TITLE TALK

☐ FNTG 2015

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LISA AUBREY JOINS FNTG STAFF

Lisa J. Aubrey has joined the New Jersey Agency Operations staff as **Asst. Vice President** and **Asst. New Jersey State Agency Manager**. In that capacity she will assist Wanda Custer, New Jersey Agency Manager, and the New Jersey Agency Department in meeting the needs of the FNTG agency network in New Jersey.

Lisa comes to us from a competitor, where she served as State Manager for New Jersey and Pennsylvania. She was previously Director of Agency Training for a major underwriter, and has also been employed by several title agents in various capacities. Lisa received a B.A. degree from Montclair State University in Communications Studies and is a licensed New Jersey title insurance producer. She currently serves as President of the New Jersey Land Title Association.

Lisa is located in the East Brunswick Agency Operations office. She may be contacted by telephone at 732-545-1003 (ext 161) or by e-mail at **Lisa.Aubrey@fnf.com**.

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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.

CFPB DELAYS RULE IMPLENTATION UNTIL OCTOBER, 2015

The Consumer Financial Protection Bureau ["CFPB"] has proposed to delay implementation of its so-called "Know Before You Owe" regulations from **August 1** to **October 3, 2015.** The CFPB was created by the **Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010** ["Dodd-Frank"], which also transferred HUD's RESPA jurisdiction to the CFPB. Section 1032(f) of Dodd-Frank required the CFPB to propose for public comment rules and model disclosures that integrated the **Truth-in-Lending Act** ["TILA"] and **Real Estate Settlement Procedures Act** ["RESPA"] requirements. CFPB accordingly published drafts of the mortgage and settlement disclosures in May and November 2011 (respectively). This was followed in July 2012 by a series of proposed regulations, over 1,000 pages in length, collectively known as the proposed "Final Rule" (or as the TILA-RESPA Proposal). The ultimate version of the Final Rule was published in the *Federal Register* late in 2013 and is 1,888 pages in length. Formally known as the **Integrated Mortgage Disclosures under RESPA (Regulation X) and TILA (Regulation Z),** it was originally set to take effect on **August 1, 2015.** But the CFPB has published a notice in the *Federal Register* that the effective date will be delayed until **October 3, 2015.**

The Final Rule replaces the current Good-Faith Estimate ["GFE"] and HUD-1 Settlement Statement ["HUD-1"] with new documents known (respectively) as the **Loan Estimate** and the **Closing Disclosure.** (The current RESPA rule

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CFBP Implementation (cont'd from Page 1)

went into effect on January 1, 2010 and is the basis for the HUD-1 and GFE forms now in use.) The CFPB has adopted the catchphrase **Know Before You Owe** to describe its consumer-friendly regulations. (The acronym **TRID**, for **T**ILA-**R**ESPA **I**ntegrated **D**isclosure, is sometimes used to describe CFPB-mandated rules and forms.) In the words of the CFPB:

"The forms use clear language and design to make it easier for consumers to locate key information, such as interest rate, monthly payments, and costs to close the loan. The forms also provide more information to help consumers decide whether they can afford the loan and to compare the cost of different loan offers, including the cost of the loan over time."

The scope of CFPB's Final Rule is extensive, and is not limited to the proper use of the new **Loan Estimate** and **Closing Disclosure** forms. Rather, the CFPB seeks to protect consumers through a broad range of regulations which cover all aspects of the mortgage lending process. The CFPB has advised lenders that they cannot avoid responsibility for errors by seeking to shift the blame to third-party contractors or vendors. [See CFPB Bulletin No. 2012-03 (April 13, 2012) and OCC Bulletin No. 2013-29 (Oct. 30, 2013).] Thus, title companies providing settlement services may be subjected to additional requirements imposed by lenders in anticipation of increased scrutiny by the CFPB. In response, the American Land Title Association ["ALTA"] has created the **Best Practices Initiative** ["Best Practices"], which consists of the following seven pillars:

1. Establish and maintain current licenses
2. Written procedures and controls for escrow trust accounts
3. Written policies to protect non-public personal information
4. Written polices ensuring compliance with Federal and State consumer financial laws
5. Written procedures related to policy production, delivery, reporting and premium remittance
6. Maintain appropriate professional liability insurance
7. Procedures for resolving consumer complaints

It is unclear whether (or to what extent) lenders will require settlement-service providers to furnish evidence of compliance (whether through self- or third-party certification). At this point, the title industry does not know if Best Practices compliance certification will generally be accepted as conclusive proof of a provider's fitness to conduct settlements. Nevertheless, ALTA and many title insurers, including FNTG, believe that Best Practices compliance is the best path for title insurance agents to take.

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UCC FILING PROCEDURES CHANGED BY TREASURY DEPTARTMENT

Under Article 9 of the Uniform Commercial Code ["UCC"], security interests in both fixtures and non-fixtures are perfected by the **f**iling of financing statements.*N.J.S.A.*12A:9-502(c).Financing statements may be filed with the county recording officer or with the Department of the Treasury in Trenton. But financing statements affecting fixtures must be filed with the county clerk or register.

