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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.

April / Spring 2016 Edition

The Spring Edition of the Liber & Page Newsletter…

First Nationwide Title Agency, LLC, proudly continues our quarterly newsletter with this April / Spring edition of the Liber & Page. Inside this issue of L&P, you will find our breakdown of the recent FinCEN Geographic Targeting Orders affecting high-value residential real property in Manhattan and Miami-Dade County, Florida, an update on recent changes to the Foreign Investment in Real Property Tax Act by First Nationwide's General Counsel, Jeffrey S. Tanen, Esq., some notable sales tax bulletins and lower court rulings relating to practical real property law, and an in-depth look at how refinance rates for title insurance are calculated in New York State.

-Vincent G. Danzi, Editor

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Real Property News

FinCEN Geographic Tracking Orders targeting untraceable funds used in real property transactions

On January 13, 2016, the United States Treasury Department issued Geographic Targeting Orders (GTOs) to several title insurance companies. These GTOs, and the underwriting directives issued by the targeted insurers in response to them, require the title agents of those title insurance companies to (i) determine if a transaction meets certain criteria and, if it does, then to (ii) compile and report certain information about those transactions to the applicable title insurance underwriters, who will, in-turn, report the transactions to FinCEN.

The following outline is a logical digest of the factors which determine whether the GTO is applicable to a particular transaction. The factors which determine this fall into three possible categories: details relating to (i) the Property, (ii) the Purchaser, or (iii) the Purchase transaction itself.

Is it a "Covered Transaction"? (Property, Purchaser, Purchase)

If **all of the following** questions are answered affirmatively, and the upcoming transaction is to be insured by one of the title insurers which received the GTO, then it is a, "Covered Transaction," and is subject to the GTO.

1. **Property**: Is the property to be purchased:
   a. Located within the County of New York, City of New York, and State of New York or, alternatively, in Miami-Dade County, Florida?
   b. Residential[1] real property?
2. **Purchaser**: Is the purchaser a corporation, limited liability company, partnership, or similar legal or business *entity*?
3. **Purchase**:
   a. Is the transaction closing between March 1, 2016, and August 27, 2016?
   b. Is the total price over three million dollars (>$3,000,000)?
   c. Is the total price to be paid without any institutional bank loan?
   d. Is or will any part of the purchase price to be tendered using the following forms of payment?:
      i. Currency;
      ii. Cashier's checks;
      iii. Certified checks;
      iv. Traveler's checks; or
      v. Money orders
   e. Is any portion of the purchase price being held as a good faith deposit by a third party, and, if so, has any portion of such good faith deposit been funded using the above forms of payment?

1 For purposes of the GTOs, "'residential real property' means real property (including condominiums and cooperatives) designed principally for the occupancy of from one to four families." FinCEN Q&As on GTOs issued February 1, 2016.

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FIRPTA Update

FNTA's General Counsel Jeffrey S. Tanen, Esq., provides a primer and update on the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) income tax withholding rules.

Under current law, if a foreign person sells property in the US, the buyer is obligated to withhold ten percent (10%) of the gross sales price and remit this to the IRS.

Under the new Tax Title Act of 2015, which recently became law, the withholding has been increased to fifteen percent (15%) for all closings after February 16, 2016, except those with a sales price of between $300,001.00 to $1,000,000.00 and where the buyer acquires the property as their principal residence. Under the exception, the 10% withholding will still apply.

