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**SETTING REASONABLE EXPECTATIONS**  
**IN SHORT SALE TRANSACTIONS**

Mainstreet Organization of Realtors®

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## **SETTING REASONABLE EXPECTATIONS IN SHORT SALE TRANSACTIONS**

The concept of “Short Sales” in real estate transactions is not new. However, in today’s economic environment, the incidences of short sales in residential real estate transactions are growing at an increasing rate as the market value of residential real estate continues to decline in most markets.

It is generally anticipated that the market value of residential real estate will continue to decline, at least in the short run, as the supply of residential property in distressed financial condition continues to increase, especially due to rising unemployment.

For those who represent the sellers or buyers of financially-distressed homes, the process of obtaining the necessary approvals and closing the transaction can be very frustrating unless the expectations of both the probability that the transaction will be approved and the time span necessary to successfully complete the transaction are realistic.

## **KNOW WHAT IS ENTAILED IN A SHORT SALE**

A “short sale” is a real estate transaction in which the Purchase Price offered by the Buyer is less than the amount necessary to pay-off (a) all of the claims, liens and encumbrances, including mortgages and (b) all of the costs of the transaction, including title insurance, transfer taxes, broker commissions and attorney fees.

Because many of the other HUD-1 line items to be paid out of the Purchase Price are non-negotiable, the essential component of a short sale is that the mortgagee(s) must agree to fully release their mortgage liens in return for an agreed-upon “short payoff” of the net proceeds of the Purchase Price. In many cases, because the short payoff is insufficient to pay the senior mortgagee, junior mortgagees may receive none of the proceeds of the sale.

If you are representing the Seller(s) of the property, before you complete the Listing Agreement and set the Listing Price with the Seller(s), you should carefully prepare a Net Sheet using the form approved by MORE®. If the Net Sheet indicates that a sale of the property at the Listing Price will result in a Short Sale, then be sure to add the Listing Agreement Short Sale Addendum using the form approved by MORE®. Also, in addition to the Multi-Board Residential Real Estate Contract 5.0©, you should anticipate having the Short Sale Addendum to the Multi-Board Residential Real Estate Contract 5.0© executed by the Seller(s) and Buyer(s).

You should also advise the Seller(s) that, in order to obtain the essential approvals of all of the mortgagees and lienholders on a timely basis, the Seller(s) will be required to provide to the mortgagees and lienholders a number of documents, comprising what is generally referred to as the “Short Sale Package”. Exhibit A is a comprehensive list of the documents necessary for the short sale package, however each lender/servicer has their own procedures as to which of these documents they require and how (and when) they want these documents submitted to them.

In order to set reasonable expectations of Seller(s) and Buyer(s) as to when and if the proposed short sale will be approved by the necessary lienholders on terms acceptable to the Seller(s) and Buyer(s), it is helpful to know as much information about the specific transaction as possible.

### **KNOW THE PROPERTY**

- Was the property principal residence or investment?
- **Is the projected short pay-off relative to the market value of the property?**
- Is the projected closing date in the contract realistic based on the circumstances?
- What is the condition of the Property?
- **Does the general condition of the property or other factors dictate a lower market value than comparable properties?**
- Based on the Real Property Disclosures, are there major defects in the property?
- If the property is a condominium (or otherwise subject to declarations and by-laws):
  - a. is there a limit or prohibition on rentals?
  - b. is there a right of first refusal?
  - c. what is the financial condition of the Association?

### **KNOW THE HOMEOWNERS**

- Has the homeowner already considered the alternatives to a short sale?
- **Who will be “driving” the short sale for the homeowner?**
- Is the property part of an estate of a deceased homeowner?
- **Is the property subject to a bankruptcy or may become subject to a bankruptcy before the sale is closed?**
- Is the homeowner being represented by legal counsel?
- Is the homeowner being proactive in dealing with the financial distress?
- Is the Seller informed of the potential tax liability resulting from the short sale?

### **KNOW THE LENDER / SERVICER**

- **Is the first mortgage held by a lender or being serviced by a Servicer under a PSA?**

- **Are there any existing or pending government programs or legislation which would incent or deter the Lender from processing the short sale and taking the loss?**
- What is the general financial condition of the Lender?
- What is the reputation of the Lender/Servicer in dealing with loss mitigation?
- If the Lender / Servicer rejects deductions for some of Sellers costs (such as closing cost credits, surveys, property tax reপরations, home warranties, will/can the Seller bear such costs or will the Buyer(s) waive or absorb them?

