FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Limited Guaranties

A national bank brought a mortgage foreclosure action against a real estate holding company and its individual principals as guarantors of the mortgage loan. The referee issued a report adjudicating the amount owed. The bank made a motion to confirm the report and declaring the individual principals jointly and severally liable for the adjudicated amount as guarantors of the loan.

The supreme court, Kings County, denied the motion. While it acknowledged that the principals signed a guaranty in connection with the mortgage, their guaranty was limited. First, it would only be triggered upon default (suggesting that amounts accrued prior to default might not be covered?). Second, the guaranty specifically covered a number of expenses and risks such as property taxes, insurance, loss by condemnation or fire, tenant security deposits, etc. but made no reference to principal and interest. Hence, principal and interest was not recoverable from the individual guarantors. See *Madison Nat'l Bank v. Jefferson Mgmt. LLC,* 2011 N.Y.Slip Op. 51715 (Kings Cty. Sup. Ct., 9/22/2011).

Public Authorities Exempt from Mortgage Recording Tax

In an Advisory Opinion dated August 18, 2011, the NYS Department of Taxation and Finance advised that it considered the New York Public Authority (and, consequentially, probably every public authority) exempt from mortgage recording tax. The Department acknowledged that the public authority did not fit any of the statutory exemptions to the mortgage recording tax. However, it reasoned that other exemptions arise under the common law. Specifically, the Department took the position that a tax on a state agency was tantamount to a tax on the State itself, and therefore invalid. The Department relied on the cases of the NYS Urban Development Corporation and the Teachers' Retirement System, both of which were declared to be exempt from mortgage recording tax. See *Advisory Opinion, TSB-A-11(1)R, August 18, 2011.*

Surrogates' Jurisdiction and Fraudulent Conveyances

Husband, future second wife, and husband's father took title to real property in 1991. Thereafter, husband and second wife got married, and husband died intestate in 2001. Husband was survived by second wife, his adult daughter by his first marriage, and by his infant son. In 2003, second wife and her attorney were appointed co-administrators of husband's estate. In the following month, second wife, as co-administratrix, conveyed to herself husband's interest in the property. That 2003 deed also purported to convey any interest of adult daughter's through a forged signature.

Using the 2003 deed and other documents second wife executed with someone she falsely represented as husband's father, second wife obtained a mortgage loan in the amount of $370,000. Second wife and her attorney were subsequently removed as co-administrators.

There are several important points in this case. First, second wife did not take husband's interest by survivorship. Since they were not married at the time they

took title, they took title simply as tenants in common and not as tenants by the entirety. A subsequent marriage does not alter the form of ownership.

Second, the surrogates' court held that the deed and the mortgage were void *ab initio* because they were fraudulent. On appeal the Appellate Division, Second Department, reversed. The mortgage and deed were void as to their respective fraudulent portions. The deed and the mortgage, for example, cannot affect the rights of the adult daughter and husband's father. But as to the second wife, her one-third interest in the property is properly subject to the $370,000 mortgage. "A mortgage given by one of several parties with an interest in the mortgaged property is not invalid; it gives the mortgage security, but only up to the interest of the mortgagor."

Third, and perhaps as *obiter dicta*, the Appellate Division ruled that the Surrogates' Court lacked subject matter jurisdiction to adjudicate the interests of living persons with respect to the mortgage. While the intended result may have been reached in the previous point, this broad language is interesting. The jurisdiction of the surrogate is a topic that never appears to have been settled. There is a constant tension between matters ancillary to an estate proceeding, which the surrogate may determine, and matters extraneous to estates. For example, is a landlord-tenant matter ancillary to estate accounting proceedings, where the landlord is an estate? What about a partition action among the heirs of the same person? A clear jurisdictional rule would be desirable, but simply excluding the interests of living persons from the surrogate's jurisdiction appears to be too broad. See *Real Spec Ventures, LLC v. Estate of Deans,* 2011 N.Y.Slip Op. 06482 (2nd Dept., 9/13/2011).

New York Times Supports Our Industry

In an article found here http://www.nytimes.com/2011/10/02/realestate/the-case-for-hiring-a-lawyer-getting-started.html?_r=1&hp, the *New York Times* stressed the importance of retaining counsel when purchasing residential real property in New York.