New York State Land Title Association, Inc.
Tradition, Excellence, Knowledge and Vision

THE Bulletin

Title Insurance: Protecting Your Piece of the Planet

WINTER 2008 THE JOURNAL OF THE NEW YORK STATE LAND TITLE ASSOCIATION, INC. VOLUME 87, NUMBER 1

MARK YOUR CALENDAR

ALTA 2008 Tech Forum
Las Vegas, Nevada
April 13-15, 2008

NYSLTA 87th Annual Convention
The Greenbrier
White Sulphur Springs, W. Virginia
August 24-27, 2008

ALTA 2008 Annual Convention
Koloa, Hawaii
October 15-18, 2008

QUARTERLY QUOTE

"But with continued hard work and effort by our members to improve the perception and professionalism of our industry, hopefully, spring cannot be far behind."

—MICHAEL P. MIGLINO
NYSLTA President
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Please Join NYSLTA Officers, Executive Committee and Members at the NYSLTA 87th Annual Convention

The Greenbrier
White Sulphur Springs, West Virginia
August 24-27, 2008

Visit www.NYSLTA.org for Convention photos

Michael P. Miglino
President

On My Mind

Sharon Sabol
Executive Vice President

Looking Ahead to Sunnier Days for the Title Industry

The cloudy skies and cold winds of January and February have enveloped the Northeast. We are mired in the depths of the winter of 2008. Although we've experienced many winters much harsher than this one, if you're like me, you can't wait for the warm, sunny days of spring to arrive. This year, the seasons remind me of the state of our business. It seems that the entire real estate industry is locked in one of its worst winters ever.

The past two or three years were like autumn, the harbinger of tougher times to come. Negative media coverage, numerous investigations and blue ribbon commission reports criticized the Title Industry in New York and across the country. With the downturn in the real estate market, the sub-prime lending collapse and the credit crisis that has engulfed the financial community, our business has slowed considerably. More recently, our industry has become the target of anti-trust litigation. It seems as though we are frozen in a long, cold winter.

But before you reach for your favorite anti-depressant, you should be mindful of an old expression, that "it's always darkest before the dawn". All the troubles that plague the real estate community cannot and should not be placed on the doorstep of those who earn their living in the title business. Unfortunately, we are an easy target. Because Title Industry representatives collect many of the closing charges that the parties in a real estate transaction are required to pay, there is a perception that all these funds go into the coffers of the Title Insurer or its agent. On closer analysis, we actually retain only a small part of the amounts collected. The biggest portion of these costs goes to the payment of state, county and local transfer and mortgage recording taxes.

Many of the ancillary forms that must be completed at closings have been mandated by regulation or statute and not by the Title Industry. The responsibility for making

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NYSLTA 87th Annual Convention

Summer 2008 is quickly approaching, and plans are underway for another first-class NYSLTA Annual Convention. As always, our Association Convention is an event to attend and enjoy. Circle your calendar for August 24-27 and meet us at The Greenbrier, White Sulphur Springs, West Virginia.

Our Annual Convention provides an opportunity to learn about the latest industry news impacting the Title Industry, and interact in a relaxed setting with NYSLTA Officers, Executive Committee and other members. In addition to our excellent speakers featured at our business program, there are many social events for fun and relaxation. Of course, our Annual Golf Tournament is always a great event.

The Greenbrier Spa has always been one of the resort's most popular amenities. Guests enjoy The Greenbrier's sulphur springs and the natural benefits of the minerals.

Please visit the Association Web site at www.NYSLTA.org, click on Annual Convention page, to view Convention photos.

ALTA's President, Gary L. Kermott, will be our keynote speaker at our General Session. He is Vice Chairman of First American Title Insurance Company in Santa Ana, Calif. Kermott transitioned to this role in November 2006, following an eight-year term as President of First American Title Insurance Company. In addition to his role as Vice Chairman of the Title Company, Kermott has also served as Executive Vice President of The First American Corporation since July 1999. Convention registration and details will follow in the coming months.

Looking forward to seeing all at The Greenbrier.

Please e-mail:
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BY VINCENT G. DANZI, ESQ.
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Mortgage Taxes in New York State—Understanding the Tax and its Associated Credits and Exemptions

As anyone who has purchased a piece of real property in New York State knows, the State and its municipal subsidiaries tax *the recording* of evidence of conveyances of real property. For purposes of taxation, a "conveyance" will be taxed differently depending upon whether it can be classified as either an outright transfer or as collateral for a loan. In plain English, in the context of real property this means that the conveyance of an interest in real property using a deed will be taxed differently than a conveyance of an interest in real property using a mortgage. Taxes on mortgages are governed by Article 11 of the New York Tax Law (hereinafter the "Tax Law"). Although the customary security instrument used in New York State for real property is a "Mortgage", statutorily this term also includes a "Deed of Trust"[1] (rarely used in New York).

The New York mortgage tax total that we know of as, say, 1.05% in Suffolk County, or 1.25% in Columbia County, or 2.05% for mortgages under 500k in New York City, etc., is actually a sum of smaller, individual mortgage taxes each "known"[2] by individual names and each with its own criteria for exemption and applicability. In New York State, counties do not adjust the rate of a New York State mortgage tax, rather they either impose, or do not impose, particular available codified mortgage taxes. The first three taxes that we will look at are the "Basic", the "Additional", and the "Special Additional" mortgage taxes.

