

Real Estate Law Update

Flags of Mortgage Fraud

Much has been written about the flags of mortgage fraud, with a description of flags often buried in articles not read very carefully. In the interests of brevity, and as a tool for you and your staff to have a ready simple guide, here are some of the most common flags of fraud. For a more detailed explanation, see my papers on real estate fraud in the 2014 and 2015 Real Estate Summit materials.



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1. Things not called for in the agreement of purchase and sale including:

- deposits "paid" but not called for by the agreement of purchase and sale; even if you see cancelled cheques or receipts for the payments, uncalled for payments made are a flag of fraud.
- VTB mortgages not called for by the agreement of purchase and sale; It means all the cash to be paid on closing is not being paid and the VTB mortgage may not be good consideration.
- amending agreements reducing the purchase price because for example renovations were not made to the property as required by the agreement or to reflect additional deposits paid; it may mean the lender is lending on

expected fair value without notice of the price reduction

- deposits or additional deposits paid directly to the vendor; payments to vendors as additional deposits are not usual and suspicious, even with receipts or acknowledgements of payments.

2. Payments to third parties unrelated to the transaction, even if you get a direction

Closing proceeds should be paid to the vendor or borrower or to pay off existing mortgages or other usual expenses only. A direction to pay third parties unrelated to the actual transaction is a flag of fraud and needs to be further investigated and where necessary, the lender advised. A lawyer should not be the client's banker. Never forget your duty to the lender. Note that some title insurers

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require funds on private mortgage transactions to be paid to discharge prior mortgages or executions or to the registered owner only. It is not sufficient to pay funds to a borrower's lawyer in trust on direction.

3. Clients willing to pay premium legal fees

Excessive legal fees for standard transactions are often seen as flags of fraud suggesting that the lawyer will prefer the interests of the personal client over that of the lender client or that flags of fraud may be ignored in the interests of realizing an advantageous fee.

4. No real estate agents involved or real estate agents named in the offer but no invoice for the balance of commission or instructions not to pay them

Some fraudsters put the name of an agent into an agreement of purchase and sale to make it look legitimate but you are instructed as vendor's lawyer not to pay the agent; If there is no named agent or no real agent, the purchase price on the offer may not reflect a market transaction and may be inflated to induce the lender to lend more than the property is actually worth.

5. Flips

Flips are legal but the issue is disclosure; the ultimate lender must be told of the price increase.

6. Recurring parties

The same people appear in a series of transactions, sometimes as buyers, sometimes as sellers with transactions dubbed "investment deals". The parties do not appear to know much about the deals or do not otherwise appear to have the "means" to buy these properties.

Other Things to Worry About

1. You have a duty not participate in a fraud even if you are not acting for the lender.
2. Do not assume that the lender knows about the ultimate sale price, has seen the agreement of purchase and sale or amendments, or has been told everything relevant by the mortgage broker. Lawyers have a duty to disclose or advise of material changes in a transaction.
3. Do not rely on your client's acknowledgement or receipts that he or she received or paid any additional cash deposits.
4. Do not rely on your client's direction re funds if the money is going to non-deal related parties.
5. Always have a real forwarding address for your vendor client. Watch out for those who say "I will come in and pick up my report and my cheque" and have no verifiable address. If your vendor client sold, where are they moving? Get some proof.
6. Check client ID against the property they are selling. Get the story if the ID does not match. If there is some "story", substantiate it.
7. Be suspicious of transactions among "friends", relatives, etc. that involve no real estate agents. Some frauds occur where the client tells the lawyer some "story" which the lawyer accepts at face value such as selling to a brother, a cousin, exchange to satisfy a debt, a private transaction. These are often fraudulent mortgage transactions with inflated values and a typical flag of fraud.
8. Remember your duty to the lender and your obligations under the Rules of Professional Conduct.