First Nationwide Title Agency, LLC

The Liber & Page

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Vincent G. Danzi, Editor.

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Welcome to the Liber & Page, the official newsletter of First Nationwide Title Agency, LLC.

January 2016 Edition

Introducing the Liber & Page Newsletter…

First Nationwide Title Agency, LLC, proudly introduces the first issue of our quarterly newsletter, the Liber & Page. Inside each issue of L&P, you will find the latest real estate news relevant to professionals like you who negotiate and facilitate real estate transactions, both large and small. L&P will be supplemented with special editions when important developments break. In addition to news about new laws, regulations, and case law, each issue will also feature an "In Depth" column that focuses on a particular facet of our industry. Vincent G. Danzi, senior vice president and senior counsel at First Nationwide, is L&P's editor. Feel free to contact him at vdanzi@firstnat.com with any comments or suggestions.

-Steven Napolitano, CEO

Contents

Real Property News

Nassau County Declares Emergency to Delay Rise in Document Recording Fees Until 2016

Nassau County Administrative Code §19-17.0 had been amended to increase the Nassau County Clerk block recording fee from one hundred fifty dollars ($150.00) to three hundred dollars ($300.00). The Tax Map Verification Letter fee had also increased from seventy five dollars ($75.00) to two hundred twenty five dollars ($225.00). Both of these increases initially took effect on Monday, December 7, 2015.

However, after title industry testimony by Robert Treuber, Executive Director of the New York State Land Title Association before the Nassau County Legislature at its last meeting of the year on Monday, December 21, 2015, the lawmakers suspended collection of the raised fees until January 4th, and voted to refund the increased fees collected thus far. (Video of the vote on the measure is available here, at about 7:23:30 http://nassaucountyny.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1610&Format=Agenda)

Suffolk County Raises Tax Lot Verification Fee

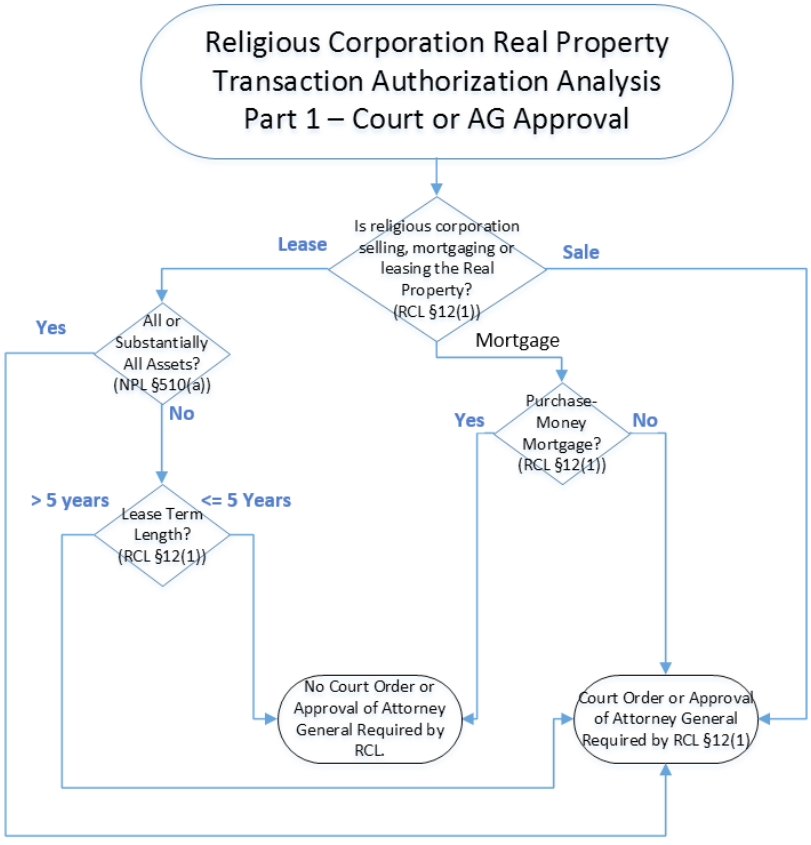
Effective December 18, 2015, Suffolk County's Local Law 34-2015 was amended to raise the Real Property Tax Service Agency fee, aka the Tax Lot Verification fee, from sixty dollars ($60) to two hundred dollars ($200), per lot.

