

"HOW DO I GET THIS EXCEPTION WAIVED?"

Practical Advice for Shorter and Less Stressful Residential Closings for the Attorney New to the Practice of Real Estate Law

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Every one of us has, at one time or another, been asked to do a real estate closing for a friend or relative. It is commonly thought by those outside of the legal profession that all attorneys, having graduated from law school and passed the bar exam, know how to do real estate closings. Isn't that what they taught us in law school? Friends and relatives are rarely persuaded when you tell them that you specialize in divorce or criminal law. You should still know how to do a simple real estate closing!

Alas, how many of us have learned that there is no such thing as a "simple" closing for a friend or relative? Even among real estate specialists, law firms do not typically "handhold" new attorneys through their first closing, and the new attorney is often stressed, baffled and confused throughout the entire closing process. It certainly does not make for a pleasant experience.

New attorneys would indeed fare well if they all signed up for a seminar that prepares them for their first closing. Chicago Title Insurance Company offers such a seminar several times per year titled, "Surviving Your First Real Estate Closing." However, such a seminar may not be scheduled until after your first closing. More than likely, you will have to struggle through your first closing on your own, without the benefit of a "nuts and bolts" real estate seminar. So what do you do?

This article will identify a few issues that often

arise in closings and offer some advice on resolving the issues before arriving at the closing table. The article is not comprehensive, but rather, its scope is limited to questions relating to title insurance that have been asked by attorneys during closings.

1. Review the title commitment and survey BEFORE the closing

As the seller's attorney, it is your responsibility to order the title commitment and the survey. If you do not review the title commitment and survey until the evening before an early morning closing, or worse, at the closing table, you cannot expect to have a smooth closing. At best, you will have caused everyone in the closing, including yourself, unnecessary closing delays and stress. Upon your receipt of the title commitment and survey, review the title commitment and the survey individually and then make sure that the two documents make sense when read together.

A) "Do attorneys really have to know how to read SURVEYS?"

Yes! Every real estate attorney should know the basics about surveys. The buyer's and seller's attorneys, as well as the title company, should review the survey and bring up unresolved issues before the closing.

1) Read the certifications by the surveyor. Is the

surveyor's work a true plat of survey or something less than a survey, such as a mortgagee's inspection plat?

Also make sure that all the easements and encroachments shown on the survey appear as Schedule B exceptions on the title commitment.

-) Is the survey recent (six months or less)?
-) Does the survey have the original seal?
-) Does the legal description on the survey match the legal description on the title commitment?
-) Are there any building line violations? Building line violations are basically encroachments of improvements over the building line delineated on the original plat of subdivision or in a declaration, grant or reservation of covenants and restrictions. The crucial information you should obtain from your client is the length of time that the improvements have been in place and whether your client is the only party in the neighborhood who is violating the building line. Are the neighbors also violating the building line? Once you have that information, call the title company and ask if an endorsement to the policy can be issued insuring over the building line violation.
-) Are there any encroachments? Look at the survey to see if any improvements on the property encroach onto adjoining land or onto easements. How large is the encroachment? Send or fax a copy of the survey to the title company and ask if an encroachment endorsement can be issued. If the neighbor's improvements encroach onto your client's land, the title company will not furnish an endorsement.
-) What else does the survey show? Look for evidence of any unrecorded easements, such as a neighbor's walkway traversing the land, or boundary problems, such as joint driveways, common parking lots, retaining walls or any overhanging eaves or fire escapes.
-) Does the survey reflect all the easements, encroachments, etc. that appear on the commitment? If it does not, call the surveyor.

- 8) Does the property have access to a street? If, on the other hand, access to the land is via an easement, make sure that the survey shows the easement and that the title company insures the easement as an additional parcel in Schedule A of the policy.

B. "How do I get the LIENS waived from the commitment?"

Liens are most frequently the culprits responsible for long closings. Experienced real estate practitioners will invariably tell you to keep nearby a checklist of the various types of liens affecting real estate and the corresponding statutes of limitations. Such a comprehensive checklist may be found in the January/February 1998 *Title Issues* article by Richard Bales titled, "Liens Affecting Real Estate: A Checklist."

Title companies should not raise a lien on the title commitment if the statute of limitations has already run, but as we all know, occasional mistakes do occur. You, as the attorney, should know the law and use your knowledge to save time and unnecessary stress.

