FRAUD Insights

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Just when you thought mortgage fraud had been replaced by illegally diverted wire transfers, stolen checks, and stolen identities of owners with unoccupied properties — along comes an outrageous story of a loan originator allegedly forging an escrow settlement statement. A recent fraud was uncovered in bank purchasing mortgage loans originated by a specific lender. Read "HOW a bank uncovered a scheme" for all the details.

Annie Green, A.V.P. and Escrow Officer with Chicago Title in Frisco, Texas, is always one of the first to sign up for the annual escrow training events. She shows up early, participates and soaks it all in. Recently, she encountered an agent/attorney-in-fact which caused her to take a step back and pause. After reviewing the documents from the agent/attorney-in-fact, she chose to resign from the transaction. Annie shared the details of the transaction with National Escrow Administration. Her email began with, "I just wanted to reach out to say **THANK YOU** for keeping us updated at every training seminar regarding POA fraud and red flags to watch out for." Read "WE are listening!!!" to learn more.

This month, our state withholding series features the great state of Oregon. Beginning January 1, 2008, all transfers of Oregon real property became subject to Oregon Real Estate Withholding requirements. Unlike most other states, in Oregon the withholding obligation is placed on the escrow agent who is defined as the authorized agent. An authorized agent is an escrow agent licensed under Oregon Revised Statutes. Read "OREGON real estate withholding" for detailed information.

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STOP

TELL US HOW YOU
STOPPED
FRAUD

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HOW a bank uncovered a scheme

In the course of a residential refinance, a borrower signed loan documents on January 22, 2021; the three day right of rescission expired on January 26, 2021 at midnight.

The lender did not fund the loan until February 8, 2021. The deed of trust recorded on February 9, 2021, and loan proceeds were disbursed that same day.

The loan was sold on the secondary mortgage market to a major bank. The onboarding process for new loans serviced by the bank requires an audit for compliance with Regulation Z of the Real Estate Settlement Procedures Act (RESPA) regarding the three day right of rescission.

The bank's auditor reviewed an escrow settlement statement provided by the loan originator that reflected the funding date as January 26, 2021, with a recording and disbursement date of January 27, 2021.

The bank auditor reached out to the title company in order to confirm the dates shown on the purported escrow settlement statement. The escrow officer could not confirm any information about the transaction, as the bank was not a party to the loan transaction.

The escrow officer raised the issue with her manager. The manager was confused as to why the settlement statement from the bank did not match the settlement statement generated by their office. She noticed it was drastically altered.

Not only were the settlement and disbursement dates changed, but other areas of the settlement statement were altered, including: prepaid interest, lender credits, messenger fees, title insurance premium, sub-escrow fee, county taxes, recording fees, payoff amount, the balance paid to the borrower at closing and even the date/time stamp in the footer of the document.

The escrow manager contacted her manager; they reached out to the loan officer who readily admitted that he provided settlement statements to purchasing banks that contained estimated dates which were not always updated with the actual escrow settlement dates. As a result of the altered escrow settlement statement and this conversation, the title company determined they could no longer do business with this loan officer.

The escrow manager's boss called the owner of the lending company who declared he no longer allowed this loan officer and his team to originate loans for his lending operation — as of that day.

After thorough consideration, the title company concluded they would resign as escrow holder and title insurer on all pending transactions involving the lending company to avoid potentially becoming involved in any incorrect or misleading documents in these transactions. In addition, they have elected to refrain from future business with this lender.

Resigning from a transaction is always a last resort; however, in certain circumstances it is necessary. Gaining and retaining customers is hard work but a company's reputation is even more valuable.

The escrow company's management recognized the importance of ensuring they protect the reputation of their company and employees by choosing not to conduct business with someone — who by their own admission — falsifies closing documents relied upon by others.

If you become aware of any fraudulent practices by your lender customers do not hesitant to bring it up to your management. It is always best to error on the side of caution.

WE are listening!!!

One morning, Chicago Title escrow officer Annie, began to mentally organize her day while on the way to the office. She had one file on the top of her mind.

The file was a sale transaction where the seller appointed her son, via power of attorney, to act as her agent/attorney-in-fact. She was told the seller was elderly but her last email with the son was bothering her. Annie's training kicked in. She started to ask herself:

✓ Why was there a need for the power of attorney?

✓ Where was the mother?

✓ Why was she unable to sign the documents herself?

So far, none of the answers provided by the seller's son were acceptable. In fact, Annie had more questions than answers. Below are some of the facts Annie was struggling with:

» The power of attorney was signed by the seller in 2019.

» The listing real estate agent never met with the seller — only her son.

» The real estate agent believed the mother was alive and well, but when the seller information sheet came back, her forwarding address was in an entirely different city than where the property was located.

» The son also wrote on the sheet escrow was not authorized to contact the seller directly.

Annie called the son to explain she needed to talk to his mom directly. The son shouted at Annie, stating she would never talk to his mother and she was to rely on the power of attorney. He continued to raise his voice. Since they were failing to communicate, Annie explained he could call her back when he could speak to her in a calm and professional manner and hung up.

The next time they spoke Annie gave the son two options. Either his mom could attend the closing in person, or his mom could sign a new power of attorney specific to the transaction at hand. Once again, the son raised his voice and lost his manners.

