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New York Law Journal Reprint— Real Estate Trends: Growing Fraud— Self-Help Measures Can Head Off Problems

Today's bank robbers rarely use a mask and gun. The crimes are usually completed at a real estate transaction's closing table. According to the Federal Bureau of Investigation, lenders incurred more than \$1 billion in mortgage losses in 2005 as a result of fraud¹ During this same time period, the title industry reported \$916.4 million dollars in paid title claims,² more than a fourfold increase from \$120 million in claims paid for in 1981³ These statistics do not include the number of fraud or forgery claims where the victim failed to purchase title insurance.

Typical Fact Patterns

Forgeries and fraud committed by imposters having no relationship to the victims have become more prevalent in recent years⁴ Without the bona fide owner's knowledge or permission, an imposter pretends to be the owner of record and obtains a mortgage for a property with the assistance of fake identification and/or a forged power of attorney. The imposters are often aided by hard-money lenders eager to provide financing without extensive financial and background checks.

Another type of property fraud occurs between parties who have a relationship to each other, such as between spouses, parents and children⁵ The child or spouse forges the owner's name and conveys or mortgages the property⁶ A typical scenario involves a property owned by tenancy by the entirety, where one spouse brings to a closing another person purporting to be the other spouse and transfers or mortgages the other's interest in the property without consent.⁷ Another scenario finds one spouse forging the other spouse's name on the deed so as to destroy the entirety and make it a single individual ownership in fee simple absolute⁸ The spouse will then convey the property to new purchasers⁹

In many of these cases, a surprised owner only discovers the fraud when receiving a default or foreclosure notice from the mortgagee or a knock on the door from someone claiming to be the owner of the property¹⁰ As a forged deed is void and conveys no title, the mortgage or transfer in these cases, will not be effective as a conveyance of the true owner's interest in the property.¹¹ Courts will not permit a bank to foreclose against the innocent owner's or spouse's interest in the property, thereby leaving the money owed to the bank unrecoverable by eviction or ejection¹²

Regarding the latter scenario noted above, the law is well settled that when "a husband and wife take title to the real property as tenants by the entirety, each acquires an undivided interest in the entire property with rights of survivorship which may not be impaired without the consent of the other."¹³ Either spouse may sell, mortgage or encumber his or her rights to the property, subject to the continuing rights of the other.¹⁴ The result in this type of situation is the innocent purchaser or mortgagee is left with an interest in only part of the property, an action for fraud against the seller, and title insurance protection if a policy has been purchased.¹⁵

Role of Professional

With suspicious eyes and a small amount of due diligence, real estate professionals can reduce the number of real estate closings involving fraud and forgery. Although no real estate related insurance company defends and protects its customers better than title insurance companies do, practitioners cannot rely on these insurers as panaceas. Agents for title companies and lenders need to take additional measures to reduce the increase in fraudulent conduct.

Two reasons provide motivation for all real estate practitioners to attempt to stamp out fraud. First, cooperative unit buyers rarely purchase title insurance. As long as these buyers continue to fail to purchase title insurance, whether by choice or ignorance, horrendous financial consequences hover over those that can least afford to endure such a burden. Second, at least two courts have relieved title companies¹⁶ of responsibility to indemnify (a) where it was determined that the lenders had constructive or inquiry knowledge of relevant facts of the fraudulent conduct,¹⁷ and (b) where the insured's complicity in or constructive knowledge in the fraudulent scheme was demonstrated.¹⁸

For the most part, however, New York courts will not find a closing agent, lender or title company responsible for monetary losses for failing to adequately ascertain the correct identity of a party to a transaction.¹⁹ For example, for liability purposes, accepting a health insurance card and a credit card (both without photo) satisfies the "sufficient identification" requirement to close on a loan or property.²⁰ Culpability will also not be imputed to a party or lender for failing to obtain an original or certified copy of a death certificate or for the failure to

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compare an applicant signature's to prior signed documents,²¹ or to check the accuracy of the information or identification presented by an applicant's (alleged) spouse.²² Furthermore, no duty exists requiring the closer to authenticate the provided identification²³ or to ask in appropriate circumstances whether the parties had filed for divorce.²⁴

Moreover, proving a real estate transaction to be the product of a forgery or fraud is exceedingly difficult. As long as a duly executed deed with a certificate of acknowledgement exists, proving a forgery or fraud in a New York court requires the plaintiff to produce evidence of fraud that is "so clear and convincing as to amount to a moral certainty."²⁵ This rule of law relies on the flawed logic that the notary has necessarily complied with the requirements of CPLR §4538 simply by reciting the language of the standard form whereby the notary attests that the signatory "proved" to the notary "on the basis of satisfactory evidence to be the individual whose name" is the subject of the transaction.²⁶

Preventing the Fraud

Accordingly, to protect their clients from being victimized by such conduct, real estate professionals need to use the preemptive self-help measures recommended below.

