

The Title Examiner

Ticor Title

An Informational Newsletter Provided Courtesy of Ticor Title Insurance Company

From the Editor

Winter is finally almost over, not that you can tell yet here in Northern New York but we can hope! And along with the end of winter comes the latest version of our Title Examiner, something else to enjoy. This issue contains articles on the new foreclosure statute, subdivision maps and why owners' title insurance can really make a difference.

I just want to mention a couple of other items in passing that have been affecting our region. First of all, many of the county clerks have increased recording and filing fees. These include Genesee, Livingston and Wayne counties but may eventually include others as tight budgets on the county level force them to look to other sources for revenue. If you are not sure of the current fees for a county, please call our offices to help you determine them. Phone numbers and other contact information for our offices and the counsel in each is included later in this issue but there are many people in each office who can help you with this or with any other title issue.

Secondly, some of you may be receiving additional items with your title reports or even just your title acknowledgments that you are not familiar with. You may find a notice of ancillary services which we are asking you to have your clients sign and return to us with your closing package. Also, you may be receiving a closing or curative checklist along with your title work. We're hoping this will help you to determine if you are sending all the necessary items with your closing/curative package so that we can issue policies faster and without having to follow up with you so that you aren't spending time on files that have already closed.

Have a great spring!!

Josephine Carra, Editor
Ticor Title Insurance
19 West Main St.
Rochester NY 14614
585-546-6350
carraj@ticortitle.com

New Legislation Creates More Hurdles for Hurting Lenders

By David Case, Esq.

Foreclosure practice has changed vastly recently. The passage of Senate Bill 8143-A into law (Laws 2008, Ch. 472) alters the landscape of mortgage lending, servicing, and foreclosures. This new law makes a wide variety of changes to the way certain foreclosures must be handled, which shall be highlighted here.

The new law also adds or amends sections to Banking Law §§ 6-l (High Cost Home Loans), 590 (regarding mortgage brokers), 590-b (Responsibilities of a Mortgage Broker), 595-b (Regulation of Loan Servicers); N.Y. Penal Law Art. 187 (creating a new crime of Residential Mortgage Fraud), and other amendments that shall not be covered here.

The new law amends N.Y. R.P.A.P.L. § 1303, which originally required, under the Home Equity Theft Prevention Act of 2006, that a certain notice containing statutory language (to beware of equity sharks) at 14 point font on colored paper be served with the Complaint.

Now, in addition to a normal Summons stating that the defendant must answer or face default, and besides N.Y. R.P.A.P.L. § 1320 requiring another notice within the Summons indicating that the defendant must Answer the Complaint or face default, the new § 1303 notice provides a third notification that if the defendants do not Answer the Complaint they may lose their home. The notice also directs the mortgagor-defendant to seek the advice of an attorney or local legal aid office.

Now that the defendants have been advised, by these required notices, in writing three times to answer the Complaint, the foreclosing attorney (and the Court) should

become apoplectic if the defendant brings an Order to Show Cause on the eve of sale stating that they did not realize that they actually had to Answer the Complaint.

The new law creates new section 1304 of the Real Property Actions and Proceedings Law. This section is an effective 90-day stay of a foreclosure on any high cost, subprime, or non-traditional home loan. Section 1304 requires the lender to send a certain statutory notice to the borrower at least ninety (90) days before the commencement of an action of one of the aforementioned home loans by registered or certified mail and first class mail to the borrower's last known address.

The part about the "last known address" is humorously superfluous considering that the loan cannot be a "home loan" if the premises are not owner-occupied. Therefore, if the property is not the "last known address", then the loan is not a "home loan" and the 90-day notice is not necessary.

The definition of a high cost home loan has not been substantially changed. However, the new law creates definitions of a sub-prime and non-traditional home loan.

