

Uncertainty About Foreclosure Sales!

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Real estate brokers and recent purchasers are asking a lot of questions about the recent national news about invalid foreclosure sales. Perhaps I can help to reduce the stress and uncertainty. The questions are coming from prior purchasers who are now worried about what they should do in response to the news, and from current purchasers who are reasonably concerned about the risk of purchasing property after foreclosure sales. Should people buy REO listings?

What are the foreclosure sale issues?

Most of the issues of those national news stories should not cause a risk of challenges to the non-judicial type of foreclosure done in Washington. There are reports of false documentation supporting prior sales. There are reports that courts are requiring proof of ownership of the notes and invalidating MERS assignments. Almost all of those issues are involved with judicial foreclosure methods almost never used in Washington residential transactions. WA purchasers from prior foreclosure sales should not worry much about those national news reports.

However, the news has not yet mentioned a new Court of Appeals decision in Washington published September 28th, that does create new uncertainties about the validity of a Trustee sale. The opinion of Division II is named [*Albice v Premier Mortgage Services*](#). The Court allowed a borrower to set aside the Trustee sale even though purchased by a third party (not the lender doing the foreclosure.) The opinion has a lot of troubling and often inconsistent statements. The opinion says the prior sale is *void*, not voidable. The opinion says the buyer cannot be a bona fide purchaser relying upon statutory presumptions from the Trustee deed. The opinion imposes new duties on the Trustee and constructive knowledge of the foreclosure details on the purchaser.

These foreclosure uncertainties have not been the law in Washington. The facts of the *Albice* case are extreme. The Court was motivated to avoid the loss of significant equity. This time the Court ruled against the purchaser due to a sympathetic former borrower. Many prior Washington cases have ruled in favor of the purchasers. The Washington statutes and prior cases have repeatedly ruled against prior borrowers, stating the primary goal is that a Trustee sale should be final and relied upon. I believe that remains applicable to most Trustee sales.

What is the protection of a title insurance policy against these risks?

Almost all the persons who are asking about the risk of their prior purchase received an owner's policy of title insurance. The usual purchaser of a resale of property after a recent foreclosure sale receives a title insurance policy that will protect them against loss in that event. The Covered Risks of an owner's policy will insure against loss and attorney fees that would be suffered if the prior owner challenged a prior Trustee sale.

Other than the coverage of the title insurance, the purchasers from the lender that foreclosed probably have no legal remedy against that seller. The REO sellers do not provide deeds that warrant that the lender owned the property, nor any other warranty of the condition of title. You also know that REO sellers usually will not pay the premium for the proper Homeowner's Policy that would insure against a lot of the risks arising from matters that are missing from the usual statutory warranties of title. These topics are discussed at length in my prior blog articles.

Even the minimum lesser coverage of the standard coverage title insurance policy will insure against the risk of a former owner challenging a prior tax sale. Some title companies are inserting a special exception of coverage in commitments following a foreclosure sale, such as "Any rights, claims or interest of (the mortgagor) in the land or any claim that the foreclosure by (lender) is invalid." The resale purchaser usually will require the seller to provide a title policy without such an exception.

There are Exclusions to coverage that would apply in very rare circumstances: (1) if the property was actually occupied by the prior borrower/owner at the time of the resale, (2) if the Insured purchaser was the prior debtor (like reacquiring the property), (3) if the purchaser has actual knowledge of a defect in the foreclosure proceedings that is not disclosed by the recorded documents and not disclosed to the title company, or (4) if the purchaser paid so little of the property's value that a court would say the purchaser is not a bona fide purchaser for value. If one of those exceptions may apply, you should consult an attorney about your coverage and your risk of a successful foreclosure sale challenge.

How do these issues affect resales of property after the foreclosure?

A resale is from the lender ["REO Sales"] or from the third-party who acquired at the Trustee's auction sale, now reselling to a new purchaser. The resale is almost always to a genuine, *bona fide* purchaser for full value. The courts that might set aside a prior sale are much less willing to affect a genuine resale purchaser.

Most of the transactions involving real estate brokers are for sellers and purchasers at the resale, not the actual Trustee sale. I expect all of the transactions being handled through escrow agents also will have title insurance issued to the purchasers. I predict very little change in the willingness of the title companies to insure the validity of the prior sale for the resale transaction purchaser. In most transactions, the title companies in Washington are able to issue owner's policies insuring the resale purchaser against loss due to an attack on the prior Trustee's sale.

Outside the view and involvement of our customers, you can expect all title companies will certainly increase their scrutiny of the prior foreclosure and will increase underwriting approval procedures. At any closing of a resale, the real estate broker and escrow agent should expect to provide proof to the title company that the former owner/borrower is not occupying the property, regardless of the basis for that party to remain in possession.

Will title insurance be available to the persons who want to buy at the Trustee's sale?

A proposed purchaser might ask for a title report (aka "preliminary" or "commitment") proposing to insure the purchase at the Trustee's sale. However, you should expect one or more Special Exceptions to coverage will remain in any policy following a foreclosure sale. The language will vary, but in substance the title company will remove coverage against loss due to an attack by the former owner/borrower on the validity of the prior Trustee's sale. The limitation on insurance will apply to the lender (or its successor entity) acquiring at its own sale, AND apply to a third-party purchaser acquiring by a bid at the Trustee sale. The news today suggests that lenders and Fannie Mae may even be willing to offer warranties of their compliance with foreclosure sale proceedings. I never thought I would see a bank's warranty. Fascinating!

Conclusion: Business as Usual for Most Residential Transactions!

For all the other usual transactions, past and future, there are more important things to worry about than the risk of a challenge to the prior foreclosure sale.

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