



MARCH 2009

Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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Working with Distressed Sales

No matter where we turn today, information about the economy and the real estate market surrounds us. Real estate foreclosures have become an undeniable part of the real estate landscape. Distressed sellers and properties are abundant in today's economic downturn and many REALTORS® have endeavored to assist these sellers and work with buyers interested in purchasing them. Distressed home sales are often complicated. In each distressed sale, a foreclosure has been involved in some manner.

Distressed sales typically fall into one of three scenarios:

1. **Pre-Foreclosure:** The seller is in default and at risk of the lender filing for foreclosure. REALTORS® can help the seller find assistance from reputable foreclosure prevention counselors, encourage the seller to work with the lender to modify the loan terms or, if there are no other viable options, list the property for a short sale.
2. **Foreclosure Stage:** The lender has filed the foreclosure action, but there may be many months before the owner loses the property, depending upon how far the foreclosure process has progressed and the length of the redemption period. REALTOR® involvement at this point generally consists of selling the house before judicial confirmation of the sheriff's sale. A short sale may be required for a successful sale.
3. **Post-Foreclosure or REO:** Most properties sold at sheriff's sales go to the lender. The lender's Real Estate Owned (REO) department or an

asset manager often is assigned to handle the property. While the lender generally is eager to sell, control over negotiations and sales likely rests in the hands of a corporate REO department agent or asset manager. These individuals may be very challenging to work with because they are likely in another state and unfamiliar with Wisconsin law.

This *Legal Update* examines the different stages of distress where a homeowner or property seller may find him or herself and the assistance that a REALTOR® might offer. This includes an overview of foreclosure avoidance, short sales and the foreclosure process. The short sale discussion includes pointers for using the Wisconsin REALTORS® Association's short sale checklist and short sale addenda for listing contracts and offers to purchase. The *Update* concludes with a review of REO sales. Much of the *Update* is presented in question and answer format; many of the questions are from the Legal Hotline.

Foreclosure Avoidance

Foreclosure is the legal process that a mortgage lender can use to repossess (take over) properties. When a homeowner does not make his mortgage payments, the lender may have the right to repossess, and in most instances, resell the home. If the property is worth less than the total amount owed on the mortgage loan, a deficiency judgment also could be pursued. Both foreclosures and deficiency judgments could seriously affect an owner's ability to qualify for

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credit in the future. Clearly, foreclosure should be avoided at all costs.

The foreclosure numbers continue to rise. According to figures compiled by the Wisconsin Director of State Courts Office, the number of mortgage foreclosure filings in Wisconsin (excluding Portage County) rose 21.4 percent in 2008 over 2007 – the second consecutive year in which the foreclosure filings have increased by more than 20 percent. Some foreclosed property owners were lured by low teaser rates; some may have “fudged” the information on their loan applications; and others simply experienced one of life’s timeless hardships such as a job lay-off, major illness and medical bills, breadwinner death or divorce.

Depending upon the individual circumstances, there may be ways to try to bail homeowners facing foreclosure out of their current situations, but some may still wind up in a short sale transaction or a sheriff’s sale despite everyone’s best efforts. While it is not the job of REALTORS® to counsel homeowners with cash flow problems, they may be approached by homeowners who know they are in trouble or who are thinking they may need to sell.

REALTOR® Practice Tips:

The single most important thing licensees should always do when talking with an owner struggling with mortgage payments is to immediately call his or her lender. The owner’s options for retaining the home are most effective when they talk to the lender before they are deep in default. The longer they wait, the greater the chance of them losing their property.

Lenders may be able to help cash-strapped home owners refinance or modify their loans, work out a repayment plan for past-due amounts, restructure the interest rate or other loan terms, postpone payments for a specified period or permit the homeowners to sell for less than the mortgage

amount, in other words, a short sale.

REALTORS® should urge homeowners with delinquent mortgage payments to:

1. **Take assessment of the extent of their delinquencies.** The homeowner must open bills and letters from the lender and other creditors and determine whether his or her budget can handle the monthly payments and, if there is a problem, he or she should get help.
2. **Contact the lender ASAP.** Homeowners should take immediate action to contact the lender if they are having trouble paying a loan. Lenders increasingly should be willing to work out a loan modification or refinance, especially given the Obama Administration’s \$275 billion Homeowner Affordability and Stability Plan (Stability Plan). Homeowners should contact the lender’s Loss Mitigation Department without delay. While all seemingly deserving property owners may not be able to renegotiate their mortgages or find another plan that will succeed, it is always worth the effort because working with the borrower is always less expensive for the lender than foreclosure and the alternatives for the borrower are always worse. The homeowner should be prepared to explain his financial situation in detail so that the lender can offer viable options.
3. **Work with a reputable counselor.** The homeowner should seek foreclosure prevention or mortgage counseling. If the homeowner does not feel comfortable calling the lender, one good option is to call one of the agencies listed below or any U.S. Department of Housing and Urban Development-approved housing counseling agency. He or she may call 800-569-4287 or TDD 800-877-8339, or visit to www.hud.gov/offic-es/hsg/sfh/hcc/hcs.cfm?webListAction=search&searchstate=WI for a listing of HUD-approved housing counseling agencies in

Wisconsin. These agencies frequently have information on local services and programs that provide financial, legal, medical or other support that can help address any root problems as well as the mortgage default. The housing counseling agency may also offer credit counseling. These services are usually free.

HUD Guide to Avoiding Foreclosure

Whether clients or customers are in foreclosure now or worried about it in the future, the HUD has information that can help. Visit www.hud.gov/foreclosure/index.cfm or call 800-225-5342 to see what options the Federal Housing Administration can offer them.

HOPE for Homeowners Program

The HOPE for Homeowners program will refinance mortgages for borrowers who are having difficulty making their payments, but can afford a new loan insured by HUD's FHA. Under the Stability Plan, the new loans made available will have reduced fees and expanded qualification levels for borrowers and increased flexibility for lender loan modifications. Visit www.hud.gov/hopeforhomeowners/index.cfm or call 800-225-5342 for more information.

Homeownership Preservation Foundation

One good option for foreclosure prevention counseling is the Homeownership Preservation Foundation (888-995-HOPE [4673]; www.hpfonline.org). Here a property owner can receive free advice from counselors who work for non-profit agencies certified by HUD. The Foundation is a Minnesota-based entity dedicated to reducing foreclosure and preserving homeownership.

Wisconsin Foreclosure Resource

The Wisconsin Housing and Economic Development Authority has teamed with NeighborWorks® America, the Homeownership Preservation Foundation and numerous counseling

agencies and lenders to offer assistance and access to counseling under the umbrella of the Wisconsin Foreclosure Resource, online at www.wisconsinforeclosureresource.com.

Homeowner Affordability and Stability Plan

The Stability Plan will offer assistance to up to 9 million working homeowners making a good-faith effort to stay current on their mortgage payments by refinancing or restructuring their loans. The theme of the Stability Plan programs is to find a reasonable way to make the amount of monthly mortgage payments affordable so that homeowners can continue to pay their mortgage loans and stay in their homes.

Low-Cost Refinancing for Responsible Homeowners

Under current rules, most families who owe more than 80 percent of the value of their homes have a difficult time securing refinancing and are at risk of default and foreclosure. For example, if a borrower's home was worth \$200,000, he or she would have limited refinancing options if he or she owed more than \$160,000. Yet millions of responsible homeowners who put money down and made their mortgage payments on time have – through no fault of their own – seen the value of their homes drop low enough to make them unable to access these lower rates. The Stability Plan proposes to give 4 to 5 million responsible homeowners who took out conforming loans owned or guaranteed by Freddie Mac and Fannie Mae the opportunity to refinance.

For many families, a low-cost refinancing could reduce mortgage payments by thousands of dollars per year. For example, consider a family that took a 30-year fixed rate mortgage of \$207,000 with an interest rate of 6.50 percent on a house worth \$260,000 at the time. Today, that family has

\$200,000 remaining on their mortgage, but the value of that home has fallen 15 percent to \$221,000 – making them ineligible for today's low interest rates that generally require the borrower to have 20 percent home equity. Under the lower interest rates available under the Stability Plan refinancing plan, it is projected that this family could refinance to a rate near 5.16 percent – reducing their mortgage payments by \$196 per month and by \$2,347 per year.

Loan Modifications under the Homeowner Stability Initiative

The Homeowner Stability Initiative is intended to help owner-occupied households at risk of imminent default or in default because of the recession, and unable to sell because real estate prices have significantly fallen. Homeowners with total debt (including housing debt, car loans, credit card debt, etc.) equal to 55 percent or more of their income will be required to agree to enter an HUD-certified consumer debt counseling program as a condition for a loan modification.

In the first step under the Initiative, the lender would reduce interest rates on the mortgage to a specified affordability level where the monthly mortgage payment is no greater than 38 percent of the borrower's income. Second, the Initiative will match further reductions in interest payments dollar-for-dollar with the lender, down to a 31-percent debt-to-income ratio for the borrower. Lenders would have to keep the modified interest rate and payments in place for five years. Thereafter, the interest rate can be gradually stepped-up to the loan rate in place at the time of the modification. Clear and consistent loan modification guidelines will be developed and applied industry-wide.

Mortgage loan servicers will receive an up-front fee of \$1,000 for each eligible modification meeting guidelines. Servicers will also receive "pay

for success” fees – awarded as long as the borrower stays current on the loan – of up to \$1,000 each year for three years. Incentive payments also will be available to mortgage holders and servicers for modifications made while the borrower is at risk of default but still current. Balance reduction payments up to \$1,000 per year are also offered to borrowers as an incentive to keep their payments current.

To encourage lenders to modify more mortgages and enable more families to keep their homes, an insurance fund – to be created by the U.S. Treasury Department at a size of up to \$10 billion – will be designed to discourage lenders from opting to foreclose on mortgages that could be viable now out of fear that home prices will fall even further later on. This Initiative provides lenders with the security to undertake more mortgage modifications by assuring that if home price declines are worse than expected, they have reserves to fall back on.

If the total expected cost of a modification for a lender, taking into account the government payments, is still expected to be higher than the direct costs of putting the homeowner through foreclosure, that borrower will not be eligible for the Homeowner Stability Initiative. Lenders then will receive incentives to accept alternatives to foreclosures, like short sales or deeds in lieu of foreclosure. Data on properties that are foreclosed will be systematically collected to streamline the process of selling or redeveloping them, thereby ensuring that they do not remain vacant and unsold.

Mortgage “Cram-Downs” by Bankruptcy Judges

The Obama administration plans to seek careful changes to personal bankruptcy provisions so that bankruptcy judges can modify mortgages written in the past few years when families run out of other options. When an individual enters personal bankruptcy

proceedings, mortgage loans in excess of the current value of his or her property would be treated as unsecured. This would allow a bankruptcy judge to develop an affordable plan for the homeowner to continue making payments. To receive judicial modifications in bankruptcy, homeowners must first ask their lenders for a loan modification and certify that they have complied with reasonable requests from the lender to provide essential information. This provision will apply only to existing mortgages under Fannie Mae and Freddie Mac and within conforming loan limits so that millionaire homes do not clog the bankruptcy courts. Any changes to the bankruptcy provisions require Congressional amendment of the Bankruptcy Code.

