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ISSUES ARISING FROM APPLICATION OF SECTION 614.17A OF THE IOWA CODE TO INVALIDATE RIGHTS OF FIRST REFUSAL

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I. INTRODUCTION

The purpose of this outline is to discuss the possible issues arising from the application by the Iowa Court of Appeals (hereafter the "Court") of the limitations of the Affidavit of Possession statute, now Section 614.17A of the Iowa Code (hereafter "Section 614.17A") in the case of West Lakes Properties, L.C., vs. Greenspon Property Management, Inc., No. 16-1463, 2017 WL 4317297 (Iowa Ct. App. Sept 27, 2017) (hereinafter "West Lakes"), to terminate the enforceability of a right of first refusal agreement, and to discuss whether and to what extent such issues should be addressed legislatively.

II. FACTS OF THE WEST LAKES CASE

In early 1997, Greenspon entered into an agreement to purchase an undeveloped parcel of land in Urbandale from West Lakes. An addendum to the purchase agreement provided Greenspon with the right of first refusal to purchase a portion of an adjacent lot. Greenspon recorded notice of both the sale and the right of first refusal with the Polk County Recorder's Office shortly thereafter. The right-of-first-refusal notice provided that upon receiving and accepting "a bona fide offer for the sale of any or all" of the subject property, West Lakes would be required to present the offer to Greenspon, which would have twenty days to purchase the property under the same terms.

In the ensuing years, West Lakes remained the record title holder to the adjacent lot, and Greenspon had no opportunity to exercise its right of first refusal.

On April 11, 2016, West Lakes filed a petition in equity to quiet title to the adjacent lot, alleging Greenspon had not filed a verified claim under Iowa Code section 614.17A on or before ten years after the original filing of the right-of-first-refusal notice and asking the district court to find Greenspon "is forever barred and estopped from having or claiming any right, title, or interest to or in" the property. In an answer filed on May 24, Greenspon admitted it had not filed a verified claim under section 614.17A, but it denied its right of first refusal was void or unenforceable.

Just over two weeks later, West Lakes filed a motion for summary judgment. While Greenspon did not file its own motion for summary judgment, its counsel asserted at the summary judgment hearing: "Both sides really feel it's a legal issue." Following the hearing, the district court granted West Lakes' motion. Upon de novo review on appeal, the Court upheld the district court ruling.

III. PROVISIONS OF SECTION 614.17A

Section 614.17A provides as follows:

(1) After July 1, 1992, an action shall not be maintained in a court, either at law or in equity, in order to recover or establish an interest in or claim to real estate if all the following conditions are satisfied:

a. The action is based upon a claim arising more than ten years earlier or existing for more than ten years.

b. The action is against the holder of the record title to the real estate in possession.

c. The holder of the record title to the real estate in possession and the holder's immediate or remote grantors are shown by the record to have held chain of title to the real estate for more than ten years.

(2) a. The claimant within ten years of the date on which the claim arose or first existed must file with the county recorder in the county where the real estate is located a written statement which is duly acknowledged and definitely describes the real estate involved, the nature and extent of the right of interest claimed, and the facts upon which the claim is based. The claimant must file the statement in person or by the claimant's attorney or agent. If the claimant is a minor or under a legal disability, the statement must be filed by the claimant's guardian, trustee, or by either parent.

b. The filing of a claim shall extend for a further period of ten years the time within which such action may be brought by any person entitled to bring the claim. The person may file extensions for successive claims.

(3) Nothing in this section shall be construed to revive any cause of action barred by section 614.17.

IV. WHAT THE COURT HELD IN THE WEST LAKES CASE

A. A right of first refusal is an interest in land as defined under Section 614.17A because it is a servitude that directly restrains alienation of an interest in land (with the Court defining "servitude" as a legal device that creates a right or an obligation that runs with land or an interest in land) (West Lakes, pp 5-6).

B. The right of first refusal arose as an interest in land from the date of its recording and not from the date any cause of action on such interest accrued (West Lakes, p. 7).

C. Because Greenspon did not file a claim to preserve its right of first refusal within 10 years after the recording of the right of first refusal, it is no longer enforceable under the terms of Section 614.17A (West Lakes, p. 7).

D. Because Iowa's marketable title act shares the goal of improving the system for transferring real property, first refusal rights should be subject to the recording demands of Section 614.17A (West Lakes, p. 6).

