



A red banner with a black border. On the left, there is a logo with "VSB" in white on a black square and "RPS" in red on a black square. To the right of the logo, the text "The FEE TAIL" is written in a large, bold, black sans-serif font. On the right side of the banner, the text "The Real Property Section's email supplement to The FEE SIMPLE" is written in a smaller, black sans-serif font.

The Real Property Section is pleased to provide its members with *The Fee Tail*, a newsletter with timely cases and statutes of interest to the practice of real estate law in the Commonwealth. All members may submit ideas for future *Fee Tail* issues to [Sarah Louppe Petcher](#). We prefer to draw these cases from our members, so if you have recently litigated (or are aware of) a current real estate case, either at the trial court or appeals level or a recent statute of interest to the section, please contact us.

Below are a notice of updated jury instructions, an FHA report on missed second liens, and several cases of interest.

Updates

[New Model Jury Instructions for Eminent Domain Cases](#)

The Virginia Model Jury Instruction Committee, chaired by Justice Stephen R. McCullough, has adopted new Eminent Domain Jury Instructions, as proposed by a special subcommittee of the VSB Real Property Section Eminent Domain Committee. The subcommittee was composed of Charles Lollar, Elizabeth Chupik, Michael Coughlin, Adam Cherry, Sandy Cherry, Nancy Auth and Paul Terpak, chair. Copies are available online and in print.

[FHA Reports HUD Second Liens Are Being Missed](#)

The U.S. Department of Housing and Urban Development (HUD) has several tools to help borrowers avoid foreclosure. One of the resources is through an interest-free second lien—called a partial claim lien—that borrowers can use to pay down arrearages. FHA has reported persistent instances in all areas of the country in recent years where the lien is successfully recorded but not detected by title agents.

According to HUD, the best way to obtain payoffs for partial claims is through the [SMART Integrated Portal](#) (SIP). Title companies and attorneys with third-party authorization may create accounts to request and to receive documentation online, often with a short turnaround. [Read more.](#)

Cases of Interest

[Town of Iron Gate v. Simpson](#) (Court of Appeals of Virginia) — September 17, 2024
Simpson, a landowner, sued the Town of Iron Gate for inverse condemnation after it allowed water from a broken stormwater drainpipe to flood her property. The Town had been alerted to issues with the pipe several times, over multiple years but failed to stop the issues.

To state a claim for inverse condemnation, a petitioner must allege 1) that she is the owner of private property or some right attached thereto; 2) that the property or right connected to that property has been damaged or taken by a body with condemnation authority; 3) that the taking and/or damaging was for a public use; and 4) that the government body failed to pay just compensation. At trial, the Town demurred to Simpson's claim, arguing she failed to allege the taking was for a "public use." The trial court overruled the demurrer. At the damages trial, the Town attempted to present evidence that Simpson refused to mitigate when she rejected a demand from the Town that she sign a deed of gift to allow access to her property to install a new pipe. The trial court excluded that evidence. Simpson ultimately was awarded monetary damages and attorneys' fees. The Town appealed, and the Court of Appeals affirmed. [Read more.](#)

[Barr, et al. v. Garten Development](#) (Court of Appeals of Virginia, unpublished opinion) — September 17, 2024

The Barrs and Garten Development ("Garten") own adjoining property. Garten's property (the dominant property) is accessed by a gravel road crossing Barr's property. The original right of way was granted in 1914 when the two properties were subdivided from a single larger one. The 1914 Deed conveyed four things to the owners of the dominant property and their successors: 1) mineral rights to both properties; 2) rights of way to allow development for mineral exploitation; 3) sufficient land to develop a site for mineral processing and 4) "rights of way for proper ingress and egress." Three subsequent deeds reserved prior rights and easements but also specified "a right of way" on the disputed gravel road. [Read more.](#)

[Tuscarora MarketPlace Partners LLC v. First National Bank](#) (Court of Appeals of Virginia) — October 1, 2024

On July 24, 2023, the Circuit Court of Pittsylvania County ("circuit court") granted

summary judgment to First National Bank (“FNB”) in its declaratory judgment action against Tuscarora MarketPlace Partners, LLC (“Tuscarora MarketPlace”) and URW Community Federal Credit Union (“URW”). As a result, the circuit court declared that the restrictive covenants within the 1998 “Declaration of Restrictions and Conditions” (“Declaration”) entered into by FNB’s predecessor in interest, Virginia Bank & Trust Company (“VB&T”), remained “valid and enforceable” against Tuscarora MarketPlace. The circuit court also temporarily enjoined both Tuscarora MarketPlace and URW from “taking any actions which [would] violate the restrictive covenants.” Tuscarora MarketPlace appealed and assigned error to the circuit court’s holding below that the “Declaration is enforceable as a real covenant” because FNB failed to establish either that horizontal privity existed between the parties or that the Declaration “touch[es] and concern[s]” the use of the land in question. Finding no error, the Court of Appeals affirmed the circuit court’s decision. [Read more.](#)

[Putnam v. Covington](#) (Rappahannock County Circuit Court) — August 21, 2024

In 1997, Covington and her future husband (“Nol”) acquired two parcels of land adjacent to a third owned solely by Nol. The two married in 2004 and divorced in 2018. The Property Settlement Agreement (“PSA”) covered all three parcels as one property (the property), and stipulated that the three parcels together were owned 50 percent by each party, with Nol entitled to 56 percent of the proceeds at disposition. The PSA stated that Nol was permitted to reside at the property with their dog, Jack. After Jack died, Nol would have the right to buy out Covington or to sell the property with a pro-rata distribution of the proceeds. [Read more.](#)

[Gwin v. Beatty et al.](#) (Fairfax County Circuit Court) — September 11, 2024

In a long running case, the Fairfax County Circuit Court has refused to reconsider its judgment that misrepresentations about hidden defects made by home sellers fraudulently induced a buyer to purchase property, even though she never made further inquiry into the issues. The court awarded \$575,000 in compensatory damages and \$150,000 in punitive damages to the buyer. Moving for reconsideration, the sellers—a married couple—claimed that caveat emptor barred the claims, and that the buyer had ample opportunity to examine the property before buying it. In its ruling, the court stated that the defendants ignored that caveat emptor doesn’t apply “if the defect is concealed and not ‘obvious to ordinary intelligence’ or ‘open and obvious’ and discoverable by ‘a cursory inspection.’” However, the court found that lacking any evidence that the seller’s wife made misrepresentations, it dismissed her and held the husband solely liable for the judgment in *Gwin v. Beatty, et al.* (VLW 024-8-070). [Read more.](#)

[Tait v. Commonwealth Land Title Ins. Co.](#) (Court of Appeal of the State of California) —

June 8, 2024

In 2016, the Taits purchased a residential property in Danville for \$1.25 million. Commonwealth issued the Taits an American Land Title Association (ALTA) Homeowner's Policy of Title Insurance for the property.

The policy insures the Taits against "actual loss" arising from certain defined covered risks, which include someone else having an easement on the property. The policy limits Commonwealth's liability for an unknown easement to the lesser of the Taits "actual loss" or the policy limit of \$1.25 million. The policy does not define "actual loss." The policy excepts from coverage certain building and subdivision restrictions recorded by the Town of Danville ("town") and a recorded irrevocable offer of dedication of a drainage easement. The building restrictions prohibit further subdivision of the property and the construction of any building within the area of the offered drainage easement. As they had intended upon purchasing the property, the Taits proceeded with plans to subdivide the property into two lots. [Read more.](#)



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