For additional information regarding the Stability Plan programs,

see www.financialstability.gov/ and www.realtor.org/government_affairs/gapublic/homeowner_afford_stability_plan.

Beware of the Scams

Homeowners in financial difficulty must beware of the so-called mortgage “foreclosure consultants” like IMC Financial Services, LLC, and American Financial Corp. d/b/a National Foreclosure Counseling Services, both with offices in Florida, that have been sued by the Minnesota attorney general along with 10 other similar companies. The lawsuits allege that the companies unlawfully charged up-front fees as high as \$1,850 and failed to deliver promised services to save the homes from foreclosure. Homeowners should not pay money in advance to companies promising to modify or negotiate terms of existing mortgages.

Rising Defaults Projected for Option ARMs

The predictions for foreclosures in the future are bleak: nationally one-third of all homeowners owe more on their mortgages than what their homes are worth and it is projected that there may still be up to 8 million foreclosures between 2009 and 2012.

Dire predictions forecast that more than 50 percent of all outstanding option Adjustable Rate Mortgages (ARMs) will default, rivaling the subprime loan defaults experienced to date. Option ARMs are adjustable-rate mortgages that offer four different payment options for a borrower to choose from each month, which is why they are sometimes called “pick-a-payment” or “pay-option” ARMs. These choices typically include:

1. a minimum payment amount that does not cover the monthly interest (leads to negative amortization or a growing mortgage principal amount) and in many cases is only available for the first few years of the mortgage term,
2. an interest-only payment that avoids negative amortization but does not reduce the principal amount,
3. a fully amortizing 30-year payment and
4. a fully amortizing 15-year payment that accelerates payment of the mortgage principal.

When the adjustable interest rate on these mortgages is reset in 2009 or 2010 and ratchets upward, and previously unpaid principal and interest is added to the balance, monthly payment amounts will increase dramatically. An ugly tragedy will surely unfold for mortgagors lured into property ownership by unbelievably low teaser rates.

Any solutions that sound too simple or too good to be true usually are. Homeowners should be alert to scams like “equity skimming.” In this type of scam, a “buyer” approaches the owner and offers to get him or her out of financial trouble by promising to pay off the mortgage or give the owner a sum of money when the property is sold. This “buyer” may suggest that the owner move out quickly (or remain as a “lease to own” tenant), and deed the property to him or her. The “buyer” collects rent for a time, does not make any mortgage payments and allows the lender to foreclose. Clearly deeding the property to someone else does not necessarily make the mortgage obligation go away.

Foreclosure rescue scams are often very creative and the individuals operating them are very crafty. For example:

- “We’ll Save Your Credit! Just pay us a fee and sign your house over to us. The foreclosure will be recorded against us, not you.” No, it won’t. The foreclosure will be reported against the borrower on the note, which is still the original homeowner.
- “We’ll pay off your delinquent mortgage; you can stay in your home as a renter, and you will have the option to buy it back.” The ugly reality is that often the “new” owner simply gives the homeowner an amount of money and pockets the rents received while delaying the foreclosure as long as possible. In the end, the homeowner is evicted from the home he or she no longer owns and any equity is gone.



REALTOR® Practice Tips:

Homeowners in financial distress must be urged to protect themselves from scam artists and predatory lenders.

Loan Avoidance Resources

- REALTOR® Resources Page – Mortgage Loan Assistance, online at www.wra.org/LoanAssist.
- *Legal Update* 03.05, “Predatory Lending,” online at

www.wra.org/LU0305.

- *Legal Update* 07.01, “Avoiding Foreclosure,” online at www.wra.org/LU0701.

Short Sales

When homeowner efforts to refinance, work out a loan modification or otherwise avert a foreclosure fail, many homeowners will sell before the foreclosure runs its full course, often times in a “short sale.” In a short sale, a reasonable sales price in the current market is not sufficient to pay the mortgage(s), other liens and expenses at closing. The seller must either pay additional money at closing to cover the shortage or negotiate an agreement with the lender(s) whereby the lender(s) accept less than the full amount owed. These transactions typically involve scenarios where the mortgagee is foreclosing on the property. Most short sales involve properties in foreclosure, but not all properties in foreclosures are sold in short sales.

Short Sale Checklist

When an agent gets a telephone call from a property owner who thinks a short sale is the best option, where does the agent start? What should he or she do?

REALTORS® can use the WRA-SSC Short Sale Checklist to guide them as they gather the information needed to assess the owner’s situation and see if a short sale is a good solution for the owner. The Preliminary Background section of the Short Sale Checklist provides this guidance. The agent is to:

1. Perform a Comparable Market Assessment (CMA) to estimate current value.
2. Obtain a search and hold/title report from the title company.
3. Have the owner complete a Listing Questionnaire Regarding Title Issues (sample copy on Page 22 of this *Update*, available online at www.wra.org/LU0309quest and on Zipform).

4. Prepare a net sheet to project sellers’ proceeds/deficits.
5. Have the seller review the mortgage terms and conditions (due-on-sale, prepayment penalties, etc.).

The second section of the Short Sale Checklist directs the seller to talk to his or her lender first and foremost. The Alternatives to a Short Sale section also prompts the agent to discuss the various alternatives to short sales. The point is to be sure that there are no other viable options that would allow the owner to keep the property and that would be less damaging to the owner’s credit standing. These alternatives include:

1. Forbearance agreements to temporarily suspend loan payments.
2. Repayment plans with the seller’s lender(s).
3. Loan modification, i.e., change adjustable rate to fixed rate, add missed payments to loan balance, extend loan term.
4. Refinancing with the seller’s lender(s) or other lenders.
5. Working with the Homeownership Preservation Foundation at 888-995-HOPE or online at www.wisconsinforeclosureresource.com/.
6. Deed in lieu of foreclosure.
7. Bankruptcy.

REALTORS® should be aware that refinancing and loan modification may be especially good choices to look at if the homeowner qualifies for the Stability Plan programs discussed on Pages 3-4 of this *Update*. Agents must use good judgment as licensees to determine if a short sale is a realistic possibility after reviewing information gathered as per the Preliminary Background section of the WRA Short Sale Checklist. If so, the owner can then decide what avenue he or she wants to pursue.

A sample copy of the WRA Short

Sale Checklist appears on Page 23 of this *Update* and is available in hard copy from the WRA and on Zipform.

Identifying a Short Sale

When meeting with prospective seller-clients, the best thing that REALTORS® can do for the sake of the sellers and themselves when facing a listing where the numbers may be tight – a possible short sale – is to take the time to do their homework regarding the homeowner, the mortgage and title to the property before the listing contract is signed. This will help the REALTOR® and the homeowner choose the best course of action and help save them from unpleasant surprises and from wasting their time and energy on fruitless strategies. The Preliminary Background section of the WRA Short Sale Checklist provides a roadmap for this process.

Brokers should prepare a net sheet showing the seller's estimated proceeds and a CMA, a routine step in the listing presentation. In order to complete these tasks, the broker must gather information about the liens and encumbrances that will be involved at a future closing.

It is critical to know what liens are outstanding and how much money will be needed to clear those liens from title. To this end, listing brokers may wish to use the "Listing Questionnaire Regarding Title Issues" (revised December 2007) to prompt sellers to identify potential title issues that would not be evident from simply examining recorded documents, including whether they are behind with mortgage payments. A sample copy of this questionnaire appears on Page 22 of this *Update*. The questionnaire is also available online at www.wra.org/LU0309quest and on ZipForm.

In addition, the listing broker may also want to order a search and

hold from the title company to see what liens appear of record. While this certainly is not within a real estate broker's job description, it is better to get a full picture of what the broker is dealing with up front and try to head off disaster down the line. While the Listing Questionnaire Regarding Title Issues and the title search may come up with the same list of liens, sometimes they may be critically different. Sellers in financial straits may not reveal or remember all that is going on and thus may overlook disclosing one or more liens. The seller also may be unaware of some items in the title report like procedural glitches in court proceedings affecting title or adverse information appearing on an official map.

The seller should review the seller's mortgage and examine the due-on-sale clauses and prepayment penalty provisions to make sure that the procedures for obtaining lender consent to the sale are being followed and that there is not any prepayment penalty that will need to be included when calculating the amount the seller must pay to release the mortgage lien.

Do REALTORS® make the decision on how to proceed: short sale,

loan extension, rewrite, etc.?

No, this is the property owner's decision. REALTORS® can provide resources and information about alternatives, but cannot provide legal or tax advice or make a decision for the homeowner.

Listing a Property for a Short Sale

If the agent and the owner have worked through the steps in the first two sections of the Short Sales Checklist and the homeowner has determined that his or her situation would be appropriate for a short sale and that there are no better alternatives, the agent may proceed to the third section of the Short Sale Checklist that assists the agent to Prepare for Short Sale. The agent is reminded to:

* Determine the appropriate contact person in the lender's loss mitigation department and write down that individual's name and telephone number!

1. Present the listing contract and Addendum SSL to the Listing Contract – Short Sales to the seller; have the seller review them with the seller's attorney and tax advisor.
2. Execute the listing contract and



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Addendum SSL.

3. Obtain seller authorization letters giving permission to discuss the seller's loan and finances with the seller's lender(s).
4. Prepare a CMA or obtain an appraisal for the lender.

An important part of this process is the use of the WRA Addendum SSL. A sample copy of Addendum SSL appears on Page 24 of this *Update* and it is available in hard copy from the WRA and on Zipform.

While face-to-face discussions help the broker gauge if the seller is tracking the explanation of the process, the broker should have at least the key points regarding short sales summarized in writing. One effective way to achieve this measure is to have a short sale addendum to the listing contract, which provides a resource that the seller can refer to and which protects the broker from future backlash if things do not turn out as the seller had envisioned. An addendum gives the broker an opportunity to obtain the sellers' signatures on a document that acknowledges that the sellers have been cautioned about the potential outcome and consequences of a short sale.

Key points that should be covered in a short sale listing addendum include all of the personal financial information and additional paperwork involved, the maddening delays, the seemingly discretionary and arbitrary control that the lenders have and the last-minute obligations that lenders seem to create for seller payment of any deficiency. Specifically, the short sale listing addendum should emphasize to the seller:

1. **Explanation of a short sale:** the seller must negotiate a written agreement with the lender whereby the lender will accept less than what is actually owed to release the mortgage on the property. If there is more than one lender or lienholder, multiple lenders and lienholders may need to agree to take less than the full balances owed.
2. **Potential tax consequences:** if a lender does not make the seller pay any remaining balance due on the loan after the

short sale closes, then the seller may owe income taxes on the debt forgiven, unless the Mortgage Forgiveness Debt Relief Act of 2007 negates that tax liability. Capital gains might also be due; the seller should consult with a tax advisor regarding the seller's specific circumstances.

