Title Talk No. 106

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RATING BUREAU ACTIVITY: RATE & FORM MANUALS AMENDED

The New Jersey Land Title Insurance Rating Bureau ["NJLTIRB"] has recently received approval of the Department of Banking & Insurance ["DOBI"] for certain changes to the *Rate* and *Forms Manuals.* These changes, a summary of which is set forth below, became effective on **February 1, 2019,** pursuant to **NJLTIRB Filing No. 2018-05.**

New Policy and Commitment Forms Adopted. None.

Existing Policy and Commitment Forms Withdrawn. None.

New Endorsement Forms Adopted.
ALTA 11.1-06 (Mortgage Modification with Subordination) (NJRB 5-174)
ALTA 11.2-06 (Mortgage Modification with Additional Amount of Insurance) (NJRB 5-175)
ALTA 26-06 (Subdivision) (NJ Variation) (NJRB 5-176)
ALTA 39-06 (Policy Authentication) (NJRB 5-178)
Partial Release of Mortgage Premises (NJRB 5-177)

Revised Policy Forms Adopted.
ALTA Homeowner's Policy (NJRB 1-16)

Revised Endorsement Forms Adopted.
ALTA 3-06 (Zoning) (NJRB 5-87)
ALTA 14-06 (Future Advance –Priority) (NJ Variation) (NJRB 5-107)
ALTA 16-06 (Mezzanine Financing) (NJRB 5-114)
ALTA 20-06 (First Loss –Multiple Parcel Transaction) (NJRB 5-121)
ALTA 25.1-06 (Same as Portion of Survey) (NJ Variation) (NJRB 5-126)
ALTA 29.1-06 (Interest Rate Swap –Additional Interest) (NJRB 5-130)

Existing Endorsement Forms Withdrawn.
Subdivision Endorsement (NJRB 5-61)

Other Forms Revised.
Important Notice and Disclosure (NJRB 3-05)

Revisions to Forms Manual. The NJLTIRB Forms Manual has been revised to reflect the changes discussed above.

Revisions to Rate Manual. The NJLTIRB *Rate Manual* has been revised to:
•Withdraw § 10.36
•Revise § 10.37 to add ALTA 11.1-06 and 11.2-06
•Revise § 10.53 to correct its title
•Revise § 10.60 to make technical corrections to its wording
•Add § 10.104 -- ALTA 26-6 (Subdivision) (NJ Variation)
•Add §10.105 -- Partial Release of Mortgage Premises
•Add §10.106—ALTA 39-06(Policy Authentication)

The changes discussed above which relate to revisions made to existing filed forms are largely technical in nature, and thus do not require changes in current underwriting practices.

The **ALTA 11.2-06** Endorsement (NJRB 5-175) is intended for those instances where a mortgage is modified to increase the principal amount of the indebtedness secured by the insured mortgage. The increase in the principal amount secured may jeopardize the lien priority of the new money secured by the mortgage. Since ALTA 11.2-06 provides for an increase in the Amount of Insurance , it is important that the mortgage modification (or the amended and restated mortgage, as the case may be) be reviewed prior to closing to ensure that it contains language sufficient to secure a lien for the increased principal amount of the mortgage. (cont'd on page 2)

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Additionally, when issuing this endorsement , record title must be updated and all title interests and liens created subsequent to the Date of Policy must be shown in § 3b of ALTA 11.2-06, unless those interests or liens are specifically subordinated to the lien of the insured mortgage ,as amended , by way of a recorded subordination agreement .

The **ALTA 11.1-06** Endorsement (NJRB 5-174) is intended for those instances where the insured lender requires assurance that the lien of its mortgage, as modified, is not subordinate to specific matters of record. Underwriting for this endorsement is the same as the underwriting procedures utilized in issuing ALTA 11-06. Requests for issuance of ALTA 11.1-06 are expected to be infrequent.

The **ALTA 26-06** Endorsement (NJ Variation) (NJRB 5-176) is simply a replacement for the existing Subdivision Endorsement, and thus no new underwriting procedures are required.

The **ALTA 39-06** Endorsement (NJRB 5-178) is intended for those instances where a policy or endorsement is issued electronically or without "ink" signatures and the Insured seeks affirmation that the Company will not deny liability under the policy or endorsements solely on the grounds that the policy or endorsements were issued electronically or without signature. As such, does not require any additional underwriting considerations and may be issued when requested.

The **Partial Release of Mortgage Premises Endorsement** (NJRB 5-177) is intended for those instances where a lender is recording a partial release of mortgage and seeks assurance that the partial release will not impair the lien of its mortgage on the lands not being released. When issuing this endorsement title must be searched to ensure that the insured mortgage is still open of record and held by the party giving the release. The partial release of mortgage must be reviewed prior to closing to ensure that at least some portion of the Land encumbered by the mortgage will remain so encumbered. Obviously, this endorsement may only be used in connection with a loan policy issued by the same title insurer which originally insured the mortgage.

