FRAUD Insights

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By Lisa A. Tyler
National Escrow Administrator

This is our 100th edition! Can you believe it? Since January 2006, we have rewarded $114,000 to title officers, escrow officers and accounting staff for diligently preventing fraud and forgery in their own area of influence.

Since our first edition, we have consistently provided detailed information about how our heroic employees and agents have detected crimes, and aided in the prevention of the same crime being perpetuated elsewhere in the Company.

We have also provided tips and tricks for our employees to avoid common losses and prevent title claims, and information on workplace and personal safety. It is astounding, but in eight years we have never come close to running out of material. So, we have to ask…HAVE you had enough?

There is a reason our Company only handles property escrows. We are licensed and insured to issue title insurance. Many employees have asked why we do not. The article "WHY don't we handle holding escrows?" provides three great examples of why we do not and the pitfalls if we did.

Often it is not the act of a single hero that saves the Company from closing and insuring a transaction with the potential to later have a loss or claim. Many times it is the actions of several heroes acting together to protect the Company from risk of loss. The story entitled "THREE-way split" is a story of three co-workers doing their best to recognize a risk and eliminate it before proceeding to close and insuring the transaction.

Using adverse possession with criminal intent is not a new game, but it has become more widespread. Read "THE people of the state of California v…" to find out how alleged fraudsters may have used adverse possession laws to literally steal properties.

This edition contains the fourth story in the continuing saga of FIRPTA nightmares. In this story an escrow officer at another company holds back the funds post-closing to pay the withholding to the IRS, pending the outcome of the seller's application for a waiver or reduction of the amount due. The escrow did not have any written instructions to hold back the funds. Three months later the escrow officer discovers the seller never sent the application to the IRS! Now the remittance is late and the penalties are steep.

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Publisher
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Editor
Lisa A. Tyler
National Escrow Administrator

WHY don't we handle holding escrows?

A holding escrow does not involve the transfer or encumbrance of real estate. A holding escrow is a two party agreement to hold funds pending the outcome of conditions. We are licensed title insurance providers. We operate with the understanding of our regulators and our insurance carriers that escrow transactions are handled in connection with the issuance of a final policy of title insurance. There are certain departments within the Company that ARE licensed and authorized to handle holding escrows, such as construction disbursements. This story is not about one of those departments.

Typically a holding escrow will involve one individual or entity raising capital from multiple investors for an eventual purchase, not necessarily real estate related. Sometimes an entity raising the capital wants an escrow/title company with a reputable name (in order to lend legitimacy to their scheme and to give the investors a level of comfort) to hold the investor's funds until all the capital is raised. Some escrow officers have learned this the hard way. Here are three examples:

Example #1 - We have a file with $171,128.96 in it from the year 2000. The escrow officer opened the file as a holding escrow only. The agreement was between the City and the Department of Fish and Game. The purpose was for the City to find a place to relocate the burrowing owls on a parcel of land they wanted to develop.

The expiration date of the holding agreement was 2002, however, the land is still not developed and the owls have not been relocated. The City and Department of Fish and Game have not been in contact with our offices in the last ten years. How do we resolve this monetary issue?

Example #2 - Investors loan a junior lienholder money to purchase a first deed of trust now in default in order to save their lienholder's interest from being foreclosed out. The investors deposit their funds into escrow. Once enough funds are accumulated to buy the loan, the existing note holder endorses their note and assigns their deed of trust to the second lienholder.

The second lienholder does not require title insurance, since they are already a lienholder in jeopardy. The second lienholder does not further assign their interest to their investors. What happens next?

The owner of the property does not suddenly start making payments on the first and second loans; instead they default and the property is subsequently lost to foreclosure. The beneficiary of the first and second lien is now the owner of the subject property. They fix up the property and sell for a profit and fail to pay off the investors who once invested money in the buy-out of the note and deed of trust.

The investors are out hundreds of thousands of dollars and want the title company – not our company - (who failed to record assignments of the deed of trust into their names) reimbursing their money.