A large number of the closing imposters rely on false identification to accomplish a fraud. Hence, no closing should occur without at least two forms of original credible photo identification such as a passport and valid driver's license. Counsel should request copies of identification prior to the closing. If two forms of photo identification cannot be produced, then the closing should be postponed or adjourned.

Additionally, every closer should be familiar with methods for identifying an altered or fake driver's license. One title company utilizes the I.D. Checking Guide, which provides pictures of valid driver's licenses that can be compared to the one produced at the closing, as well as suggestions on ensuring that a driver's license is valid.²⁷ For example, the first two of several numbers on the far right bottom of every valid New York driver's license always matches the year of the holder's birth date.²⁸ Practitioners have an even better tool to determine the veracity of a license by logging the presented license into a Web site that will report its authenticity.²⁹

The probability of a fraud can be even further reduced by receiving copies of the loan applications and forms of identification before the day of closing. This will allow time to compare samples of an applicant's signature by comparing the current application to prior signatures on signed past deeds, mortgages and satisfactions which can be found on the Automated City Register Information System (ACRIS) Web site.³⁰

At the closing table, the title closer must pay careful attention to signatures, identification presented, and any inconsistencies between documents.³¹ Affidavits must be signed by all parties verifying their identity. If any person present at the closing cannot speak English fluently, make sure to have a translator present at the closing.³² Particu-

larly in New York City, one can find access to qualified interpreters of every human language.³³

Certain situations should put the closer on heightened alert. This includes any closing where a power of attorney (POA) is presented and when the closer becomes aware that a party is involved in anything ranging from a marital dispute to a full-blown pending or consummated divorce. The case law is awash with cases where domestic disputes were the motivation for the fraudulent activity.³⁴ Therefore, if a party is closing by POA, its authenticity should be verified prior to closing. Also, the title closer should call the POA principal while at the actual closing table to verify who they are and ensure that they gave a POA for closing. No or low documentation loan closings should also trigger increased vigilance. These borrowers may have been instructed by mortgage brokers to inflate their incomes when they cannot even manage to pay for one mortgage payment.³⁵

In a situation where spouses are transferring title or giving a mortgage, make sure both individuals are present at the closing table or contact is made with the absent spouse. Alternatively, a borrower or seller of a property claiming the death of a spouse should be requested to produce at closing a certified death certificate proving such. If it is not possible to obtain a certified copy, one title company even goes so far as requesting the borrower get a non-certified copy along with a letter from the funeral home as verification. Make sure to follow up with a phone call to the funeral home to confirm the authenticity of the letter.

As there is an increasing pattern in fraud amongst people suffering from gambling, drug or alcohol problems, a background check may provide helpful information. Simple checks that can be run include a yellow pages search, and a search on public record directories such as Search Systems, BRB Publications, and Public Record Finder.³⁶ Finally, if there is any suspicion as to identity fraud, the lender may want to actually visit the property to verify who is living there.³⁷ Using a number of these methods, the real estate bar can greatly decrease the number of fraudulent transactions.

In any event, court intervention may not be far off. As extremely reckless conduct and grossly negligent fact patterns have been making their way through the court system, Courts may be more willing to impose liability for a litigant's negligence or to find the requisite evidence of complicity in the fraudulent scheme than they have been in the past. The magnitude of the problem suggests that some corrective action by the courts or the Legislature³⁸ will be required to alleviate the present situation.

1. See Press Release, Federal Bureau of Investigation, Mortgage Fraud Operation 'Quick Flip' (Dec. 14, 2005) (available at www.fbi.gov/pressrel/pressrel05/quickflip121405.htm). The reported loss is up from \$429,000,000 in 2004. For fiscal year 2005, there were 721 pending FBI Mortgage Fraud cases, which was up from 534 in fiscal year 2004.

2. Neil DasGupta & Richard McCarthy, "Title Insurance and Industry Statistics," A.M. Best Special Report, Nov. 27, 2006 (available at www.alta.org).

3. Id.

4. *Burger v. Singh, et al.*, 28 A.D.3d 695, 816 N.Y.S.2d 478 (2nd Dept. 2006).