First, we must define a home loan. In their usual panache for using a phrase to define itself, the legislature defines a home loan as "a home loan, including an open-end credit plan, other than a reverse mortgage..." where:

1. the principal amount of the loan at origination does not exceed the Fannie Mae conforming loan rate for comparable dwelling in existence at the time of origination;
2. the borrower is a natural person;
3. the mortgage is given by the bor-

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- power primarily for personal, family, or household purposes (i.e.: owner occupied);
4. upon one to four family dwellings; and
 5. the premises are in the State of New York.

If a mortgage meets the definition of a home loan, then it is a subprime home loan if the annual percentage rate of the loan at origination is more than three (3) percentage points over the U.S. Treasury Daily Yield Curve Rate on the 15th day of the month the loan was originated. Those rates are published on the New York State Banking website: www.banking.state.ny.us.

However, the New York State Banking Department did not publish the rates for a twenty (20) year mortgage. A foreclosure attorney determining if the threshold is met for a 20-year obligation to qualify as a subprime home loan must turn to the U.S. Department of Treasury website: <http://www.ustreas.gov/offices/domestic-finance/debt-management/interest-rate/yield.shtml>. If the mortgage is a subordinate mortgage, than a subprime home loan is one where the APR exceeds five (5) percentage points over the yield curve rate.

A non-traditional home loan is one that negatively amortizes or is interest only. There is some question if the new law means an interest only period or if the entire life of the loan is interest only with a principal balance balloon at the end. Either legislative amendment or judicial guidance will elucidate this issue.

From the womb of the new law N.Y. C.P.L.R. § 3408 was spawned, which mandates a settlement conference in any foreclosure of a high-cost, subprime, or non-traditional home loan originated between January 1, 2003, and September 1, 2008. This conference must be held within sixty (60) days after proof of service of the Summons and Complaint is filed with the Clerk.

At the conference, the Court shall treat the defendant as if (s) he made an application to proceed as a poor person and the Court can appoint an Attorney to represent the defendant. Yes, the legislature is making taxpayers pay for Attorney Representation in a non-criminal matter—albeit that representation is only for the conference. In any event, at the conference the Plaintiff shall appear or appear by its attorney, who must be fully authorized to dispose of the case. The Court may permit the Plaintiff and/or its attorney to appear by phone or video phone.

For those matters commenced before the new law was signed, but where a final Judgment of Foreclosure and Sale has yet to be issued, Plaintiff's Counsel must advise the Court, where applicable, that the loan is a high-cost or subprime home loan. Where the mortgage being foreclosed secured a high-cost or subprime home loan the Court must send the mortgagor(s) advising them of their right to request a settlement conference.

Section 1302 of the New York Real Property Actions and Proceedings Law was amended, effective November 1, 2008, to require foreclosing plaintiff to make an affirmative averment in their pleadings in a foreclosure of a high cost or subprime home loan that the plaintiff is the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a foreclosure action.

The Court System, and some foreclosure counsel, are still adapting to the new laws. Average foreclosure timelines in New York State are already some of longest in the country; this law will make the foreclosures for those that cannot settle longer and help settle only those foreclosures that probably would have settled anyway.

David Case, Esq.
Relin, Goldstein & Crane, LLP
28 E. Main St, Suite 1800
Rochester, NY 14614
cased@rgcattvs.com

Another Argument for Owner's Insurance

By
Justine Welch, Esq.

If you believe that your client doesn't need Owner's Title Insurance, think again! This coverage is inexpensive and the risks it covers are so vast, why wouldn't you protect yourself (and your client) and avoid that call to your insurance carrier?

The circumstances and mistakes that give rise to a potential claim are as numerous and varied as one's imagination can fathom. Just talk to any insurance underwriter and the war stories abound. Simple statistics would dictate the inevitability of one of these claims being from your client. Why not have a policy to fall back on?

As an example, take a look at the Purchaser herein who leaves the closing table seemingly secure in the belief that he has purchased the property free and clear of any claims or liens and that title is marketable.

