

6-30-2010

## Do You Believe in Ghosts Coming Back to Haunt You?

Investors rely heavily on the closing agent to give them a title policy at closing to insure their interest in the property. Unfortunately most investors don't know the difference between an insurable and marketable title and it can come back to haunt them in the future.

An insurable title simply is a title that may have deficiencies attached to it, but a title insurance policy is issued to insure the amount of the purchase price – except that the title policy may have “exceptions or exclusions” that are not covered by the policy. Some exceptions are expected, such as boundaries and liens, code violations and judgments that are not recorded in the public record. But for the title agent to protect himself and close the transaction, he must generate exceptions/exclusions that should be disclosed by a seller and could be deal killers if buyers knew.

A marketable title by definition does not have any deficiencies that could be found with an insurable title. Plain and simple, the title is clear of any defects. It can't be said any plainer. While there will be exceptions to the title policy, they will be standard exceptions that have to be in place for the title insurance company to issue the title policy. This type of policy is the only type any buyer should accept unless he is prepared to do what is called a Quiet Title Action in the judicial system to quiet any potential claims against his title.

Newbie investors may only have a small frame of reference with closing a purchase and that's usually from when they bought their own home. In this instance they had to sign a couple of inches of mortgage documents and the buyer's lender was looking over their shoulder to make sure they got a marketable title, not just an insurable title, or the lender would not have sent any money to the closing table.

As an investor, you will be closing with cash or hard money. If you are using a hard money lender, he should be scrutinizing your closing more closely than a bank because he has his personal money or a private lender's money at risk. Most hard money lenders are now requiring some money from any investor borrowers and many are requiring personal guarantees.

If the investor has his own cash to close, he is likely to trust the closing agent to do the right thing. This may not be the best strategy because the result could be a very expensive lesson in what should have been done in the initial contract writing and checking on the work the closing agent does.

While checking the closing agent may sound impossible since the average investor is focused on getting the property sold, here are three critical things that can be done that will at least partially insure you are getting a fair shake and a marketable title:

1. Always put this, or a similar clause, in your contracts, "Seller to provide clear, marketable and insurable title at closing." Ask your attorney for the wording he uses.
2. As soon as the closing has the lien letters from the municipalities that have jurisdiction over your property, review them carefully to see what issues there may be with your property. In one recent case, the lien letters I reviewed clearly stated that the particular city did not cover the area where the property was located. The letter went on to say that the area in question was high in code compliance issues and that the buyer should contact the correct municipality immediately! The closing agent had intended to use that lien letter for issuing the title policy.
3. Before you go to the closing, ask to see the title commitment from the closing agent. This is the same document that will become your title policy after your purchase deed has been recorded. Look at the exclusions and exceptions to the title policy in the Schedule A or B, whichever is applicable for that title company. Before the actual closing and before you give the closing agent money, ask that they delete the B-1 exceptions and your title commitment suddenly becomes your title policy. If certain exceptions or exclusions are not deleted, you know you could have a problem in the future.

A very common problem we have with factory closing agents that work for banks on REO (Real Estate Owned) properties is simple water bills. The closing agent does a lien search but the water bill is not a lien, or not just yet. What can happen is you close on the property and when you or your buyer goes to turn on the water the city or county says, "OK" but only after you pay the open water bill. We have seen water bills over \$2,000! Remember, electric bills follow the person on the bill, water sticks to the property. If the owner leaves the state, the electric bill may never be collected, not so with the water bill.

Another larger issue with REO title transfers is that we see about 40% - 45% have defects in the chain of title. In one recent case, the foreclosing entity was not a legal entity, but since the homeowner didn't do a foreclosure defense, the title was transferred by auction to this illegal entity. This entity then sold the property to us, or would have if we hadn't had our closing agent shadowing the title work and they caught the problem.

The seller's closing agent went to the Asset Manager and gave him a list from our title company of what deficiencies had to be corrected for us to close. The Asset Manager and the realtor involved tried to cancel the sale and keep our deposit. As soon as we took the issue to a higher authority, the closing agent, realtor and the Asset Manager happily returned our deposit.

But it didn't end there, two months later, the realtor came back and said the title deficiencies would be corrected shortly and they were accepting our last offer of 55%

below what we had signed the original contract for. Don't you wonder what would have happened if an investor had closed on this property and later found out about the title deficiency and that he couldn't sell the property? Do you think they would have been this cooperative once the transaction was closed? No, they would have held out those multiple clauses in their original addendum about the buyer (you) accepting everything ugly attached to the property!

Another common defect is that the parties to the foreclosure are not properly served and much later someone comes forward and says they never knew about the foreclosure and that they would not have let it happen. Naturally they want their home back and they may have a valid claim – which you may have to defend in court if your title policy doesn't cover this contingency.

The title issues come to the forefront when the end-buyer finally sells the property to a buyer who needs conventional financing or when he goes to finance the property using a conventional lender. This would usually be a rehabber selling a property to a retail buyer, or a landlord looking to refinance. The bank carefully checks the title work and when they find the title deficiencies or gaps/breaks in the chain of title, the deal doesn't close – everyone is a loser.

What infuriates me is that some realtors have made their own Addendums that clearly stipulate that the title you are getting is not marketable. At least three brokerage firms locally have adopted the policy of forewarning the investor-buyers that they will get insurable but not marketable title! Read the Addendums carefully and completely, or have your attorney read them, and don't be surprised when you can't sell or refinance a property you counted in getting money out of!

In summary, if you are an investor buying from wholesalers, REOs directly from Asset Managers, or even from homeowners, you better make sure you trust the closing agent you work with. Again, we are so concerned about the issue of marketable title because we encounter it so often that we shadow all REO transactions and close as many as possible non-REOs with our own title agent. Take a little extra time in your closings to make sure you are getting marketable title for every purchase you make, unless you know what trouble you could be getting into or you know how to cure these issues.

To your limitless success,  
Dave Dinkel