



McFerran, Burns & Stovall, P.S.
ATTORNEYS AT LAW

3906 S. 74th St., Tacoma, Washington 98409
Tel: 253.284.3838 ♦ Toll-Free 1-800.236.4948 ♦ Fax: 253.284.3841
(Also offices located in Seattle and Kent)
www.mbs-shortsales.com



ESCROW
CLOSER'S
SHORT SALE
INFORMATION
PACKAGE



3906 S. 74th St., Tacoma, Washington 98409
Tel: 253.471.1200 ♦ Toll-Free 1-800.236.4948 ♦ Fax: 253.284.3855
(Also offices located in Seattle and Kent)
www.mbs-shortsales.com

WHAT IS A SHORT SALE?

A "short sale" occurs when a mortgage lender or lenders agree to accept less than the total amount of money they are owed on a piece of real estate in order to facilitate the sale of that property.

This is generally accomplished when the owners of the property have fallen behind on their monthly mortgage payments and a foreclosure of the property is looming.

A "short sale" allows the property to be sold and the lender to recoup some of its losses. It also allows the homeowner or property owner to sell the property and avoid having a full foreclosure further ruin their credit and potentially severely impede their economic future for years to come.

WHAT QUALIFIES A PROPERTY FOR A SHORT SALE?

The owners of the property, in most cases, (V.A. Loans are an exception) generally must be at least thirty (30) days or more behind in their mortgage payments and facing a potential foreclosure action in order to qualify for a short sale with most mortgage lenders. Keep in mind that the investor who actually owns the loan determines these guidelines and they can vary from one investor to another.

Further, the owners generally must show a financial inability to get caught up with their mortgage payments as well as a further inability to then continue timely payments in the foreseeable future. A recent hardship, such as a loss of employment, may play favorably into the analysis.

The property value on the open market today must also be less than what the owners owe their mortgage lenders. We commonly say that the property is "under water" or "upside down."

WHY WOULD A LENDER ACCEPT LESS THAN WHAT IS OWED?

Foreclosures are a very expensive and time consuming legal action for mortgage lenders in our state. Once the approximate six (6) month non-judicial foreclosure process is completed and all the fees are paid, the lender then has to sell the property to try to recoup its money.

This involves the sale costs to the lender that the now foreclosed owner would have been facing if they tried to sell the property on their own. Repair costs, marketing costs, Realtor® commissions, appraiser costs, title fees, escrow fees, excise tax, property taxes as well as having their money tied up in a non-productive asset are all borne by the lender who foreclosed as they attempt to re-sell the foreclosed property.

In today's declining real estate marketplace there is a very good chance that lenders will still end up selling the property for even less money than they were owed except that now they have incurred all of these additional costs of foreclosing as well as all the carrying costs on the property, such as real estate taxes and utility bills, while the property sits vacant.

Because of these many costs and the unpredictability of the declining value of the property in the marketplace, a properly submitted and documented short sale lender proposal package can often be very appealing to a lender.

STATE-SPONSORED INFORMATION FOR DISTRESSED HOMEOWNERS

Escrow closers are often asked for information by consumers who are in financial distress. The State of Washington did, in early December 2010, publish a Seller's Advisory for Distressed Homeowners providing a basic understanding of sources where they may obtain help and assistance. We attach a copy of that publication and encourage you to copy and freely distribute it to your customers.



3906 S. 74th St., Tacoma, Washington 98409
Tel: 253.471.1200 ♦ Toll-Free 1-800.236.4948 ♦ Fax: 253.284.3855
(Also offices located in Seattle and Kent)
www.mbs-shortsales.com

WHO MAY LEGALLY NEGOTIATE SHORT SALES IN THE STATE OF WASHINGTON?

ONE STORY OF MANY

A lady recently came to our law office. She had sold property in the State of Washington which was subject to two loans. A Real Estate Agent in Washington had hired a company in Texas to negotiate this lady's short sale. The owner thought she was relieved of liability after the short sale, but such was not the case as she was dismayed to learn!