The son followed up with an email stating, "Getting a new POA signed at this point would be troublesome." He also requested a mobile signing agent come to him. At that point, Annie escalated her concerns to management and underwriting.

The use of a power of attorney is always a cause for concern. The title insurance industry has experienced several problems and claims, based on the improper use of powers of attorney. Below, let us review some best practices which should be followed when a principal in a transaction has appointed an agent/attorney-in-fact.

» A power of attorney is an instrument in which an individual, called the principal, appoints an agent, also called the attorney-in-fact, to act on his or her behalf for some stated purpose or purposes.

» The power may be limited to a particular activity, such as closing the sale of the principal's home, or can be general in its application.

» The actions of an agent/attorney-in-fact are legally considered those of the principal.

» The power may give temporary or permanent authority to act.

Each time the Company is asked to rely on a power of attorney, questions need to be asked. The very same ones Annie posed.

The answers may indicate whether the power of attorney can be relied upon or not. In addition, it is important to:

» Send a copy of the power of attorney to the title officer for review.

» Confirm the agent/attorney-in-fact possesses the original power of attorney.

» Contact the principal to confirm the power of attorney has not been revoked.

» If the principal cannot be contacted, find out why and evaluate whether the power of attorney is still valid or not (e.g., deployed military, in nursing home, deceased, etc.).

» Make sure the principal is aware of the terms of the transaction.

» Verify the principal executed the power of attorney of their own free will.

» Do not accept disbursement instructions from the agent/attorney-in-fact that divert proceeds from the principal.

Neither Annie nor underwriting were comfortable proceeding with the sale. There were too many unanswered questions. She submitted her story to settlement@fnf.com with this comment, "I know you all must get tired of coming up with creative ways to 'hold' our attention over…BUT WE ARE LISTENING!!!!"

Annie did not buckle to the pressure or bullying tactics of the seller's son. She used the skills she learned from training to prevent the Company from a possible claim, since she was unable to even verify the seller was still alive. She put an alert in the title plant on the property in question (PIQ) in case the son tried to open this order at another FNF affiliate.

For her efforts Annie is being rewarded $1,500. Training provided by the Company is for the enhancement of both the employee and the Company. Be like Annie and always attend escrow training to gain industry knowledge.

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OREGON real estate withholding

Like many other states, Oregon has a statute which requires tax withholding in connection with the sale of real estate.[1] The escrow agent is responsible for withholding and remitting the required amount to the Oregon Department of Revenue (DOR). Like other states, Oregon has exemptions to the withholding requirement.

Certain exemptions from withholding are based on seller's status and must be demonstrated solely to the escrow agent in its capacity as a statutory authorized agent responsible for withholding. Examples include:

- An individual who is a resident of Oregon on the closing date;
- A C corporation registered to do business in Oregon;
- A pass-through entity such as an LLC or grantor trust reporting income to the DOR, in which case the entity or trust are disregarded; or
- A governmental instrumentality (such as city, county, state or federal agencies).

Other exemptions must be affirmed by the seller under penalty of perjury on a DOR form[2] which must be delivered to the DOR by the escrow agent within 30 days after closing.

One of the most common exemptions requiring written affirmation by a seller on a DOR form, is the sale of a principal residence where the gain qualifies for exclusion under section 121 of the Internal Revenue Code.

A seller may complete the DOR form and claim an exemption based on a transfer that qualifies for deferral of gain under Section 1031 of the Internal Revenue Code. If seller receives any funds, referred to as "boot" in the sale of relinquished property under a 1031 exchange, Oregon tax withholding applies to that amount.

Other exemptions indicated on the DOR form are:

- Total consideration (sale price) is $100,000 or less
- Sale is under foreclosure, forfeiture, or writ of execution
- Seller is acting under judicial review (For example, seller may be a court-appointed personal representative, executor, conservator, or bankruptcy trustee.)
- Transfer is in lieu of foreclosure for no additional monetary consideration paid to seller.
- Seller is a resident of Arizona, California, Indiana, or Virginia; and expects zero Oregon tax because of credit for taxes paid to seller's home state.

Determining whether an exemption applies may require the seller to obtain advice from a tax professional and may require review of the Internal Revenue Code, Oregon tax statutes, and applicable federal and state regulations and rules. Escrow agents are not qualified to provide tax advice, which is why it is extremely important that sellers are notified of the withholding requirement at the beginning of their transaction.

When no exemption applies, the seller must identify or calculate the withholding amount, using the DOR form. Required withholding is the **lesser** of the following:

1. Four percent (4%) of the total consideration (sale price)
2. All of the net sale proceeds
3. Eight percent (8%) of the taxpayer's gain from the sale (as calculated on the DOR form)

The payment is due to the DOR within 20 days after escrow agent's disbursement of seller's proceeds. An escrow agent must keep all Oregon withholding forms for a period of six years following the closing date.

There is helpful information on the Oregon Department of Revenue website at: www.oregon.gov/DOR. **Taxpayers can call** 503.378.4988 or 800.356.4222 or email questions.dor@oregon.gov.

[1] *See* ORS 314.258 and Oregon Administrative Rule 150-314-0040

[2] 2021 Form OR-18-WC

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