Land Records – Creation and Transfer of Interests

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Published on www.lorman.com - Mar 2018

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I. Conveyance Formal Requisites

Transfers of real property are subject to the Statute of Frauds, a statute at common law which provides that no action shall be brought upon real estate contracts unless the agreement or some memorandum thereof shall be in writing and signed by the person sought to be charged or by his authorized agent. Though the statutes vary considerably, all states have codified one or more versions of the Statute of Frauds. The following is an example:

> Agreements required to be in writing
>
> Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:… 10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein…
>
> N.Y. Gen. Oblig. Law § 5-701(a)

The Statute of Frauds applies to conveyances, including deeds, mortgages and easements by express grant as well as contracts for the purchase of an interest in real estate. However, the Statute does not mandate recording: The Statute of Frauds does not require that as a condition to enforcement between the parties, the conveyance be recorded in the public land records, and thus the conveyance may in fact have been signed and delivered, but never recorded. As a practical matter, a failure to timely record the conveyance will expose the grantee to any number of risks, including the defeat of its claim as the result of the grantor's conveyance to another party who takes their interest without actual or constructive notice of the previous purchaser.

II. Process of Recording

Though the conveyance, if in writing to the degree of detail required by the Statute of Frauds, will be enforceable as between the parties to the conveyance, the writing itself in the form of an instrument of conveyance is not entitled to recordation unless it meets the requirements of the state's recording laws. It is important to note that the state's recording laws are distinct from the state's Statute of Frauds. Thus, recordation of the instrument does not assure its

validity, and conversely, validity of the instrument does not assure its recordation.

A. Recording strategies and tactics

Certain individuals, whether they are professionals or laypersons, chose to take advantage of the recording laws to place a notice of record that charges real estate with claims of ownership, liens, or simply of a claim calculated to interfere with or prevent a transfer by the property's owner or nominal owner. Recording laws do not serve as an arbiter of the validity of the claims of private contestants, but rather as conditions under which instruments may be submitted for recording. Historically, the lis pendens, a notice of the pendency of an action or a future contemplated action, was an instrument that was recorded by counsel for a party, in part to deter prospective purchasers from acquiring land in dispute, thus forcing the nominal owner to negotiate. (Exhibit 23) Certain instruments delivered and accepted for recordation will be of doubtful validity, if not fraudulent, yet there is nothing that the register can legally do to prevent their recordation. (Exhibits 24 and 25) Thus, it is entirely possible that an instrument that is invalid as a consequence of a failure to comply with the Statute of Frauds would, if in recordable form, ultimately be accepted for recordation by the county recorder, but that another instrument that though valid would, if not in recordable form, be denied recordation by the same recorder for its failure to comply with the recording laws.

B. What are recording laws?

Recording laws are statute laws that specify criteria that the county recorder or register shall impose in determining whether a document submitted for recordation shall be accepted or denied. Seen from the vantage of the transactions document submitter, recording laws empower the county recorder or register of deeds to refuse to accept documents submitted for recording unless the document substantially complies with requirements concerning document format. Recording laws vary considerably among states; the grantee should never assume that the document, solely because it is in recordable form in the state where it was prepared or executed, will be recordable in the state where the land is located. Though recording statutes of states differ, the following are among the requirements of one state's statute:

> Standard format requirements for recorded documents.
>
> (a) Except as provided in pars. (d) and (e), no document may be recorded in the office of a register of deeds unless it substantially complies with all of the following on the first page of the instrument:

1. The name of the instrument is clear and is located not less than 0.5 inch nor more than 3 inches from the top of the document. If more than one instrument name is given, the first name given shall be used for indexing purposes.

2. A horizontal area within 3 inches of the top of the instrument in the upper left corner of the instrument, not less than 0.5 inch by 2 inches, is left blank for the unique document number.

3. An area in the upper right corner of the instrument, at least 3 inches by 3 inches, is left blank for recording information.

4. A horizontal area for the return address, at least one inch by 3 inches, is on the instrument in one of the following areas:

a. Directly below the recording information area described under subd. 3.

b. Directly below the document number area described under subd. 2.

c. Directly below the name of the instrument if the return address does not extend further than 3 inches from the top of the instrument.

5. a. Subject to subd. 5. b. and c., a space and a line are provided directly below the return address information and the line is labeled as "parcel identifier number", "parcel identification number", "parcel ID number", "parcel number" or "PIN".

b. If multiple parcels are affected by the instrument, the line described under subd. 5. a. may be used to refer the reader to another area of the instrument where the parcel identifier number is located.

c. Subdivision 5. a. applies only in a county whose board requires the use of a parcel identifier number.