E. In the absence of constitutional concerns, it is not for the Court to overlook the language of the statute to reach a particular result deemed unjust under the particular circumstances of the case (West Lakes, p. 8).

V. WHAT THE WEST LAKES COURT DID NOT HOLD.

A. The Court did not address the argument raised by Greenspon on appeal that Section 614.17A should not affect the right of Greenspon to seek contractual damages for breach of contract, since that argument was not preserved by Greenspon at the district court level (West Lakes, p. 7).

VI. ISSUES HIGHLIGHTED BY THE WEST LAKES APPLICATION OF SECTION 614.17A TO CUT OFF THE ENFORCEMENT OF A RIGHT OF FIRST REFUSAL

A. Even a contingent future claim to possession which is not yet enforceable can be cut off due to a determination that such a claim arises under Section 614.17A when it is first recorded.

B. A contractual right to future possession can be terminated in favor of the very party granting such right.

C. Perhaps even a nonpossessory claim could be deemed an interest in or claim to real estate under Section 614.17A as a result of the Court's basis for applying Section 614.17A to the right of first refusal as being a servitude on the land.

D. The holding of the West Lakes case could have a retroactive application to all outstanding rights of first refusal that are currently more than ten (10) years old.

E. The Court may have inadvertantly "redefined" what constitutes a sufficient chain of title to support the application of Section 614.17A, in a manner which is contrary to Iowa case law and to the comment to Title Standard 10.1 of the Iowa Land Title Standards of the Iowa State Bar Association.

F. Even though the Court did not so hold in West Lakes, the reasoning in this case could be used for a denial of a right to enforce a damages claim for breach of a right of first refusal.

G. The holding evidences the position of the Iowa Supreme Court as previously held that the requirement and value of strictly applying the language of Section 614.17A to the facts of the case to promote the settling of outstanding title claims of more than ten (10) years overrides any unintended consequences of doing so if there is no constitutional issue involved.

VII. DISCUSSION

A. The West Lakes case application of Section 614.17A to a right of first refusal appears to modify substantially the situations in which that Code section is to be applied.

B. Before the West Lakes case, my experience was that title examiners would see Section 614.17A being used to cut off a conflicting possessory interest in real estate of a third

party as against a record titleholder in possession, which otherwise would be enforceable against the current titleholder in possession but for all of the facts that:

1. it was a claim to ownership and possession which arose more than ten years ago;

2. it was a claim against which the current titleholder in possession has an enforceable right of adverse possession under Section 614.17A due to such titleholder having:

   (a) Possession of the property (as evidenced by an affidavit of possession);

   (b) a claim of a right and color of title to the property established by a record chain of title in such titleholder and his predecessors in title which goes back to a record title event (e.g. deed or probate proceeding) at least 10 years prior which postdates the date that the conflicting interest arose, and which is free of any reference to the conflicting claim (see comment to Title Standard 10.1 discussion below).

3. it was a claim for which no filing had been made by the claimant of the conflicting interest within the last ten years since the claim arose in order to preserve the claim.

C. Such a manner of applying Section 614.17A appears consistent with discussions by commentators on Section 614.17A, including Kenneth D. Benhart, author of The Mechanics of Iowa's Marketable Title Legislation, 22 Drake Law Review 326 (1973) where he said at page 330:

> "Although so worded, the Affidavit of Possession statute has not been considered to apply to all claims to or interests in real estate. It is generally thought to bar actions based only upon claims or interests that are antithetical to or inconsistent with the holder of record title's possession. In other words, only those interests that can be reached by adverse possession can be reached by the Affidavit of Possession statute. Thus, "inchoate" interests (e.g. possibilities of reverter and rights of reentry and "incorporeal" interests arising from use restrictions are thought to be impervious to section 614.17 since they are non-possessory types of interests. Possession of land is not adverse to the future interests of possibility of reverter or right of reentry before the condition is breached. Once the condition is breached and the interest becomes a present possessory estate, it can be adversed by one in possession and the Affidavit of Possession statute becomes applicable. The "Stale Uses and Reversions" statute was apparently enacted to reach such interests prior to breach of the condition, but was

written so as to apply to them whether the condition has been breached or not."