New York's Religious Corporations Law Amended

Effective December 11, 2015, the New York State Legislature amended Article 2, Section 12 of the New York Religious Corporations Law to permit a corporation formed as a religious corporation to seek either a Supreme Court Order or the approval of the Attorney General in order to (i) sell, (ii) mortgage or (iii) lease for a term greater than five (>5) years, real property held by the religious corporation. Previously, §12(1) of the law had not provided the alternative of Attorney General approval.

Conveyances of real property by religious corporations must be authorized through the proper board of directors voting and outside-approval provisions found in both the New York Not-for-Profit Corporation Law and the New York Religious Corporations Law. The approval of the Court or of the Attorney General may be required in the case of a transfer or other disposition of the real property of the religious corporation. If a religious corporation is selling its real property, approval of the Attorney General or a court order will be required.[1] Except in the case of a purchase-money mortgage, approval of the Attorney General or a court order will also be required whenever a religious corporation mortgages its assets.[2] Approval of the Attorney General or a court order will also be required in the case of the leasing of the real property of the religious corporation, unless (i) the real property leased is not all, or substantially all, of the religious corporation's assets, and (ii) the lease term is for five years or less (<=5).[3]

The following flowchart shows the process of determining whether the approval of the Attorney General or a court order is required to authorize a conveyance of real property held by a religious corporation.



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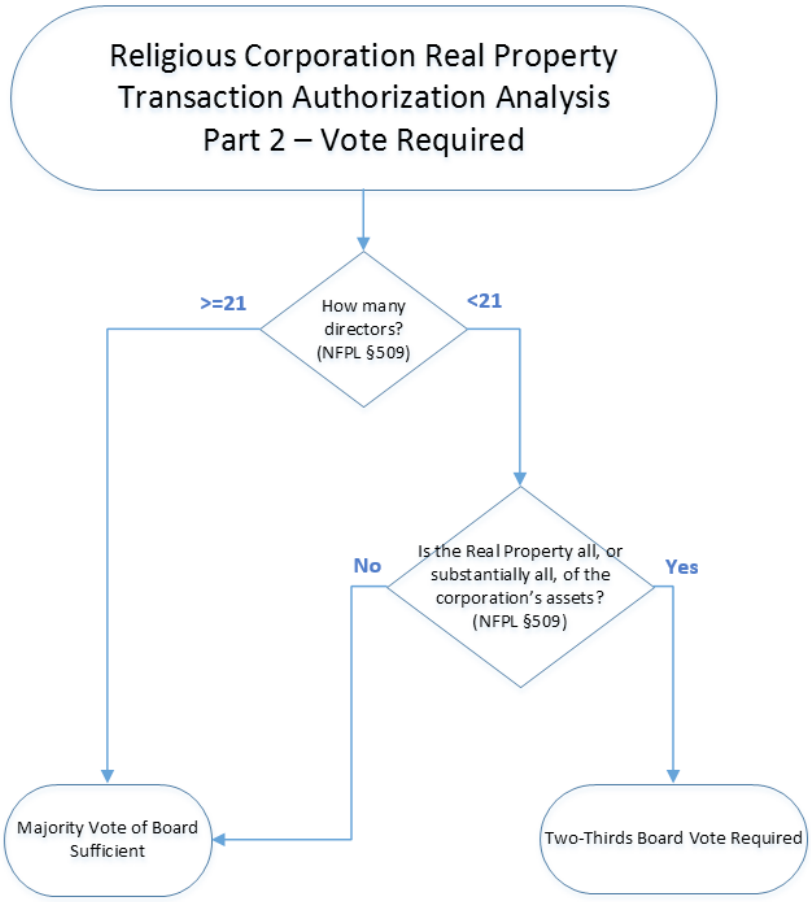
The number of directors required to vote on the transaction depends upon the number of directors which the religious corporation has, and also upon whether or not the real property would constitute all, or substantially all, of the assets of the religious corporation. Where a religious corporation has twenty one or more (=>21) directors, a majority vote of those directors will be sufficient to authorize a conveyance of real property. Where a religious corporation has fewer than twenty one (<21) directors, then the question turns on whether the transaction is for all, or substantially all, of the religious corporation's assets. If it is for all or substantially all of the religious corporation's assets and the religious corporation has fewer than twenty one (<21) directors, then a two-thirds (2/3rd) vote will be required to approve the transaction.[4] The following flowchart shows the applicable statutory decision points for deciding upon



