

DATE: September 15th, 2008
TO: Escrow Department Personnel
FROM: Kim Dawson & Tena Jones – Escrow Administration

The purpose of this memo is to provide you with information as it relates to a Notice of Default being recorded on the property you have in your transaction. There is a lot of valuable information in this memo and we encourage you to read through all of it.

Notice of Default Checklist and Guidelines:

- These Guidelines apply under the following conditions **ONLY**:
 - Residential one to four family dwelling units
 - Seller occupies as his/her principal place of residence
 - Buyer is an Investor – will not be occupying property as principal residence
 - A Notice of Default has been recorded
- Review your preliminary title report to determine if a Notice of Default and/or Notice of Sale have recorded on the property. If so, you need to follow these guidelines.
- If the Buyer is listed as “or assignee/nominee” this can be a problem. Watch for assignments of interest just prior to the close of escrow. If this occurs, contact Escrow Administration.
- Have your buyer and sellers execute the **Occupancy Status** checklist provided in your systems (see sample attached) so you will know how to proceed based on their written statement of occupancy intentions.
- Under the Civil Code a Seller who has an “Investor Buyer” is allowed a Five (5) Day Right to Cancel. This means the Seller has five (5) business days after the date they signed the contract OR 8:00am on the day of the scheduled foreclosure/trustee’s sale, whichever occurs first, to cancel the contract (and escrow). This is to protect the Seller from investors abusing the current foreclosure market.
- If someone is representing an equity purchaser, they **MUST** provide written proof to the seller the representative has a valid current California Real Estate Sales License, either as a broker or a salesperson. You **MUST HAVE** a copy of the DPL (Declaration and Proof of Real Estate License (C.A. R. form DPL 4/08) signed by buyer and seller for your file.

Note: California Civil Code Section 1695.17 provides: (b) the failure to comply with subdivision (a) shall at the option of the equity seller render the equity purchase contract void and the equity purchaser shall be liable to the equity seller for all damages proximately caused by the failure to comply.

Scenarios

SCENARIO #1: Seller is NOT an owner occupant and the buyer IS AN INVESTOR

- Be sure you have the Occupancy Status checklist completed and signed for your file for proof the seller is not the current occupant of the property.

SCENARIO #2: Seller IS an owner occupant and Buyer WILL NOT occupy the property as their personal residence (INVESTOR TYPE).

- If seller is remaining in property after close of escrow:
 - **DO NOT HANDLE** (must have special written permission from legal department to handle)
 - Read the contract to see if the box is checked regarding owner occupancy for a clue
 - Refer to your Occupancy Status Checklist signed by buyer and seller

If seller is **NOT** remaining in the property after close of escrow, you are ok to handle the escrow and you should prepare an amendment with the following language:

“All parties are aware a Notice of Default (or Sale) has been recorded on the subject property. Seller may have certain protections under California Civil Code 1695. Seller acknowledges they have been advised to seek legal advice with regards to this matter and hereby requests escrow holder to close the transaction as instructed under the terms and conditions mutually agreed to in this escrow. “Seller has not provided a Notice of Cancellation to the buyer pursuant to California Civil Code §1695.4 et seq”

SCENARIO #3: Seller IS an owner occupant and Buyer WILL OCCUPY the property

- Be sure you have the Occupancy Status checklist completed and signed for your file for proof the buyer will be occupying the property.

Final Important Reminders & Notes

- If someone is representing an equity purchaser, they **MUST** provide written proof to the seller the representative has a valid current California Real Estate Sales License, either as a broker or a salesperson. You **MUST HAVE** a copy of the DPL (Declaration and Proof of Real Estate License (C.A. R. form DPL 4/08) signed by buyer and seller for your file.
- **NO EARLY RELEASES OF FUNDS FROM ESCROW TO THE SELLER.** Call management for help if this is requested in your escrow
- Notify your management for next steps if possession of Seller OR Buyer changes during course of escrow.
- Read the attached Q & A for more answers to your questions and help on handling this type of escrow.

