

The Title Examiner

Ticor Title

An Informational Newsletter Provided Courtesy of Ticor Title Insurance Company

From the Editor

I hope that you have printed this issue of The Title Examiner from your pc and are now reading it in your backyard while sipping cool lemonade- what a terrific summer we have had so far in northern New York!!

In this issue we have an article submitted by Steve Pheterson, one of our advisory board members from Rochester. Steve clearly illustrates how the Monroe County Bar Association is pursuing the unlawful practice of law by non-attorneys. The Bar Association of Erie County has had a similar unlawful practice committee for several years with the same goal of maintaining the quality and integrity of legal services rendered to all consumers. Steve's article reminds all attorneys of their duty to report the unlawful practice of law, and avoid being involved in a legal transaction where the other party is "represented" by a non-lawyer.

We are also pleased that Rick Rossettie, one of our advisory board members from the southern tier, has submitted a very informative article about New York's position on mortgage prepayment penalties. Attorneys for borrowers, as well as title companies, should be well aware of the applicable statutes and procedures to prevent collection of unlawful prepayment penalties. I'm sure Rick would welcome your comments and inquiries.

Also in this issue Lisa Meyers and Mary Buckley, two of our thirteen statewide underwriters, have prepared a list of commonly raised title issues and practice guidelines. Their list of useful websites should help your practice, but the personal assistance from all our underwriters is always available to you. Remember our website (www.nyticor.com see page 6) can be a tremendous resource for you.

In closing, we hope you are all taking the time to enjoy your family and friends. Remember that prosperity does not equal wealth, but rather it is quality of life- like relaxation, fun, food and refreshments, and laughter. We wish you a healthy, safe, and relaxing summer.

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Be Aware of Unlawful Practice of Law

By

Steven J. Pheterson, Esq.

Following in the footsteps of the Erie County Bar Association, the Monroe County Bar Association recently established the Monroe County Bar Association Unlawful Practice of Law Committee (the "Committee"). One of the major issues being examined by the Committee, and an issue that is no doubt of great interest to the region's real estate attorneys, is the representation of buyers, sellers and lenders in real estate transactions by non-attorneys.

This type of representation has increased in recent years and is being conducted by various settlement service companies and other non-lawyers, including notaries. With this increase, lawyers throughout Western New York are increasingly finding themselves sitting opposite non-lawyers in real estate transactions and are in need of guidelines from the Monroe County Bar Association as to what their ethical responsibilities are in such situations.

The purpose of this article is to provide lawyers faced with this situation a background of the law and their ethical responsibilities and to describe why the Committee was formed and what actions it is taking to create clearer guidelines. Further, this article will attempt to respond to supporters of allowing non-lawyers to represent parties in real estate transactions.

The Committee was formed with the

purpose of educating the public about the existence of Judiciary Law Sections 476-A to 495 and assisting in the enforcement of those sections. The sections provide for the prohibition on the unauthorized practice of law, including the provision of tools for investigation and enforcement.

Of particular importance are Sections 476-A, 478 and 495. Judiciary Law §476-A defines the phrase "unlawful practice of law" to include any "...act forbidden to be done by any person not regularly licensed and admitted to practice law in this state..." and also permits the Attorney General to pursue a civil action against an individual engaged in the unlawful practice of law, and provides that should the Attorney General fail to act or refuse to act on written notice from the bar association, then the bar association may pursue said action.

... it is important that parties to a real estate transaction are provided legal advice only by those who are qualified to provide it.

Further, Judicial Law §478 prohibits the practice of law by non-attorneys and §484 provides that "No natural person shall ask or receive, directly or indirectly, compensation for...preparing deeds mortgages, assignments, discharges, leases or any other instruments affecting real estate...unless [that person is]...regularly admitted to practice as an attorney or counselor, in the courts of record in the state." These sections have been interpreted and upheld by New York courts, most importantly in Duncan & Hill Realty Inc. v. Department of State, 62 AD2d 690, (4th Dept. 1976), app dismissed, 45 NY2d 821, 381 NE2d 608, 409 NYS2d 210 (1978).

