FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Title News

Title Insurance Rates Reduced by 15% on Purchases for less than $1,000,000

As part of a settlement agreement with the Office of the Attorney General, First American Title Insurance Company of New York and Fidelity National Title Insurance Company have agreed to reduce their title insurance rates on purchases for less than one million by 15%. For example, where title insurance for the purchase of properties in the amounts of $900,000 and $500,000 used to be $4,110 and $2,518 respectively, the new rates are in the amounts of $3,494 and $2,142. While the expressed intention of the Attorney General had been to alleviate closing costs for home-buyers, the discount applies to commercial and mixed-use properties as well. Moreover, the new 15% discount is cumulative with the existing 30% Bulk Rate discount. Since the new discount applies only to Owner's Policies, Loan Policy rates have not changed. Nevertheless, our readers will remember the re-writing of the Re-issue rate discount rules in February of this year to reduce closing costs on more mortgage closings. Although the agreement with the Attorney General applies only to policies issued by First American and Fidelity, competition has driven Commonwealth Land Title Insurance Company to adopt the discount. Word in the industry has it that other underwriters will soon join in order to remain competitive.

Attempted Bribe to Buildings Inspector Results in Arrest

On June 2, Mao Lin, 35, of Brooklyn offered $500 to a building inspector as a bribe to ignore illegal construction. The Premises at 2 Spring Street in Manhattan were subject to a stop work order issued by the Department of Buildings. The bribery attempt was duly reported and the Department of Investigations sent an inspector later that day, to whom Lin offered another $500. Lin was subsequently arrested and charged with Bribery in the Third Degree. If convicted, he faces up to seven years in jail.

Failure to Follow Notarization Procedures Results in Fraud

Theresa Simpson-Palmer refinanced her home, which she co-owns with her husband. As she was estranged from her husband, she attended the closing with an impostor. When the title closer asked for identification, the impostor claimed to have left it at home and it was arranged that the closing would continue and a copy of the ID would be faxed during the rescission period. After the closing, Simpson-Palmer complied and the bank released a $50,037.74 cash out to her. When Mr. Palmer discovered that his home was subject to a new mortgage he filed suit seeking damages in the amount of $350,000 and asking for the mortgage loan to be voided.

Perfecting the Closing

Drafting Effective Escrow Agreements at Closing

It is an all too common situation to attend the closing of what should be a clean, easy file and encounter a myriad of problems unexpected at the pre-closing stage. These situations call for professional judgment and creative thinking, and oftentimes result in an escrow agreement to postpone the ultimate resolution of the issue until after the closing. Recurrent examples include unposted water bills, defects in the property discovered in the final walk-through, and banks that fail to fund on time. The following are some guidelines to keep in mind when called upon to draft such an agreement.

The Parties

First and foremost, one should ascertain who are the parties to the agreement. Only a party charged with an obligation is a necessary party. Therefore, the escrowee must always be a signatory. It is important to realize that "obligations" includes not only positive duties -such as that of the escrowee who must actively do something- but also passive obligations; i.e. letting or allowing something to happen. For example, an escrow agreement may provide that if the seller fails to procure a sign off on an open permit within 90 days, the escrowed funds will be delivered to the buyer on demand. The seller's attorney, acting as escrowee, signs the agreement. If time lapses and proper demand is made, the seller's attorney will find herself in a dire conflict of duties: on the one hand she would have a duty to abide by the agreement she signed, on the other, her client did not approve the disbursement of escrow to the buyer. In sum, any party that may have a right to object to any contingency under the agreement should be joined.

The draftsman should also be concerned with writing the correct names of the parties. "ABC Corp.", "A B C Corp.", "A,B,C Corp." and "A.B.C. Corp." are all different, viable names with the Department of State and searches on one may not show returns on the other. Individuals, likewise, are subject to confusion because of similar given and last names. In order to protect the agreement from misspellings and similar names it is recommended to specify further the individual or entity by reciting its address.

Considerations

Once the parties have been established, meticulous drafting calls for considerations. Considerations are a recital of the facts leading to the escrow agreement and are usually preceded by language such as "WHEREAS", "In view of the fact that…", "The parties being aware (or acknowledging)…". Their purpose is two-fold. First, they explain to the future reader why the agreement was a proper measure. While the parties sitting at the table may understand its reasoning in the heat of the closing, the cold reader may have doubts as to what transpired and wonder whether the decision to enter into an agreement was justified. This is especially important if one of the parties is not represented by counsel. Presenting the agreement as reasonable under the circumstances vests it with a presumption of legitimacy.

