

# FEDERAL STANDARD ABSTRACT TITLE NEWS

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## Title News

### **New Short Sale Guidelines**

The point of a short sale is to get the seller's mortgagee to accept a payoff amount lower than what is actually owed by showing the lender that the mortgage is undersecured; i.e. by showing that the fair market value is lower than the debt. If the property cannot be sold for an amount high enough to pay off the mortgage, there is no point in going to foreclosure. The lender is better off allowing the sale to go through at market value and collect what it can.

The difficulty arises in the information available to the parties. Lenders considering a short sale do not run new appraisals. They rely on market information provided by the seller. On the other hand, the seller has a strong incentive to portray a bleak market picture to induce the lender to accept the short sale. In addition, there have been instances where lenders consent to short sales and the properties are immediately flipped -i.e. resold- at higher amounts. All this means that lenders have reason to mistrust what the sellers claim the current fair market values to be.

As a consequence, some lenders have begun adding provisions in their short sale payoff letters allowing them to reinstate the mortgage if the property is resold within a certain period or if the lender was induced to accept by fraud. For instance,

representing to the payoff lender that the fair market value is \$200,000, when the seller knows it is \$300,000, would be an instance of fraud.

Title underwriters, needless to say, are concerned about these new provisions. The possibility that a lender may reinstate the seller's mortgage after the sale is a serious matter. Some underwriters have instructed their title agents not to insure any transaction where the payoff lender reserves any right to reinstate the mortgage debt. Others are also refusing to insure any transaction where the parties have misled or withheld relevant information (e.g. fair market value or the actual closing costs), even if the payoff letter does not disclose any reservation of rights. The rationale in this approach is that a fraud is a fraud and the lender does not need to reserve any rights to act on it.

Attorneys involved in short sales are well-advised to discuss their payoff conditions with us prior to closing. As it often happens in new areas, different underwriters have issued different guidelines. A discussion prior to closing will allow us to find the most suitable underwriter for the specific transaction and prevent surprises at the closing table.

### **Subordinating Federal Tax Liens**

In the interest of facilitating mortgage refinances, the IRS has announced an expedited process to subordinate federal tax liens to private mortgages. The IRS press release can be found at <http://www.irs.gov/newsroom/article/0,,id=201424,00.html>.

### **NYC Condominium Floor Plans**

ACRIS currently shows the recording information for condominium floor plans but does not make them available for viewing. The City Register has amended its filing requirements to allow it to scan new floor plans and make them available on ACRIS.

### **Foreclosure Purchase Risk of Loss**

The successful bidder on a foreclosure sale moved to void the sale because the prior owner had entered the premises and caused \$150,000 in damages. The foreclosing mortgagee rejoined that, under the terms of sale, the successful bidder had assumed the risk of loss from the date of the auction. The court agreed with the mortgagee. *US Bank, NA v. Cedeno*, 2009 WL 294715 (Orange Ct., Feb. 6, 2009).

### **NYC Residential Registration**

Currently, in order to record deeds, the City Register requires a Preliminary Residential Property Transfer Form or an affidavit stating that the subject property is not a multiple dwelling. Effective May 3, 2009, registration statements will also be required for all one and two family buildings when neither the owner nor any family member occupies it. "Family

members" include spouses, domestic partners, parents, parents-in-law, children, siblings, siblings-in-law, grandparents and grandchildren.

### **Endorsements on Notes and Foreclosures**

In the past we have reported instances where assignments of mortgage that did not properly follow the note holder prevented lenders from foreclosing on them. This was of special concern to MERS, since MERS appeared as nominee under the mortgage, but was never mentioned in the notes.

Two decisions in New York have recently considered the opposite case: What happens if the notes are properly endorsed and delivered, but the underlying mortgages are not assigned? Both decisions state that an endorsement of a mortgage note carries with it any mortgages made as collateral. *Deutsche Bank Nat'l Trust Co. v. Gilles*, 22 Misc.3d 113, and *Wells Fargo Bank, N.A. v. Perry*, 2009 WL 440908 (Suffolk Cty., Feb. 26 and 20, 2009). The moral is: better no assignment than a bad assignment.

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