

# **Title School: Back to the Basics**

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Chapter 1

## **General Underwriting**

## **The Very Basics of Underwriting**

- Title Policy imposes two duties on the Underwriter:
  1. Duty to Defend
  2. Duty to Indemnify
- Where there is a good chance of litigation, even with no chance for loss, a policy should not be written since the duty to defend and the ultimate cost of defense, in many cases, exceeds the actual loss.
- Off record risks must be considered.

## **Relying on Title Work from Another MVT Agent or Approved Attorney**

Agent or Approved Attorney should certify title on MVT's Certificate of Title form. Fill-in-the blank versions of the forms are available at:

<http://www.mvt.com/Agent/Mississippi/MiscellaneousForms>

- Form 10-1: Application for Title Insurance Commitment and Attorney's First Certificate.
- Form 10-2: Application for Title Insurance Policy and Attorney's Final Certificate.
- Form 10-3: Application for Title Insurance Policy and Attorney's Certificate.

## **Affirmative Coverage**

### ALTA 34-06 – Identified Risk Endorsement

- ALTA 34-06 Identified Risk Endorsement allows you to indemnify against loss or damage occasioned by certain title matters of record which are not likely to cause a loss of title or be enforced against the named insured.
- You should make exception for the identified risk in Schedule B of the policy and attach the ALTA 34-06 endorsement providing affirmative coverage over the exception identified in the endorsement.
- When affirmative coverage over an identified risks is requested, you should secure permission from the home office.

## **Common Underwriting Red Flags**

- Proposed insured is seeking a policy not in connection with a real estate transaction.
- Another underwriter has declined to insure the subject property.
- Borrower, or other interested party, brings a release or subordination agreement to the closing attorney.
- Parties are not able to appear at closing to sign documents.

## **Extra-Hazardous Risk**

- Title through:
  - Tax deed;
  - Sheriff's deed under an execution sale;
  - Federal Marshal's deed under execution sale;
  - Sale by Commissioner of Internal Revenue for unpaid taxes; or
  - Sale following a drug forfeiture.
- Title to land now under or formerly under navigable waters (filled-in land).
- Title to air space or transferable development rights.
- Title by adverse possession.

## **Extra-Hazardous Risk**

(Continued)

- Title acquired through eminent domain/condemnation.
- Title to severed mineral or oil and gas interest.
- Insurance of options to purchase.
- Titles in or through or in trust for individual Indians or tribes, or reservation lands, or tribal property.
- Present or threatened title litigation.
- Transactions refused by other insurers.
- Title through rail roads.

## **Extra-Hazardous Risk**

(Continued)

- Title or easements from the U.S. other than through a patent.
- Requests to insure against “creditors’ rights” claims.
- Requests to insure against “mechanics’ lien” claims.

## **Adverse Possession**

Miss. Code Ann. § 15-1-13

- Adverse possession requirements: Acts of possession (for a ten year period) must be:
  - open,
  - continuous,
  - exclusive,
  - adverse, and
  - notorious.
- A title which is dependent on adverse possession is not insurable unless there is a final non-appealable order from a court of competent jurisdiction confirming title.

Chapter 2

## **Liens and Judgments**

### **Judgment Liens**

- SOL on actions to enforce a domestic judgment is 7 years after rendition plus 6 months to refile. Miss. Code Ann. §§ 15-1-43, 15-1-47, and 89-5-19.
- Running of SOL is tolled by the automatic stay in bankruptcy. Trustmark Nat'l Bank v. Pike County Nat'l Bank, 716 So.2d 618 (Miss. 1998).

## Lines of Credit

- A Line of Credit is “. . . any loan, extension of credit or financing arrangement where the lender has agreed to make additional or future advances.” Miss. Code. Ann. 89-5-21(4).
- Deed of Trust securing a line of credit requires special attention in closings because of two features that differ from a traditional deed of trust.
  - 1<sup>st</sup> - The payoff statement may not reflect the entire balance.
  - 2<sup>nd</sup> - Miss. Code Ann. 89-1-49(4): A deed of trust which states on its face that it secures a line of credit is **not** extinguished by payment of the debt, but must be extinguished according to Miss. Code Ann. 89-5-21(5).

