



GAME OVER

With foreclosures at an alarming rate, it's time for Michigan to face its reality and get down to business.

The number of homes being sold after foreclosure or as short sales remains staggering in Michigan. It is difficult to believe that any REALTOR® firm can completely avoid dealing with either a listing that goes into foreclosure or a buyer who is interested in trying to purchase a home in the foreclosure process, even if such a firm tries to do so.

Over the course of the past several months, we have fielded literally hundreds of questions regarding the foreclosure and short sale processes over the MAR Legal Hotline, in the course of providing legal updates, and in providing services to REALTOR® clients. We have tried to reduce these many questions into a basic set of questions and answers which may prove helpful to REALTORS® in trying to get their hands around the foreclosure or short sale process. Due to the length of the questions and answers, the questions will be presented in three (3) parts.

FORECLOSURE & SHORT SALES: PART I

Unfortunately, over the past several months, Michigan has been experiencing an increasing number of foreclosures. In fact, the number of foreclosures has become so great that a typical REALTOR® firm would have to close its doors to avoid dealing in some way with foreclosed properties. During recent months, we have fielded hundreds of questions regarding the foreclosure and short sale process over the MAR Legal Hotline, in the course of providing legal updates, and in providing services to our REALTOR® clients. Hopefully, the following questions and answers will provide REALTOR® offices with some assistance in dealing with foreclosed properties.

The questions discussed below are all based upon the following hypothetical scenario: Bob and Mary Brown appear at Acme Realty on May 1, 2007. They meet with Salesperson Smith. The Browns advise Salesperson Smith that they purchased 123 Elm Street a few years ago. While the Browns love living at 123 Elm Street, they have been unable to make their mortgage payments since Bob lost his

job. The Browns believe they have some equity in their house and would like Salesperson Smith to list and sell their home for them.

The Browns have mentioned that they have missed some mortgage payments and that Bob has lost his job. Is it legally permissible for Salesperson Smith to ask the Browns if the bank has threatened foreclosure or has in fact started foreclosure proceedings?

It is perfectly permissible for Salesperson Smith to ask the Browns about foreclosure. It is not an invasion of their privacy. In fact, it is critical for Salesperson Smith and Acme Realty to have this information to fully carry out their fiduciary duties in the event that Salesperson Smith agrees to list the Browns' property.

In response to Salesperson Smith's question about foreclosure, the Browns reply that they have received a letter from their bank mentioning foreclosure, and that someone has posted a document entitled "Notice of Foreclosure" on their home. What does this mean?

It would appear that the bank has accelerated the debt owed it by the Browns (i.e., declared the entire loan amount due and owing) and has at least begun foreclosure proceedings. When a lender starts the foreclosure process, it must have a notice of foreclosure posted on the owners' property, and the notice of foreclosure must be published for four (4) weeks in a county-wide newspaper.

The Browns indicate that they have brought the Notice of Foreclosure with them and can provide a copy to Salesperson Smith. Is there any information in the Notice of Foreclosure that would be helpful to Salesperson Smith in deciding whether to list the Browns' property?

Yes. There are at least three (3) very important pieces of information in the Notice of Foreclosure which will be helpful to Salesperson Smith in deciding whether to list and try to sell the Browns' property. These items include: (1) the name of the lender and the amount the lender claims is owed on the property – in this case, the Notice of Foreclosure

indicates that the lender is Ace Bank, who is owed \$120,000; (2) the date of the foreclosure sale – in this case, the foreclosure sale was to be held on April 1, 2007; and (3) the term of the redemption period – in this case, the Notice of Foreclosure indicates that the redemption period shall end on October 1, 2007.

Why is the amount claimed owed by Ace Bank, \$120,000, important to Salesperson Smith?

The amount claimed by Ace Bank, \$120,000, indicates a starting point for Salesperson Smith in her analysis of whether it is feasible to sell this property. Salesperson Smith, in doing her market analysis, will need to be able to determine whether a willing buyer will pay at least \$120,000, plus amounts equal to transfer tax, commissions, and other seller closing costs.

Why is the date of the foreclosure sale in the Notice of Foreclosure important to Salesperson Smith?

The date of the foreclosure sale is important because under Michigan law, it is the date that triggers the beginning of the redemption period. It is also important to know, if a foreclosure sale has occurred, if there was any issue regarding abandonment of the property (which will be discussed in later questions).

Why is the date of the expiration of the redemption period important to Salesperson Smith?

The date of the expiration of the redemption period is critical to Salesperson Smith, inasmuch

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as it defines how much time she will have to list and sell the property. In this case, Salesperson Smith determines that she has five (5) months to list the property, find a buyer, and close the sale.

Why is the name of the lender in the Notice of Foreclosure important to Salesperson Smith?