Example #3 - A movie producer approaches an escrow company to handle a holding escrow to fund the production of a movie. According to the holding agreement deposited into escrow, the funds will be wire transferred from investors until the minimum budget for the film is met.

The film production commences. Several large deposits are received and the escrow holder starts to receive bills for movie production, before all the capital is raised to meet the minimum budget. The producer instructs the escrow officer to pay the production costs to three different entities. She promptly complies.

Subsequently, the funds are stolen by the "movie producer" who established fake entities to receive the wire transfers for escrow. The investors are wondering why the funds were released without all the capital first being raised in accordance with the written agreement. They are looking for the escrow holder for full reimbursement of their investment.

These are just a few of many examples of why we do not handle holding escrows that do not involve the issuance of a title insurance product.

TELL US HOW YOU STOPPED FRAUD

settlement@fnf.com or
949.622.4425

THREE-way split

In May of 2013, ServiceLink received a contract for an all-cash sale for a Buyer to purchase an REO bank owned property in New Jersey for $59,850. The title was not clear at the time the buyer entered into the purchase contract because the seller/bank was waiting for a deed in lieu (DIL) from the original owner and lien releases to be recorded.

To expedite the closing process, the ServiceLink closer asked the attorney who prepared the DIL and lien releases if they could record the DIL and lien releases with the Buyer's new purchase deed. The attorney agreed.

The ServiceLink closer received the original DIL and lien releases for recording. They had the purchase deed prepared and executed by the seller/bank representative. The transaction closed in June, the file was completely disbursed and documents were sent out to a vendor for recording.

The recording service vendor rejected the documents which were prepared by a law firm handling the DIL and sent them back for correction. Before you know it, it was December and the purchaser had since fixed up and re-sold the property. In fact he had it under contract with a new buyer and could not complete the sale because he was not recorded as the owner of the property.

After getting all the original documents back from the recording service, the ServiceLink closer noticed the DIL document was missing and now she needed to have a new DIL executed or find the original one. She contacted the attorney's office who stated they had it and corrected it for recording, but would not release it now because there was a new lien of record.

Kim Arndt and Chris Daniel, the assistant vice presidents and directors at ServiceLink working tirelessly on this never-ending transaction, did some research and found out the new lien the attorney discovered was already satisfied. The attorney finally agreed to send the corrected DIL back to ServiceLink for recording. The closer at ServiceLink sent the documents to another recording service vendor who expedited the request and finally had the documents recorded on January 31, 2014.

This is where it gets crazy! After the original documents were recorded and sent back, the abstractor reported a Notice of Settlement of record. It appeared the original owner, who signed the DIL, had a buyer to purchase his property and recorded a notice of the impending sale.

Kim and Chris acted swiftly again and contacted ServiceLink's account executive/director for this REO bank, Cherri Springer. They brought her up-to-speed on the transaction and recorded Notice of Settlement. She called the title company that recorded the Notice of Settlement and asked if their file from the original owner had closed.

Luckily, it had not, but it was scheduled to close on February 7, 2014. Cherri explained to them their "seller" was no longer the valid owner of the property and that he had executed a DIL in 2013. They stopped the sale transaction.

Sometimes when a transaction goes on and on with post-closing issues it can be put on the "back burner" and become the lowest priority. That did not happen in this case. Chris, Kim and Cherri stayed on top of the transaction, reacted swiftly to correct documents, research liens and ultimately stop an intervening sale and deed. For their efforts they have been rewarded $1,000 and a letter of recognition from the company.

MORAL OF THE STORY

Documents sent for recording have to be scrutinized for accuracy and completeness. If the recording documents are returned for errors it is important to correct them as quickly as possible and then attempt recording again. If there is any lapse of time, the public records should be re-examined for intervening liens, conveyance deeds or any other document recorded that might cloud the title to the subject property.

Any recorded documents placing a cloud on title have to be removed or dealt with prior to recording the documents from the current transaction, enabling the insurer to issue a valid title insurance policy or policies after recordation. The process is tedious and tiresome, but necessary none the less, since our policies insure free and clear marketable title to owners and lien position or status to lenders.