The Basic Mortgage Tax

The "Basic" mortgage tax is provided for in Section 253.1 of the Tax Law. This tax is imposed in every county in New York State. It is imposed on a mortgage at the rate of, "fifty cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or **under any contingency may be** secured at the date of the execution thereof or **at any time thereafter** . . ." (emphasis added)[3] Note the bold-faced words, which explain why credit-line mortgages[4] and negative amortization mortgages[5] are taxed at the maximum indebtedness they may secure and not by the amount actually disbursed to a borrower upon recordation. This verbiage is used repeatedly throughout Article 11 to achieve a consistent calculation for the other mortgage taxes. There is no direction as to who must pay this tax which, due to market forces, essentially results in the tax being paid by the mortgagor.

The Special Additional Mortgage Tax

The "Special Additional" mortgage tax (otherwise known as the "Quarter Point") is provided for in Section 253.1-a of the Tax Law. Again, this tax is imposed in all counties. It is imposed at the rate of twenty-five cents for each one hundred dollars and each remaining major fraction thereof of mortgage debt. Although most practitioners and title companies only see it levied in a single way, the levying of the Special Additional mortgage tax could be very complicated due to some very specific rules of application. There is a possible exemption from this tax. The tax will not be imposed where the mortgagee is a natural person or persons **and,** "the mortgaged premises consist of real property improved by a structure containing six residential dwelling units or less, each with separate cooking facilities . . ." (emphasis added)[6]

If the above, rather narrow exemption does not apply then the Special Additional tax is applicable to the mortgage conveyance. However, when the tax is applicable (which, obviously, is most of the time) the statute provides further direction as to who must, or may, pay the tax. The Special Additional mortgage tax cannot be, "paid or payable, directly or indirectly, by the mortgagor," where the mortgaged premises is, "real property principally improved or to be improved by one or more structures containing in the aggregate not more than six residential dwelling units, each dwelling unit having its own separate cooking facilities," unless one of the following exceptions apply[7]:

- As provided in NY Tax Law § 258 – This section of the tax law allows the mortgagor to pay the Special Additional tax that is properly owed by a mortgagee but which mortgagee refuses to pay said tax. The mortgagor may decide to do this in order to obtain a discharge of the mortgage as recorded. In other words, the mortgagor may elect to get the mortgage recorded and then immediately have it discharged in order to clear any clouds on title. If the mortgagor decides to do this then this section enables him/her to sue for the amount he/she had to expend or to apply for a credit.
- As provided in NY Tax Law § 259 – This section deals with mortgages made by corporations in trust to secure payment of bonds or obligations issued or to be issued thereafter.

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BY JEAN PARTRIDGE
Chief Counsel and Managing Member
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The Importance of Performing Core Title Services

Over the past several years, there has been much discussion regarding 'Core Title Services'—what are they and why do we in the title industry care? The term core title services has been used by both the Federal and the State regulators when discussing what would constitute a legitimate legal joint venture (JV) or affiliated business arrangement (AfBA). There are several factors considered when making this determination, however providing "substantial" or "core" title services appears to be a common thread among all the legislation regarding JV's and AfBA's in the title arena. The purpose of this article is to remove some ambiguity for the reader as to what constitutes core or substantial title services and the importance of such services. The Federal and State regulations will be examined, as well as, pending legislation in New York.

The purpose of the legislation, both of the Federal government and the State of New York is an attempt to prohibit AfBA's that are really sham operations designed to circumvent the law and give 'kickbacks' to the actual source of business. Many of the sham AfBA's are formed for the primary purpose of providing an incentive (kickback), in the form of partnership revenue, to the actual source of business. In its simplest form, the AfBA is often formed between the "client" (source of business, sometimes referred to as the originator) and a title agent or an underwriter. The "client" then receives a percentage of the partnership profits on transactions he or she refers to the title agent or underwriter. The present legislation prohibits this type of potentially collusive partnership between title insurance corporations, title agents, real estate attorneys, mortgage brokers, real estate developers and lenders.[1] The federal statute, the Real Estate Settlement Procedures Act (RESPA), which went into effect in 1975, prohibits kickbacks or any other compensation for the referral of settlement services business.[2] Similarly, New York has passed legislation which proscribes improper relationships between title insurers, agents and other participants in real estate transactions.[3] New York also has a licensing bill pending that addresses the concept of core services. The intent of all the legislation is to protect the consumer from unnecessary charges.

While RESPA focuses on fair-dealing and reducing settlement costs throughout the entirety of the real estate transaction process, the New York statute is focused particularly on title insurance practices.[4] N.Y. Ins. Law §6409 prohibits the payment of any commission or rebate to any person acting as an agent for a person prospectively acquiring an interest in real property for the referral of that business to a particular title insurer or its agent (hereinafter "company").[5] Federal and state legislation devised to prevent collusion in real estate transaction practices have produced mixed results. A party to a real estate transaction (e.g.: a mortgage broker, a developer or a real estate agent) may participate in an arrangement where it forms a mutually beneficial partnership with a title agency or an underwriter. Many of these partnerships formed create a bona fide provider of settlement services, which are permissible under the RESPA AfBA exemption; however, many are not and are merely creating a screen behind which circumvention of the laws may be attempted.

