

# TITLE TALK

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### Updates from the Fidelity National Group: Sumner Returns to FNTG as Agency Counsel;

Ralph DiDomenico, Fidelity National Title Group [δFNTGö] Regional Agency Manager, and Wanda Custer, FNTG New Jersey Agency Manager, are pleased to announce that **Scott K. Sumner** has re-joined the FNTG family as Vice President and New Jersey State Agency Counsel.

Scott K. Sumner originally joined the FNTG family in August, 2003 as Chicago Title's East Brunswick Office Counsel. Prior to his departure in 2010, Scott acted as counsel for certain direct as well as agency operations. After a stint with a competitor, he has returned to serve the needs FNTG's New Jersey agency operations network.

Scott was graduated from the University of Arizona in 1993 with a Bachelor of Arts in Economics and from New York Law School in 1996 with the degree of Juris Doctor. He is admitted to the bar in New Jersey and New York and the United States District Court for the District of New Jersey. Sumner also holds a New Jersey insurance producer license in the line of title insurance.

Prior to joining FNTG, Sumner practiced with the Prudential Insurance Company, as a sole practitioner in Ridgewood, and as an attorney with the firm of Liebowitz, Stern & Stern in Englewood. His law practice was focused on transactional matters, including real estate closings.

As FNTG New Jersey Agency Counsel, Sumner provides underwriting guidance to the Company's network of Chicago, Commonwealth and

Fidelity National policy-issuing agents throughout the state. He is located in the NJ Agency Operations office in East Brunswick. Also located in East Brunswick are **Robert J. Narucki**, Special Counsel, and **Lawrence J. Fineberg**, Regional Counsel. **Gary M. Ham**, who serves as New Jersey State Counsel, as well as Direct Operations Counsel, is located in the Hackensack office.

### Daub Departs Agency Department

**Leslie A. Daub**, the former agency counsel, has left the Company to become general counsel for a prominent Chicago Title agent located in northern New Jersey. We thank her for her years of service to the FNTG family, and we wish her the best of luck in her new position.

### Bulk Sales Law Amended

On September 14, 2011, Governor Chris Christie signed into law **P.L. 2011, c. 124**, which amends **N.J.S.A.54:50-38**, the key section of the bulk sales law. The amendment exempt transfers of certain one- and two-family dwelling units and seasonal rental properties from the law's requirements, provided that the seller is an individual, estate or trust. The act took effect immediately but applies retroactively to **August 1, 2007**. What is the bulk sales law, and what effect does it have on real estate transactions?

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**Bulk Sales** (continued from Page 1)

The bulk sale of certain assets is subject to taxation under the Sales and Use Tax Act, *N.J.S.A. 54:32B-1 et seq.* Accordingly, the statutory scheme imposed a notice requirement in connection with such sales. In 2007 the Legislature enacted **P. L. 2007, c.100, §5** (eff. June 28, 2007 and operative Aug. 1, 2007). This section, which has been codified as *N.J.S.A. 54:50-38*, expands the bulk sale requirements as follows:

Whenever a person shall make a sale, transfer, or assignment **in bulk** of any part or the whole of the person's **business assets, otherwise than in the ordinary course of business, the purchaser** ... shall, at least ten (10) days before taking possession of the subject of the sale ... notify the Director [of the Division of Taxation]. ... Within 10 days of receiving such notice, the Director shall notify the **purchaser** ... that a possible claim for State taxes exists...

The statute goes on to state that if the purchaser fails to give notice to the State, the amount of unpaid taxes becomes a **lien on the proceeds of sale** payable to the seller. Furthermore, the **purchaser** shall be **personally liable** for the payment of the taxes due to the State. See also *N.J.S.A. 54:49-1* (entitled "Tax a debt and a lien..."). The notice requirement is satisfied through the timely submission by the transferee of form **C-9600** ("Notification of Sale, Transfer or Assignment in Bulk") to the Treasury Department. As a practical matter, the bulk sales program has become a general tax collection statute, which enables the government, when it is notified of a pending transaction, to collect any taxes which may be due and owing from the seller.

The Treasury Department, Division of Taxation, has published a Technical Bulletin regarding this subject: **TB-60** (7-3-08), as amended by **TB-60R** (10-21-10). Annexed thereto is form **TTD** ("Asset Transfer Tax Declaration"), which is to be completed by the transferor. Note that form **TTD** does **not** replace form **C-9600**, which must also be submitted. If the Treasury Department is unable to make a timely determination of the amount of tax due (which frequently occurs), it will require that a

portion of the proceeds be held in escrow. (The New Jersey Association of Realtors® [NJARA] has adopted a bulk sales addendum to its standard form of real estate contract, which appoints the purchaser's attorney or title company as escrow agent.)

