

PENN ATTORNEYS TITLE ALERT

DATE: 04/30/09

RE: Title Alert 2009-05 Fighting Mortgage Fraud ~ Suspicious Releases & Deeds

Mortgage fraud has become a significant area of loss for the Company. We spend millions of dollars each year on this category of claims. In light of this, it is important to implement appropriate underwriting practices to curb these claims.

Two areas of fraud that seem all too common involve forged mortgage releases or satisfactions and forged deeds. Set forth below are best practices for examining titles with respect to these issues.

SUSPICIOUS RELEASES¹ or SATISFACTIONS

Purpose

The purpose of this section is to call attention to cases in which

- (i) a suspicious mortgage release appears in the chain of title, or
- (ii) a suspicious mortgage release is introduced into the insured transaction to be recorded at or near the time of the closing.

Changes to Search and Examination Procedures

Suspicious mortgage releases are those which do not occur in the normal sequence of a sale or refinance transaction. A mortgage release that was filed shortly before a closing is immediately considered suspicious. Any mortgage release that is filed without an accompanying transaction is suspicious. As we should be suspicious of mortgage releases we should be suspicious also of other liens that appear to be released under similar circumstances. Under the narrow circumstances outlined below, a mortgage that is the subject of a suspicious release must be shown as a numbered exception in the commitment for title insurance, along with the purported release as a sub item. The commitment for title insurance must include a requirement for satisfactory proof of payment of the debt secured by the mortgage that is the subject of the suspicious release. See detailed examination standards below.

Changes to Closing Procedures

The transaction closer, escrow officer, title officer, attorney or agent who closes the transaction will be responsible for verifying, prior to closing and issuance of a title policy, that the obligation secured by the mortgage that is the subject of the suspicious release has in fact been satisfied. This includes any release that is presented for recording at the closing or is discovered in a bring down of the title prior to closing.

¹ The term "release" as used herein means a release, partial release, or full satisfaction of mortgage.

Title Alerts from 1997 to present are available on our website at: <http://www.pennattorneys.com>

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Verification

This may involve contacting the lender for verification, requiring copies of cancelled payoff checks, running a credit report (with appropriate permissions) or other satisfactory evidence of a valid payoff. Please consult with us for additional guidance on what constitutes accepted methods of verification of the release.

Reviewing suspicious releases

With the rush to efficiency over the last several years many examiners have been looking at releases rather than reading them. With suspicious releases, very careful attention needs to be paid to the text and contents. Below are listed specific examination standards to be used in reviewing these instruments.

Examination Standard for Detecting Recently Recorded Fraudulent Releases

When examining the chain of title, the following steps must be taken to detect possible fraudulent release documents. These steps should apply whether performing an initial title search or an update or bring down of the title.

Full copies of all releases recorded within the last 24 months must be reviewed unless any one of the following conditions exists with respect to the released mortgage:

- The mortgage was recorded prior to but not reflected in a policy of title insurance issued by a company in First American family.
- The mortgage was recorded prior to the last full value transfer (apparent arms length sale transaction including a purchase money first mortgage to an institutional lender.)
- The mortgage was recorded more than 15 years ago.

A release may be relied upon, after review, if *all* of the following conditions exist:

- 1 It is a full release of the mortgage relating to the property to be insured (as opposed to a partial release of some other property.)
- 2 The release was recorded subsequent to a new mortgage in favor of an institutional lender, the proceeds from which would have logically been used to pay off the obligation secured by the released mortgage. For example, it makes sense that the release exists because a new mortgage with a similar or greater face amount was recorded recently but prior to the release in question.
- 3 The release does not appear questionable on its face to the examiner (e.g. release is executed by the borrower, or is hand written, is "doctored up" in any way, etc.)

*If the above 3 criteria are not met, the mortgage affected by the suspicious release will be shown as an exception on Schedule B-II, along with a requirement for proof of the validity of the release on Schedule B-I of the title commitment, in substantially the following form:

B-II Exception: **"Mortgage recorded [insert recording reference for mortgage] and the effect of a document purporting to be a release thereof recorded [insert recording reference for release]."**

B-I Requirement - **NOTE: The Company will require satisfactory proof of full payment of the debt secured by the mortgage listed as exception number _____ on Schedule B-II hereof, prior to removing the exception or insuring the contemplated transaction."**

*Leaving the mortgage and its suspicious release as a Schedule B item on a final policy is not an acceptable practice!