RESPA refers to these types of partnerships as "affiliated business arrangements" (AfBA's).[6] The New York State Insurance Department (NYSID) has adopted the term "joint venture" to refer to such arrangements.[7] The attempts made by The U.S. Department of Housing and Urban Development (HUD) to adjust its regulatory scheme to differentiate between AfBAs appropriate under RESPA and illegitimate "sham" business arrangements will be discussed in some detail below. For now, it is important to recognize that one factor considered by HUD and NYSID when evaluating these schemes is whether those compensated for their participation in a real estate settlement, as title agents, provided core or substantial services.

THE FEDERAL STATUTE

Requirements Under RESPA

When RESPA was enacted in 1975, it contained a strict prohibition against giving or receiving any fee, kickback or thing of value for the referral of settlement service business and AfBA's were not permitted. In 1983 Congress amended RESPA to permit affiliated or controlled business arrangements provided certain conditions were met. RESPA retained its prohibition against the giving or receiving of any referral fees, which prohibition still exists today. The regulations relating to the amendments were not published until 1992. The 1992 regulations set forth a three prong test that must be satisfied in order to be RESPA compliant. These regulations provided that Section 8 of RESPA would not be violated if 1) the consumer received a written disclosure of the nature of the relationship and an estimate of the AfBA's charges; 2) the consumer was not required to use the AfBA; and 3) the only thing of value received from the arrangement, other than payment for services rendered, was a return on ownership interest.[8] This is commonly known as the Affiliated Business Rule or the AfBA exemption.

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- When the mortgagee is an exempt organization pursuant to NY Tax Law §253.1-a (b). This subsection exempts: "An organization organized other than for profit which is operated on a nonprofit basis no part of the net earnings of which inures to the benefit of any officer, director or member and which is exempt from federal income taxation pursuant to subsection (a) of section five hundred one of the internal revenue code shall be exempt from the special additional tax imposed by this subdivision."

In cases where the mortgaged premises is not, "real property principally improved or to be improved by one or more structures containing in the aggregate not more than six residential dwelling units, each dwelling unit having its own separate cooking facilities," the Special Additional mortgage tax is payable by the mortgagor except where the mortgagor is an exempt organization pursuant to NY Tax Law §253.1-a (b).

The Additional Mortgage Tax

The "Additional" mortgage tax is provided for in Section 253.2(a) of the Tax Law. This tax is not imposed in all counties and in the counties where it is imposed, the computation of the tax can be different. First, counties can opt out of the tax if those counties do not fall into one of the following categories:

A county within:

- The City of New York
- Metropolitan commuter transportation district
- Niagara Frontier transportation district
- Rochester-Genesee transportation district
- Capital District transportation district
- Central New York regional transportation district

If the subject real property is within the Metropolitan Commuter Transportation District the tax is thirty cents per one hundred dollars of mortgage debt. If the real property that is being mortgaged is outside of this district, the tax is twenty-five cents per one hundred dollars of mortgage debt. The first ten thousand dollars of mortgage debt is exempted from the tax, "in any case in which the related mortgage is of real property principally improved or to be improved by a one or two family residence or dwelling."[8] This exemption, when applicable, therefore results in a subtraction of twenty-five to thirty dollars from the amount normally due under to the Additional tax.

Local Mortgage Taxes

There are many subdivisions of Tax Law Section 253 which authorize counties and smaller political subdivisions to impose their own local mortgage taxes. The City of Yonkers in Westchester County and Albany County are just two examples of municipalities or counties where the local legislature has imposed a local mortgage tax. See the table in the next column for an index to the corresponding section of the tax law dealing with a particular municipality or county.

Tax Law §	County/ Municipality it affects	Tax Law §	County/ Municipality it affects
253-A	city of 1 million + (i.e. New York)	253-L	Rensselaer County
253-C	Nassau County	253-M	Wayne County
253-D	City of Yonkers	253-N	Wyoming County
253-E	Broome County	253-O	Chautauqua County
253-F	Rockland County	253-P	Albany County
253-G	Westchester County	253-Q	Montgomery County
253-H	Lewis County	253-R	Schenectady County
253-I	Columbia County	253-S	Steuben County
253-J	Sullivan County	253-T	Yates County
253-J*2	Hamilton County	253-U	Herkimer County
253-J*3	Essex County	253-V	Cortland County
253-J*4	Schoharie County	253-V*2	Dutchess County
254-K	Genesee County[9]		

Exemptions and Credits Applicable to Mortgage Taxes

Now that we have briefly reviewed the individual mortgage taxes that make up what we know of as the New York Mortgage Tax, we can turn to available exemptions and credits that the payor of the taxes can take advantage of.

The "252-a.2 Affidavit"

A Reverse mortgage can be recorded without payment of mortgage tax by use of a "252-a.2 Affidavit". "Reverse mortgages conforming to the provisions of section two hundred eighty or two hundred eighty-a of the real property law securing obligations of mortgagors or exempted therefrom . . . shall be exempt from any tax. . . ."[10] "Section 252-a.2 of the Tax Law provides that to claim this exemption the lender should provide documentation to enable recording officers to affirmatively determine when a mortgage being presented for recording is a reverse mortgage conforming to section 280 or section 280-a of the Real Property Law and entitled to an exemption."[11]

However, two of the most familiar forms of exemptions/credits are obtained by filing either a "255 Affidavit" or a "339-ee(2) Affidavit". Both of these affidavits can require some detailed calculations.

