UNDERSTANDING A DEED OF TRUST

FIRST INTEGRITY
TITLE COMPANY

By Alex Pankonin
General Counsel for First Integrity Title Company

The preferred method in Colorado to secure loans against real property is a deed of trust. A deed of trust is given as security for a debt. When a borrower takes out a loan from a lender, the borrower promises to repay the loan through what is called the promissory note. The deed of trust ties that promise to repay to specific real property. Since the promise to repay is tied to specific real property, all the owners of the specific real property, even if one of those owners is not on the loan, must still execute the deed of trust giving their consent to have their interest in the real property encumbered by the deed of trust. This is why non-borrowing spouses, who are also on title to the real property, are asked to execute the deed of trust at closing.

Although the word "deed" is in the name, a deed of trust is not considered a conveyance. Instead, a deed of trust is merely considered a lien on real property. The powers of foreclosure and sale found within a deed of trust follows the promissory note. So, when the promissory note that is secured to real property by a deed of trust is endorsed or transferred to another party, the deed of trust and the powers found in it are automatically transferred to the current holder of the note. This is commonly referred to as "lien theory". As a consequence, in Colorado, a deed of trust is not required to be assigned to the current holder of the note in order for it to enforce the deed of trust. In other words, the deed of trust follows the note.

Colorado is unique in that it is the only state in the union to have a public trustee system. As a result, all deeds of trust must name the public trustee for the respective property's county as trustee. If the deed of trust names a private trustee or any person other than a public trustee, as trustee, it will be deemed and taken to be a mortgage for all purposes and foreclosed only as mortgages are foreclosed through the courts. Deeds of trust may use the non-judicial foreclosure process through the public trustee's office or foreclosure through the courts, whereas a mortgage may only be foreclosed through the courts.

Title companies frequently see prior deeds of trust not released of record even though the underlying debt has been satisfied. Colorado statute provides for the release of the lien securing the satisfied debt to occur within ninety days of the loan being paid in full. Even with the statute, many lenders neglect to release their deeds of trust. Colorado has a Race-Notice recording statute, meaning that instruments affecting real property gain priority "first in time, first in right" as they are recorded with a few exceptions for taxes and mechanic's liens, to name a few. Accordingly, a deed of trust generally is subject to other interests in the property that exist at the time of recording. Exceptions to this rule include the doctrines of equitable subrogation and purchase money mortgages. Unreleased deeds of trust present issues because of this Race-Notice situation. The current lender's deed of trust will not be in "first priority position", but instead behind the unreleased deed of trust. These unreleased deeds of trust situations pose marketability of title issues and insurance risk. They can be difficult to correct and time consuming to investigate, but in the end most title insurance companies will do their best to assess the risk and make every effort to clear title so that their insured(s) can be secure in their purchase or loan.

Colorado is unique in that it is the only state in the union to have a public trustee system.

We hope that this article has provided a better understanding of deeds of trust and clarified some of the closing components and issues surrounding their use. By no means is the information contained herein comprehensive, this is merely intended to be a brief discussion of some common issues related to deeds of trust and to help facilitate better understanding around the use and release of a deed of trust as it pertains to title insurance and the settlement and closing experience.

2017 © All Rights Reserved by First Integrity Title Company