

Short Sale and Foreclosure Resource Guide

The professional in today's residential real estate market faces unique challenges. Calls to the MAR Legal Hotline indicate that a growing segment of members' business is dealing with short sales. Also, while the occurrence of foreclosure is relatively low in Maryland compared to the rest of the country, the rate and number of foreclosures in the state has risen substantially. We have created this Resource Guide to assist you as a real estate professional in meeting these challenges. The information included in this guide covers general information about foreclosure and short sales, as well as articles, publications and useful links.

Some of the resources listed here will be helpful to you as you deal with clients who are considering short sales or facing foreclosure. Additionally, we have included resources for you to direct clients and customers to that will help answer their questions and give them important information.

SHORT SALES

What is a Short Sale?

A short sale is the sale of a home where the net proceeds are not enough to cover the seller's obligations, including mortgage payoff, closing costs, property taxes, transfer tax and commission. In some cases, these sellers may be in default on their mortgage and are potentially facing foreclosure. Life changes such as a divorce or job transfer may force a sale of their property, but some sellers find themselves in an "upside down" situation, meaning that they owe more than they can potentially realize from the sale of their property.

REALTOR® Responsibilities and Duties

Q. I am the listing agent for a property and this will be a "short sale." Do I have to disclose this fact to prospective buyers? Are there any other issues of which I should be aware?

A. A convergence of factors such as rising interest rates on sub-prime adjustable mortgages, flat or falling home prices, home-equity credit lines and 100% financing are coming together to create an unfortunate and growing need to understand this kind of transaction. You need to consider how and when to disclose this fact to prospective buyers. In addition, you need to be in a position to understand how the transaction will be structured, including the need for lender involvement and approval.

For these purposes, we define a short sale as one where the net proceeds from the sale of a home are not enough to cover the seller's mortgage obligations and closing costs, such as property taxes, transfer taxes and the commission, and the seller is unable to bring cash to settlement to cover the difference. In addition, some short sellers may also be in default on their mortgage loans and headed for foreclosure. Finally, homeowners who bought at the top of the market or who took out large amounts of equity with a refinance and who now need to sell because of life

changes like a divorce or job transfer may also find themselves “upside down,” owing more than they will net from the sale.

Until recently, debt forgiven by the lender in a short sale may have been reportable by the borrower/seller as income on that year’s taxes. Thus, not only did the sellers lose money in the transaction, they would owe taxes on the amount of debt they could not pay. On September 1, 2007, President Bush signed the Mortgage Forgiveness Debt Relief Act of 2007, which creates a three-year window for homeowners to refinance their mortgage and pay no taxes on any debt forgiveness they receive.

Practice Tip #1. We recommend disclosing in the comments section of the MLS listing that a property is a short sale. In our opinion, this is a material fact, because the contract of sale will almost certainly require the approval of the lender, and a buyer would likely consider this an important factor when making a decision about whether or on what terms to make an offer. Also, the MLS Remarks should indicate that the compensation offered to cooperating and buyer’s brokers may be subject to change if the lender requires it. In this case, it is acceptable to offer, for example, 50% of the total commission approved by the lender. The point is to provide as much information to all parties to the transaction.

Practice Tip #2. Be sure to include a “Third Party Approval” addendum in the contract. This is an absolute necessity for ensuring that the parties understand the contract is contingent on the agreement of the seller’s mortgagee to accept the net proceeds of the sale as full payment of the underlying debt. You might also consider a rider for the yard sign indicating a property is a short sale. We acknowledge that some practitioners suggest waiting to disclose the fact until a buyer is ready to make an offer. Discuss this with your broker or office manager to determine the policy in your office. Whatever the office policy, you should use a disclosure form prepared by your brokerage for short sales.

Practice Tip #3. When offering cooperative compensation through the MLS, be sure you also advise potential cooperating brokers that the gross commission established in your listing agreement is subject to court or lender approval and could potentially be reduced. You might also indicate in the remarks or comments field how you’ll share the compensation you receive with the successful cooperating broker in the event the gross commission is reduced, instead of locking yourself to a specific percentage of compensation to the cooperating broker. **But Beware!** Arbitration panels in other states have held the listing broker responsible for the full amount of compensation offered in the MLS because the listing knew it would never be paid in full to the cooperating broker but put it in the listing anyway, then relied on the disclosure to negotiate a lower amount of compensation. The bottom line is to make full disclosure of all relevant information to all parties.