the number of directors required to vote upon a measure.

The Protecting Americans from Tax Hikes Act of 2015 signed into law

The Protecting Americans from Tax Hikes Act of 2015 ("PATH") was signed into law on December 18, 2015, enacting significant reforms to the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA), and providing for the permanent extension of many taxes which currently expire on a regular basis. A copy of the PATH Act is available online here: http://docs.house.gov/billsthisweek/20151214/121515.250_xml.pdf[4]

Important Upcoming Dates and Deadlines

Attention 1031 Exchangers!

April 15th will be here before we know it. As a reminder for those who are in the middle of a 1031 exchange, remember that 26 U.S. Code §1031(3)(b) requires that a person who is exchanging like-kind property must acquire the replacement property the earlier of, "(i) the day which is 180 days after the date on which the taxpayer transfers the property relinquished in the exchange, or (ii) the due date (determined with regard to extension) for the transferor's return of the tax imposed by this chapter for the taxable year in which the transfer of the relinquished property occurs." This means an individual taxpayer who first relinquished property between October 17th (or 18th preceding a leap year) and December 31st of any given tax year would find that the 180th calendar day would fall after April 15. In such cases, it may be advisable to consider filing an extension for paying your taxes. Those in the midst of accomplishing a like-kind exchange should contact their exchange accommodator and/or accountant for more details.

The number of directors required to vote on the transaction depends upon the number of the directors which the religious corporation has, and also upon whether or not the real property would constitute all, or substantially all, of the assets of the religious corporation.

On March 15, 2015, the Suffolk County Bar Association will be presenting a single-evening course on 1031 Exchanges in Hauppauge, New York. It will be presented by Pamela Michaels, Esquire, VP, Asset Preservation, Inc., from 4:00pm to 6:00pm. Details can be found at the website of the Suffolk County Bar Association at www.scba.org.

Recent Official Guidance

Coops

The Real Estate Finance Bureau has issued a new guidance document entitled, "Digital Submission Requirements for Cooperative Interests in Realty." The guidance document has an issue date of December 9, 2015, and an effective date of January 1, 2016. It is posted on the Real Estate Finance Bureau's website on the, "Proposed Rule Making," and, "Hot Topics," pages and can be viewed at the following web address: http://www.ag.ny.gov/pdfs/ref/Digital_Submission_Requirements_12.9.15.pdf

[1] NY RCL §12(1)
[2] Id.
[3] See NY RCL §12(1) and NY NPL §510(a)
[4] See NY NPL §509(a)-(c)

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Sales Tax

The following sales tax bulletins were recently issued by the New York State Department of Taxation and Finance, available at this url: https://www.tax.ny.gov/pubs_and_bulls/advisory_opinions/sales_ao.htm