Mrs. K is in financial trouble and her lender (Beneficial) has begun foreclosure. She has decided to give a Deed in lieu of foreclosure which is signed by her Attorney In Fact and conveys the property to Beneficial. Mr. Sen purchases the property from Beneficial and gives a purchase money mortgage to ABC lender. Mr. Sen's attorney advises that if the bank is satisfied with the condition of title, then Mr. Sen could be satisfied as well.

Some years later, Mr. Sen passes away. His estate is selling the property and when that Purchaser examines title, it is "discovered" that the Power of Attorney utilized to sign the Deed in Lieu was never recorded nor was an affidavit as to the validity of the Power of Attorney recorded. In fact, when a copy of the Power of Attorney is located, it shows the appointment of a different individual than the one who had executed the Deed in Lieu. The Power of Attorney appointed the wife of the individual who had actually executed the Deed in Lieu. Had Mr. Sen purchased an Owner's Policy, all costs associated with his Estate's inability to convey title would have been covered.

We are not making this stuff up. It really happens and experienced real estate attorneys are involved in these closings. I urge you to consider the Owner's Policy as something you highly recommend in your residential real estate practice.

Justine Welch, Esq.
Ticor Title Insurance
122 Niagara St.
Lockport NY 14094
716-434-2825
justine.welch@ticortitle.com



Don't Overlook the Subdivision Map

By

William P Johnson, Esq.

Different fields of work have their own levels of caution in looking for problems or verifying information. In business deals numerous types of "due diligence" are used to confirm contract terms, while in the media politicians' statements are often the subject of "fact checking" before they are simply reported. An accountant's audit investigation can range from a review of compiled records to a full audit.

In real estate law, reviewing of the title has various levels of investigation including reviewing a title report, examining an abstract of title and a survey and reading selected primary documents filed with the county clerk and the courts, as deemed necessary.

The depth of a title examination depends upon how far the lawyer believes he or she needs to look to make sure the client has good title and also that the client's intended use of a property will not be impaired by the rights of others. Obviously, the examination needs to make sure there are no superior ownership or lien rights which could cause title to be cut off.

Furthermore, easements should be considered to determine whether the improvements or other intended uses of the property are affected by the location of easements. Other items, such as restrictive covenants and setbacks, also need to be addressed to make certain that a client's current or future use of the property will not be negatively impacted.

One often overlooked source of title encumbrances is a filed subdivision map (also sometimes called a "plat"). Based on New York law, if a tract of land is improved into multiple lots following a common plan, a subdivision map usually needs to be filed with the county clerk after the plan shown on the map receives required governmental approvals. Important information pertaining to the title may be set forth on these filed maps. A title examiner is alerted to a filed subdivision map's existence by the property's legal description.

A title abstract contains an abstracted or condensed version of deeds, mortgages or other liens, easements, restrictions, Surrogate's Court records and other items from the public record which affect title, but rarely does it include filed subdivision maps.

Title reports prepared for title insurance purposes or otherwise contain a further summarized version of what is found in the title abstract, but based on the scope of the report, it may or may not include the details of a subdivision map applicable to the subject property.

Surveys, which are usually provided in real estate transactions, at a minimum contain land boundaries, dimensions and locations of improvements. However, the breath and detail on a particular survey is usually governed by standards of a local bar association or surveyors' association. The information for the surveyed property shown on a subdivision map may or may not be included within those standards.

As noted in Peter Battaglia's article in Ticor's *The Title Examiner* (Winter 2007-2008), the case of *O'Mara vs. Town of Wappinger*, 485 F. 3d 693 (2nd Cir. NY, 2007) reaffirms the position that a restriction placed on a final plat and filed with a county clerk is enforceable against subsequent purchasers.

Certainly, experienced title examiners also know that restrictions, setback requirements, location of drainage and utility easements, forest preserves and other restrictions on use might be shown on filed subdivision maps. It is also important to check the

survey's dimensions for a particular subdivision lot against those shown on the subdivision map.

With such an impact on the use of the property arising from the details of a subdivision map, a title examiner would rightly conclude that it is important to review such maps. Yet despite the significance of filed subdivision maps, in many counties the maps are difficult to obtain and review.

