

Why We Don't Worry About "Due-On-Sale" in "Subject To" Deals

By Matthew S. Chan

(Excerpt from "The TurnKey Investor's "Subject To" Mortgage Handbook")

There are many reasons why we are not overly concerned with due-on-sale. It does not mean we are unaware or do not care. Our confidence comes from our knowledge and ability to deal with it if it does occur.

Most institutional lenders have a department devoted to properties they own through foreclosure actions. Those foreclosed properties are generally known by lenders as "real estate owned" or REOs. Most of these lenders try their best to minimize REOs. It is not in most lenders' best interest to intentionally cause a REO. That is why we continually emphasize the importance of making continued payments and having the ability to financially cover those payments when vacancies occur. Lenders are generally happy if payments are made and the loan is current.

"We Don't Care Where the Money Comes From"

When I first started out doing "subject to" mortgage transactions, one of the things I quickly wanted to find out was to separate the theory of a lender's invoking the due-on-sale provision and the practicality of their enforcing it.

When I called lenders to fax in the Power of Attorney (POA) our sellers signed for us, I discovered it was actually a common occurrence for lenders to receive documents with instructions to give third-parties access and control over the account.

Lenders are very accustomed to third-parties such as property managers, attorneys, accountants, insurance agents, and other professionals accessing loan information. They are also used to receiving instructions for address changes, statements, coupon books, and insurance changes.

And when there is an arrearage on a loan, the Collections Department (sometimes called Loss Mitigation) is often gratified that someone is calling for instructions to reinstate the loan.

I have found that once you provide the necessary written authorization by the borrower, such as a signed and notarized POA, lenders are often more than happy to deal with you. They are happy to cooperate in making address changes, getting you coupon books, and providing current loan information as long as it is in the spirit of servicing the loan.

When we deal with sellers to buy with a "subject to" mortgage, they sometimes enter the early stages of foreclosure. The lender is no longer handling the account and it has been transferred to a real estate attorney.

In many of those conversations, I often speak to the attorney or the clerk handling the account and ask them if they have any problems with us (a third-party) reinstating the loan. Sometimes they will ask why we would reinstate the loan. I tell them directly that we are a property management company that has been contacted by the borrower to negotiate on their behalf and perhaps to reinstate the loan.

However, we will not issue funds to reinstate the loan unless our financial interests are protected.

I then ask: “Do you or the lender have any problems that the borrower and I have an agreement whereby I have a financial interest in reinstating the loan?”

You know what they say? No problem. They say it makes sense that we would have an agreement with the borrower to have a financial interest if we are the ones issuing funds on their behalf to reinstate the loan.

In fact, nearly everyone I spoke to in each case did not care. To paraphrase their response, “nothing would make us happier than to receive the money to reinstate the loan and to stop the foreclosure.” They don’t care who pays or who the party is so long as they receive certified funds.

When I am on the phone with either the lender or the attorney, I try as much as I can to take a human approach. I position myself as the outside third-party being called in by the borrower because I have the expertise and the funds to solve the problem.

In all cases, I make it understood that I am not doing this as a “favor” to the borrower. I am doing it because it is my job and that I have a financial interest in profiting from this transaction. The lender and the attorney easily accept my position. In their minds, no company would reinstate the loan unless they could profit from it. They never ask the nature of the transaction, and I do not give them specifics of the “subject to” mortgage transaction I intend to complete.

The foreclosure attorney represents the lender at this late stage. They simply want the money, and they don’t care who pays it or where the money comes from.

This is evidenced each month when lenders accept our checks month after month, and it is clear that the borrower is not making the payments.



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