Does real estate fall within the scope of the foregoing statute? TB-60R notes that the term **business assets** includes **realty**, if a use of the realty is to support a business on its premises which includes, but is not limited to, renting space to another. In any event, it seems that the Treasury Department takes the position that sales of real estate which do not occur in the ordinary course of business are subject to the bulk sales rules. Thus, the sale of a warehouse or factory is included within the scope of the law, because the seller's ordinary course of business is the storage or manufacture of goods, rather than the sale of real estate. Similarly, the sale of a multi-family dwelling is included, even if the seller occupies one of the units, because the seller's ordinary course of business consists of the collection of rents, rather than the sale of real estate. On the other hand, the sale of a house by a builder or developer is excluded, because it is part of the developer's ordinary course of business to build and sell homes. For more information, please visit the website of the Division of Taxation: [www.nj.gov/treasury/taxation](http://www.nj.gov/treasury/taxation).

But even to the extent that real estate transactions fall within the scope of the law, it is clear that the responsibility for compliance lies with the purchaser (or his or her attorney), and **not** the title company. And in the event of non-compliance, a personal penalty is imposed on the purchaser (rather than a lien on the insured realty).

In general, compliance with tax laws is beyond the scope of coverage afforded by the policy and thus beyond the concern of title companies. There are, of course, exceptions to the rule, such as taxes which (if unpaid) become liens on realty. But, for the reasons discussed above, the bulk sales law does not fall within an exception to the general rule. Accordingly, many title insurers (including the FNTG family) believe it is both inappropriate and unnecessary to insert a requirement or exception in a commitment or policy regarding compliance with the same. Nevertheless, insertion of an **informational**

**note** in the commitment regarding bulk sales procedures may be appropriate. In sum, the law can be a trap for the unwary, and the parties to a transaction which is or may be subject to its provisions would be well-served to comply with same.

*Title Talk* is published periodically in printable electronic format by the Fidelity National Title Group, and is distributed free of charge to its customers and friends. *Title Talk* contains general information about topics of interest to those involved with real estate conveyancing and title insurance in New Jersey. It is **not** intended to provide legal advice or opinions or as a substitute for obtaining the advice of counsel.

### Foreclosure “Rescue” Schemes Addressed by New Law

In an effort to address abuses arising from foreclosure “rescue” schemes, the Legislature has enacted the **Foreclosure Rescue Fraud Prevention Act** [FRFPA or the Act], P.L. 2011, c. 140, approved Dec. 20, 2011, eff. *ca.* **June 18, 2012**, which provides for the licensing and regulation of **foreclosure consultants** by the Department of Banking and Insurance. The Act nevertheless exempts from licensing several classes of persons, including attorneys, real estate brokers, and any person licensed as a title insurance producer while acting under the authority of that license or conducting the business of title insurance. Under the law, a **distressed property** is a one-to-four family, owner-occupied dwelling, which is the subject of a mortgage foreclosure or in which the mortgage is at least ninety days delinquent. FRFPA regulates two types of transactions: a **distressed property conveyance**, in which the owner conveys his interest in the realty; and a **distressed property conditional conveyance**, in which the seller continues to occupy the realty and is given an option to re-purchase. (The closing of a *conditional* conveyance must take place at the office of an attorney or title company.)

The Act accordingly places certain limitations on the form of contract which the owner of distressed property may enter into and proscribes certain conduct by the distressed property purchaser. (Such contracts are also subject to a 10 business day cancellation and

attorney review period.) Furthermore, the contract must be recorded. A *conditional* conveyance which violates the Act is subject to avoidance within a two-year period, but the title of a *bona fide* purchaser or mortgagee is protected.

What is a foreclosure rescue scheme, and what is its connection with flip sales and short sales? A **flip sale** is a transaction in which the purchaser acquires title with the intention of re-selling the property (at a profit) immediately or in the near future. Flips are not illegal or improper *per se*. However, an increasing number of persons engaging in improper or unlawful conduct utilize flip sales as a vehicle to carry out their fraudulent schemes. A **short sale** occurs when a mortgagee is asked to accept less than the full amount of the debt from the proceeds of the sale of the encumbered property. The lienholder is induced to accept the lesser amount (in full satisfaction of the debtor’s obligation) on the grounds that there are insufficient proceeds from the sale to pay the debt in full.

What is the connection between flip sales and short sales? In some cases a person facing mortgage foreclosure is approached by a person or entity which proposes a **foreclosure rescue** scheme, whereby the mortgagor sells the property to the “rescuer” for a price below market value. (The seller may remain in the property as a tenant, with an option to re-purchase his home when his financial situation improves.) The lender B having seen the below-market-value contract B agrees to accept a discounted pay-off figure. However, the rescuer may then seek to “flip” the property to someone willing to pay a greater sum of money. If the lender later discovers that the property has been “flipped”, it may demand additional payment. In a variation of this scheme, the rescuer may obtain purchase-money or other mortgage financing. If he defaults in his obligations, the property will be lost through foreclosure, thereby depriving the former owner of the opportunity to re-acquire it. Either of these scenarios may lead to unpleasant litigation. See *Hageman v. 28 Glen Park Assoc.*, 402 N.J. Super. 43 (Ch. Div. 2008); *Deutsche Bank v. Mitchell*, 422 N.J. Super. 214 (App. Div. 2011).

