

FEDERAL STANDARD ABSTRACT

TITLE NEWS

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Title News

The Importance of Identification

In arranging and preparing for closing, there are many things which have to be done or the transaction simply will not happen. The buyers are usually thinking of their commitment and the rate-lock from the lender so that they receive the loan which they can afford to repay and avoid losing their down-payment under the contract by defaulting. The sellers are calling the title company to clear liens against the property, if any, and arranging to have the water meter read by the municipality so they, the sellers, can move into the house they are closing on later the very same day. It is a stressful process, to say the least.

In the midst of so many details that must be covered, provided to the proper parties and approved of before closing, it is too easy to forget one of the most important aspects of closing that can shut down the entire process if not provided properly – proofs of the parties' identities. Perhaps you have heard the story of the husband who refinanced his home without telling his wife about it. (The person at the closing pretending to be his wife was the

girlfriend he eventually left her for after the \$200,000.00 credit line was used up.) Maybe you represented the purchaser in a closing where one of the current owners forged the signature of the other to give five mortgages that cannot now be cleared because the wronged party is suing the other one for fraud in Kings County Supreme Court. Oh yes -- and the one who committed the forgery fled the country with \$1,000,000.00 in certified checks, never to be heard from again.

Ill-gotten gain derived through fraud used to be the worst thing that would happen in Real Estate. Then September 11th happened, and everything changed. Not only do the bank attorney, the title company and the parties' attorneys all have to watch out for fraud now. They also must be aware of the use of funds made available at closing being used to sponsor terrorism at home and around the world. Who knows where the money from today's cash-out refinancing is going? Is it being used to fund a cell of terrorists? You may be fairly confident that none of your clients are involved in terrorism, but ask your bank or title company about the subject, and they will be telling you

some interesting stories, like the ones mentioned above. Have you heard about the cash-out refinancing where the owner granted a power to a friend to sign the documents at closing, and that friend didn't want the check sent to the address of the owner or himself, instead asking that the bank's check for \$150,000.00 be sent to a gas station on Route 112 in Patchogue, Long Island, with no individual person's name attached? This loan did not close, needless to say. The bank attorney and title closer shut it down after an hour of signing a Consolidation, Extension and Modification Agreement at the closing table. To go further would have placed the bank and title company in jeopardy of violating the Patriot Act.

Under the Patriot Act, banks must provide proof of parties' identities. The bank attorney must usually sign off on a statement that confirms the checking of the parties' identities and even send a copy of the parties' picture identifications to the bank in the post-closing file. If the bank does not get the proper I.D.s, the bank will call the attorney to ask about it (it has to under the law) and he or she, if this keeps up, may lose the bank's account.

Generally, every picture I.D. must be current. If not, then several different forms of identification must be presented to the satisfaction of both the bank and the title company. Lack of identification is enough to shut down any closing, since closing without it not only creates potential civil, it is a criminal act. Furthermore, once guilt has been established in any criminal proceeding, civil liability is sure to follow. Therefore, you should always ask your clients to provide current, up-

to-date picture identifications *before* closing. If your bank or title company do not do the same, something is very, very wrong. Asking about I.D.s ahead of closing may save everyone a few hours' time, at the the least, and at best, you will be spared criminal and civil proceedings.

Title Issues in Like-Kind Transactions

Under IRS Code section 1031, payment of capital gains tax on like-kind transactions involving certain types of Commercial Real Estate may be deferred until later years. Besides the capital gains tax benefits, however, one might also exchange like-kind properties in order to acquire:

1. Property that may be refinanced;
2. Property that may be depreciated; or
3. Property with a rental income.

There are other advantages that one should explore by asking a tax expert or like-kind-exchange Intermediary about the benefits of a like-kind exchange. Nevertheless, aside from the tax benefits of a like-kind exchange, there are certain title requirements that must be met for a like-kind exchange to prove successful.

First and foremost, during the on-going process of the like-kind exchange, which may take up to six months to complete from start to finish, there must be no change in certified title. If title is in a certain LLC, it must remain in that particular LLC during the entire process. If title is in a particular individual, title should stay in that same individual

during the entire like-kind exchange, with no one either added to or removed from certified title. If you change the party or parties in certified title, you risk losing the tax-deferred status of the transaction under the IRS Code -- which would defeat the purpose of the like-kind transaction in the first place.

Why would parties not realize this discrepancy until they are themselves sitting at the very closing table? Because, for example, certified title may be in a husband but he himself is relying on his wife's income to get a bank loan because he has bad credit. In this case, he will have to choose between either borrowing money from the bank together with his wife or doing the like-kind exchange on his own. Once he puts his wife in title during the exchange process (in order to satisfy the bank), the husband loses his capital-gains-tax-deferred status, nullifying at least one purpose of the like-kind exchange.

Further, lenders rarely loan money to Trustees, loaning money to qualified individuals instead. If your client is a Trust formed for estate planning purposes and is thinking of a like-kind exchange, therefore, it would be wise to convey the Trust property to an individual before the exchange process even begins; then back again to the Trust after the transaction is over. The property could, for instance, be conveyed back to the Trust Grantor or Trustee "as an individual" for the duration of the exchange; then back to the Trust entity again afterwards, depending, of course, on the requirements of the Trust itself. A Revocable Living Trust entity may be ignored for tax purposes in a like-kind exchange, however, if the Revocable

Living Trust is ignored for tax purposes in general. In that case, the individual Grantor or Trustee of the Trust entity may acquire title to the new property (even though the forfeited property was originally held in the Trust) without forfeiting the tax-deferred status.

If an Exchanger dies after closing on the "old" property but before acquiring the "new" one, then his or her estate may take title to the new property without having to pay the capital gains tax. In such an instance, therefore, title should be kept in the Executor or Administrator of the estate until the like-kind exchange is complete. In no way should the executor convey to the devisees under the will, or to the decedent's heirs at law, until the like-kind exchange is over.

A single Exchanger may exchange property in order to acquire title to a like-kind property that is held by a single-member LLC, since single-member LLC's are disregarded for tax purposes under the "check-the-box" rules. Further, that same single Exchanger may trade an old large property for several smaller ones that add up to roughly the same size, and those several smaller parcels may each be held by a different single-member LLC without losing deferred-capital-gains-tax status.

Simply put, when qualifying or disqualifying a transaction for tax-deferred status, the IRS always looks at the issue of title. For the other requirements of like-kind exchanges, some of which are quite complex, consult a tax professional or a qualified Intermediary. Nevertheless, the one issue both you and your client should be

crystal clear about its title: It should not be changed during the entire like-kind exchange -- except in those cases mentioned above.

City Register's New Policy

At a meeting with the committee of the New York State Land Title Association recently, the City Register stated that for all documents submitted for recording after June 1, 2008 -- including all documents rejected prior to

that date which are resubmitted for recording after June 1, 2008 -- the Register will *not* automatically return any documents by mail. This is a marked change from past policies, because previously, the City Register would return all recorded documents by mail.

Now your Title Company will handle all returns instead. So from now on, if you record a document, or if a document is rejected for recording, it will be returned to you by the Title Company.

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