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New requirements affect residential real estate closings

by Gary R. Gehlbach

Arguably the most significant changes in residential real estate transactions in 40 years are now occurring.

The federal Dodd-Frank Act created the Consumer Financial Protection Bureau in 2011, in the midst of and to a large extent in reaction to the residential mortgage crisis then sweeping the nation. Concerned that residential mortgage lenders were not being sufficiently transparent with borrowers and that significant lender's charges were not being disclosed until the closing, the CFPB developed new forms and procedures that are now effective for residential mortgage loan transactions for which applications were made on and after Oct. 3, 2015.

Residential mortgage loans that are subject to the new rules include typical residential mortgage loans, refinances of residential real estate, loans on residential real estate involving 25 acres or less, vacant land transactions, transactions involving residential construction and loans on residential time shares.

Certain loans, however, are not subject to the new rules – home equity lines of credit (which, surprisingly to many borrowers, usually involve a second mortgage on the real estate), reverse mortgages, mortgages secured by a mobile home, no-interest second mortgages made for down payment assistance and loans made by a creditor who does not make more than four mortgage loans per year. Cash transactions not involving financing also are excluded.

For several decades, residential mortgage lenders have been required to provide borrowers with a Good Faith Estimate. This form has been replaced with a new Loan Estimate. As soon as a mortgage lender receives a complete loan application for a residential mortgage, the lender has three days to send the borrower a five-page Loan Estimate.

Because a loan application is not deemed complete for these purposes

Closings continued on page 2

Inside

EEOC rules govern wellness programs

by Douglas E. Lee

While final regulations have yet to be announced, the Equal Employment Opportunity Commission's proposed regulations addressing the application of the Americans With Disabilities Act to workplace wellness programs gives employers some idea of what to expect.

Generally, the proposed regulations allow an employer's group health insurance plan to offer a wellness program only if:

- the program is reasonably designed to promote health or prevent disease;
- participation in the program is voluntary;
- reasonable accommodations are made for employees with disabilities;
- the employer explains to employees what medical information will be obtained and how it will be used and disclosed and
- the program contains restrictions on how the employer can collect medical information and disclose that information to others.

Wellness continued on page 3

NLRB ruling limits ability to restrict employee e-mail use

by Douglas E. Lee

Employers updating their employee handbooks should consider whether their e-mail policies are consistent with a change in National Labor Relations Board precedent.

In *Purple Communications, Inc.*, the Board reversed a prior ruling and found that employees have a presumptive right to use their employer's e-mail system to engage in communications relating to concerted activity – including union activity – during nonworking time. The Board previously had held that an employer could prohibit nonwork-related use of its e-mail system, so long as the employer did not discriminate against concerted activity.

The employer's policy at issue in *Purple Communications* prohibited employees from using "the computer, internet, voicemail, and email systems . . . in connection with . . . activities on behalf of organizations or persons with no professional or business affiliation with the Company" and from "sending uninvited email of a personal nature." The Board held the policy illegal under the National Labor Relations Act because it denied employees the right to solicit one another for union organization purposes on nonworking time.

In its decision, the Board distinguished a long line of cases in which it previously had found that employees do not have the right to use employer property, such as bulletin boards, telephones and copy machines, for organizing activity. The Board said that e-mail was different because "employee email use will rarely interfere with others' use of the email system or add significant incremental usage costs" and that "email systems function as an ongoing and interactive means of employee communication in a way that other, older types of equipment clearly cannot."

At the same time, the Board cast doubt on the "broad pronouncements" in these older cases and stated that the reasoning that prohibited employee use of telephone systems was "unpersuasive." The Board did not overrule those cases, however, leaving those issues for another day.

Closings . . .

Continued from page 1

unless it includes the address and price of the property to be purchased, a lender should be able to issue a pre-approval letter without being required to send the Loan Estimate within three days.

For covered transactions, the standard HUD-1 Settlement Statement that has been used for over 40 years is being replaced by a two-page Closing Disclosure, a three-page ALTA Settlement Statement – Borrower/Buyer and a three-page ALTA Settlement Statement – Seller. The requirement for separate buyer and seller statements is designed primarily to preserve the confidentiality of the buyer's financing terms.

The new rules likely will extend the time between when a sales contract is signed and the closing date. The new Closing Disclosure must be delivered to the consumer at least three days before the closing (excluding Sundays and federal holidays). The lender is then locked in to the charges listed on that Closing Disclosure and cannot change those at the closing.