Let's assume that the lien is properly raised on the title commitment as an exception to title. Call your client and find out more information. Was the lien paid off years ago? Was your client planning on paying the lien with the proceeds from the closing? Does it even affect your client? You will need this information when you contact the title company to ask how to get the title exception waived.

Obviously, if it is your client's lien and the lien has not been paid, you should obtain a payoff letter from the creditor. If your client insists that the lien was paid, you should obtain a release of the lien. In unusual circumstances, present the facts to the title company and consult a title company underwriter as to the options that are available to your client.



1) *Mortgage* (735 ILCS 5/13-116)

Limitations Period: If the mortgage has a due date on its face, then the lien expires 20 years after the due date. If there is no due date, then the mortgage expires 30 years after the date of the instrument. The title company will probably not waive the mortgage based on the expiration of the statute of limitations unless the land was purchased by a bona fide purchaser.

Clearance: Release; Payoff letter (make sure that the letter includes a "per diem" interest amount, i.e. an amount to be added to the payoff amount to cover additional interest for each day after the payoff date contemplated in the payoff letter).

2) *Judgment Lien* (735 ILCS 5/12-101)

Limitations Period: A judgment is a lien on the debtor's property for seven years from the date the judgment is rendered (not from the date the memorandum of judgment is recorded). The judgment may be revived within 20 years from the date it was entered. The death of the debtor can extend the limitations period by one year.

Clearance: Release; Payoff letter.

3) *Federal Tax Lien* (26 USCA 6321)

Limitations Period: The statute of limitations is 10 years from the assessment of the tax. The enforcement period may be extended for an additional 10 years if the IRS re-files the Notice of Federal Tax Lien within 30 days of the expiration of the original period. The expiration date of the lien appears on the recorded lien form and conforms to the limitation period rules stated above.

Clearance: Release; Certificate of Discharge of Property (issued by the IRS; it releases a specific parcel of land from the lien and no other land; requires a copy of the Closing Statement); Conditional Commitment Letter (issued by the IRS; it is a version of a "payoff letter"; requires the payment of the amount specified and often a holdback of additional funds in a title indemnity until the Certificate of Discharge of Property is issued). For more information, see the September/October 1998 *Title Issues* article by Howard Samson entitled

"The 'Release of Lands' Concept."

4) *Illinois Income Tax Lien* (35 ILCS 5/1101)

Limitations Period: The statute of limitations is 20 years from the date of recording of the lien.

Clearance: Release; Payoff letter.

5) *Mechanics Lien* (770 ILCS 60/1 et seq.)

Limitations Period: This is a lien for labor or materials that a contractor or sub-contractor furnishes to the improvements located on the land. The statute of limitations is 2 years from the date the work was completed, unless an owner (or any other necessary party) extends the time period by filing bankruptcy. See Garbe Iron Works, Inc. v. Priestler, 99 Ill.2d 84 (1983).

Clearance: Final lien waiver along with a release of lien or a payoff letter.

6) *Condominium Assessment Lien* (765 ILCS 605/9), *Sewer and Water Lien (Municipal)* (65 ILCS 5/11-139-8), *Weed Cutting Lien* (65 ILCS 5/11-20-7 for municipalities, 60 ILCS 1/105-15 for townships)

Limitations Period: None.

Clearance: Release, Payoff letter.

7) *Child Support Lien* (735 ILCS 5/12-108)

Limitations Period: None.

Clearance: If the recorded instrument is notice of a child support order, you will need a letter from the Clerk of the Circuit Court or from the Illinois Department of Public Aid stating that child support payments are current. If payments are delinquent or if the recorded instrument is notice of an enforceable lien for past due child support payments, the delinquency should be paid prior to or through the closing. The Clerk's or Department's receipt for payment will be sufficient for clearance purposes. If the total child support obligation is satisfied, you should obtain a release from the Clerk of the Circuit Court or the Department of Public Aid.

C. "Is a TITLE INDEMNITY or a PERSONAL UNDERTAKING an option for my client?"

If all else fails and you are unable to get the



necessary documents to clear up the lien in time for the closing, call the title company to see if a title indemnity is an option.

