

Court clerk sounds tax fraud alarm

by Alan Cooper

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The troubled housing market is creating headaches for court clerks and real estate professionals in the assessment of recordation taxes.

Fairfax County Circuit Court Clerk John T. Frey addressed one of those problems in a detailed letter sent to "Land Records Patrons" on March 12. The letter analyzes Virginia Code § 58.1-803 (D), the law that creates an exemption from the tax for a refinancing by the same lender.

The key language in the letter: If you try to play games with his office to avoid paying the tax due, Frey will refer you to the commonwealth's attorney's office for prosecution of a Class 2 misdemeanor – a penalty that will increase to a Class 1 misdemeanor on July 1.

Frey says he must take that action because he can be personally liable for monies not collected, and he has no authority to remove a document from land records even if it is fraudulent.

The exemption applies to the amount of the original debt. In other words, if a borrower refinanced a \$200,000 mortgage for \$300,000, the tax would apply to the extra \$100,000, but not to the first \$200,000.

That probably was a typical transaction as recently as three years ago, when many borrowers were cashing out the equity in their homes before the real estate market imploded.

These days, they're more likely to be refinancing the same or a lesser amount because their equity hasn't increased, or even decreased, but they can lower their monthly mortgage payments by taking advantage of lower interest rates.

As Frey points out, "the same lender" in today's market is unlikely to be the bank that made the loan in the first place, even if the same bank is doing the refinancing. That's because the original lender typically has sold the loan to an entity that bundled it with other mortgages and sold the bundle to a pension fund or some other bondholder.

The bank that the person refinancing the loan might logically think is "the same lender" is in fact a servicing agent for the entity to whom an attorney or settlement agent will send the payoff check.

Frey cites a 1992 attorney general's opinion that says, "the lender providing the refinancing must be the same as the lender now holding the existing debt being refinanced."

"Over the past few months," Frey notes, "the clerk's office has uncovered many improper claims for the refinance with the same lender exemption."

Some of those claims have taken the form of changing the name of the lender on the deed of trust to conform with the name of the lender on the payoff or omitting the pages in payoff statements that reflect the true identity of "the same lender."

Tina E. Sinnen, the circuit court clerk in Virginia Beach, said she agrees with Frey's analysis of the law and believes that other clerks in Hampton Road do as well. Not that she thinks that should be the law.

If the intention is to give the owner a break because the property hasn't changed hands, it shouldn't make any difference who the lender is, she said.

Kathy Golladay, supervisor of the civil division in the Roanoke city clerk's office, and Sinnen agreed, however, that deputy clerks typically do not attempt to look behind a document that asserts that the refinancing is with the same lender.

She relies on the integrity of attorneys and other real estate professionals in accepting the assertion, Sinnen said.

Richmond Circuit Court Clerk Bevill M. Dean agrees with Sinnen that clerk's offices are not prepared to look behind the documentation to ensure that the money is coming from the "same lender."

"Trying to trace that piece of paper is a nightmare" and one that hardly seems necessary when the apparent intent in the law to give the property owner a break, Dean said.

Daniel H. Borinsky, the attorney and certified public accountant who operates Esquire Settlement Services Inc. in Prince William County, said he has written legislators about his concern that the law is at odds with reality.

"My dilemma as a settlement agent is that I do not want my clients to pay more recording taxes than they should," he said. "However, I have significant doubts that many purported 'refinances with the same lender' actually qualify for the recording tax exemption."

He recommended eliminating the exemption or having the tax apply to all refinancings.

Assessed value

Borinsky thinks legislative attention is needed for another aspect of recordation law, this one encompassed in Code § 58.1-801.

The law bases the amount of the tax on "the consideration of the deed or the actual value of the property conveyed, whichever is greater."

Borinsky said the law was aimed at such unusual circumstances as the sale of property for less than its fair market value, such as a foreclosure or a sale between family members.

In such cases, clerks typically based the tax on the assessed value of the property, which many offices require to be listed on the cover sheet of the deed.

In today's market, it is not unusual for the sale price to be substantially less than the assessed value, Borinsky said. In such cases, he gets an independent appraisal to show that the actual value of the property is near the sales price, Borinsky said.

Sinnen said her office typically considers the value recited in the deed to be "the actual value of the property conveyed," so that the phrase "whichever is greater" isn't an issue.

She said that interpretation is consistent with what she views as the point of the law - collecting a tax based on the fair market value of the property.

Dean said settlement agents filing the deed of trust in his office typically pay the tax based on the assessed value if it is larger than the sale price because the figures are close enough that an appraisal to establish fair market value probably wouldn't be worth the effort.

Legislation addressing the issue was introduced in this session of the General Assembly but was carried over until next year so that the Senate Finance Committee could study the financial ramifications of any change in the law, according to Chip Dicks, a Richmond lawyer and lobbyist who represents the Virginia Circuit Court Clerks' Association and the Virginia Association of Realtors.

Dicks said he expects the committee to look into the refinancing issue as well.

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