Now, two years later, both the primary lienholder and the second lienholder have assigned their debt to two collection companies for \$73K and \$26K respectively and they want money for those deficiencies.

The woman claims that she thought she was going to be relieved of all mortgage debt liability. The negotiator said she would, so she says. She says that the Agent said so as well. The Agent (now referred to as a Broker under Washington law) thinks he never said anything of the kind. The Broker had nothing to do with the negotiations and feels he has no liability.

The Broker, however, hired the Texas Company. The Broker has the paperwork and contract, but the Texas Company is no longer in existence. No one has any idea of whether there was insurance coverage or if there are any assets owned by the business. The contract says that there is no liability for negligence and that any claim must be litigated in the State of Texas. The seller never signed any agreement with that negotiator. The Broker never read the contract before signing it. The Managing Broker had no knowledge of any actions being taken in this transaction by his Broker.

This woman feels that her Broker has legal liability as she was under the impression that her debts were going to be relieved by the successful short sale. Does the woman have a case against the Broker? Against the negotiator? Against the buyer? Against the Managing Broker?

ANALYSIS

In the State of Washington, many people are negotiating short sales for sellers. Brokers are negotiating short sales themselves; others are hiring fellow Brokers, and still others are hiring companies all around the country to negotiate their short sales. Title companies are doing them. Attorneys are doing them. Escrow companies are doing them. Even Mortgage Brokers are doing them. The question remains: Is it legal for absolutely everybody to perform the services of a short sale negotiator for property in the State of Washington? The answer in the State of Washington is very clearly no.

WHO CAN NEGOTIATE SHORT SALES?

Only Washington State Licensed Real Estate Brokers, Washington State Licensed Mortgage Originators, and Washington State Licensed Attorneys can legally negotiate short sales in our state. All others (including those above-named parties outside the state not licensed in the State of Washington) are not authorized to conduct short sale negotiation activities inside the State of Washington. The laws and regulations are very clear.

Unless they are licensed Attorneys, licensed Mortgage Brokers or licensed Real Estate Brokers, neither Title Companies nor Independent Escrow Companies can legally perform short sales negotiations. Their licenses alone do not provide them authority to negotiate short sales.

In the State of Washington Real Estate Brokers may negotiate short sales for transactions for which they are actually providing real estate brokerage services only so long as the fee charged is not in excess of the ordinary and customary commission charged for the typical sales transaction with NO UPCHARGE or SURCHARGE for the inclusion of short sale negotiations. We all know that short sales require a considerable amount more work and effort, but Real Estate Brokers may not charge any additional fee unless they hold additional licensing as a Mortgage Loan Originator and can comply with the regulations associated with that license.

Licensed Real Estate Brokers are narrowly exempt under the Mortgage Brokers Practices Act allowing them to negotiate short sales. What this means is that the Broker must actually provide brokerage services for the transaction. That same Broker must actually conduct the short sale negotiations. If a real estate licensee is only acting as a negotiator in the transaction, then the exemption does not apply and that Real Estate Broker must be a Licensed Mortgage Loan Originator in order to perform short sale negotiation services. A Real Estate Broker is not allowed to hire another Real Estate Broker, who is not an active co-listing Broker in the same actual transaction, to perform negotiation services even under a commission-sharing arrangement or referral fee basis.

SHORT SALE GUIDANCE FOR LICENSEES

The State of Washington Department of Licensing did in early December 2010 publish definitive guidance to Real Estate Licensees as to their ability to conduct short sale negotiations in the State of Washington.

As we find many Licensees still not fully aware of the Regulations, we attach herein a copy of that state publication. We encourage all escrow closers to read these guidance materials, and to freely copy and distribute them to your real estate brokers customers.