TSB-A-15(37)S: Petitioner, a construction company in New York City, asked whether (a) fees paid to a broker for its services in purchasing taxable building materials on behalf of the Petitioner are considered a taxable service, and (b) whether reimbursements made by Petitioner to the broker for the purchase of the building materials would be taxable. The Department of Taxation and Finance concluded that purchases made on behalf of Petitioner by a broker acting as an agent are subject to sales tax as a sale directly from the vendor to the Petitioner, but that compensable fees paid to the broker for acting as Petitioner's agent are not subject to sales tax. Where the broker is not acting as an agent of the petitioner, but is purchasing the materials on behalf of the Petitioner nonetheless, the sales to the broker are subject to sales tax, but the broker can avoid paying sales tax on these materials if it intends to resell them to the petitioner by providing a resale certificate to the materials vendors. If the broker does resell such materials to the petitioner, then the entire amount charged to the petitioner, inclusive of any broker's fees, would be subject to sales tax.

TSB-A-15(38)S: Petitioner, a renter of eight furnished units in Onondaga and Cayuga Counties – five one-family dwellings, two condominium units and one apartment – asked whether rent charges, for two days or up to a month or longer, are subject to state and local sales taxes. The Department concluded, "that Petitioner's rental units are not rooms in a hotel and its charges to rent the units without any 'hotel' services are not subject to the State and local sales taxes administered by the Department."

TSB-A-15(40)S: Petitioners, who have maintenance service contracts with owners of sewage treatment plants for condominium/apartment complexes, asked whether the monthly fees they charge for the services they perform are subject to sales and use tax. The Department concluded that, "the monthly fee is subject to tax as a charge for maintenance services under Tax Law §1105(c)(3) and (5)." The Department reasoned that, "the primary function of Petitioner's monthly fee activities is to keep the plant 'in a condition of fitness, efficiency, readiness or safety or restoring it to such condition' by ensuring that it is operating as it [is] supposed to. 20 NYCRR § 527.7(a)(1). Therefore, Petitioner's monthly fee is taxable as a maintenance service."

TSB-A-15(42)S: Petitioner asked whether the service it provides of removing a sample of a building to be tested for asbestos, which it sends out to a lab for analysis and then e-mails the results of the test to its clients, is subject to sales tax. The Department concluded that, "Petitioner's service is subject to tax as the maintenance, servicing or repair of real property. The delivery method is irrelevant."

TSB-A-15(43)S: Petitioners who are both located outside of the United States and run similar services of facilitating the online purchase and reservation of hotel rooms by third party customers (travelers) through their websites, including many rooms in New York State, asked whether they qualify as room remarketers for sales tax purposes. Petitioners collect a non-refundable deposit at a fixed percentage of the reservation, typically 10% of the total value of the online reservation. Neither Petitioner determines the cost of the hotel reservations; these are set by the hotel operators and all other costs associated with the traveler's stay are paid directly to the hotel operators. The Department concluded that, "Petitioners are not required to collect State and local sales and use taxes because the Petitioners do not meet the definition of 'hotel operator' or 'room remarketer' under the New York Tax Law." The Department found that since the Petitioner does not have the right to determine the rent for occupancy, the petitioner did not meet the definition of "room marketer" under the Tax Law. The petitioners also did not fit the definition of "hotel operators" because they were not operating a building or portion thereof for the lodging of guests. Rather, "the hotel operator and the occupant remain jointly liable for the sales tax on the full amount of rent for any occupancies in New York State that are arranged through Petitioners."

Case Law

October 28, 2015: 2015 WL 6581085 (Business Entities)

THE BOARD OF MANAGERS OF THE A BUILDING CONDOMINIUM, Plaintiff,
v.
13TH & 14TH STREET REALTY, LLC, et al.,
Defendants.

In a dispute regarding allegedly shoddy construction of a condominium building, the defendant / third-party plaintiff contractor ("Hudson Meridian") alleged that it retained the services of Cabinet Shapes Group LLC ("LLC"), as a woodworking subcontractor, and, "that their agreement required LLC to defend, hold harmless, and indemnify Hudson Meridian against any claims related to LLC's work on the project and to name Hudson Meridian as an additional insured on its liability insurance policy. Hudson Meridian asserted claims against LLC for negligence, breach of contract, breach of express and implied warranties, indemnification, failure to procure insurance, and contribution." LLC maintained that it was not party to a contract with Hudson Meridian.

