

Real vs. Personal Property

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With many parts of the country facing economic difficulties, foreclosures have been running at near all-time highs. With that comes many challenges, including having bankruptcy and real estate foreclosure proceedings “tripped up” by lack of clear title to the home. Without marketable title, the lender cannot accomplish its real asset recovery objective.

Of all residence types, title issues are most prevalent with mobile (manufactured) homes. Too often we find that many of these homes, from the standpoint of the lender, legally speaking, are still classified as personal property, as opposed to real property—even when the home is being taxed as real property. This is because the originating mortgagee and its closing agent failed to take the necessary steps to classify the mobile home as real property. This problem is particularly prevalent in states like North Carolina where mobile homes are a popular choice for new and existing homebuyers.

Lenders and their servicers are becoming increasingly aware that their

portfolios may be heavily populated with such “problem” loans. These title challenges are time consuming and expensive to resolve, especially as they often only become apparent once foreclosure actions have commenced. One way of navigating around this obstacle is for the mortgage lending team of lender, servicer and their legal counsel to enter into a loss mitigation plan with the borrower.

POINT OF VIEW

—Terry Hutchens

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Sorting Things Out

The roots of these problems began a decade ago when the large volume of originations overwhelmed many lenders who were doing all they could just to

keep up with the tidal wave of closings. In some cases, closing agents relied solely on tax records. Here in North Carolina, for example, the Department of Revenue changed the tax laws. Generally speaking, as long as a mobile home had its wheels, tongue and axles removed, had a permanent foundation, was in a residential neighborhood, and was placed on land owned by the homeowner, it could be taxed as real property. However, the foreclosure record owner search doesn’t ascertain whether the mobile home is real or personal property. Many of these homes retain an active Certificate of Title with the North Carolina Department of Motor Vehicles (DMV) and are considered personal property. (Note: mobile or manufactured homes are those that at some point had wheels and axles and were conducted along our roadways. Modular homes, also popular today, are not mobile homes and do not fit into this discussion.)

The Way It Should Have Been Done

This conflict between taxing (real property) status and vehicle (personal

property) status should ideally be resolved at loan origination when an owner first sites his or her mobile home. This is accomplished by making the closing attorney aware of the mobile home on the property. More importantly, the closing attorney or settlement agent should be directed to file a Declaration of Intent to Affix. The filing of a Declaration of Intent to Affix (filed with the Register of Deeds) obviates the homeowner of ever registering the home with the Department of Motor Vehicles. The home then becomes real property.

Servicers should be alert to these issues. They can obtain the borrower's name and the VIN number from the appraisal and then call the Department of Motor Vehicles to determine if there is an outstanding Certificate of Title in the borrower's name or with a VIN number. Understand that this method isn't 100 percent accurate. If the original borrower has sold the home and the title wasn't transferred to the new owner, then the DMV won't have any record reflecting the new owner/borrower. Another approach is to check the title policy, if one was issued, and look for an ALTA 7 Endorsement, which means that the home is insured to be real property. The ALTA 7 Endorsement will provide the basis for a title claim with the title insurance company if an issue regarding the status of the home as real or personal property arises.

Loss Mitigation to the Rescue

As we have learned with loss mitigation, the sooner the better, before the borrower gets mixed signals—and, possibly, mixed attitudes—from the default and forbearance/loss mitigation sides of

an organization. Our goal is to have the borrower cancel out any vehicle registration for the mobile home and (properly) reassign title as real property.

While the borrower may not want to cooperate (assuming the parties intended the mobile home to be real property), we have found that a professional and non-threatening approach is extremely helpful in getting the borrower to help us clear up title at workout time. Resolving this issue can be part of the workout incentives package. Also, most borrowers execute as part of their loan package a document generally referred to as a Compliance and Error of Omissions agreement. This agreement contractually obligates the borrower to assist in correcting obvious errors.

Realistically, we find that more and more owners facing foreclosure are represented by counsel, which may drive up the expense, time and difficulty of curing the defect in the title to the mobile home, but not always. Often, we find that when a borrower is represented by counsel, they will facilitate the loss mitigation/title remediation actions. After all, both the borrower and the lender profit from the transactions. The borrower keeps the house and the lender cures a title/security issue.

A home improperly classified as personal property is an attractive asset for other creditors to target. Thus the importance and value of getting the borrower to sign documentation that cancels title as personal property and perfects the lender's lien. Even if the workout package ultimately fails, and the borrower is once again in foreclosure or worse, bankruptcy, the lender and servicer can now go after a home with clear

real property title and as a fully secured creditor.

Certainly, on a national perspective, loss mitigation has been gaining strength since HUD initiated its loss mitigation program in 1996 in an effort to allow FHA insured borrowers to retain home ownership. Most of these claims were centered on special forbearance, mortgage, modification and partial claims. During fiscal year 2004, more than 54 percent of the 155,495 FHA borrowers entered into loss mitigation, with 2005 projections topping 90,000 claims.

Our efforts with mobile homes will support this trend towards helping borrowers keep their homes. Overall, it is good for the lending industry and our communities.

A Healthy Industry Merits Our Attention

The mobile home industry projects production of more than 130,000 units in the coming year, with these residences especially popular in states like North Carolina, Florida, Texas and Arizona. The aggregate value of home and land for many of these properties now approaches and exceeds \$100,000.

The task ahead is two-fold. First, through sound origination and closing procedures, as outlined above, the lender and servicer can ensure real property title and a valid lien to this important and profitable sector of their business. Second, we must work together to clear existing loan portfolios of mobile homes with inadequate title and unprotected liens during loss mitigation, and, aided by a mortgage financing savvy law firm, consider cost-effective portfolio correction programs.