The "255 Affidavit"

The so-called 255 Affidavit is an affidavit meant to comply with Section 255 of the Tax Law. Section 255 is broadly entitled, "Supplemental Mortgages". Put simply, a supplemental mortgage may be used to correct or modify a previously-recorded mortgage instrument. The section provides that the supplemental mortgage or instrument will not be subject to mortgage tax unless it modifies the previously-recorded mortgage in any one of the following ways:

1. It creates or secures a new or further indebtedness other than the principal indebtedness already secured by the previously-recorded mortgage to be modified[12]; and / or
2. It encumbers real property other than that already secured by the previously-recorded mortgage and such newly-encumbered real property is either:
    a. In the City of New York and is either not owned by the mortgagor named on the previously-recorded mortgage or the newly-

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The Bulletin

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New York State

Land Title Association

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encumbered property (or already-encumbered property) was acquired by that mortgagor with the intent of evading mortgage tax[13]; and / or

b. Located in a county where the Additional tax is currently imposed and the already-encumbered real property was recorded in a county which had suspended the Additional tax at the time of recording said previously-recorded mortgage.[14] "This rule applies in the case of the locally authorized taxes."[15]

If the above situations do not apply, no new mortgage tax will be due. If the above situations do apply the recording of a supplemental mortgage will trigger tax in an appropriately reduced amount. Except in the case of 2a (above) which could completely eliminate any exemption, an affidavit is constructed that claims a partial exemption from the mortgage tax. In order to claim any exemption or credit from mortgage taxes an affidavit must be filed with the mortgage document or instrument.[16] Please note that a refund may also be claimed under this section (*by application to the tax commission*) in the event that tax was paid when it should not have been.[17]

Elements of the Affidavit

Let us take the common scenario where a first mortgage is being amended to secure further indebtedness. This is often done so as to secure additional financing using the property's equity at a more favorable interest rate than could be achieved by taking out a separate second position mortgage. The security instrument (the "mortgage") already recorded is to be supplemented in the public record to show that it secures further indebtedness. The most common method for accomplishing this entails recording two new documents in the mortgage liber at the county clerks' office.

The first document is the "new money mortgage". This is a new mortgage which has a face amount equaling the difference between the current principal balance of the previously-recorded mortgage and the face amount of the mortgage lien as it will be when consolidated. For example, assuming that the pre-existing mortgage was originally taken in the face amount of $250,000, but has been paid down to $220,000, and further assuming that the mortgage as consolidated will have a face amount of $300,000, the face amount of the new money mortgage will be $80,000. Mortgage tax is paid to record this new money mortgage.[18]

The second document is commonly known as a CEMA (Consolidation Extension Modification Agreement) agreement. This document is used to link the two mortgages into a single first position lien. It is recorded in the mortgage liber along with the supplemental mortgage (the "new money mortgage").

The 255 affidavit, in this case, will describe the owner of the property, the property encumbered, the pre-existing mortgage, its current balance, the new mortgage lien, its new face amount, and the amount of mortgage tax due therewith. Put very simply, the mortgage tax due can be calculated by computing the mortgage tax that would be due if a new mortgage (with no exemption) were being recorded in that county for the full amount of the consolidated lien, then computing the mortgage tax that would be due if one were to record a mortgage in the amount of the current unpaid principal of the previously-recorded mortgage, and then subtracting the second figure from the first. See the following example (we will use Suffolk County's mortgage tax of 1.05% as an example):

Example

Previously-recorded mortgage	
Current Balance	$100,000
New Money mortgage	
Amount	$ 50,000
Consolidated mortgage	
Amount	$150,000
Mortgage Tax due equals:	
Tax due on new $150,000 mortgage	
1.05% of $150,000-$30 (1st $10k exempt)	$ 1,575
Tax due on new $100,000 mortgage	
1.05% of $100,000-$30 (1st $10k exempt)	$ 1,050
Mortgage Tax due on Consolidated lien	$ 525

(Note: you might have noticed that this amount $525 could have been found by simply applying the mortgage tax rate of 1.05% to the new money mortgage of $50,000. However, that approach will only work in a county that does not have graduated mortgage tax rates and should therefore be avoided. See footnote 18.)

Another example of where a 255 affidavit is commonly used is with a Spreader Agreement or a Collateral Mortgage. The purpose of both of these instruments is to spread the lien of the pre-existing mortgage onto property that was not originally encumbered by the pre-existing mortgage. When such additional instrument does not increase the monetary indebtedness secured, no additional mortgage tax will be due when recording such an instrument unless the property that is to be newly encumbered: (1) was not previously subject to the Additional mortgage tax described above (or a local mortgage tax [see footnote 15]), or (2) where the newly encumbered property is located in a city with a population of one million or more (New York City) and the mortgagor does not own both properties.

Of course, there could be a time when your 255 affidavit needs to take into account a combination of the above situations. For instance, if your client has property that is located in a county that did not impose the Additional tax and against which a mortgage has been recorded, and he/she now wishes to both increase the mortgage indebtedness and also to spread the lien onto property not previously encumbered which does impose the Additional tax, then a proper 255 Affidavit will take both factors into account.

The "339-ee(2) Affidavit"

Although applicable to mortgage taxes, the 339-ee(2) Affidavit is an affidavit meant to comply with Section 339-ee(2) of the Real Property Law, which is part of Article

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9-B also known as the Condominium Act. It allows the first purchaser of a new condominium unit to record their purchase money mortgage without paying full mortgage tax. A mortgage tax credit is given to the purchaser[19] equal to the amount of mortgage taxes paid by the sponsor of the condominium (exclusive of any amount paid arising from the Special Additional mortgage tax) on its construction mortgage multiplied by the purchaser's pro rata percentage of interest in the common elements.