## Procedure for Satisfaction of a Deed of Trust securing a Line of Credit

Miss. Code Ann. 89-5-21(3) and (5)

- Any deed of trust which states on its face that it secures a line of credit is to be satisfied and cancelled by the lender upon:
  - Receipt and payment of all sums owing in connection with the line of credit; **and**
  - A written request by the borrower to cancel the line of credit and the deed of trust securing the line of credit.

## Ad Valorem Taxes

- Ad valorem taxes are due on February 1, in arrears for the preceding year. Miss. Code Ann. § 27-41-1.
- Ad valorem taxes have priority over all judgments, executions, encumbrances or liens whenever created. Miss. Code Ann. § 27-35-1.

## Tax Titles

- Tax sales may violate the due process clause of the Constitution. See Mennonite Board of Missions v. Adams, 103 S.Ct. 2706 (1983) and Deweese Nelson Realty, Inc. v. Equity Services Co. & Beeman Investment Company, 502 So.2d 310 (Miss 1986).
- Tax Title Services (“TTS”) is a company that offers a service that “certifies” that the tax sale process was completed properly. TTS sells its products to purchasers of tax deeds with the promise that the purchasers can obtain title insurance for their property without a quiet title action based on TTS’s guarantee of the tax deed procedure.
  - MVT does **NOT** accept TTS’s product or similar products from other companies.



## Federal Tax Liens

26 USCA § 6321 et seq.

- A federal tax lien is not applicable against purchasers until filed in the county where the property is located.
  - Once filed, the federal tax lien attaches (1) to all real property owned by the taxpayer at the time the federal tax lien is filed and (2) all real property acquired anytime thereafter until expiration of the federal tax lien.
    - Exception – The IRS has stated that a purchase money deed of trust has priority over a previously filed federal tax lien. Rev. Ruling 68-57.
  - The federal tax lien is valid for 10 years and 30 days from the date of the assessment, but may be refiled for additional 10 year periods. 26 USCA § 6502(a).

## Federal Tax Lien

Recorded IRS Tax Lien and Release of Levy

- Lien vs. Levy
  - A lien is not a levy. A lien secures the government's interest in your property when you don't pay your tax debt. A levy actually takes the property to pay the tax debt.
  - The IRS could release the levy (for instance, if the taxpayer is making payments in accordance with an agreement with the IRS). However, a release of the levy is not a release of the lien (the IRS will keep the lien in place).

## Judgment Liens in Favor of United States

- A judgment lien in favor of the United States is valid for 20 years from the initial filing of the judgment in the land records and may be refiled for additional 20 year periods. 26 U.S.C.A. § 3201(c).
- Unlike federal tax liens, purchase money mortgages do not have priority over liens in favor of the United States.
- In order for a subordinate lien in favor of the United States to be extinguished by the foreclosure of a prior deed of trust, a judicial foreclosure is required. 28 U.S.C.A. § 2410.
  - The US must be named as a party to cut off the lien.

## Judgment Liens in Favor of United States

(Continued)

- Even if a judicial foreclosure is conducted and proper notice is given, the United States has a one year period following foreclosure in which the property can be redeemed. 28 U.S.C.A. § 2410(c).
  - If less than one year has passed since the foreclosure sale, include an exception for the right of redemption of the United States.
    - Item \_\_. Right of redemption pursuant to 28 U.S.C.A. § 2410(c) arising out of the following lien(s): \_\_\_\_\_[insert recording info for the lien].

## Effect of State Statute of Limitations on the U.S.A.

Liens of the United States are not bound by state statute of limitations. Magnolia Federal Bank for Savings v. United States of America, 42 F.3d 968 (5<sup>th</sup> Cir. 1995). United States of America (FMHa) v. Muirhead, 42 F.3d 964 (1995).