If the Closing Disclosure is mailed, it will be considered received by the borrower three days after mailing, meaning that if the Closing Disclosure is mailed on a Monday, it will be considered received by the borrower on Thursday. The three-day waiting period then begins, so the earliest the closing can occur is the following Monday.

Perhaps the most significant change will be in actually scheduling closings. Experts in the industry are advising real estate brokers and attorneys that, when contracts are prepared, the closing date should be at least 60 days after the date of the contract to account for the new procedures.

Another change will be in dealing with last-minute events that change closing numbers. For example, buyers often conduct a final walk-through of the property just before closing, and if an issue with the condition of the property arises during the walk-through, it is usually resolved with a credit to the buyer or other adjustment at the time of closing. Depending on a number of factors, such an adjustment could delay the closing for a week or so.

This possibility is especially problematic for closings that are part of a chain of closings among parties that are simultaneously buying and selling residences. While attorneys in the past usually recommended that buyers not take possession before a closing or that sellers not retain possession after a closing, the possibility of closing delays likely will require more flexibility in these instances. Provisions for pre- or post-closing possession might now need to be developed to deal with homeowner's insurance, security deposits and utilities.

While the new changes have received considerable hype and are causing anxiety among real estate brokers, mortgage lenders, attorneys, buyers and sellers, the actual results may be much less disruptive. As typically is the case, time will be the judge.

Changes in estate taxes suggest need to review estate plans

by Gary R. Gehlbach

With the significant increase in the federal estate tax exemption in recent years, the focus for many clients has turned from estate tax planning to income tax planning.

Fifteen years ago the estate tax exclusion was $675,000. Today the federal exemption is $5.43 million and in 2016 will be $5.45 million. The Illinois estate tax exemption, however, is stuck at $4 million, which is still sufficiently high to allow most decedent's estates to avoid filing an estate tax return and paying the estate tax.

At the federal level, a concept called portability applies. When the first spouse dies, that spouse's unused estate tax exemption can be transferred (ported) to the surviving spouse. This means that, at least in theory, a married couple could have a combined estate of $10.86 million and experience no federal estate tax. Interestingly, only 0.14% (that is, fourteen in ten thousand) households are expected to have estates larger than the two-spouse combined federal estate tax exemption.

Illinois, however, has not adopted portability. Therefore, a couple with a potential estate approaching $4 million should engage in estate planning to avoid or minimize the potential estate tax.

For the vast majority of individuals and couples whose estates are worth considerably less than $4 million, generally no estate tax planning is warranted. Rather, the focus is on income tax planning and, more specifically, tax basis adjustment.

A person's tax basis in an asset is generally the cost of the asset or the value of the asset if received as a result of someone's death (or the giver's tax basis if received as a gift during the giver's life), less allowable depreciation deductions. When an asset is sold, taxable gain or loss is usually measured as the difference between the net sales price and the seller's adjusted tax basis. Generally, when a person dies the assets in his or her estate receive a step-up in income tax bases equal to the values of those assets as of the date of death. (Some notable exceptions exist, however, such as assets funded with pre-tax contributions.)

Under fairly traditional estate tax planning for married couples, on the death of the first spouse assets with a value equal to not more than the decedent's estate tax exemption were sheltered by channeling them to a by-pass trust, typically called a Family Trust, for the benefit of the surviving spouse. The Family Trust would be structured so that, when the second spouse would die, the value of the assets in that trust would not be subject to estate tax in the surviving spouse's estate.

The protection from estate tax, however, meant that the assets in the Family Trust did not receive a step-up in tax bases. As a result, any significant appreciation in the value of the assets since the death of the first spouse could lead to substantial income tax when the assets were sold.

Therefore, if estate tax is no longer a concern, using a Family Trust might no longer be good planning. Instead, other estate planning techniques are available to safeguard the assets of the first spouse to die, allowing the surviving spouse to have the benefit of those assets during the balance of his or her life, but ensuring that those assets receive step-ups in income tax bases on the death of the second spouse.

Wellness . . .

Continued from page 1

Like final regulations adopted in 2013, the proposed regulations distinguish between "participatory" and "health contingent" wellness programs. Participatory programs require only participation and base rewards on participation rather than on satisfaction of a standard related to a health factor. Health contingent programs, on the other hand, require employees to satisfy a standard related to a health factor (such as maintaining a specified cholesterol level) or require employees to complete an activity related to a health factor (such as attending a specified educational session) to obtain a reward.

