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Discharge tracking services as a best practices solution to the consumer for paid mortgage liens

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Laws, regulations and contractual duties provide the mortgage servicer and title insurer with the minimum guidelines to comply with the mortgage lien discharge. They do not, however, fulfill the reasonable expectation of the consumer that their paid off mortgage at closing will clear the mortgage lien from their recorded title.

Third-party discharge tracking services have been and currently are the "best practices" solution to the consumer for paid or satisfied mortgage liens. The service provides an inexpensive solution to landowners who typically expect that mortgage liens are cleared from 100% of all properties shortly after closing by either the title company or the lender being paid at the closing. However, in reality, this is not the case and the deviation of reality from the expectation often results in higher costs to mortgage servicers and title companies. With the increasing pressure being placed on servicers and title companies by regulatory agencies such as the Office of the Comptroller of Currency (OCC) and Consumer Financial Protection Bureau (CFPB), and heightened standards such as National Mortgage Settlement Standards to provide the consumer with greater understanding of the transaction and protection from risks associated with the transaction, it is apparent that one of the "best practices" of a closing is assuring that the previous lien on property is removed within a reasonable amount of time after the closing on that property.

It is no secret that mortgages that have been paid but remain undischarged lurk behind numerous title insurance claims in the United States. Whether a mortgage is discharged or not depends on who is asking the question.

To most mortgage servicers the obligation to discharge the mortgage derives from the mortgagee's contractual duties in the mortgage, and from their State statutory duties where the collateralized property is located. These obligations vary from mortgage to mortgage and State to State. Therefore, to the mortgagee, "minimum full compliance" with their obligation to discharge the lien may be fulfilled if, instead of recording, they deliver the discharge to the borrower or to the borrower's settlement agent. This minimum compliance, however, fails, in a large number of cases, to actually result in that discharge being filed in the land records.

The title industry's practices also appear to follow this path of least resistance. The underwriting requirements under Schedule 2 B of most title commitments typically require the payment or satisfaction of the mortgage, and the discharge of the associated recorded lien as a condition to issue the final title policy. However, obtaining that recorded discharge information becomes

problematic especially if the paid mortgagee elects to "comply" with their duty to discharge by sending the discharge document to their borrower. Because the title policy by its terms does not promise "clear title" to the insured, there is no duty to the title underwriter to obtain the recorded mortgage discharge information. The policy promises "insurable title" which promises the insured that any monetary loss or damage associated with an undischarged mortgage will be defended and where applicable paid under the policy terms. And, if the new owner failed to purchase an individual title insurance policy, he or she has no coverage assuring even insurable title.

To the consumer or landowner whose title to the property on which a mortgage was paid or satisfied, there is a logical expectation that "mortgage discharge" means that the title on his or her property is clear of any mortgage lien when paid or satisfied at a closing. In other words, the new owner in a purchase and sale, or the current owner in a refinance, believes that someone has undertaken the duty to assure that, without a doubt, the mortgage discharge is being recorded in the land title records and removed from the real property.

Bottom line - increasing regulation and self-imposed best practices are pushing the entire industry to meet or exceed the expectations of landowners in dealing with the purchase and sale, or refinancing of real property. One of those expectations is that the current owner of the property is left with "clear and marketable title" not merely "good title". Clear and marketable title requires someone engaging in the process of assuring that the prior lien on the property is actually discharged and recorded. Consumers can rely on discharge tracking services to satisfy their expectation to obtain "clear title" - not just "insurable title" after they close on a loan.

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