TRANSACTION WITHOLDING

1)	Sales price under $300,000.00 and Purchaser acquiring as principal residence	No withholding
2)	Sales price $300,001.00 to $1,000,000.00	10% withholding
3)	All other transactions	15% withholding

In addition, there is no withholding under the following circumstances:

1) Sale price under $300,000.00 and purchase principal residence
2) Seller provides non-foreign status Affidavit
3) Seller provides withholding certificate from the IRS
4) The amount realized by seller is zero
5) The property is acquired by the US government

By *Jeffrey S. Tanen, Esq.*

Recent Official Guidance

Sales Tax

The following real property-related sales tax bulletins were recently issued by the New York State Department of Taxation and Finance (DTF), and are available at this url: https://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/sales_tax_bulletins_by_number.htm

TB-ST-129, Issued March 17, 2016: DTF has issued a brief outline on the sales taxability of home repairs and capital improvements in New York State. Repair and maintenance work and material is generally sales taxable in a sale to an end consumer. Tax exempt organizations which are purchasing the materials and service are the exception to that rule. Capital improvement work, however, is not sales taxable, regardless of the nature of the purchaser. The amorphous distinction between these two types of work is somewhat acknowledged in the bulletin in that the reader is directed to consult Publication 862 for examples of work projects that are reckoned as one sort or another. The reader is also cautioned that, "Since the method of installation may affect how the work is taxed, certain work must be looked at on a case-by-case basis."

Just as with physical products, services too can be resold. The bulletin explains that in the case where a contractor is providing sales taxable work to a consumer, a contractor hiring a subcontractor to perform a portion of that work is not sales taxable. The contractor, in such a case, is merely reselling the subcontractor's work and materials.

TB-ST-505, Issued March 17, 2016: In similar fashion as in the above bulletin about repairs and capital improvements, DTF issued this bulletin explaining analogous concepts related to landscaping. Capital improvement work is not sales taxable whereas repair and maintenance work is. Capital improvements, (i) substantially add to the value of the real property, or appreciably prolong the useful life of the real property, (ii) become part of the real property, or are permanently affixed to the real property so that removal would cause material damage to the property or article itself, and (iii) is intended to become a permanent installation.[2]

Examples of such capital improvements in the landscaping context include, (a) planting or installing a new lawn, (b) installing retaining walls, (c) planting shrubs and trees, (d) installing permanent ponds and water features, and (e) planting perennials.[3] "The removal of shrubs and trees to improve the landscape without replacement or not otherwise part of a capital improvement project is considered maintenance of real property and is a taxable service."[4]

2 TB-ST-505, page 1 of 5.
3 Id.
4 Id at 2.

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Case Law

March 16, 2016: 2016 WL 1033522
(Covenants Against Grantor's Acts)
JOSEPH SCHOTTLAND, et al., plaintiffs-respondents,

v.

BROWN HARRIS STEVENS BROOKLYN, LLC, et al., defendants,

JENNY NETZER, etc., et al., defendants third-party plaintiffs-respondents;

TIMOTHY M. COSTELLO, etc., third-party defendant-appellant.

The purchasers (Schottland) acquired residential real property in 2010 in Brooklyn from the sellers (Netzer) via a deed containing covenants against the grantor's acts, whereby the sellers asserted that they had not encumbered the property they were conveying to the purchasers. In fact, a conservation easement had previously been granted to a third party by the sellers, and this fact was not disclosed or acknowledged on the deed to the purchasers, and thereby breaking that covenant. The sellers made a claim for indemnification against the attorney which represented them at the time of the sale for any amounts which they themselves may be forced to pay. The attorney's motion under CPLR 3211(a) to dismiss the complaint against him was denied, and the court herein considered the matter on appeal.

The court found that,

> "any potential liability of the sellers in the main action would be the result of their own affirmative act of encumbering the property with a conservation easement in 2002," rather than the allegedly negligent drafting of the deed.[5] The attorney's motion was granted and the third-party complaint against him dismissed.

March 16, 2016: 2016 WL 1035196
(Corporation-Authorization of Mortgages)
JOSEPH MOCKIN, ET AL., Plaintiff,

v.

ASTORIA FEDERAL SAVINGS AND LOAN, Defendant.