6. The margins on the bottom and sides of the instrument are at least 0.25 inch.

(b) Except as provided in pars. (d) and (e), no document may be recorded in the office of a register of deeds unless it substantially complies with all of the following:

1. The paper is white and is at least 20 pound weight.

2. The page width is 8.5 inches and the page length is either 11 inches or 14 inches. The maximum deviation from any of these measurements may not exceed 0.25 inch.

3. A multipage instrument is not hinged or otherwise joined completely at the top or sides.

4. The entire document is clear and the letters, numbers, symbols, diagrams and other representations in the document are large enough and dense enough to be reproduced or read by a copy machine and a microfilm camera or optical scanner to the extent that the image captured is legible.5. The ink is black or red, except that signatures and coded notations on maps may be other colors.

6. The top margin of each page is 0.5 inch, except that company logos may appear within this margin if they do not interfere with any of the other requirements of this subsection.

(c) The register of deeds shall provide, upon request, a blank form which a person may complete and use as the first page of an instrument that the person seeks to record. The blank form shall be provided without charge and shall conform to the provisions of pars. (a) and (b).

§59.43(2m), Wis. Stats.

III. Recording Statutes: Effect on Priorities

A. Consequence of recording, non-recording

The legislatures of all states have enacted recording acts that in effect encourage the timely recordation of conveyances. Although the specific provisions of state recording acts or statutes vary considerably, if they share a characteristic it is that they protect subsequent purchasers and incumbrancers who give value and take title in good faith without notice of a prior claim. There are three basic types of recording statutes in the United States: Notice, Race, and Race-Notice. Notice and Race-Notice are the most common types of recording statutes. With certain exceptions, the recording statutes apply with equal force to all conveyances, including deed, mortgages, leases, and easements by express grant.

1. Notice

Under a Notice recording statute, an unrecorded conveyance is invalid as against a subsequent bona fide purchaser for value and without notice. The subsequent bona fide purchaser prevails against the prior interest, regardless whether the subsequent purchaser records or not.

2. Race-Notice

Under a Race-Notice recording statute, an unrecorded conveyance is invalid as against a subsequent bona fide purchaser for value without notice who first records. The recordation and indexing of an instrument, such as a deed or mortgage, in the office of the register of deeds imparts constructive notice of the contents thereof. The act is straightforward in its approach to determining who, as between two claimants, will prevail in a dispute over real estate in which both claim an interest: The claimant who first recorded his deed is accorded ownership as against the second

to record, so long as the first claimant had no actual notice (actual knowledge) of the second's rights at the time of recordation. The spectrum of interests, recordation of which imparts notice, is broad, and includes owners, mortgagees, lessees and holders of easement rights. Therefore, no search of the title is complete unless a search of the records of the register of deeds for all instruments affecting the title, including deeds, mortgages, easements, affidavits, and restrictive covenants, is made.

3. Race

   Under a Race recording statute, no conveyance or other instrument is valid as against purchasers for a valuable consideration but from the time of recordation. The first to record wins, and a subsequent purchaser need not be bona fide and without notice.

B. Resolving priorities under the recording laws: Examples

Several examples illustrate how the outcome of a dispute between two contestants will depend upon the type of recording statute of the state.

Example 1:

August 1, 2016:	Paul conveys real estate for value to Jessica ("Jessica's Deed")
August 2, 2016:	Jessica's Deed is recorded.
August 4, 2016:	Paul conveys the same real estate for value to Loren ("Loren's Deed")
August 5, 2016:	Loren's Deed is recorded.
	(Assume that Jessica had no actual notice of Loren's interest, and Loren had no actual notice of Jessica's interest.)

Under all types of recording statutes and at common law, Jessica will prevail against Loren.

Example 2:

September 1, 2016:	Barbara conveys real estate for value to Robert ("Robert's Deed")
September 3, 2016:	Barbara conveys the same real estate for value to Susan ("Susan's Deed")
September 4, 2016:	Robert's Deed is recorded.
September 5, 2016:	Susan's Deed is recorded.

(Assume that Barbara had no actual notice of Robert's interest, and Robert had no actual notice of Susan's interest.)

Under both a Race statute and a Race Notice statute, Robert will prevail against Susan. Under a Notice statute, Susan will prevail against Robert.