If the clouds on title are not cleared prior to recording documents for the current transaction, the insured owner or lender might be in a position to make a claim against their policy, which will cost the company time and money to process and possibly have to pay-out the policy limit.

THE people of the state of California v...

What would you do if the police showed up at your door and told you the home you thought you legally purchased was the subject of a major fraud indictment with the Attorney General of the State of California? Twenty-three separate sets of homeowners are facing this circumstance as the result of an indictment issued by the Attorney General, wherein it is claimed six people from Fresno, Calif. ran a statewide housing scheme using adverse possession laws to fraudulently seize homes throughout the state.

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Pursuant to the indictment, the suspects, two of which are attorneys, are charged with 288 felony counts including perjury, filing false court records and preparing false evidence. According to the Attorney General's filing, the scheme involved locating seemingly abandoned residential properties and filing for adverse possession of the property in court in order to obtain title.

Once title was obtained, the property would then allegedly be restored and then sold to unsuspecting buyers. Under California law (Code of Civil Procedure 325), an individual can claim adverse possession of real property if he or she has occupied or claimed it continuously for at least five years and paid property taxes for that period of time, among other requirements.

According to the Attorney General's filing, since 2006, the adverse possession pleading on at least twenty-three homes filed by the defendants allegedly provided factually impossible and knowingly fraudulent evidence and statements in court under penalty of perjury in

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order to obtain the properties.

The alleged scheme was uncovered when the true owner of a residence in Santa Barbara County, sought an equity loan in 2010 and contacted a title company in order to determine if there were any liens against her property. The true owner was notified that third party had been listed as the deed holder of the home in July of that year.

After seeking assistance from the Legal Aid Foundation of Santa Barbara County, a court determined that third party's claim to the property was fraudulent and restored ownership to the true owner. The court then notified the California State Bar and the California Attorney General's office opened an investigation in June 2011.

For the families who thought that they had legally purchased these homes, they are all in danger of losing their homes to the superior claims of the true owners or their heirs. Then, their only recourse may be to seek restitution from the defendants or to make a claim against their title policies, if they had purchased a policy.

FIRPTA nightmare #4

The sellers were foreign and knew they were subject to FIRPTA Withholding, but they were not completely prepared. They wanted to file form 8288-B, Application for Withholding Certificate, requesting a reduction or waiver, but they did not yet have a U.S. Taxpayer Identification Number (TIN) and the file was ready to close. The sellers did have an attorney they were working with.

The escrow officer, not an employee of the Company, agreed to close the deal and hold 10% of the gross sale price totaling $31,200 in escrow file until the sellers received their U.S. TIN and Withholding Certificate from the IRS. The buyer knew nothing about this. There were no holdback instructions in the file. There was not a completed 8288, 8288-A or even an 8288-B in the file.

Three months after closing, the sellers' attorney sent over the W-7 Application for IRS Individual Taxpayer Identification Number and a Form 8288-B Application for Withholding Certificate. The forms had never been sent to the IRS for processing. Per the regulations, the seller had to file the W-7 and 8288-B PRIOR to the closing.

The escrow officer panicked and escalated the file to the escrow manager who contacted the buyer and seller to obtain the 8288, 8288-A so they could send the $31,200 to the IRS. Obviously the withholding would be late which means the IRS would issue a penalty notice to the buyer since the buyer was never even notified of the seller's foreign status, much less had agreed to the holdback.

MORAL OF THE STORY

If a foreign seller is going to file a Form 8288-B Application for Withholding Certificate requesting a reduction or waiver of the withholding prior to closing, the buyer must agree to hold back the entire withholding amount in escrow, along with the completed forms. It will take the IRS at least nine months to answer the request and issue a Withholding Certificate.

The buyer has to be involved in the agreement to hold funds, because the IRS names the buyer as the withholding agent. They have 100% responsibility to make sure the funds are timely remitted to the IRS once the 8288-B has been processed and a certificate has been issued reducing the amount of the withholding. The buyer only has 20 days from the date of the certificate to send in any funds due the IRS, along with the completed Forms 8288 and 8288-A.