



FLTA Tallahassee

Report

Serving Title Professionals Throughout Florida

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Short Sale Minefield

Today's most prevalent closing transaction, the short sale, is a dangerous minefield for the title agent. If the title closing business wasn't risky enough, the short sale has increased the risk factor almost exponentially. This article will discuss some of the land mines the title agent should consider when working on a short sale transaction.

Negotiating the Short Sale – Effective January 1, 2010, it is unlawful for any person to “act as a mortgage broker” in Florida without a current, active Florida mortgage broker's license. Sec. 494.0025(2), Fla. Stat. (2009). The definition of “act as a mortgage broker” is defined in Section 494.001, Florida Statutes, as: “... for compensation or gain, or in the expectation of compensation or gain, directly or indirectly, accepting or offering to accept an application for a mortgage loan, soliciting or offering to solicit a mortgage loan on behalf of a borrower, **NEGOTIATING OR OFFERING TO NEGOTIATE THE TERMS OR CONDITION OF A NEW OR EXISTING MORTGAGE LOAN** on behalf of a borrower or lender, or negotiating or offering to negotiate the sale of an existing mortgage loan to a noninstitutional investor.” {Emphasis added.} There are two basic exemption categories: (1) a Florida Bar licensed attorney may “negotiate the terms of a mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client”; and (2) a person making a mortgage loan using his or her own funds who does not hold himself or herself out to the public as being in the mortgage lending business. Therefore, with respect to the title agent's business, unless you are a licensed mortgage broker or attorney representing a client in the negotiation of a short sale, you are prohibited from negotiating a short sale. Whoever knowingly violates these statutes commits a felony of the third degree. Each such violation constitutes a separate offense. Sec. 494.0018, Fla. Stat.

The Florida Department of Financial Services, which regulates title insurance agents and agencies, had deemed that a title agent's license is not authorization to negotiate short sales even before this statute took effect on January 1, 2010. Hence, the DFS, backed by the provisions of these new statutes, maintains that a title agent should not perform any part of the negotiation with a lender to be paid off in a short sale transaction (including a refinance where the lender will be accepting less than what is owed). Merely acting as a conduit between the lender and the borrower in transmitting copies of documentation could be considered negotiation by the DFS. However, merely requesting estoppel information would generally not be considered negotiation.

Unlicensed Practice of Law – Could negotiating a short sale and/or completing documents over and above those customary for a common real estate closing be considered the unlicensed practice of law? Is the nonlawyer title agent practicing law when he or she negotiates or assists in the negotiation of a short sale? The Florida Bar's Standing Committee on the Unlicensed Practice of Law is studying the issue of nonlawyers assisting buyers in negotiating and finalizing a real estate short sale. Short sales are now in the cross-hairs of The Florida Bar. One could argue that negotiating a short sale is the unlicensed practice of law inasmuch as the statutes referred to above (Sec. 494.025, Fla. Stat.) exempt Florida Bar licensed attorneys negotiating a short sale during the course and as a part of the representation of the client. One should be reminded that the unlicensed practice of law is a criminal offense, a felony of the third degree. Sec. 454.23, Fla. Stat. (2009).

No Errors & Omissions Coverage – A title agent's errors and omissions policy may not cover the acts of negotiating a short sale. Nor, would the negotiation of a short sale be a covered matter under a title insurance policy. This would render the nonlawyer, non-mortgage-broker-licensed title agent virtually without any insurance coverage for his or her acts of negotiating a short sale.

Fraud Upon the Lender or Other Parties to the Transaction – Closing instructions and/or estoppel letters from the lender receiving a short pay may include language that allows that lender to renege on accepting the short pay and releasing the property from the mortgage if the lender felt it was misinformed and misled into accepting a much smaller amount than the outstanding balance of the mortgage. Some closing instructions or estoppel letters state that the lender may renege on giving a release of its mortgage if a subsequent "flip" transaction occurs soon after the short sale transaction. Reversing the short sale transaction may be impossible, as un-doing a closed transaction is a nightmare that most agents do not want to experience. Nor, would a title agent want to be accused of participating in a mortgage fraud scheme of misleading the short pay lender as to the financial conditions and factors of the short sale transaction.

These are some of the problems a title agent should consider. The title agent is cautioned to walk lightly through the minefield of short sale transactions.

ByLaw Committee Report
by Frank Tricomi, TICOR Title – FLTA Zone 3 Vice President

The Bylaws Committee is moving towards an updated version of FLTA's Bylaws. Since the Committee's initial organizational meeting at the Association's mid-year conference in February, the Committee has met on several occasions with the goal of both updating the content of the Association Bylaws and streamlining the format. The current goal of the Committee is to present a draft revision of the Bylaws to the FLTA Board of Directors in June. After review, comment and possible further revision by the Board of Directors, the revised Bylaws will be submitted to the full FLTA membership at the November annual convention for a ratification vote.

If you have any suggestions, insights, and/or recommendations for the Bylaws' revision, please feel free to submit them to phancock@fnf.com or frank.tricomi@ticortitle.com.