The subcontract at issue was dated March 1, 2007, and was between Hudson Meridian and, "Cabinet Shapes." Invoices for the work were from, "Cabinet Shapes Corp.," and the payments by Hudson Meridian were payable to, "Cabinet Shapes Corp." On or about April 11, 2009, "Cabinet Shapes Group LLC," was formed by Maria Sereti, who asserted by affidavit that, "Cabinet Shapes Corp.," was owned by her late husband and that the two entities were and are independent from one another with, "Cabinet Shapes Corp.," no longer in business. By Order dated October 28, 2015, the court ruled that, "third third-party defendant Cabinet Shapes Group LLC's motion to dismiss is granted unless Hudson

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Meridian, within 20 days of entry of this order, serves and files an amended complaint setting forth a claim against Cabinet Shapes Group LLC based on successor liability."

October 30, 2015: 2015 WL 6581087 (Settling a Judgment on Notice)

THE SOUTH TOWER RESIDENTIAL BOARD OF MANAGERS OF TIME WARNER CENTER CONDOMINIUM, Plaintiff,
v.
THE ANN HOLDINGS, LLC f/k/a The Ann LLC, Defendant.

The plaintiff won summary judgment against the defendant for specific performance of a real estate contract. The plaintiff claimed under a single cause of action for the specific performance of the contract, and did not seek either monetary damages nor an award of attorneys' fees. On February 25, 2014, the Court granted plaintiff's motion for summary judgment and directed plaintiff to settle the judgment, "on notice."

On March 10, 2014, plaintiff filed a proposed order and judgment with notice of settlement. The proposed final order included an instruction to the Referee Clerk to calendar a determination of legal fees and costs due to the plaintiff. The defendant did not submit a counter-judgment, and a judgment with the plaintiff's instruction was filed on April 23, 2014. In a memorandum opinion dated April 9, 2015, the Appellate Division unanimously affirmed the judgment and underlying order.

In denying the defendant's motion for an order to dismiss any request by the plaintiff for attorneys' fees, the court explained that the plaintiff was entitled to costs and expenses by virtue of the breach of specific condominium bylaws by defendant, and also by the failure of the defendant to object to the judgment, "on notice," by filing a counter-judgment.

The court explained:

> "This Court's order dated February 25, 2014, concluded with the directive to 'settle judgment on notice.'
>
> The direction to "settle judgment" means that the prevailing attorney should work out with the adversary a proposed draft judgment that conforms to the decision. If the parties disagree, the prevailing party will then present to the court a proposed judgment, and the adversary will normally present a proposed counter-judgment (22 NYCRR 202.48). Here, defendant fails to explain why it did not object to plaintiff's judgment by filing a counter-judgment."

In Depth: TRID and the Simultaneous Rate

Understanding Simultaneous Title Insurance Premiums Under the TRID Rules

On October 3, 2015, the Truth in Lending, RESPA, Integrated Disclosure (TRID) rules finally went into effect. One particular subject has been getting a lot of attention of late: that of the proper way to disclose the title insurance premium in a simultaneous transaction where the purchaser is purchasing both an owner's title insurance policy for the owner's benefit, and a loan title insurance policy for the mortgage lender's benefit. In a nutshell, the TRID disclosures direct that where both owner's and loan title insurance policies are issued simultaneously in a transaction, the full premium for the loan policy should be disclosed, and only the additional premium required to obtain both policies should be disclosed on the Loan Estimate or Closing Disclosure as the cost of the owner's policy.[5] When one considers that the Loan Estimate and the Closing Disclosure are disclosures that are meant to depict the costs of a mortgage transaction, this way of disclosing premiums makes some sense. The problem, however, is that this is not the way that simultaneous title insurance premiums are actually calculated in New York State. Indeed, while this method of showing the incremental cost of, "optional," owner's title insurance coverage makes sense within the more limited context of shopping for a mortgage loan, it has somewhat flummoxed the settlement services industry that this method must now also be used to show final title insurance costs paid at the closing table, as well.

