



# FIDELITY NATIONAL TITLE UPDATES

NOVEMBER 2008

"Appreciate the **Fidelity** Difference"

SPECIAL EDITION

## 2008 NY LEGISLATIVE ROUNDUP

This summer, Governor David A. Paterson signed into law several pieces of legislation, including one concerning real estate brokers' rights, one affecting state-chartered banks' use of "due on sale" clauses, and another clearing up some confusion as to the obligation to dispose of personal records. We also note that in May 2008, the New York State Assembly passed, and the Senate is now considering, a bill offering foreclosure relief to subprime mortgagors.

### ***BROKER'S COMMISSION ESCROW ACT***

In response to the growing number of residential real property sellers who fail to pay real estate brokerage commissions at closing (despite enforceable written contracts requiring them to do so), on August 5, 2008, the Governor signed into law The Commission Escrow Act (Bill No. A. 7519A/S. 4874 Chap. 436, Laws of 2008) which amends NY RPL § 294-b. Brokers have hailed the Act for providing them with a new aid to collect commissions. The Act requires that when a contractually agreed-upon real estate brokerage commission has not been paid at or prior to closing, the disputed amount must be taken from the sale proceeds and placed in escrow with the county clerk.

The purpose of the Act, which is *effective January 1, 2009*, is to "aid in enforcing the recovery of brokerage commissions for residential real property and cooperative apartments due under affidavits of entitlement filed with the county clerk" (NYS Assembly Memorandum). While the prior law (NY RPL § 294-b) provided for the filing of such affidavits, the affidavit alone frequently proved ineffective in compelling sellers to pay commissions. As a result, brokers were left with no recourse other than to pursue the seller through costly litigation.

Under the Act the broker still must file an "affidavit of entitlement to commission for completion of brokerage services" with the recording office of the county in which the property is located. However, the amendment enhances the effectiveness of such an affidavit because it requires that commissions not paid at closing be paid into an escrow account with the appropriate county clerk. The amount deposited from the sale must be equal to the lesser of the net proceeds of the sale or the amount of the unpaid portion of the agreed-upon commission. After closing, the two parties (the seller and the broker) would be left to determine their respective rights to the escrowed amount either in court or by some other agreed-upon process.

*"On August 5, 2008, the Governor signed into law a new subprime lending reform bill meant to protect borrowers of "subprime" mortgages. Watch for a future issue of this publication for details of this important legislation."*

In addition to filing the affidavit, the Act imposes several other requirements on the broker, including (1) service of the affidavit on the seller (and the seller's attorney if known) within five business days after filing the affidavit; and (2) a written contract of brokerage employment with the

seller containing the following statement in clear, bold type:

**AT THE TIME OF CLOSING, YOU MAY BE REQUIRED TO DEPOSIT THE BROKER'S COMMISSION WITH THE COUNTY CLERK IN THE EVENT THAT YOU DO NOT PAY THE BROKER HIS OR HER COMMISSION AS SET FORTH HEREIN. YOUR OBLIGATION TO DEPOSIT THE BROKER'S COMMISSION WITH THE COUNTY CLERK MAY BE WAIVED BY THE BROKER.**

If neither party commences an action within sixty days from the day the deposit is made, the seller is entitled to petition the court for an order directing payment to the seller plus accrued interest, but such an order shall not be deemed to determine the broker's rights to a commission. A broker

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# Fidelity National Title Updates

NOVEMBER 2008

"Appreciate the **Fidelity** Difference"

SPECIAL EDITION - Page 2

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still may commence an action to determine the parties' rights under the brokerage agreement, but must do so within six months of the date of the deposit.

It is important to note that the new law specifically requires that the establishment of the escrow (or the seller's failure to do so) does not constitute or create a lien against the property and does not interfere with the payment of other liens of record so that title may be transferred with no harm to the buyer.

Finally, it is worth mentioning that the Act speaks only to a "seller" of real estate and, as drafted, appears not to apply to buyers and buyers' brokers.

## AMENDMENT TO "DUE ON SALE" LAW

On July 7, 2008, the Governor signed into law an amendment to New York's Banking Law § 6-g (Bill No. A. 251/S. 5621, Chap. 152, Laws of 2008). The amendment limits the use by New York State chartered banks of "due on sale" clauses in mortgage instruments related to certain types of transfers of certain real property.

A "due on sale" clause in a mortgage instrument gives the lender the right to demand that the borrower pay the remaining balance of the loan when a property is transferred. Currently, Federal law restricts federally-chartered banks from using such clauses when a residential property is transferred between family members. The property transfer in such case is not a "sale" and, therefore, is not subject to repayment of the mortgage balance.

Prior to the amendment, state-chartered banks were not subject to the same rule which led to inconsistent results and a great deal of confusion among members of the bar. Under the new law, which is effective July 7, 2008, *with respect to residential property containing less than five dwelling units*, including cooperatives and manufactured homes, state-chartered banks may no longer exercise "due on sale" clauses to require the full principal balance of a mortgage be paid upon the following transfers:

- C On the death of a joint tenant or tenant by the entirety;
- C Granting of a lease of three years or less without an option to purchase;

C To a relative resulting from the death of the borrower;

C To the spouse or children of the borrower;

C Resulting from a divorce, legal separation, or an incidental property settlement from one spouse to another; or

C Into a living trust in which the borrower is a beneficiary who retains occupancy rights.

