

Buyers and foreclosures...

Since the beginning of the foreclosure epidemic a couple of years ago, the primary focus has been on legal and practical issues faced while working with sellers and lenders during the foreclosure process and with lenders selling homes after the foreclosure process. It is now apparent that there are legal issues and practical matters which can dramatically impact buyers and their agents should they choose to attempt to purchase a property through a short sale or from a lender after the foreclosure process. A home in the foreclosure process, or owned by a lender after the foreclosure process, shall be referred to in this article as a "Repo Home."

First, a buyer's agent will need to make certain that he knows the buyer's purpose in seeking to purchase the home. For example, if the buyers are first-time home buyers whose lease on an apartment ends in three months and they wish to take possession of their new home within three (3) months, the buyer's agent may wish to advise them that they may not be good candidates for the purchase of a Repo Home. If the buyers choose to try and purchase a Repo Home after receiving this advice, the buyer's agent will want to make certain that he can demonstrate that he advised the buyers of the potential prolonged time requirements for such a purchase. On the other hand, if buyers indicate they are investors who have purchased many homes and are simply interested in getting the most value for their dollar, these buyers would be good candidates for the purchase of a Repo Home.

Second, if buyers are interested in purchasing a Repo Home, the buyer's agent should alert them as to the potential risks with respect to the physical condition of the home. If the home has been vacant for a substantial period of time, the buyers will need a very thorough inspection. Further, if the buyers purchase the Repo Home from a lender, they should be

advised in advance that most lenders will not take responsibility for the physical condition of the home and are not required to provide a seller's disclosure statement. Further, the buyers should also be advised that many lenders use an addendum to the standard form of purchase agreement which shifts responsibility for the condition of the home from the date of the purchase agreement through closing to the buyers. In other words, if the purchase agreement becomes effective on November 1 and the house burns down on November 15, under the terms of some bank forms, the buyers would be required to pay the full purchase price and accept the property in its burned down condition.

Third, the buyer's agent should make the buyers aware of what may become a very frustrating process in the event they purchase a Repo Home either through a short sale or directly from a lender. The stories of REALTORS® submitting offers for approval to lenders and then waiting weeks if not months to obtain a response are numerous. Further, the practice of submitting multiple offers accepted by a seller to a lender for the lender's approval is becoming more and more commonplace. Many REALTORS® report losing buyer clients in transactions due simply to a lender's failure to timely respond to pending offers.

Fourth, if buyers represented by a REALTOR® become interested in a property which the REALTOR® knows involves a short sale, it will be helpful to the buyers if, at the outset, the REALTOR® explains the basic mechanics of a short sale. In other words, buyers should be advised that they have to make an offer which is not only acceptable to the seller, but may also need to be acceptable to multiple lenders. Buyers should be advised that the seller will not have sufficient funds to pay off all the lenders; thus, the seller will be negotiating with one or

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more lenders to persuade them to accept some amount less than the amount they are actually owed. It may be easiest to explain to the buyers that the transaction is not only contingent upon the approval of the buyers' own lender, but is also contingent upon obtaining the approval of one or more of the seller's lenders. In providing the buyers with this information, a REALTOR® may be concerned about dampening the buyers' desire to purchase a home. On the other hand, this is a new environment for buying and selling homes. Traditionally, upon the seller's acceptance of an offer, enthusiastic buyers would immediately begin making preparations to complete the transaction. These preparations include the cost of undertaking an inspection, paying fees for an application for a mortgage loan, and ending their current living arrangements (i.e., terminating a lease or selling their own home). As the negotiations with the seller's lenders become protracted and the buyers are incurring costs, it is important that they understand the additional contingency in a short sale, i.e., the seller's lenders' approval.

Fifth, a REALTOR® representing a buyer interested in purchasing a Repo Home may wish to discuss with the buyer the listing broker's expertise in handling transactions involving Repo Homes. Obviously, any information provided by the buyer's agent regarding the listing broker would need to comply with the dictates of the Code of Ethics. If the listing broker is well experienced in handling these types of transactions and has a reasonably successful track record, that information should be imparted to the buyer. If, on the other hand, it appears that the listing broker has little or no experience in these types of transactions and does not appear well acquainted with the issues, the buyer's agent may indicate to the buyer that the likelihood of a successful transaction is diminished. This discussion would blend into a discussion with the buyer about what the buyer's agent can or cannot control or attempt to influence in the transaction. The buyer needs to understand that the ability to successfully negotiate with lenders for a short sale or to obtain a timely response to an offer which has been accepted by the seller lies wholly within the powers of the listing broker and any other persons representing the seller. While typically buyer's agents do all they can to discharge their fiduciary duties to the buyer, the buyer must understand that his

agent does not represent the seller and cannot directly negotiate with the seller's lenders.

Sixth, if REALTORS® are representing buyers who are purchasing a Repo Home directly from a lender, they must make certain that their buyers obtain appropriate title insurance for their home. We are aware of lenders who only agree to provide a title search through the date of foreclosure and will only convey the property through the use of a special warranty deed. Also, it would appear that some lenders provide title commitments which contain exceptions that effectively eliminate much of the value of title insurance to a buyer. Thus, it is extremely important that the buyers have the title insurance commitment reviewed by a knowledgeable attorney to make sure that they will, in fact, be getting appropriate title insurance.

Seventh, buyer's agents need to advise buyers that values of homes in the current economic environment can freely fluctuate. More and more claims are being asserted against buyer's agents on the theory that the buyer paid too much for the home. Buyer's agents need to make sure that buyers are advised that if they wish to be as certain as possible about an appropriate purchase price for a property, the buyers need to obtain the services of an appraiser.

Finally, if a REALTOR® is representing a buyer who is seeking to purchase a home pursuant to a short sale during the foreclosure process, the buyer's agent needs to be able to document that he advised the buyer that if the closing for the transaction does not close prior to the end of the redemption period, the buyer will lose any then-existing rights to buy the home from the seller. If the transaction is not closed by the end of the redemption period, the buyers need to understand that if they still want the home, then they will have to start the process all over again with the lender.

While we have always urged REALTORS® representing buyers to use written buyer's agency agreements, the use of such agreements is even more critical with respect to Repo Homes. The buyer's agency agreement needs to spell out what the REALTOR® will or will not be doing for the buyer. While the buyer's agent will certainly agree to act as the agent for the buyer in purchasing a home, the agreement should also indicate that the REALTOR® will not be the home inspector, appraiser, attorney, or provider of any other specialized services the buyer may need in conjunction with the purchase of the home. **MAR**

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