

Deal Breaker or Deal Maker?

Purchase Money Security Instruments



by Jeff Lee

Section 2898 of the Civil Code provides that a mortgage or deed of trust given for the price of real property has priority over all other liens created against the purchaser, subject to the operation of the recording laws.

Mortgages and deeds of trust given by a buyer to a seller or third persons imposing a lien upon real property to secure payment of the purchase price are called purchase money mortgages and purchase money deeds of trust. They occupy a unique position in real property financing. Under such mortgages and deeds of trust the sole security for the debt is the real property or an estate for years therein.

Under the provisions of the United States Code Title 28 Section 3201 (b), "A lien created under subsection (a), purchase money mortgage or purchase money deed of trust shall have priority over any lien or encumbrance which is perfected later in time". Accordingly, absent consent of the United States, a purchase money mortgage or deed of trust would not have priority over the lien of a judgment entered by a federal court for a dollar amount in favor of the United States of America, a federal corporation, or an agency, department, or instrument of the United States of America.

Rules of Title Practice are providing that the company has actual knowledge that the parties/buyer intended a purchase money deed of trust and further provided the recorded deed of trust recites it is a purchase money deed of trust, the deed of trust may be insured as superior in priority to prior liens against the purchaser-trustor, with the exception to this rule are judgment liens arising from a judgment entered in federal court in favor of the United States of America.

Note, any liens that the buyer may have against them with the exception of a federal court lien in favor of the United States will still attach to the Real property and be a lien upon the real property but it's priority will be behind that of a Purchase Money Deed of Trust.

In situations whereas the buyer executes a first and second Deed of Trust caution and examination needs to be made to determine if both mortgages are considered as Purchase Money Mortgages or Purchase Money Deeds of Trust. If the buyer is using the First Deed of Trust for the purchase of the property but then executes a second Deed of Trust concurrently to use as an equity line or for improvements, etc...the second Deed of Trust may not have priority over any liens or judgments as the Purchase Money Deed of Trust (First Deed of Trust) would have, and the liens or judgments would have to be addressed.

It is important to understand that not all title companies have the same underwriting guidelines. Is your title company running buyers' names? In a market where transactions are increasingly more complicated and affordability is down the title companies that require existing liens against the buyer to be satisfied prior to close can ultimately transform a purchase that started as a deal maker to a deal breaker. ★



Jeff Lee is the San Joaquin County Sales Manager of Alliance Title Company and has 12 years of industry experience including title, customer service, marketing and management. He is a fourth generation Stocktonian and lives in Stockton with his wife, Sharon, daughter, Amber, and son Jeron. His website, www.alliancejefflee.com, was recently awarded the Real Estate Library Gold Award for its content and format. Some of his past accomplishments include 2000 Sales Representative of the Year, 2001-2004 Achievement in Sales Award, and 2004 Employee of the Year.



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