In this action, the plaintiff sought to set aside mortgages given to the defendant by an entity co-owned by the plaintiff and his father. The plaintiff's allegation was that his father gave the mortgages to the defendant without his authorization, and that therefore the purported conveyance of the mortgage interests to the defendant was without authority on behalf of the borrowing entity. After settling a motion-related issue of whether the defendant's answer was timely, and which involved an assignment of mortgage during the litigation, the court addressed the propriety of the Supreme Court's dismissal of the plaintiff's case on the substantive issue of whether the mortgages were valid.

A series of mortgages had been given by Juda Mockin, as President of 513 Properties, Inc., to Astoria Federal Savings and Loan. These mortgages were consolidated into a single lien. Joseph Mockin, Juda's son, owned 50% of the shares of 513 Properties, Inc., with his father Juda. The court found that, "Astoria's submission of 513's corporate documents, which Juda presented at the closings on the mortgage loans and authorized Juda, as 513's president, to act on behalf of 513 with regard to those transactions, utterly refuted the plaintiffs' allegation that Juda lacked actual authority to mortgage 513's property. Accordingly, the Supreme Court properly granted dismissal of the complaint pursuant to CPLR 3211(a)(1)."[6]

March 16, 2016: 2016 WL 1035242
(Hearing on Equities is Required for Real Property Partition)
JACOB GUO, respondent,

v.

Mon-Chin Guo, et al., Appellants.

In an action for the partition and sale of real property, the defendants appealed from an order of the Supreme Court in Nassau County which, sua sponte, granted summary judgment to the plaintiff and referred the matter to a referee to ascertain the rights of the parties and proceed with the partition.

The subject of the partition was a single-family house in Old Brookville, New York, which had been owned by the parties (two brothers and their mother) as joint tenants since 1978. Quoting Goldberger v. Runicki (94 A.D.3d 1048, 943 N.Y.S.2d 176), the court reiterated that, "The right to partition is not absolute, however, and while a tenant in common has the right to maintain an action for partition pursuant to RPAPL 901, the remedy is always subject to the equities between the parties."[7] In the present case, the court found that the remedy of partition should not have been granted to the plaintiff before the court conducted a hearing to de-

5 Schottland v. Brown Harris Stevens Brooklyn, LLC., Supreme Court, Appellate Division, Second Department, New York. March 16, 2016

6 Mockin v. Astoria Federal Sav. and Loan, N.Y.S.3d, 2016 N.Y. Slip Op. 01812 (2016)

7 Guo v. Guo, 2016 WL 1035242, 2016 N.Y. Slip Op. 01806, March 16, 2016.

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termine the equities between the parties.[8]

In Depth: New York Refinance Rates: A Rate for All Reasons

New York Refinance Rates: A Rate for All Reasons

Those refinancing mortgage loans in New York State typically have to include the cost of title insurance coverage into their closing cost analysis because their mortgage lenders require such coverage. Although the mortgage loan which is being refinanced may have been insured at the time it was originated, new title issues could have arisen between that origination date and the time at which the mortgage loan is refinanced at a closing. A new title insurance policy provides assurance that those matters will be investigated and properly dealt with. By the same token, refinance transactions usually do carry significantly less risk than that involved in insuring completely new mortgage loans because of the lesser extent of the required search period. In recognition of this reduced risk, title insurers in New York State have filed specific rates which are available to their customers which can help to reduce the title insurance premium cost of a refinance transaction. As mentioned in a previous article in this Newsletter, most title insurers in New York State are rate filing subscribers of the Title Insurance Rate Service Association (TIRSA).[9] TIRSA files rates and rate formulas on behalf of its members. These rates are found in the "TIRSA Manual" which is available at www.tirsa.org.