Viewed strictly from a title insurer’s underwriting perspective, foreclosure rescue, flip and short sale transactions may be insurable, although they

present a higher than normal degree of risk. HUD (and many lenders) have promulgated guidelines regulating **flips**. Furthermore, the **foreclosure rescue** or **short sale** aspect may present certain difficulties, as discussed above. Therefore, when asked to insure a transaction involving a foreclosure rescue or flip or short sale, many insurers have adopted procedures which include obtaining the following proofs : (a) that both the mortgagee **and** its foreclosure attorneys agree that the short sale pay-off figure is accurate; and (b) that both the mortgagee and mortgagor-seller are aware of the impending flip sale or mortgage financing by the rescuer.

### Obtaining Title Insurance for Deeds in Lieu

The recent increase in the number of mortgage defaults has led to renewed interest in alternatives to the traditional foreclosure process, including the **deed in lieu of foreclosure** [ōDILō]. It is well-settled that a mortgagor may give up his equity of redemption in a *separate instrument* which is supported by adequate consideration. (The mortgagee's forgiveness of the mortgage debt is generally deemed to satisfy this requirement.) However, an instrument of this nature presents two major problems: First, the mortgagee acquires title *subject to* junior (or intervening) liens, encumbrances, etc. Second, if the mortgagor files a bankruptcy petition, the DIL is vulnerable to attack as a preference or fraudulent conveyance. See 11 *U.S.C.* §§ 547 and 548.

Note that the mortgagor may not waive the equity of redemption *in the mortgage instrument itself*, or in a document executed contemporaneously therewith. Accordingly, requests to insure the validity of DILs delivered into escrow *at the time of the mortgage closing* are viewed with skepticism by title insurers. This is because the same may be attacked as a **clog** on the mortgagor's equity of redemption. Furthermore, if the mortgagor-grantor dies, is adjudicated incompetent or files a bankruptcy petition prior to its delivery out of escrow, questions may be raised about its effectiveness as a conveyance of title.

Sometimes a mortgagee will require a DIL to be delivered into escrow as part of a post-default "workout". In such cases it may be argued that because the mortgagor has already defaulted, allowing the

mortgagee to commence a foreclosure suit, the mortgagee's forbearance is sufficient to justify the arrangement. Obviously, this is a sensitive matter in which the title company's willingness to insure must be decided on a case-by-case basis.

The mortgagee may wish to have the DIL recite that the mortgage is *not* intended to merge with the fee, in order to facilitate a strict foreclosure suit (if the same should prove necessary), or in the event the transaction is subsequently attacked by the mortgagor's bankruptcy trustee. However, it should be noted that if a federal tax lien has been filed against the mortgagor, a strict foreclosure suit (which does not result in a judicial sale) cannot be relied upon to divest the interest of the United States. See 28 *U.S.C.* §2410.

Upon subsequent conveyance to a *bona fide* purchaser for value, the mortgage may be discharged in the conventional fashion, or by recital in the deed. However, most county recording officers now take the position that unless the mortgage is discharged before (or simultaneously with) the recording of the DIL, realty transfer tax [ōRTFō] must be paid.

In cases where the mortgage is *not* merged with the DIL, title insurers may be requested to provide so-called **non-merger coverage** in the owner's policy insuring the DIL grantee. Although there is no standard form or endorsement for the same, title companies have occasionally agreed to do so in some instances. Nevertheless, such coverage is considered to be an extra-hazardous risk, for which an additional premium may be charged.

Where a DIL is delivered in connection with a mortgage which secures a lien on residential property, the lender may wish to take advantage of the remedy found in the Fair Foreclosure Act [ōFFAō]. The FFA's so-called "optional procedure" permits strict foreclosure under certain circumstances. See *N.J.S.A.* 2A:50-63. In such cases, the DIL is subject to a seven (7) day right of rescission, and proof must be obtained that the right has not been exercised.

Underwriting guidelines promulgated by the Fidelity National Title Group (and most title insurers) permit the insurance of DILs, but only if:  
(a) all liens or interests appearing of record, whether prior or subsequent to the recording of the mortgage,

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are set up as exceptions; *and*

(b) an ALTA 2006 policy (containing a creditors' rights *exclusion*) is issued; *and*

(c) proof is obtained that the mortgagor has vacated the property (or the exception for rights of parties in possession is retained in the policy); *and*

(d) the other guidelines set forth herein, as well as any additional requirements which may be imposed by the underwriter, are adhered to.

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