As you can see this credit works in a very different way than does the 255 Affidavit approach. Whereas the 255 Affidavit credit applies whatever credit it gives by virtue of the then-existing current principal balance remaining unpaid on the mortgage to be amended, the 339-ee(2) credit applies regardless of the current amount secured by the construction mortgage. It would therefore be a mistake to liken the 339-ee(2) credit to a purchase transaction where a 255 Affidavit was used along with an assignment and assumption of the seller's mortgage to get a credit for mortgage taxes.

A proper 339-ee(2) affidavit will contain a schedule that walks the clerk through the credit amount claimed.

Schedule for an Affidavit pursuant to Real Property Law §339-ee(2) (shown below)

Total Mortgage Tax Already Paid by Sponsor $31,500.00			
Sponsor's Mortgage	Parties	Sponsor to Bank	
	Recording Info	Dated 01/01/07, Recorded 01/31/07, in Liber xxx Page xxx in Suffolk County Clerks's Office	
	Loan Amount	$3,000,000.00	
		Basic [Tax Law §253(1)] 50 cents for each $100. And each remaining major fraction thereof of mortgage amount	$15,000.00
		Additional [Tax Law §253(2)] 30 cents for each $100. And each remaining major fraction thereof of mortgage amount[20]	$9,000.00
		Special Additional [Tax Law §253(1-a)] 25 cents for each $100. And each remaining major fraction thereof of mortgage amount	$7,500.00

Purchaser's Mortgage	Parties	Borrower To Bank		
	Loan Amount	$500,000.00		
	Mortgage Taxes	Gross Tax Due	Credit (tax paid x percentage ownership in common elements	Net Taxes Due
	Basic [Tax Law §253(1)] 50 cents for each $100. And each remaining major fraction thereof of mortgage amount	$2,500.00	$15,000 x 2.312% **=$346.80**	=$2,153.20
	Additional [Tax Law §253(2)] 30 cents for each $100. And each remaining major fraction thereof of mortgage amount Minus $30 for the first $10,000	$1,220.00	$9,000 x 2.312% **=$208.08**	=$1,011.92
	Special Additional [Tax Law §253(1-a)] 25 cents for each $100. And each remaining major fraction thereof of mortgage amount	$1,250.00	**No credit** for Special Additional	=$1,250.00
			Total Mortgage Tax Due Herewith	**$4,415.12**
			Borrower's Portion (Basic [§253(1)] and Additional [§253(2)] Taxes):	$3.165.12
			Lender's Portion (Special Additional Tax [§253(1-a]):	$1,250.00

The above is merely a brief review of some of the most commonly encountered mortgage taxes and exemptions and credits that can be applied against them. There are many other situations in which mortgage taxes may or may not be due. It would therefore be worthwhile to review Article 11 of the Tax Law specifically when recording a mortgage to which the parties to it are not the usual homeowner-borrower and institutional lender. How much is owed and by whom may be otherwise than you think.

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[1] Tax Law §250.2(a)

[2] The word "known" is used here for the "names" of these taxes because, although these individual taxes are not formally labeled in the statute, they are labeled as such on page 4 of form MT-15 (Mortgage Recording Tax Return) available at the website of the New York State Department of Taxation and Finance: http://www.tax.state.ny.us/

[3] Tax Law §253.1

[4] A Credit-Line Mortgage is a mortgage where a certain credit line limit is secured. The borrower is able to draw against this credit-line up to the amount of the limit.

[5] A Negative Amortization Mortgage is a mortgage where the borrower pays back less than the full amount of interest owed to the lender each month resulting in an increase in the total principal owed.

[6] Tax Law §253.1-a(a)

[7] Id.

[8] Tax Law §253.2(a)

[9] For a relatively up-to-date resource of which counties impose which taxes download form MT-15 from the New York State Department of Taxation and Finance website. http://www.tax.state.ny.us/

[10] Tax Law §252-a.2

[11] Excerpt from email issued by the Department of Taxation and Finance to Recording Officers and others regarding an Advisory Opinion dated October 18, 2007 on the application of the mortgage recording tax to reverse mortgages. Ralph Fatato, Tax Regulation Specialist I (published on New York State Bar Association's Real Property Law Section Blog)

[12] Tax Law §255.1(a)(i)

[13] Tax Law §255.1(a)(ii) . . . Please note further that the, "If the commissioner of taxation and finance finds that transfers of one or both of such properties in connection with the recording of the spreading agreement or additional mortgage have been undertaken for the purpose of avoiding or evading the application of this paragraph rather than solely for an independent business or financial purpose, such commissioner may disregard such transfers. For purposes of this subparagraph, there shall be a presumption that all transfers of one or both of such properties to related parties within the twelve-month period preceding the recording of such spreading agreement or additional mortgage have been undertaken for tax avoidance or evasion purposes and such presumption may be rebutted only with clear and convincing evidence to the contrary. For this purpose, the term "related" shall have the same meaning as in paragraph (b) of subdivision two of section two hundred fifty-three-a of this article except that references to "fifty percent" in such paragraph (b) shall be read as "twenty-five percent".