There are a multitude of lenders, both in state and out of state, foreclosing mortgages in the State of Michigan. Each lender is different as far as its willingness or ability to approve short sales, or in fact, whether it will entertain any type of negotiations after the foreclosure sale. If Salesperson Smith is not acquainted with the policies and practices of Ace Bank on these issues, she should consider asking other persons in the office or colleagues in the business about the policies of Ace Bank. If Salesperson Smith determines that it will not be possible to sell the property without Ace Bank agreeing to take less than \$120,000, it is important that she find out whether, in fact, it is likely that Ace Bank will even consider such a deal. Some lenders simply will not accept any-

thing other than the full amount owed. If that is the case with Ace Bank, then Salesperson Smith may opt not to take the listing.

Does Salesperson Smith now have enough information in her possession to undertake her market analysis and determine whether she has a reasonable likelihood of success in finding a buyer and closing the sale of the Browns' home?

Absolutely not. At this stage, Salesperson Smith has no notion whether \$120,000 would be enough to satisfy all liens against the Browns' home. If there are junior mortgages or other liens on the Browns' home, the amount of those mortgages and liens would have to be added to the amount Salesperson Smith will need to raise through the sales price for the Browns' home to close the deal.

Salesperson Smith asks the Browns whether there are any other mortgages on their property. The Browns indicate there are no other mortgages. Is Salesperson Smith now ready to proceed forward with a market analysis?

Unfortunately, no. Many sellers in deep financial distress have

not been making payments to any lender for months. They simply forget that they granted a second mortgage and perhaps a third mortgage to other lenders. Salesperson Smith should obtain a “pre-commitment” or an “informational title commitment” from a title agency. This document should reflect any other mortgages and/or other liens against the property.

Salesperson Smith obtains a pre-commitment which shows that the Browns granted a second mortgage in the amount of \$30,000 to Risk Bank, and a third mortgage in the amount of \$10,000 to FBN Mortgage. How do the second and third mortgages impact Salesperson Smith's likelihood of success in selling the Browns' home?

The second and third mortgages simply raise the ante on how much Salesperson Smith will have to obtain in a sale to fully pay off all lenders. In addition to the \$120,000 owed to Ace Bank, another \$40,000 would now need to be raised to pay off the second and third mortgages. Salesperson Brown now determines that she would need to obtain a sales price of \$180,000 to make certain all of the lenders, commissions and closing costs can be paid.

Salesperson Smith undertakes her market analysis and determines that if she is to find a buyer for the Browns' property within the five-month redemption period, the sales price would most likely be in the range of \$160,000 to \$170,000. Should Salesperson Smith list the property?

Salesperson Smith should only undertake listing the Browns' property if she is confident that she has the skills and the energy to pursue a short sale (i.e., a sale in which the first, second and/or third lenders will have to be induced to take something less than the full amounts owed on their mortgages). Further, Salesperson Smith will need to make certain that the Browns understand that it is highly likely they will not receive a single dollar at closing. Further, Salesperson Smith may wish to advise the Browns that in the event of a short sale, they should check with an accountant as to any possible tax consequences involved in the forgiveness of debt by a bank (e.g., Ace Bank accepting \$105,000 of \$120,000 owed it, and forgiving the remaining \$15,000).

If Salesperson Smith lists the Browns' property, can she put an offer of cooperation and compensation in the MLS?

Yes. Salesperson Smith can place the Browns' property in the MLS offering cooperation and compensation to other REALTORS®. However, Salesperson Smith must be mindful of the fact that if she offers, for example, three percent of the sales price as compensation to a cooperating REALTOR®, she is legally bound to pay that amount at closing. If there are insufficient proceeds at closing to pay the offered split, Salesperson Smith will either have to induce the cooperating broker to take less or face potential arbitration for the full amount.

Is there anything Salesperson Smith can do to protect herself from claims by cooperating REALTORS® in the event of a short sale?

Technically, there is no way for Salesperson Smith to offer three percent compensation to cooperating REALTORS® through the MLS contingent upon “net proceeds” being available to pay the three percent. If Salesperson Smith indicates in the “Remarks” section of the MLS that there is a possibility of a short sale or a likely short sale, then cooperating REALTORS® will at least be aware of the risk that they will not be paid in full at closing. This issue will need to be addressed contractually as offers are presented and the shortfall amount is determined. Listing REALTORS® should notify cooperating brokers as soon as they become aware that there will be a shortfall.

Salesperson Smith decides she will proceed forward with listing the Browns' property. The Browns are delighted. They advise her that they are moving to North Carolina next week and will provide her with a forwarding address. Does the Browns moving to North Carolina have any potential impact on Salesperson Smith marketing the property?

The Browns moving out of the property could severely impact Salesperson Smith's ability to sell the Browns' property. Ace Bank could deem the property abandoned, which would, in turn, dramatically shorten the redemption period (i.e., the time Salesperson Smith has to market and close the sale of the Browns' property). **MAR**