3. **Credit rating consequences:** the seller's credit rating may be adversely affected if the lender forgives part of debt, depending upon what the lender reports to the credit bureau. Under current policy, a person with a short sale or foreclosure on his or her credit record cannot buy a home using a loan that would be sold to Fannie Mae or Freddie Mac for five years.
4. **Documentation needed to apply for lender approval:** most lender loss mitigation departments will require a statement of need or hardship accompanied by supporting documentation. Loss of job, high medical costs, death of an owner, natural disasters such as a flood or tornado, or excessive military service for reservists may qualify as a hardship. There must be a relationship between the hardship and the need to sell, and a decline in value alone is not a hardship. The seller will also need to provide employment verification along with paycheck stubs and W-2s or verification of a lost job, personal financial statements, the last couple of tax returns, cash flow analysis, an appraisal or CMA; and the listing contract, complete with a short sale addendum. The seller must gather all of this information for submission to each lender's loss mitigation department.

Sellers should be made aware that the short sale financial information will be compared with the information supplied on the original loan application. Sellers may be accused of loan fraud if the short sale financial information is inconsistent with their loan application data. Sellers with concerns in this regard should consult an attorney before seeking lender approval of a short sale.

5. **Authorization for broker to converse with lender:** the seller must authorize the broker to discuss the seller's loan and financial situation with each lender, determine each lender's short sale requirements, submit the seller's financial

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documents and market data to each lender, and provide other non-legal assistance to expedite the short sale process. Separate written authorization letters may be needed. Any negotiations involving legal, tax or personal financial advice must be handled by the seller's attorney or other credentialed advisors.

6. **Authorization to advertise a potential short sale:** the broker will market the transaction as a potential short sale, subject to lender approval.
7. **Lender approval is discretionary:** lender approval of a short sale is purely at the discretion of the lender. The decision to condition a short sale upon additional requirements or a restructuring of the transaction, or to decline the short sale, is made solely by the lender.
8. **Broker not liable:** the seller agrees to not hold broker responsible if a lender rejects a short sale, imposes unacceptable terms and conditions, or takes so long that buyers are lost.

These issues are all addressed on the WRA Addendum SSL. Sellers should be encouraged at every juncture to consult with their attorneys and tax advisors if they have any legal or financial questions or concerns.

As directed in the Short Sale Checklist, the broker and seller should review and execute the listing contract and the Addendum SSL, and the broker should identify the proper contact person from each lender's loss mitigation department. The broker should then become familiarized with each lender's short sale approval requirements and the financial documents that the seller must submit. Some lenders may accept the seller's document package before any accepted offers are submitted for lender approval while others may want the financial information together with any offers.

Loss Mitigation Consultants

Is it a good idea to work hire a loss

mitigation consultant to negotiate a short sale with the lenders and lienholders in a short sale transaction?

That depends upon whether the consultant offers expertise that cannot be furnished by the listing agent and if the seller and listing agent are willing to pay the fee charged for this service. It would be wise to investigate the experience and expertise of the consultant and determine exactly what services will be rendered. Remember that anyone offering to negotiate in the sense of independently bartering back and forth on behalf of the seller with different proposals – a service beyond what a real estate broker can provide – would arguably need to be an attorney or have some other credential authorizing such services. Loss mitigation departments have been known to be willing to pay a consultant's fee, but make sure that the brokers giving up part of their commission are making that sacrifice for a service with legitimate value.

Disclosure of Short Sale

The broker is listing a home and found out it might be going into a short sale or foreclosure. How does a broker let people know about a potential short sale: in the MLS? in the Real Estate Condition Report?

On one hand, as the agent of the seller, the broker does not want to compromise the seller's chances of getting the best price possible for a home by disclosing the seller's distressed condition too early.

On the other hand, the Wis. Admin. Code § RL 24.07(2) requires licensees to promptly disclose material adverse facts in writing to all parties to the transaction. Failure to disclose may lead to licensee liability. A transaction that might be a short sale may fall more squarely under § RL 24.07(3), which provides that a licensee is practicing competently when the licensee discloses to the parties in writing the information suggesting the

possibility of a material adverse fact, recommends that the parties obtain expert assistance and, if directed by the parties, drafts appropriate contingencies to address this matter.

The fact that the transaction may be subject to lender(s) approval and apparently will not be able to close without such approval falls within the category of information that may be stated factually to buyers. If it is disclosed that lender approval will be needed, then the appropriate contingencies can be included in the offer to purchase for the protection of both the seller and buyer.

The broker may disclose the potential short sale in MLS remarks (unless the MLS has created some other system for short sale disclosures) and in the Real Estate Condition Report (RECR) as well. Any offer should be made subject to the short sale (see the WRA offer addendum for short sales: Addendum SSO) as this is an adverse factor.

MLS Short Sale Commission Adjustment

Many times the lender requires that the total commission in a short sale be discounted. For example, a listing is written for a 6-percent commission and the offered co-broke commission is 2 percent. If the lender approving the short sale lowers the listing broker's commission to 5 percent, the listing broker would like to not take the brunt of the entire 1-percent discount and feels that the co-broker should share the pain.

Would the following language be appropriate? "Co-Broke to be 2 percent or one-third of total commission allowed by lender, whichever is lower." The broker would like some guidance or better language suggestions for disclosing the broker's intent to "share the pain."

The first step is to obtain the seller's permission to disclose within the MLS Confidential Remarks section

that this is or may be a short sale, subject to the lender's approval. Then, the listing broker may also disclose how any reduction in commission required by the lender as a condition of the lender's approval will be apportioned between the listing broker and the cooperating broker. One way is described above. Another way could be to inform MLS participants that the cooperating broker's commission shall be reduced by an amount equal to ___ percent of the reduction required by the lender. Using the example above, the listing broker would state that the "cooperating broker's commission shall be reduced by 33% of the reduction required by the lender." Note: the percentage of the reduction can be in any amount – it is not required to be in the same percentage as the division of the commission initially offered to cooperating brokers.

There is no one way to make this disclosure. The key is to do so before the cooperating broker produces an offer in a manner that allows the cooperating broker to determine in advance the compensation being offered by the listing broker and the potential commission reduction for the co-broke.

What can a listing broker do to protect against the lender in a short sale transaction, or the court in certain circumstances, requiring a reduction of commission as a condition of approving a sale of an MLS listed property? Can the listing broker simply put "Call for details?"

Pursuant to the policies and procedures of the National Association of REALTORS®, Multiple Listing Services cannot publish listings that do not include an offer of compensation expressed as a percentage of the gross selling price or as a definite dollar amount, nor can they include general invitations by listing brokers to other participants to discuss terms and conditions of possible cooperative relationships.

However, MLSs, at their discretion, may adopt rules and procedures enabling listing brokers to communicate to potential cooperating brokers that gross commissions established in listing contracts are subject to court approval, and that compensation payable to cooperating brokers may be reduced if the gross commission established in the listing contract is reduced by a court. In such instances, the fact that the gross commission is subject to court approval and either the potential reduction in compensation payable to cooperating brokers or the method by which the potential reduction in compensation will be calculated must be clearly communicated to potential cooperating brokers prior to the time they produce an offer that ultimately results in a successful transaction.

MLSs also must give the listing broker the ability to disclose to potential cooperating brokers the possibility of a short sale. As used in MLS rules, short sales are defined as a transaction where title transfers, where the sale price is insufficient to pay the total of all liens and costs of sale and where the seller does not bring sufficient liquid assets to the closing to cure all deficiencies. MLSs may, as a matter of local discretion, require listing brokers to disclose potential short sales when they know a transaction is a potential short sale. In any instance where a listing broker discloses a potential short sale, they must also be permitted to communicate to other participants how any reduction in the gross commission established in the listing contract required by the lender as a condition of approving the sale will be apportioned between listing and cooperating brokers. All confidential disclosures and confidential information related to short sales must be communicated through dedicated fields or confidential "remarks" available only to participants and subscribers.

Can the listing broker go back against the seller to collect the amount of the commission reduction required by the lender in its approval of a short sale?

While it has been suggested in other situations that a broker might have the seller sign a separate promissory note or find some other way to collect a commission shortage, this may not be a good idea with a lender-mandated commission reduction in a short sale. Wis. Admin. Code § RL 24.07(4) provides, "DISCLOSURE OF SIDE AGREEMENTS. A licensee, when engaging in real estate practice, who becomes aware of the fact that a party to the transaction has not disclosed that party's entire agreement regarding the transaction to that party's secured lender, shall disclose this fact, in writing and in a timely manner, to the party's secured lender." Any side agreement for payment of the commission reduction must be disclosed to the lender under this rule. If it is not, the broker arguably has put the seller in the position of defrauding the lender who approved the short sale.

Buying a Short Sale Property

Buyers will optimize their chances of successfully purchasing a short sale property if they are prequalified or pre-approved for financing. Lenders will also be more receptive to "as is" offers with no subject to sale or other contingencies that bring the potential for delay, no repair or closing cost credits for the buyer, and quick closing dates, such as "within 30 days of the seller's receipt of lender approval." The key to drafting an offer to purchase on a short sale property, however, is to make the offer contingent upon lender(s) approval of the sale.

Lender Approval Language

When writing an offer on a short sale property, what language needs to be included regarding lender approval of the short sale?

The WRA-SSO Addendum SSO to the Offer to Purchase – Short Sales

(revised 2009) defines a short sale for the benefit of the parties and contains a Lender Approval Contingency – that is the critical provision. The offer is made contingent upon each lender who is receiving a reduced payment in the short sale approving the terms and conditions of the offer. The seller agrees to submit the financial information needed by each lender to evaluate the offer (if not already submitted). If a lender's approval requires a change to the terms and conditions of the offer, the contingency indicates that the changes are not binding upon the parties unless the buyer and seller amend the offer to include those lender-requested terms. The offer is considered to be approved by a lender when such an amendment has been done, or, if no changes were required by the lender, upon the seller's written notice to the buyer. If the short sale is not approved by the lender – or if the approval requires changes to the offer that are unacceptable to the seller – then the seller can give the buyer written notice terminating the offer. If the seller is going to terminate, this must be done within five days of the seller's receipt of the lender's decision regarding the short sale.

Addendum SSO also includes optional provisions that may be used if the offer is “as is,” if various contingency deadlines will run from the receipt of lender approval rather than acceptance of the offer and if there is a deadline by which the seller must obtain lender(s) approval or allow the buyer to terminate the offer. This latter provision allows the buyer to set a deadline for the seller's receipt of lender approval and, if the deadline is not met, the buyer can end the offer.

If the short sale is “as is,” the buyer must be sure to include all necessary inspection and testing contingencies in the offer. The buyer may also decide whether they will implement the inspection and testing contingencies right away or wait until lender

approval before investing time and money. This is a catch 22 decision for the buyer because the lender will invariably want a speedy closing once lender approval has been given.

See the sample copy of Addendum SSO (revised in 2009) on Page 25 of this *Update*; this addendum also is available in hard copy from the WRA and on Zipform.

The sellers have a pending foreclosure and have authorized the broker to disclose this to potential buyers. A cooperating broker, who was informed that this was a possible short sale, wrote an offer for the buyer. The sellers decided to accept the offer; however, the offer did not mention the short sale. Can the seller accept the offer and then give notice to the buyer that the offer is a short sale and subject to the seller's lender's approval? Or does the offer have to be countered with this language?

The seller cannot unilaterally change the terms and conditions of the offer after acceptance. The seller needs a lender approval contingency included in the offer. The best way to achieve that result is for the sellers to counter the buyer's offer and add the lender approval contingency. Brokers may obtain short sale contingency language from the lender, the seller's attorney or a short sale addendum like Addendum SSO.