(Continued on page 2)

(Continued from page 1)

In the context of real estate transactions this means that a non-lawyer cannot and should not be representing or providing legal advice to parties involved in real estate closings and cannot be preparing mortgage and deed documents for closing unless under the supervision of a duly licensed attorney employed by or a member of a law firm.

Further, the Committee has determined that at a real estate closing, the buyer should not be represented by a paralegal even if he or she is employed by an attorney. A primary focus of the Committee is to investigate potential violations and to bring said matters to the attention of the Attorney General and/or the state bar association so that appropriate action may be taken.

The Committee is also seeking to establish rules and guidelines on how attorneys who witness the unlawful practice of law should respond, including what, if any, ethical responsibilities fall on an attorney who witnesses the unlawful practice of law. New York's Lawyer's Code of Professional Responsibility Disciplinary Rule 3-101(A) states that "A lawyer shall not aid a non-lawyer in the unauthorized practice of law." While this rule seems straightforward, it is, in fact, unclear what exactly constitute aiding a non-lawyer in the unauthorized practice of law.

Here are at least three major concerns for an attorney who finds himself or herself in closing, or prior to closing, opposite a non-lawyer representing a party. The first issue is whether the lawyer can, at the direction of the purchaser, forward title documents in connection with the transaction to an individual representing the purchaser who is not an attorney. The Bar Association of Erie County Professional Ethics Committee examined this issue in Opinion 1 dated April 18, 2003. The opinion the committee issued found that "the mere act of forwarding documents to a non-lawyer does not appear to be defined as aiding a non-lawyer in the unauthorized practice of law", but that "In order to avoid even the appearance of impropriety (Canon 9) in assisting a non-lawyer in the unauthorized practice of law, it is recommended that the attorney for the seller deal directly with purchaser."

The second issue concerns whether a lawyer can continue to represent a client in which a representative of the counter party is engaged in the unlawful practice of law. The New York State bar Association, in opinion 908-1/12/07, answered this question in the affirmative

when it stated "A lawyer who continues to represent a client in a transaction in which the counter-party has chosen to be represented by a non-lawyer is not thereby aiding and/or abetting the unauthorized practice of law."

The third issue for attorneys confronted with the unlawful practice of law is required to report said violation to the County Bar Association Ethics Committee. The Committee has recently requested and is awaiting an opinion on that question from the Ethics Committee of the Monroe County Bar.

In addition to determining the proper course of actions for attorneys who are confronted with the unlawful practice of law, the Committee has been and continues to work on ways of monitoring and investigating alleged violations.

At present, the Committee's procedure is as follows: (1) identify instances of the unauthorized practice of law; (2) refer the instance to the Attorney General's office for their investigation; (3) if

... there is a fairly even divide between states which allow non-lawyers to represent home buyers and states, like New York, that do not.

no action is taken by the Attorney General, attempt to educate the wrong-doer and seek voluntary compliance through a cease and desist letter; and (4) if (2) and (3) do not resolve the matter, determine, first at the subcommittee level and the Committee level, whether we should advise an independent civil action by the bar association.

Further, the Committee considers the unlawful practice of law an important issue and believes that the purchase and sale of a home is one of the most significant transactions an individual will ever engage in and that, due to its importance and the complexity of both New York state's property law and the numerous contingencies that exist even in standard form contract used throughout Western New York, it is important that parties to a real estate transaction are provided legal advice only by those who are qualified to provide it.

Those who support representation by non-lawyers claim that New York is the last bastion for attorney representation of home buyers, but in actuality, there is a fairly even divide between states which allow non-lawyers to represent home buy-

ers and states, like New York, that do not.

