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REAL PROPERTY

Agreeing to Disagree

By Andrew Lieb and Ivan Young

As the co-chairs of the Real Property Committee, we had met to set an agenda for the committee into the New Year. At one of these meetings, the co-chairs began a heated debate about the pros

and cons of short sales and agreed to share our positions with the local bar. As you can tell, we have agreed to disagree, but we ask you to join our debate and consider your own position when providing legal services to distressed homeowners.

Short Sales — A Great Option

By Andrew Lieb

A short sale benefits the homeowner

If you picked up your telephone and your attorney said to you that he just got you \$200,000 in a settlement, you would jump up and



Andrew Lieb

down thinking the world was just right. Yet, when a short sale attorney calls the same client to say that the mortgagee/bank has waived their potential deficiency judgment of \$200,000 and will accept the proceeds in full satisfaction of the note, everyone acts like the homeowner got nothing. This is simply not true. The homeowner got the benefit of not owing \$200,000 and this is a huge windfall. Yes, the homeowner is not walking away with a wad of cash in his pocket, but he is avoiding a judgment that can haunt him for the next 20 years. Moreover, if the homeowner is utilizing the Home Affordability Foreclosure Alternatives Program, they will also receive \$3,000 in relocation assistance. So, this homeowner who has not paid their mortgage note, is in default and potentially owes hundreds of thousands of dollars is being paid to quietly leave. This does not sound so bad.

A cash for keys scenario, called a Deed-in-Lieu may also be a good option, but lenders are typically looking for the distressed homeowner to attempt a short sale before going down this route. It's simple. A Deed-in-Lieu requires a lender to take a home, than to sell that recently acquired home; whereas a short sale is a 1 step process of just selling the home without ever taking a deed with all of the transaction costs inherent therein. Therefore, lenders prefer short sales. Further, the application package is substantially similar for both types of workouts and therefore a good short sale attorney will have the requisite documentation prepared for either option that the lender prefers in each specific tailored situation. The key to working with distressed homeowners is not being a short sale attorney, a Deed-in-Lieu attorney or a Bankruptcy attorney, but instead serving as a general foreclosure defense attorney who uses all tools in his arsenal in order to avoid a deficiency judgment being placed upon your client.

Being in default hurts your credit

We are not dealing with credit worthy clients when we are representing distressed homeowners and credit should be the least of their worries. Yet, it must be specified that a proper short sale includes a waiver of a deficiency judgment and therefore a judgment remaining on a client's credit report is a misnomer. Moreover, short sales, typically entitled "settled for less" on a credit report usually result in a FICO score decline of approximately 100 points compared to a 200 point decline for a foreclosure. To be clear, a foreclosure generally remains on a

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Short Sale Benefits Homeowner (Continued from page 16)

credit report for seven years. Moreover, a foreclosure and a Deed-in-Lieu must be indicated on a Uniform Residential Loan Application, Form 1003, for seven years whereas a short sale is not expressly questioned thereon.

Income tax is typically waived incident to a short sale

Pursuant to the Mortgage Forgiveness Debt Relief Act of 2007 (the Act), cancellation of debt income is a forgiven incident to a short sale for up to two million through 2012. Yes, to qualify under the Act, the debt must expressly relate to a distressed homeowner's principal residence without any prior cash out having derived from a refinance where the utilization of the cash was not related to the principal residence, but as you can see cancellation of debt income is forgiven

without tax. Therefore, a short sale attorney should check their client's HUD-1 Statements from a refinance to corroborate the homeowner's explanation of the utilization of the funds. Yet, insolvent clients can also avoid cancellation of debt income regardless of property type, so this avenue for avoiding income tax should also be explored.

Saving face

Yes, a homeowner can simply file a Chapter 7 Bankruptcy and avoid a deficiency judgment. Yet, many homeowners cannot emotionally coup with bankruptcy. Moreover, a Chapter 7 Bankruptcy is only available to homeowners who pass the means test and have not filed in the prior eight years. Therefore, many distressed homeowners will not qualify. To not favor a treat-

ment, does not mean a practitioner should avoid a treatment option. The foreclosure defense attorney's job is to zealously advocate for their distressed homeowner's legal rights. In such, all legal strategies should be explored and a tailored approach should be selected that both meets the client's legal needs and emotional desires.

It is this attorney's opinion that short sales are good for some clients and a benefit has nothing to do with impropriety. In fact, incident to every short sale a client is required to sign an Arms-Length Affidavit evidencing that the purchaser is not related in blood or business to the seller. Moreover, short sales transpiring under the Home Affordability Foreclosure Alternatives Program require that purchasers not sell the property within 90 calendar days of closing. To learn more about every workout

option, the practitioner is directed to the Making Home Affordable Program Handbook at the following web address: https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_32.pdf

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a family-also the founder and lead instructor of the firm's New York State licensed Real Estate School, which serves as the Pro Bono arm of Lieb at Law offering continuing education courses to Real Estate Agents and Brokers. Additionally, Mr. Lieb actively instructs continuing legal education courses at Nassau Community College, a former Faculty Member of the Suffolk Academy of Law, and a former Associate Instructor at Indiana University.