How Long Does It Take?

With a short sale, will two or three months be long enough to get the lender's decision?

The REALTOR® can share what he or she has experienced, heard and read regarding how long it may take for lender approval of a short sale. In these times of change, what is true this week may start to shift by next week and be entirely different in two weeks. There are also variations depending upon the lender and seller's circumstances. In the end, this is a decision

that will be made by the buyer.

Short Sale Secondary Offers

The broker received several offers on a property where the seller is facing foreclosure. All offers included Addendum SSO and a lender approval contingency. The seller used multiple counter-proposals; some were accepted and some were countered. The broker believed that a seller could accept all offers as primary offers as long as they were contingent on lender approval, and then let the lender decide which one to select. The seller accepted and approved multiple offers in primary position. Now selling agents are calling the broker and asking how the seller could accept multiple offers in primary position. The agents are concerned that there are now four clients in primary position that are being “strung along” by the lender and could find out in two months that their offer is not being approved. Under normal circumstances, there would be one primary and multiple seconds, but in this case what should brokers do? And, if there was a mistake made by accepting them all as primary, how does the broker correct it?

It is very risky and ill-advised for a seller to accept more than one offer to purchase as a primary offer. Standard of Practice 1-7 provides in relevant part, “REALTORS® shall recommend that sellers... obtain the advice of legal counsel prior to acceptance of a subsequent offer except where the acceptance is contingent on the termination of the pre-existing purchase contract” Clearly the safest practice from the seller's standpoint is to make subsequent offers secondary offers – with each one also subject to the approval of the seller's lender for a short sale. The seller can submit the offers to the lender at the same time for the lender's consideration.

Although accepting all of the offers in primary position is possible, because they are all contingent upon lender

approval from the same lender and the lender is only going to approve one offer, it may cause the buyers and their agents to be misled and it could lead to multiple approved primary offers if communication errors are made by the lenders or agents and more than one buyer comes to believe the lender approved their offer. If a group of offers are all accepted as primary subject to lender approval, each individual buyer and agent may also believe that their offer is primary. At minimum all buyers must clearly understand that there is a “pool” of primary offers and the fact that any particular offer is accepted as primary means nothing. There is no advantage because they are all similarly positioned. It would be prudent to alert all parties, in writing, that there are multiple accepted offers with the same bank approval contingency.

However improbable, a bank could approve more than one offer – in that instance the seller would be obligated to sell the property to more than one buyer.

Accepting all of the offers as primary may also place the seller at risk of a breach of contract claim. Each of the offers is accepted with the parties agreeing to act in good faith and with due diligence to complete the terms of the contract. Any one of the primary buyers could allege that the seller cannot in good faith attempt to negotiate a short sale to meet the terms of their contract given there are multiple primary offers.

Lender Response to Offers

When the lender receives the seller's accepted offer and has reviewed the short sale documentation submitted by the seller, the lender may accept the offer. This may come in the form of a statement that the lender will accept no less than x dollars no later than x date, accompanied by a required commission reduction. The lender may also require that the seller be responsible for any shortage

still due on the mortgage loan.

If the lender refuses the offer, the listing agent would be wise to try to determine what amount the lender is looking for. The seller will then be in the position where he or she can propose an amendment to the offer that increases the purchase price to meet the lender's demand. If the buyer refuses to amend, the seller may want to enter into a Cancellation Agreement and Mutual Release with the buyer and work with any secondary or new offers. Sometimes the lender may simply ignore the offer.

Seller Ownership

The seller has control (with the lender's approval) in signing documents when it is a short sale. At what point does the seller lose control over the property and is no longer able to sign contracts and other documents?

The seller would sign the offer to purchase, amendments, etc., in a short sale just as with any other transaction with a buyer. The difference is that the sale requires the lender's approval and that approval may be conditioned upon the parties modifying their original contract and upon a commission reduction. The offer to purchase is the contract between the seller and buyer, while the seller's negotiations with the lender to secure approval are separate.

The lender (and the lender's asset managers) would be signing offers and deeds in an REO transaction when the lender has title to the property. In an REO deal, typically the bank has bid in its mortgage at the foreclosure sheriff's sale or received a deed in lieu of foreclosure and become the owner of the property. In this situation, the seller is out of the picture.

Seller Obligation for the Shortage

What is the seller's obligation if the bank approves an offer that brings in less money than what the seller owes the bank? Is the seller still obligated to pay the remaining balance on the loan?

When a lender approves a short sale, one of the conditions of that approval may be that the seller makes arrangements to pay the remaining balance due on the mortgage loan (the deficiency) outside of the real estate transaction. The seller may have to sign another promissory note or give other security for the shortage. If the lender does forgive the deficiency and lets the seller off the hook, the seller must determine whether the forgiveness of part of the seller's debt will result in taxable income to the seller. The Mortgage Forgiveness Act of 2007 alleviates that tax liability for many sellers in short sales closing before January 1, 2013.

Taxing Short Sales and Foreclosure Sales

If a homeowner sells her home at a loss and the remaining loan is forgiven, does this constitute a cancellation of debt?

Yes. To the extent that a loan from a lender is not fully satisfied and a lender cancels the unsatisfied debt, the homeowner has cancellation of indebtedness income. If the amount forgiven or canceled is \$600 or more, the lender must generally issue Form 1099-C, Cancellation of Debt, showing the amount of debt canceled. However, the homeowner may be able to exclude part or all of this income if the debt was qualified principal residence indebtedness, the homeowner was insolvent immediately before the discharge or the debt was canceled in a title 11 bankruptcy case. An exclusion is also available for the cancellation of certain non-business debts of a qualified individual as a result of a disaster in a Midwestern disaster area. See IRS Form 982 for details, online at www.irs.gov/pub/irs-pdf/f982.pdf.

Form 982 assists the taxpayer in determining whether or not the cancelled debt is income:

- **Bankruptcy:** Debts discharged through bankruptcy are not

considered taxable income.

- **Insolvency:** If the borrower is insolvent when the debt is cancelled, some or all of the cancelled debt may not be taxable. A borrower is insolvent when total debts are more than the fair market value of total assets. This may be determined using Form 433F, Collection Information Statement, available at www.irs.gov, but the assistance of a tax professional is recommended.
- **Mortgage Forgiveness Debt Relief Act of 2007:** The Act generally allows taxpayers to exclude income from discharge of debt (purchase, building and improvement costs) on their principal residence, but not on second homes or investment properties. This provision applies to debt forgiven in calendar years 2007 through 2012. The Act helps homeowners facing foreclosures or who sell their homes in a short sale by excluding up to \$2 million of forgiven debt (\$1 million if married, filing separately), provided the discharge is due to the decline in the home's value or the taxpayer's financial condition. See www.irs.gov/individuals/article/0,,id=179414,00.html for more information. There is also a helpful two-page brochure available at www.irs.gov/pub/irs-pdf/p4705.pdf that can be printed and given to consumers.

Lenders must send Form 1099-A, Acquisition or Abandonment of Secured Property, to borrowers if there is a foreclosure or deed in lieu of foreclosure, or a Form 1099-C, Cancellation of Debt, which reports the amount of debt forgiven. What is important is that the form received accurately states the fair market value (FMV) of the property. For a foreclosure, the winning gross foreclosure bid is considered to be the FMV; for a short sale, it is the sales price; and for a deed in lieu of foreclosure, the appraised value of the property should be used.

See IRS Publication 4681, *Canceled Debts, Foreclosures, Repossessions, and*

Abandonments, online at www.irs.gov/pub/irs-pdf/p4681.pdf, for additional information and resources. Anyone facing any of these situations should always consult with a tax professional for an evaluation of his or her personal circumstances.

Short Sale Resources

- WRA-SSC Short Sale Checklist
- WRA-SSL Addendum SSL to the Listing Contract – Short Sales
- WRA-SSO Addendum SSO to the Offer to Purchase – Short Sales
- January 2008 *Legal Update*, “Short Sales – A Risky Business,” at www.wra.org/LU0801
- NAR *Field Guide to Short Sales*, at www.realtor.org/libweb.nsf/pages/fg335

Foreclosure Process

Foreclosure is the legal process whereby

the lender (mortgage holder) attempts to take title to the property secured by a mortgage when the borrower/owner is many months behind on mortgage loan payments. Wisconsin's judicial foreclosure process is governed by Wis. Stat. Chapter 846 and generally takes four to 18 months.

Any lien holder (not just the first mortgage holder) has the right to force a sheriff's sale. Once the property owner has been delinquent with the mortgage payments for approximately three to six months, the bank will have its attorneys begin a foreclosure lawsuit. Based on precedent in Wisconsin, the lender customarily sends the owner a letter by certified mail warning that they intend to foreclose on the property before filing with the court. The attorneys will prepare a summons and complaint, which will be filed with the court and served upon the seller and all other

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lien holders and parties with an interest in the property, such as tenants. If these other interested parties are not named as defendants in the lawsuit along with the owner, the foreclosure judgment and potential sheriff's deed may not affect or terminate their interests in the property. After the complaint has been served, a lis pendens is filed with the register of deeds in the county where the property is located to indicate that a lawsuit involving the property has been filed.

If the property owner does not answer the complaint or appear in court, the court may enter a default judgment against the owner. If the owner attempts to pose a defense in an effort to stall the process, the court may give a judgment on the pleadings if the stated defenses have no merit and raise no factual issues. If the owner does present a genuine issue of material fact, the case may be resolved by summary judgment, typically in favor of the lender.

One defense homeowners around the country are employing to delay foreclosures is requiring the lender to produce the original mortgage note signed by the homeowner. During recent years mortgages were bundled and sold and resold to investors. In many cases the original note was lost, stored in a distant warehouse or destroyed. However, the original note is almost always electronically retained and can eventually be found. Judges are often willing to accept electronic documentation. Nonetheless, homeowners may consider this successful because the proceedings have been delayed and pressure has been exerted on the lender, opening the possibility that some alternative to foreclosure might be found.

When the lender obtains a judgment of foreclosure, the court confirms that the borrower is in default on the mortgage debt, that the lender has the right to have the property sold by sheriff's sale, the time and

place of the sale and whether or not the lender is seeking a deficiency judgment. A deficiency judgment holds the borrower responsible for any amounts still owed to the lender after the proceeds of the sheriff's sale have been applied to the debt.

Right of Redemption

The foreclosure judgment also specifies the length of the borrower's redemption period, that is, the amount of time given to pay the entire mortgage debt and thus prevent the sheriff's sale. The length of the redemption period will depend upon the type and size of the property, if the lender is seeking a deficiency judgment, if the property is owner-occupied and if it is abandoned. The court will set a shorter redemption period in those cases where the lender will accept the high bid at the sheriff's sale as payment in full and forego any deficiency against the owner.

For the purposes of this discussion, it is helpful to divide all properties into two general types:

- **Type R foreclosures** include one- to four-family owner-occupied residential properties and farms, churches and other properties owned by tax-exempt charitable organizations.
- **Type C foreclosures** include all other properties: commercial, retail, industrial and residential properties that are not owner-occupied or that have more than four units.

12 months

The redemption period is 12 months for all type R foreclosures if the lender seeks a deficiency judgment.