5. *Elder v. Elder*, 2 A.D.3d 671, 770 N.Y.S.2d 95 (2nd Dept. 2003)

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- (mother claimed that her signature on a deed purportedly transferring the property to her son was a forgery); *Field v. Field et al.*, 130 Misc. 2d 751, 497 N.Y.S.2d 586 (Sup. Ct. Kings Co., 1985); *Altegra Credit Co. v. Tin Chu*, 784 N.Y.S.2d 918 (Sup. Ct. Kings Co. 2004).
6. *Northgate Electric Profit Sharing Plan v. Hayes*, 210 A.D.2d 384, 620 N.Y.S.2d 418 (2nd Dept. 1994); *Money Store/Empire State, Inc. v. Lenke*, 151 A.D.2d 256, 542 N.Y.S.2d 174 (1st Dept. 1989); *Field v. Field et al.*, 130 Misc. 2d 751, 497 N.Y.S.2d 586 (Sup. Ct. Kings Co., 1985); *Altegra Credit Co. v. Tin Chu*, 784 N.Y.S.2d 918 (Sup. Ct. Kings Co. 2004); *Elder v. Elder*, 2 A.D.3d 671, 770 N.Y.S.2d 95 (2nd Dept. 2003).
7. *Northgate Electric Profit Sharing Plan v. Hayes*, 210 A.D.2d 384, 620 N.Y.S.2d 418 (2nd Dept. 1994); *Money Store/Empire State, Inc. v. Lenke*, 151 A.D.2d 256, 542 N.Y.S.2d 174 (1st Dept. 1989); *Field v. Field et al.*, 130 Misc. 2d 751, 497 N.Y.S.2d 586 (Sup. Ct. Kings Co., 1985).
8. *Field v. Field et al.*, 130 Misc. 2d 751, 497 N.Y.S.2d 586 (Sup. Ct. Kings Co., 1985).
9. Id.
10. See *Altegra Credit Co. v. Tin Chu*, 784 N.Y.S.2d 918 (Sup. Ct. Kings Co. 2004) (mother first became aware of fraudulent mortgage given by son when unopened mail to her son began accumulating at her home).
11. *Field v. Field et al.*, 130 Misc. 2d 751, 497 N.Y.S.2d 586 (Sup. Ct. Kings Co., 1985); *Northgate Electric Profit Sharing Plan v. Hayes*, 210 A.D.2d 384, 620 N.Y.S.2d 418 (2nd Dept. 1994).
12. *Northgate Electric Profit Sharing Plan v. Hayes*, 210 A.D.2d 384, 620 N.Y.S.2d 418 (2nd Dept. 1994).
13. *First Am. Title Ins. Co. of NY v. Kevlin*, 203 A.D. 2d 681, 610 N.Y.S.2d 361 (3rd Dept. 1994).
14. *Northgate Electric Profit Sharing Plan v. Hayes*, 210 A.D.2d 384, 620 N.Y.S.2d 418 (2nd Dept. 1994).
15. *Field v. Field et al.*, 130 Misc. 2d 751, 497 N.Y.S.2d 586 (Sup. Ct. Kings Co., 1985).
16. See *Schultz Management v. Title Guaranty Co.*, 158 A.D.2d 428, 551 N.Y.S.2d 527 (1st Dept. 1990); *Zelber v. Lewoc*, 6 A.D.3d 1043, 776 N.Y.S.2d 134 (3rd Dept. 2004).
17. See *United States v. Orozco-Prada*, 636 F Supp 1537 (SDNY 1986) and *Schultz Management v. Title Guaranty Co.*, 158 A.D.2d 428, 551 N.Y.S.2d 527 (1st Dept. 1990) (a subsequent action by the mortgagees against title insurer).
18. *Schultz Management v. Title Guaranty Co.*, 158 A.D.2d 428, 551 N.Y.S.2d 527 (1st Dept. 1990).
19. *Burger v. Singh*, 28 A.D.3d 695, 816 N.Y.S.2d 478 (2nd Dept. 2005); *Banque National de Paris v. 1567 Ownership Associates*, 214 A.D.2d 359, 625 N.Y.S.2d 152 (1st Dept. 1995); *Money Store/Empire State, Inc. v. Lenke*, 151 A.D.2d 256, 542 N.Y.S.2d 174 (1st Dept. 1989).
20. *Shube v. Cheng*, 157 Misc. 2d 555, 596 N.Y.S.2d 335 (Sup. Ct. Nassau Co. 1993).
21. *Beckford v. Northeastern Mortgage Investment Corp.*, 262 A.D.2d 436, 692 N.Y.S.2d 412 (2nd Dept. 1999).
22. Id.
23. *Burger v. Singh*, 28 A.D.3d 695, 816 N.Y.S.2d 478 (2nd Dept. 2005); *Banque National de Paris v. 1567 Ownership Associates*, 214 A.D.2d 359, 625 N.Y.S.2d 152 (1st Dept. 1995); *Money Store/Empire State, Inc. v. Lenke*, 151 A.D.2d 256, 542 N.Y.S.2d 174 (1st Dept. 1989).
