



# Title Topics



February

2007

## Letters of Indemnity Where Did They Go?

**In the not too distant past**, one of the common ways to clear a title exception was to obtain a Letter of Indemnity from the prior title insurer. Our Title Topics issue of November 2000 contained an extensive treatment of letters of indemnity. ( If you would like a copy, please let us know.)

Basically, a letter of indemnity was issued when the issuing company's policy insured over a defect in title, such as, an open mortgage or judgment. In most cases, the so-called "defect" was nothing more than a mortgage that had been satisfied within the last year but remained open of record because of lenders' sloppy discharge practices. Be that as it may, **a lot** of indemnity letters have been written over the years. Those days are now gone, with a few exceptions.

As of May 1, 2006 all of the title insurance companies doing business in New Jersey entered into an **Inter-Underwriter Indemnification Agreement**. We in the industry have dubbed it the "**Treaty**." The intention of the Treaty is to eliminate the delivery of indemnity letters in most (but not all) circumstances.

**How does the Treaty work?** Let's say that our examination of title discloses the existence of an unsatisfied mortgage made by a prior owner. We set up the open mortgage as an exception in our commitment, and we are then provided with a policy insuring the current owner that does not list the mortgage as an exception. Because of the Treaty, it is no longer necessary to

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**1099 Real Estate Reporting Changes-** The IRS has issued a new Seller's Certification form for use where the seller contends that the sale or exchange of the principal residence is excepted from the 1099S information reporting requirements. The revised form now has 6 seller's assurances, up from 4, and must be used on transactions that closed on or after January 22, 2007. The first 5 assurances must be marked "True" and the 6th as either "True" or "N/A".

Here's a link to the forms:

<http://www.charlesjones.com/Forms.html>

## Advisory Opinion 710

### Advisory Committee Backtracks

**December's crisis** regarding the issuance of Opinion 710 by the Supreme Court Advisory Committee on Professional Ethics seems to have abated, for now.

The release of Opinion 710 caught real estate practitioners by surprise. No one we knew had been polled by the Committee and the comments we received are indicative of the confusion caused by the release of the Opinion.

One client wrote, 'I think we should start folding our tents and close up shop. At least 70% of all deals in Hudson County are like this!!!' Another was not as pessimistic, he wrote, "Typical nonsense. Just you wait until I become King!!!"

Why the hullabaloo now? No one knows. Saying it was responding to "numerous inquiries," the Advisory Committee on Professional Ethics issued a clarification of Opinion 710 to reassure lawyers they may participate in run-of-the-mill real estate transactions involving a seller's concession.

The clarification came after the release of the panel's opinion was interpreted as far more restrictive than the committee apparently meant. The panel now states the opinion "does not implicate a contract of sale that explicitly states that the seller shall provide the buyer with a credit against legal and legitimate costs or expenses related to the sale, which would otherwise be absorbed by the buyer, such as actual closing costs."

E. Robert Levy, executive director of the Mortgage Bankers Association of New Jersey, which had asked for a clarification, said the "language should suffice." In a letter to the committee, Levy and Gerd W. Stabbert Jr. of Budd Lerner said the emphasis in the original opinion on the alleged misrepresentation re-

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**FLASH!** As we went to press, we learned that the State Bar is formally asking for the withdrawal of Opinion 710 since the opinion is "awkward" in language and "flawed" in its assumption that anyone is being defrauded or deceived. More to follow in the weeks ahead.

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**Underwriting Treaty** *(Continued from page 1)*

request a letter of indemnity from the insurer which issued the policy in order to omit the mortgage as an exception. The Treaty provides that our underwriter is indemnified against loss – as if an indemnity letter had been issued. But, as noted above, the Treaty does not apply to all situations.

**What does the Treaty cover and not cover?** Specifically, it applies to: mortgages, judgments, federal tax liens, franchise tax liens, construction liens, reimbursement agreements, institutional liens, federal and New Jersey estate tax, transfer inheritance tax, tax sale certificates and marital rights. These liens and encumbrances must have arisen against a **prior owner** and must **not be excepted** from coverage.

**Not all title exceptions are covered by the Treaty.** For example, tidelands claims and outstanding ownership interests are beyond its scope. In addition, liens, etc., attaching **after the original effective date** of the owner's policy are beyond the scope of the Treaty. The policy must not have lapsed; *i.e.*, the insured under the policy must still hold title to the land in question.

The new title company is indemnified by the terms of the Treaty "... against loss or damage, including reasonable legal fees...". The amount of indemnification is limited to the **lesser** of: (a) the face amount of the Prior Insurer's policy; or (b) \$500,000.00. Note that the Treaty does **not** require the prior insurer to take affirmative steps to remove from the record an exception raised by Vested Title. Instances where so-called **performance (or undertaking) indemnity letters** were customarily requested under prior practice are beyond the scope of the Treaty.

In some circumstances, the Treaty requires that notice be given by us to the existing title company. Liens requiring such notice are: **tax sale certificates, and home equity and other revolving credit mortgages.**

**Practical application.** If our examination of title discloses a lien or other matter **which falls within the scope of the Treaty**, you should attempt to obtain a copy of the policy (if any) issued in favor of the current owner. Once we have the policy, we will confirm that it is in effect (*i.e.*, that the insured

is the current owner of the land) and that the matter in question is neither excepted nor excluded from coverage. Assuming these criteria are met, we will omit the exception. If the matter in question does **not** fall within the scope of the amended Treaty, an indemnity letter will have to be requested.

The Treaty has saved us a great amount of paperwork and time. However, it does not mean that there should be no attempt to clear the open mortgage or tax sale certificate. Good business practice requires nothing less.

**Opinion 710** *(Continued from page 1)*

garding purchase price relied on by investors in the secondary market for mortgage-backed securities was causing an overly broad interpretation of what was permissible. The Association said the broad interpretation caused many attorneys to refuse to close mortgage loans that involved sellers' concessions.

Indeed, in their letter, Levy and Stabbert pointed out that Fannie Mae and Freddie Mac specifically allow a seller to contribute up to 6% of the selling price as a concession dependent upon loan to value ratios. In addition, they note that HUD through its FHA program allows seller concessions up to 6%.

We would hope from the experience learned from the issuance of Opinion 710 that the Advisory Committee will seek input from practitioners when it next decides to wade into real property practice.

**Satisfying Those Pesky Liens**

**Public Defender Lien-** The telephone number for the State Public Defender's Office is 609-633-0494. A payoff letter may be requested via fax to 609-292-8154.

**Motor Vehicle Commission-Surcharge Office-** Credit card payment can be arranged at 1-888-651-9999. Payoff letters can be obtained by calling 609-292-7500.

This information was accurate when we went to press. If you have updated information, please let us know.

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