## Pop Quiz

Question 1: Kramer recently obtained a discharge from a Chapter 13 Bankruptcy. He now wants to sell his house, and asked you to handle the closing. You discover that Newman has a \$20,000.00 judgment lien on the property, which pre-dated the bankruptcy filing, and which was not avoided in bankruptcy. Kramer tells you to disregard the judgment because the bankruptcy wiped out the lien. What do you do?

- A. Insure over the judgment lien because the bankruptcy wiped it out.
- B. Call Jerry, George and Elaine to discuss this because they will know what to do.
- C. List the judgment lien as an exception on the policy since it was not avoided in bankruptcy.

## Pop Quiz

Answer: C

- A discharge releases the debtor from any further personal liability for his scheduled prepetition debts.
- A discharge does not discharge the debtor's real property from *in rem* liens against the real estate that survive bankruptcy.
- **Secured liens ride through bankruptcy.**

## Pop Quiz

Question 2: Mr. Jones filed a Chapter 13 Bankruptcy in January 2010. Prior to filing bankruptcy, ABC Bank held a \$20,000 judgment against him which was recorded in Hinds County. Mr. Jones subsequently obtained a discharge, but the ABC Bank judgment was not avoided. After the bankruptcy was over, Mr. Jones purchased Blackacre. Does ABC Bank's judgment attach to the property Mr. Jones acquired **after** his bankruptcy.

- A. No, it does not attach since the property was acquired after the discharge, even if the lien was not avoided in bankruptcy.
- B. Yes, it does attach. ABC Bank can now proceed to foreclose on Blackacre.

## Pop Quiz

Answer: A

- A prepetition judgment or lien which is not avoided in bankruptcy will not attach to property acquired by the debtor after the debtor receives a discharge in bankruptcy, notwithstanding the survival of the lien *in rem*. While the lien may ride through bankruptcy, it does not attach to the property since it was acquired subsequent to the bankruptcy.
- If Mr. Jones was **dismissed** instead of **discharged**, then the Bank's lien would attach and ABC Bank could execute on the judgment.
  - It is critical for a title underwriter to understand the implications of a discharge versus a dismissal.

Chapter 3

## Estates and Trust

## Unadministered Estates

- Upon death of a person, his property vests immediately in his heirs or in devisees or distributees under his will, if a will has been made. Beach v. State, 173 So. 429 (Miss. 1937).
  - Passage of title to real estate to the heirs does not require settlement of the estate or a court order declaring heirship.
- The court may authorize the sale of real estate when the value of the personal estate is not sufficient to pay the decedent's debts. Miss. Code Ann. § 91-7-189.

## Unadministered Estates

### Heirship Affidavits – Miss. Code Ann. § 89-5-8

Guidelines for Reliance on Heirship Affidavits:

1. Obtain two (2) heirship affidavits to determine the identity of the heirs at law of the decedent.
2. The affidavits must be obtained from disinterested and credible persons.
3. The affiants knew the deceased during his entire adult life.
4. The agent personally believes the affiants to be reliable.
5. The heirship affidavits should be recorded as exhibits to the deed.

## Unadministered Estates

### Claims of Creditors

- If less than 3 ½ years have passed since the date of death of the decedent:
  - Administer the estate in order to cut off creditors; or
  - Add an exception for the claims of creditors of the decedent.
- If more than 3 ½ years have passed since the date of death of the decedent, no exception to the claims of creditors is required.

## Muniment of Title

### Miss. Code Ann. § 91-5-35

If the decedent's Will has been probated as a muniment of title:

- The muniment of title establishes the devisees of the property;
- The muniment of title does **not** cut off the claims of creditors of the deceased; and
- Medicaid recovery and claims of creditors will still need to be addressed.

