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Developments in short sale and foreclosure title ins. issues

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There have been two recent developments that effect title insurance for purchases of distressed properties where they be residential or commercial.

Short Sales

A number of lenders are attempting to include in their short sale approval letters a provision which would allow them the right to invalidate a short sale transaction after the closing and re-impose the security instrument. An example of this language is as follows:

If the property was acquired by means of fraud, (lender's name) reserves the right to pursue any and all actions available to it to offset it losses. If it is determined that sellers and/or buyers participated in any way to the fraud, this short sale will be void, and the Note and Security Instrument will remain in full force and effect.

Title insurance companies are not willing to take the risk and insure properties with this provision in effect. They are unable to insure a new owner or lender if the sale allows the seller (bank) to void the short sale and re-impose the lien after the closing and disbursement of funds.

Along the same line, certain lenders at attempting to restrict the transfer of properties purchased through a short sale transaction by requiring the title company or settlement agent (closing attorney) to notify the lender of any transfers of the property after the closing on the short sale has taken place. An example of this language is as follows:

There is to be no transfer of property within 30 days of the closing of this transaction. Escrow instructions must contain a clause that if such a transaction takes place then the title/escrow company must notify (lender).

Neither title companies nor closing agents/attorneys are in a position to track a property after the closing to insure that there is not a transfer within 30 days, thus title insurance companies are not willing to take the risk and will not write a title insurance policy if this provision is in the short sale approval letter or closing instructions.

Foreclosure Sales

Judge Long of the Mass. Land Court issued his decision in U.S. Bank National Association v. Ibanez (Misc. Case No. 384283) and two companion cases reviewing the practice of lenders/foreclosing mortgagees, to not record assignments of mortgages until after the foreclosure sale. In his ruling, judge Long found that the mortgagee had no title to foreclose where the mortgagee did not have in its possession an assignment of mortgage dated prior to the date of publication of notice required by M.G.L. c. 244, Â§14. By this ruling, the court has essentially invalidated every foreclosure sale where the mortgagee was unable to produce an assignment dated prior to the publication date. It is not necessary that the assignment be recorded prior to the publication date but must be dated prior to the publication date.

As a result, title insurance companies, even though they believe that the assignment of the

mortgage takes place once the note is transferred to the third party and the assignment is no more than an acknowledgment for a prior transaction, they are unwilling to write title insurance on a foreclosed property unless the assignment comports with the holding of the Ibanez case or falls within certain exceptions outlined by the individual title insurance company.

Conclusion

Both of these issues are cause for concern for the real estate market. The real estate attorney must be ever vigilant when reviewing a title on a property. It is not enough to review a title and see that there is an assignment of a mortgage but a close examination is necessary in all instances where there is or has been a foreclosure or short sale of the property.

Both of these issues have caused any number of closings to be delayed or purchases to be terminated due to the foreclosure not being in compliance with the Ibanez case, or in the instance of a short sale, the mortgage holder being unwilling to remove the offending language from agreement.

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