FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Title News

The Federal Deposit Insurance Corporation

It has been patently unclear during the past month what new turn the Mortgage Crisis will take. For example, this past July the Federal Government decided to help Fannie Mae and Freddie Mac by buying the stock of these quasi-private/quasi-public corporations. There was also a run on IndyMac Bank in California, the second largest run on a United States bank in history, while the President assured all those with money in IndyMac that their deposits were guaranteed up to $100,000.00 by the Federal Deposit Insurance Corporation.

Instead of chronicling the debates and deliberations involved in the Mortgage Crisis, however, it behooves us to consider the Title issues that may concern the Federal Deposit Insurance Corporation, since it seems increasingly likely that this government agency will take a larger role in the economic lives of Americans and will even come to take Title to property in our part of the State, as not only individual borrowers default on their loans, but as the Mortgagees who made those loans start to fail, as IndyMac just did.

In general, the FDIC can take Title to property in three different ways when a depository institution is placed under federal supervision:

1. As a corporate entity.
2. As a receiver.
3. As a conservator.

When the FDIC takes Title as a corporation, it executes documents as a corporation. No more is required to convey title, other than the signature of an officer of the corporation. When it takes Title as a receiver, the failed bank must convey Title to the FDIC as a corporation first; then the FDIC may transfer Title out to the new buyer.

When the FDIC takes Title as a conservator, however, the original depository institution remains technically in Title. In these circumstances, the failed bank must execute all documents "acting through" the FDIC as a conservator. Janice E. Carpi, *Real Estate Title Problems Created by the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, Title Insurance in Troubled Times, at 72 (PLI Real Estate Law &

Practice Handbook Series No. 375, 1991).

If the bank is to be liquidated, the nation's Comptroller of the Currency will appoint the FDIC as receiver for any national bank. If the bank is not liquidated, the Comptroller appoints a conservator to foreclose the bank's assets.

However, New York State officials, such as a state supervisor, may appoint a conservator or receiver for a *state bank* and submit that appointment to the FDIC for approval. The FDIC may then accept said appointment regarding the state bank if it chooses. 12 U.S.C. section 1821(c)(3). But the FDIC may also reject such an appointment made by the state and instead choose to serve itself as conservator or receiver for the next 15 days. 12 U.S.C. section 1821(c)(4). The state may then in turn challenge this decision by the FDIC to act as conservator or receiver within 30 days of the FDIC's decision to act as conservator or receiver. 12 U.S.C. section 1821(c)(7).

When a thrift institution is put into receivership by the FDIC, a third party is not allowed to foreclose or levy upon the thrift's assets without FDIC consent. 12 U.S.C. section 1825(b)(2). Foreclosure Consent and Redemption Rights, 57 Fed. Reg 29,491 (1992) (FDIC statement of policy).

<u>Title Insurance Coverage</u>

Imagine this: You represent a buyer of a property worth approximately $500,000.00. The previous owner defaulted on his Mortgage, and the bank foreclosed and is now in Title. But this bank also made a lot of bad loans and is carrying a lot of foreclosed properties that it cannot move because of the soft market. The bank fails. Is any of the prior Title Insurance purchased previously still legally effective?

Generally, if the foreclosing bank had a Mortgage Policy before it foreclosed, that policy is still effective even after the Mortgagor defaults or the Mortgagee fails. Carpi, at 69-70.

If the depository institution is placed into receivership, the FDIC "steps into the shoes of the lender, and succeeds to all of its right, title and interest in all of the assets of the institution," including of course the prior Mortgage Policy. The assets of the failed bank vest in the FDIC by operation of the United States Code, not by conveyance of Title, and no new deed need be executed or recorded.

If the FDIC sells the failed lender's interests to another depository institution, however, there is a *bona fide* conveyance of Title, so that the purchasing bank is *not* covered under the failed institution's Mortgage Policy but must buy its own Title Insurance for coverage. *Ibid.*

When the FDIC takes title as a receiver, on the other hand, the FDIC does not have to pay local or state real estate taxes, during the period of receivership. 12 U.S.C. section 1825(b)(2). Any sale by the FDIC as a receiver to a new purchaser is therefore subject to an involuntary lien for unpaid taxes. At the time of the sale, the new purchaser can take Title subject to the tax lien, require the receiver to pay the unpaid taxes, or do an adjustment with the receiver to lower the purchase price accordingly. Carpi, at 68.

Liens and Encumbrances

If a lien is involuntary, like a tax lien, the holder of the lien must obtain FDIC consent before foreclosing the lien on the property in which the FDIC holds a vested interest. But if the lien is voluntary, FDIC consent to foreclosure is assumed in the following circumstances:

1. A *bona fide* Mortgage which is senior to the FDIC's interest;
2. A *bona fide* Mortgage which encumbers the FDIC's Title; or
3. A *bona fide* government guaranteed Mortgage.

If the FDIC has an unrecorded Title or lien interest in property, foreclosure by all other lien-holders is also allowed.

The FDIC's Right of Redemption

Even though the FDIC's interest in property may be junior to that of another lienor, the FDIC has a one-year Right of Redemption, in its *corporate capacity only*, where a sale is made to satisfy a lien that attached prior to the FDIC's lien. 28 U.S.C. section 2410(c). Thus, even though a sale was done to satisfy a Mortgage which is senior to the FDIC's lien, the FDIC may still nullify the sale and exercise its Right of Redemption for one year.

If the FDIC is acting in its capacity as a receiver or a conservator, however, a thrift institution which holds a junior lien has the aforementioned Right of Redemption. *FDIC v. Bennett,* 898 F.2d 477 (5th Cir. 1990). Since junior liens are subject to cancellation when the FDIC governs the depository institution, this Right of Redemption will have "significant effect" on the marketability of Title, according to Pedowitz' *Real Estate Titles*.

Conclusion

The statutory and case law involving the FDIC can appear overly technical and removed from day-to-day practice. We are in all likelihood entering a phase of practice that is quite new to most if not all practitioners, however. As banks fail new Title issues will come up. Every practitioner should therefore have at least a general knowledge of this area of law and know the proper questions to ask the Title Company, such as, "How is the FDIC in Title?" And if a property involving the FDIC is being bought by your client, you should find out as much as you can about the FDIC on line, at www.fdic.gov to begin with. While it is unfortunate that the FDIC should take Title to a property at all, everyone in Real Estate should at least be ready if it does happen.

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