FEDERAL STANDARD ABSTRACT
TITLE NEWS

Issue #56 *June 2009*

Title News

RP-5217 Filing Fee Increase

Effective June 1, 2009, the NYS Legislature has increased the filing fee for the RP-5217, also known as the Equalization Form or the Real Property Transfer Form, which is one of the so-called "transfer documents." For residences and farms, the fee will increase from $75 to $125. For all other properties, the fee will increase from $165 to $250. The fee to file the NYC RPTT for the transfer of a cooperative interest will increase from $50 to $100.

Mortgagee Title Insurance

It is common knowledge that title companies offer more protection on Lender's Policies ("LP") rather than on Owner's Policies ("OP"). For example, LP often benefit from affirmative language that is denied for OP, and items that pose minimal risk may be "omitted for the mortgage and excepted in OP." The reason for this different treatment is not just the fact that the LP is usually for a lower amount than the OP. The reason is that the OP and the LP provide *different* coverage. The OP insures losses caused by defects in title up to the Insured Amount. The LP, on the other hand, insures a lien good for a certain amount.

To illustrate, imagine that after the closing, the holder of the OP discovers a priors owner's mortgage and calls her insurer to put a claim on the OP. The insurer will recognize that this is an encumbrance on the title, and address the claim. Now, if the holder of the LP were to put a claim under the same facts, the insurer would reply that there is no claim under the LP. "But, why?" the lender complains, "I have a LP and there is a mortgage on record that is ahead of mine and that is not excepted." The lender has no claim because it has no loss. The fact that there is another mortgage does not by itself mean that the lender's mortgage is no good, or that the lender cannot collect its due. It only means that if the property is foreclosed on, it is possible that the proceeds may not be enough to cover the lender's claim *because of the title defect*. But until there is a foreclosure sale, no one can tell whether the lender will have a claim under the LP. That is the key difference between the OP and the LP. The holder of an OP has a claim the moment a defect on her title arises; the holder of a LP only has a claim only once there has been a foreclosure sale and it can be determined whether a title defect prevented the lender from collecting in full. Claims on the OP are immediate, but claims on the LP are deferred until foreclosure and sale. That is why title insurers are more generous in LP coverage. Typical variations, encroachments, and rights-of-way do not affect the price or distribution at the foreclosure sale. If they do not affect the price, then there is no claim.

In a recent decision, the Appellate Division, Second Department, may have overturned this principle by treating a claim on a LP as an immediate claim. In *Surace v. Commonwealth Land Title Ins. Co.*, 2009 WL 1413093 (decided May 12, 2009), the defendant issued a LP at a mortgage closing, but because of its 9-month delay in submitting the mortgage for recording, another mortgage was closed on and recorded without knowledge of the first. The plaintiff brought an action alleging that the insurer had breached the LP and had been negligent by failing to record the mortgage timely. The insurer moved to dismiss as a matter of law. The Supreme Court, Richmond County, decided for the plaintiff and the insurer appealed. On appeal, the Appellate Division upheld the decision of the lower court and, with only a vague reference to the documentary evidence, affirmed that the LP had been breached by the insurer. The decision does not discuss the meaning of "loss" in a LP.

This decision is troublesome for the title industry because it puts a claim on a LP on the same footing as a claim on an OP. While the court might have been correct in finding the insurer negligently responsible for failing to record the mortgage timely, that is a separate issue from the breach of the LP. The court itself draws the distinction. If the case law adopts the position that claims on the LP will not be deferred until foreclosure and sale, then the insurers will lose the ability to offer affirmative insurance or other protections to the lenders. Since the lenders are used to getting affirmative coverage, they may disrupt otherwise feasible transactions until they become used to the new guidelines.

DISCLAIMERS

These materials have been prepared by Federal Standard Abstract for informational purposes only and should not be considered professional or legal advice. Readers should not act upon this information without seeking independent professional or legal counsel.

The information provided in this newsletter is obtained from sources which Federal Standard Abstract believes to be reliable. However, Federal Standard Abstract has not independently verified or otherwise investigated all such information. Federal Standard Abstract does not guarantee the accuracy or completeness of any such information and is not responsible for any errors or omissions in this newsletter.

While we try to update our readers on the news contained in this newsletter, we do not intend any information in this newsletter to be treated or considered as the most current expression of the law on any given point, and certain legal positions expressed in this newsletter may be, by passage of time or otherwise, superseded or incorrect.

Furthermore, Federal Standard Abstract does not warrant the accuracy or completeness of any references to any third party information nor does such reference constitute an endorsement or recommendation of such third party's products, services or informational content.

If you have any questions or comments, contact us at fsa@federalstandardabstract.com