FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Title News

TIRSA Announces Changes in Title Insurance Rates

The Title Insurance Rate Service Association, Inc. ("TIRSA"), the entity that negotiates title insurance rates with the New York State Insurance Department on behalf of all insurers, has announced two consumer-friendly amendments to the Rate Manual effective February 15, 2006. First, borrowers obtaining new loans will no longer be required to provide proof of insurance in order to qualify for the re-issue rate. Circumstantial evidence of it found in the public records will be deemed sufficient.

Second, the discounted rate on re-issued amounts has been changed. When the re-issued amount was up to $250,000 the discount was 50% of the published rate, and when greater than $250,000, 30% of the rate. The new discount will be 50% where the re-issued amount is $475,000 or less, and 30% if greater.

ACRIS Updates

New York City's Department of Finance has announced that (i) documents to be recorded in Bronx, Kings or Queens Counties may be submitted at the Business Center in any of these counties; (ii) incomplete Cover Pages will be purged from ACRIS if not completed within 30 days, and completed ones will be purged within 90 days if not submitted with payment; (iii) incomplete E-Tax Forms will be purged from ACRIS within 45 days, and completed E-Tax Forms will be purged from ACRIS if not submitted attached to a cover page within 90 days; and (iv) ACRIS documents with the imprint of a fax number will be rejected.

Roccanova v. Commissioner of Department of Social Services of City of New York
2004 NYSlipOp 24402, 10-21-04, corrected 1-26-05

A Social Services lien filed pursuant to Social Services Law Section 369 (2) (b) (i) (A) and (B), regarding liens against real estate owned by a recipient of Medicaid assistance, is not subject to the general six-year Statute of Limitations found in the CPLR. These liens subsist until the sale of the premises or the death of the debtor, after which occurrence the six-year Statute of Limitations may begin to run (this last assertion appears to be an *obiter dictum*). A non-consideration transfer to a trust for the benefit of the debtor did not trigger the Statute of Limitations.

Perfecting the Closing

Real Property Law Section 275

Many a closing attorney working on consolidating mortgages has stopped and wondered at the repetition of language such as "this Assignment is not subject to the requirements of section 275 of Real Property Law because…". Being pressed with time, the intrigue is usually forgotten as quickly as it arises in the quiet comfort that whatever the requirements of section 275 are, *it's a good thing they do not apply.*

Section 275, as modified in 1989, was the legislature's answer to what it perceived to be an abuse of a loophole in the mortgage tax. Prior to 1989, Section 275 gave a borrower who paid off a mortgage the right to request an assignment to any party of her choosing. This was intended to guarantee mortgage tax savings when taking a new loan from a different lender. The lender of record would receive payment in full from the new lender, in exchange for an assignment of mortgage to the new lender. The borrower would then execute a mortgage and note only for the difference between the old indebtedness and the new loan amount, resulting in a smaller mortgage to record and a lighter mortgage tax burden. This is the typical CEMA transaction we still use today.

The problem arose in that the statute was too broad for its purpose. The statute did not require that the borrower take a new mortgage loan. The industry saw an opportunity in those mortgages that were paid off without the proceeds of a new loan. When a borrower paid off a loan with her own money, the borrower would ask for an assignment to a nominee of hers, who would hold the indebtedness intact –i.e. without receiving or requesting monthly payments- until the borrower refinanced and had the old mortgage assigned to the new lender.

> For example: in 1980 A takes a mortgage loan in the amount of $400,000 with Bank1. In 1985, when the outstanding amount is $300,000, A pays the loan in full and requests an assignment to B, a friend of hers. B holds the mortgage for two years in the understanding that he is not to collect anything, and that he is holding it for A's benefit. When A takes a new mortgage loan with Bank2 in 1987 in the amount of $500,000, she has B assign the old mortgage to Bank2, thereby reducing the mortgage tax liability to $200,000, the difference between the new loan and the outstanding assigned amount.

It was this scheme that prompted the redrafting of Real Property Law Section 275 in 1989. The State of New York identified two purposes assignments fulfill: (1) mortgage tax savings, and (2) trading of mortgage loans among lenders in the secondary market. The mortgage tax savings purpose has been identified in the following four cases:

1. the replacement of a construction loan with permanent financing;
2. the refinancing of an existing loan with a new lender, such as where the original lender assigns a note and the mortgage securing its payment to another lender in return for consideration and such mortgage is consolidated with another mortgage which secures any funds advanced by the new lender to the mortgagor;
3. the modification of the terms of a loan by a mortgagor and mortgagee in order to avoid foreclosure; and
4. a refinancing that occurs in conjunction with the sale of property such that the seller conveys property to the purchaser subject to the lien of the mortgage and the original lender assigns its note and mortgage on the property to the purchaser's lender.

Whenever an assignment fulfilled any of the above, language such as the following should be added in the assignment or in simultaneously recorded affidavit:

> "The Assignee is not a nominee of the mortgagor's and the mortgage continues to secure a bona fide obligation."

In the case of mortgages traded in the secondary market -e.g. when a bank sells its mortgages to liquidate assets and borrower suddenly receives notice to make her payments to another lender-, the State requires that the assignment or an affidavit simultaneously recorded recite the following language:

> "This assignment is not subject to the requirements of section 275 of the Real Property Law because it is an assignment within the secondary mortgage market."

Failure to comply with the requirements of Section 275 results in the unrecordability of the assignment, which usually undermines the transaction.

This article has dealt mostly with the history of Section 275, but it is important to realize that the 1989 redrafting may have repercussions beyond the apparent original intention. First, borrowers no longer possess an absolute right to request an assignment, so lenders are free to deny them or charge any fee for their cooperation. Second, some lenders have reportedly grown wary of assigning loans fearing the assignee may be a nominee of the mortgagor's. Third, an assignment has been forbidden in the following case:

> "The New York City Department of Finance has refused to accept an assignment of a pre-existing mortgage to the seller of real property as part of the buyer's purchase money financing without payment of mortgage recording tax on the prior but still outstanding indebtedness. It asserts that, under Section 275, the mortgage as assigned to the seller secures a new obligation on which mortgage tax is due." (Michael J. Berey, *Legislation Addresses Mortgage Assignment*, New York Law Journal, 8-24-98.)

Industry Curiosities

What does the word "mortgage" mean?

At common law, a mortgage was a conveyance of absolute title subject to a condition, which was not necessarily the payment of money. Failure to meet the condition, which could be anything, such as offering one's issue in marriage, resulted in a fee simple vested in the mortgagee. The mortgagee was then entitled to transfer the property without need to foreclose. The noun "mortgage" is French Norman for "dead pledge" and denotes a conveyance of property that is not immediately effective, and was distinguished from a "live pledge," which was another form of financing. A live pledge was a conveyance of title where the grantor retained an interest to collect the fruits of the real estate, such as actual harvests or rent money, until the debt was paid. The allusion to "live" as opposed to "mort" refers to the creditor's active interest in the real estate. In New York, statutory law has divested the mortgage of its title nature and turned it into little more than a lien. But it is interesting to note that a remnant of the old common law mortgage survives in Real Property Law Section 256 regarding mortgages executed to secure obligations other than the payment of money.