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# Times Have Changed in NYC Coop Real Estate

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Co-op apartments, rare outside of New York City and its surrounding suburbs maintain a substantial presence in the region's real estate market. Co-op properties range from income-restricted, affordable units to luxury apartments occupying entire floors of buildings on Fifth Avenue. While the majority of new construction projects in the city are condo developments, by a large margin most apartments in the five boroughs are still units within co-op buildings; owner-occupied co-op apartments outnumber condo units by nearly 3-to-1 in New York City. The average sale price of a co-op unit city-wide was over \$800,000 in 2018. Despite their prevalence in the market and the significant investment purchasers make when buying a unit, title insurance policies are not typically issued to buyers. Attorneys representing clients who are buying a co-op unit may want to reevaluate this position and consider recommending their clients obtain title insurance.

## LIMITS TO THE TRADITIONAL CO-OP LIEN SEARCH

Conventionally, attorneys representing the purchasers of co-op units or lenders financing transactions address potential title issues by relying on the information and protections of a lien search prepared by a title company. The parameters of such a product are restricted - only the information provided by the attorney requesting the search are used to populate the report. For such searches, it is outside the scope of the title company to determine if all appropriate parties are being searched or if any items returned in such a search affect the subject property. It is thus the responsibility of the attorneys to make such determinations. Even if the lien search is accurate, the distinct nature of co-op ownership requires additional diligence beyond a review of a lien search. Unlike real property, there is no evidence of ownership recorded in the public records. With the exception of UCC Financing Statements (and in New York City in more recent years, transfer tax cover pages,) there are no recorded documents directly connecting an owner to a unit. Only possession of the stock certificate and proprietary lease evidences one's interest in the co-op unit. In instances where these documents have been lost, uncertainties arise. A purchaser or lender might have to rely upon representations and records from various third parties: lenders which might have held the documents as collateral for loans, stock ledgers maintained by co-op corporation's board, maintenance records of the managing agent, etc.

## A BETTER ALTERNATIVE - TITLE INSURANCE

With these limits in mind, title insurance might be an appealing option for purchasers and lenders. The insurance shifts the risk of loss covered by the title policy to the title company for the above title matters. When preparing to issue a title policy, the title company may identify matters which would never be disclosed in a standard lien search. It becomes the responsibility of the title insurance underwriter to determine if additional searches may be required and that any potential issues are satisfactorily addressed. Once issued, the title company's policy covers the insured for matters covered by the policy for losses up to the full purchase price or loan amount. The coverage provided under the policy is therefore monetarily and conceptually much broader than the errors and omissions coverage under a co-op lien search.

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## SPECIAL AREAS OF RISK

### FEDERAL TAX LIENS

Out of convention, lien searches follow the real property standard of searching the sellers for federal tax liens only in the county in which the property is located. For condos and conventional homes, this is sufficient to discover liens which might attach to the property. However, as personal property, liens upon the shares in co-ops work differently. The IRS may file federal tax liens in alternate jurisdictions in which the taxpayer resides, and enforce that lien upon the co-op shares. Unlike money judgment creditors, the IRS does not need to levy or serve a notice of execution upon the shares to perfect its lien. In other words, liens filed outside the subject property's county- even outside the state- may attach to a unit and such a lien would never be disclosed in a standard co-op search.

Without title insurance, the buyer or lender must rely on the borrower or seller to provide all possible jurisdictions in which liens might be filed, and manage the complexity of arranging the searches. There is no method to search for federal tax liens on a national level; the liens are recorded accordingly to the local custom in various offices (at the city, county, and/or state level) and with different indexing standards.

### ESTATES

Another area in which the particular treatment of co-ops versus realty which might induce a purchaser to consider title insurance is when a sale is being made out of an estate. In any sale of a co-op by an estate, the personal representative of the estate must be the party effectuating the transfer- heirs or the surviving spouse (except in specific instances) cannot do so. Typically, the transfer agents require standard documentation of any estate before the corporation will consent to the sale: a current certification that letters testamentary remain in effect, the New York State Release of Lien of Estate Tax, and the affidavit of debts and domicile as requirements for an estate to transfer shares. Even if the co-op's transfer agent has reviewed this documentation, additional problems which might be apparent only through a thorough examination of the Surrogate's Court file, such as subsequent challenges to the personal representative's authority or specific bequests would not be apparent.

Recent changes to the IRS's policy regarding the release of federal estate tax have also complicated co-op closings and created the potential for delays or uncertainty over title being clear. In the past, the IRS would issue a Release of Lien upon receipt of the tax return, basic estate documentation and a proposed closing statement; this would be provided in advance of the closing and could be relied upon as proof that no lien of federal income tax would attach to the unit. However, the current practice for the IRS requires far more documentation than what was once required, and will only provide a conditional commitment to release a lien. A particularly onerous requirement is for an escrow agent to hold the net proceeds in escrow for an indeterminate amount of time until the final closing letter is issued. At some point following closing, the Release of Lien specific to the unit will be issued. The title company would obtain and review the documentation to reach a comfort level whereby it would issue a policy insuring there is no lien upon the unit.

### CONCLUSION

As the monetary value of the average co-op unit in New York City now far exceeds the liability covered under a co-op lien search, buyers, lenders, and their attorneys face potential exposure resulting from incomplete or inaccurate searches. Furthermore, the scrutiny applied to sellers by the co-op corporation's management may not be as comprehensive as a transaction should demand. Buyers may presume that their full investment is protected against any potential title issues - in today's market, attorneys might present them with the option of obtaining the added security provided by a title policy.

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