It would seem, according to such an analysis, that a right of first refusal would be more akin to a possibility reverter or a right of re-entry, which is non-possessory and not subject to adverse possession until the event occurs, being in the case of a right of first refusal a sale of the property by the grantor of the right of first refusal, which gives the holder of the right of first refusal the right to acquire the property on similar terms. However, as further discussed below, the Iowa courts have made rulings more supportive of the West Lakes analysis as to when an interest arises and becomes adverse to another under Section 614.17A

D. While in the West Lakes case the interest in real estate evidenced by the right of first refusal was created more than ten years ago and the plaintiff West Lakes had a chain of title to and had been in possession of the real estate for more than ten years since the granting of the right of first refusal, and no claim to preserve the right of first refusal was filed by Greenspon during such period, the court in West Lakes used Section 614.17A to cut off, in the right of first refusal, an interest which was:

1. a contractually created interest agreed to by the very party which then sought its termination under Section 614.17A.

2. contingent and not yet enforceable by Greenspon as a possessory interest.

3. could never be adverse to the current possession of West Lakes as the party seeking to have it declared unenforceable.

4. deemed to be an interest in real estate subject to the statutory limitations of Section 614.17A as a servitude that affects alienability and which arose at the time it was created.

5. a claim which arose subsequent to the last conveyance in the chain of title, which was the conveyance of title to West Lakes itself. (See again discussion of Title Standard 10.1 Comment below)

6. in the Court's eyes not entitled to any equitable considerations since the fact scenario fell within the clear language of the statute.

E. The holding in West Lakes, as based upon the above referenced points, though shocking to some, did not create as much "new law" as it might appear in the manner in which it applied the statutory provisions of Section 614.17A. In fact, as we look at prior cases dealing with the interpretation of Section 614.17A, we can see that West Lakes was basically consistent with and supported by such previous court decisions which (i) hold that interests or claims in real estate under Section 614.17A against which the ten year time period of adverse possession by the current titleholder of record run "arise or exist" at the time of their creation and not when they become enforceable by action, and which (ii) reflect the guiding principal of the Iowa courts to aggressively apply Section 614.17A as a marketable title act, rather than as a statute of limitations, by which it could be

applied both to current or contingent possessory interests despite possible inequities, all in the cause of simplifying the establishing of marketable title.

1. In the case of Lane v Travelers Insurance Co. of Hartford, Connecticut 299 N.W. 553(Iowa 1941) (hereinafter "Lane"), the court held, in a case dealing with the application of then Section 614.17 to cut off the claims of contingent remaindermen under the will of Edmund Lane, as against subsequent owners in possession of the record fee title, that the words "claim arising or existing" prior to a certain date under Section 614.17 means "originating or coming into being" rather than "accruing" in the sense of enforceability of the claim (Lane, p.555). The Court held, therefore, that even a contingent remainder created under a will as a future possessory interest, since recognized and protected by a court as an existing right upon creation, is a right against which title can be acquired by a third party by adverse possession, even prior to the termination of the life estate which was the condition precedent to the possessory rights under the remainder interest (Lane, p. 555, citing Ward V. Meredith 173 N.W. 246, 249 (Iowa 1919.)

2. In another case dealing with whether a remainder interest in persons should be subject to the application of Section 614.17A before the death of the life tenant, the court in the case of In re Hord, 836 N.W. 2d 1 (Iowa 2013) (hereinafter "Hord") cited from the Lane case the court's determination of the difference between when a claim "arises" and when a clam "accrues" thereon, and held that a claim under Section 614.17A arises or exists on the date the instrument creating the interest was recorded, such that even a future interest is deemed to arise or exist when the interest appears of record, and not when it vests, becomes possessory or becomes actionable (Hord, p. 7).

3. In the case of Presbytery of Southeast Iowa vs Harris, 226 N.W.2d 232(Iowa 1975) in which the court upheld the constitutionality of Section 614.24 of the Iowa Code against the enforcement of a reversionary interest before the condition for the reversionary interest to become possessory occurred, the court cited also the terms of Section 614.17A as an additional marketable title act, and states that such acts "clearly represent a salutary attempt on the part of our General Assembly to keep pace with public demands for needed reforms in the field of land title conveyancing practices ... and are designed to shorten the period of search required to establish title in real estate and give effect and stability to the record titles by rending them marketable and alienable – in substance to improve and render less complicated the land transfer system" (Presbytery, p. 236). The court went on to state (citing a Minnesota case) "as we have heretofore noted, a statute of limitations necessarily deprives a person of an interest which he would be able to assert in the absence of the statute if he fails to commence action in the stated period. Marketable Title Acts merely require filing notice rather than commencing an action; hence they may apply to vested future interests" (Presbytery, p. 239). Finally the court states that a statute such as 614.24 or 614.17A is not "a statute which operates to bar the claimants remedy before he has had an opportunity to assert it", but is a statute which "requires nothing more

than the filing of a notice of claim after which enforceability thereof is extended for an additional (period)" (Presbytery, p. 242).