[14] Tax Law §255.1(b)

[15] See item 15 on page 6 of 8 TSB-M-96(2)(R) *General Questions and Answers on the Mortgage* Recording Taxes http://www.tax.state.ny.us/pdf/memos/mortgage/m96_2r.pdf

[16] Tax Law §255.2(a) – "If, at the time of recording such instrument or additional mortgage, any exemption is claimed under this section, there shall be filed with the recording officer and preserved in his office a statement under oath of the facts on which such claim for exemption is based. The determination of the recording officer upon the question of exemption shall be reviewable by the tax commission."

[17] Tax Law §255.2(b)

[18] Please note that in a city of one million people or more (New York City), mortgage tax rates are graduated. In such a case the tax on the new money mortgage would be computed by aggregating the pre-existing mortgage and the new money mortgage. That portion of the new money mortgage which exceeded the $500,000 threshold would be taxed at the higher tax rate.

[19] The benefit of the credit is usually assigned to the condominium sponsor by the purchase contract. This section also imposes additional criteria which should be reviewed by sponsor's counsel.

[20] Notice that we did not subtract $30 here as the exemption for the first $10,000 of debt under §253.2(a) is only available in the case that, "the related mortgage is of real property principally improved or to be improved by a one or two family residence or dwelling."

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Looking Ahead to Sunnier Days for the Title Industry

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sure that these forms are completed properly and delivered to the appropriate agency of government has been placed by others on the Title Industry. Similarly, the decision to relax mortgage lending criteria or to borrow amounts that were beyond the borrower's ability to repay, were not made by those in the Title Industry. Unfortunately, poor decisions made by other members of the real estate community have also tainted the public perception of the Title Industry.

Let's be fair. There is no question that there are abuses in our industry that must be addressed. We must accept responsibility for them and work to correct them. But we have taken steps to address some of these questionable practices. For example, we recently completed a series of ethics seminars that touched on topics like sham controlled business arrangements, conflict of interest issues for real estate attorneys, and a review of opinions of the New York State Insurance Department which focused on the application of Section 6409 (d) of the Insurance Law to certain courses of conduct. The seminars, presented by a panel of underwriters and agents chaired by Larry Lipschitz were held in five different locations around the state. They generated a lot of debate and demonstrated an interesting diversity of opinion on these important issues. But there can be no question that the seminars focused the attendees' attention on numerous ethical questions that impact our business daily.

The Association, agents and underwriters together, continue to search for the best way to engage the Department of Insurance in a dialogue that will make it aware of those matters that we agree are essential to the conduct, health and integrity of the industry. Association committees continue to work on legislation and other matters that will benefit our membership and our industry. For example, the Law Committee chaired by Barry Balonek, worked with our lobbyists to craft an amendment to CPLR 5014 that would eliminate or at least reduce the negative impact of the recent court decision entitled Greenpoint Mortgage Funding, Inc v. Gletzer 847 NYS 2nd 896 (2007). In that case, a judgment creditor had docketed his judgment against the judgment debtor on Oct. 23, 1991. The judgment had resulted in a lien for a period of 10 years on the judgment debtor's real property in the county where the judgment was docketed. On Oct. 22, 2001, the judgment creditor commenced an action pursuant to CPLR Section 5014 to renew his judgment and thereby extend his lien for an additional 10 years. In 2003, prior to a determination of the judgment creditor's action, the judgment debtor executed mortgages in favor of Greenpoint Mortgage Funding, Inc. and another lender. Thereafter, in 2005, the Court granted the relief requested by the judgment creditor for a renewal, judgment nunc pro tunc, to Oct. 23, 2001. The result essentially subordinated the mortgage liens to the renewal judgment even though the lenders had no notice of the pending proceeding for the renewal judgment.

The amendment drafted by the Law Committee provides, among other things, that the lien of a renewal judgment entered in an action commenced prior to the expiration of the original lien but not docketed until after the expiration of

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In response to numerous complaints regarding the aforesaid Affiliated Business Rule, alleging sham arrangements were created to sidestep the RESPA bans in June of 1996 HUD issued a policy statement to help determine whether an arrangement is a sham or whether the AfBA was a bona fide provider of settlement services. Both the federal statute and HUD's 1992 regulations make the AfBA exemption available in situations where the referral of business is made to a "provider of settlement services."[9] The policy statement makes clear that one must find or create an entity which is a bona fide provider of settlement services before it may be determined whether the entity has satisfied the three conditions required for the AfBA exception to apply. Therefore, it can be said that the test is really a four prong, rather than a three prong test to determine AfBA RESPA compliance.

In determining whether an entity is a bona fide provider of settlement services or is merely a sham arrangement used as a conduit for referral fee payments, HUD balances a number of factors. HUD established a series of ten questions to make this determination. However, HUD provided neither a maximum nor a minimum number of criteria to be met; rather HUD states it will balance the answers and then make their determination. Four of the ten questions focus on performing substantial services. As mentioned earlier, even if an entity qualifies as a bona fide provider of settlement services, it must still meet the three prong test of the AfBA exemption rule in order to comply with RESPA.

Further, HUD requires that any entity that receives a fee perform and provide "substantial services" for which it is receiving the fee.[10] Although Congress has indicated that 'substantial services' in the title arena may include the following: a) a title search, b) an evaluation of the title search to determine the insurability of title, c) clearing and underwriting objections to title, d) conducting the closing, e) the actual issuance of the policy on behalf of the title company, and f) the maintenance of records relating to the policy and the policy holder, Congress has not definitely defined substantial services for the title agency AfBA's.[11] One point that is clear, however, is that when all of these substantial services are provided by the pre-existing entity (NOT the AfBA entity) that otherwise could have actually received referrals of business directly, that such AfBA or JV would not pass the AfBA exemption rule and would violate RESPA. This idea was promulgated in the RESPA/HUD policy statement. Thus, if a mortgage broker and an *existing* title agency or underwriter form an AfBA *new* title agency and the *existing* agency or underwriter performs all the services noted above, with the staff and in the office space of the existing agency or underwriter, this arrangement would clearly violate RESPA.

