



The Current Deal

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an e-newsletter briefing Stewart clients, customers, and interested parties on legal and industry developments in New York State and beyond.

Welcome to the second edition of The Current Deal. We hope you find the information vital and useful. We welcome your comments, and, of course, please contact us if we can be of service.

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Other Articles

Short Sales

By Christopher W. Burdick, *Senior Vice President & Underwriting Counsel*

In these troubled times in the residential real estate market, "short sales" and distressed sales have become more common. With the decline in property values, some houses are financially "under water" – that is, the value of the property has fallen below the unpaid principal balance of the mortgage or mortgages encumbering it. Title insurers are called upon, of course, to insure title out of short sales, but we do so with great care. A few pointers:

What is a Short Sale?

A sale in which the pay-off lender agrees to discharge the mortgage for less than the unpaid principal balance (and costs).

- *Why Would the Pay-Off Lender Agree to a Short Sale?*

Clearly, the lender wouldn't agree to a short sale lightly, however, if the lender determines that it is unlikely to receive more in a foreclosure sale, it may behoove the lender to accept such an arrangement. The lender is unlikely to consider a short sale unless the loan is in default.



- *What Will the Pay-Off Lender Require*

The property owner will need to prove an inability to repay the loan. The lender typically requires a great deal of documentation, including, but not limited to:

- Financial statements, tax returns and other financial data.
- Contract of sale
- Full disclosure of all closing costs and adjustments, including real estate commissions, property taxes, legal fees, transfer taxes.
- HUD-1 Settlement Statement.

- *The Lender's Pay-Off Letter*

The pay-off lender (or its foreclosure counsel) will set forth special requirements before agreeing to discharge the mortgage. The lender often will release the property owner of its obligation under the promissory note upon the borrower fulfilling all of the lender's conditions to the short sale.

- *The Title Company's Concerns*

Bogus transactions may arise. Here are a couple of examples:

- Property owner negotiates a short sale with lender. Property owner sells to straw man after payment of short sale. Straw man sells to buyer for a price much higher than the short sale (property owner and straw man may split the profit).
- Property owner negotiates short sale with lender. Under an undisclosed side agreement, buyer purchases for price higher than short sale. Property owner pockets the profit.

- *Stewart Title's Requirements for Short Sales and Distressed Sales*

Stewart must be assured that both the pay-off lender and the buyer's lender are fully apprised of and have agreed to the transaction. Stewart will require

- The pay-off lender's pay-off letter which states the amount the lender is willing to accept and the conditions of the transaction. The pay-off letter must be followed exactly with no variations.
- A HUD-1 Settlement Statement must be signed by buyer and seller and, assuming the pay-off lender requires same, approved by the pay-off lender.
- Assuming seller is to receive no proceeds, copies of all checks and an affidavit from the settlement agent, or buyer, if there is no settlement agent, to the effect that seller has received no proceeds.
- All junior liens and mortgages are to be satisfied. If there are no instructions from any lien holder on pay-off, such lien holder's lien shall remain an exception to title.
- If foreclosure has been commenced, a letter to Stewart from the foreclosing attorney to the effect that upon lender's receipt of the amount stated in the pay-off letter, the attorney will discontinue the action, cancel the *lis pendens* and provide a satisfaction of mortgage.