In fact, lenders have had experience reporting the costs of simultaneous title insurance premiums in this way since the last major round of changes to the Good Faith Estimate were put in place in 2010.[6] The Loan Estimate, which replaced the GFE, discloses such costs in the same way as the GFE has for the last several years. This same incremental difference calculation is now to be shown on the Closing Disclosure, as well.[7] The significant change here is that the Closing Disclosure, the replacement for the HUD-1, is a form which is commonly used, and sometimes even prepared, by those other than the lender, so this alternative method for depicting simultaneous premiums has come as a new development to some.

In title insurance parlance, New York State is what is called a, "filed rate state." This means that title insurance companies must file their rates, and their methods of calculation, with the New York State Department of Financial Services (the "DFS"), and obtain approval for same prior to charging any such rates to a customer.[8] All but a few title insurance companies have subscribed to membership in the Title Insurance Rate Service Association, or TIRSA for short. TIRSA is a rate setting agency and files rates and a rate manual on behalf of its members. (It also has some limited pseu-

In title insurance parlance, New York State is what is called a, "filed rate state." This means that title insurance companies must file their rates, and their methods of calculation, with the New York State Department of Financial Services (the "DFS"), and obtain approval for same, prior to charging any such rates to a customer.

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do-governmental statistical agent duties, as well[9]). Although a TIRSA member can file its own rates, the existing members have delegated this task to TIRSA. Even the title insurance companies which have not joined TIRSA, and have filed their own rate manuals, have nevertheless modeled their own rate calculations on TIRSA's. The result is that the simultaneous issue calculation for all title insurance companies in New York State actually works in the same way.

Section 13 of the TIRSA rate manual explains the rules for a simultaneous title insurance rate: "When an owner's policy and a loan policy are issued simultaneously covering identical property, the rate for the owner's policy shall be the applicable owner's rate. The rate on the amount of the loan policy that does not exceed the amount of the owner's policy shall be calculated at thirty percent (30%) of the loan rate. The rate on the amount of the loan policy in excess of the amount of the owner's policy shall be calculated at the full loan rate."

In other words, when a simultaneous rate is called for in New York State, the full one hundred percent (100%) owner's rate is charged, and the loan policy is issued at only 30% of its normal rate, up to a policy coverage of the insurance amount of the owner's policy. Any amount of loan title insurance coverage above the face amount of the owner's policy is charged at one hundred percent (100%) of the loan rate.

Both the TRID method and the TIRSA method for depicting simultaneous title insurance premiums should result in the same total premium amount being charged and shown to the consumer. However, it is easy to imagine how confusion can quickly set in once changes to the policy amounts are made. For example, assume that a new home is being purchased for one hundred thousand dollars ($100,000), with an eighty thousand dollar ($80,000) purchase money mortgage. Using the official TIRSA simultaneous calculation method, the charge in Zone 2 (downstate) for the one hundred thousand dollar ($100,000) owner's policy would be six hundred fifty-eight dollars ($658) (100% of the owner's rate) and the eighty thousand dollar ($80,000) loan policy would cost one hundred sixty-nine dollars($169) (30% of the normal loan rate), for a total simultaneous premium of eight hundred twenty-seven dollars ($827). Under the TRID rules, the cost for the loan policy of eighty thousand dollars ($80,000) would be shown as five hundred sixty-three dollars ($563) (100% of the loan rate) and the owner's policy of one hundred thousand dollars ($100,000) would be shown as costing two hundred sixty-four dollars ($264) ($827-$563). Both scenarios add up to the same eight hundred twenty-seven dollar ($827) total.