Clause & Amendment Samples to be used in every transaction when handling a Notice of Default

The Occupancy Status Checklist Amendment and Clause has been added to all production systems as follows:

Northern California: (Impact)

Document is located in Section 2 as **Amendment/Supplement - Notice of Default**. *Clause* is listed as **Nod**

Southern California:

Impact: *Document* is located in Section 4 as **Amendment/Supplement - Notice of Default**. *Clause* is listed as **Nod**

iClose: *Document* is located in Escrow Instructions as **Amendment/Supplement - Notice of Default**. *Clause* is listed as **Notice of Default - Seller & Buyer**

AWI: *Document* is located in Document Processing as **Notice of Default**. *Clause* is listed as **Notice of Default**

(Sample Amendment and Clause are shown on the next page)

SAMPLE AMENDMENT:

[Direct Information]

ESCROW AMENDMENT/SUPPLEMENT – NOTICE OF DEFAULT

Escrow Number: **TEST-100-SR8** Date: **September 15, 2008**
 Property Address: **123 Anywhere Street, City, CA** Escrow Officer: **Kim Dawson, Escrow Officer**

TO: **LandAmerica Title Company**

All parties herein are aware a Notice of Default has recorded against the subject property. In connection therewith and to comply with California Civil Code requirements and/or the C.A.R Form NODPA, we are notifying all parties to this escrow as follows:

Sellers: (Check those that apply)

- I currently reside in the subject property
- I will continue to occupy the property AFTER the close of escrow
- I am vacating the property at close of escrow. My forwarding address after the close of escrow is:

Forwarding Address	City, State, Zip Code

- I do not currently occupy the subject property. My current and forwarding address is:

Forwarding Address	City, State, Zip Code

Buyers: (Check those that apply)

- I am purchasing this property as my principal residence
- I am purchasing this property as an investment property and will not be residing at the address which is the subject of this escrow. My current address is:

Forwarding Address	City, State, Zip Code

[=signature=]

SAMPLE CLAUSE:

All parties are aware a Notice of Default (or Sale) has been recorded on the subject property. Seller may have certain protections under California Civil Code 1695. Seller acknowledges they have been advised to seek legal advice with regards to this matter and hereby requests escrow holder to close the transaction as instructed under the terms and conditions mutually agreed to in this escrow. Seller has not provided a Notice of Cancellation to the buyer pursuant to California Civil Code §1695.4 et seq.

Notice of Default Property Transactions Frequently Asked Questions

Escrow has been opened under the standard RPA-CA Contract and Joint Escrow Instructions and you have just discovered through your review of the preliminary report a Notice of Default recorded prior to the date of the contract.

Question: Do you accept the RPA-CA and process the escrow with the contract as presented?

Answer: When you initially took the RPA-CA, you would have no way of knowing that a Notice of Default had been recorded. So yes, you can accept it – because you are not aware of the Notice.

Question: If a Notice of Default is recorded and you have an RPA-CA, do you require the contract be re-written under the NODPA contract type?

Answer: If the preliminary report comes in with a Notice of Default, **we must insist that they re-write under the NODPA, per C.A.R. instructions.** If for some reason the parties refuse, then you must contact your State Escrow Administrator immediately.

Escrow opened under RPA-CA Contract and Joint Escrow Instructions with Notice of Default recording during the escrow period.

Question: Do you close under existing RPA-CA contract?

Answer: You must make a determination if this transaction falls under the guidelines outlined on page (1) of this memo. If it does, then you must act according to the GUIDELINES we have given you, or contact your State Escrow Administrator.

Question: Do you require the contract be re-written on NODPA form?

Answer: If it falls under the guidelines and the Buyer is an investor, you will need to have the contract re-written on the NODPA.

Question: If the Grant Deed was prepared before the recorded Notice of Default, do you have to re-draw the deed for execution after the rescission period expires?

Answer: Because the Grant Deed is not considered “delivered” until the date of recording, you do not have to re-draw or have the Seller re-sign the Grant Deed.

Question: Can there be an early release of funds to the Seller?

Answer: There can be **no early releases to the Seller.**

Question: What do you do if the NOD records less than five days prior to COE?

Answer: This is highly unlikely. By this time, you should already have a demand from the lender indicating the amount to pay off the loan of record. However, should this happen, call your State Escrow Administrator. We very well may have to do the same analysis to determine the best way to proceed.