Section 16 – Modification of an Insured Loan

For many years, the TIRSA Manual had just two basic types of refinance discounts, found respectively in sections 14 and 16. The simpler of these two rates is still found in Section 16, and is applicable to transactions where a previously-insured mortgage loan is being modified in a limited way, with no new money being borrowed. A discount of 50% will apply to such a new mortgage policy which insures the modification of a previously-insured loan where (i) the previously-insured mortgage was insured within the last past ten years, (ii) there has been no change in the ownership of the mortgaged interest, (iii) the property secured thereby is identical to that insured previously, and (iv) the modification works no increase in the outstanding principal balance of the mortgage loan.[10] This requires that the new mortgage policy is in an amount equal to the outstanding principal balance at the time of the refinance. Although these requirements significantly reduce the applicability of the Section 16 discount, an even steeper discount of 70% is available where the borrower is a Public Benefit Corporation or a Not-For-Profit Organization under IRC 501(c)(3), and where several other further transactional qualifications are met.

Section 14 – Refinance and Subordinate Mortgages

The refinance provision which is much more widely seen and utilized in everyday transactions is that found under Section 14 of the TIRSA Manual. For the remainder of this article, I will use the term "Basic Section 14" discount to refer to this discount. Section 14 was amended relatively recently last year to refer to two new, further possible discounts available under new Sections 14A and 14B, which I will refer to herein as the "additional" discounts, and which apply to a smaller subset of transactions than does the Basic Section 14 discount. These new Section 14A and 14B discount sections are not to be confused (though you should be forgiven for doing so) with the subsections of Basic Section 14, which are somewhat confusingly numbered Sections 14(A) and 14(B). The new additional discount subsections must, however, be read in conjunction with the older Basic Section 14 in order to arrive at a correct final rate. Lastly, although Section 14A and 14B are meant to be applied as further discounts to that rate calculated under the Basic Section 14 rate, when either Section 14A or 14B are deemed to apply to a transaction, such applicability (somewhat circularly) affects how the Basic Section 14 refinance rate is to be calculated.

If this sounds confusing to you, you might find some solace in that it is also confusing to many people. The refinance rates currently in effect in New York State have evolved over time, with new provisions essentially bolted onto older provisions; with each new amendment intended to effect change while preserving, as best as possible, the previous construct. Put another way, the TIRSA manual may be likened to an LLC's operating agreement which has been repeatedly amended over time, but not restated in full. In a departure from the format of the rest of the TIRSA Manual, the mechanics of how these three sections work together are illustrated with several pages of transaction examples within the TIRSA Manual following the new additional discount sections. While these examples help to fill in the blanks, their necessary existence is itself indicative of how obtuse the literal text of the manual can be. Ironically, the actual calculation and decision steps necessary to arrive at a correct rate are not particularly complex. In this article, we will condense the Basic Section 14 and the additional discounts available under Section 14A and Section 14B down to their essentials.

The Discounted Portion

First let us review how the Basic Section 14 discount

8 Id at 2

9 The current roster of TIRSA members is listed before the table of contents of the TIRSA Manual.

10 TIRSA §16(A)

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works. The first piece of information that we must have in order to calculate the Basic Section 14 discount rate is the portion of the new loan policy which will be entitled to the Basic Section 14 discount (the "Discounted Portion"). Recall, however, that when we reviewed Section 16, the discount section for mere modifications of previously-insured loan policies, we did not concern ourselves with the portion of the new policy which should be entitled to a discount. This is because the Section 16 discount is only available in transactions where the outstanding principal balance is not increased in the refinance. Therefore, in such a transaction all the principal indebtedness being newly insured was, at one time, previously insured. This is not the case in most refinances.[11] In most refinances, the borrower is indeed borrowing some additional amount of money, or is re-borrowing some amount previously borrowed. Therefore we cannot use the Section 16 mortgage modification discount for this type of refinance transaction.