Example 3:

October 1, 2016:	Alan grants mortgage to First Bank.
October 3, 2016:	Alan grants mortgage to Second Bank
October 4, 2016:	Second Bank's mortgage is recorded
October 5, 2016:	First Bank's mortgage is recorded

(Assume that First Bank had no actual notice of Second Bank's interest, and Second Bank had no actual notice of First Bank's interest.)

Under all types of recording statutes, Second Bank's mortgage enjoys lien priority over First Bank's mortgage.

C. What constitutes the act of recording?

The act of recording, though a ministerial act on the part of the recorder or register of deeds, is of particular significance insofar as the protection of the rights of the grantee or mortgagee striving to place their interest of record. Recording typically consists of a stamp made by the register of the date and time received by the register, and the imprint of a sequential document number the register assigns to the document. However, recording as manifested by the acceptance of a document by the register, does necessarily impart constructive notice to subsequent purchasers. In addition to acceptance by the recorder, in many states the instrument recorded must be "properly indexed" or it will not impart constructive notice of the rights of the purchaser or lender, jeopardizing the purchaser to attack by a future purchaser or lender. Indexes are comprised of component parts, and they vary between states as well as between counties in the same state. Thus, depending upon the operative statute that specifies the contents of the index, "properly indexed" may require that the instrument be entered by the register in the proper column in the index for the parcel designed for entry in the public tract index, and for the parties in the public alphabetical indexes. In a state where proper indexing is a prerequisite for imparting constructive notice, an entry by the register in the wrong column means that, because the entry is in a place that the prospective purchaser is unlikely to search when investigating the seller's title, the prospective purchaser, and not the party whose deed was recorded first but improperly indexed, will be protected

under the Race Notice recording act. In several states the index is an essential part of the real estate records, and when the instrument is not properly indexed, it is as though the instrument has not been recorded. Howard Sav. Bank v. Brunson, 244 N.J. Super 571, 582 A.2d 1305 (Ch. Div. 1990); Ioannou v Southold Town Planning Bd., 304 A.D.2d 578, 758 N.Y.S.2d 358 (N.Y. App. Div. 2003); Cf. Anderson v. North Florida Prod. Credit Ass'n, 642 So.2d 88 (Fla. 1st DCA1994).

The following are examples of instruments which, though first recorded, did not impart constructive notice on prospective purchasers and as a result, left the improperly indexed instrument's grantee without the protection of a Race Notice recording act:

- A mortgage by a properly owner recorded, but indexed only against their neighbor's lot.

- A declaration of restrictive covenants affecting130 lots in a subdivision plat recorded but indexed by the register against only Lots 1 and 2. Lots 3 through 130 were subsequently conveyed to purchasers whose deeds were recorded and properly indexed.

- A mortgage of land located in Occidental County that was recorded, inadvertently, in Oriental County. The mortgagor filed a Chapter 7 petition for bankruptcy before the mortgage was recorded in Occidental County.

D. Who is responsible for proper indexing?

The question, whether the register of deeds, knowing of the importance of the index to investors and purchasers in the community, has an incentive to periodically investigate whether and assure that the entry of instruments were made in the proper column of the index, may be debated. However, title agencies have an implicit duty to their insurer to assure that before any title insurance policy is issued, not only has the conveyance been accepted for recording by the register of deeds, but it has also been properly indexed after recording. (In a populous county, the making of an entry in the public tract index, a task requiring the involvement of a deputy register trained to understand descriptions, could occur as much as several weeks after the date the conveyance was accepted for recording by the register's recording clerk. Thus, making certain that an entry in the proper column of the index has been made requires another visit to the register weeks after submission for recording.) It is not unusual for the title agency, when a discovery that a conveyance was not indexed or indexed in the wrong column, to call the register of deeds' staff's attention to a failure to have indexed a conveyance, after which the register of deeds typically proceeds to make an entry in the appropriate index.

E. Duty of care of attorneys who submit instruments for recordation

Conveyances are submitted to the register of deeds for recordation by any number of parties, including title company staff, closing agents, lenders and attorneys. An attorney who delivered the mortgage of his client to the register of deeds in proper form for recordation, but did not verify that the mortgage was properly indexed, was liable to the client when the mortgagor later died without have paid the note, and the real estate was sold to a bona fide purchaser who, because of the register's error in indexing, had no constructive notice of the unsatisfied mortgage. Antonis v. Liberati, 821 A.2d 666 (Pa. 2003).