Second, escrow situations usually come about because of a party's failure to disclose or address an issue prior to closing. Reciting considerations allows the innocent party to put on

record the other's admission of fault and its own good faith in attempting to work out a solution with the party at fault. For example, if the seller failed to procure a sign off, the agreement might spell out the fact that the seller failed to do so, which could work as an admission to prove breach of contract. Alternatively, if the seller was willing to wait but it was the buyer that was pressed to close because of an expiring interest rate, then the seller might want the agreement to express that the seller was perfectly willing to comply but that it was the buyer who insisted on closing without the sign-off because of an expiring rate. No breach of contract could then be inferred against the seller and the reviewer might be convinced of the seller's good faith.

Escrow & Release Conditions

After reciting the considerations, it is time to lay out the escrow funds or items and the conditions for their release. These are open to negotiation and cannot be explored here. The only points to keep in mind are to stipulate that all notifications must be writing, if only to protect the escrowee, and to express where or how the escrow funds will be released. Are funds going to be wired or checks overnighted? Certified or attorney escrow checks? If the escrow includes documents, are they going to be delivered or picked up? Who will pay for the courier? Will the funds be kept in an escrow account?

Default Clause

Perhaps the most important point to remember from this article is the default clause. All too often escrow agreements specify an amount to be released when something happens, but no provision in case nothing happens. For example, the buyer might feel secure in closing without a certificate of occupancy if the seller's attorney holds $5,000 in escrow. All is well until the seller after the closing decides that it is not worth her while to obtain the certificate in exchange for $5,000. The seller might conclude that complying might be more costly or that there is no profit to be made in it. This is a terrible situation for an escrowee to be in. Not only will the funds sit indefinitely in the account, but there will be an array of angry phone-calls and no power to act. The buyer might eventually decide to sue the seller and the attorney will be joined as an impleader –i.e. stakeholder-, which will result in long hours of unpaid work. For the buyer's attorney this is even more troublesome: the client ended without a certificate of occupancy, no price adjustment, and no course of action the seller other than litigation. It is always important to include a clause stating what will happen if the parties neglect to comply so that no matter what the situation is, the escrow agreement will terminate with the lapse of time. Finally, the escrowee might also want to consider adding a clause allowing the invasion of the escrow for reasonable attorney fees associated with the defense of the escrow in litigation or office hours spent sending notifications and doing accountings.

Notarization

While having a document notarized does not render an obligation any more binding, it is recommended that an escrow agreement be notarized. The reason is authentication: A notarized document is deemed to be self-authenticating (See CPLR Rule 4538 and Federal Rule of Evidence 902 [2]). This means that if it ever needs to be presented in a jury trial, there will be no need to verify its authenticity by corroborating the signatures. By being properly notarized, the document carries a presumption of authenticity. Although litigation over most escrow agreements might be hard to envision because of the low amounts involved, an escrow

agreement might be introduced into evidence to prove a collateral issue, such as an admission recited in the considerations. Following the above example, where the seller might be sued for breach of contract for failure to provide a certificate of occupancy, the seller could point to the paragraph in the agreement that recites that it was the buyer –now the plaintiff- who insisted on closing without it. Likewise, if the buyer discovered that the seller removed something in the final walkthrough, an escrow agreement reciting that fact could be used to prove a pattern or intention to deceive in case something else is found amiss once the buyer takes possession.

Balancing It All

The last point to be made is that this article offers guidelines, not rules. While we recommend that the above issues be kept in mind, we do not recommend that they be categorically applied. Pondering over an escrow agreement can sometimes create an impression of mistrust and hurt the parties' healthy relationship and an overall willingness to work together. This is a particularly sensitive matter if the parties expect (or hope!) to have many transactions together or if the parties are members of the same closely-knit community. It may not always be in the client's best interest to stall transactions to obtain the best possible escrow agreements. Sometimes it may pay to be less careful or even to accept the other party's word on minor issues in order to instill trust and good will. Making a closing look like an easy, problem-free affair may also improve the client's regard for her attorney.

If you have any questions or comments, or if you have an inquiry that you would like us to address in upcoming issues, please contact us at fsa@federalstandardabstract.com.
