
TUTE Fall 2024

Description

The Unknown Title Examiner

That scraping noise you hear is TUTE moving a soapbox into position.

The rant this month concerns these so-called “contracts for deed.” Really, they are nothing more than installment sales contracts (ISCs), and labeling them “contract for deed” is like calling bull testicles Rocky Mountain Oysters. It doesn’t make either one any more appealing.

An analysis of the mechanics of these (ITHO^[1]) abominations reveal the pitfalls and headaches of transactions in which they appear. Recall that there are two “titles” to real property: the equitable title and the legal title. When the two titles are merged without conditions, the result is a fee simple absolute. A fully executed contract, however, vests the equitable title in the vendee while the vendor retains the legal title. This is true whether or not the contract is recorded, but when it *is* recorded, it serves as notice to the world that the two “titles” are vested in different persons or entities.

So what, you say? Remember that liens attach to the *equitable* title. Let’s see the implications of this: suppose the IRS files a lien against Lucy Van Pelt, who is the contract purchaser of property from Charles Brown. Now Lucy defaults on the contract and good ol’ Charlie Brown wants the property back. He can get it, of course, but he gets it with the lien attached unless he can convince the IRS to release it.^[2]

Slightly more far-fetched is the situation in which Lucy is able to get a loan secured by a mortgage. Of course, if she defaults, the lender can foreclose her interest (which is the equitable interest) but what then? Does the lender “step into her shoes” and become the contract vendee? Can the lender force the vendor to deed the property to it upon payment of the contract price? (If the lender mistakenly thinks it has a lien against the fee simple, its next call will be to the underwriter that issued the loan policy.)

A more common problem is when Lucy defaults and then disappears. Charlie Brown’s ISC may have an automatic reverter clause which Charlie may mistakenly rely upon to resell the property, claiming, naturally, that Lucy’s default reverts full title in him. TUTE believes most underwriters would consider this uninsurable and require Charlie Brown to get a court order terminating the contract. (If Charlie is able to find Lucy, he can get her to sign a termination, but her 5-cent advice stand has been unoccupied for a long time.)

The best advice TUTE can give to attorneys and agents dealing with ISCs is “be wary and be careful.”

On a somewhat less bilious topic, TUTE takes a look at notarization outside the United States. An increase in fraudulent foreign acknowledgments led one underwriter to issue a bulletin warning agents to be cognizant of the possibility of forged embassy or consulate notarizations. Unfortunately, agents simply can no longer take a US Embassy notarization at face value; with increased electronic sophistication comes increased opportunities for criminal behavior.

Embassies and consulates are wet-ink notaries. This means that the agent has to receive the original document in order to proceed; but it also means that the agent has time to verify that the acknowledgement is valid. Ask for an e-mailed copy of the original, examine it, and see if it raises any red flags. As with other absent-seller transactions, the sniff-test can be an agent's first line of defense.

Here are some indications that further investigation *may* be necessary:

1. Location: if the embassy is a great distance from the signer, TUTE often hears the hardship that would be endured to travel there. If the notarized documents are sent from a location far from the embassy, be wary; embassies will be located in cities with postal/overnight facilities—it would be odd for the documents to be carried hundreds of miles (or kilometers, TUTE supposes) to be sent to the agent.
2. Status of the notary: high-ranking officials will not be taking acknowledgments. The identity of the notary can often be verified directly with the embassy; in one instance, the notary had been an employee at the embassy but had left several years prior.
3. If the proceeds are to be wired to a bank some distance from the seller (or even to a different country!), take the same precautions you would if the seller weren't out of the US.

Sellers who are not near an embassy can provide document authentication through an apostille if the country is a part of the 1961 Hague convention. An apostille is similar to a document under triple seal in the US; a local notary takes the acknowledgment which is then authenticated by a government official certifying that the notary is, in fact, authorized as a notary. The complete list of countries participating can be found at the official website, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=41>. A slightly more user-friendly list can be found courtesy of the Georgia Secretary of State, <https://www.gsccca.org/notary-and-apostilles/apostilles/hague-apostille-country-list>. Documents authenticated through an apostille are reliable and recordable anywhere in the US.

TUTE closes with the reminder that if you build a better mousetrap, the bad guys will build a better mouse.

[1] In TUTE's Humble Opinion

[2] This scenario played out in a neighboring state!

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