

R.I.P. Bond for Deed

from the desk of David M. Touchstone

In the August, 2002 newsletter, I wrote at some length about Bond for Deed. I will not reprise here what I have previously written. I do wish, however, to bring to your attention two important recent developments in the law which have profound implications for the use of bond for deed contracts.

In 2004, the voters of Louisiana approved certain amendments of Article VII, Section 20 of the Louisiana State Constitution. This is the section in our state constitution that regulates the right to claim a homestead exemption against property (ad valorem) taxes. Prior to the amendment, purchasers of residences under bond for deed contracts could file homestead exemptions. This had been a hard fought and a hard won right; for some reason, many of the parish assessors had vigorously resisted the right of bond for deed purchasers to file homestead exemptions. In any event, the 2004 amendments deleted that right. After the amendments, Subsection (7) of Section 20 now reads:

“No homestead exemption shall be granted on bond for deed property. However, any homestead exemption granted prior to June 20, 2003 on any property occupied upon the effective date of this paragraph by a buyer under a bond for deed contract shall remain valid as long as the circumstances giving rise to the exemption at the time the



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exemption was granted remain applicable.”

In other words, bond for deed purchasers who filed for homestead exemption prior to June 20, 2003 and who have maintained that homestead exemption are “grandfathered”. No other bond for deed purchasers will be entitled to the homestead exemption. This change in the law significantly depreciates the use of and value of bond for deed contracts.

But the change in homestead exemption is not the worst of it. Although bond for deed has been sometimes utilized as a substitute for credit sale deeds on owner financed transactions (a practice I do not recommend), that has not been the primary role of bond for deed in Louisiana practice. As I explained in greater detail in my 2002 article, bond for

deed contracts since about 1988 have been used primarily as a surrogate for assumption type transactions. In about 1988, institutional lenders started including language in their mortgage forms which forbade assumption of the mortgage without the written permission of the mortgage holder. Out the window went “unqualified assumptions”. Louisiana lawyers, being an imaginative breed, pulled out and dusted off the antique and seldom used legal vehicle known as bond for deed. The thinking here went like this: the new language in the mortgage forms prohibited “transfer of ownership”. It was the transfer of ownership that the newly minted “due on sale” clauses prohibited. In other words, after 1988, a transfer of ownership (such as an assumption transaction) allowed the mortgage holder to “call” or demand payment in full of the mortgage indebtedness. But, thought the Louisiana lawyers, bond for deed is not a transfer of *ownership*; it is merely a transfer of *possession* and, thus, does not constitute a trigger to the due on sale clause. About 1997, the institutional lenders revised their mortgage forms once again, and this time explicitly added the execution of a bond for deed as a trigger to the due on sale clause. Up until last week, my position on whether or not First Commerce would act as a closing agent on a bond for deed contract was to review the due on sale clause in the underlying mortgage that was to be “wrapped” by the bond for deed contract to see if it contained

the pre 1997 language or the post 1997 language. That all changed last week; last week, I discovered the December 15, 2006 decision rendered by the Louisiana Supreme Court in *Levine v. First National Bank of Commerce*, 948 So. 2d 1051 (La. S. Ct. 2006). The Louisiana Supreme Court ruled in the Levine case that even pre 1997 mortgage forms allow mortgage holders to call the mortgage indebtedness in full should the mortgagor make the property a subject of a bond for deed contract. To repeat, if the mortgage form has the standard due on sale prohibition against transfer of the property, even if it fails to explicitly mention bond for deed as a trigger, the standard prohibition will suffice as a legal basis for the mortgage holder to call the mortgage in full should the property be made subject to a bond for deed contract. Bottom line for us at First Commerce: we won't handle a bond for deed that is wrapping any kind of a due on sale clause. Some really aggressive agents think it is okay to do such things as long as the danger is fully disclosed to the parties. Well, we don't agree; many times such disclosures just don't get through to the parties and when their property gets seized in a foreclosure, they decide to sue somebody, anybody, regardless of how much disclosing occurred. Better safe than sorry. As far as we are concerned, Bond for Deed is a dead duck. R.I.P.