

A New Scam Involving Trustees

[On behalf of Dornish Law Offices, PC](#) | Jun 1, 2008 | [All](#), [Real Estate Practice](#)

By Bradley S. Dornish, Esq.

Recently (July 2008), we received notice from one of our Title Insurance Underwriter's warning us of a new scam involving Trust Deeds and Short Sales. We have been instructed not to close these transactions without prior review and approval by the Title Insurance Company's Underwriting Department. We've been warned that four other agents called in during the week with the same type of transaction.

The Title Company is calling it a scheme involving a Trustee who takes title to property on behalf of owners who are in financial distress. The real estate investor serving as "Trustee" uses a Warranty Deed to Trustee, which Deed includes "full power and authority granted to said Trustee, with respect to the said premises or any part of it, and at any time or times, to subdivide said premises or any part thereof, to dedicate parks, streets, highways or alleys and to vacate any subdivision or part thereof, and to re-subdivide said property as often as desired, to contract to sell, to grant options to purchase, to sell on any terms, to convey either with or without consideration, to donate, to mortgage, to pledge or otherwise encumber said property or any part thereof, to lease said property or any part of from time to time..."

In addition, the Warranty Deed to Trustee Form provides "In no case shall any party dealing with the said Trustee in relation to said premises, to whom said premises or any part thereof shall be conveyed, contracted or be sold, leased or mortgaged by said Trustee, be obligated to see the application of any purchase money, rent or money borrowed or advanced on said premises, or be obliged to see that the terms of this Trust have been complied with, or be obliged to inquire into the necessity or expediency of any act of said Trustee, etc."

The provisions do not acknowledge any price paid for the Trust Deed, although the powers provided are quite broad. Real estate investors acting as Trustees are apparently using the Trust Deeds to negotiate Short Sales with the mortgage holder, and immediately after taking Title, convey the property to a third party for greater consideration paid to the Trustee.

These transactions are considered fraudulent because they are not good faith transfers for value to a bonafide third party, when there is a transfer without consideration to a Trustee. Therefore, the transfer to the Trustee, and the transfer from the Trustee to the eventual purchaser are considered part of the same transaction. In that situation, it is necessary for the second transaction to the third party purchaser to be disclosed to the bank at the time of the Short Sale to avoid a situation where a fraudulent Short Sale is obtained.

On the other hand, if an Investor actually buys the property and negotiates a complete arms length Short Sale from the seller and the bank to the Investor, and subsequently conveys the property for a higher price to a third party purchaser, the transaction would not be fraudulent.

The Investor needs to understand that he cannot at the same time be a Trustee acquiring the title to a property in that capacity with a Fiduciary Deed from a Seller, and at the same time be negotiating for an independent sale from the Investor to a third party for separate profit. There is an inherent conflict between serving as Trustee and negotiating on one's own behalf, which should only be resolved by the Seller having access to separate legal counsel. Further, if the transaction from the Seller to the Trustee/Investor is not for value, i.e. the Investor has not purchased the property and paid for it, then the banks are right to want information on the sale to the third party, and to claim that the Short Sale was negotiated and obtained under false pretenses.

If you are attempting to engage in these types of transactions, be forewarned that most closing companies, if they are following the instructions from their Title Insurance Companies, will *not* close the transactions for you, especially if they are simultaneous closings. There are plenty of ways to make money in real estate in the current market without getting into conduct which is considered to be a "scam" or "fraud."

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