FEDERAL STANDARD ABSTRACT
TITLE NEWS

Issue #47 *September 2008*

Title News

New Adverse Possession Law

In our September 2006 issue we reported the Court of Appeals decision *Walling v Pryzbylo*,7 N.Y.3d 228 where the Court settled the question that no "claim of right" was required to acquire property by adverse possession. The public was outraged that simple uses such as tending shrubbery over time could mean losing property to a neighbor. The New York State Assembly in Chapter 269 of the Laws of 2008 recently reversed this decision by statute. As of July 7, 2008 a successful claim for adverse possession will require "claim of right". "Claim of right" is defined as "a reasonable basis for the belief that the property belongs to the adverse possessor or the property owner, as the case may be." In addition, the statue declares that certain actions as "permissive" and not adverse possession. Examples of these actions are planting shrubbery, fencing, lawn mowing and similar maintenance. The adverse possession must also now "put a diligent owner on notice".

Real Estate Broker Commissions

Real estate brokers of residential property fearing that their commissions may not be paid at closing are now entitled to have the seller deposit an amount equal to the commission (but not greater than the net proceeds of the sale) with the recording clerk of the county where the property is located. The funds will be then be held in escrow by the county clerk (or city register) until the dispute between broker and seller is resolved. Brokers will be entitled to this relief only if the property sold is residential (including coops) and: (i) the commission agreement contains a proper notice form, as required by the new law (Chapter 436 of the Laws of 2008); (ii) an affidavit from the broker claiming entitlement to the commission is recorded against the property prior to closing; and (iii) the broker serves a copy of the affidavit to the seller prior to closing. Note that the statute expressly falls short of creating an encumbrance on title. Hence, the purchaser's rights are unaffected by this.

Understanding the Lender

"The LTV (loan-to-value) is only 20%! Why won't you waive this requirement? What's your risk!" Attorneys often get in heated discussions with lenders regarding requirements that seem to be overprotective. The attorney reasons that if the LTV is as low as 20%, then the lender has no basis for imposing other lending conditions. For example, why force the purchaser to sell her current residence before buying a new one?

Why make her pay off debts and credit cards at closing when the LTV is about 20% and the debts represent about 5% of the value of the property? What if my client was fired or her wages reduced right before the closing? She can still afford to buy the property and the LTV is so low, that the lender will always be paid off in foreclosure! Can't we waive these requirements since the bank will collect in full on foreclosure? What's the real risk here?

The lenders' response is always the same: The LTV is irrelevant. Foreclosing on property is the lender's plan B -the "exit plan"-. A low LTV only means that the lender is very likely to collect its dues on foreclosure. But being made whole –or paid in full- is not the same as making money with a performing loan. The lender will only give a loan if the borrower can show that she can make her payments. Entering into transactions "to be reimbursed" is no good business. A lender's plan A is to be repaid in due course with monthly payments.

Moreover, a non-performing loan cannot be sold (except at a loss). This means that if a loan is tied up a in a lengthy foreclosure, the lender loses part of its ability to lend. Lenders liquidate –i.e. sell to other lenders- loans to gather cash to make more loans. If their funds are tied up for years in foreclosures, the lending operation comes to a halt.

It is the cashflow, therefore, and not the LTV, what lenders look at first. Brokers are familiar with terms such as DTI (debt-to-income ratio), DSC (debt service coverage ratio) and "disposable income", all of which are tools to determine how much of the regular income is available to make the monthly payments. Attorneys negotiating with lenders would be wise to learn the language of lenders. Arguments based on LTV or cash reserves are doomed to fail. In order to appeal to lenders, one should speak about income, cashflow and how much disposable income is available to make the monthly payments.

Lastly, one should also bear in mind that some conditions are not negotiable because they are intrinsic to the loan program; e.g. "conventional loans" have a maximum loan amount depending on the county; and a person can only have one "primary residence" at any one time.

If you have any questions or comments, contact us at fsa@federalstandardabstract.com