Short Sales – Not Always Best Option

By Ivan Young



Ivan Young

In today's troubling economic climate, more and more homeowner's find themselves in a distressed financial situation either delinquent in paying their mortgage or are paying a mortgage on a house that is "underwater" (i.e., the outstanding mortgage exceeds the current market value of the property). Although there are many options for distressed homeowner's (i.e., loan modification, foreclosure defense, forbearance and/or repayment agreement, deed-in-lieu, partial claim, short refinance, and cash-for-keys), one of the most widely known and heavily advertised option is the "short sale."

Generally speaking, a short sale is when the bank or an investor agrees to the sale of a real estate property for an amount less than the full amount of the outstanding balance that is owed on the property. The difference between the selling price of the property and the full amount of the outstanding balance owed on the same to the bank or the investor is known as a deficiency! Distressed homeowners are usually solicited by their bank, investor, real estate agents, and general information websites which represents that a short sale will "cure" their distressed situation. This is simply not true.

Listed below are four specific reasons why a short sale almost always does NOT benefit a distressed homeowner:

A short sale benefits many people other than the distressed homeowner

A short sale benefits the mortgage lender, the investor, the realtor and the purchaser of the property greatly. In a short sale, the mortgage lender doesn't have to foreclose (and pay for the foreclosure related fees, property taxes, homeowner's insurance, maintenance fees, eviction costs, REO broker commission fees nor wait the 24-60 months it may take to actually foreclose). The realtor selling the property will get a commission from the sale, usually around 6 percent of the sale price. Lastly, the purchaser usually gets a move-in ready home for under market value. In contrast, the distressed homeowner, who is the only party that receives no monetary benefit at the closing, must leave their home, disrupting their family's life particularly with children that must change schools, and begin the insurmountable task of finding a rental with no cash in their pocket and terrible credit.

If the distressed homeowner were not to do a short sale, they could save their money for as many months as it takes to foreclose on them, then usually negotiate with the lender to pay them a few thousand dollars for cash-for-keys to leave the property without destroying it nor forcing the lender to perform an eviction proceeding.

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Short Sale Not Always The Best Option (Continued from page 16)

A short sale hurts your credit

Don't believe the hype being put forth today by various industries and media outlets. A short sale causes the same harm to your credit as a foreclosure or a bankruptcy, if not more, should the lender or investor obtain a deficiency judgment against a homeowner which is reported on their credit for the next 20 years. At least with bankruptcy (i.e. Chapter 7), the homeowner is discharged of their debts and can begin rebuilding their credit within months after filing for bankruptcy.

You may owe taxes as the result of a short sale

Distressed homeowner may receive a 1099-C reflecting the difference between what they owed and what the mortgage lender agreed to accept in a short sale. *This amount is considered income, and the homeowners will have to pay taxes on it.*

There are some exceptions to this general rule, such as insolvency and certain types of mortgage debt, so the homeowner is best advised to first consult with their tax adviser, which will usually cost them more money as well before proceeding with the short sale. *(See the Mortgage Forgiveness Debt Relief Act of 2007.)*

The debt might not be forgiven

In many cases although the lender agrees to remove the lien from the property so it can be sold, the homeowner's personal obligation for the debt is usually not released. In other words, the lender isn't accepting the short sale amount as payment in full. This is particularly true of second mortgages.

It is this attorney's opinion that if a short sale somehow benefits the homeowner it is probably because something is being done illegally (i.e. the homeowner remains in the house after the short sale,

house is being sold to a family member or close friend or receives money at the closing.) Should any of these situations occur when representing a party at a short sale, I urge that you ask many questions about any part of the transaction and have documentation for any questionable part of the transaction. Being a participant to any illegal scheme of a short sale is not worth your practice, law license or reputation.

Note: Ivan E. Young is Principal Counsel at the Young Law Group, PLLC, founded for the sole purpose of providing a new level of legal experience and expertise to individuals and

businesses that are experiencing one or more financial hardships and/or financially related legal predicaments. Mr. Young's area of practice includes but not limited to foreclosure defense, modification, bankruptcy, real estate, criminal, family law, motion practice. Mr. Young is the Co-Chair of the Real Property Committee and a member of the Suffolk County Bar Association, of the New York State Bar Association, of the American Bar Association, of Amistad, of the Long Island Hispanic Bar Association and a member of the National Hispanic Bar Association.

1. http://en.wikipedia.org/wiki/Short_sale_%28real_estate%29