Some counties store the maps remotely and it takes days to receive them once ordered. In other counties the maps are on microfilm and chopped up into several microfilm pages that are difficult to read as a whole. Newer subdivision maps have started to become scanned onto computers through processes that in some instances produce good images and at other times nearly illegible ones. County clerks with a generous supply of shelf space have subdivision maps available in books or under bound covers. This situation usually applies to older subdivision maps, and while such maps are the easiest to read, at times they are missing or disintegrated from age and overuse. Reviewing a subdivision map can be a burden but it is important nonetheless.

In performing a title exam recently, I reviewed a subdivision map (after working hard to retrieve it) and saw that about one-third of a backyard was a federally designated wetland. The survey did not show the wetland area of the property, nor did the recorded instruments disclosed by the title abstract indicate the wetland status.

In my particular case the sellers did not know about the wetland designation from their purchase occurring a few years before and it was a great surprise to both buyer and seller when I raised the title objection a few weeks before the contract closing date. Consequently, the closing was delayed and I further investigated the wetland designation with the town and the Army Corps of Engineers to confirm the continuing wetland status.

A wetland shown on a map cover is a double problem. With a federal jurisdictional wetland, federal law prohibits against "filling the wetland". The practical result is that the grade of the land cannot be changed for construction of improvements such as a pool, a deck, a shed or an addition to the home.

Additionally, because the wetland designation is on a subdivision map, it constitutes a restriction in the same fashion as a setback. Technically, all the owners of the subdivision who received the benefit of the land use restrictions shown on the subdivision map each have an interest in enforcing the restrictions.

These concerns raise two additional impacts for an owner. First, the owner's actual use of the property could be constrained by governmental agencies or benefited neighbors. Secondly, even if a specific owner's use of the property is not disturbed by a wetland limitation, a subsequent buyer who may expect broad freedom in use of the backyard is likely to raise a significant title objection if the seller does not know of the wetland and disclose it at the contract stage.

In my particular deal, the buyer ultimately agreed to go forward with the purchase but only after the price was reduced to reflect the diminished value of the property as encumbered by the wetland.

Case law and practical concerns demonstrate that a review of the subdivision map is an important part of title examination, even though access to the maps is sometimes difficult. A title insurance

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policy that does not raise subdivision map exceptions, whether they are the restriction aspect of wetlands or other concerns, insures over subdivision map title issues.

Thus, when a title examiner cannot or does not review the map, title insurance offers a level of protection for the buyer and the buyer's lawyer. However, a cautious approach suggests that if a subdivision map is available, it is better to have reviewed it even if there is title insurance coverage.

William P. Johnson, Esq.
Nesper, Ferber & DiGiacomo, LLP
One Towne Centre, Suite 300
501 John James Audubon Parkway
Amherst, New York 14228
716-688-9800
wjohnson@nfdlaw.com

Northern New York Underwriters

Buffalo District (716) 854-2982

Peter Battaglia
battagliap@ticortitle.com
Mark Burhans (Lockport)
burhansm@ticortitle.com
Justine Welch (Lockport)
justine.welch@ticortitle.com
Mary Buckley
buckleyma@ticortitle.com
Mary Jane Keyse
keysem@ticortitle.com
Lisa Meyers
meyersl@ticortitle.com
Dennis Zimmerman
zimmermand@ticortitle.com

Rochester District (585) 546-6350

Josephine Carra
carraj@ticortitle.com
David Reddinger
reddingerd@ticortitle.com
Christine (Tina) Gleason (Bath)
gleasonc@ticortitle.com
Bernardine (Bunny) Thorn (Lyons)
thornb@ticortitle.com

Syracuse District (315) 474-1273

Gil Hoffman
hoffmang@ticortitle.com
Elissa Fagelman
fagelmane@ticortitle.com
Eva Hemingway
hemingwaye@ticortitle.com
Derek Teeter
teeterd@ticortitle.com

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