24. *First Am. Title Ins. Co. of NY v. Kevlin*, 203 A.D. 2d 681, 610 N.Y.S.2d 361 (3rd Dept. 1994); *Beckford v. Northeastern Mortgage Investment Corp.*, 262 A.D.2d 436, 692 N.Y.S.2d 412 (2nd Dept. 1999).
25. See *Paciello v. Graffeo*, 819 N.Y.S.2d 480 (2nd Dept. 2006); See also CPLR §4538 (2006); *39 College Point Corp. v. Transpac Capital Corp.*, 22 A.D.3d 663, 802 N.Y.S.2d 733 (2nd Dept. 2005) (holding that a certificate of acknowledgment should not be invalidated on unsupported evidence of an interested witness); *Albin v. First Nationwide Network Mortgage Co.*, 248 A.D.2d 417, 670 N.Y.S.2d 42 (2nd Dept. 1998); *Elder v. Elder*, 2 A.D.3d 671, 770 N.Y.S.2d 95 (2nd Dept. 2003); *Osborne v. Zornberg*, 16 A.D.3d 643, 792 N.Y.S.2d 183 (2nd Dept. 2005); *Shim v. Exim Capital Corp.*, 272 A.D.2d 315, 707 N.Y.S.2d 467 (2nd Dept. 2000).
26. See CPLR §4538 (2006); *39 College Point Corp. v. Transpac Capital Corp.*, 22 A.D.3d 663, 802 N.Y.S.2d 733 (2nd Dept. 2005); *Albin v. First Nationwide Network Mortgage Co.*, 248 A.D.2d 417, 670 N.Y.S.2d 42 (2nd Dept. 1998).
27. See www.driverslicenseguide.com to purchase the I.D. Checking Guide, 2006.
28. Id.
29. Application for a DMV dial-in account can be found at www.nysdmv.com/forms/mv15com.pdf and a user manual available at www.nysdmv.com/forms/mv15dial.pdf.
30. See <http://www.nyc.gov/html/dof/html/jump/acris.shtml> (limited to the Bronx County, Queens County, Kings County, and New York County).
31. *Field v. Field et al.*, 130 Misc. 2d 751, 497 N.Y.S.2d 586 (Sup. Ct. Kings Co., 1985).
32. Id.
33. When the foreign language in question is "Chinese," be careful to arrange for an interpreter capable of interpreting the particular dialect of Chinese involved. People speaking Mandarin and Cantonese, for example, can only communicate with each other in writing, as the spoken languages are completely different while the written language is identical.
34. *First Am. Title Ins. Co. of NY v. Kevlin*, 203 A.D. 2d 681, 610 N.Y.S.2d 361 (3rd Dept. 1994); *Field v. Field et al.*, 130 Misc. 2d 751, 497 N.Y.S.2d 586 (Sup. Ct. Kings Co., 1985); *Money Store/Empire State, Inc. v. Lenke*, 151 A.D.2d 256, 542 N.Y.S.2d 174 (1st Dept. 1989).
35. James R. Hagerty & Ruth Simon, "More Borrowers With Risky Loans Are Falling Behind---Subprime Mortgages Surged as Housing Market Soared; Now Delinquencies Mount," Wall Street Journal, Dec. 5, 2006.
36. Available at www.yellowpages.com, www.searchsystems.net/, www.brpbpub.com/pubreesites.asp, www.publicrecordfinder.com.
37. *Phelan v. Brady*, 119 N.Y.587 (1890) ("actual possession of real estate is sufficient notice to a person proposing to take a mortgage on the property, and to all the world of the existence of any right which the person in possession is able to establish"); *Vitale v. Pinto*, 118 A.D.2d 774, 500 N.Y.S.2d 283 (2nd Dept. 1986).
38. It seems obvious that legislation stiffening the penalties for notaries who do not genuinely check identification would be a minimal palliative step.

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Blues singer and
Grammy Award winner,
John Hammond,
will be a very special entertainer
at the NYSLTA 87th Annual Convention.