

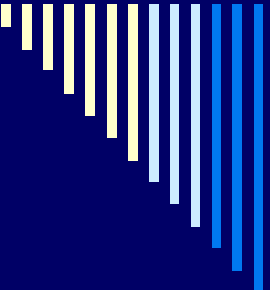
RETURN OF FORECLOSURE RESCUE SCAMS

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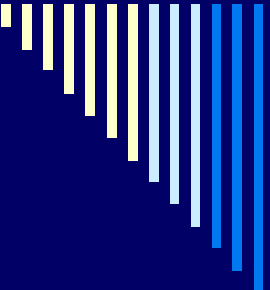
STATISTICS

- Distressed properties, including short sales and REO's, accounted for 29 % of all home sales in the US in January, 2010, according to First American CoreLogic;
 - REO sales increased to 22% in January, 2010, up from 19% in December.
 - In Detroit, 48% of sales were REO
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Goal of Foreclosure: Obtain Marketable Title.

- An thorough title search of the property is an important tool in obtaining marketable title through a foreclosure;
 - Red flags of issues which a title search can reveal-
 - -deeds for no stated consideration;
 - -mortgages recorded in an untimely manner;
 - -flipping;
 - -fraudulent conveyances;
 - -prior foreclosure activity and lis pendens;
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Goal of Foreclosure: Obtain Marketable Title.

- Review the origination file, particularly the HUD-1
 - -beware of unknown title agents, particularly “notary closings”.
 - diversion/theft of funds;
 - late or unrecorded mortgages;
 - defective TILA notices;



Obtaining Marketable Title in the Foreclosure

Title search reveals a defect in the insured lien or the conduct of the closing:

(1) issue written notice to the title insurance company under the title policy and any closing protection letter;

(2) Assess remedies:

- equitable subrogation arguments for late recorded mortgages;

- if a late recording may allow for a “relation back” argument, can you extinguish an intervening lien as a junior creditor ?



Obtaining Marketable Title in the Foreclosure

- The role of the former owner, who may be the victim of a foreclosure rescue scam:
 - Does the former owner retain an interest in the property conveyed to a straw buyer ?
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EXTINGUISHING THE FORMER OWNER'S INTEREST

- Modeste v. Lost & Found Recovery, LLC, Supreme Court of the State of New York, Kings County (2008)-victim of foreclosure rescue scam lacks standing to invalidate a purchase money mortgage obtained by a straw buyer due to an absence of privity;
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EXTINGUISHING THE FORMER OWNER'S INTEREST

- Mathurin v. Lost & Found Recovery, LLC, 19 Misc. 3d 756 (N.Y. Sup. 2008)-. Court held that the lender had a duty to determine if the buyer/borrower was committing a fraud against the seller. Court denied a motion to dismiss filed by a lender.
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FORECLOSURE AND SHORT SALE FRAUD

- ❑ Scam: Seller signs a sale agreement with a buyer (newly formed limited liability company), for a price which is less than the lender's debt and may be based upon an intentionally deflated appraisal report.
 - ❑ Business/legal steps-
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FORECLOSURE AND SHORT SALE FRAUD

- Business/legal steps-
 - -Executed disclosures stating:
 - -arm's length transaction;
 - -no misrepresentations;
 - -arbitration provisions;
 - -no funds to seller;
 - -no seller involvement with property in future;
 - -if breach, clawback for the full debt.
 - -accurate valuations
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REO STAGE

- Foreclosure Rescue Scam Fraud Risks
 - -former owner brings quiet title action, impairing ability to sell the property;
 - -late recorded mortgage- title has vested but title company will not satisfy a senior lien defect;
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REMEDIES AGAINST TITLE COMPANY

- Possible Causes of Action:
 - -breach of contract (title policy)
 - -breach of contract (closing protection letter);
 - -unfair trade practice in failing to properly investigate the claim or determine coverage;
 - -breach of the implied covenant of good faith and fair dealing;
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DISCOVERY AS A WEAPON

- -Reserve information for bad faith claims-relationship between denying claims and setting reserves;
 - -policies and procedures related to paying title policy and closing protection letter claims;
 - Audits of files of a settlement agent;
 - -deposition of in house claims lawyer;
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