3906 S. 74th St., Tacoma, Washington 98409
Tel: 253.471.1200 ♦ Toll-Free 1-800.236.4948 ♦ Fax: 253.284.3855
(Also offices located in Seattle and Kent)
www.mbs-shortsales.com

FORECLOSURE FAIRNESS ACT

On July 22, 2011, the Washington State Foreclosure Fairness Act ("Act") became effective. It requires lenders to give borrowers an opportunity to mediate alternatives to foreclosure.

Qualifications:

To be eligible for a mediation, a borrower must:

1. Be an owner occupier of the subject property; and,
2. Be referred to Mediation by an attorney or housing counselor.

Two-Step Process:

1. The Act has two distinct opportunities to meet with the lender. The first, dubbed "the meet and greet" must be requested by the homeowner within thirty (30) days of the receipt of certain notices from the lender. The meet and greet is to occur within ninety (90) days of that lender's notice and this initial meeting process delays issuance of the Notice of Default (start of foreclosure) until this requested meeting is held.
2. The second step is the Mediation. One does not have to participate in the meet and greet to have a Mediation. The information in this packet relates to the Mediation – Step #2.

What a Mediation Does:

1. Upon receipt of the timely request from an Owner Occupant, a mediation must be held within forty-five (45) days of the referral to Mediation by an attorney or housing counselor. This provides an opportunity to attempt to reach a resolution with the lender regarding matters of the homeowner's inability to make timely monthly payments.
2. A mediation delays the issuance of a Notice of Trustee's Sale until the requested mediation has occurred. The Notice of Trustee's Sale starts a minimum ninety (90) day process prior to a foreclosure sale occurring.
3. A Mediation may be requested only by an attorney or housing counselor. An owner may not initiate a Mediation without an attorney or a housing counselor referral. If the "meet and greet" and Mediation take place, and are unsuccessful, the foreclosure process may be delayed upwards of four (4) months or longer.

Borrower's Responsibilities:

1. Request mediation through attorney or housing counselor referral.
2. Supply ten (10) days prior to the mediation:
 - a. Two (2) years' tax returns.
 - b. Current income information.
 - c. Future income information.
 - d. Debts and obligations from sixty (60) days prior or longer as required by the mediator.
 - e. If applicable, we are requesting HAMP compliance paperwork to help streamline bank approvals as certain loans, particularly Fannie Mae and Freddie Mac loans, require such paperwork under federal regulations.
3. Mediate in good faith, which means among other things, timely supplying the above information to the mediator.

Lender's Responsibilities:

1. Provide notice of right to mediate to borrower as required by statute.
2. Supply ten (10) days prior to mediation:
 - a. Loan balance.
 - b. Copies of Promissory Note and Deed of Trust.
 - c. Proof of ownership of Promissory Note.
 - d. Estimate of arrearages outstanding.
 - e. Estimate of charges/fees outstanding.
 - f. 12 month payment history with breakdown of fees and charges.
 - g. Analysis of net present value of loan.
 - h. Explanation of reasons for past denials of loan modifications.
 - i. Most recent appraisal/broker price opinion.
 - j. Any "pooling agreements" restricting modifications.
3. Mediate in good faith.

Possible Mediation Results:

1. Restructure loan, modification, forbearance, short sale, other foreclosure alternatives.
2. No resolution and lender pursues foreclosure.
3. Determination the bank failed to negotiate in good faith.

The restructured loan may have (a) reduced interest rate; (b) principal reduction or deferment; (c) extended term; (d) changes in loan type; (e) combination of (a) through (d).

If there is no resolution, the lender may continue a foreclosure and issue a Notice of Trustee's Sale. This Notice sets the foreclosure sale date at least ninety (90) days in the future. Should the mediator decide the lender failed to mediate in good faith, it may be a defense or preclude a non-judicial foreclosure. The law actually is contradictory and confusing how this works. Still, it is clear the legislature wanted to discourage lenders from negotiating in bad faith and then pursuing the foreclosure action. To assert this defense, there are specific statutory steps that must be taken in court, which are beyond the scope of the fixed fee mediation.

