

Title Commitments – What’s in it for the Lender?

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Lenders find many challenges when dealing with their Clients and the many parties to every transaction they process. To be successful, a lender must be able to have a working knowledge of the various parallel businesses associated with a real estate transaction. Perhaps one of the most difficult interactions a lender must coordinate for their Client is with the Title Company.

When a loan is approved, and Title is ordered, the lender should quickly receive a Title Commitment, which can be broken down into three main parts:

- Schedule A – Details the terms of the deal, which include the parties to the transaction, a legal description of the property, insured party names and Policy amounts.
- Schedule B – Contains the exceptions to Title. Among other items, this section is where a lender will find easements, oil and gas interests, encroachments, and restrictions (including HOA information).
- Schedule C – Provides for the requirements for the transaction to receive a “clean” Title Policy. If requirements are not addressed, they become exceptions to the Title Policy once issued.

While an Escrow Officer with the Title Company will typically highlight any issues on a Commitment that could violate the lender’s closing instructions unless addressed, it is important for a lender to be proactive in reviewing the Commitment for potential problems as well.

There are many areas of the process where a lender’s understanding of a Title Commitment will benefit their Clients and increase the chances of a seamless closing. The following topics represent the most common challenges where an early identification would result in less closing conflicts.

1. Divorce Challenges

When a Title Commitment is received, it will disclose how record Title is held. Should a lender see an additional party in Title that was not mentioned on the loan application, this could serve as notice that a Divorce has or will be occurring.

In Texas, the rule on marriage is very clear – you are either married or not. In other jurisdictions, a “legal separation” may also be recognized, so it is important to know the specifics for each State in which the lender intends to do business.

In step with the Texas rules, a final decree of divorce signed by a judge must be presented and reviewed by the Title Company. If the transaction is to occur prior to the divorce



being finalized, both spouses must sign in the same manner in which they would if the two were not going through a divorce.

Often, the decree will add additional items to the transaction, such as a payment of equity to the ex-spouse or the requirement of a Special Warranty Deed to place record Title in the ex-spouse receiving the property under a decree.

Even where cash is being taken out of a transaction to payoff an ex-spouse, it may be possible to keep the loan's classification as a rate and term refinance, rather than converting it to a Texas Home Equity Loan. To do this, the decree can provide for a partition of the property known as an Owelty Agreement. These agreements can be the basis for an Owelty Lien, which is a valid lien for refinancing and does not require Home Equity rule adherence.

2. "Invalid" Liens and Mortgages

Another area that should be proactively addressed is related to the identification of liens and mortgages on Schedule C that are unexpected. The liens or mortgages may have been paid off previously or are completely unknown to the borrower. Under either scenario, the absence of evidence of the lien or mortgage on the credit report alone will not serve to remove the item from the Title Commitment.

A lender should proactively communicate with the Escrow Officer information about a surprise mortgage or lien. If the borrower is indicating that the lien was paid, a lender can often resolve the issue quickly by directing the borrower to obtain some or all of the following information:

- Release of Lien – This is the ideal document to obtain. Typically, the lien holder will mail the borrower a Release of Lien and instruct them to record the document. Because most borrowers do not record the document, it doesn't appear in the records. By providing the original Release of Lien to the Title Company, the lien can be removed from the Commitment and the Release will then be recorded with the transaction.
- Copy of Settlement Statement – A settlement statement for a transaction can show where a prior lien was paid and provide comfort to the Title Company that the item can be removed in many cases. While not 100% effective, this information can often cure the Title sufficiently.
- Original Note Stamped Paid – So long as the Original Note is actually brought to the closing for the Escrow Officer to see, this too can provide enough evidence for a lien to be removed from a Title Commitment, assuming the Note and Lien properly reference each other.
- Previous Title Policy – If a previous Title Policy was issued which treated the lien in question as having been paid, the Title Company can often work with the previous Title Company to remove the item.



While these are just some of the suggestions for removing unwanted liens from a Title Commitment, the best thing a lender can do is proactively communicate with the Escrow Officer and borrower. In doing so, other options for removing the liens may present themselves, or it may be discovered that the lien is still valid and needs to be paid as part of the transaction.

3. Decedents in Title

Many Americans never draft a Will to protect their families in the event they pass away, even fewer actually have their Wills probated once deceased. The unfortunate result of either is that Title to real estate is not properly addressed.

The existence of a Will is but one step in having Title to real estate pass to the heirs. Without the process of Probate, the Will has no impact on Title whatsoever. Once Probated, the method and type of Order obtained will dictate how the property will be distributed.

In cases where a Will is not Probated within 4 years of death, the most common option for heirs is to utilize Affidavits of Heirship to disclose the facts upon which the default rules of Intestate Succession will apply. Ideally, these affidavits should never be considered as an option unless 4 years have passed from the date of death.

A proactive lender can help minimize the impact of deceased parties in Title by notifying the Escrow Officer if they believe that a current owner is in fact deceased.

4. All Borrowers not in Title

An extremely common issue that arises in refinances is when one of the borrowers are not shown as being in Title. The cause of this discrepancy is usually due to a marriage after the property is acquired or the addition of a borrower simply because their credit and income is needed to qualify.

From a Title Company perspective, there is absolutely no reason to ever add this person to Title. Instead, the Title Company will be satisfied with simply having the additional party sign the Deed of Trust.

Because of Title Company indifference on this topic, it is important that a lender be aware of what their particular underwriting guidelines are. Often, underwriters require that vesting match the borrowers verbatim. If this is the case, the lender will need to prepare the borrowers that an additional charge for a Deed will be required. The lender can then notify the Escrow Officer of this need and have the Deed prepared for the transaction.



5. Can I use this Survey?

One of the most common questions that are asked of Title Companies is whether or not the survey provided by the borrower is acceptable to issue a Policy with survey coverage. While the lender does not need to become an expert on surveys, a quick review of the borrower provided survey can often provide instant feedback on whether or not it is acceptable.

Generally, the following elements are required in order for a survey to be valid:

- The survey must show **all** improvements. If a pool or other improvements was added that does not appear on the survey, a new one will likely be required.
- The surveyor seal and signature must both be legible.
- The legal description on the survey must describe the same property as that on the commitment.

These few elements represent the initial once over that is necessary to determine if a survey is acceptable. Because a Title Examiner will also review any survey submitted, additional issues may be identified that need to be addressed for the transaction to be insured without lender prohibited exceptions.

All matters related to the lender involvement in a transaction can be reduced to just one word – communication. Title Companies, like lenders, are only compensated when a transaction closes. Working together, the likelihood of a successful closing within the desired timeframe is far more likely to occur.

