

## MARKETABLE vs INSURABLE TITLE FOR REO FILES

In many areas, the seller's attorney is charged with the responsibility of preparing sales contracts. The lawyer who has been around the track once or twice will ensure that the contracts require that the seller tender only "insurable" title. In other parts of the country, it is the brokers and not the lawyers who are responsible for preparing sales contracts. And more often than not, the contracts that are used are those approved by local Bar Associations and/or Realtor Boards and cannot be modified in any way.

And all too frequently, these contracts provide that the seller shall tender and the buyer shall accept "marketable title". Unless either the contract or a rider/addendum addresses this issue, the seller is stuck with this title burden.

Is there really a difference between "marketable" and "insurable" title? How do these terms affect an REO sale?

The first question is whether or not an REO property can actually be sold with "marketable title". For starters, in many areas, "marketable title" is generally considered to be the state of title which a "reasonable person" (have you ever met one?) would come to expect in a given transaction. There is more to it, but this is the five-cent explanation. Marketable title would be expected when a homeowner is selling his house on the open market. Insurable title, in short, is the title that a title insurer would insure without certain exceptions. Often the difference is minor or academic, but not so with most REO sales.

In a post-foreclosure matter, the successful bidder (i.e., the lender) obtains title via a referee's deed (or sheriff's deed, depending upon where you are). This deed conveys only whatever title the referee or sheriff was given pursuant to the Court's order or similar circumstances. Typically, this deed will convey title, subject to the following exceptions and issues: (by the way, this list is *not* all inclusive; it just gives you an idea of the usual problems with marketable title in an average foreclosure). Further, since the referee/sheriff's deed does NOT even come close to conveying marketable title, if the seller should offer a buyer marketable title, it is giving MORE than it has! These are the typical issues which contrast marketable vs insurable title:

- a. Title companies will typically not insure any state of facts which may be shown on an accurate survey.

The survey may disclose premises which are out of possession, cut off by easements, improperly bounded, illegal structures, encroaching improvements and the like. These are all typical impediments to marketable title. Sometimes these exceptions can be cleared up with the proper affidavit from a seller, but only if the seller has owned the property for more than two years. This is unlikely in most REO sales.

- b. Rights of persons in possession or tenants: If there is a lease that predated the mortgage, it may not be cut off by the foreclosure. Also, in many cities, tenants may have certain rights that cannot be cut off, such as rent control and/or rent stabilization. These are also impediments to marketable title because there are people who have rights in the building that survive the foreclosure.
- c. Building code and easements, covenants and restrictions: There is no guarantee that the premises comply with any building codes, and violations of record may not be cut off in a foreclosure. Most REO's are sold "as is and where is" without any representation that the premises are legal or comply with any regulations. Also, covenants and restriction are not typically cut off in a foreclosure and they survive, even if they are being violated. If any laws, regulations, codes, covenants or restrictions are violated by the premises or their use, there is a problem with marketable title".
- d. The title policy from loan origination or otherwise may insure against certain liens of record. If the liens are still of record, despite the fact that there is now "insurable" title, the seller still does not have marketable title until and unless the liens are removed of record.

The moral of the story is that the seller of any REO should take pains to ensure that there is no obligation to convey marketable title. This can be addressed in the contracts, in the riders or in the customary REO addenda favored by lenders and services.

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