Six months

The redemption period will be 6 months for all type R foreclosures that are 20 acres or less if the lender is not seeking a deficiency judgment and if the mortgage was recorded after January 22, 1960. The redemption period is also six months for all type C foreclosures if the

lender seeks a deficiency judgment.

Three months

The redemption period will be three months for all type C foreclosures where the lender is not seeking a deficiency judgment and if the mortgage was recorded after May 12, 1978.

Two months

The redemption period will be two months in all cases where the property is abandoned. The lender must prove that the owner has relinquished possession and control of the property, not just that it is simply vacant. For example, if a property is listed for sale, the property may be vacant, but the owner is still exercising possession and control via the efforts of the listing broker marketing the property.

At the end of the redemption period, the property is sold at a sheriff's sale to the highest bidder. Advance notice of the sheriff's sale is published in the newspaper once a week for six weeks and the sheriff posts the notice of the sale in six public locations. Sheriff's sales are held at the county courthouse and are open to the public.

If the highest bidder is not the bank, the winning bidder must immediately put down 10 percent of the bid price in cash or certified funds at the time of the bid. If the high bidder defaults on his obligations to make all payments within the prescribed time, the high bidder will lose the deposit and the property will be re-advertised for sale.

Approximately one to three weeks after the sheriff's sale, the attorneys for the bank will hold a hearing for the court to confirm the sheriff's sale. The court will normally approve the highest bid. The lender may ask for extra expenses to be added to the judgment and ask for a writ of assistance if it becomes necessary to evict occupants of the property after the sheriff's deed is recorded.

Mandated Mediation

As mortgage foreclosure filings rose

in almost every county in Wisconsin last year, judges are evaluating whether or not they can take a more active role in addressing the problem.

Judge William D. Dyke of the Iowa County Circuit Court is piloting an alternative dispute resolution program wherein lenders who file a foreclosure action as of January 1, 2009 are required to notify the defendants that foreclosure mediation is an option under Wis. Stat § 802.12, the alternative dispute resolution statute. Judge Dyke hopes this program will lead to resolution by the parties without foreclosure. This might help the parties to learn about all of their options before walking away from their home. Many owners, it is assumed, do not understand the process or cannot afford an attorney.

Listing a Property in Foreclosure

In this time of economic stress it is not surprising to hear that the homeowner listing his property is in foreclosure. REALTORS® and consumers alike sometimes are uncertain about whether the home can still successfully be listed and sold once a foreclosure action has begun.

The period of redemption is an important factor to be considered by a broker listing the property for sale and for a broker with a buyer for the property. It roughly indicates how long the brokers have to get the property sold and closed for a price that pays off the owner's total mortgage debt and to stop the foreclosure. The final deadline for getting the property sold and closed, however, extends beyond the redemption period. Rather, the right of the owner to redeem the property by paying off the total amount due to the lender runs until judicial confirmation of the sheriff's sale. It is only then that title to the property passes to the purchaser at the sheriff's sale.



REALTOR® Practice Tips:
The property owner may redeem

his or her property by selling the property and paying off the foreclosure judgment before judicial confirmation of the sheriff's sale. The property still belongs to the owner and the owner can still sell until then.

Listing Foreclosure and Pre-Foreclosure Properties

Can a broker list a property knowing that the seller may be in foreclosure or is late in making mortgage payments?

Before listing the property it is prudent practice to determine whether the owner will be able to convey title in the event a buyer can be found. When considering listing a property that is in foreclosure or pre-foreclosure, the prudent broker will evaluate the property owner's debts, judgments, liens and other encumbrances on the property. Obtaining a search and hold from the title company and completing the WRA Listing Questionnaire Regarding Title Issues (www.wra.org/LU0309quest) will help the broker and seller determine whether listing is in the seller's and broker's best interests. More information about listing properties in foreclosure is available in the January 2008 *Broker Supervision Newsletter*, "Listing Foreclosure Properties," online at www.wra.org/BSNJAN08.

Disclosure

A broker has listed a home and just learned the seller is in foreclosure. Is the broker obligated to tell the buyers that a foreclosure action has been filed? Or is the listing broker obligated to not disclose this information?

Whether the possibility of foreclosure constitutes a fact the broker needs to disclose as an adverse material fact is a judgment that only the broker can make after considering all of the facts and circumstances in the situation. For example, a foreclosure action may not need to be disclosed if the buyer can close the sale before judicial confirmation of the sheriff's sale.

Although disclosure may not initially need to be made based on the information available when the listing is taken or when an offer is written, facts and circumstances may change to the point where the broker must make timely written disclosure of the facts.

If the broker, as a competent licensee, knows that the seller will not be able to meet his or her obligations under the offer, then the issue constitutes an adverse material fact. Wis. Admin. Code § RL 24.07(2) requires the broker to timely disclose adverse material facts in writing to all parties to the transaction, even if the broker's client would direct the broker not to disclose.

Broker Duties

After taking a listing, the broker finds out that the seller is in foreclosure. Can the broker walk away from the transaction? What can be done if the closing is set and there are not enough funds to close the deal and pay commission?

Once the listing is entered into, the broker has a contractual and a fiduciary duty to the seller to provide brokerage services for the duration of the transaction. The listing broker should do whatever he or she can to help the seller meet the terms and conditions of the offer. If the seller has enough money to meet the contract obligations and provide a clear title, the closing should proceed. If the funds fall short, the seller and the seller's attorney can try to borrow needed funds, convince lien holders to accept less than the full amount due or find other ways to meet the seller's closing obligations.

A broker cannot put his or her interest in commission ahead of the broker's duty to help the parties complete the transaction. Although the listing contract provides that the broker's commission is due at closing, the broker cannot stop the closing just because there is not enough money to pay the full commission at that time.

The listing broker may consider renegotiating the commission, creating a payment plan for the seller, having the seller give a promissory note, taking a lien on other property owned by the seller or going to court to obtain a judgment for the commission.

Buying a Property in Foreclosure before the Sheriff's Sale

Sheriff's Sale Beats out Short Sale Offers

A property is being sold as a short sale and there are multiple offers accepted, all subject to lender approval of a short sale. Can a higher-priced offer at sheriff's sale automatically knock the other offers out?

Yes, it would be within the lender's control and discretion to not approve any of the accepted offers as short sales and instead allow the judicial confirmation of the sheriff's sale to proceed. This assumes that the sheriff's sale is less expensive for the lender or holds some other benefit.

Lender Cancels Sheriff's Sale

At what point does the bank cancel the sheriff's sale?

The lender would be unlikely to cancel a sheriff's sale unless they were certain that the owner could sell, refinance or otherwise come up with at least the same amount of money that the lender would have netted from a foreclosure sale. If the bank was going to bid in their mortgage balance and end up owning the property and reselling it (REO), this computation likely will take account of the holding costs and resale costs that would be avoided by allowing the seller to sell to a third-party buyer before the sheriff's sale.

Buying at Sheriff's Sale

Potential buyers at the sheriff's sale may not have much time to research the title and condition of the property beforehand. Potential buyers should evaluate the property's value and

check title for any additional loans or liens encumbering the property so that they can make an informed decision about whether the property is a wise investment. The sheriff conducts the foreclosure sale and any buyers with 10 percent of their maximum bid at the sale may bid.

Sheriff's Sale

A buyer-client is going to purchase a foreclosure property at sheriff's sale. This property has a grant from the city and a grant from community assistance programs from when they did some work on the property that created a lien. Do these liens go with the property at the sheriff's sale when the sheriff's deed is given?

A client planning to purchase a property at sheriff's sale needs to be very careful with regard to title. Just because the sheriff's sale is part of the foreclosure process that involves a court and the sheriff, that does not mean that the title is necessarily clear.

When the lender that started the foreclosure filed its pleadings in court, the lender may have done a good job of checking title and making sure that everyone who had any liens against was named in the foreclosure complaint. All parties named will generally have their liens removed from title when the court confirms the sheriff's sale and the sheriff's deed is given. However, many lenders today have their foreclosures handled by asset managers who may at times try to cut corners and not order a full judicial foreclosure commitment from the title company. Consequently, they miss some of the liens against the property.

The sheriff's deed itself is not a warranty deed. Instead, it is similar to a quitclaim deed. The sheriff's deed passes the former owner's title after barring all parties named in the foreclosure action holding liens and encumbrances on the property and barring any parties filing any liens after the lis pendens is filed with the register of deeds.

The agent needs to be particularly cautious about giving advice on the legalities of foreclosure sales. The client, accordingly, should be directed to meet with an attorney to review title and the litigation documents to determine if there are any liens that were not extinguished by the foreclosure.

Listing Protection

A home is listed that is in foreclosure and the sheriff's sale is scheduled for later this month. If the lender is the highest bidder at the sheriff's sale, are protected buyers still protected for one year when the bank lists the property?

Timely delivery of a list of protected buyers extends a listing contract beyond its expiration date with the seller of the property. However, listing protection ends once the property is transferred to a new owner/seller. When the lender acquires the property at the judicial confirmation of the sheriff's sale, there will be a new seller and no listing protection for previously interested buyers. The lender may list the property for sale with any broker.

Abandoned Properties

Foreclosures impact entire neighborhoods, often bringing down property values. Homes in foreclosure often are vacant, attracting vandals, drug traffic and even prostitution. Some communities have addressed this situation by enacting ordinances making lenders, absent owners or even real estate agents responsible for boarding the property and stopping the escalating vandalism and decay.

Elsewhere around the country, advocates in Cleveland are working with the city to allow homeless people to legally move into and repair empty, dilapidated houses. And in Atlanta, some property owners are paying homeless people to live in abandoned homes as security measure.

An activist in Miami is taking it one step further and advocating for squatters' rights. He is helping homeless

people move illegally into foreclosed homes and he then argues a tenant-landlord relationship should apply. He contends that “a human has more right to a home than a bank has to keep it empty.” Miami has recently passed an ordinance requiring owners of abandoned homes, whether an individual or bank, to register those properties with the city so police can better monitor them. However, with regard to this activist, a Miami spokeswoman has said that there are no actions on the city's part to stop this and that if people trespass into private property, it is up to the property owner to take action to remove those individuals.

Evicted Tenants

The impact of foreclosure is not limited to property owners and lenders. More than 20 percent of properties facing foreclosure nationwide are multi-family and single-family rentals, according to a 2009 report from the National Low Income Housing Coalition. Since rental properties often are home to multiple families, renters make up roughly 40 percent of the families facing eviction.

A lot of states have proposed bills but most just give renters more notice that they will be evicted – often times 30 days – but that may not be enough time to find affordable housing and get their affairs in order. Some proposals require that existing leases be honored and renters be provided with at least 90 days' notice before eviction in the absence of a lease.

Fannie Mae and Freddie Mac extended their moratorium on evictions of borrowers or renters facing foreclosure through February 28, 2009. They also plan to offer post-foreclosure rental options to qualified owner-occupants and tenants, including a new rent-to-own program with month-to-month leases and market-value rent set by property management companies. Keeping foreclosed properties occupied and in better repair supports

local property values and promotes faster recovery in the housing market.

Notably the Obama Administration's Stability Plan includes \$1.5 billion to provide renter assistance, reducing homelessness and avoiding entry into shelters.