Benefits of Statutory Mediation:

1. Possibility of restructuring loan.
2. Possibility of saving home.
3. Requirement that a decision maker is available at mediation.
4. Potentially avoiding a foreclosure's effect on credit.
5. Statutory duty of lender to negotiate in good faith.
6. Possible defenses to foreclosure.
7. Delay of foreclosure.

Should Mediation Fail:

1. You may cure defaults and continue to pay on the original loan.
2. You can engage in a short sale.
3. You can let home go in foreclosure.
4. You can conduct further negotiations with your lender.
5. You may be able to sue for a restraining order against the initiation of a foreclosure.
6. You may file for bankruptcy protection, if eligible.

CONSUMER INFORMATION ABOUT THE FORECLOSURE FAIRNESS ACT

We thank Columbia Legal Services that has prepared a series of consumer pieces about the Foreclosure Fairness Act. We attach those materials and encourage you to copy and distribute them to your real estate brokers and distressed homeowner customers.

WHY DO WE PROVIDE THIS INFORMATION TO ESCROW CLOSERS?

This is a brand new law. In our practice, we find that very few brokers are presently aware of this new Consumer Protection statute for those facing foreclosure. As you interact with both brokers and distressed homeowners, we encourage you to help us educate the marketplace about this important new Consumer Protection statute.

3906 S. 74th St., Tacoma, Washington 98409
Tel: 253.471.1200 ♦ Toll-Free 1-800.236.4948 ♦ Fax: 253.284.3855
(Also offices located in Seattle and Kent)
www.mbs-shortsales.com

SALE AND FORECLOSURE EFFECTS ON CREDIT AND ABILITY TO REPURCHASE

To Short Sale or Not Short Sale - That IS the Question

Sellers many times wonder whether allowing their property go into foreclosure would be easier or smarter than going through the tedious short sale process. This short article is not intended to be an exhaustive treatise on the subject, but to address credit and repurchase impacts of a short sale.

Most foreclosures in the State of Washington are non-judicial, which means that the foreclosure lender looks only to the value of the property and not to the debtor or their other assets for recovery. In fact, the debtor can stay in the property rent free during the five to six month foreclosure process and still remain almost a month after the foreclosure is completed before being forcefully evicted. Sellers are many times advised by their legal counsel of the benefits of allowing a foreclosure to occur in light of this resulting anti-deficiency. Remember that this generally speaks of only the foreclosing lender in first or primary position.

A short sale in the State of Washington generally involves offering the home for sale through a listing with the local multiple listing service. In most cases, buyers will view the house. There will be open houses. Offers may be made on the property. Sellers are required to have some active involvement in the sale of the property.

Short Sales in a Nutshell

Sometimes the value of certain residential property, after accounting for transaction costs of sale or transfer, may be less than the amount that is actually owed the lender for that property. A negotiated payoff less than what is owed is a short sale. Not all

Lenders will negotiate a short sale. A real estate attorney can be of tremendous assistance in negotiating those matters with the lender. In

many instances, short sale negotiations are only available to borrowers who are already behind in their payments to the lender.

Credit Impact of a Short Sale

This author has contacted a goodly number of lenders and mortgage brokers to ascertain whether a foreclosure is more detrimental than a short sale to a borrower's credit rating. A recent study by Vantage Score has shown a far less impact to credit by a short sale versus a foreclosure.

When a lender completes a foreclosure against a borrower, the detrimental credit score impact under FICO will be as high as 250-300 points according to an informal survey of mortgage lenders and mortgage bankers recently conducted. All agreed that a full foreclosure will have a significant detrimental impact on the credit score of the debtor. The real question is whether a short sale is as credit damaging as a foreclosure. In a report by Vantage Score that survey indicated a loss of about one-half to one-third as many FICO points for a short sale versus a full foreclosure. The study found that generally a short sale is far less credit damaging than a full foreclosure. That study indicated a FICO score impact of 75-125 points against the seller in a typical short sale transaction.