In practice, it appears that state-chartered banks rarely exercised their option pursuant to the "due on sale" clauses in these types of transfers. Therefore, the new amendment can be read as simply codifying current practice. However, in adopting this law, the Legislature gives consumers a statutory *safe harbor* against debt acceleration in certain types of transfers, some of which are commonly used in estate planning, i.e., transfers and conveyances involving family members or living trusts.

## NEW YORK AMENDS LAW ON DISPOSAL OF PERSONAL RECORDS

On September 4, 2008, the Governor signed into law an amendment to "The Disposal of Personal Records Law" (§ 399-h of New York's General Business Law) (Bill No. A.10625/S.7895, Chap. 516, Laws of 2008). The amendment, which became effective upon signing, clarifies that the requirements regarding disposal of records containing personal identifying information apply to *all corporations and associations, including not-for-profit corporations and non-profit organizations*.

Intended to protect consumers from identity theft, New York's Disposal of Personal Records Law required entities that gather personal information, such as SSNs, drivers' license numbers, bank account numbers or mothers' maiden names, to take appropriate steps when disposing of such information, including shredding, destroying or redacting the personal identifying information before disposal, or to take actions consistent with commonly accepted industry practices that the entity reasonably believes will prevent unauthorized access to such information.

The need for this amendment arose as a result of confusion whether the existing law applied only to for-profit

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# Fidelity National Title Updates

NOVEMBER 2008

"Appreciate the **Fidelity** Difference"

SPECIAL EDITION - Page 3

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corporations or organizations. This confusion appears to have been prompted by the definition of "business person" in the existing law as "any natural person, or agent or employee of such person that is conducting business for profit" seemingly putting an emphasis on the "for profit" element. This was not the legislature's intent.

The amendment clarifies the law by deleting the definition of "business person", above, and adding to subsection (2)(d) language stating that "an individual person shall not be required to comply with this subdivision unless he or she is conducting business for profit." As the NYS Assembly Memorandum states, "[t]his [clarification] serves to exempt consumers disposing of their own records . . . while capturing, for example, individuals that prepare taxes for profit that are not affiliated with a larger tax preparation firm."

There are strict penalties for violating § 399-h. The NYS Attorney General may sue for an injunction to "enjoin and restrain" violators and/or for fines up to \$5,000. Thus, entities subject to New York's Disposal of Personal Records Law should familiarize themselves with the records disposal procedure to ensure compliance.

## **FORECLOSURE RELIEF LEGISLATION**

On August 5, 2008, the Governor signed into law a new subprime lending reform law (A. 10817/S. 8143, Ch. 472, Laws of 2008) meant to protect borrowers of "subprime" mortgages. Watch for a future issue of this publication for details of this important legislation. However, recent activity in the New York state legislature signals that additional relief for subprime borrowers also may be on the way.

Pending before the State Senate (S. 6724) is a proposed foreclosure relief Bill passed in the NYS Assembly on May 7, 2008 (A. 9695). The purpose of the bill is to provide foreclosure relief for subprime mortgage loans, second mortgages and home equity loans by imposing "a one-year delay between the moment where the lender has proven

entitlement to foreclosure and the actual court order which transfers title and enables foreclosure to proceed." (NYS Assembly Memorandum).

The proposed legislation is a response to the public crisis that exists in the New York state housing market due to the extension of unaffordable mortgage loans, second mortgages and home equity loans. As set forth in the Assembly Memorandum, it is the legislature's hope that this proposed legislation will encourage lenders to settle foreclosure matters out of court to the maximum extent possible. "It is in the interest of New York State to ensure the rights of all parties are protected and that all foreclosures which come into the New York courts during this period are carefully scrutinized." The proposed legislation provides that "such period of time is intended to permit the parties to settle the action outside of court and to forestall foreclosure within the current economic climate."

Under the proposed legislation, once the mortgagee establishes a right to foreclosure, the court-ordered delay (not to exceed one year) would allow the parties to establish a temporary payment schedule until a final settlement can be reached.

The court-imposed one-year moratorium would not be automatically granted. To qualify, a mortgagor would have to establish that they live in the house subject to foreclosure, that they own no other real property, and that the loan at issue qualifies as a subprime loan (as defined in the statute). On the flip side, the lender must establish to the satisfaction of the court, the minimum monthly amount necessary to preserve its relevant financial position. The mortgagor must then establish his or her ability to make such minimum monthly payment to qualify for the moratorium.

Fidelity National Title will continue to monitor this, and other, pertinent legislation.

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# Fidelity National Title Updates

NOVEMBER 2008

"Appreciate the **Fidelity** Difference"

SPECIAL EDITION - Page 4

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