Foreclosure's Impact on Tenants

In a foreclosure of a multi-unit property, does the foreclosure terminate the rights of the leaseholders? Do the leaseholder (tenant) rights survive the foreclosure and continue with the new owner who buys at the sheriff's sale? Do the leaseholders have to be named in the foreclosure action for the foreclosure to terminate their rights?

The following are general principles of law. The broker should refer any property owners and tenants to legal counsel for advice regarding their rights and interests in any given transaction or set of circumstances.

Part of the answer will depend, in part, on when the lease was executed. Wis. Stat. § 708.02 provides that leases entered into after the mortgage is recorded would be subject to termination by the foreclosure. Wis. Stat. § 708.02 provides, “Foreclosure; effect in lease. If property subject to lien created by mortgage or land contract is leased after the lien has attached, the lease is subject to termination at the time the interest of the lienor is terminated.” If these tenants are named in the foreclosure action, the judicial confirmation of the sheriff's sale and the giving of the sheriff's deed will terminate their rights and interests.

If a lease agreement was entered into and recorded prior to the recording of the mortgage, the possession of the tenant cannot be disturbed and the tenant may continue to occupy the premises, subject to the terms and conditions of the lease agreement.

If the lease was entered into after the lis pendens for the foreclosure action was filed with the register of deeds, those

tenants' rights and interests are eliminated in the foreclosure action by the judicial confirmation of the sheriff's sale and the giving of the sheriff's deed.

As for tenants in possession without recorded leases whose interests arose before the filing of the lis pendens, they must be named as defendants in the foreclosure action before their rights and interests can be foreclosed upon (terminated). The foreclosure action must name any parties in possession of the property regardless of whether or not they have recorded lease agreements if the sheriff's sale buyer is going to get free and clear title.

Property owners and tenants should speak with their attorneys regarding any questions concerning their legal rights and interests in a specific situation.

Deed in Lieu of Foreclosure

How does a deed in lieu of foreclosure work? Do leases survive a deed in lieu of foreclosure? The broker just received listings from a bank. These houses each have a family renting them. The leases are hand-written, very sketchy and do not have many details. Are the leases binding on the bank who is now the owner of the properties?

A deed in lieu of foreclosure occurs when a property owner in default on his or her mortgage decides to quitclaim the property back to the lender rather than attempt a short sale or go through the foreclosure process. When a deed in lieu of foreclosure is considered, the bank should work with the title company to determine the status of title to the property because any mortgages, judgments or liens filed against the property or created by the borrower will likely remain against the property upon its transfer back to the bank. Thus a deed in lieu of foreclosure is generally used only when title is clear. If other liens have attached to the property, a foreclosure action becomes necessary because a foreclosure removes the liens of all lenders,

creditors and other lienholders named as parties in the foreclosure complaint.

Leases would generally survive a deed in lieu of foreclosure because the borrower quitclaiming his interest in the property to the bank would not extinguish the rights of any tenants. It would be helpful if the former owners assigned the leases to the bank so that the bank could, in turn, assign these leases to new purchasers when the broker sells the properties.

The broker was notified that the listed property was turned over to the bank. If the broker understands correctly, the listing is now void and the home can be listed with another firm since the bank now owns the property (REO). It was deeded over in lieu of foreclosure. Is the listing broker owed a commission since it was a transfer and not a foreclosure? Can the firm go after expenses since the seller transferred his property to the bank?

A property owner facing foreclosure may deed the property to the lender as an alternative to sale or completion of the foreclosure. The transfer of title may be exchanged for the cancellation of the mortgage debt. Whether a lender will participate in such a process will depend on the borrower's financial situation and any debts, liens or judgments on the property. If the seller has provided the lender with a deed in lieu of foreclosure, the lender has become the new seller.

The broker could pursue a commission per the commission provisions of the listing contract, for instance, on lines 51-57 of the 1999 WB-1 Residential Listing Contract. The transfer of title to the property is arguably a sale because the seller received consideration – the forgiveness of his mortgage loan debt. It may also be considered a transaction that caused a change in ownership or control.

Being practical, one must wonder whether the sellers have money or assets to collect if the commission

claim is successful. It may just be a case of the old saying, "You can't beat a dead horse." The broker may discuss this matter with his attorney or the firm's legal counsel if he wants to consider legal action for the commission.

Foreclosure Resources

- *Legal Update 99.05*, "Mortgage Foreclosures," online at www.wra.org/LU9905
- *NAR Field Guide to Foreclosures* at www.realtor.org/library/library/fg329
- January 2007 *Legal Update*, "Avoiding Foreclosures," online at www.wra.org/LU0701
- January 2008 *Broker Supervision Newsletter*, "Listing Foreclosure Properties," online at www.wra.org/BSNJAN08.

For a glimpse into the rate of foreclosure filings in Wisconsin, visit www.city.milwaukee.gov/ImageLibrary/User/jsteve/NSP_Appendix.pdf. (Editors note: There are two underlines in the Web address after NSP – type shift underline twice.)

REOs

REO means "Real Estate Owned" by the lender. It is another way to say the property has gone through the foreclosure process and has now been repossessed by the foreclosing lender. REO owners are typically extremely willing sellers because an REO on the books is an obvious sign of having made a poor lending decision. The overhead, carrying costs and losses involved with an REO as well as any potential property management fees incurred means the bank is likely a willing negotiator.

Prospective REO purchasers should carefully evaluate the property's value and check for any additional loans or liens encumbering the property so that they can make an informed decision about whether the property is a wise investment. While many buyers may

assume that there will be no title problems with any property bought from a lender or "from the sheriff" at sheriff's sale, that is not necessarily true.

Most REO homes are generally run-down; stripped of appliances, curtains and copper piping; and in general disrepair. Many were not winterized properly by the asset managers working for the banks who own them and have mechanical problems and other defects just waiting to be discovered. Many REO properties are purchased by investors who may rehab them and then sell them or rent them.

Expectation Management: Purchasing an REO

REOs are bought and sold in a world that tends to work under an entirely different set of rules and standards. When a lender forecloses on a property and the property goes to sheriff's sale, the lender will often bid its mortgage and purchase the property. The lender will receive a sheriff's deed at the judicial confirmation hearing to what has now officially become an REO. Most lenders then turn the property over to a national asset management company thousands of miles away that is unfamiliar with Wisconsin law. Some asset managers are pretty good – they view the negotiation as a business without an emotional component.

Lenders and their asset managers were unprepared for the volume of REO property they are now struggling to manage. They did not (and some apparently still do not) have the systems or staff in place to deal with the onslaught. There is a logjam of properties and transactions, and many asset managers and lenders are operating with inexperienced and, perhaps at times, incompetent personnel.

Many REO asset managers do not respond promptly to buyers' offers, and some buyers may have to wait as long as six weeks. In some cases lenders are apparently getting multiple offers and taking weeks to

respond and choose the best one.

Some REO sellers will require a buyer to fill out a mortgage application with their mortgage division in order for them to consider the offer. A buyer's initial offer to purchase may be submitted on a familiar Wisconsin form, but the written response from the asset manager will invariably be a lengthy REO addendum that overrides most of the offer to purchase provisions. This addendum is written by the lender's legal counsel and may be very difficult for buyers to understand. The buyer may need legal counsel to interpret the addendum, and the attorney's advice may be that the buyer should never sign such a heavy-handed document. Some REO addenda provisions require that the buyer pay for the title insurance policy and the real estate transfer fee, allow scant time for inspections and little time for financing, require non-refundable earnest money or charge the buyer a daily fee for a delayed closing (when there is no penalty if the seller causes the closing to be delayed). The REO addendum generally is non-negotiable and cannot be altered.

REALTORS® and buyers today are frustrated when asset managers provide verbal responses and will not counter offers in writing. Once a sale is verbally finalized, it is discouraging when the lender reveals that there is another offer and asks for the buyer's highest and best price, changes the terms and conditions of the buyer's offer or indicates that they have accepted another offer. Many asset managers and lenders, however, operate under a system in which the asset manager may have the ability to give a conditional approval or acceptance, but final acceptance requires the lender's corporate approval. In other words, it may be a very long time before there is actually a contract signed by the buyer and the seller. In some REO transactions the signed offer is not received until

shortly before or even after closing.

REALTOR® Practice Tips:

Although REO asset managers negotiate verbally, there is never a legal binding contract under Wisconsin law until there is an agreement signed by both parties; don't mislead buyers into thinking otherwise.

Closings on REO properties are often delayed for days or even weeks due to lender/asset manager difficulties getting the deed, final signed HUD, title work and other documentation to closing on time. In some cases there are problems when charges, such as delinquent utility bills or subdivision association dues, do not appear on the closing statements; the REO seller will not reimburse any charges after closing.

The title companies used in REO transactions often are unorganized and unfamiliar with Wisconsin law and practice. There may be confusion over acreage (when partial releases are required), rental weatherization stipulations, unsatisfied secondary liens still on title, etc.

REO transactions are "as is, where is" transactions. That means that the seller will not provide an RECR or give any other disclosures about the condition of the property. It also means that asset managers will rarely, if ever, make any repairs from the lender/seller's funds.

REO sellers will fail to disclose major ongoing problems like a property with frozen or leaking pipes or a failed septic system, even if they have been specifically informed. So it is critical that the buyer inspect the property. Common obstacles include that the power or other utilities have been turned off, vandalism and safety concerns associated with showing or inspecting abandoned property.

REO Sales "As Is"

The closing for the REO property is supposed to be today but at the walk-through yesterday there were

cracked pipes. The lender says the pipes were cracked when the buyer first viewed the property. Apparently the lender took photos on his cell phone when the listing was taken. The buyer and cooperating broker did not notice them when viewing the property. Is the bank obligated to disclose this when they sell "as-is?"

Wis. Admin. Code § RL 24.07(b) provides: "Listing broker. When listing real estate and prior to the execution of the listing contract, a licensee shall inspect the real estate as required by sub. (1), and shall make inquiries of the seller on the condition of the structure, mechanical systems and other relevant aspects of the property as applicable. The licensee shall request that the seller provide a written response to the licensee's inquiry." The listing broker then compares the seller disclosure to the results of the listing broker's inspection. If there are discrepancies, the broker is required to make timely written disclosure of material adverse facts.

There is no exemption from the Wis. Stat. Chapter 709 seller disclosure law based solely on the fact that the owner does not live in the property. Such owners might include the owner of a rental duplex or a bank that has acquired a home by foreclosure. A seller in this position can either (a) complete the RECR to the best of his or her knowledge, (b) retain a professional to provide an inspection report to be used as the basis for completing the RECR, (c) refuse to complete the RECR and sell "as is," risking buyer rescission or (d) refuse to complete the RECR and sell "as is," refusing to accept any offers from buyers who do not waive their Chapter 709 rescission rights.

Generally, an "as is" clause alerts the buyer that he or she is responsible to determine the condition of the property being purchased. The "as is" clause also indicates that the seller does not intend to make repairs and that the

buyer must take the property the way it is. The use of an "as is" clause, however, does not necessarily mean that the seller may still not need to make some disclosures about the property.