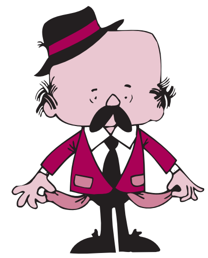
Participatory programs are permitted under existing regulations as long as they are made available to all similarly situated employees. Health contingent programs are subject to several additional requirements, including a requirement that rewards not exceed 30 percent of the total cost of employee-only coverage under a plan (or up to 50 percent if the reward relates to tobacco prevention or reduction).

Under the proposed regulations, a wellness program cannot condition a reward on an overly burdensome amount of time for participation, use unreasonably intrusive procedures or place on employees significant costs related to medical examinations. If an employer collects medical information on a health questionnaire, it should provide follow-up information or advice, such as feedback about risk factors or using aggregate information to design programs to treat any specific conditions.

In regard to reasonable accommodations, the proposed regulations provide that accommodations must be offered to all employees with disabilities, whether the wellness program is participatory or health contingent. For example, an employer might have to provide a sign language interpreter for a deaf employee attending a nutrition class or a large-print version of written materials for an employee with impaired vision.

Secured creditors face new bankruptcy requirements

by Megan G. Heeg



Two recent changes in the bankruptcy arena serve to increase the obligations of secured creditors seeking to be paid in a bankruptcy case.

First, on Dec. 1, 2015, most official national bankruptcy forms were replaced with substantially revised, reformatted and renumbered forms. The revised forms include proof of claim forms and reaffirmation documents.

The main goal of the new forms is to make all forms easier to use and understand. These new forms, however, require creditors – especially creditors holding a residential mortgage – to file more detailed proofs of claim, which will result in more pages, more paperwork and more disclosures.

Second, a recent decision of a federal appellate court requires secured creditors' attention. In the decision, the U.S. Court of Appeals for the Seventh Circuit (which includes Illinois) held that a secured creditor must timely file a proof of claim in a Chapter 13 case in order to receive a distribution under the debtor's plan. Before that decision, uncertainty had existed as to whether both secured and unsecured creditors were required to file proofs of claim within 90 days of the date set for the first meeting of creditors.

With the court's decision applying the deadline to all creditors, a secured creditor that does not timely file a claim no longer will be entitled to receive a distribution under a Chapter 13 plan. A failure to file a claim, however, does not affect the creditor's lien, and a secured creditor that does not to file a proof of claim still can enforce its lien through foreclosure, even after the debtor receives a discharge.

In Print and At the Podium

Mr. Lee was named an Illinois Leading Lawyer in 2015. Leading Lawyers are selected through a survey of peers, and the total number of Leading Lawyers is limited to fewer than five percent of all lawyers in Illinois . . . An article by **Mr. Gehlbach** on recent changes in federal estate tax procedures was published in the Illinois State Bar Association's *Trust and Estates* newsletter . . . **Mrs. Heeg** recently presented to the Winnebago County Bar Association's bankruptcy section about debtors' exemption claim rights and limitations . . . After 20 years on the board of directors of Open Sesame Children's Learning Centers, **Mr. Lee** retired as president of the board. **Mrs. Foulker** then was one of two people elected as co-president of the board . . . **Mrs. Foulker** has been elected as a member of the board of directors of the United Way of Lee County . . . **Mrs. Considine** is completing the first year of her two-year term as president of the board of directors of the Dixon Area Chamber of Commerce & Industry . . . **Mr. Lee** is serving as vice-chair of the board of directors of KSB Hospital.

Deals and Decisions

As a U.S. Trustee in bankruptcy matters, **Mrs. Heeg** continues to refer bankruptcy fraud cases to the U.S. Trustee's office. In October, the U.S. Trustee's office recognized her work at its annual trustee training seminar . . . **Mrs. Considine** recently completed an extensive dissolution of marriage trial that continued over the course of several months and involved complex maintenance and business valuation issues . . . **Mr. Lee** has been admitted as a member of the Iowa bar . . . As counsel for a developer, **Mr. Gehlbach** helped procure approval from the City of Dixon for the restructuring of a residential subdivision . . . **Mr. Lee** recently assisted a client in preparing several work site safety policies . . . **Mr. Gehlbach** successfully handled two complex estate tax returns . . . Both **Mr. Gehlbach** and **Mr. Lee** continue to represent sellers and purchasers of local businesses . . . **Mr. Lee** continues to represent employers in unemployment appeals.

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