

Explaining the Gap is Like Crossing a Piranha Infested River

I have often said that holding deals together is tougher than finding them. Following is a sample of “issues” that arose with one deal that could have been deal killers but weren’t.

1. The dreaded “Gap” issue reared its ugly head once again when the end-buyer (“C”) couldn’t understand why his name wouldn’t be in the public record a day after he closed. He was whining that he had closed with other title companies and they didn’t have that problem. That’s not true, they had the same issue but they simply didn’t inform the end-buyer and he didn’t know to look in the public record.

The attorneys doing the closing for us in this deal wanted to do the closing the correct way – close the “B-C” leg after the deed was recorded in the public record and after it became posted in the ATIDS System (Title Insurer’s Internal System).

In a normal “A-B” closing, the deed is recorded very shortly after the closing. When you have an “A-B” and then a “B-C” closing WITH THE SAME closing agent, the two deeds are recorded at the same time and, again, shortly after the closing. However, if there are two closing agents, the process becomes more complicated.

This closing was done in “escrow” with the original seller’s (“A”) documents coming from a different closing agent as our “B-C” closing agent. If this first closing agent is located out-of-state, the recording process of the “A-B” deed transfer is even slower to get it into the local public record.

Once the “A-B” leg is closed, investor “B” is ready to sell to the end-buyer “C” who is also ready to get the deal done. But “B” isn’t the owner of record (not recorded yet) so can he actually sell something he doesn’t own? Technically, he can’t, but these transactions are regularly done by holding (escrowing) the documents that are signed in the “B-C” transaction along with “C’s” cash until the “A-B” deed is recorded. In some states, every transaction is closed in escrow and then both sides can be recorded at the same time in their proper order for deed transfer.

So, here we are trying to explain to the “C” buyer about how the GAP works and asking that he wire his closing money in immediately so we can close the “A-B” leg so our transactional funding isn’t at risk. This is because for transactional funders, the end-buyer’s cash must be in the closing agent’s bank account as wired funds (no cashier’s checks). Cashier’s checks are too easily counterfeited and they can also be cancelled by the remitter.

The “B-C” closing agent we use developed his own Disclosure Document about the “exposure” during the GAP period and an Escrow Agreement stating that the closing agent will not be responsible if something goes wrong in the GAP period. But by this time the buyer is freaking, again because other closing agents have done the same double closing for him without mentioning any disclosures or escrow issues. When this happens, it is almost always best to let the attorney explain the process to the “C” buyer as he has more credibility than you do and he knows what he is talking about. If the attorney won’t cooperate with you, take the closing elsewhere.

Meanwhile, the “A-B” closing agent is getting squirrely because we are past the closing date. But in the spirit of getting paid, they relent and go day-by-day with the excuse of the Re-occupancy Certificate being delayed.

Starting from the beginning – the “GAP” in title insurance is the time between the closing of a real estate transaction and when the new deed to the buyer is recorded in the public record. Florida is a deed recording state, so until the seller’s deed to the buyer is recorded in the public, the seller still owns the property.

This assertion may be disputed by some people reading this article but the reality is the seller has the ability to re-sell the property or re-finance it if he moves quickly enough simply because the next closing agent only knows what is shown in the public record as the “Owner of Record”. Is it fraud to re-sell the property? Of course! But that hasn’t stopped some people from doing it.

To add insult to injury the above property needed a Certificate of Re-Use (re-occupancy) issued by the city to allow the deed to be transferred. The investor buyer “B” called the city and made an appointment with the inspector to do the property inspection. It passed and the inspector offered to do the “C” buyer’s inspection at the same time – but “C” had to be there and naturally he wasn’t able to get there. The CR was issued for the “B” buyer but the “C” end-buyer took a week longer – further delaying the closing for almost a week.

The lender’s closing agent for the REO was only a block away from our office but he wouldn’t do the “B-C” transaction. His closer said they thought it was illegal. I stress the word “thought” since they were fine for our attorneys to close the “B-C” leg. Our attorneys are so straight laced, they won’t park over the white lines in the parking lot – but they were glad to do this transaction because it is legal with certain caveats. Just goes to show that just because one attorney or closing agent won’t do a closing for you that another one won’t. If two or three closing agents (not the gals doing the paper work, but the attorney(s) for the firm) say the transaction is illegal, it probably is!

Since our attorneys were closing the second leg, they reviewed the title work and found some serious issues that needed to be corrected before they would accept the insurable title from the “A” seller. Perhaps the biggest was a Power of Attorney (“POA”) from the seller’s wife that needed to be corrected by having the wife sign a Quitclaim Deed to rectify the potential problem of the wife coming back and saying “*I didn’t sign that*”, “*I was not served at all*”, “*I had an interest and he shouldn’t have sold*” or any number of other reasons that could cloud the title.

The title issues were cleared and the CR was issued. The “C” buyer did wire in the funds; the transactional funding was provided for the “A-B” leg and the deal closed with only a week’s delay. If your question is why not use the “C” buyer’s money to close since it is in the account, it’s because it is illegal unless done absolutely correctly – ask your closing attorney how to do it – no legal advice here.

As I write this Insight, it has been 12 days since the County has had the deeds in their office to be recorded – and nothing yet. Is the County punishing the public because it was wasteful with our tax money that clerks had to be laid off to pay the remaining clerks? What is this world coming to?

To your limitless success,

Dave Dinkel

P.S. This is why it is easier to let your attorney explain the GAP to your “C” buyer. It may not be what you want to hear but it will keep you out of trouble!