First, the seller has the duty to exercise ordinary care in refraining from any act that would cause foreseeable harm to another or create an unreasonable risk to others. Second, the seller may be liable for misrepresentation if he or she actively conceals a defect or prevents a buyer from investigating the property and discovering the defect.

Third, the seller may be liable if he or she makes false affirmative statements about the property. In the 1992 Wisconsin Court of Appeals case of *Grube v. Daun*, 173 Wis. 2d 30, 59, 496 N.W.2d 106 (Ct. App. 1992), the Court held that when a seller or an agent of the seller makes an affirmative representation about the condition of the property, the seller or agent is not relieved by the "as is" clause from the duty to investigate before making the representation and to accurately report the results to the buyer. Although an "as is" clause will protect the seller and the seller's agent from claims based on nondisclosure, it does not protect an affirmative statement about some aspect of the property. The buyer is entitled to rely upon the affirmative statement and expect full and fair disclosure of all material facts relevant to that aspect of the property.

Finally, the seller may be liable in an "as is" situation if he or she fails to disclose material conditions that the buyer is in a poor position to discover, as discussed in *Green Springs Farms v. Spring Green Farm Assoc. Ltd. Partnership*, 172 Wis. 2d 28, 492 N.W.2d 392 (Ct. App. 1992). In that case, the seller failed to disclose that there had been salmonella contamination on the chicken farm being sold. The Court found that real estate sellers have the duty to fully disclose to potential buyers the existence of

conditions that may be material to the decision to purchase and that the buyer is in a poor position to discover. Thus the use of an "as is" clause is not always going to be an escape for the seller from all disclosures.

From the licensee's standpoint, Wis. Admin. Code § RL 24.07 requires that licensees perform reasonably competent and diligent property inspections and disclose material facts and potential adverse facts to the parties in writing. This is not waived in "as is" sales. In fact, when a buyer is purchasing "as is" it is very important for the buyer to know the condition of the property. Generally, the buyer has expert inspectors inspect the property as a condition of the offer to purchase, but this does not excuse the licensee from his or her duty to assure that all known material defects are disclosed in writing to the buyer and that all affirmative statements are in fact true.

Delay with the Deadlines

The agent worked with buyers who wrote an offer on an REO property with a binding acceptance date of midnight on Friday, January 16, 2009. The agent was told the bank will get to the offers (there are multiple) "when their schedule permits." The agent had told the buyers prior to writing the offer that often times in a foreclosure situation, the bank does not always respond according to the deadlines in the offer. If the bank would accept this offer after the binding acceptance date, are the buyers obligated to purchase the home?

If the bank would accept the offer after the deadline for binding acceptance, the buyers would not be bound. A counter-offer would be needed to create a binding contract at that point.

Prior RECR

An agent recently listed an REO property. The property was listed previously in the MLS with an RECR from the former owner. In the RECR, the seller disclosed some items about

the leased fuel tank and the well. The REO company has no disclosures and are selling "as-is." Is the agent allowed to incorporate the information from the RECR into the new listing?

The agent cannot use the prior owner's RECR, as it has no bearing on this listing. However, the agent may need to disclose the information the agent read in that RECR if it constitutes a material adverse fact, just as if the agent had obtained the information from another source. Whether the information contained in the prior owner's RECR constitutes a fact the agent needs to disclose as an adverse material fact is a judgment that only the agent can make after considering all of the facts and circumstances in the situation.

If the agent, as a competent licensee, knows that this fact: (1) has a significant adverse affect on the value of the property; (2) significantly reduces the structural integrity of the property; (3) presents a significant health risk to the occupants of the property; or (4) is information that indicates that a party to the transaction is not able to or does not intend to meet their obligations under the contract, then the issue constitutes an adverse fact. If a party to the transaction were to so indicate, or if a competent licensee would generally recognize that this fact is of such importance that it would affect a reasonable party's decision to enter into a contract or would affect the party's decision about the terms of the contract, the fact is both adverse and material. If this fact is both adverse and material, then Wis. Admin. Code § RL 24.07(2) requires the agent to timely disclose the fact in writing to all parties to the transaction, even if the client would direct the agent not to disclose.

Rental Weatherization of an REO

Are bank-owned properties exempt from weatherization codes? The seller is an REO and they included an "as is" clause. The buyer will use the

property for rental and has drafted the offer to provide that the seller will comply with rental weatherization.

The Rental Weatherization Program is designed to ensure that residential rental properties in Wisconsin meet minimum energy conservation standards. This Wisconsin Department of Commerce program only applies to residential property that is being transferred (deed, land contract, etc.) and will be used as rental property after the sale.

The register of deeds will not record a property conveyance unless:

- **Certificate of Compliance:** A state-certified inspector (paid by the owner) has issued a certificate of compliance indicating that the property meets the weatherization standards. The certificate is valid for the life of the building.
- **Stipulation:** The buyer has filed a stipulation (\$50) promising to bring the property into compliance with the weatherization code within one year after the transfer. The completed stipulation must be presented with the fee to DComm or a Commerce agent for validation before it can be recorded with the register of deeds.
- **Waiver:** The buyer has filed a waiver (\$50) stating that the building will be demolished within two years.
- **Exclusion:** The property or transfer is excluded from weatherization code compliance.

Excluded properties or transfers must be indicated on the Real Estate Transfer Return form by stating the proper exclusion code or the register of deeds will not record the conveyance. A detailed list of excluded transfers can be found in Wis. Admin. Code § Comm 67.04(32) and in the Real Estate Transfer Return form instructions.

The penalty for noncompliance with the rental weatherization rules is generally \$500 per dwelling unit. DComm or the local municipality can start

a citation action under Wis. Stat. § 778.25 requiring the owner to pay the specified forfeiture or appear in court.

For additional rental weatherization information, contact the DComm Rental Weatherization office at 608-267-2240 or visit <http://commerce.wi.gov/SB/SB-RentalWeatherizationProgram.html>.

If the property is not excluded and has not received a certificate of compliance, the parties must determine who will be responsible for compliance. The parties may agree that the buyer will bring the property into compliance within one year after the transfer, in which case there needs to be a stipulation provided at closing. In an REO situation, the seller may refuse to take any responsibility or sign any documents relative to rental weatherization because the selling bank or the asset manager may be located in a different state and not understand how Wisconsin's rental weatherization program works or its purpose.

Procuring Cause

A buyer wrote an offer with a broker on a property before the property was foreclosed. The buyer understands the lender now holds title to the REO property and wants to write an offer as soon as it is available. The first offer was drafted with another agent before it became an REO. Since the bank is now the seller, can the buyer write the offer with a different agent? Which agent will be the procuring cause?

Procuring cause refers to an uninterrupted series of events that results in the sale of the property. Had the first offer resulted in a successful transaction, it appears the first broker would have been the procuring cause. However, once ownership is transferred to the lender, the prior MLS offer of compensation and listing contract are terminated. Once the bank lists the property and places it in the MLS, a new series of

events for procuring cause begins.

Dry Closing Delay

The agent is working with a buyer who is purchasing an REO property from a bank. The closing was last week and the buyer paid cash. They found out at the last minute that it was going to be a "dry closing." The title company had to send proof of the funds and the buyer's signed HUD to the seller in California for signature. They still do not have it back from the seller, so commission cannot be disbursed and the agent cannot get the keys to give to the buyer. Will the agent have to make an appointment with the listing agent to get in the property?

Yes, until such time as the seller authorizes otherwise, the buyer must obtain permission to enter the property. Currently this permission must come from the listing agent or the seller.

Auction Sale of REO

A buyer is interested in an REO property that the lender is going to sell at auction. Can the agent help the buyer buy the property at the auction and still receive a commission? What should the agent and the buyer do to prepare for the auction?

In an auction sale transaction, a cooperating agent often has the opportunity to register a buyer before or at the auction. If the buyer ultimately purchases the property offered at the auction, the cooperating agent may earn whatever fee or commission was offered by the auctioneer, the auction company or the listing broker on the MLS.

Often the buyer and the agent must be pre-registered prior to the auction using specific forms and procedures. These steps help eliminate any doubt as to representation and ensure that the agent/broker will be duly compensated for work completed. Agents should verify the specific auction company's procedures early in the process.

Buyers generally can familiarize themselves with an auction property by

carefully reviewing the bidder's information package available from the auctioneer. The bidder's package from a Wisconsin-registered auctioneer should contain a current title report with copies of all title exceptions, surveys, service contracts, leases, purchase and sale agreements, floor plans and financial statements, if appropriate.

Most auction properties are usually sold "as is, where is," with no property condition reports and without warranty or guarantee of any kind (other than clear title), so the buyer should be strongly urged to inspect the property before the auction sale. The buyer may also need to obtain a mortgage pre-approval or line of credit – the purchase agreement from an auction usually does not include a financing contingency.

Cooperating agents should attend pre-auction open houses with buyers, help buyer-clients determine the market value of the property prior to the auction, assist the buyer with auction registration and strategy and attend the auction with the bidder. Commission is generally payable when the property closes.

The July 2007 *Legal Update*, "Real Estate Auctions," online at www.wra.org/LU0707, is a valuable resource in understanding auctions as well as the role of auctioneers and real estate licensees.

\$8,000 First-Time Homebuyer Credit

Buyers looking to purchase homes in foreclosure, short sales or any other residences may be able to take advantage of a new, non-repayable tax credit if they meet the eligibility requirements. Under the American Recovery and Reinvestment Act of 2009, a first-time buyer's \$8,000 tax credit will be available for the purchase of a principal residence on or after January 1, 2009, and before December 1, 2009. The credit does not need to be repaid as long as the homebuyers stay in the

house for at least three years. The credit is claimed on the homebuyer's income tax return using IRS Form 5405 (revised February 2009) (www.irs.gov/pub/irs-pdf/f5405.pdf) to reduce the buyer's income tax liability, with any unused credit refunded as a check to the buyer. The \$8,000 tax credit could be a deciding factor for some buyers who are on the fence or who are not sure how long they are going to stay in their new residence.

See www.irs.gov/newsroom/article/0,,id=187935,00.html, www.realtor.org/government-affairs/gapublic/american-recovery-reinvestment-act-home?lid=ronav0019#taxcredit and <http://recovery.gov> for more information about the homebuyer tax credit as well as other programs created in the Act including increased FHA, Fannie Mae and Freddie Mac loan limits, and green building and energy efficiency measures.

Listing Questionnaire Regarding Title Issues

Property: _____ Date: _____

Seller: _____

The Seller is: ☐ property owner (LIST ALL OWNERS on the line above ↑) ☐ personal representative for estate of deceased property owner ☐ guardian for property owner ☐ power-of-attorney for property owner

In order to avoid any surprises at closing, be prepared with the information the title company will need, and give ample time to resolve any potential concerns that are identified, please check YES if you are aware, and check NO if you are not aware, of any of the following situations occurring, either in the past, at present, or expected in the future, with respect to the property you are selling?