F. Parallel public sources of information

Public records systems continue to evolve, with modernized electronic records replacing older hard copy paper records. In counties that have adopted new and improved databases and indexes designed to supplement the historic public tract and alphabetical indexes, there may be a temptation on the part of database users to discontinue searching the historic, occasionally unwieldy public tract and alphabetical indexes. Some counties have introduced sophisticated digital mapping systems designed to add information and improve land records access. However, unless the statute that mandates indexing is repealed, indexing in the public tract index remains a prerequisite for constructive notice, though the county register of deeds may have adopted a better parallel computerized index that is used by administrative personnel and public users. Associates Fin. Servs. Co. of Wis., Inc. v. Brown, 2002 WI App, 258 Wis. 2d 915, 656 N.W.2d 56 (Ct. App. 2002).

G. Public records destruction

Recording the deed to which one attributes ownership of real property essentially eliminates a need to preserve the original deed for safekeeping: Under the Best Evidence Rule, a copy of the recorded deed duly certified by the register in the absence of the original is the best evidence of the deed itself. It may be tempting to assume that, once they have been recorded in the public land records repository, the conveyance instruments will in fact be permanently preserved for posterity in the event a challenge to the title is posed. Unfortunately, this is not always the case. Public land records are subject to the same events of loss as other paper and electronic records. Paper records can be lost by virtue of flooding, wind and fire. Thus, courthouse records have occasionally been destroyed as the result of the destruction by fire of the courthouse edifice and its contents. In more recent times, electronic records have been destroyed by the register of deeds or its contractors who, in the course of entering or transferring data have deleted scores of documents. (In one case in a Midwestern state, all conveyances recorded in the office of a county register between June and August were

inadvertently deleted, some never to be replaced.) Generally, custodians who have destroyed public records are immune from liability. Private property owners whose title depends upon evidence of ownership that was destroyed, if they obtained title insurance, will have recourse under their policy.

IV. Appurtenant Easements

In contrast to deeds and mortgages, transfers of easements that are appurtenant are occasionally unaffected by the Statute of Frauds and the recording statutes. The Statute of Frauds mandates that a transfer of an interest in real estate shall be in writing. Easements by express grant are a transfer of rights in the land of another and are therefore within the Statute of Frauds. Nonetheless, in many states, it is not necessary in order to effectuate a transfer of an appurtenant easement, having been created, that the conveyance of the dominant estate must expressly refer to the perimeter of the servient estate, and the appurtenant easement will pass to the grantee by implication. Union Falls Power Co. v. Marinette County, 238 Wis. 134, 298 N.W. 598 (1941). Therefore, solely by examining the four corners of the deed that conveys the dominant estate, by scanning the legal description, or even by examining the chain of title, the reader would not necessarily know whether an appurtenant easement benefiting the fee simple title conveyed exists, or whether it had passed to the grantee.

V. Manufactured Homes

The titles to manufactured homes and mobile homes, if such homes are permanently affixed to the land, generally pass with the title to the land by deed. However, statutes of the state may require the issuance or re-issuance of a certificate of title by the state. In the event that it cannot be established whether the structure constitutes real property under the laws of the state, a search and examination of the certificate of title to the structure, and of financing statements filed under Article 9 of the Uniform Commercial Code may prove necessary. In the event any doubt exists concerning whether the structure constitutes real property, transfer or surrender of the certificate of title to the structure may be necessary.

VI. Correcting Errors in the Record

A. Role of the affidavit

Affidavits are useful in curing or avoiding the impression of title defects of many different types. Affidavits of the kind designed to be recorded in the office of the register of deeds that enhance the marketability of title or bar title claims are to be distinguished from those required by the purchaser or the title insurer. For example, the title insurer may require an affidavit that

confirms that no work has been done on the site that will give rise to mechanics' liens, or an affidavit by the member of a limited liability company ("LLC") confirming the identity and authority of the LLC members authorized to sign conveyances. The purchaser or the closer may require that the seller sign an affidavit that they are not a "foreign person" whose status would require the withholding of proceeds of sale under the Foreign Investment in Real Property Tax Act ("FIRPTA"), 25 U.S.C. §1445.

