

Mortgage satisfaction conundrum: What is in the future? Part 2

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Lenders' (and investors) originating and closing new loans on real property rely on their title insurance policies to (among other covered matters) maintain their priority claim on the property securing a loan to the landowner(s). These title policies serve to attract investors to offer mortgage loans to landowners in the United States. The policy, however, does not serve to actively police a payoff lender's performance of its duty to issue and properly record a discharge of the mortgage lien.

In most circumstances, the underwriting title insurance company issued the policy on representations by the attorney closing a transaction that the title commitment's requirements and conditions were fully met. One such requirement typically conditions the issuance of the policy on the full payment or satisfaction of open loans and the cancellation or discharge of the securing mortgage lien. Yet originating lenders' pressures to immediately issue the title policy and title insurers' needs for premium remittances drive the practice of title policy issuance without confirmation of a properly executed and recorded mortgage lien discharge. I am told that this practice is based on well-calculated business factors measured against predictable covered risks.

This may make sense from the title company's perspective, but what about from the perspective of the attorney who closed the offending transaction or the one seeking to process a new transaction? The attorney who closed the prior transaction typically represents to the title underwriter that the title commitment's mortgage discharge requirement is satisfied even though a recorded mortgage satisfaction may not have been verified. The attorney supports this representation after confirming the amount of the payoff with the lender's payoff department, verifying the payoff amount and per diem on the HUD-1, confirming payoff borrower's written commitment to accept responsibility for shortages, confirming acceptance of the sufficiency payoff funds by the payoff lender, verifying the funds were debited from their trust account, and confirming that the payoff lender did not deliver statutorily specific objections to the payoff. The title insurance underwriter issues the title policy based on the closing attorney's verification of these checks and balances despite the absence of a recorded discharge of mortgage.

The practice of foregoing confirmation of recorded mortgage satisfaction directly affects the sanctity and marketability of title and often hides mistake, fraud, defalcation and other significant monetary and soft-cost risks.

Other consequences include damaged attorney reputations by realtors, loan officers, loan brokers, and consumers in an already competitive marketplace, or enforcement actions by State insurance regulators or by other State or Federal licensing agencies.

So what is being done to address this confusing conglomeration of factors stemming from

undischarged mortgage liens?

Historically, indemnification of any prior undischarged mortgage lien was the practice in the title industry. Indemnification treaties among title companies have come and gone, but given the level of fraud and mistake stimulating title claims from undischarged mortgage liens, indemnification has been avoided if not completely abandoned.

Part three will appear in the May 10th edition of NEREJ in the Finance section.

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