4. The Supreme Court has stated in the Lane case, and in citing the Lane case in the Hord case, with regard to the equity of applying Section 614.17A strictly to cut off the claims of remainder interests in those cases, that "it may be that the legislature did not intend this provision to apply to such a case as the present" but "as we view it, the language of the statute is plain and unambiguous", and "there can be little doubt of the desirability of statutes giving greater effect and stability to record titles" (Lane, p. 555).

5. In the West Lakes case, the Court responded to the assertion by Greenspon that the application of Section 614.17A to the facts of that case would be inequitable by citing the case of Martin v Martin, 720 N.W.2d 732, 738 (Iowa 2006) where it held that "absent constitutional concerns it is not for the courts to overlook the language of the statute to reach a particular result deemed unjust under the particular circumstances of the case" (West Lakes, p. 8).

F. Where the West Lakes Court diverges from the previous applications by the Iowa Supreme Court of Section 614.17A was (i) its application of the statute to a contractual agreement between the very parties who created the contract, (ii) its application of the statute to a situation where the chain of title in the party wanting to enforce the statute was not sufficient under the statute, as previously interpreted by an Iowa Supreme Court case and as discussed in the Comment to Iowa Title Standard 10.1, and (iii) its finding that a right of first refusal was an interest and claim in real estate because it was a servitude on land.

1. With the dispute in the West Lakes case being between the actual grantee and grantor of the right of first refusal, by definition there could be no valid adverse possession by West Lakes against Greenspon. West Lakes could not be dispossessed by Greenspon, neither then nor in the future, since Greenspon could not even act until and unless West Lakes decided to dispossess itself of the property by wanting to sell it to a third party.

    a. On the other hand, in both the Lane and Hord cases, where the holder of the remainder interest was deemed to be adverse to the current titleholder in possession, the facts in both cases were that an intervening event title occurred which caused a third party, not directly involved with the holder of the remainder interest, to have received a fee interest conveyance which made the current titleholder's interest adverse to the remainder interest.

    b. Just as I would believe that the Iowa Supreme Court would never see the interest of the life tenant as adverse to the interest of a remainderman, since the latter could never dispossess the former, I would think the Court in West Lakes would see that West Lakes could never be dispossessed by Greenspon, and so was not able to

claim adverse possession against Greenspon under Section 614.17A.

c. However, the Court did not focus on whether the interest of Greenspon was one adverse to the right of West Lakes to remain in possession, but instead focused on such interest as a claim creating a servitude adverse to West Lakes ability to sell the property to whomever it wanted.

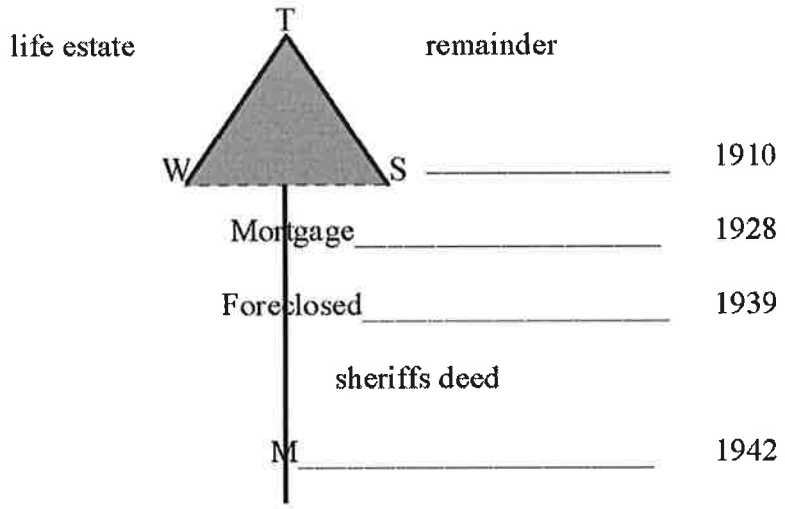
2. The strict application of the language of Section 614.17A to the facts of the West Lakes case in effect goes against a previous Supreme Court interpretation of what constitutes an adequate chain of title by the record titleholder in possession to use the defense of that statute, and is also contrary to the Comment of Title Standard 10.1 of the Iowa Land Title Standards of the Iowa State Bar Association. By "strict application" of the statute, I mean that the Court in West Lakes looked only at the facts that the claim arose more than 10 years ago, that the titleholder in possession has a chain of title to the real estate going back at least 10 years, and that no claim to extend was filed, but fails to consider whether the title events in the chain of title of the current titleholder during such period are all subsequent to the date the claim arose and are all free of any reference to such claim.

