Frazzle Dazzle

November 17, 2011

Texas Local Government Code §192.001 states Mortgages and Deed(s) of Trust "shall be filed of record".

Timely filing of the Deed of Trust in public records serves as constructive notice to the world a lien exists and identifies the Obligor and the secured party (SP1) to who the debt is owed and to who's name [Obligee(x)] the lien is required to be perfected in. Where the Obligor (Payor, Mortgagor, and Property Owner) concurrently signs a Deed of Trust to be security for the note is actual notice to the parties involved that there was an attachment of a lien to the note making the Obligee (Payee, Lender) a secured party being Holder in Due Course of a secured note. For the note to remain secured and the Deed of Trust to remain continuously perfected requires timely filing of the Deed of Trust in public records.

This author, like judges, attorneys, law professors and the people need not ask or explain why Texas lawmakers placed Texas Local Government Code §192.001 into the Texas Statutes. Maybe §192.001 was written into the statutes to provide courtesy constructive notice to a secured party (SP) to remind a secured party (SP) time requirements are applicable for timely complying with recordation requirements for perfection, a secured party (SP) attempting to perfect of record a Deed of Trust would most likely be time barred. As criminal law has a statue of limitations, many areas of civil law have an equal equivalence of being time barred.

Attachment of a Deed of Trust to a note at the time of closing provides only temporary perfection. Filing of record provides constructive notice to the world and such filing then assures the secured party now holds a recorded permanently perfected lien. Permanently, not really, perfection of a lien will only exist so long as the indebtedness exists. This writing will not address the methods of discharging the indebtedness, the UCC define the methods for discharging the indebtedness, nor will this writing address court ordered judgments. Anyone ever wonder why the Internal Revenue Service (IRS) files their liens of record? Could it be that federal actions need to comply with state law?

The Texas Recording Statutes, which include portions of the Texas Property Code provides that a secured party (Obligee, Lender) may file of record any document allowed by law to be recorded. Where a closing is conducted by a Mortgage Broker, it is usually found that Mortgage Broker's timely filed of record the Deed of Trust. This author is not concerned with why the Mortgage Broker filed the Deed of Trust of record; filing could have been required by the Title

Insurance Carrier, requirements of an interested party in purchasing the secured note after closing or by the third party financing contract requiring the Mortgage Broker to execute such filing. The fact is, if temporary perfection is not filed for record to establish a permanent perfection, temporary perfection would expire by operation of law.

Whereas the Recording Statues allows one to record a real property lien (Deed of Trust) if they so choose, Texas Local Government Code §192.001 explicitly states that a real property lien (Deed of Trust) must be filed. Ignorance of the law is not an excuse!!!

Lest assume a Mortgage Broker (Obligee1, Lender1) filed a lawful Deed of Trust of record as required by Texas Local Government Code §192.001 would be constructive notice in public records that Obligee1 has a colorable perfected claim to Legal Title of the real property.

This writing will not dwell into faults, errors and omissions of a Deed of Trust naming MERS (Mortgagee) as both an agent and beneficiary of the Deed of Trust, where in personal opinion, such filing of the Deed of Trust of record would only give a false impression of a colorable claim to Legal Title. It would be better to allow the courts to iron out the legalities if one can be an agent for oneself acting as an agent for unidentified Holder in Due Course [Obligee(x)] of the indebtedness.

Obligee1 elects to sell the secured note as a true sale to proposed Obligee2. To comply with negotiable instrument laws (UCC), Obligee1 endorses the note. If the secured note is endorsed without Obligee1 naming the subsequent Obligee, such secured note in essence has been endorsed “In Blank” and becomes an instrument payable to the bearer of the instrument. In the old days, Obligee1 would have conducted the sale under cover of a Bailee’s letter. Laws surrounding the Bailee’s letter would protect Obligee1 as to being the Holder in Due Course. Proposed Obligee2, under the terms of the Bailee’s letter would either have to return the instrument to Obligee1 or tender funds to Obligee1. Upon Obligee2 tendering funds to Obligee1, Obligee2 would then become the possessor and holder of the instrument. As the UCC defines, negotiation is not completed until all required indorsement appear upon the face of the instrument, whereas Obligee2 would then indorse the instrument thus becoming the Payee to the instrument and have rights as the Holder in Due Course to enforce the instrument. Here, for Obligee2’s instrument to remain a secured instrument and for Obligee2 to remain being a secured party (SP) and according to Texas Local Government Code §192.007, an assignment of the lien (Deed of Trust) must be filed of record. Time limits for filing an assignment of the lien for perfection from Obligee1 (SP1) to Obligee2 (SP2) must also be adhered too.

For MERS to work properly as agent for any secured party, filing according to Texas Local Government Code §192.007 would still be required to show perfection of a lien to secured party (SP1) was assigned to secured party (SP2). MERS as agent for Obligee1 (SP1) assigning the lien to Obligee2 (SP2) where MERS also claims to be the agent would still need to be filed of record. A proper filing would reflect that MERS as an agent for Obligee1-SP1 (Grantor) was assigning for value the Deed of Trust (lien) to Obligee2-SP2 (Grantee) for which MERS could be an agent.

Texas Local Government Code §192.007 requires that any action affecting an instrument (Deed of Trust) filed under Texas Local Government Code §192.001 must be recorded, therefore MERS operating as an agent for any secured party (SP1 – SP2 – SP3, etc,) must be filed of record somewhat following the above paragraph.

Texas public records have on file, many MERS attempts to assign the lien to SP3^{or}4 as being an agent for SP1. This filing of an assignment is a logical impossibility as the once secured note has already been sold multiple times to reach Obligee3^{or}4 and thusly Obligee1 has no interest in the now unsecured instrument for MERS to be an agent for. Whereas, Obligee2-3-4 have failed to timely perfect of records the lien rights the Deed of Trust offered, such Deed of Trust (lien) has expired by operation of law.

For Texas county officials, nearly 5 years ago, it was calculated and published in "Have a Note", Dallas County and Tarrant County alone have not had the assignment fees paid amounting to an excess of $50 Million.

Considering other Texas statutes, these assignment fees not being paid is a paltry number in comparison to the penalties that could be invoked for fraudulent filings such as the MERS as agent assigning for SP1 to SP3^{or}4. Additionally, where these fees were not paid resulted in many of a county having to cut back on public projects and even worse, having to pay interest fees on borrowed money. The largest Texas statutory fee factor will come into play when those who have lost property to a false claim of a Trustee's Deed bring their matter before the courts. By memory, the value is $50,000 or the value involved for each incident. (It is in the Texas Statutes)

Alarm, Fannie Mae and Freddie Mac in cases could be the MERS SP4!!!

In short, MERS could be Mortgagee as agent of the owner of the Legal Title under the Deed of Trust when such assignment of ownership of Legal Title was filed of record as required by law.