AfBA's formed to circumvent Section 8 of RESPA typically provide little or no services to their customers. In the sham type of arrangement, the AfBA entity does not perform title examinations, does not read and clear the title, nor does it typically have a staff of employees. However, the policy statement does recognize that in some instances legitimate title agencies may contract out *some* services. For example, few title agencies or underwriters have title examiners or closers on staff—these services are typically performed by independent contractors; reading and the preparation of title reports may even be performed by a third party independent contractor on occasion. HUD has not established that ALL settlement services must be performed by the AfBA in order to comply with RESPA rather, HUD has established a 'substantial' standard. HUD has stated that 'substantial' settlement services must be performed by the AfBA. HUD has looked at whether the contracting party is independent of the existing entity and whether the contractor receives payment from the new AfBA entity at less than the reasonable value of the services rendered. HUD has indicated that if the new AfBA entity is paying a fee of only $50.00 for the examination, reading and preparation of a title report to the existing title agency, it would view the difference between the payments made to the contracting party and the value of the services rendered as a disguised referral fee—which would clearly violate RESPA.

In concluding the discussion regarding the RESPA regulations, it should be apparent that a key to the permissible AfBA under RESPA is the performance of substantial or core settlement services. The AfBA entity must be a "bona fide provider of settlement services"—not a mere shell entity. Further, all of the substantial services cannot be provided by an existing agency whose principals are also the principals in the AfBA or by the underwriter partner. Unfortunately, it may not be clear to the reader (as it is not to the writer) what services or combination thereof would meet the 'substantial' services criteria; RESPA is ambiguous regarding this issue. The criteria set forth above serve only as a guide to the services RESPA regulators review to determine the AfBA title agency's RESPA compliance.

THE NEW YORK STATUTES

While the HUD analysis under RESPA differs from the analysis required under the laws of the State of New York, the New York Insurance Law prohibition on rebates was a direct response to the adoption of RESPA. However, New York Insurance Law §6409(d) is broader and aims at a "flat bar" on receipt of any compensation for the referral of any title insurance business. The operative statute in New York is New York Insurance Law §6409(d), which states:

"No title insurance corporation or any other person acting for or on behalf of it shall make any rebate of any portion of the fee, premium or charge made, or pay or give to any applicant for insurance, or to any person, firm or corporation acting as agent, representative, attorney, or employee of the owner, lessee, mortgagee or the prospective owner, lessee, or mortgagee of the real property or any interest therein, either directly or indirectly, any commission, any part of its fees or charges, or any other consideration or valuable thing, as an inducement for, or any compensation for, any title insurance business. Any person or entity who accepts or receives such a commission or rebate shall be subject to a penalty equal to the greater of one thousand dollars or five times the amount thereof."[12]

In order for a joint venture to operate legally under New York Insurance Law §6409(d), the joint venture must satisfy the criteria enumerated by NYSID. The Department has opined, in its opinion letters, that a joint venture does

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not violate §6409(d), when the joint venture has multiple sources of business and is not limited to the referrals made by a co-owner of the joint venture. In addition, a client of a co-owner must not be obligated to obtain title insurance from the joint venture, and any compensation paid to a co-owner must be based solely on such co-owner's ownership interest in the joint venture and NOT based on the volume of business they refer to the joint venture. These criteria are very similar to the policy statement issued by HUD relating to RESPA, previously discussed.

As mentioned above, the RESPA analysis also requires that any entity perform and provide "substantial settlement services" for which it is receiving a fee. While §6409(d) does not contain such a requirement, presently pending before the New York legislature is a bill to amend the insurance law regarding the licensing of title agents. Under this proposed amendment, in addition to similar disclosure requirements as in RESPA, the pending bill does address "core title services." However, the reference to "core title services" as used in the proposed licensing bill of the New York State Land Title Association does not mirror the purpose of "core title services" as used in RESPA. While core title services are defined in the bill in §2151 (c) as: (1) examination of the title search to determine insurability of the title (2) preparation and issuance of a title insurance commitment; (3) clearance of title exceptions in connection with the issuance of a title insurance policy; (4) the collection of the title insurance premium; and (5) the marking up of a title insurance commitment to bind a title insurance corporation or the preparation and issuance of a title insurance policy on behalf of a title insurance corporation—these are NOT set forth as criteria that must be met in order to be a legitimate title agent.[13] Pursuant to the proposed bill, separate criteria are set forth under §2151(n) which, if performed, designates one as a title agent and therefore, a license would be required.[14] Core title services, as used in this bill seems to be merely a list of functions for which an agent must not pay more than the reasonable and customary compensation to independent contractors. Proposed §2159 (e) of the bill states "a person, other than a title insurance corporation or a title insurance agent who is not an originator, who performs one or more, but less than ALL (emphasis added), of the core title services shall not be paid, by a title insurance corporation or a title insurance agent, more than the reasonable and customary compensation for the services actually rendered."[15] The purpose of this section is to prohibit the payment of fees for services rendered in connection with the issuance of a title insurance policy to no more than "the reasonable and customary compensation for the services actually rendered" and to prohibit payments that are merely disguised referral fees. Many in the title industry will agree that "core title services" may not have been the best choice of words for use in this context since it does not have the same meaning or impact as "core title services" as used under RESPA. As opposed to the RESPA statute where "core title services" are a primary focus in the statute; in the New York bill, "core title services" is merely incidental to the main focus of the bill—which is to require the licensing of agents.