a. The case of Lytle v Guilliams, 41 N.W.2d 668 (Iowa 1950) involved basically the following fact situation, at a time when the requirements for the application of then Section 614.17 as a defense to a possessory claim were that the claimant had to have an interest arising prior to January 1, 1930, had to have failed to file a claim to preserve the interest prior to July 4, 1943, and the party asserting the 614.17 defense had to have chain of title going back to January 1, 1930:

> Testator (T) died in 1910. T devised his land to his wife (W) for life, remainder to his son (S). According to T's will, S was to pay $2,700 out of his remainder to each of two daughters of T (D_1 and D_2). This has never been paid. In 1928 W and S gave a mortgage to M for $2,000. The mortgage was foreclosed by M in 1939. T's three children (S, D_1 and D_2) predeceased W who died in 1947. None of the successors of D_1 or D_2 where made parties to the foreclosure proceeding. The land was purchased by M and a sheriff's deed was issued to him in 1942. The daughters' successors bring an action in 1948 to recover the land necessary to satisfy the $2,700 to each of the daughters as specified in T's will. M contends that the action is barred by section 614.17 because it is based on a claim that arose before 1930

and the claim was not preserved by the required filing before July 4, 1943. (See Diagram A).

Diagram A.



Result: the daughters' interest vested at the time of T's death in 1910. Thus, it would appear that their successors' action would fail because it is based on an interest that arose before 1930. However, because M did not acquire the sheriff's deed until 1942, he does not qualify as a holder of record title since January 1, 1930, and consequently his defense would be of no avail.

The determining factors in the holding of the Court in Lytle were: (i) the Sheriff's Deed purporting to cover the full fee interest did not issue until 1942; (ii) prior to that time, the only "conveyance" of record of the fee interest prior to 1930 was the probate of the will of the decedent creating the life estate and creating the remainder interests, which remainder interests were the interests sought to be cut off by the titleholder in possession; and (iii) based on such facts, M "and (his) grantors have not held the record chain of title since January 1, 1930, within the definition of the statute" (Lytle, p. 672).

b. In the Comment to Title Standard 10.1 dealing with the application of Section 614.17A, we give the following example and caveat:

> One must exercise care, of course, to make certain that the facts of the particular case in which it (Section 614.17A) is proposed to apply the section are such as to bring the case within its scope. For instance, assume

the following state of facts: Fifteen years ago a conveyance of record is made to Smith, expressly subject to a contract of sale to Brown. Smith then conveys of record to White eight years ago and his conveyance is not made subject to such contract, nor is it otherwise qualified. A good record chain of title from White is thereafter made but no conveyance or forfeiture of the contract interest of Brown appears of record. Under this set of facts, § 614.17A does not apply to bar Brown's claim. This is true because it is not the fact that (in the language of the statue) the "holder of the record title to the real estate in possession and the holder's immediate or remote grantors are shown by the record to have held chain of title to the real estate for more than ten years." The case would be otherwise if the assumed facts were altered only in the particular that the conveyance by Smith to White was recorded more than ten years ago rather than less than ten years ago.

c. The chain of title of West Lakes goes back 10 years, but since the creation of the right of first refusal postdated the deed to West Lakes, there is no way West Lakes' chain of title satisfies the provisions for a valid chain of title under Section 614.17A as set forth in the Lytle case and in the Comment to Title Standard 10.1. Other cases like Lane and Hord do not focus on this issue in their rulings, but the facts of those cases fit the requirements of Lytle and the Comment to Title Standard 10.1 for a valid ten year chain of title in the party using Section 614.17A as a defense.