Since UCC financing statements cover interests in personalty, they may not be used as a basis for issuing title insurance policies. The Title Insurance Act, *N.J.S.A.* 17:46B-1 *et seq*., empowers title companies to insure title to realty only. See *N.J.S.A.*17:46B-10. Nevertheless, title companies are often asked to file UCC financing statements. Such requests are sometime characterized as "courtesy" or "accommodation" filings because they involve documents which are not to be insured under a title insurance policy.

The New Jersey Treasury Department, Division of Revenue and Enterprise Services ["DORES"] has adopted regulations, effective **July 1, 2015**, which require that **all UCC filings be submitted in electronic format.** Thus, paper copies of UCC documents intended to be filed in Trenton will ***not*** be accepted, unless the party submitting the forms has obtained an exemption from the electronic filing requirement. ***N.J.A.C.* 17:33-2.9.** As a practical matter, this means that title companies will not be able to accept paper copies of UCC documents for filing, because the same will be rejected by DORES.

Most title insurers take the position that is it inappropriate for title companies to complete the computerized versions of UCC forms available on the DORES website, as this could be construed as the unauthorized practice of law. See ***N.J.S.A.* 17:46B-13.**

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CONDO LIENS AND BANKRUPTCY: *In re Rones*

What is the effect of the filing of a Chapter 13 bankruptcy petition on a lien asserted by a condominium association? ***In re Rones*, 531 *B.R.* 526** (Bankr. D.N.J. 2015), a recent opinion by Judge Christine M. Gravelle, attempts to answer this question. The debtors, Mark and Ronda Rones, owned a unit in Whispering Woods Condominium, located in Monmouth Junction. They failed to pay dues imposed by the condominium association [the "Ass'n"], and in 2013 the Ass'n filed a lien in the original amount of approximately $6,000, which was later increased to a sum in excess of $18,000. The unit was also encumbered by a first mortgage which exceeded the value of the realty. Therefore, to the extent the Ass'n's lien was subordinate to the mortgage lender's, it was unsecured. In 2014, Mr. and Mrs. Rones filed a Chapter 13 petition. The Plan submitted by the debtors acknowledged approximately $1,500 of the Ass'n's lien as secured; the balance was treated as unsecured. The Ass'n objected to confirmation of the Plan.

Judge Gravelle began her analysis by noting that the Bankruptcy Code [the "Code"] recognizes three types of liens: judicial, statutory and consensual. It permits a Chapter 13 debtor to "strip down" or "bifurcate" certain liens into secured and unsecured portions, citing 11 *U.S.C.* §§ 506(a) and 1322(b). But this remedy is not available if the claim is secured "…***only*** by a security interest in real property that is the debtor's principal residence…". 11 *U.S.C.* §1322(b)(2); *Nobelman v. Am. Sav. Bank*, 508 *U.S.* 324 (1993). Into which category does a condominium association lien fall?

After analyzing the relevant sections of the New Jersey Condominium Act, *N.J.S.A.* 46:8B-1 *et seq.* [the "Act"], the court found that the lien in question could best be characterized as a consensual lien (rather than as a statutory lien), notwithstanding the wording of *N.J.S.A.* 46:8B-21 (which states that unpaid dues are liens on the units). The lien is consensual because it arises from the master deed and by-laws, even though it is also referred to in the statute. The court also determined that the lien is a "security interest". So does 11 *U.S.C.* §1322(b)(2) support the Ass'n's objection to the Plan?

The court distinguished *Nobelman, supra*, which involved a mortgage, finding that *N.J.S.A.* 46:8B-21 provides the Ass'n with a statutory right to payment, which is not modified by the Plan. Unlike a mortgage lender, a condominium association enjoys the benefit of *N.J.S.A.* 46:8B-21.b, which provides its lien with a limited (*i.e.*, 6 month) super-priority over mortgages, etc. (As noted above, the Plan acknowledged this by classifying a sum equivalent to 6 months of dues ($1,500) as secured, and the balance as unsecured.) Therefore, the Ass'n is not a creditor whose claim is secured "…***only*** by a security interest in real property that is the debtor's principal residence…". The court thus determined that the anti-modification provisions of 11 *U.S.C.* §1322(b)(2) were not applicable in this case and over-ruled the Ass'n's objections to the Plan.

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SETTLEMENT CHARGES REVISITED

As discussed in ***Title Talk* No. 91** (Winter 2014-15), earlier this year the New Jersey Land Title Insurance Rating Bureau ["NJLTIRB"] received approval of the Department of Banking & Insurance ["DOBI"] for certain changes to the *Rate Manual* concerning settlement charges, effective on **April 1, 2015.** *Rate Manual* §**1.9** has been amended to reflect a revision in the explanation of the term **settlement**, which now includes "closing- or settlement-related functions performed both before and after the occurrence of the closing or settlement itself". However, no **settlement charge** may be imposed for those functions covered by *Rate Manual* §7.1 ("Service Charges"). Pursuant to Art. 6 of the *Rate Manual, where settlement services are provided, the charges for same are not optional, but mandatory.*

Rate Manual **§6.1** ("Settlements with Disbursements") has been revised to set the initial settlement length, for which the minimum settlement charge of **$300.00** (for settlements held at the agent's office during normal business hours) is imposed, at **60** (formerly 90) **minutes**. And **§6.2.3** ("Settlements of Greater than Normal Length") is revised to provide that when a settlement with disbursements exceeds 60 minutes in length, an additional charge of **$100.00** (formerly $25.00) is imposed for each additional hour (or fraction thereof) in excess of the initial 60-minute period.

