

THE DAILY RECORD

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TitleTRACK

Short sales, attorney affirmation in foreclosures

Short sale transactions, in which an existing lender accepts less than the full amount of the mortgage debt, present many challenges. The main issue involved with a short sale is the lender's *estoppel* letter.

An *estoppel* letter sets forth the terms on which the closing can take place, the chance that the lender's mortgage is in foreclosure, the need to ensure that the details of the transaction have been fully disclosed to all parties, simultaneous or "flip" closings when a second closing follows the short sale, and the provisions of the Home Equity Theft Prevention Act.

Below is a brief synopsis of some of the requirements when dealing with a short sale.

Short sale lender's estoppel letters

A short sale lender's *estoppel* letter, often received days or weeks prior to closing, sets forth guidelines upon which the lender has based its approval of the short sale. It is critically important that those guidelines are followed.

Conditional approval of the short sale: The short sale lender's approval of the transaction must be verified, and is not revocable after closing. *Estoppel* letters have stated that the lender's approval may be revoked at any time due to its review of the closing documents or its discovery of information about the parties involved, the transaction or the property. An *estoppel* letter may place resale conditions on the property; these restrictions would be added to the deed and adhered to by the buyer.

Lien release: Some lenders, in their *estoppel* letters, agree to accept a reduced payoff amount, but the letters do not mention the release of the corresponding mortgage lien. The *estoppel* letter must state that upon receipt of the loan payoff funds, the lender will release its lien on the property and have it duly recorded in the county clerk's office.

Specific terms of approval: An *estoppel* letter sets forth specific terms, which must be complied with for the short sale lender's approval to be effective. Particular attention must be paid to the amount of the purchase price, the total of the closing costs, real estate agent commissions, the amount payable to junior lien holders, and, often, a condition that no proceeds can be made payable to the seller.

Pending foreclosure

If there is an ongoing foreclosure action, the law firm conducting the foreclosure needs to confirm in writing that upon closing, pursuant to the *estoppel* letter, it will discontinue the foreclosure action and cancel the related notice of pendency, without seeking any additional fees or costs.

Full disclosure

All material facts regarding the resale, ownership, or valuation of the property should be known by all of the parties to the transaction. For example, the lender or title insurance company may become aware that the property in question will be quickly resold or that a short sale is not truly arm's length. When becoming aware of such facts, the short sale lender and title insurance company may decline to move forward with the sale.

Short sale flips/simultaneous closings

It must be verified that each stage of a short sale flip/simultaneous closing is independently funded and that each of the two transactions can stand on its own. The purchaser under the short sale must provide sufficient funds to close the first transaction, and the purchaser on the second transaction must independently produce sufficient funds to close his/her transaction.

When an *estoppel* letter prohibits the transfer of the property in question for 30 or more days after closing, language must be placed in the deed and in any subsequent conveyance.

Transactions requiring additional scrutiny

The following situations typically require additional scrutiny: The short sale buyer is related in any way to the short sale seller or when the short sale buyer requests the reconveyance of the property during the prohibited conveyance period.

Additionally, the short sale buyer may have entered into an agreement with a party who is related to the short sale seller, or the short sale buyer may have an agreement with the short sale seller permitting the seller to re-acquire the property. If the lender or title insurance agent becomes aware of any of these situations, the sale may be cancelled.



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This month's article touched briefly on a topic that is popping up everywhere in the country due to the foreclosure world that we live in now. A short sale is one way for a lender to receive a portion of the debt owed to them without having to spend thousands of dollars on a foreclosure action and then add the property to its inventory, while paying the costs to maintain it, pay the taxes on it and try to sell it.

Attorney affirmation in foreclosure actions

On Oct. 20, 2010, the New York State's Chief Administrative Judge issued Administrative Order AO/548/10, which directs the plaintiff's counsel to file an affirmation in residential mortgage foreclosures attesting that a specifically named representative of the plaintiff has confirmed the accuracy of the filings and the notaries contained in the filings.

The affirmation is to be filed at one of three stages of the foreclosure action:

- 1) In actions commenced after Oct. 10, 2010, at time of the filing of the RJI;
- 2) In pending cases, where the judgment of foreclosure has not been entered, it may be filed at the order of reference or the judgment of foreclosure; or
- 3) When the judgment of foreclosure has been entered, but the property has not gone to sale, it must be filed five days prior to the schedule auction.

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