The Federal Trade Commission (the "FTC") and the Department of Justice ("Justice"), in a 2004 letter commenting on a Massachusetts bills that would permit non-lawyers to represent home buyers, argued in favor of the law by making broad statement about competition as "the hallmark of America's free market Economy" and the claim that little or no harm will result from non-lawyers representing home buyers in real estate matters. Whether or not it is true that by allowing non-lawyers to represent parties in real estate transactions will result in more competition which will provide lower prices to consumers; however, unlike what the FTC and Justice imply, this will come at the cost of a lower quality of service and more fraud without the protection of the IOLA provisions; and, more importantly, if the reasoning from the letter is actually followed the entire concept of unlawful practice of law will be eviscerated.

For example, if the FTC and Justice argue that non-lawyers should be able to prepare closing documents and represent home buyers in real estate transactions because competition is beneficial for consumers due to lower prices, than why can't non-lawyers provide other legal service such as the preparation of standard form wills and trusts or provide legal advice on the drafting of contracts or an adoption?

Finally, the Committee has also recently tackled the issue of independent notaries performing closings. The Committee has taken the position that it is impossible for a notary to attend a closing without explaining the documents (i.e. what is a note, a W-9 or the right of rescission?)

If you know of an instance of the unauthorized practice of law, please feel free to contact:

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Title Alerts & Useful Tidbits

By

Lisa Meyers, Esq.

Mary Buckley, Esq.

Ticor Title Insurance Buffalo Branch

Following are important title issues we frequently address for our customers:

- **BUILDING LOAN AGREEMENTS ARE REQUIRED TO BE FILED PRIOR TO OR AT THE TIME THE MORTGAGE IS RECORDED.** Failure to do so WILL affect the priority of the mortgage lien in relation to any mechanics lien. Careful attention must be paid to the preparation of the affidavit which accompanies the Building Loan Agreement. (See Section 22 of the Lien Law)
- **A MORTGAGE MADE TO THE SELLER OF THE SUBJECT PROPERTY IS CONSIDERED A TRUE PURCHASE MONEY MORTGAGE AND WILL TAKE PRIORITY OVER AN INSTITUTIONAL MORTGAGE EVEN IF THE INSTITUTIONAL MORTGAGE IS RECORDED FIRST.** To Insure That The Seller Held Mortgage Is Second Or Subordinate To The Institutional Mortgage, There Must Be A Recital On The Seller Held Mortgage Stating The Same Is Subordinate. (See *Giragosian V. Clement And Citibank (New York State)*, 604 Nys2d 983, 3d Dep't, 1993).
- **WHEN A BORROWER EXECUTES TWO INSTITUTIONAL MORTGAGES CONTEMPORANEOUSLY, THE LIEN PRIORITY MUST BE ESTABLISHED.** It Should Be Noted That At The Erie County Clerk's Office All Documents Recorded For A Single Transaction, i.e., Deed, Mortgages, Affidavits Etc. are considered recorded at the exact same time unless you request otherwise from the clerk. In order for the second institutional mortgage to be considered subordinate, it must contain subordination language or be recorded at least one minute after the first institutional mortgage.
- **WATCH THOSE FANNIE MAE DEEDS.** Federal National Mortgage Association, a/k/a/ Fannie Mae conveyances, have been containing deed restrictions as to subsequent resale and encumbrances of premises. For an example, on one deed the consideration paid to Fannie Mae was \$6,000.00, the restriction read as follows: "Grantee herein shall be prohibited from conveying captioned property to a bonafide purchaser for value for a sales price of greater than \$7,200.00 for a period of six months from the date of this deed. Grantee shall also be prohibited from encumbering subject property with a security interest in the principal amount of greater than \$7,200.00 for a period of six months from the date of this deed. These restrictions shall run with the land and are not personal to grantee." We will be unable to insure that which violates the above restrictions.