Remember that prior to closing and issuance of a title policy, verification will be required to determine that the obligation secured by the mortgage which is the subject of the suspicious release has in fact been satisfied. This includes any release that is presented for recording at the closing or is discovered in a bring down of the title prior to closing.

Steps to verify the payoff of the underlying debt might include the following inquiries:

- Contacting the lender for verification of payoff and a zero balance.
- Requiring copies of the cancelled payoff checks.
- Running a credit report on the seller/owner/borrower (with appropriate permissions).
- Other appropriate evidence of payment requested after discussion with us

As discussed above, this procedure must be followed unless credible information exists which validates that the secured obligation has been satisfied.

SUSPICIOUS UNINSURED DEEDS

Purpose

The purpose of this section is to announce a new examination standard for detecting forgeries and otherwise validating uninsured deeds in the chain of title, as well as to address circumstances under which questions relating to the validity of such transfers may be resolved.

Changes to Search and Exam Procedures

Many of the fraud claims we encounter have something in common -- uninsured deeds in the chain of title. Unless such an uninsured deed falls within specified exceptions, the validity of the deed must be verified before it is relied upon. If the searcher/examiner is unable to determine the validity of the uninsured deed based upon these guidelines, then it is recommended that the commitment show title as vested back to the last insured transfer. The "effect" of the subsequent uninsured deed(s) should be shown as an exception.

Uninsured Deeds in the Chain of Title which Generally Do Not Require Verification

Notwithstanding the foregoing, and except as provided in the "Signature Comparison" section below, it is acceptable to vest through an uninsured deed without further verification in any of the following circumstances:

- 1 If the deed in question was recorded over five years ago and the examiner is unaware of any evidence of a challenge to the transfer.
- 2 If the deed is a family transfer from the record owner(s) to his/her/their family Trust or a transfer from a family Trust back to the Trustors/Settlors of the trust.
- 3 If the deed or transfer is an interspousal or interfamily transfer where no one is being removed from title or is losing any of their previous interest in the title. For example, a deed executed solely for the purpose of changing status of the vesting from tenants in common to joint tenancy. On the other hand, a deed from one spouse to the other should appear suspicious if the grantor is thereby removed from title, and the deed is not accompanied by a final divorce decree authorizing such transfer.
- 4 If the deed was recorded in conjunction with a final court order determining ownership, e.g. a court order pursuant to a probate, divorce, or quiet title action affecting the property.

Signature Comparison

In all cases, the signature on an uninsured deed must be compared to the signature of the grantor contained on a recorded purchase money mortgage given by the grantor at the time of his or her acquisition. If no purchase money mortgage exists to perform this comparison, utilize other available signatures on other mortgages in the chain of title. Although we are not handwriting experts, if, in the opinion of the examiner, the signatures do not match, the validity of the deed must be verified before the issuance of a policy of title insurance.

Verification of the Validity of an Uninsured Deed

Determining the insurability of title following an uninsured deed is not a perfect science. Please consult us if you need or want assistance.

Some factors which should be considered during this process are:

- 1 Is the signature of the grantor genuine? Has it been compared to a reliable signature, such as the signature on a previous purchase money mortgage?
- 2 Is the notary public reliable? In some states, online searches can be performed to determine whether or not the notary public is in good standing.
- 3 Is the property owner-occupied? Many forgeries, particularly those that do not involve family members, involve either vacant land or non-owner-occupied property. This is not always the case, but it may be a factor.
- 4 Was consideration paid for the transfer? Again, this is useful information but not determinative
- 5 How long ago was the deed recorded? Our standard for carefully scrutinizing uninsured deeds includes a five year time period. This is because in many jurisdictions, five years may help (not always) with a variety of defenses. But generally speaking, the newer the uninsured deed, the more suspicion it deserves.

Above are some of the considerations. But what is an acceptable underwriting standard to clear the issue?

In the end, it will frequently be a judgment call. Contacting the grantor at a reliable address or telephone number is the best approach. If you can contact the grantor, and verify that you are truly dealing with the grantor and not an imposter, most suspicious deeds will either be confirmed to be forgeries or determined to be valid transfers.

Either of the following two underwriting requirements are acceptable, provided the identity of the affiant or grantor can be established:

- An affidavit from the grantor that the transfer was freely and fairly made with or without consideration.
- A new deed signed and notarized in front of a Penn Attorney® or notary public.

As always, contact us if you have any questions.