Short sales are more complex than traditional real estate transactions. In addition, the seller may be in a very emotional state and facing losing the home. Some sellers may be in denial and have waited until the last minute. Facing foreclosure, they now turn to you for help. REALTORS[®] should be careful to avoid making misleading statements or promises about the seller’s financial situation. You should also be careful not to undertake representation of a client if you are not

satisfied that the services you will be rendering are within your field of competence. Finally, if your client has any specialized tax or legal needs, you should advise him or her to immediately seek competent, professional assist

Working with Short Sales

On Line Articles:

- “Sold Up Short: How to Succeed at Short Sales,” by Mariwyn Evans. A look at some of the most common questions on this topic that you and your customers likely will face today. Armed with this information, you can decide whether short sales are an avenue worth exploring for your business. The article also includes many specific practice tips. . Reprinted from REALTOR® Magazine Online June 2007 with permission of the NATIONAL ASSOCIATION OF REALTORS®. Copyright 2007. All rights reserved.

<http://www.realtor.org/rmomag.nsf/pages/Feat1200706>

- “WARNING! *You Gotta Know When to Fold Em. . .*,” by Mildred Wilkins. A cautionary tale. Agents and brokers must know when to terminate a short sale listing and walk away. The risk to the brokerage firm and agents is significant if you do not recognize when you are no longer able to help. Short sales are fast becoming both an integral and significant part of the market, so agents should read this article very carefully and keep it handy as a ready reference as you go off into "short sale land." Used by permission.

<http://www.columbusrealtors.com/15927.cfm>

- “Short Sales,” by Ron Walker. Short sales may help a homeowner avoid foreclosure, but it requires patience from all parties. The bottom line is that the owner wants to sell, the buyer wants to buy, and the lender will agree to the sale if it costs the lender less than what it costs to foreclose. The only problem is whether there is enough value or money to satisfy everyone Used by Permission

<http://texasrealtors.com/web/7/54/magazine/issues/07/0407/columns/legal/legal.cfm>

- “Rescue Sellers With Short Sales,” by Richard Westlund. Using short sales as a way to rescue sellers in financial distress. Key issues to consider include finances, carrying costs, processes, relationship between the borrower and the lender, property price , the contract and overall financial implications. Used by Permission.

<http://www.floridarealtors.org/FLRealtorMagazine/2007/September/0907Rescue.cfm>

Other Sources for REALTORS®

- NAR’s “Field Guide to Short Sales.” Includes links to articles, books, websites, statistics, and other material on each subject. Go to:
www.realtor.org/libweb.nsf/pages/fg335
- “C.A.R. Form Reminds of Short Sale Pitfalls”, *Realty Reality*, 2007, by Bob Hunt. This article discusses the potential pitfalls of short sales and how the new form, the Short Sale Addendum, created by the California Association of REALTORS® helps to address them. Used by Permission.
<http://www.mdrealtor.org/LinkClick.aspx?fileticket=rrJYOo0M5CU%3d&tabid=299&mid=737>
- “Brokers—Are Your Agents Putting You At Risk?” *Observations from the Desk of Mildred Wilkins*, 2007. With short sales becoming more common, the author discusses several aspects of this type of transactions and what Brokers need to do to protect their business. Used by Permission.
<http://www.mdrealtor.org/LinkClick.aspx?fileticket=kiRHsKaT62E%3d&tabid=299&mid=737>
- “Danger Ahead: You’re Entering the Short Sale Zone”, *Observations from the Desk of Mildred Wilkins*, 2007. Article discusses the appropriate steps to be taken by listing agents when handling short sale transactions from disclosure to listing the property to a realistic time frame. Used by Permission.
<http://www.mdrealtor.org/LinkClick.aspx?fileticket=gRBsyJsbf04%3d&tabid=299&mid=737>
- “Debunking the Myths”, *Observations from the Desk of Mildred Wilkins*, 2007. This article outlines the ten most common myths about short sales and gives the reality and reason for debunking those myths. Myths include payment of commission, notification of short sale and ethical concerns. Used by Permission.
<http://www.mdrealtor.org/LinkClick.aspx?fileticket=fZpBOf1u4ZE%3d&tabid=299&mid=737>

FORECLOSURES

Foreclosure Law

Need information about state laws regarding foreclosure? Foreclosures.com offers laws by state and can be found at http://www.foreclosures.com/www/pages/state_laws2.asp?state=md. This website also provides information on listings and information about foreclosures.

Foreclosure Process

Q. I have been asked about the foreclosure process in Maryland many times in the past few weeks. Please provide a description of the current practice.

A. Maryland's current foreclosure process, from the first foreclosure filing to final sale, is among the shortest in the nation. In Maryland, lenders may foreclose on a mortgage or deed of trust in default using either the judicial, assent to decree, or non-judicial foreclosure process, which typically takes approximately 90 days.

Judicial Foreclosure must be used in cases where the security instrument contains neither a power of sale nor an assent to a decree, a lender must file a complaint against the borrower and obtain a decree of sale from a court having jurisdiction in the county where the property is located before foreclosure proceedings can begin. The court will then determine whether a default has occurred.

