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# Lien Release

By Judon Fambrough

**L**iterature regarding real estate transactions focuses primarily on the preparation of sales contracts and the mechanics for closing. What goes unaddressed, both in the literature and in the promulgated forms, is the party responsible for preparing and recording the release of liens once the mortgage is paid. Oversight is understandable because far more loans are entered than ever reach maturity 20 to 30 years later.

Two possible real estate liens are created when a purchase is financed by either the seller or third-party lender. The first is the well known deed of trust securing the buyer's promissory note (sometimes referred to as the real state lien note). The second is the lesser known vendor's lien retained by the seller in the deed.

A vendor's lien is a charge imposed by law to secure the payment of the purchase price for real property. Usually the vendor's lien is expressly reserved in the deed so that notice will be given to third parties when the deed is recorded. An express vendor's lien operates similarly to a contract for deed. The seller retains superior title to the property until the purchase price is paid.

The vendor's lien arises incident to a purchase-money debt. If there is no debt, there is no vendor's lien. Consequently, the retention of a vendor's lien in the deed is valid only when all or a part of the purchase money is financed by the seller. When the purchase is financed entirely

by a third-party lender, the seller generally conveys the vendor's lien to the lender.

## Recordable Release

Because the promulgated forms are silent on the issue of release, many buyers are confused as to the documents needed to clear title when the mortgage is retired. Some buyers demand no documentation. They feel the payment of the mortgage is sufficient in and of itself. Others require the mortgagee to return both the buyer's promissory note and deed of trust with *Paid in Full* written across the face of each instrument. Neither alternative clears title.

What is needed is a recordable release of lien from the seller for the vendor's lien (where applicable) and another release from the mortgagee for the promissory note and deed of trust. Both releases need to be filed in the county where the property is located. Once recorded, the releases nullify any further effectiveness of the promissory note, the deed of trust and the vendor's lien. The return of the lien instruments to the buyer is customary but not necessary in lieu of the recorded releases.

If the sales contract does not address the party responsible for preparing and recording the releases, it is the seller's and lender's responsibility. If the buyer does not insist on the preparation and recording of the releases, however, the matter may go unattended. If so, the buyer's title will continue to be clouded after the mortgage is paid.

The statutes of limitation for collecting (or foreclosing) on both the vendor's lien and deed of trust is four years in Texas. If no legal action has been filed for collection on the liens for four years after the liens mature, there is indication the liens have been paid. However, subsequent buyers of the property may insist on filed releases before purchasing the property. Buyers who anticipate the problem may wish to specify the parties, and their successors in interest, responsible for preparing and recording the release instruments. Specifications should be placed in the sales contract, in the promissory note and in the deed of trust.

## New Law for Residential Property

Effective September 1, 1993, Section 12.017 was added to the Texas Property Code. The statute allows title companies to file an affidavit of record that has the effect of releasing a mortgage lien against a one- to four-family residence if, among other things, the:

- mortgagor has proof that the mortgage has been paid,
- mortgage remains unreleased for 60 days and
- title company has given the mortgagee (lender) at least 15 days written notice of its intent to execute and record the affidavit.

## Anticipate Problem

Buyers who are about to retire a mortgage may wish to proceed

in the following manner to assure release will come with the final mortgage payment.

First, the buyer may employ an escrow agent to coordinate the transaction. The buyer will tender final payment to the agent. The agent will forward the payment after receiving the proper releases from the lienholders. However, an escrow agent's services will not be free.

A local title company may be helpful.

Alternatively, the buyer may tender the final payment via a sight draft from a local bank. Once the proper release instruments are received at the bank, the sight draft will be funded.

**Buyers must remember that a recordable release of record is necessary to clear title.** If the seller retained a vendor's lien

for all or a part of the purchase money, a release from the seller also is necessary. Persons with specific questions should consult their attorney.

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