Now let's change the insurance amounts so that the mortgage policy is now only seventy thousand dollars ($70,000), but the purchase price stays at one hundred thousand dollars ($100,000). Using the official TIRSA simultaneous calculation method, the charge for the one hundred thousand dollar ($100,000) owner's policy would still be six hundred fifty-eight dollars ($658) (100% of the owner's rate) and the seventy thousand dollar ($70,000) loan policy would be one hundred fifty-five ($155) (30% of the loan rate), for a total simultaneous premium of eight hundred thirteen dollars ($813). The loan policy premium only drops slightly in this scenario because the loan policy premium is only at thirty percent (30%) of its normal potency whenever calculating the simultaneous rate. However, under the TRID rules, the disclosed cost for both policies will change, and the owner's policy premium will increase even though there is no actual increase in coverage!

Under the TRID formula, the loan policy of seventy thousand dollars ($70,000) would be shown as five hundred eighteen dollars ($518) (100% of the loan rate) and the owner's policy of one hundred thousand dollars ($100,000) would now be shown as two hundred ninety-five dollars ($295) ($813-$518). Notice that the actual savings derived from the $10,000 decrease in loan policy coverage amount only results in the entire simultaneous title insurance premium going down just fourteen dollars ($14) ($827-$813), not the amount which the TRID disclosure will apparently indicate for the loan policy of forty-five dollars ($45) ($563-518). On the other hand, the TRID disclosure will show the consumer that the cost of the one hundred thousand dollar ($100,000) owner's policy has now increased from two hundred sixty-four dollars ($264) to two hundred ninety-five dollars ($295).

A similar distorting effect on policy costs can be seen if one adjusts the policy coverages in the opposite direction as well. The Consumer Financial Protection Bureau (the "CFPB") is apparently comfortable with these premium distortions so long as the total amount charged to the consumer is ultimately accurate. However, now that the costs of owner's title insurance must be labelled as, "optional," in TRID-covered transactions, it is perhaps more important than ever for practitioners to clearly understand and to be able to explain to their clients the true costs and economies of forgoing important title insurance coverage.

The TRID disclosures represent the continuing evolution of mortgage disclosures, but it should always be remembered that these disclosures are **mortgage** disclosures, after all, and are designed to depict the costs of **mortgage** transactions. For a long time, the HUD-1 Settlement Statement was a useful product of the Real Estate Settlement Procedures Act, that was even used in many non-RESPA transactions. Previously, the RESPA HUD-1 Settlement Statement showed the settlement costs of an entire purchase transaction accurately, and it was used in combination with the final TILA disclosure, which depicted the costs of the mortgage origination. The Closing Disclosure, while *taking the place* of both of these disclosures by combining the content of both into one form, does not in fact *replace* the HUD-1 Settlement Statement, practically speaking. Indeed, the CFPB put the Closing Disclosure in TILA's Regulation Z rather than RESPA's Regulation X, and gave it a decidedly creditor-centric focus. With the arrival of the Closing Disclosure, the real estate industry is losing the nationally-familiar settlement statement we have hitherto used to depict title insurance costs accurately.

The American Land Title Association, and several state analogs, have started promulgating local replacements for the HUD-1 Settlement Statement to be used in combination with the Closing Disclosure. In the meantime, we can help to avoid confusion in interpreting the creditor-centric Closing Disclosure and its creditor-centric methods of calculation if we remember that the Closing Disclosure is a mortgage disclosure and not a true settlement statement. Against this backdrop, the odd way that the TRID rule requires the disclosure of the simultaneous title insurance premium may not seem quite so very odd after all.

[5]See Comment §1026.37(g)(4)-2 & §1026.38(g)(4)-2

[6]§1024 Appendix C, Block 5.

[7]Compare HUD RESPA Q&A # 21, published October 23, 2009, with Comments

[8]New York Insurance Law §6409(b) §1026.37(g)(4)-2 & §1026.38(g)(4)-2

[9] Page 4 of Report on Examination of the Title Insurance Rate Service Association, Inc., as of June 30, 2012: http://www.dfs.ny.gov/insurance/exam_rpt/31004f12.pdf

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