B. Effect of curative statutes

Affidavits if recorded in the register of deeds are often specifically accorded recognition by statute when they address specific types of issues. The following is an example of a statute that recognizes affidavits:

> When conveyance is free of prior adverse claim. A purchaser for a valuable consideration, without notice as defined in sub. (2), and the purchaser's successors in interest, shall take and hold the estate or interest purported to be conveyed to such purchaser free of any claim adverse to or inconsistent with such estate or interest, if such adverse claim is dependent for its validity or priority upon: (i) Facts not asserted of record. Any fact not appearing of record, but the opposite or contradiction of which appears affirmatively and expressly in a conveyance, affidavit or other instrument of record in the chain of title of the real estate affected for 5 years. Such facts may, without limitation by noninclusion, relate to age, sex, birth, death, capacity, relationship, family history, descent, heirship, names, identity of persons, marriage, marital status, homestead, possession or adverse possession, residence, service in the armed forces, conflicts and ambiguities in descriptions of land in recorded instruments, identification of any recorded plats or subdivisions, corporate authorization to convey, and the happening of any condition or event which terminates an estate or interest.
>
> §706.09(1), Wis. Stats.

The following are examples of affidavits that are commonly used and widely accepted in real estate transactions.

1. Name affidavit

   Affidavit signed by an owner that confirms that an individual is also known, or was formerly known, by another name. (Exhibit 26)

2. Judgment affidavit

Affidavit signed by an owner that denies that a judgment or tax lien against a person by the same or similar name is against him. (Exhibit 27)

3. Affidavit of marital status

   Affidavit signed by an owner confirming that on the date she signed a deed she was not married. (Exhibit 28)

4. Affidavit of trustee

   Affidavit signed by a trustee of a trust that holds the title to real estate that confirms the identity of the trustee and her authority to convey real estate. (Exhibit 29)

5. Estoppel affidavit or affidavit of fair dealing

   Affidavit signed by former owner confirming that on the date he conveyed real estate in lieu of foreclosure to a mortgagee, that the deed was supported by full consideration, that it was not fraudulent in any respect, and that no advantage was being taken of the debtor's necessity to drive a hard bargain.

6. Affidavit to show actual location of improvements or easements

   When easements that contain vague descriptions have been recorded, the easement may cloud the title to the real estate because of its broad description. The owner or a land surveyor may sign an affidavit that confirms that the line of poles or cables is located along a specific portion of the land described in the easement, thus relieving the remaining land from the impression that the easement affects it.

7. Affidavit to show power of attorney

   Affidavit signed by the attorney-in-fact attaching a copy of a power of attorney bearing the property owner's signature, the original of which has been lost.

C. Affidavits that are inappropriate

Affidavits are instruments that are prepared to supply missing information, cure clerical error, or confirm undisputed facts. They are usually not sufficient, if signed by a party not knowledgeable about the facts, to replace conveyances that have not been executed. The following are examples of affidavits that are of doubtful value in curing the title:

1. Affidavit by the grantee of a deed that states that the description of the deed is in error, and that the deed conveyed other real estate rather than that described by the deed
2. Affidavit by the mortgagee, without an identical affidavit by the mortgagor, that states that a satisfaction of mortgage was inadvertent and executed in error.
3. Affidavit by the closing agent stating that a mortgage the closing agent notarized, though the mortgage lacked the signature of a co-owner, duly mortgaged the interest of the co-owner.
4. Affidavit by one of two co-grantees of a deed stating that the other co-grantee's name should not have been on the deed, and that that latter party is not an owner.
5. Affidavit by one of two co-grantees of a deed stating that the deed's property classification should have been stated "joint tenancy," not "tenancy in common."
6. Affidavit by the grantor of a deed that he did not intend the grantee, a minor child, to be a grantee, and that another individual was to be the grantee instead.
7. Affidavit by an owner to the effect that a judgment, tax lien or child support lien filed against a person having the same name is not against him, though it is in fact.
8. Affidavit by a co-owner stating his spouse cannot be located, and therefore his deed conveying their home is valid without her signature.

VII. Legacy of a Housing Downturn: Short Sales and Foreclosures

From a survey of current state laws, it should be apparent that important procedural laws govern the transfer of ownership of real property, priority between competing legal interests, and the depository of public ownership records that have a bearing on land titles. Thus, the Statute of Frauds requires that all conveyances shall be in writing and signed by the grantor, and recording laws require that the grantee, if he is to be accorded certain protections, must assure that the conveyance is acknowledged and timely recorded. It may be tempting to conclude from these laws that transfers of ownership require for their validity volition or assent on the part of the transferor.

