

Late Recording of Mortgages, Current Payoff Issues and Closing Problems Caused by Desperate People

Late Recordings of Mortgages and Avoidance by Bankruptcy Trustees

POSTED:

Jan 2, 2003

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1. Bankruptcy Code Section 547 permits trustees to "avoid" (cancel) mortgage when:
 1. refinance mortgage is recorded more than 10 days after closing (funding or signing?) **and**
 2. borrower files bankruptcy 90 days or less after the date of recording.
 3. If loan is purchase money mortgage, lender has 20 days from closing date to record mortgage.
2. Mortgage is void (not a lien) if avoided. Lender becomes an unsecured creditor.
3. Recording process: Sign deliver to register recording stamp imaging posting
 1. What is recording: recording stamp or posting?
 2. Elapsed time: 20 to 120 days for entire ROD process
4. Trustees began making these claims when recordings became slow in refinance boom. National problem. One hundred claims in one underwriter's regional office alone.
5. Recordings: deliver to title company or register of deeds immediately after closing.
 1. Get a receipt.
 2. Mark your file to show when documents were sent to register or title company.
 3. Ask your title company what its recording lag is.

4. Keep evidence of each **attempted** recording.
6. Defenses that may be asserted:
 1. Contemporaneous exchange of value (deadline missed, but not by much).
 2. Prompt delivery for recording, delay caused solely by ROD. See *Gold v. Interstate Financial Corp.*, 2005 WL 110446 (Bankr.E.D.Mich.) (discussion of 91-day delay in recording, but no ruling by court).
 3. Earmarking doctrine: the money was designated to pay off an old debt, the amount of the old and the new are the same, so there is no harm to the estate or creditors by treating the new loan as if it was the old. Cases accepting the earmarking doctrine: *Kaler v. Community First Nat'l Bank*, 137 F.3d 1087 (8th Cir. 1998) and *Shapiro v. Homecomings Financial Network, Inc.*, 318 B.R. 119 (Bankr.E.D.Mich. 2004). Cases rejecting it: *In re Messamore*, 250 B.R. 913 (Bankr.S.D. Ill. 200) and *Gold v. Interstate Financial Corp.*, 2005 WL 110446 (Bankr.E.D. Mich.).
 4. Equitable subrogation.
 5. Prior mortgage still of record when bankruptcy petition filed (trustee had notice of mortgage lien that was paid off).
7. There are different ways of resolving the claims:
 1. Pay trustee based on what he/she would get for unsecured claims. For example:
 1. Sale price of property \$149,000
 - Less 6% broker's commission (9,000)
 - Less undisputed mortgage (27,000)
 - Less Trustee's attorneys' fees (27,000)
 - Available for creditors \$86,000
 - Paid to other creditors (12%) \$10,300
 - Paid to lender (88%) \$75,700
 - Offered \$9,483 (30% of \$10,300 plus \$4,000 att'y fees)
 2. Buy the unsecured claims if the amounts are small (\$5,000 in unsecured v. \$100,000 mortgage).

Current Issues in Mortgage Payoffs

1. Paying off a loan in foreclosure
2. Choosing the right means of delivering the payoff
3. Payoffs lost by couriers
4. Emergency plans for interruptions in courier service due to terrorist acts
5. Payoffs of equity loans revisited
6. Partial releases of mortgages

See attached section of Nielsen, *Title and Escrow Claims Guide*, discussing the recent cases on loan payoffs.

Closing Problems Caused by Desperate People

1. Recognizing the person who is in a desperate financial condition, and the 21st Century brands of financial hardship:
 1. Gambling addiction
 2. Shopping addiction
 3. Divorce
 4. Job loss
 5. Get-rich-quick schemes that steal savings
2. Identify the flim-flams that prey on desperate people, and make sure these operators are not in your customer base:
 1. Buyers of property in foreclosure.
 2. The Dorean Group "mortgage elimination" scheme.
3. Normal assumptions do not apply to the person who desperately needs money.
4. Adopt practices that take into account the risks in dealing with the desperate person:



1. Affidavits
2. Payoffs
3. Promises to act post-closing
4. Attempting to collect for closing errors after closing
5. Effect of immediate filing of bankruptcy petition
6. Divorce decrees

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