3. The determination by the Court in West Lakes that "an interest in or claim to real estate" under Section 614.17A includes any servitude in land, opens the door to further expansion of the reach of the application of Section 614.17A to interest or claims that are non-possessory in nature.

a. With the term "servitude" being defined in a footnote in the West Lakes case as "a legal device that creates a right or obligation that runs with the land" (Restatement Third of Property: Servitudes Section 1.1(Am. Law Inst. 2000)), interests in land such as easements, restrictive covenants, and Association liens for unpaid dues, all being nonpossessory interests, could arguably be found by the Court to be subject to the requirements of Section 614.17A.

b. The Iowa courts may be hesitant to apply the 10 year time frame of Section 614.17A to interests such as restrictive covenants, already made subject to the operation of Section 614.24 (Stale Uses and Reversions Act), but if the differentiation between possessory and

nonpossessory interests under Section 614.17A has been breached, who knows what the court might do under various facts and situations that fall with the "clear and unambiguous" language of that Section.

c. Any application of Section 614.17A to easements would be contrary to the protection given to easements from elimination under the Marketable Title Act in Section 614.36 of the Iowa Code, and as interests omitted from the definition of "use restrictions" under Section 614.24.

VIII. SO WHERE ARE WE?

A. The Iowa courts, up to and through the West Lakes decision, appear to be interpreting Section 614.17A as being applicable to interests in or claims to real estate:

1. which have arisen more than ten years ago;

2. for which no claim to preserve such interest has been filed within the last ten years;

3. whether or not they are possessory interests;

4. whether or not they are yet enforceable as an interest adverse to the possession and ownership of the current titleholder in possession;

5. even if they are contractual interests between the parties that are involved in the dispute; and

6. whether or not the ten year chain of title of the party relying on Section 614.17A as a defense goes back at least ten years to a title event which both postdates the date on which the interest or claim arose and is free of any recognition of or reference to such interest or claim.

B. The Iowa courts base such holdings and interpretations of the application of Section 614.17A in large part upon:

1. The duty of a court to strictly apply the plain language of the statute to fact situations to which such language would apply, without consideration of equitable arguments against such application; and

2. The determination that since Section 614.17A, as a marketable title act rather than a statute of limitations, allows claims to be preserved and extended by timely filing of a claim to extend, the aggressive enforcement of this statute is justified by the benefits such marketable title acts have on simplifying the determination of marketable title (no matter that this may beg the question of whether the statutory provisions of Section 614.17A

are adequately clear as to which interests or claims are subject to the requirement of filing claims to extend).

IX. WHAT SHOULD BE DONE?

A. I believe the time has come to legislatively amend and/or update Section 614.17A for the purpose of better balancing the benefits to be derived under that statute as a marketable title act with the need to be clear as to the types of interests and claims that can be affected by the statute.

B. Possible areas of focus in connection with such statutory modification could be as follows:

1. Lessen the need for the Iowa courts to take on the roll of "defining" what an interest or claim in land is, to the extent possible, so that we can avoid to a greater extent the case by case application by the courts of the statute to additional types of interests, which necessarily works retroactively to affect like interests which may have already been in existence for ten years.

2. Clarify that the interests or claims in real estate to which the statute applies are to be possessory interests, i.e. those interests or claims which could result in the current titleholder being divested of ownership and possession now or in the future by the claimant, in order to avoid possible application of the statute by court interpretation to nonpossessory claims deemed servitudes, such as easements, covenants, liens for Association dues, etc.

3. Clarify that the statute is not applicable to interests which are never cut off by Section 614.36 of the Marketable Title Act or which are addressed by other marketable title statutes such as 614.24.

4. Protect contractual rights between parties such as rights of first refusal and options by making the statute inapplicable for use by the party granting the interest while that party is still in ownership and possession.

5. Clarify that the chain of title of a party using the statute as a defense to a claim must be consistent with the holding in the Lytle case and the comment in Iowa Title Standard 10.1.

6. Clarify that the bar of Section 614.17A is only as to the enforceability of any lien or claim upon the real estate and not necessarily a bar to any actions for damages for breach of contract.

7. Keep in mind, however, that it is not unfair to provide that parties with an interest subject to the terms of the statute must viligently protect their right as against third parties in possession with whom they have no privity of contract.