CONDITION	YES	NO	CONDITION	YES	NO
1. Remodeling, construction work or repairs within the last 6 months? Any planned?			14. Unpaid homeowners or condominium association dues, fees or charges?		
2. Remodeling or construction work without proper building permits?			15. Judgments in court or tax liens against the owner?		
3. Disputes with neighbors about the location of the boundary lines?			16. Unpaid child support, income taxes, property taxes?		
4. Unrecorded contracts or persons claiming ownership rights or lien rights on the property?			17. Part of a building, garage, fence, driveway or landscaping on the neighbor's property? (or vice versa)?		
5. Environmental concerns e.g., underground fuel storage tanks, damaged asbestos, high radon levels, deteriorated lead-based paint?			18. Unpaid assessments for utility service or municipal improvements, e.g., sewer lateral, tree planting, sidewalk repairs, street work, etc.?		
6. Violations of local zoning or building codes, for example, inadequate setbacks or lot size?			19. Violations of recorded covenants and restrictions, for example, fence in violation of architectural rules?		
7. Any leases or rental agreements?			20. Burial grounds on the property?		
8. People or companies allowed to travel across or use your property without a recorded document?			21. Shared driveways, shared wells, or anything else shared with the neighbor?		
9. Other persons in possession or occupying the property?			22. Questions or issues about your legal right to access the road?		
10. Unrecorded deeds or land contracts?			23. Lawsuits involving the property (pending or threatened)?		
11. Mineral rights reserved by someone on the property?			24. High voltage electric or high pressure gas lines nearby?		
12. Persons claiming rights to occupy or live on the property?			25. Other violations of laws, regulations, ordinances or restrictions?		
13. Basement rooms used as bedrooms not in compliance with building code?			26. Missed mortgage payments or foreclosure or bankruptcy filings?		

For each YES answer, please give the item number, provide a description and attach any pertinent agreements and documents. Use the back side or additional pages, if needed.

Seller's Signature

Seller's Signature

SHORT SALE CHECKLIST

Property Address _____

Seller: _____ Agent: _____

Date Done	PRELIMINARY BACKGROUND
	1. Comparable Market Assessment (CMA) to estimate value
	2. Search and Hold/Title Report from the title company
	3. Listing Questionnaire Regarding Title Issues (www.wra.org/LU0309 or ZipForm)
	4. Net Sheet to project sellers' proceeds/deficits
	5. Mortgage terms and conditions (due-on-sale, prepayment penalties, etc.)
	6.
	7.
Date Done	ALTERNATIVES TO A SHORT SALE SELLER SHOULD TALK TO THE LENDER FIRST!
	1. Forbearance agreements to temporarily suspend loan payments
	2. Repayment plans with the Seller's lender(s)
	3. Loan modification, i.e., change adjustable rate to fixed rate; add missed payments to loan balance; extend loan term
	4. Refinancing with the Seller's lender or other lenders
	5. Homeownership Preservation Foundation at 888-995-HOPE or online at http://www.wisconsinforeclosureresource.com/
	6. Deed in lieu of foreclosure
	7. Bankruptcy
	8.
Date Done	PREPARE FOR SHORT SALE LENDER LOSS MITIGATION DEPARTMENT CONTACT: Name: _____ Phone: _____
	1. Present Listing Contract & "Addendum SSL to the Listing Contract -- Short Sales" to Seller; have Seller review with Seller's attorney & tax advisor
	2. Execute Listing Contract and Addendum SSL
	3. Obtain Seller authorization to talk to Seller's lender(s)
	4. Prepare CMA or obtain appraisal
	5.
Date Done	SHORT SALE APPLICATION TO LENDER SELLER MATERIALS TO BE SUBMITTED TO SELLER'S LENDER
	1. Pay stubs and W-2's
	2. Bank statements
	3. Financial statements
	4. Cash Flow Analysis
	5. Hardship Letter with supporting documentation: job loss verification, medical statements, homeowner association data, disability documents
	6. Offer(s) to Purchase with Short Sale Addendum (Addendum SSO) and/or Lender Approval Contingency
	7.
	8.

ADDENDUM SSL TO THE LISTING CONTRACT - SHORT SALES

1 This Addendum is made part of the Listing Contract signed by _____,
2 Seller, on _____, 20____, with respect to the Property at _____,
3 _____, Wisconsin.

4 ■ **SHORT SALE DEFINED:** The sale of the Property will likely be a short sale: the sales price may not be enough to pay all
5 debts and obligations secured by mortgages and other liens together with closing costs. Seller must negotiate a written
6 agreement with the lender whereby the lender will accept less than what is actually owed to release the mortgage on the
7 Property. Accordingly, any offer accepted by Seller must include a short sale contingency requiring prior lender approval of
8 the transaction. Although this addendum refers to "lender," "loan" and "mortgage" in the singular, Seller acknowledges that
9 multiple lienholders and lenders may need to release their mortgages and liens in exchange for less than the balances
10 owed in order to sell the Property.

11 ■ **TAX CONSEQUENCES:** If the lender does forgive the deficiency and Seller does not qualify under the Mortgage
12 Forgiveness Debt Relief Act of 2007, Seller may owe income tax on the debt forgiven (see IRS Form 982). The short sale
13 also may result in capital gains. Seller is urged to consult with a qualified tax professional regarding the taxpayer's specific
14 circumstances. Broker cannot provide Seller with personal tax advice.

15 ■ **CREDIT RATING CONSEQUENCES:** There may be adverse consequences to Seller's credit rating if the lender forgives
16 part of the amount owed, depending upon the lender's characterization of the short sale.

17 ■ **DOCUMENTATION FOR SHORT SALE APPLICATION:** Most lender loss mitigation departments will require financial
18 information from Seller. This may include a statement of need or hardship accompanied by supporting documentation;
19 employment verification along with paycheck stubs and W-2s or verification of a lost job; personal financial statements;
20 Seller's last two income tax returns; a cash flow analysis for Seller; an appraisal or CMA; the listing contract and this
21 addendum; and the accepted offers to purchase containing a lender approval contingency, once received. Seller agrees to
22 provide such information and documentation as is required by the lender. Broker may help Seller assemble and submit this
23 information to lender, and will furnish the lender with market data regarding the local housing inventory, home prices,
24 holding versus closing costs and such other documentation and information that may help Seller win lender approval.

25 ■ **AUTHORIZATION TO ASSIST SELLER IN MAKING ARRANGEMENTS WITH LENDER FOR SHORT SALE:** Seller
26 authorizes Broker to discuss with Seller's lender the details of Seller's loan and the lender's short sale requirements, submit
27 the needed Seller financial information and market data, and provide other non-legal assistance to expedite the short sale
28 process. Seller will provide written authorization letters to Broker as needed. Broker shall assist Seller to make
29 arrangements for short sales, but any negotiations involving legal, tax or personal financial advice must be handled by
30 Seller's attorney or other professional advisors.

31 ■ **AUTHORIZATION TO MARKET PROPERTY AS A SHORT SALE:** Seller authorizes Broker to disclose that the
32 transaction will be a short sale, with the offer subject to approval by Seller's lender.

33 ■ **LENDER APPROVAL WITHIN LENDER'S DISCRETION:** The approval of a short sale, the imposition of additional
34 conditions or a last minute reversal or rejection are all decisions made solely by the lender. The lender may require an "as is"
35 sale, forbid Seller payment of buyer's closing costs or prohibit the Seller from receiving any proceeds. Any new offer terms
36 and conditions required by lender must be mutually agreed to by the parties in an amendment to the offer. There is no
37 guarantee that the lender will approve a short sale and, if they do, they may still require Seller to pay the remaining
38 shortage. Seller recognizes that the parties may be forced to wait a very long time for the lender's response and that Broker
39 has no control over the outcome.

40 ■ **BROKER NOT LIABLE:** Seller understands that Broker does not control lender decisions. Seller shall not hold Broker
41 responsible if a lender rejects a short sale, imposes terms and conditions that are unacceptable to Seller or takes too long
42 making decisions. Broker is not responsible for verifying information provided by Seller.

43 **SELLER IS URGED TO CONSULT WITH AN ATTORNEY BEFORE AGREEING TO SHORT SALES**

44 _____
45 (Seller's Signature) ▲ (Date) ▲ (Seller's Signature) ▲ (Date) ▲

46 _____
47 (Listing Agent's Signature on Behalf of Broker) ▲ (Date) ▲

ADDENDUM SSO TO THE OFFER TO PURCHASE - SHORT SALE

1 Addendum made part of the Offer to Purchase dated _____ made by the
2 Buyer _____ with respect to the Property at _____
3 _____.

4 ■ **SHORT SALE DEFINED:** The sale of the Property is a short sale: the sales price is not enough to pay all debts and
5 obligations secured by the mortgages and other liens on the Property, together with closing costs. Seller must pay
6 additional money at closing to cover the shortage or negotiate a written agreement with the lender whereby the lender will
7 accept less than what is actually owed to release the mortgage on the Property. Although this addendum refers to "lender,"
8 "loan" and "mortgage" in the singular, Seller and Buyer acknowledge that multiple lienholders and lenders may need to
9 release their mortgages and liens in exchange for less than the balances owed in order to provide clear title to the Property.

10 ■ **LENDER APPROVAL CONTINGENCY:** The Offer is contingent upon approval of the terms and conditions of this Offer by
11 each lender accepting a reduced payment. Seller shall promptly submit this accepted Offer to Seller's lender(s), along with
12 any other documentation required by the lender(s) that has not already been sent. (In some cases Seller's financial
13 information will have already been submitted to Seller's lender(s), but in other cases it may not have been done yet.) If a
14 lender's approval of the sale is conditioned upon modification of certain terms and conditions of this Offer, those changes
15 are not binding upon Buyer and Seller without the parties' mutual consent expressed in an amendment to this Offer. The
16 Offer is considered approved by the lender(s) when the Offer has been amended to incorporate the terms required by the
17 lender(s) or upon Seller's written notice to Buyer that lender(s)' approval has been received and no Offer modifications are
18 necessary. If the short sale is not approved by all lenders, or the terms and conditions or a lender's approval of the short
19 sale are not acceptable to Seller, Seller may terminate this Offer by written notice to Buyer not later than five days after Seller
20 receives written notice of the lender's action or inaction.

21 **THE FOLLOWING PROVISIONS ARE A PART OF THIS ADDENDUM ONLY IF MARKED, SUCH AS WITH "X":**

22 ☐ **"AS IS:"** Seller is selling the Property "as is." Seller has not made any warranty or representations regarding the
23 condition of the Property and will not make any repairs or cure any defects. Accordingly, Buyer is responsible for
24 determining the condition of the Property and has included all necessary inspection and testing contingencies in this Offer.

25 ☐ **DEADLINES RUN FROM TIME OF LENDER APPROVAL:** All deadlines (excluding the deadline(s) for payment of
26 earnest money), such as for the financing contingency and the home inspection contingency, shall run from the time the
27 lender approves the sale instead of acceptance of the Offer.

28 ☐ **DEADLINE FOR LENDER APPROVAL:** If Seller has not obtained all needed lender approvals on or before
29 _____, 20____, Buyer may terminate this Offer by written notice to Seller and Buyer's earnest money shall be
30 promptly returned.

31 ■ **ADDITIONAL PROVISIONS:** _____
32 _____
33 _____
34 _____
35 _____
36 _____

37 _____
38 (Buyer's Signature) ▲ (Date) ▲ (Buyer's Signature) ▲ (Date) ▲

39 _____
40 (Seller's Signature) ▲ (Date) ▲ (Seller's Signature) ▲ (Date) ▲

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