FEDERAL ESTATE TAX EXCLUSION SET FOR 2019

The federal estate tax ["FET"] exclusion for **2019** has been set at **$11,400,000.00.** On January 1, 2013, Congress enacted **P.L. 112-240**, the "American Taxpayer Relief Act of 2012" ["ATRA"], which, among other things, set the federal estate tax ["FET"] exclusion under **26 U.S.C. §2010** at **$5,000,000** for estates of decedents dying in the year **2013** and **2014.** But these figures were adjusted for inflation to **$5,250,000** (for 2013), **$5,340,000** (for 2014), **$5,430,000** (for 2015), **$5,450,000** (for 2016) and **$5,490,000** (for 2017). The maximum tax rate for that portion of an estate which exceeds the exclusion was formerly **35%**; it is now **40%** (for decedents dying in 2013 or there- after). The IRS had set the 2018 exclusion at $5,600,000, but Congress then enacted the "Tax Cuts and Jobs Act of 2017" ["TCJA"], **P.L. 115-97**, in late 2017, which increases the exclusion to approximately **$11,200,000** (subject to adjustment for inflation by the IRS).

As noted in ***N.J. Title Practice***, **§54.07 (4th Ed. 2016)**, the exclusion had been gradually increased from $675,000 in 2000 to $3,500,000 in 2009. In 2010, the exclusion was unlimited; *i.e.,* no tax was imposed on estates of decedents dying in that year (provided a proper election was made). However, if Congress had not acted, the tax would have been restored in 2011. Congress responded by amending the statute, through the enactment of **P.L. 111-312**, the "Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010", which set the exclusion at $5,000,000 for decedents dying in the years 2011 and 2012. As noted above, ATRA extended the $5,000,000 exclusion (as adjusted for inflation) through, the years 2013, 2014, 2015, 2016 and 2017. Thereafter, TCJA increased the exclusion to approximately **$11,200,000** for the years 2018 through 2025. Note that figures for the years 2012-2019 have been adjusted by the IRS for inflation.

The lien of FET, if unpaid, has a duration of **10 years** from the decedent's death. See **26 U.S.C. §6324**. Accordingly, guidelines adopted by most title insurers (including FNTG) generally require that, in cases **where the decedent died within the last 10 years,** the title commitment should contain the requirement requiring proof of payment or proof that the estate is not subject to the tax.

SALES OF REALTY Y NY NON-PROFIT AND RELIGIOUS CORPORATIONS

In general, real estate transactions involving non-profit and religious corporations are governed by **Title 15A** (formerly **Title 15**) and **Title 16** (respectively) of the New Jersey statutes, ***N.J.S.A.* 15A:1-1; 16:1-1 *et seq*.** Titles 15A and 16 are intended to regulate non-profit and religious corporations (respectively) formed under New Jersey law. And, in fact, most non-profit and religious institutions owning real estate in New Jersey have been formed under Titles 15, 15A or 16. The requirements for insuring such transactions are discussed at length in ***N.J. Title Practice*, Chs. 47** (Corporations: Non-Profit) and **48** (Corporations: Religious) (4th Ed. 2016).

What occurs if a non-profit or religious corporation has been formed under the laws of another state, such as New York? Does the law of New York apply to the sale, lease or mortgage of its New Jersey real estate? The answer is unclear. However, as a matter of conveyancing practice, some attorneys and title insurers (including FNTG) believe it is prudent to assume that any additional requirements imposed by the **New York Not-For-Profit Corporations Law** [NY N-PCL] or **New York Religious Corporations Law** [NY RCL] should be complied with when confronted with a transaction involving New Jersey realty owned by a non-profit or religious corporation formed under the laws of New York.

NY N-PCL §510(a) states that a "sale, lease, exchange or other disposition of all, or substantially all, of the assets of a [non-profit] corporation may be made upon such terms and conditions ... as may be authorized in accordance with the following procedure: ... **(3)** if the corporation is...classified as a charitable corporation..., such sale [etc.] shall in addition require approval of the attorney general or the supreme court..." (which is the equivalent of the New Jersey Superior Court). The law is only applicable to a transaction which involves all, or substantially all, of the assets of the corporation. It does not apply to mortgages, or to instances where the non-profit corporation has not been classified as "charitable". **NY N-PCL §§ 511** and **511-a** set forth (respectively) the procedures for obtaining approval from the court or from the attorney general. The same are incorporated by reference into the **NY RCL** (discussed below).

NY RCL §12 states that a "religious corporation shall not sell, mortgage or lease ...any of its real property without applying for and obtaining leave of the court or of the attorney general therefore...".

The law does **not** apply to **purchases** of realty by religious corporations, and thus **purchase-money** mortgages are exempt. Nor does it apply to **leases for a term of five years or less**. Approval is obtained by submitting a petition to the New York Supreme Court (which is the equivalent of the New Jersey Superior Court) or to the Attorney General, pursuant to the procedure set forth in certain sections of the NY N-PCL, discussed above.