Basic Section 14 provides that a refinance discount is available for the portion of a new loan policy in an amount equal to the greater of (a) the full consideration paid for the deed, lease or assignment, which vested title in the mortgagor (the "Vesting Instrument(s)")[12], or (b) the face amounts of all existing mortgages made by the owner of the title (the "Existing Mortgages")[13]. Such Vesting Instruments or Existing Mortgages, in order to be the valid basis of a Basic Section 14 discount, must meet the following criteria:

- The Vesting Instrument or Existing Mortgages must have been created within the last past ten years;[14]
- The new loan is made by "all of the same or some of the same" persons as shown as the owners in the Vesting Instruments or the borrowers in the Existing Mortgages, as applicable, depending upon which total is being used for determining the Discounted Portion.[15]
- The new mortgage describes the "same property or some of the same property" as is set forth in the Vesting Instruments or the Existing Mortgages, as applicable depending upon which total is being used for determining the Discounted Portion. [16]

The amount of discount to apply to the above Discounted Portion is either fifty percent (50%) if the new loan policy is in the amount of $475,000 or less[17], or thirty percent (30%) if the new loan policy exceeds the amount of $475,000.[18] For the portion of the new loan policy which exceeds the Discounted Portion, the remaining portion is charged at the full applicable rate.[19]

So how much of a discount does Basic Section 14 actually provide?

In general, smaller new mortgages (<= $475,000) where the Discounted Portion represents a significant percentage thereof, enjoy the biggest discount. However, in order to fully appreciate the true value of the Basic Section 14 discount, it helps to understand more about how the loan policy premium is calculated. Without reproducing too much of the TIRSA manual, see the following illustration of how a Basic Section 14 discount would reduce the charges for a $150,000 loan policy on property located in Manhattan, where the face amount of the mortgage being paid off is $75,000.

Policy Amounts	Full Rate	$150,000 policy (no discount)	$150,000 policy (refinance of $75,000)
First $35,000	$344 flat	$344 @ 100% = **$344**	$344 @ 50% = **$172**
From $35,001 to $50,000	$5.55 per k	15 x $5.55 = $83.25 @ 100% = **$83.25**	15 x $5.55 = $83.25 @ 50% = **$41.63**
From $50,001 to $100,000	$4.54 per k	50 x $4.54 = $227 @ 100% = **$227**	25 x $4.54 = $113.50 @ 50% = **$56.75**
			25 x $4.54 = $113.50 @ 100% = **$113.50**
From $100,001 to $500,000	$3.64 per k	50 x $3.64 = $187 @ 100% = **$187**	50 x $3.64 = $187 @ 100% = **$187**
		Total $841.25	**Total $570.88**

The regular, full charge for the loan policy is computed by first applying a minimum premium for the first $35,000, which in our example is $344. In the refinance example above on the right, this first $35,000 is given a 50% discount (because the new policy will be for $475,000 or less; in this case $150,000). For the portion of the new policy which is between $35,001 and $50,000, the undiscounted policy is charged $5.55 per thousand, whereas the refinanced example receives a 50% discount in this tier as well. When we get to the $50,001 to $100,000 tier, our refinance policy gets a discount on the per k tier, up to the Discounted Portion of $75,000. After $75,000, the refinanced policy is charged at the full rate per thousand of the applicable tier.

As you can see, the rate tiers are regressive, with the

11 Although the underlying justification for a refinance discount is partially based on the theory that a portion of the new policy has been previously insured, the fact of that previous insurance is not a requirement of the discount.

12 TIRSA Section 14(A)(1)(a) & TIRSA Section 14(B)(1)(a)

13 TIRSA Section 14(A)(1)(b) & TIRSA Section 14(B)(1)(b)

14 TIRSA Section 14(A)(2)(a) & TIRSA Section 14(B)(2)(a)

15 TIRSA Section 14(A)(2)(b) & TIRSA Section 14(B)(2)(b)

16 TIRSA Section 14(A)(2)(c) & TIRSA Section 14(B)(2)(c)

17 TIRSA Section 14(A)(1)

18 TIRSA Section 14(B)(1)

19 TIRSA Section 14(A)(3) & TIRSA Section 14(B)(3)

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lower insurance amounts costing the most per-thousand. In other words, the first $50,000 of insurance is more expensive than the last $50,000. However, the above calculation formula also illustrates that the Basic Section 14 Refinance discount is actually applied to these highest-cost tiers. Therefore the cost difference between a new policy which will be in the amount of $475,000 or less will be considerably cheaper than a refinance of the same mortgage where the new policy will be in the amount of $476,000, because the Discounted Portion (normally the most expensive portion) will receive a steep 50% discount in the former scenario, but only a 30% discount in the latter scenario.