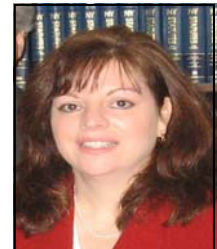
- **TROUBLE GETTING PRIVATE MORTGAGE DISCHARGES EXECUTED.** Section 321 of the Real Property Law gives you the specifics as to who must execute the discharge.
- **IF YOUR CLIENT IS PURCHASING FROM A LENDING INSTITUTION, PLEASE BE AWARE THAT SOME INSTITUTIONS HAVE JUDGMENTS AGAINST THEM AND INDEMNITY AGREEMENTS ARE NECESSARY TO INSURE OVER THE LIENS.**
- **IF YOUR CLIENT IS GOING TO BE MODIFYING OR CONSOLIDATING EXISTING MORTGAGES, A JUNIOR MORTGAGE TO THE EXISTING MORTGAGE MUST BE SUBORDINATED TO THE MORTGAGE(S) AS MODIFIED OR CONSOLIDATED.** It Must Be Subordinated To Every Subsequent Modification Or Consolidation Unless The Agreement Provides Otherwise.
- **WHEN EXAMINING A MORTGAGE FORECLOSURE FILE, BE AWARE THAT A FEDERAL TAX LIEN HAS A RIGHT OF REDEMPTION.** This right of redemption lasts 120 days from the date of sale. 26 U.S.C. Sec. 7425(d)(1), 28 U.S.C. Sec. 2410(c). Note: There is a one year period of redemption for other types of federal liens including money judgments.



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Welcome To The Worldwide Web

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www.nyticor.com

NORTHERN NEW YORK TICOR—Includes access to the rate calculator, online or printable ordering forms, access to real estate forms, all branch directories, 1031 Exchange information, TIRSA Manual, and other relevant information.

<http://www.fntiweb.com/>

FIDELITY NATIONAL TITLE INFORMATION—This site contains information regarding title insurance in every state.

<http://www.dos.state.ny.us/>

NEW YORK STATE DEPARTMENT OF STATE—Great for searching existence of business entities.

<http://public.leginfo.state.ny.us/menuf.cgi>

NEW YORK STATE LEGISLATURE—Search Legislative information and Laws of New York State.

http://www.hud.gov/offices/hsg/sfh/res/respa_hm.cfm

RESPA- REAL ESTATE SETTLEMENT PROCEDURE ACT—Official RESPA site.

<http://www.ffiec.gov/nicpubweb/nicweb/nichome.aspx>

NATIONAL INFORMATION CENTERT—This is a great site to search for current and not current banking institutions. Track down the proper party to execute a discharge of mortgage.

www.nass.org

NATIONAL ASSOCIATION OF SECRETARIES OF STATE—Has links to the home pages of the Secretaries of State of all the

States, the District of Columbia, Guam, Puerto Rico and the Virgin Islands.

www.alta.org

AMERICAN LAND TITLE ASSOCIATION—This site features title industry news, including government action, information on upcoming ALTA events and information on the Land Title Institute's correspondence courses.

www.tirsa.org

TITLE INSURANCE RATE SERVICE ASSOCIATION, INC.—Information regarding the Title Insurance Rate Manual for New York State is available on this site.

<http://www.lexisone.com>

LEXIS ONE—Access case law and legal forms free of charge.

<http://www.mersinc.org/index.aspx>

MORTGAGE ELECTRONIC REGISTRATION SERVICE—The official website of MERS.

<http://uccplus.com/>

UCC/plus—Order the UCC guarantees here.

<http://www.state.de.us/corp/default.shtml>

STATE OF DELAWARE—Order Delaware Corporation information.

We Asked, You Responded, We Listened!

Earlier this year our Marketing Team, headed by Carmen Polito, Dave Reddinger, Chris Dardano and Chad Faulkner, developed a customer survey. The survey was sent to over 600 Ticor Title customers across the northern New York area. Your responses (nearly 200, or approximately 33%) were greatly appreciated!

After reviewing the responses, we felt it was crucial to contact those customers with concerns or issues, particularly those who felt that our competitors are providing better service in certain areas. You can be assured your input will be utilized to enhance our service to you.