Accordingly, when asked to insure a transaction involving a New York non-profit or religious corporation, a title company may insert requirements regarding compliance with the statutory provisions discussed above.

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RECORDING FEES AND RECORDING OFFICERS: *NJLTA v. Dana Rone*

May county recording officers impose new or additional recording charges which have not been specifically authorized by the Legislature? That is the question posed by the Appellate Division's recent decision in ***New Jersey Land Title Ass'n v. Dana Rone,* -- N.J. Super – (App. Div. 2019), 2019 WL 508858,** which has been approved for publication. The saga began in 2006 when the Essex County Register's Office [ECRO] decided to accept electronically-submitted documents for recording. In order to be able to provide this service, ECRO entered into a shared servicing agreement for a web-based document management system. Under the agreement, ECRO was compelled to pay fees for the use of the system. In 2016, for example, the cost to ECRO was $24,700.

In an effort to recoup these expenditures, the Essex County Board of Chosen Freeholders adopted an ordinance permitting the ECRO to charge a "surcharge or convenience fee of $3.00 … to offset the cost of electronic receipt transactions". Believing that the additional fees charged to electronic filers were unjustified, NJLTA filed a complaint in 2016 against Dana Rone, the Essex County Register. The Law Division nevertheless entered judgment in favor of the Register, and NJLTA appealed.

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RECORDING FEES AND RECORDING OFFICERS: *NJLTA v. Dana Rone* (cont'd from page 3)

Judge Gilson, writing for a unanimous panel of the Appellate Division, framed the issue as follows: Whether a county register or clerk has the authority to charge a "convenience fee" for the electronic filing of documents. It concluded that: "The Legislature has prescribed the fees a county register or clerk may charge for the filing of documents, and a convenience fee is not one of the legislatively authorized fees. Accordingly, we hold that a county register or clerk cannot impose such a fee."

The opinion analyzed the statutory scheme relating to the recording of documents and the imposition of fees therefor. It noted that documents affecting real property are filed in the county where the land is located. ***N.J.S.A.* 46:26A-1.** The county clerk or register is designated as the recording officer. ***N.J.S.A.* 40A:9-90.** Electronic filing is authorized by ***N.J.S.A.* 46:26A-1** and ***N.J.A.C.* 15:3-9.3.** A uniform schedule of recording fees have been set by the Legislature. ***N.J.S.A.* 22A:4-4.1.** Since the list of fees established by statute does not include a "convenience fee" for electronic recording", county recording officers are not at liberty to impose such a charge.

RECENT CASES CONSTRUE MORTGAGE FORECLOSURE STATUTE OF LIMITATIONS: *Deustche Bank v. Weiner; Deustche Bank v. Gillis; and Wilmington Savings Fund v. Vaish*

For many years, New Jersey lacked a statutory time limitation for mortgage foreclosures, In 2009, the Legislature remedied this deficiency by enacting ***N.J.S.A.* 2A:50-56.1** which amends the **Fair Foreclosure Act** [FFA] to provide that an action to foreclose a residential mortgage must be commenced upon the occurrence of the **earliest** of the following events: (a) 6 years from the maturity date (*i.e.*, the date the last payment is due); (b) 36 years from the date of recording or (c) 20 years from the date of default. ***N.J. Title Practice***, §81.20 (4th Ed. 2016).

A number of decisions have construed the statute. See ***Title Talk* No. 101** (Fall 2017). More recently, ***Deutsche Bank v. Weiner*, -- N.J. Super – (App. Div. 2018), 2018 WL 5831060** (approved for publication) rejected defendants' contention that the 6-year time frame of §56.1(a) controlled, because plaintiff lender's acceleration of the debt upon default advanced the maturity date. The panel, in a unanimous decision by Judge Fisher, found that this interpretation, if accepted, would conflict with the 20-year period allowed by §56.1(c).

In other words, the court rejected the notion that the acceleration of debt upon default is the equivalent of changing the maturity date. ***Deutsche Bank v. Gillis*, 2019 WL 490093 (App. Div. 2019),** involved a similar argument by the defendants, which was rejected by the 2-judge panel in an unreported opinion, applying similar reasoning.

***Wilmington Savings Fund Society v. Vaish*, 2019 WL 573451 (App. Div. 2019)** involved a purchase-money mortgage which was executed by the wife, but (apparently by mistake) not the husband. As part of its foreclosure suit, plaintiff lender sought a determination that the mortgage could be enforced against the husband as an equitable mortgage. After reviewing the factors applicable to judicial recognition of equitable mortgages, the Chancery Division agreed with the lender's contention. The husband also raised numerous affirmative defenses, including the applicable statute of limitations. The trial court struck these defenses; it noted that the foreclosure was timely, as it was commenced within 20 years from default, in accordance with §56.1(c). A two-judge panel of the Appellate Division affirmed the Chancery Division, in an unreported decision.