Rate Manual **§6.3** ("Settlements without Disbursements") has been revised to set the initial settlement length, for which the minimum settlement charge of **$150.00** is imposed, at **60** (formerly 90) **minutes.** Section **6.4.3** ("Settlements of Greater than

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Settlement Charges (cont'd from Page 3)

Normal Length") is revised to provide that when a settlement without disbursements exceeds 60 minutes in length, an additional charge of **$50.00** (formerly $25.00) is imposed for each additional hour (or fraction thereof) in excess of the initial 60-minute period.

Section **6.4.4** ("Settlements of Greater than Normal Length; Itemization of Charges") provides that whenever a settlement (with or without disbursements) of greater than normal length occurs, the insurer or agent must provide the applicant (upon request) with an itemization of the time expended. The same must include settlement-related functions performed both pre-and post-settlement. Many title insurers (including FNTG) have therefore recommended that their respective direct operations and agents keep records of the time spent on settlement-related activities for each file in the event an itemization of charges is requested.

An example illustrating the operation of **§6.2.3** has been added to the Appendix portion of the *Rate Manual*. In this hypothetical situation, an agent conducts a settlement with disbursements, which is held at the agent's office during normal business hours. One hour is spent at the table preceded by one hour in preparation time. Thus, the settlement charge is **$400,** computed as follows: **$300** for the hour spent at the table (in accordance with §6.1) plus **$100** for the hour spent in pre-settlement-related functions (in accordance with §6.2.3).

It should be noted that the additional charges imposed for pre- and post-settlement-related functions under *Rate Manual* §§ 6.2.3 and 6.4.3 are separate and distinct from those permitted under §3.1.5(c) ("Right to Impose Special Charges"). Therefore, the title company may not charge $100.00 for pre-settlement-related functions under §6.2.3, and then charge an additional sum for the same activities under §3.1.5(c). As discussed in ***Title Talk* No. 92** (Spring 2015), whenever a special charge is imposed under §3.1.5, a form entitled ***Consent to Special Rate or Charge*** must be signed by the applicant in accordance with §3.1.5(d). The Consent to Special Rate or Charge form should not be used simply because the settlement fee includes charges for settlement-related activities imposed under *Rate Manual* §§ 6.2.3 and 6.4.3. The form is applicable only where the title company seeks to impose fees which are not covered by those sections.

NJLTA TO SEEK *AMICUS* STATUS IN MORTGAGE PRIORITY CASE

NJLTA will seek leave to intervene as *amicus curiae* in ***Rosenthal & Rosenthal v. Benun***, -- N.J. Super --, 2015 WL 3752524 (App. Div. 2015), a case which involves a priority contest between two mortgagees, Rosenthal & Rosenthal ["R&R"] and Riker Danzig ["RD"]. R&R's mortgage was recorded first, and it secured funds advanced (or to be advanced) by R&R to a business entity. The mortgagor, a principal of the entity, placed the mortgage on her residence as collateral security for the loan. R&R is a factor; *i.e.*, one who lends money to businesses based on pledges of accounts receivable. RD is a law firm, and its mortgage secured legal fees incurred by the business entity. R&R had actual knowledge of RD's mortgage when it made additional advances. When the mortgagor defaulted, R&R commenced a foreclosure suit. RD answered by asserting priority of its mortgage, based on R&R's actual knowledge. The Chancery Division found in favor of R&R, but the Appellate Division reversed. R&R has filed a certification petition with the New Jersey Supreme Court.

The Appellate Division opinion may be divided into two parts. In the first, the court applied the common-law rule that a lender with *actual knowledge* of a subsequently-filed lien may lose priority to that lien with respect to *optional* advances made after it acquires such knowledge. But in the second, the court held that the enactment of the statute governing line of credit mortgages, *N.J.S.* 46:9-8.1 *et seq*., does not alter the result.

More specifically, the Appellate Division based its determination on two salient facts: (a) R&R had actual knowledge of RD's mortgage; and (b) R&R's future advances under mortgages were classified as "optional" or "discretionary" (although this may only have been obvious upon a review of the unrecorded note). The Appellate Division determined that the statute, by its terms, does not apply. ("Rosenthal's advances… were not provided on a 'line of credit'. They were granted on a 'mortgage loan' as defined in *N.J.S.A.* 46:9-8.1(a).") The problem for the title industry is that (based on the court's analysis) it may be impossible to determine the continued priority of a mortgage solely by consulting the land records, and thus the decision may affect current underwriting practices.

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