In fact, as a practical matter, because the property's owner may for any number of reasons be indisposed, real estate ownership is frequently transferred without the consent, approval or participation of the real estate owner. In light of landowner vital statistics and tenure life cycles, this should not be surprising. Owner mortality or mental incompetence deter or delay, but do not permanently arrest, the transfer of ownership. Thus, ownership of the property of a decedent will be transferred to a successor either by operation of law or by probate court having jurisdiction of the decedent's estate. Property of a party to divorce is subject to transfer, regardless of the co-owner's objection, by the court having jurisdiction of the parties and the subject matter. Properties that are subject to

mortgages and deeds of trust will, upon default, entitle the mortgagee to foreclose the interest of the mortgagor and ultimately divest the mortgagor by involuntary conveyance. In the event that ownership coincides with the owner's bankruptcy, the bankruptcy court has jurisdiction to transfer the interest of the debtor in real property by court order notwithstanding objections by the debtor.

Although the residential real estate marketplace spans diverse geographical regions that defy generalization, the incidence of transfers of real estate by home mortgage foreclosure increased each year between 2004 and 2011, finally decreasing in 2012. According to one source, more than 2.2 million foreclosures were initiated in the United States in 2007, an increase of 75 percent from 2006, involving as many as 1 out of every 100 homes in the nation. Nevada posted the nation's highest foreclosure rate for 2007 with 3.4 percent of its households entering some stage of foreclosure during the year. Consumer Bankruptcy News, Vol. 18, No. 6, February 14, 2008.

Foreclosure where consummated will result in the transfer of title to the lender and ultimately to a purchaser or investor. That is to say, there is a market in foreclosed properties that requires an investigation of the title. When a prospective purchaser anticipates acquiring the title from the foreclosing lender, the purchaser must evaluate whether the foreclosure proceeding was conducted pursuant to applicable law, and whether the sheriff's deed or conveyance by which the foreclosure culminated effectuated a transfer of the title free from the interest of the mortgagor and others claiming through them. Thus, an evaluation of the title is incomplete without an examination of the procedural steps marking the prerequisites of the foreclosure, including notice of sale, summons and complaint, proof of service, lis pendens, and notice of entry of judgment. Importantly, transfer of the title where ownership is involuntarily divested, requires particular vigilance on the part of the title's examiner. A failure on the part of the mortgagee to adhere to the procedural requirements of the statute could expose the purchaser of the foreclosed real estate to claims on the part of the mortgagor, lien holders and others resulting in a failure of title or title marred by outstanding encumbrances.

Though foreclosure case proceedings do not constitute a distinctly separate or parallel land records system as such, they require the same painstaking examination and degree of ready access as do conveyances that form the chain of title in the conventional sense. Because in states where foreclosure is by court action followed by a judicial sale, they entail a protracted civil proceeding requiring meticulous care at every stage, the post-foreclosure purchaser must raise important questions: Were all persons having an interest in the property made parties? Was service of process proper? Have the rights of redemption of the mortgagor and subordinate lien holders, respectively, expired?

The foreclosure may also be subject to dismissal or collateral attack by virtue of defects in the underlying mortgage or the assignment of mortgage: Was the mortgage signed by all necessary parties, thus averting a counterclaim denying foreclosure by a non-signing co-owner or a spouse of the owner? Did the mortgage contain a complete and accurate legal description? Did the mortgagee lack standing to sue for foreclosure because it had no ownership of the mortgage? LaSalle Bank v. Lamy, 12 Misc.3d 1191 (N.Y. Supp. 2006). Any number of defects in the mortgage may require action for reformation to cure the defect before foreclosure will be ordered.

The prospect of mortgage foreclosure, a proceeding that may require a year or more to complete, poses significant holding costs and legal fees for the lender, and a deteriorating credit history for the borrower. Depending upon their objectives, borrower and lender may have an incentive to explore a "short sale:" A voluntary sale by the borrower to a purchaser, in which the lender has agreed under stated conditions to accept a discounted payoff to release an existing mortgage, thus averting foreclosure. However, depending upon the status of the title, a short sale may require more than a two-party agreement between borrower and the first mortgage lender. If a short sale is to result in a transfer of the title free from liens and encumbrances, all lenders, lien holders, and parties having an ownership interest in the real estate, including the seller's bankruptcy trustee, an ex-spouse that retains property rights, and life tenants or remainder interest holders, must agree to release or relinquish their interests.

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