Buying Another Home

The current changes in underwriting by lenders in a marketplace recoiling from the current sub-prime credit crunch makes any accurate prediction on repurchase ability difficult to determine at least in the short run.

Currently, F.H.A., V.A. and other government assisted loan programs have by policy indicated that they will allow a borrower with hardship shown to obtain a new government mortgage loan in three (3) years after a full foreclosure. Conventional lenders have not provided such certainty and we can only infer a four (4) to five (5) years foreclosure impediment.

The ability to repurchase is greatly enhanced with a short sale versus a foreclosure. In fact, in some instances with government financing, there could be no waiting period whatsoever. However, that is the exception not the rule. The current conventional attitude is that a waiting period of 18-24 months with shown hardship could sustain a new governmental mortgage loan and a bit longer time for conventional sources.

3906 S. 74th St., Tacoma, Washington 98409
Tel: 253.471.1200 ♦ Toll-Free 1-800.236.4948 ♦ Fax: 253.284.3855
(Also offices located in Seattle and Kent)
www.mbs-shortsales.com

CONGRESS PASSES CHANGES TO TAX LAW **AFFECTING FORECLOSURES AND SHORT** **SALES**

After a number of years of loosening credit standards, our nation is now seeing the impact of substantial tightening of credit in the various real estate markets. As a result, values of real estate collateral are collapsing; debtors are allowing their properties to be foreclosed and many are merely walking away from their homes. In some instances, a seller may look to a short sale as an exit strategy.

Short Sales in a Nutshell

A short sale involves a property whose value is generally less than the amount owed the lender, especially when one accounts for transaction costs associated with the sale. Most sellers hope that the lender will forgive any remaining amounts owed after the completion of the short sale. However, up until December 20, 2007, the amounts forgiven by the lender were still taxable income to the borrower and were, many times, an unknown and unexpected tax consequence of a foreclosure or short sale.

Recourse vs. Non-recourse Financing

In the State of Washington most borrowing by debtors is "recourse financing." What this means is that a lender may hold the debtor personally liable for the amount of the debt. "Non-recourse financing" means that the lender may look only to the collateral offered to satisfy the debt. In California, most mortgages that are used to purchase residential properties are non-recourse. Such is generally not the case in the State of Washington.

However, in the State of Washington, most foreclosures are conducted in a fashion that results in the borrower being relieved (under Washington State foreclosure law) of any further obligation or liability for payment of the debt by virtue of the lender using a non-judicial method to foreclose. In

short, the debt becomes non-recourse by virtue of the foreclosure method employed by that lender.

Short Sales and Deficiencies

Most sellers seeking a short sale automatically assume that any amounts owed the debtor over and above the sale amount will somehow be "forgiven." This understanding occurs because in many states, such as California, the rules require the lender to forgive the debt in some certain specific situations. Such is not the case in the State of Washington and many times this surprises borrowers and real estate professionals alike who do not anticipate its impact. In Washington, one must negotiate a waiver or forgiveness or the lender (including second or third lenders) may be entitled to collect the deficiency amount after the short sale closes and for years into the future. Don't leave yourself exposed to such harmful economic impacts. We highly encourage you to speak with an attorney on this matter.

Phantom Tax on Debt Forgiveness

If the debt is forgiven by the process of foreclosure in the State of Washington or if the debt is forgiven by the lender itself, up until just recently, the cancellation of debt was deemed income under the Federal Tax Code in most instances.

Effective December 20, 2007, President Bush signed into law the Mortgage Forgiveness Debt Relief Act of 2007. This Act amends the Internal Revenue Service Code to exclude from gross income amounts attributable to a discharge, prior to December 31, 2012, of indebtedness incurred to acquire a primary residence. The Act limits to \$2 million the excludable amount of such forgiveness. As a formula, it reduces the basis of a principal residence by the amount of the discharged indebtedness excluded from gross income. It only applies to one's primary residence and not to investment property.