## Medicaid Lien

- The state of Mississippi has the right to seek recovery of Medicaid payments from the estate of a deceased Medicaid recipient who was 55 years of age or older when the assistance was received. Miss. Code Ann. § 43-13-317.
- The Medicaid Recovery lien is not terminated by any statute of limitations. Article 4, Section 104, of the Mississippi Constitution of 1890.
- To determine if any Medicaid Recovery is due, contact the Estate Recovery Division of Medicaid.
  - Phone Number 1-800-421-2408

## Federal Estate Tax Lien

26 U.S.C.A. § 6324(a)

- The Federal Estate Tax Lien:
  - Attaches as of the date of death of the decedent;
  - Attaches without an assessment or demand for the tax due; and
  - Attaches to all property constituting the gross estate of the decedent.
- Bona Fide Purchasers take title subject to a federal estate tax lien. See Detroit Bank v. U.S., 63 S.Ct. 297 (1943); U.S. v. Vohland, 675 F.2d 1071 (9<sup>th</sup> Cir. 1981).
- SOL for federal estate tax lien is 10 years from date of death. 26 U.S.C.A. § 6324(a).



## Federal Estate Tax Liens

Unlike general federal tax liens, imposition of the federal estate tax lien does not require any recordation of notice among the public records, and is effective even against subsequent bona fide purchasers of estate property. Detroit Bank v. U.S., 317 U.S. 329, 63 S.Ct. 297 (1943); U.S. v. Vohland, 675 F.2d 1071 (9<sup>th</sup> Cir. 1981).

## Trusts

- Determine that the Trust Agreement, or a Certificate of Trust in conformity with Miss. Code Ann. § 91-9-7, has been recorded. Miss. Code Ann. § 91-9-1.
- Determine that the Trustee is authorized by the Trust Agreement to take the contemplated action.
  - A Trustee only has the authority granted in the Trust Agreement.

Chapter 4

## Foreclosures

### Foreclosure Basics

- In a nonjudicial foreclosure, the law should be strictly construed. Even a minor error can be fatal.
- A valid foreclosure of a deed of trust cuts off and extinguishes junior liens and encumbrances. United States v. Boyd, 246 F.2d 77 (5<sup>th</sup> Cir. 1957).
  - Exception – A special procedure must be followed to extinguish a subordinate federal tax lien or a subordinate SBA lien.

## Substitute Trustee

- The beneficiary of the deed of trust has no power to appoint a substitute trustee unless expressly authorized by the deed of trust. White v. Delta Foundation, 481 So.2d 329 (Miss. 1985).
- A foreclosure sale conducted by a substitute trustee appointed by an attorney-in-fact of the beneficiary is void. Webb v. Biles, 6 So.2d 117 (Miss. 1942); Watson v. Perkins, 40 So. 643 (Miss. 1906); Allen v. Alliance Trust Co., 36 So. 285 (Miss. 1903).
  - Exception – If the deed of trust expressly authorizes appointment of a substitute trustee by the attorney-in-fact of the beneficiary, it is valid.

## Substitute Trustee

(Continued)

- The Substitution of Trustee form was properly executed, acknowledged, and recorded in the Chancery Clerk's office in which the land is located. Miss. Code Ann. § 89-5-45.
  - The Substitution of Trustee must be recorded prior to the first advertisement of the notice of sale.
  - Filing with the Clerk is not sufficient. It must actually be “. . . [s]pread at large upon the record. . .”

## Notice of Sale

- The Notice of Sale must be published in a newspaper of general circulation in the county where the sale is to be conducted. Miss. Code Ann. § 13-3-31.
  - If the property is located in more than one county, the Notice must be published in all counties in which the land is located. Cook v. Taylor, 27 So.2d 404 (Miss. 1946); Lee v. Magnolia Bank, 48 So.2d 515 (Miss. 1950).
- The Notice should provide for the time of sale to be between the hours of 11:00 A.M. and 4:00 P.M. Miss. Code Ann. § 11-5-99.

