

# PENN ATTORNEYS

## TITLE ALERT

**DATE: 08/31/10**

**RE: Title Alert 2010-14 Insuring Short Sale Transactions -- SUPPLEMENT**

**This Title Alert supplements Penn Attorneys' prior Title Alerts on short sale transactions. Please refer to prior Alerts: 2008-09, 2009-04, and 2009-06.**

Closing and insuring short sale transactions presents many unique challenges to approved attorneys. You must pay particular attention to the short sale lender's estoppel letter, possible ongoing foreclosure actions, making full disclosures to all parties to the transaction, and the handling of short sale flips/simultaneous closings.

### **I. Short Sale Estoppel Letters**

Short sale lender estoppel letters are often received by you just prior to closing and set forth strict guidelines upon which the lender has approved the short sale. It is critically important that you adhere to these guidelines, and remain alert for:

1. **Conditional Approval of the Short Sale:** You must verify that the estoppel letter approval cannot be revoked after closing due to the short sale lender's review of the closing documents or discovery of information about the parties/transaction/property. Also, some estoppel letters will place resale restrictions on the property and these restrictions must be adhered to (see below, Paragraph IV).

2. **Lien Release:** Some short sale estoppel letters agree to accept a reduced payoff amount upon the loan in question, but fail to mention the release of the corresponding lien. The short sale estoppel letter must state that upon receipt of the loan payoff funds the lender will release the lien on the property.

3. **Specific Terms of Approval:** The short sale estoppel letter sets forth the specific terms on which the short sale lender's approval is predicated. Particular attention must be paid to the amount of purchase price, total closing costs, real estate agent commissions, amount payable to junior lien holders, and typically, that no proceeds are made payable to the property seller.

### **II. Pending Foreclosure**

If there is an ongoing foreclosure action you should contact the foreclosure firm and advise them of the pending short sale of the property. You should also seek written confirmation from the foreclosure firm that upon closing the transaction pursuant to the short sale lender's estoppel letter, the foreclosure firm will:

- i.) dismiss the foreclosure action; and
- ii.) discharge the lis pendens. (but not seek any additional fees or costs).

If the foreclosure firm insists upon moving forward with the foreclosure sale, please contact us prior to closing the short sale transaction.

### III. Full Disclosure

Approved attorneys must make a full disclosure of relevant facts to all parties to a short sale transaction. For example, an approved attorney who is aware that a property will be quickly resold after closing should advise the short sale lender of such in writing. Likewise, an approved attorney that becomes aware of the fact that a short sale transaction is not actually an arm's length transaction, should advise the short sale lender in writing. In short, any material fact regarding the resale, ownership, or valuation of the property should be passed on to the parties to the transaction, including the short sale lender and the buyer's lender (on a financed transaction).

### IV. Short Sale Flips/Simultaneous Closings

1. You must ensure that each half of a short sale flip/simultaneous closing is independently funded and that each of the two transactions can stand on its own. Accordingly, the purchaser under the initial short sale transaction must provide sufficient funds to close the first transaction and the purchaser on the second transaction must independently produce sufficient funds to close the second transaction.
2. When the short sale estoppel letter prohibits the transfer of the property for a specified period of time after closing, we recommend that you:

- Include the restriction on subsequent conveyance(s) in the deed.
- Include an exception in the owner's policy as follows:

*"Restriction on conveying the Land within \_\_\_\_ days as disclosed on that Deed recorded in OR Book \_\_\_\_ at Page \_\_\_\_ (vesting deed)" (where restriction is included in vesting deed)*

Or include the following exception from coverage where the restriction is not included in the vesting deed.

*"The transaction vesting Title as shown in Schedule A is subject to a prohibition on the transfer of Title within \_\_ days after Date of Policy, in accordance with written disclosure provided to the Company."*

NOTE: This exception does NOT need to be on the Loan Policy for the transaction.

3. If you are also closing on the second sale of a short sale flip/simultaneous closing:
  - A full judgment/lien search must be conducted on the short sale buyer and any outstanding issues must be cleared;
  - Penn Attorneys recommends that you provide written disclosure to the ultimate buyer's lender of the purchase price and date of the short sale closing.
  - You must update title and clear any objections if the second closing is not occurring on the same day as the first sale.

- If the sales price of the second sale is 115% or more of the first sales price include the following creditor's rights exception (for the first transaction) in the second transaction's Owner's policy:

*"The avoidance in whole or in part, of the transfer of the Title from \_\_\_\_\_ to \_\_\_\_\_ by Warranty Deed dated \_\_\_\_\_, recorded \_\_\_\_\_ in Official Record Book \_\_\_\_\_ at page \_\_\_\_\_ or a court order providing some other remedy, based on the avoidability of said transfer as fraudulent under federal bankruptcy, state insolvency, or similar creditors' rights laws."*

#### **V. Transactions Requiring Additional Scrutiny**

The following types of short sale transactions typically require additional scrutiny; accordingly, they should not be closed by you without consulting with us:

- The short sale buyer is related in any way to the short sale seller.
- The short sale buyer has a pending contract with a party who is related in any way to the short sale seller, or has an agreement with the short sale seller to permit them to re-acquire the property (including a lease with an option to buy, a contract for deed, a land contract, etc.)
- The short sale buyer asks the approved attorney to insure the conveyance of the property during the prohibited conveyance period.

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Title Alerts from 1997 to present are available on our website at: <http://www.pennattorneys.com>

***Penn Attorneys, a Division of  
Ohio Bar Title Insurance Company***

900 State Street, Ste 320 Erie, PA 16501  
Tel 814-454-8278 or 800-352-2216 FAX 814-453-5983 or 1-800-234-2352  
[erie@pennattorneys.com](mailto:erie@pennattorneys.com)