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# THE ZOMBIE TITLE

## WHEN A MORTGAGE FORECLOSURE REFUSES TO DIE

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### Introduction

As the recent recession and accompanying real estate crisis receded, they left behind a flotsam of new legal terms. For example, all real property practitioners know what a “short sale” is. Some lawyers may have even heard of the phrase, “jingle mail” - when the underwater homeowner mails his house keys to the lender due to his inability to meet his mortgage payment obligations. But now, with a nod to the hit television series, “The Walking Dead,” there is a new distressed real estate term - the zombie title.

A zombie title is the title to real estate that results from a lender initiating mortgage foreclosure proceedings, but then unexpectedly abandoning the foreclosure before a judicial deed or consent foreclosure is issued.

The phrase is an apt one. When the foreclosing lender originally files its complaint, it is possible that the homeowner, recognizing what he believes to be the inevitable, moves out of his house and moves on with his life. He rents a new home in the same or a different neighborhood; he may enroll his children in new schools - all because he feels that the lender will eventually take title

to his home pursuant to the foreclosure. He walks away leaving (he thinks) the foreclosure of his home behind him.

But sometimes foreclosure is not inevitable. The lender may decide to drop out of the proceeding halfway through the litigation because the home is not worth the costs of foreclosure, because the lender has a surplus of inventory, or simply because the lender does not want the home.

When a lender pulls out of a foreclosure, the hapless homeowner eventually discovers that he still owns title to his house - but it often is a house that has deteriorated due to months and months of abandonment and neglect.

### The Effect of a Zombie Title on the Homeowner

A Google search of the term “zombie title” reveals disturbing accounts of mortgagors trapped in the ownership of derelict homes - homes with broken windows, stolen sinks and toilets, and holes in roofs and siding. These owners remain responsible

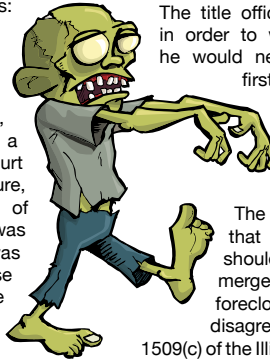


for the property taxes and association assessments. These owners will ultimately be responsible for costs incurred by the municipality in trying to maintain these properties - for example, weed cutting liens; garbage, debris, and graffiti removal liens; and ultimately, demolition liens.<sup>1</sup>

## Title Insurance Issues

Zombie titles have created new issues for title companies. Consider an attorney's recent request of Chicago Title to insure a home in Kane County. The background facts are as follows:

The owner had executed a first mortgage and a second mortgage. The first lender filed a foreclosure action, making the second lender a permissible party. The court issued a judgment of foreclosure, and the owner moved out of the home. A sheriff's sale was scheduled, but then it was abruptly cancelled. A release of the first lender's mortgage was recorded. Several months later the City of Aurora contacted the owner about some building code violations. Only then did the owner realize that he was still the owner of his home - a home subject to a foreclosure in legal limbo. The owner now wanted to repair his home and sell it - but what about the two mortgages and the foreclosure case?



Getting rid of the foreclosure litigation should be relatively simple - the attorney for the owner could seek to have the case dismissed for want of prosecution. But how could Chicago Title underwrite the two mortgages? It appears that the first lender had actually recorded a release of its mortgage. The owner's attorney argued that the title officer should simply waive the first mortgage. The title officer refused to do so. He noted that the release might have been fraudulently prepared and recorded. In addition, the judgment for foreclosure represented an enforceable lien on the home of more than \$126,000.

The title officer told the attorney that in order to waive the first mortgage, he would need assurances from the first lender that the recorded release of mortgage was legitimate. Ideally, the judgment of foreclosure should also be vacated.<sup>2</sup>

The owner's attorney argued that the second mortgage should be waived because it merged with the judgment of foreclosure. The title officer disagreed. Pointing to Section 15-1509(c) of the Illinois Mortgage Foreclosure Law, the title officer told the attorney that he could not waive the second mortgage until the court had issued either a judicial deed or a consent judgment.<sup>3</sup>

<sup>1</sup> See respectively 65 ILCS 5/11-20-7; 65 ILCS 5/11-20-13; 65 ILCS 5/11-31-1.

<sup>2</sup> For a mortgage foreclosure case involving a dismissal for want of prosecution, see *BankFinancial, FSB v. Tandon*, 2013 IL App (1st) 113152. Note that in some zombie title cases, the mortgage may not be released. In some cases the foreclosure proceeding may be dismissed.

<sup>3</sup> 735 ILCS 5/15-1509(c) provides that "[a]ny vesting of title by a consent foreclosure...or by deed shall be an entire bar of (j) all claims of parties to the foreclosure..."



The attorney noted that the owner had gone through bankruptcy and that the second lender had been named and served in the bankruptcy proceeding. The attorney asked if a mortgagor's bankruptcy provided a basis for waiving the second mortgage. The title officer explained, however, that bankruptcy only eliminates the personal obligation to pay the mortgage debt; the lien on the land remains.<sup>4</sup>

The title officer was also reluctant to waive the two mortgages because of his underlying equity concerns. In this example, the owner (who had walked away from his home, thinking he had lost it through foreclosure) now wanted to sell the property and presumably keep the proceeds of sale. Either of the two lenders might take issue with the borrower's attempts to bootstrap himself into a better position than he was in prior to the filing of the foreclosure complaint.<sup>5</sup>

## Conclusion

The problem of zombie titles is a real-life "Nightmare on Elm Street," and not just for hundreds of hapless homeowners. As the above example illustrates, zombie titles have created unique issues for real estate attorneys and title companies, too.

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<sup>4</sup> See *Johnson v. Home State Bank*, 501 U.S. 78, 111 St. Ct. 2150, 115 L. Ed. 2d 66 (1991); *Rochelle State Bank v. Gavic*, 70 Ill. App. 3d 42, 388 N.E. 2d 436 (2<sup>nd</sup> Dist. 1979).

<sup>5</sup> See Justice Hutchinson's dissenting opinion in *BCGS, L.L.C. v. Jaster*, 299 Ill. App. 3d 2-8, 700 N.E.2d 1075 (2<sup>nd</sup> Dist. 1998).