All respondents were entered in a raffle for a \$100 gift certificate. We are pleased to announce the winners are:

Buffalo- Angela Stamm-Phillips
Rochester- Dennis Hyatt
Syracuse- Heather Sunser

Thanks again, and if we can do anything to make your practice easier please contact:

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Fending-Off Illegal Prepayment Penalties

Richard P. Rossettie, Esq.

What happens when your client is about to close on a home mortgage refinancing loan, but the incumbent lender's payoff statement includes a huge illegal prepayment penalty?

You know that under New York's *General Obligations Law §5-501(3)(b)*, if the loan closed more than one year ago, any prepayment penalty called for by the note is void. So you write to the bank and tell them your client won't pay it and why. The bank ignores you. The refi commitment letter is expiring.

This situation befell John and Linda Vang last year. The mortgage to be taken-out was held by the nominee of Franklin Savings Bank, a savings bank based in Texas. The claimed prepayment penalty exceeded \$11,000. The holder of the economic interest in the mortgage, Homecomings Financial Network, Inc., ignored our correspondence explaining the nullity of the prepayment penalty claim. After conferring with Ticor on the matter, we proceeded to close the refinance loan and mark-off the mortgage based on wire remittance of the principal and interest due per the payoff statement, omitting the prepayment penalty.

Homecomings refused the payoff tender, shipping it back to us by return wire. The Vangs then paid the amount of the tender into court and brought a special proceeding under *RPAPL*

§1921(2) to compel record discharge of the mortgage.

The mortgagee's initial defensive position was that *GOL §5-501(3)(b)* was trumped by conflicting preemptive federal regulations. There was a time when that was arguably the case, but no longer after changes in the federal rules were adopted permitting state-specific opting-out from the federal scheme.¹

After concluding that New York had opted to preserve its protection of residential borrowers from such penalties, Homecomings agreed to a consent Order entered by Acting County Judge Furfure that discharged the mortgage, granted costs and attorneys' fees to the Vangs, and allowed Homecomings to collect what was then left of the payoff amount previously paid into court.²

The cash loss to Homecomings on account of lost float (two and one-half months) and litigation expenses (both sides) exceeded the amount of the penalty that it tried to collect.

Borders still matter. Though not the case in many other jurisdictions, the primary lesson of *Vang v. Homecomings* is that there is no such thing in New York as a prepayment penalty that can be collected on a residential mortgage³ after the first anniversary of closing. The corollary lesson, though, is that the practical vindication of the borrowers' rights is critically dependent upon the title insurer's under-

standing of the state-specific legal environment and its examining counsel relationships.

Ticor's willingness to insure over the refinanced Vang mortgage, leaving the resolution of the mortgage discharge to the post-closing aftermath, was itself a clearly understood early indicator to Homecomings and its counsel that the prepayment penalty claim was likely unenforceable.

With the refinance loan closed and the payoff tender languishing at no interest in the hands of the court, the Vangs enjoyed tremendous leverage over the federal pre-emption notions that Homecomings might otherwise have been tempted to persist in. The relatively rapid collapse of Homecomings' posture was no doubt helped along by these considerations.

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¹ The Alternative Mortgage Transactions Parity Act, 12 U.S.C. § 3801-06, preempts state law prohibitions against certain prepayment penalties on select types of home mortgage loans. 12 U.S.C. §§ 3803(c) and 3804. However, states are allowed to opt-out of the preemption. New York has done so: see New York Banking Law § 6(g).

² *Vang v Homecomings Financial Network, Inc. and M.E.R.S., Inc.*; Steuben County Court, Index No. 94,245

³ The ban on such prepayment penalties applies only to financing of structures up to six dwelling units.

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The Title Examiner is a periodic newsletter of Ticor Title Insurance. Please let us know if you would like to see a particular topic addressed in a future issue or if you have any questions regarding an article.