## Notice of Sale

(Continued)

- The location of the sale must be either:
  - In the county in which the land is located; or
  - In the county of the residence of the grantor, or one of the grantors, of the deed of trust. Miss. Code Ann. § 89-1-55.
- The legal description in the Notice must be correct. An insufficient legal description will cause the foreclosure to be void. Seal v. Anderson, 108 So.2d 864 (Miss. 1959), Hancock v. Pyle, 3 So.2d 851 (Miss. 1941), Federal Land Bank v. Kennedy, 662 F. Supp. 787 (N.D. Miss. 1987).

## Substitute Trustee's Deed

(Continued)

- The substitute trustee's deed should contain the following:
  - The names of all parties to the foreclosed deed of trust;
  - The date of the foreclosed deed of trust;
  - The book and page in which the foreclosed deed of trust was recorded; and
  - If the sale is made by a substituted trustee, the book and page in which the substitution of trustee is recorded.
- The omission of the above listed items does not invalidate the conveyance. Miss. Code Ann. § 89-1-53.

## Sufficiency of Sales Price & Prohibited Purchasers

- Inadequacy of price is not sufficient to set aside a foreclosure sale unless the price is so inadequate as to shock the conscience. Central Financial Services, Inc. v. Spears, 425 So.2d 403 (Miss. 1983).
  - Sales prices below 36 to 40 percent of the fair value are so inadequate to shock the conscience and are unconscionable. Litke v. Morris, 2006 WL 897961; 2006 U.S. Dist. LEXIS 16956 (Miss. 2006).
- The Trustee can not buy the land for himself at the foreclosure sale. Miss. Code Ann. § 11-5-101; Lee v. Lee, 109 So.2d 870 (Miss. 1959).
- The beneficiary of the deed of trust may purchase at the foreclosure sale. Miss. Code Ann. § 89-1-63.

## Junior Federal Tax Lien

- When property is foreclosed and notice is not properly given to IRS, a junior federal tax lien will be elevated to a first lien.
- In order for a subordinate federal tax lien to be extinguished by the foreclosure, the IRS must be provided prior notice of the foreclosure sale. 26 USCA §§ 6321 – 7434.
- Even if proper notice is given, the US has a 120 day period following foreclosure in which the property can be redeemed. Treas. Reg. § 301.7425-4.
  - If notice was given, but less than 120 days have passed since the foreclosure sale, include an exception for the Right of Redemption of the United States.

## Junior SBA Loan

- Foreclosure of a senior deed of trust where there is a junior SBA deed of trust.
- Under the language of 28 USC § 2410, the senior lien must be foreclosed judicially and the United States must be served in order for the junior mortgage of the SBA to be eliminated.

Chapter 5

## **Easements and Legal Access**

### **Right of Access to a Public Road**

- Covered Risk 4 in 2006 ALTA Policy provides “[n]o right of access to and from the Land.”
- Confirm that the plat shows the subject property touching a public road.
- If the plat does not show that the subject property touches a public road, confirm there is an easement that connects the subject property to a public road.
- If the subject property does not have direct or indirect access, add an exception for lack of access.
- NOTE: Watch out for limited or controlled access where the insured property abuts on an interstate highway or other major artery.

## Easement Claims

- A missed easement that burdens the subject property.
- Failure of title to easement because the servient estate was not searched.
- Failure of title to the easement because a lien on the servient estate foreclosed out the easement.
- Easement was owned by the borrower but was not included in the insured deed of trust.
- Easement falls short of reaching the subject property or a public road.

## Cemeteries, Burial Grounds and Archaeological Sites

- Title insurance should not be written on lands platted for or used as burial plots.
- If the survey discloses the existence of graveyards, an exception should be made in Schedule B as to that fact.
  - Many state laws allow for an implied easement from public roads to enter upon and tend to the graves.
  - The exception should also include reference to an easement to enter upon, visit and tend to the graves.
- There may also be occasions where a tract of land will include pre-historic burial sites of native people often in the form of mounds. In most states, these are given extensive protection under the law.