If the court finds that a default has occurred it will: 1) fix the amount of the debt, interest, and costs then due; and 2) provide a reasonable time within which payment may be made. The court may order that if payment is not made within the time fixed in the order, the property must be sold to satisfy the debt.

Assent To Decree Foreclosure is used when a provision in the security document declares an assent to the entry of an order for the sale of the property upon a specified default. Lenders who use the assent to decree foreclosure must file a complaint to foreclose. However, it is not necessary for a hearing to be held prior to the foreclosure sale.

The **Non-Judicial** Foreclosure process is used when a "power of sale" clause exists in a mortgage or deed of trust. A power of sale clause is the clause in a deed of trust or mortgage, in which the borrower pre-authorizes the sale of property to pay off the balance on a loan in the event of the borrower's default. In deeds of trust or mortgages where a power of sale exists, the power given to the lender to sell the property may be executed by the lender or their representative, typically the trustee. Despite the permission given in the power of sale clause, lenders in Maryland must still file an Order to Docket before foreclosure proceedings can begin. However, it is not necessary for a hearing to be held prior to the foreclosure sale.

Foreclosure Guidelines. Unless otherwise stated in the original loan document or ordered by the court, the lender must follow these guidelines in any foreclosure proceeding:

- Under the Maryland Court Rules, it is not necessary to serve process or hold a hearing prior to a foreclosure sale pursuant to a power of sale or an assent to a decree. In these situations, an action to foreclose is commenced by the filing of an Order to Docket in the circuit court for the county where the property is located. The homeowner is not entitled to be personally served with process. Notice of the filing of the action is required to be sent to the homeowner by certified and first-class mail; however, the lender is not required to show that the notice was actually received. Written notice of the foreclosure sale must also be sent by certified and first-class mail not earlier than 30 days and not later than 10 days before the date of the sale, but actual notice is not required. The homeowner is not entitled to a hearing before the sale – the only recourse under State law to challenge the lender's claim of default is to file a motion for injunction to stay the sale.

- A notice of sale must be published in a newspaper of general circulation in the county where the property resides at least once a week for three (3) successive weeks, with the first publication to be not less than fifteen (15) days prior to sale and the last publication to be not more than one week prior to sale. The notice of sale must also be sent by certified and by registered mail, not more than thirty (30) days and not less than ten (10) days before the date of the sale, to the borrower at their last known address. A sale can conceivably occur within 15 days after the filing of the Order to Docket, but this rarely occurs in actual practice.
- The sale must be conducted by the person authorized to make the sale (i.e. trustee, sheriff) and may take place immediately outside the courthouse entrance, on the property itself or the location advertised in the notice of sale, if different. If the sale is postponed, notice of the new date of sale shall be published in the manner the original notice of sale was given.
- Within thirty (30) days after the sale, the person authorized to make the sale must file a complete report of the sale with the court. The clerk of the court will then issue a notice containing a brief description to identify the property and stating that the sale will be ratified unless cause to the contrary is shown within 30 days after the date of the notice. A copy of the notice shall be published at least once a week in each of three successive weeks before the expiration of the 30-day period in one or more newspapers of general circulation in the county in which the report of sale was filed. The homeowner may file exceptions to the ratification of the sale. Objections are generally based on the insufficiency of the sales price. However, the sales price must be so low as to “shock the conscience of the court” in order to set aside the sale.
- Lenders have a period of three (3) years to file for a deficiency judgment, but it is limited to the balance of the loan in default after the foreclosure sale proceeds have been applied.

Consumer advocates contend that the short timeframes and weak notice provisions in current law seriously limit a homeowner’s options to avoid foreclosure by, for example, working out a payment plan with the lender or selling the house. In addition, filing a request for an injunction is expensive, time consuming, and not a realistic option for most homeowners. The General Assembly is considering several proposals to alter the foreclosure process and we will keep members informed as to the results of those deliberations.

Articles and Resources for REALTORS®

- The National Association of REALTORS® (NAR) website at www.realtor.org is an online resource for real estate professionals. The website has a variety of articles on foreclosure from REALTOR® Magazine, as well as articles from national news and state and local boards and association across the nation.
- NAR has a “Field Guide to Foreclosures,” a one-stop resource with news stories, articles, books, links, statistics and how-to information for REALTORS®. Go to: <http://www.realtor.org/libweb.nsf/pages/fg329>

- **The U.S. Department of Housing and Urban Development (HUD)** offers two-hour educational sessions for real estate professionals on the latest foreclosure prevention tools from FHA. For more information go to: <http://www.hud.gov/foreclosure/index.cfm>
- **HUD** offers generic information on Frequently Asked Questions about Foreclosure at: <http://www.hud.gov/offices/hsg/sfh/nsc/faqfc.cfm>