

Lender Best Practice: Powers of Attorney

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We are seeing more powers of attorney prepared by title companies, rather than attorneys. We are also seeing an increase in repurchase demands for flawed power of attorneys. Consequently, we have had to review powers of attorney more closely. In our review, we have observed common errors made in the preparation of powers of attorney.

Errors in the power of attorney are often very costly, because the power of attorney cannot be fixed after closing. Therefore, we wanted to share some of our observations.

1. **Specific vs. General.** Unless required by applicable law, FNMA requires the POA to be specific; it must include the address of the subject property. Government loans do allow general POAs, but additional guidelines may apply to the use of general POAs.
2. **Multi-state transactions.** When a POA is drafted for a real estate transaction in one state, and then signed in a second state, beware of the law that applies to the POA. The enforceability of the POA will be governed by the law of the state where the POA is signed, unless the POA contains a governing law provision which sets forth which state law should apply.

We have seen title companies prepare POAs without the governing law provision, resulting in unintended consequences. For example, we recently had a transaction where a POA was drafted in Georgia for a Georgia real estate transaction. The POA was then mailed to Pennsylvania, where it was signed and notarized. The POA was not prepared with a governing law provision, so Pennsylvania law applied to the POA. Georgia law requires 1 witness, whereas, Pennsylvania law requires 2 witnesses. The POA was witnessed by only one person and therefore, was not compliant with Pennsylvania law. As a POA cannot be fixed after closing, we could not purchase the loan from the lender.

As a best practice prior to closing, the Lender should (i) ensure that the POA includes a governing law provision or (ii) inquire about where POA will be signed and then, ensure the POA complies with the law of that state where the POA will be signed.

3. **Scope of Authority.** Understandably, many principals want to limit the power of their agent. The terms of the sale or the loan might be set forth in the POA, such as the purchase price, loan amount or interest rate. These can have the effect of limiting the agent's authority to enter into a transaction that differs from the terms set forth in the POA. In addition, POAs can have expiration dates. So, the agent's authority ends on a date certain. We see a lot of mistakes in the scope of authority. For example, the interest rate in the note is 4.625%, but the POA authorizes the agent to enter into a transaction with a note rate of 4.25% or the loan amount in the note is 313,500, but the POA authorizes the agent to enter into a transaction with a loan amount of 310,000.

As a best practice, prior to closing the loan with a POA, lender should perform additional due diligence to ensure that the loan transaction and the authority under the Power of Attorney are consistent.

Thank you for your business.

-Your SunTrust Correspondent Team