transactions Act or similar laws.(1) Prior to COVID-19, 36 states, including two New England states (Rhode Island and Vermont) enacted legislation permitting e-notarization or remote notarization.(2) Forty-five states, including five of the six New England states (Connecticut being the exception), eliminated the requirement for witnesses on acknowledged documents.(3) Thus, modern execution, attestation and acknowledgment requirements were largely in place before the pandemic.

Soon after the pandemic arrived, governors or other officials of 37 states (including all six New England states) issued executive orders permitting or expanding remote notarization and remote acknowledgments, subject to various conditions.(4)

Thus, the virus caused the acceleration, not the inception, of the adoption of laws permitting electronic execution and/or acknowledgement of instruments used to transfer interests in real property. Without the advent of the virus, implementation of such measures would no doubt have been slower, but nevertheless inevitable.

Title Searching and Recordation: With the social isolation precautions imposed by COVID-19, recording offices nationwide found themselves in a quandary. Would they stay open? What hours would they maintain? How could they allow searches of land records? How could they adequately and lawfully accept, order and record instruments of title?

Some recordation facilities were at least partially prepared to handle these questions. Prior to the arrival of the pandemic, they implemented electronic recording. Additionally, many have caused their land records, in varying degrees, to be searchable online. They adopted mechanisms for accepting recordings by mail or courier service. Those that took these measures still had to adjust to the unpredictable effects of COVID-19, but they were a step ahead. Those which had not made similar advances then had to respond during crisis conditions, in large part with measures already in place in other locations. Once again, COVID-19 was, in its way, a catalyst, not a creator.

Closings: On the wall of our office conference room hangs a large framed print, entitled, "The Closing." It depicts a hefty table in a similar but larger conference room, surrounded by perhaps 20 women and men, presumably attorneys and staff, each busily attending to his or her "piece" of a

large transaction. Having attended numerous such gatherings, I recall being comforted only by the knowledge that the stress level of each of the other players was about equal to my own.

This method of consummating commercial transactions is now the exception rather than the rule. It largely disappeared with the advent of email technology, permitting not only immediate communication, but the near instantaneous transmittal of documents between parties. Video conferencing provided yet another alternative to closing in the traditional way.

In-person commercial closings largely disappeared long before COVID-19 because advances in technology and work culture permitted it. However, it took a pandemic to push residential transactions in the same direction. Reasons for the lag in the residential realm include inexperience on the part of some clients, who cling to the traditional notion of closings, and the fact that not all clients possess the requisite technology. Nevertheless, those are factors which fade with time, and the pandemic has now begun to erase them. Of course, in-person residential closings are still largely the norm, but the continued presence of the virus and the possibility of a second wave, combined with increasing technological ease and governmental action, may over time diminish the use of the residential conference room as well. A process that had begun prior to COVID-19 has sped up by the pandemic's arrival.

Implications for the Title Insurance Industry: The title insurance industry, like all other risk management endeavors, is at its best when it exercises foresight and preparedness rather than reaction. We have long known that changes in the transactional process were on their way. Until recently we had good reason to believe that there was ample time to anticipate and adapt to those changes as they were gradually implemented. Now, COVID-19 has brought many issues once safely on the back burner to a full boil. If it has taught us anything, it is that we no longer have the luxury of passive contemplation. We must anticipate and prepare now for issues such as:

1. The likelihood that remote notarization will become a permanent and ever-increasing part of real property transactions of all kinds, including multi-state transactions;
2. The proliferation of rules, varying by jurisdiction, permitting electronic signatures on instruments conveying interests in real property and permitting the recordation of those instruments;
3. Challenges in insuring title when instruments of competing priority are recorded on land records using multiple methods; and
4. Changes to the closing process that will challenge our traditional notions of informed consent and consumer protection, while requiring us to be increasingly creative in order to champion the role of attorneys in the process.

We will be far better off facing these issues now rather than dealing with the consequences of delay.

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[https://content.next.westlaw.com/Document/l66e3df587a6611e498db8b09b4f043e0/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default](https://content.next.westlaw.com/Document/l66e3df587a6611e498db8b09b4f043e0/View/FullText.html?contextData=(sc.Default)&transitionType=Default)

(2) <https://www.docverify.com/Products/E-Notaries/What-States-Allow-Electronic-Notary>

(3)

<https://www.nationalnotary.org/notary-bulletin/blog/2017/10/nsa-tip-signature-witnesses-why-when>

(4)

<https://www.dlapiper.com/en/us/insights/publications/2020/03/coronavirus-federal-and-state-governments-work-quickly-to-enable-remote-online-notarization/>

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