

# FEDERAL STANDARD ABSTRACT

## TITLE NEWS

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### **Transfer Tax on the Acquisition of a Controlling Interest**

On November 18, 2011 the NYS Dept. of Taxation and Finance issued a bulletin clarifying how the transfer tax applies in three instances of acquisition of a controlling interest in an entity holding a real estate interest. First, if the mortgage debt exceeds the fair market value of the property, the tax is nonetheless calculated based on the fair market value. Second, if the mortgage lender pays the transfer tax upon the acquisition of a controlling interest in a real estate holding entity, the subsequent mortgage foreclosure will be exempt of transfer taxes as a mere organizational change. Third, the acquisition of a controlling interest in an entity with an option or contract to purchase real estate triggers the transfer tax because the option or contract is considered an interest in real property for the purposes of the transfer tax. The tax bulletin can be reviewed here: [http://www.tax.ny.gov/pubs\\_and\\_bulls/tg\\_bulletins/rett/controlling\\_interest.htm](http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/rett/controlling_interest.htm)

### **Mansion Tax in the Purchase of Multiple Apartments**

In a second bulletin issued on November 18, 2011, the Dept. of Taxation and Finance issued guidance on the applicability of the additional transfer tax (i.e. the “mansion tax”) on the purchase of multiple residential coop or condo units. “Unless the condominium or cooperative units are combined or are used in conjunction with one another, they are treated separately in determining the additional tax.” Hence, it does not matter how many residential coops and condos are bought in one transaction. What

matters is whether each one of them individually has a value of at least one million and therefore triggers the tax. Aggregation among units sold simultaneously only occurs if the two units have been combined to be used as one. The tax bulletin can be reviewed here:

[http://www.tax.ny.gov/pubs\\_and\\_bulls/tg\\_bulletins/rett/additional\\_rett.htm](http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/rett/additional_rett.htm)

### **The New York Standard Endorsement and NYC Emergency Repair Liens**

In an unusual opinion, the Supreme Court, Kings County, ruled that the New York Standard Endorsement attached to every title insurance policy in New York covers losses for NYC emergency repair liens. The NY Standard Endorsement exists to amend the terms of the policy with respect to mechanics liens because the law on mechanics liens in New York is substantially different from that of other states. In New York, unlike most states, *bona fide* purchasers and lenders take priority over mechanics liens appearing on the record post-closing, even if they relate to work performed before the transaction closed. To contrast, the rule in New Jersey is that mechanics liens filed post-closing but relating to pre-closing work take priority, *unless the closing occurs within 45 days of the filing of a Notice of Settlement*. Hence the reason why the pre-closing filing of a Notice of Settlement is of utmost importance in New Jersey.

The NY Standard Endorsement amends the terms of the ALTA to provide more coverage over “statutory liens” to the insured. Contrary to the intent of the endorsement, the court interpreted

“statutory liens” to include emergency repairs liens, even though Schedule B of the title policy specifically excepted unrecorded emergency repairs liens. *380 Kings Hwy, LLC v. Fidelity Nat’l Title Ins. Co.*, 33 Misc.3d 1233(A) (Kings Cty. Sup. Ct., Dec. 13, 2011).

### **Constructive Trust**

The remedy of constructive trust is well-known to real estate practitioners: It is one of the few remedies that recovers the specific real property rather than result in monetary relief. Constructive trust is most typically imposed among family and friends, for example in those instances where a parent transfers property to someone to administer for the benefit of the transferor’s child, or when someone puts down the “equity” in the purchase of

property but allows someone else to appear in title, with the unwritten understanding that the real property “in reality” belongs to the party that put down the purchase price.

To establish a constructive trust a plaintiff must show (a) a confidential or fiduciary relationship (b) a promise, (c) transfer of property in reliance thereon, and (d) unjust enrichment. In an important decision, the Supreme Court, Second Department, ruled that the element of “transfer may be satisfied where, as here, the party seeking to impose the trust has no prior interest in the property but does contribute funds, time or effort to the property in reliance on a promise to share in some interest in it.” *Augur v. Augur*, 933 N.Y.S.2d 454, 2011 N.Y. Slip Op. 08702 (2d Dept., Dec. 1, 2011).

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