The Plot Thickens and the Premium Lightens with the Additional Discounts

We just reviewed the criteria for applying the Basic Section 14 discount. Missing from that criteria was anything regarding the type of property being insured, or its use. As such, the Basic Section 14 discount is available to refinancing parties irrespective of whether the property is residential, rural, or commercial in character. This is not the case with the additional discounts under the newer sections Section 14A and 14B. These sections apply when the following criteria are met:

- The new loan policy encumbers land improved only by (i) an owner occupied residential, one to four family, property, or (ii) an individual residential condominium or cooperative unit.[20]
- The new loan is a refinance of an existing loan.[21] (Unlike the Basic Section 14 discount which could provide a refinance discount based upon the consideration shown in the Vesting Instruments without the presence of an Existing Mortgage, the additional Section 14A and 14B discounts are only available when refinancing an existing mortgage.)
- The new loan policy is, "applied for at any time during the ownership of the property by the person or persons making the new loan."[22] (Although this seemingly appears as an additional requirement in the manual, it is actually intended as a way of stating that the Existing Mortgages upon which the refinance discount is based may be over ten years old: the effective of this amendment being that if the other criteria are satisfied and a further discount under Section 14A or 14B is applicable, then the rate under Section 14 should be calculated without regard to the limitation of such Existing Mortgages being under ten years old.)
- "The source of title into the parties who executed the loan being refinanced is the same as for the parties making the new loan."[23]
- "All of the same or some of same persons executing the new loan are the same as those persons who executed the existing loan being refinanced."[24]
- "The New Loan Policy describes the same property or less as is set forth in the loan being refinanced."[25]

If the above criteria are met, then a further discount is applied to that rate determined under the Basic Section 14 discount. This discount is a further thirty percent (30%) off such Basic Section 14 discount when the refinancing lender is (i) the same as the lender on the loan being refinanced, (ii) the successor by merger to the lender on the loan being refinanced, or (iii) an assignee which is an affiliated entity or a successor by merger to the lender on the loan being refinanced, i.e. the "Same Lender".[26] If the refinancing lender is not the "Same Lender" then the discount to be applied is reduced to fifteen percent (15%).[27]

In either the case of a new lender or the same lender, the applicable discount under Section 14A or 14B is applied to **the entire premium** arrived at by using the formula set out in Basic Section 14. These further discounts, when applicable, alter the calculation of the basic refinance discount under Basic Section 14 by eliminating the requirement that the Existing Mortgages which are the basis of the Discounted Portion under Basic Section 14 be less than ten years old. However, the Discounted Portion established by such Existing Mortgages is not used in the calculation of the additional discounts. When the additional discounts are applicable, the consumer enjoys either a further discount of either fifteen percent (15%) or thirty percent (30%) from that rate computed using Basic Section 14, and may use Existing Mortgages originated more than ten years ago to substantiate the amount of the Discounted Portion.

20 TIRSA Section 14A(A)(1)(a) & TIRSA Section 14B(A)(1)(a)
21 TIRSA Section 14A(A)(1)(c) & TIRSA Section 14B(A)(1)(c)
22 TIRSA Section 14A(A)(1)(d) & TIRSA Section 14B(A)(1)(d)
23 TIRSA Section 14A(A)(1)(f) & TIRSA Section 14B(A)(1)(f)
24 TIRSA Section 14A(A)(1)(e) & TIRSA Section 14B(A)(1)(e)
25 TIRSA Section 14A(A)(1)(g) & TIRSA Section 14B(A)(1)(g)
26 TIRSA Section 14A(A)(1)(b)
27 TIRSA Section 14B(A)(1)(b)

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