

## Lenders' Addendums: Beware

We first delivered a white paper on the problems and issues with lender's addendums when buyers purchase a foreclosed property for the 2010 Legal Update. The problems and issues are particularly difficult when a REALTOR® is representing first-time homebuyers who are particularly keen to obtain the perceived economic benefits from buying a foreclosed property, but have no notion how such a transaction differs from the way they saw their parents purchase a home. Unfortunately, it would appear that some REALTORS® either did not get the message in 2010 or have simply forgotten it.

Typically, buyers who are pursuing the purchase of a foreclosed property take great care in preparing the terms of the offer which sets forth all of the terms upon which they wish to purchase the property. These buyers have no idea that they will receive a lengthy addendum or counterproposal from the lender in response to any offer they make for the property. It is important for REALTORS® who represent these buyers to prepare them for the anticipated addendum or counter proposal (the "Lender's Addendum").

While there is no standard Lender's Addendum, there are many common terms that can substantially change the terms of the transaction. First, a Lender's Addendum may well establish new dates by which the buyers must take certain actions. For example, assume that in their original offer the buyers included an inspection contingency, which must be performed within ten days from the date of acceptance by the lender. In many instances, a Lender's Addendum will change both the date from which you start counting and the number of days in which to take action. This type of change can be extremely critical where buyers are purchasing a foreclosed property for cash and are required to make an earnest money deposit equal to 10% of the purchase price. If the buyers fail to note the change in the time for conducting an inspection and have it done within the timeframe specified in their offer, they may well find that by the time they receive the inspection results, they are already deemed to have accepted the property in its current condition. The lender will lawfully rely upon the inspection provisions in the Lender's Addendum and refuse to return the buyers' deposit.

Second, the Lender's Addendum typically requires the buyers to waive any right to maintain an action for specific performance should the

lender decide not to sell the property to them and prohibits the buyers from recording a lis pendens or affidavit of interest should the lender fail to close. With this provision, the buyers are in effect waiving any right to take any action to prevent the lender from selling the property to a third party. In other words, the buyers cannot be certain they will be able to purchase the property until a deed is actually delivered at closing.

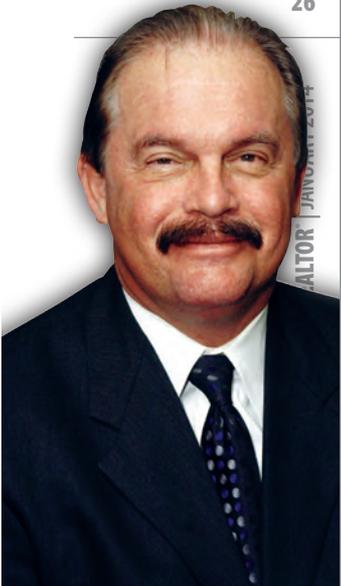
Third, Lender's Addendums typically require the buyers to waive any right to rescission of the transaction should they purchase the property and find out there has been a mutual mistake of fact which renders the property unusable. The buyers are required to accept all defects and waive any right to reduce the purchase price or hold the lender responsible for any latent defect, apparent or non-apparent defect, discoverable or non-discoverable defect or other problem with the property. In other words, the buyers are required to accept the property in whatever condition it is in on the date of closing.

Fourth, under the terms of a typical Lender's Addendum, the buyers will be in the same position with respect to legal title to the property. The lender will specifically disclaim any responsibility for any defects in title. The buyers will be provided a deed at closing which simply warrants title from the date the lender obtained title to the property through the date of closing. The form of deed the buyers will receive is commonly known as a special warranty deed, a covenant deed or a "Deed C."

Fifth, the Lender's Addendum may contain a provision whereby the seller will pay for a buyers' policy of title insurance from a particular title insurer. The Lender's Addendum typically does not specify the type of title insurance that will be provided to the buyers. Thus, some buyers receive title commitments from lenders that are nothing more than a title search from the date of the foreclosure sale or a title commitment for title insurance subject to all encumbrances whether of record or not. In other words, the buyers will not receive title insurance that would provide them with any protection in the event a defect in title is later discovered. It is very important for buyers to make certain that they are receiving a title insurance policy from a national underwriter that truly insures their title.

The white paper which we prepared for the 2010 Legal Update is on MAR's website and sets forth numerous other provisions which might pose

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problems for unwary buyers (Legal Reference Library/Legal Update Archives/2010 Legal Update). REALTORS® working with buyers of foreclosed properties (particularly first-time homebuyers) need to keep two points in mind. First, they need to make sure their buyers are prepared to deal with the anticipated Lender's Addendum. Second, they need to make sure that their buyers thoroughly review and understand their legal position and risks prior to signing the Lender's Addendum.

any particular order or that a seller reject any specific offer prior to reviewing other offers.

Second, buyers may doubt that their buyers' agent has done his or her job when they do not receive a written acknowledgement from the seller demonstrating receipt of their offer, let alone a written "rejection" from the seller. As REALTORS® are aware, there is no legal requirement that a seller do anything with an offer from a buyer, and there is no means by which a buyers' agent can compel a seller to either provide a

written acknowledgement of receipt of an offer or a formal written rejection of an offer. Further, most buyers do not understand that their agent is generally prohibited from contacting any seller directly if that seller is represented by another REALTOR®.

Finally, perhaps the most common complaint from buyers against their buyers' agents occurs in a situation

where the listing REALTOR® requests that all interested buyers present their "highest and best" offers from their clients. While the term "highest and best" has no legal meaning, it apparently leads many buyers to believe that they are in an auction situation. These buyers believe that in a fairly conducted auction, the seller must accept the highest offer submitted. This is simply not true. Even if cooperating REALTORS® are advised that the seller requests their clients' "highest and best" offers, there is no requirement that the seller actually accept the highest offer. For any number of lawful reasons, a seller may choose to accept an offer in which the purchase price is less than a competing offer. In fact, a seller who has received multiple offers after requesting everyone's "highest and best" offer is not required to accept any of the offers.

The Primer on Multiple Offers available from MAR addresses these and other points which buyers need to understand when they are in a multiple offer situation. Hopefully, REALTORS® will avoid future complaints by better educating their buyers before they submit their offer. **MAR**

## **"While there is no standard Lender's Addendum, there are many common terms that can substantially change the terms of the transaction."**

### **Multiple Offers: False Expectations**

Based upon information received over the MAR Legal Hotline and complaints filed against REALTORS® with both state and local associations, it is apparent that buyers simply do not understand the rules (or lack of rules) when they are involved with a property that is subject to multiple offers. In response to this problem, MAR has developed a "Primer on Multiple Offers" which is available on MAR's website for use by REALTORS® to help buyers deal with multiple offers. Unfortunately, when buyers lose out in a multiple offer situation, they often turn their anger toward the only person who was acting in their best interests in the transaction, i.e., their buyers' agent.

When they lose out in a multiple offer situation, there appear to be any number of perceived rules or laws which buyers falsely conclude may have been broken through the fault of their buyers' agent. First, some buyers believe that offers must be presented to a seller in the same order that they are received by the listing REALTOR®. Further, many buyers believe that the seller must fully consider and reject the first offer submitted prior to reviewing any of the other offers. Obviously, there is no rule or law requiring that offers be submitted to a seller in

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