A title indemnity is a written agreement between the party responsible for clearing the lien (usually the seller) and the title company, whereby funds are deposited with the title company to cover the lien, any interest and an appropriate cushion for possible defense costs, etc. This option may be available only if your client has sufficient funds to deposit in the title indemnity and if a title company underwriter approves the amount of the title indemnity. If your client fails to clear the lien from title, the agreement permits the title company to use the title indemnity funds to clear the title.

In very limited circumstances, a personal undertaking may be accepted by the title company. A personal undertaking is, in effect, a title indemnity without the money and therefore, dependent on the creditworthiness of the indemnitor. When signing a personal undertaking, a seller or buyer agrees to indemnify the title company from any adverse consequences of waiving the lien from the title policy. Personal undertakings are not widely available to clear title defects. Title company underwriters will only approve personal undertakings from individuals who have the financial wherewithal necessary to "make good" on such an agreement of indemnification without a deposit of funds to secure performance.

D. "My client's DISCHARGE IN BANKRUPTCY wiped out that lien, right?"

As a new attorney, you may not encounter this issue immediately. However, it is certain that at some point in your practice you may consider asking a title insurer to waive a mortgage, judgment or other lien because the property owner has been discharged in bankruptcy. Don't be deceived by the apparent simplicity of the question. Title insurers are frequently asked to waive liens based on the argument that a lien is no longer a lien against the property after a discharge of the debtor's personal liability. This argument is not a correct

statement of the law. A bankruptcy discharge only relieves the debtor from personal liability for those debts which have been discharged. It is well settled that a pre-existing lien is not affected by a bankruptcy discharge. See, e.g., First National Bank in Toledo v. Adkins, 272 Ill.App.3d 111 (4th Dist. 1995); First Federal Savings Bank v. Drovers National Bank, 237 Ill.App.3d 340 (2nd Dist. 1992). Unless there is a specific bankruptcy court order voiding a lien on the land that was perfected prior to the filing of the bankruptcy petition, the lien is not affected by the debtor's discharge and the title insurer will not waive the lien as an exception to title.

2. Obtain EXTENDED COVERAGE for the buyer

In every transaction, you should evaluate the type of coverage that your client is obtaining. The items that appear in Schedule B of the title commitment are the "special" exceptions to title. Such "special" exceptions relate to the particular parcel that is being insured and include mortgages, judgment liens, encroachments, etc. "General" exceptions relate to matters that affect every piece of property but which cannot be ascertained by the title insurer through an examination of the public records. The Owner's Policy contains five "general" exceptions, as follows:

- 1) Rights or claims of parties in possession not shown by the public records.
- 2) Encroachments, overlaps, boundary line disputes and any matters which would be disclosed by an accurate inspection and survey of the premises.
- 3) Easements, or claims of easements, not shown by the public records.
- 4) Any lien or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.
- 5) Taxes or special assessments which are not shown as existing liens by the public records.

It may seem impossible to insure over any of the



"general" exceptions since there is no evidence in the public records as to any of these matters. However, in most residential transactions, upon submission of clearance such as a recent survey of the land and an ALTA statement, the title insurer will provide "extended coverage" over all of these "general" exceptions.

The ALTA statement is in the nature of an affidavit that must be signed by all parties to the transaction. It discloses the identity of the parties in possession, whether there are any contracts or leases, and if any work that is lienable under the Mechanics' Lien Act has been performed within the last six months.

As the seller's attorney, you must furnish the buyer with the coverage specified in the real estate sales contract. Consequently, in most residential transactions you will be providing the title company with the necessary documentation for full "extended coverage" over the five "general" exceptions. As the buyer's attorney, make sure that you obtain "extended coverage" if your contract so requires.

3. Conclusion

You will undoubtedly encounter more complex issues than those outlined above. Your expertise in real estate will grow from years of gained experience. The purpose of this article is only to point out a few issues that have in the past proven to be stumbling blocks for attorneys new to the practice of real estate.

The best advice for shorter and less stressful closings is to always review the title commitment and survey well in advance of the closing and call the title company when questions arise. Your title company can tell you what type of documentation will suffice to clear title, how much will be necessary to set up a title indemnity, and whether certain risks that appear insurmountable can actually be underwritten for a premium.

Finally, make sure that you understand the state, county and municipal transfer tax requirements (including inspections, final water readings and/or fees) and that you have purchased the transfer tax stamps, if applicable, prior to your closing. Good luck!