Chapter 6

## **Surveys and Legal Descriptions**

### **Pop Quiz**

Which of the following references in a legal description to be insured require no further scrutiny and/or additional Schedule B Exceptions?

A reference to:

- A. Bodies of water
- B. Cemeteries
- C. Wetlands
- D. Road Rights of Way
- E. None of the above

## Pop Quiz

Answer: E

Rationale: If the land to be insured is comprised in any way of, or affected by "A", "B" or "C" above, appropriate exceptions should be added under Schedule B.

Whether an exception should be added due to a reference to a road right of way depends upon whether the legal description runs "along" the right of way or "into" the right of way (for example: "to the center line of Highway 463").

## Derivation Clause

- An error in a legal description is cured by a reference to another deed which correctly describes the land. Leake v. Caffey, 19 So. 716 (Miss. 1896).
  - **Example:** "Being the same property conveyed by X to Y, dated January 1, 2010 and recorded in Book 1 at Page 1."
- If you are attaching the legal description as an Exhibit, it is a good practice to insert after "See Exhibit A" the prior deed reference. This will help limit problems if Exhibit A gets omitted from the recorded deed or deed of trust.

## **Scrivener's Error Affidavit**

Miss. Code Ann. § 89-5-8.

- Notice of minor errors in an instrument affecting the title to real estate may be given by recording an Affidavit of Scrivener's error.
  - The affidavit must be prepared by an attorney licensed to practice law in this state who prepared any instrument in the chain of title to the subject real estate.
- The affidavit will be admissible as evidence in any action involving the instrument to which it relates and will be prima facie evidence of the facts stated therein and the marketability of the title to the real estate.

## **Surveys**

- To remove the Survey Exception from a Commitment and Policy based on a Survey:
  - The Survey must be either:
    - Class A or Class B survey prepared in accordance with Rule 21 Standards of Practice for Surveying; or
    - ALTA/ACSM Land Title Survey.
  - The Survey must be no more than 6 months old.
    - If you know that the survey does not reflect changes to the property, it must be updated.

## Surveys

- To remove the Survey Exception from a Commitment and Policy based on a Survey:
  - If relying on a Rule 21 survey, obtain a Surveyor's Certificate;
  - Mississippi Valley Title must be an addressee on the Plat and the Surveyor's Certificate; and
  - The Plat and Surveyor's Certificate must be reviewed and specific exceptions inserted into the commitment and policy for all adverse matters.

## Common Legal Description Claims

- Failing to attach the exhibit containing the legal description to the deed or deed of trust.
- Attaching the wrong legal description to the deed or deed of trust.
- Legal description erroneously describes property the seller owns next door or across the street that he does not intend to sell.
- Typographical errors (including missing calls) in the legal description.
- Legal description fails to "less and except" property previously sold.

Chapter 7

## Capacity

### Minors

#### General Rules

- In general, a person must be 21 years of age or older to convey or encumber real property.
  - Exception: A married 18 year old may purchase, convey, or encumber real property used, or to be used, as the married couple's actual residence. Miss. Code Ann. § 93-3-11.
- Uniform Transfers to Minor's Act: This Act allows real property to be conveyed to a custodian for the benefit of the minor, and allows the custodian to convey or encumber the real property on behalf of the minor. Miss. Code Ann. § 91-20-1 et seq.

## **Minors**

### Underwriting Guidelines

- When insuring a conveyance or encumbrance where the record owner is a minor, or insuring a title which is dependent upon execution by a minor:
  - The disability of minority must be removed pursuant to Miss. Code Ann. § 93-19-1 et seq.; or
  - A guardianship must be established pursuant to Miss. Code Ann. § 93-13-1 et seq.; or
  - The minor must be over the age of 18, married, and the property to be conveyed or encumbered must be used, or to be used, as the actual residence of the married minor.

