



Boom in mortgage refinances due to low interest rates creates challenges in title industry

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The last two years have experienced a dramatic drop in mortgage interest rates, which in turn has fueled an incredible boom in mortgage refinancings. With even long-term interest rates hovering in the 3% range, homeowners have completed in excess of 10 million refinances since May 2009. Many borrowers, financially savvy and understandably opportunistic, have refinanced twice or more during that period, re-entering the process each time the economics and long term benefits underlying the transaction open another window of opportunity.

This unabated torrent of refinancing activity has created certain particular challenges for the title industry. The first and most obvious challenge is the importance of accurate and timely recording of closing documents. Through hard work and automation, the county clerk and city registers, in conjunction with the title industry, have essentially conquered this problem by being tenacious about reliably recording documents.

Today, the two biggest issues and impediments to a smooth refinance are created by the financing institutions themselves. In New York, savvy borrowers are seeking to save on closing costs by preserving the mortgage taxes paid in conjunction with prior financings. In both commercial and residential refinancing, a borrower may request that the old lender assign the mortgage to the new lender. In exchange, the new lender pays off the borrower's balance directly to the old lender. Without any limit to the number of times this can be done, it is not uncommon to see multiple mortgages consolidated, assigned and further consolidated (even more in a commercial transaction), creating what is known as a "mortgage chain."

In an attempt to save costs and simplify the process of assigning mortgages between lenders, investors and loan servicers, the financial institutions created MERS, the Mortgage Electronic Registration System. Today, MERS is the assignee and holder of record for a significant majority of all open residential mortgages. However, as MERS is not part of the public and searchable record, the mortgages assigned to it appear to vanish into a proverbial black hole. Years later, when MERS is asked for an assignment of a mortgage, it is not unusual to find breaks in the mortgage chain which render the assignment fatally defective.

Whereas in the past both title companies and the courts accepted MERS's representation of ownership and whatever assignment MERS chose to deliver, this is no longer the case. During the mortgage and foreclosure crisis of recent years, judges have refused to allow lenders to foreclose on their mortgage loans unless they were able to deliver and prove an accurate and unbroken mortgage chain. As a result, we in the title industry have become far more critical of the mortgage chain being assigned, and will no longer accept any deviation, no matter how minor.

Another problem has been caused by lenders' internal record keeping. For example: A refinancing occurs with an assignment from a lender, who is paid in full and in exchange delivers a mortgage

assignment at closing. Forgetting that it has already assigned the mortgage to the new lender, the assigning lender then identifies the loan as paid in full, and proceeds to record a mortgage satisfaction of said (already assigned) mortgage.

Should the new lender need to foreclose on this loan, or should the borrower choose to refinance yet again, seeking another assignment, this partially satisfied mortgage can come back to haunt the borrower, and, depending on the particular circumstances, render any further assignments impossible. In such event, the property owner would need to record an entirely new mortgage and pay the associated mortgage tax thereon. Let me suggest that this unhappy homeowner would not be good company the night he or she discovers that they have to pay the mortgage tax all over again.

There are many other possible pitfalls which can complicate a homeowner's attempts to refinance or even sell his or her property. As a result, I recommend that borrowers entering into a refinance retain an attorney to represent his or her interest.

Alternatively, I suggest the following:

- * Ask the lender to arrange for a mortgage assignment to save mortgage tax.
- * Ask the lender's counsel to explain to you the documents you are signing.
- * Get copies! Get copies! Get copies! Ask that a complete set of copies of all closing documents, title report, title policy, checks and loan payoffs be delivered to you at the closing! You will need it later!

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