This is Great News for Taxpayers

This Act effectively provides taxpayers a reprieve through December 31, 2012 in order to get their financial holdings in better order and eliminates the tax impact on most taxpayers of the previous phantom tax imposed by debt forgiveness. However, Washington State taxpayers will need to be vigilant as it will be important for them to always negotiate a forgiveness of debt with their lender on a short sale in order to feel confident that no economic liability will arise after the sale knowing, as they will, that there will be no adverse tax ramifications for the debt amount forgiven by virtue of the new federal law.

3906 S. 74th St., Tacoma, Washington 98409
Tel: 253.471.1200 ♦ Toll-Free 1-800.236.4948 ♦ Fax: 253.284.3855
(Also offices located in Seattle and Kent)
www.mbs-shortsales.com

SHORT SALE CONSIDERATIONS FOR ESCROW CLOSERS

In any short sale there are frustrations for all parties involved because of the seemingly long delays in order to complete short sale negotiations. Below you will find a listing of points and considerations that will provide you a better understanding of the negotiation process:

- A "typical" short negotiation takes no less than two (2) months for lenders other than Bank of America. As we progress through the recession, we are seeing a gradual increase in the speed of negotiations with various banks around the country.
- A "typical" Countrywide (now Bank of America) short sale may take as long as three (3) months, but with the technological advances of "Equator" we are greatly speeding up that process.
- If the transaction involves two (2) or more loans keep in mind that all the different lenders must agree as to a settlement. That takes extra time to get them to agree to the same terms. If they ultimately do not agree, the short sale negotiations will fail. A stubborn junior mortgage lender can cause a short sale to fail. While it does not often occur, it can.
- The lender or bank in first position is many times only contracted to service the loan and doesn't actually own the loan in first position. They will transmit information to outsiders like the investor/owner of the loan or the mortgage insurance company. Those outside parties will actually make the decision about whether or not they will accept the short sale proposal. Most of your sellers will be very surprised by this fact.
- Banks are totally swamped with short sale applications and as more applications arrive the time periods for processing become extended. We expect this to only get worse in the future as the number of cases increase.

- It generally takes a negotiator as long as a week to get "into the bank's system" and be authorized to communicate on the seller's behalf by virtue of their acceptance of our authorization to act on the seller's behalf.
- It generally takes one (1) to two (2) weeks for the bank to up-load and assemble that initial package into their electronic system for processing. Everything is done in an electronic fashion and it takes time for them to incorporate the data into their system.
- Bank's internal negotiators are generally provided thirty (30) days (and sometimes up to sixty (60) days) for initial review of the package presented to each bank or mortgage lender.
- Expect that a type of independent appraisal by an outside real estate professional will probably be ordered by the bank. Expect that that whole process of property valuation from start to finish usually takes about two (2) to three (3) weeks. This is what we call a "BPO."
- Expect that, notwithstanding that you wait forever for a response, the bank will give your negotiator only about 48 hours notice of any action required including additional documentation requests or actual negotiations. Please expect this. This is a common industry practice. Plan on having the negotiator provide updated paystubs, checking statements and other documentation on an ongoing basis during the short sale negotiations.
- Expect that the bank will lose the whole electronic package at least once during the time of your seller's short sale negotiations.
- The information that the seller provides must be complete and timely. If it is too old, lenders will call the data "stale" and reject the short sale application.

- Banks are anxious to close files (and eliminate work for themselves) and will use every excuse to close a file if they have an opportunity. Expect this to happen at least once or twice during a typical short sale negotiation.

- Always obtain up-to-date title information and "date-downs" as distressed homeowners have a higher probability of having liens placed on their property with no notice to escrow or the negotiator.

- Always make certain that all borrowers sign the appraisal letter even when one borrower (such as in a divorce) may not be in title on the property.

- Always make sure your "HUD" has the names matching the Deed of Trust for sellers.

- Always address HOA dues, transfer fees and liens during the negotiations.

G:\University\Escrow Closers Short Sale Packet\InfoPacket.112711.doc