Question 6: How do you handle the closing if the scheduled COE falls within the Seller's right to cancel time period?

Answer: **Do not close** – wait until the time period has expired. An Equity Seller **cannot waive** this right to cancel. **If they want to close – then we must resign as escrow holder. We absolutely cannot close.**

Question 7: How do you handle the closing if the scheduled COE and the Trustee Sale date fall within the Seller's right to cancel time period?

Answer: **Do not close** – Equity Seller would have a problem and would have to get to the Trustee to postpone the sale if they could.

Question 8: Do you require any special written instruction from Equity Seller stating they HAVE NOT initiated or requested any cancellation?

Answer: We should have an instruction from the Seller stating the time period has elapsed and they did not attempt to cancel and we are authorized to close. (Cancellation time frame allowed by law to the seller is they have until midnight on the 5th business day after the contract is signed by seller or 8:00 on the day it's scheduled for trustees/foreclosure sale, whichever occurs first) **Refer to language in Scenario #1 above**

IMPORTANT NOTE: If you try to close at 8:00 and a trustee's sale is scheduled for 10 or 11:00 that same morning, DON'T AUTHORIZE RECORDING AND ATTEMPT TO CLOSE FIRST! You need to get the trustee's sale postponed...again, call your State Escrow Administrator for help.

OTHER QUESTIONS

Question: Equity Seller and/or the Equity Purchaser do NOT speak or understand English, do you require a copy of the NODPA, Short Sale Addendum (if applicable), Counter officers/addendums, all other escrow/purchase contract documents of any kind, be translated? **Yes. But we are not obligated to provide or offer any translation services.**

Question: If any sections of your regular Escrow Instructions, Amendments/Supplements or General Provisions are normally created in less than "10-point bold type" do you reformat text this size text? – **We don't typically reformat text. If we are provided a notice with text requirements, then you could produce documentation in the required format, but we cannot go backwards and re-generate documentation that has already been generated and executed.**

Question: Do you handle FSBO transactions with or without the NODPA? **Yes**

Question: If no NODPA do you create, provide and/or monitor the required civil code notices in the required 14 or 12 point text? **No, that's practicing law without a license....if it's a FSBO, unless they use the appropriate forms, we should refuse the escrow and not be the provider of these notices or create a contract between the parties.**

Question: Have you experienced any special title requirements due to possible rescission of transaction "within two years of the date of recordation of the conveyance"? **If equity purchaser thinks they got a raw deal, they have the right, two years from the conveyance, to rescind the transaction...most investors may be selling before then...however, we are not aware of any title requirements, so we cannot answer this at this time.**

Question: If the escrow is a short sale transaction, do you find that the Lender's Loss Mitigation Department, working on the short sale demand, and the Lender's Foreclosure Departments, working on the foreclosure process, are communicating with each other and providing adequate time to close? **No...Even if they are in the same office, they don't appear to communicate.**

Question: I thought there was a requirement for the Buyer's agent to have a bond? Is that still in effect? **Because the court case mentioned below was denied by the California Supreme Court, the decision stands. We do not need to ask for evidence of a bond. As of the date of this document, the CAR form NODPA was being revised to reflect this change.**

[Schweitzer v. Westminster Investments](#)

Cal.App. 4th Dist., Div. 1 (D049589) 12/13/07 / **Petition for review by Cal Supreme Ct. DENIED 3/26/08**

EQUITY PURCHASERS:

- 1) The bonding requirement of the Home Equity Sales Contracts Act (Civil Code Section 1695.17) is void for vagueness under the due process clause and may not be enforced. Section 1695.17 is vague because it provides no guidance on the amount, the obligee, the beneficiaries, the terms or conditions of the bond, the delivery and acceptance requirements, or the enforcement mechanisms of the required bond.
- 2) Although the bond requirement may not be enforced, the remainder of the statutory scheme remains valid because the bond provisions are severable from the balance of the enactment.
- 3) The court refused to set aside the deed in favor of the equity purchaser because, first, the notice requirements of Civil Code Section 1695.5 appear to have been met and, second, the seller's right to rescind applies before the deed is recorded but the statute "does not specify that a violation of section 1695.5 provides grounds for rescinding a transaction after recordation of the deed".