### **KNOW THE MORTGAGES AND OTHER LIENS**

- Is the first mortgage on the property in default?
- Are there unpaid property taxes and, if so, have they been sold?
- **Has foreclosure been initiated?**  
If so, how long ago was the property owner served with the Summons and Complaint?
- **Has the Lender/Servicer already rejected prior offers on the property?**
- Has the homeowners mortgage documentation been reviewed for possible defenses?
- Are there any other mortgages on the property?
- **Are there any other liens on the property (such as state or federal tax liens, judgment liens, etc.)?**

## EXHIBIT A

### WHAT DOCUMENTS COMPRISE A SHORT SALE PACKAGE?

The requirements of the various Lenders and Servicers for approval of a short payoff vary greatly. The Seller(s) should be prepared to provide the following documents:

1. Authorization Letter signed by all mortgagees;
2. Payoff requests by the Seller;
3. Proof of Valuation for the Property (a full appraisal performed on the property by a certified appraiser or a Broker Price Opinion (BPO) reflecting valuation based on current values, condition of the property and the neighborhood, including any necessary repairs;
4. Draft HUD-1 RESPA Settlement Statement as of a projected closing date reflecting commissions, closing costs, payoff amounts, interest due, late fees, attorneys fees, association dues and fees, transfer taxes, closing costs and title insurance policies, etc.
5. Hardship Letter (handwritten (if legible), signed and dated);
6. Pay stubs covering 2 full pay periods (or 30 days), including a year-to-date amount.
7. W-2's for the prior 2 years.
8. Federal and State income tax returns and schedules for prior 2 years;
9. Bank statements for prior 2 months;
10. Evidence of other assets, including most recent quarterly statements for all retirement, stock, CD, money markets, etc.
11. Debtor's budget and cash flow demonstrating limited disposable income;
12. Most recent escrow analysis reflecting past due taxes or other encumbrances;
13. Copy of existing listing agreement with stated commissions;
14. Copy of MLS Listing reflecting market time;
15. Copy of fully executed contract and all attachments and modifications;
16. Estimated closing date.

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**DENNIS R. BORDYN** has been practicing law in Illinois since 1982 in both private practice and as in-house counsel in the Chicago offices of major commercial equipment finance and leasing companies, including Associates Commercial Corporation and Chase Manhattan Leasing Company. His private practice has been concentrated in commercial and residential real estate, estate planning, commercial equipment finance and leasing, and small business organizations.

In addition to the practice of law, Mr. Bordyn also has extensive business experience. He held various operations and credit positions with Ford Motor Credit Company and Litton Industries Credit.

In 1990, he co-founded Relational LLC in Rolling Meadows, IL and served as Vice President and General Counsel as the company grew to revenues in excess of \$300 million and over 300 employees in the United States and Canada. In 2001, he co-founded Signified Investments LLC, a private investment firm.

Mr. Bordyn also served on the Boards of Directors of two Chicago banks, including 9 years as Chairman of the Board of a local bank.

He was published in the ISBA Agricultural Law Section Newsletter, Aug. 2004 "The Use of Lis Pendens Notices" and has been a speaker at CLE presentations to the DuPage County Bar Association Real Estate Law & Practice Committee, Illinois Institute of Continuing Legal Education, the Northwest Suburban Bar Association, as well as title company agents and community groups, on subjects such as foreclosure defenses, loss mitigation and conflicts of interest in real estate transactions.

He has lived in Downers Grove, IL since 1985 with his wife and son. His personal interests include skiing and learning classical guitar.

EDUCATION

University of Notre Dame - Bachelor of Arts (May 1973)

DePaul University School of Law - Juris Doctorate (February 1982)

ASSOCIATIONS

American Bar Association - Business Law Section

Illinois State Bar Association

DuPage County Bar Association - Chairman of 2008-2009 Real Estate Law & Practice Committee

Chicago Bar Association

Illinois Real Estate Lawyers Association - Director (2008 - present)

Mainstreet Organization of Realtors® Broker/Lawyer Committee - Member (2007 - present)

University of Notre Dame Sorin Society

Deer Valley Club - Board of Trustees (2009 - present)