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Key Provisions to Include in a Loan Document Purchase Contract

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This article is the third in a multi-part series based on the Lowndes white paper, "Selling & Acquiring Distressed Real Estate in Florida." Each installment will examine key legal and strategic considerations for acquiring distressed assets in the state. The next article will address warranties to request when purchasing loan documents.

When purchasing loan documents, particularly with a view toward foreclosure on the collateral, investors must ensure that the purchase contract includes key provisions to protect their interests. From securing original promissory note(s) to addressing title insurance coverage, a well-drafted contract helps prevent disputes and delays. This article outlines some critical considerations that should be addressed in the contract to facilitate a successful transaction.

Delivery of Original Loan Documents

To purchase loan documents for a foreclosure, the buyer must be able to demonstrate the amount of debt owed under the loan. This requires obtaining a detailed payment history from the lender, along with a current statement of the outstanding principal balance, interest, and other amounts due. The contract should require the lender to provide this information at closing. If these documents are not filed with the court, the buyer's success in prosecuting the case may be impaired.

The contract should obligate the lender to deliver originals of the promissory note, any renewal notes, allonges, and endorsements. These documents are essential for filing with the court and completing the foreclosure. If the originals are unavailable, the buyer must submit copies, and, in many cases, a "Lost Note Affidavit" explaining the absence of the originals and requesting court approval to "re-establish" the lost documents. The contract should require the lender to provide a Lost Note

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Affidavit with a reasonable explanation for any missing originals.

Adjustments for Post-Contract Loan Payments

The contract should also address what happens if the lender receives loan payments after the contract is signed but before closing. Prudent buyers will want the purchase price to be reduced by the amount of any such loan payments. The contract should also require the lender to provide written notice of the loan assignment at closing and to transmit any post-closing loan payments to the buyer.

Transfer of Escrowed or Impounded Funds

In some cases, the lender may be holding funds in escrow or impound accounts that were funded by the borrower to cover real estate taxes, property insurance, repairs, remediation, or similar matters. If such funds are still available, the contract should specify whether they will be transferred to the buyer at closing along with the loan documents.

Title Insurance and Assignment Endorsements

All mortgage lenders obtain a title insurance policy when the loan closes. This policy insures the lien of the mortgage and typically travels with the mortgage when assigned. While the policy automatically benefits the purchaser, it reflects the date of the original closing. As such, the contract should require a title update to verify that the lender is still the record holder of the mortgage in the county's public records.

In addition, the buyer should require the title insurer to issue an "assignment of mortgage endorsement" to the existing policy as a condition of closing. This endorsement insures that the buyer will become the insured mortgage holder at closing.

Timing Considerations and Substitution in Foreclosure

If a foreclosure action has already been filed, the timing of substituting the buyer as plaintiff may not be crucial, if completed within a reasonable time. However, timing is still important when the purchaser and lender are reviewing the contract and its timelines.

Conclusion

A buyer's success in acquiring and enforcing loan documents depends significantly on the terms of the purchase contract. By addressing key issues, such as enforceability, title insurance, escrowed funds, and payment adjustments, buyers can reduce risk and ensure a smoother path to foreclosure. As always, working with experienced legal counsel is essential to navigating these transactions with confidence.

A more detailed discussion of the issues presented by this article are contained in a longer article on the Lowndes Law website at the following link: https://www.lowndes-law.com/newsroom/insights/selling-acquiring-distressed-real-estate-in-florida-a-white-paper-on-the-advantages-and-disadvantages-of-six-alternatives.

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