CONCLUSION

The requirement that a compensated title agent actually perform "substantial" or "core" services, in both the Federal and New York proposed bill, is designed to eliminate the possibility of "sham" business arrangements creating shell title agents. Further, the intent is to prohibit referral fees for the placement of title insurance business. The ultimate goal is to protect the consumer from excessive charges in real estate transactions. HUD's existing regulations provide that where an AfBA provides no substantive services for its portion of the premium the AfBA violates Sections 8(a) and 8(b) of RESPA. The reason for the violation is, according to HUD, that the AfBA is merely passing unearned fees back to its owner for referring business. Such a scheme is clearly something Congress did not intend when it amended RESPA to allow certain AfBA's. The intent of Congress was "not to change the current law which prohibits the payment of unearned fees, kickbacks, or other things of value in return for referrals of settlement service business."[16] Likewise, the intent of the provisions of the proposed licensing bill discussed above, even if incidental to the main purpose of the statute—simply stated—is to prohibit referral fees.

As recently as November of 2007, HUD has had the opportunity to espouse its position regarding core services when it entered into a settlement agreement with an underwriter in another State. In the Settlement Agreement, the underwriter did not acknowledge any wrongdoing, however they agreed that any agency in the State in which it maintains an ownership interest along with any other person in a position to refer business to such agency will be operated under certain terms, to wit: the agency will have operating capital net worth comparable to independent title agencies in the market area and sufficient capital to conduct ALL (emphasis added) the work and provide ALL the services typically provided by a title insurance agency in the market area. Further, the terms of the agreement also state that the agency must provide "core title services." Similar to previous writings, HUD states that core title services are defined as 1) evaluation of the title search to determine insurability, 2) clearance of the underwriting objections, 3) issuance of the title commitment and 4) issuance of the title policy and 5) where customary in the local marketplace, performance of the closing. The agreement also states other conditions, which are not the focus of this article, that are required for RESPA compliance. HUD's enforcement position seen in its regulations, as well as, most recently in this settlement agreement, seems to be that it is difficult to justify the payment (or retention) of a significant portion of the title insurance premium to a title insurance company or agent who fails to perform and assume responsibility for the core services provided to customers—the examination of title, the preparation of a title report and policy, the clearance of title objections, and the closing of title. Let the title industry be guided accordingly.

In conclusion, with the licensing bill pending and in light of the fact that the New York Insurance Law §6409(d) was enacted in direct response to the adoption of RESPA coupled with the aforementioned trend of HUD to focus on core title services when determining the legitimacy of a

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title agency—now may be the perfect time to codify the requirements in New York. The pending licensing bill seems to be the ideal vehicle to accomplish such a task. Although, the overall intent of the proposed licensing bill appears to require the performance of "core title services", perhaps this aspect of the bill could be enhanced by a modification which would more clearly set forth said requirement.

[1] *See* N.Y. Ins. Law §6409(d), *and* Real Estate Settlement Procedures, 12 U.S.C.A. §2601.
[2] 12 U.S.C.A. §2607(a).
[3] N.Y. Ins. Law §6409.
[4] *Supra* note 1.
[5] *Id.*
[6] 24 C.F.R. §3500.15(b).
[7] *See* State of New York Insurance Dept. decision, RE: Permissibility of Proposed Business Arrangement/Joint Venture/Title Agent, *available at* http://ins.state.ny.us/ogco2005/rg050506.htm.
[8] 12 U.S.C.A. §2606.
[9] *Id.*
[10] *Id.*
[11] *See* H.R. Rep. No. 1177, 93rd Cong., 2nd Sess.1974.
[12] *Supra* note 3.
[13] Sen. Bill No. S877A, Assembly Bill No. A1743A (NY 2007).
[14] Id.
[15] Id.
[16] H.R. Rep. No. 123, 98 Cong., 1st Sess. At 76 (1983).

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the original 10 year lien period, will be effective only from the time the renewal judgment is docketed in the county clerk's office where the original judgment was docketed, except where a notice of commencement of action for a renewal judgment, (pursuant to the proposed amendment CPLR 5014-a) was filed in the office of the county clerk where the original judgment was docketed (and in any other county where a transcript of the judgment was filed) prior to the expiration of the original 10 year lien period. Achievements like this amendment, no matter how great or small, go a long way toward improving the working environment for members of our Association.

Just as we have another month of winter facing us, so too, our industry is in for some additional rough sledding in the coming months. But with continued hard work and effort by our members to improve the perception and professionalism of our industry, hopefully, spring cannot be far behind.

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W 6:00 p.m. – 8:30 p.m.

R62.9502101
TITLE INS POLICY
April 5, 2008
1 Session(s) Taught
S 9:30 a.m. – 1:30 p.m.

R62.9501101
RESIDENTIAL RE SURVEYS
March 29, 2008
1 Session(s) Taught
S 9:30 a.m. – 1:30 p.m.

BY ANA LORD, NYSLTA RECEPTIONIST

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We welcome our newest NYSLTA members:

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