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Title Insurance: Common Title Issues and Fixes

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The lender title insurance policy is a contract of indemnification from the title insurer to the lender that their lien is valid and has priority over other liens against the real property securing the mortgage loan, unless specific carveouts are outlined in the form of exclusions and exceptions. To make a loan, most mortgage lenders, including loans sold on to secondary markets will require a lender's title insurance policy be obtained. This paper will explore some of the common title issues concerning lender policies and provide curative avenues to explore with and under the guidance of the title insurer.

Abstracts of Judgment

An Abstract of Judgment is generally a summary of a court case judgment that details the creation of a lien on the defendant's real property when filed of public record. In addition to lien priority, there can always be an issue of whether the abstract of judgment was properly filed or has any validity.

Generally speaking, title insurers will require release or partial release of subject property of the current transaction from the judgement lien. Release should be executed by the current judgment lien holder and state it releases the property in full from the lien and judgement, even if the judgement debt and liens on other property survive. The release should reference the Abstract of Judgment and all liens securing the judgement. Some underwriters might agree to accept an affidavit of payment and/or sufficient evidence of satisfaction of judgment from the debtor or the debtor's attorney.

When the party to the transaction is the judgement debtor and the property is the homestead of that person, there is a specific procedure outlined in Tex. Prop. Code §52.0012(f) for release of lien on homestead property. This procedure requires at least a 30-day waiting period after recording and notice to the creditor to allow the creditor to record a contradicting affidavit.

There are times an Abstract of Judgment is filed against someone with the same or similar name to the borrower and therefore is listed on the Commitment. When it can be reasonably determined that the proposed borrower and debtor on the Abstract of Judgment are not the same person, the Abstract of Judgment can be removed from the Commitment. An Affidavit of Identity can sometimes be used to establish that the party to the transaction is not the judgment debtor, but generally requires corroborating evidence determined sufficient by the insurer's underwriter. The form of affidavit generally identifies the transaction, the full legal name and address of the affiant and all other names used by that person and may include other identifying information. The affidavit should also identify the judgment with affiant affirmatively denying that they are the debtor under penalties of perjury.

A discharge in bankruptcy does not automatically remove a judgment lien.

If the lien was recorded on or after September 1, 1993, it is extinguished if:

The property was owned by the debtor when bankruptcy was filed (Tex. Prop. Code §52.042(a)) or was acquired after the bankruptcy was filed (Tex. Prop. Code §52.042(b)), and

The debt evidencing the judgment is discharged (generally requires that it be listed on the debtor's schedules in time for the creditor to file a proof of claim).

BUT it is not extinguished if the property was owned before bankruptcy and the debt was not discharged in bankruptcy **or** the property is not exempted in the bankruptcy and is abandoned during the bankruptcy.

The statute of limitations to enforce judgment liens can also eliminate them as requirements or exceptions in the title commitment. The statute of limitations for private creditors (Tex. Prop. Code §52.006(a)) is generally 10 years from recording. Statute of limitations on judgment liens in favor of the United States (28 United States Code §3201), the State of Texas or a state agency (Tex. Prop. Code §52.006(b)) is generally 20 years from recording.

Pending Litigation

In addition to indemnity against loss, the policy also provides for defense of the insured in litigation involving a potentially covered risk, therefore pending litigation generally requires both risks to be analyzed and mitigated in issuing a policy. First it must be determined if the litigation will be finally concluded before the transaction closes. If so, then the key issues include whether all necessary parties were properly joined, how those parties were served, when the judgment becomes final and non-appealable and what is the ultimate effect of the judgment on the covered risks. Obviously analyzing and mitigating these issues before judgment is entered will streamline the underwriting process.

If the litigation will continue after closing, the uncertainty and therefore the risk increases. If the insurer agrees to provide coverage it will generally be by express insurance under P-39, so that an exception will be made for the pending lawsuit, with a provision such as "Company insures the Insured against loss, if any, sustained by the insured under the terms of this Policy by reason of a final, non-appealable judgment of a court of competent jurisdiction that divests the Insured of its interest as Insured because of this right, claim, or interest. Company agrees to provide defense to the Insured in accordance with the terms of this Policy if suit is brought against the Insured to divest the Insured of its interests as Insured because of this right, claim, or interest."

Factors to consider include the nature of the allegations related to title, the parties, and the status of the litigation. Generally, a review of all pleadings, the title insurer's underwriter will require the docket sheet and orders of the court. Discovery and motions may also be helpful, for example summary judgment motions often give a good summary of the arguments of the

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