

“Free House”

“A very misunderstood use of words”

The author will use terminology of real estate that is defined under Texas law. In applying the same principle of understanding in other states the names of the documents may be different. The buying of a house that requires external financing for purchase is not accomplished by a single legal document but that of many legal documents.

The author will not comment upon the compliance requirements of RESPA, TILA, Reg. Z, etc.

The following actions will be under supervision of a closing agent to assure that compliance with all legal documents have been fully complied with. At a minimum, for an externally financed house you would need the General Warranty Deed, Promissory Note and the Security Instrument (Deed of Trust).

The General Warranty Deed transfers the legal owner's name of the real property from the seller to the buyer. This General Warranty Deed is required to be filed in public records. The General Warranty Deed is to be executed at the same time all other legal contracts are executed.

The promissory note is executed and financing is available to fund the purchase of the real property. The promissory note only reflects payments of principle and interest. The financing entity could elect to attach a lien against the real property by the use of a security instrument to assure payment of the indebtedness, if done in accordance with commercial finance laws and if the lien has been perfected according to commercial finance laws the indebtedness reflected in the promissory note would be a: “Secured” indebtedness. If the financing entity elects not to attach a lien, fails to perfect the lien or fails to maintain a continuous perfection of the lien then the indebtedness would be: “Unsecured”. To offer up the real property as security for the promissory note the buyer would need to have legal title to the real property and such ownership is addressed in the General Warranty Deed.

The Security Instrument (Deed of Trust) contains the Power of Sale Clause, Mortgage Payment Insurance requirements, and other directions. A valid, continuously perfected Security Instrument will follow the promissory note. An unperfected Security Instrument or the loss of “Perfection” of the Security Instrument renders the Security Instrument a nullity. When the Security Instrument loses its “Perfected” status the “Secured” status of the promissory note is reduced to an “Unsecured” status.

The real property (House) is only collateral to that promissory note that is “Secured” and if the note has been rendered “Unsecured” the financing entity has lost the power to foreclose but not the power to sue on the promissory note. The Security Instrument provided for title of the real property (House) to be held in a Trustee's name until the “Secured” indebtedness was extinguished.

What has happened, the financing entity by their actions nullified the security instrument and rendered any claim against the real property (House) null and void. What the financing entity may have if the original promissory note exists is the right to sue in a court of equity for payments under that promissory note.

If the indebtedness is “Unsecured” then for the courts to award a foreclosure action to the banks, the banks get title to real property (House) that they are not legally entitled to...

The Banks get a “Free House” ...