## **Mental Capacity**

- Mentally incapacitated persons experience a disability that prevents them from executing a legal conveyance or encumbrance of title to real property.
- Closers of real estate transactions must be aware of the fact that any instrument can be set aside upon proof that the grantor was mentally incapacitated at the time of its execution.
- The following physical signs or characteristics must obligate the closer to cancel the closing of the transaction: amnesia or lack of full memory, drunkenness, drug intoxication, extreme senility, undue influence exerted upon a party by another party.

## Powers of Attorney

Miss. Code Ann. § 87-3-1 et seq.

- As a general rule, insuring any instrument executed by POA, and any title based on an instrument executed by POA, is strongly discouraged.
- In order to insure a conveyance or encumbrance executed by POA, or a title conveyed under POA:
  - Confirm that the POA is acknowledged and recorded in the land records of the county in which the property is located. Miss. Code Ann. § 87-3-1; Kountouris v. Varvaris, 476 So.2d 599 (Miss., 1985).
  - Review the POA to determine that the attorney-in-fact has the authority to convey or encumber real property. A POA should be strictly interpreted and only acts specifically authorized in the POA can be recognized.

## Powers of Attorney

(Continued)

- Determine if the principal is competent or incompetent.
  - If incompetent:
    - Review the POA to determine if it is a Durable POA. Miss. Code Ann. § 87-3-105.
    - Also, obtain an affidavit from a doctor that the principal was competent at the time of execution of the POA.
  - If competent, obtain a written authorization for the specific transaction contemplated.
- If the property is homestead, confirm that the attorney-in-fact is not the spouse of the principal. Miss. Code Ann. § 89-1-29.

## Homestead

- A conveyance of homestead without a spouse joining in the execution of the deed is absolutely void. Miss. Code Ann. § 89-1-29.
  - No subsequent action by the nonjoining spouse alone cures the invalidity of it. Craddock v. Brinkley, 671 So.2d 662 (Miss. 1996); Welborn v. Lowe, 504 So.2d 205 (Miss 1987).
  - Exception: A deed of trust executed to secure the purchase of the homestead property is valid without the spouse's signature. Jarvis v. Armstrong, 48 So. 1 (1908).
    - This exception only applies to the homestead right. If both spouses are grantees in the Deed, both must sign the purchase money deed of trust.

## Pop Quiz

When both spouses own property, how many have to sign a deed of trust on the property?

- A. One
- B. Both
- C. It depends on whether the lender shows one or both as a borrower on the mortgage – who is receiving the proceeds?
- D. Only one provided the property is not part of the homestead of either spouse.



## Pop Quiz

- Answer: B

Rationale: Title is vested in two people. The deed of trust must be executed by all title holders for the lender to obtain a full interest in the property. Both spouses have to sign whether it is homestead property or not.

If the lender sends a deed of trust to you showing only one spouse as the borrower, contact the lender and obtain permission to add the other title-holding spouse to the deed of trust as a borrower.

Chapter 8

## Post Closing Errors and Omissions

## Failing to Timely Record Documents

- A bankruptcy trustee can set aside certain transfers made within 90 days (and in some cases 1 year) prior to the filing of the bankruptcy petition. Section 547(b) of the Bankruptcy Code.
  - A deed of trust falls within Section 547(b) and thus may be avoided.
  - However, a bankruptcy trustee can not avoid a deed of trust that was recorded within 30 days after the closing.
- One court found a settlement agent negligent as a matter of law for failing to record the vesting deed and deed of trust for 6 days. In the 6 day gap, a judgment was recorded against the seller. Huntington Mortgage Company v. Schmenk, 658 N.E. 2d 1109 (Ohio 1995).

## Recording First and Second Deeds of Trust Out of Order

- The borrower takes out a first and second loan on the property at the same time. Both deeds of trust are sent for recording at the same time. The second deed of trust gets recorded in front of the first deed of trust.
  - The result is that the intended first lien deed of trust is not in the first priority position that it was insured to be in.
  - This is particularly problematic if the intended second lien holder forecloses before the intended first lien holder discovers it is in a second lien position.

## Class Dismissed

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