

“ Mark” - I heard that the Anti- Deficiency ruling may not apply to short sales is this true?

“ Carlton” - It is true that the Arizona anti-deficiency statute does not address or even mention short sales. It is true that a short sale is a taxable event that will result in debt relief to the borrower, which is then taxable (unless the 2007 Mortgage Debt Relief Act applies). But it is unclear, at least in my opinion, whether a short sale permits the lender to seek a deficiency judgment against the borrower. Of course it is good advice to get a waiver from the lender about the deficiency -- that makes it very clear no deficiency can be sought by the lender. The real question is whether a lender can pursue a deficiency when the lender has agreed to a short sale. The lender would argue that a deficiency was not waived. The borrower, probably citing the Gardner case, would argue that if the lender could not get a deficiency by foreclosing on the deed of trust, then the lender should not be able to get a deficiency by any other means. That specific issue has not yet been decided by an appellate court, so there is no way of knowing the "correct" answer.

Okay not to flog a dead horse my friend – The seconds are demanding promissory notes and cash from buyer and seller to allow the sale after the first has paid them 3-5k if they don't get it they won't let the short sale go through do we have any way to make them work with us other than send them your opinion letter and hope they see reason. Many people are suggesting sign the note, don't pay it and then use bk to get out of it, sign it and then renegotiate it, sign it and hope they don't sue you. A few months ago our tactics worked –but now banks are following a very strict script to the point that if the agent doesn't verbally accept the deal on the phone the second is giving them 24 hours to respond and then cancelling the file and sending it to collections!

As always thanks for your help – I know that it might appear I am asking the same question in a different way expecting a different answer – but this process is so organic and these seconds have taken on a collection mentality and are being very rude and aggressive and the rational of we got you 5k be happy its better than nothing doesn't work anymore they appear to want to punish the borrower...any additional guidance would be appreciated and again bill me for your time

The first, second or any other lien holder may stand on their contractual rights and refuse (for any reason or no reason) to not allow a short sale. The other situation, which you and I have discussed, is when the lien holder (whatever position) initially agrees to the short sale and then makes additional demands (i.e., a promissory note for the deficiency, etc.) shortly before close of escrow. My opinion is that a borrower would have a claim for "breach of the covenant of good faith and fair dealing" and/or "breach of contract" and/or some related claims. The problems, of course, are: (1) the borrower may not have money to hire a lawyer to pursue those claims and (2) prevailing on any claim will be difficult unless there is good "evidence." Evidence includes witnesses and especially documents.

My recommendation is to document the file so that the borrower could prevail if litigation is commenced, but more importantly make sure everyone (i.e., borrower and lender) are clear about the terms of any anticipated short sale. For example, upon initial contact with the lender (either by you or the borrower) and preliminary (i.e., telephonic) approval of a short sale, a confirming letter should be sent to the lender. The letter should identify each of the specific terms of the "agreement" AND include language: (1) that states the lender will not pursue a deficiency, whether or not a deficiency is available under the law, (2) all the terms and conditions of the short sale are included in the letter and the lender will not request or require a promissory note from the borrower for any amount, and (3) the person signing the letter has the authority to enter into the agreement on behalf of the lender (which makes that individual personally liable for any "misstatements").

Many of the seconds continue to ask for a promissory note and force the issue, using various collection tactics – what do we do as professionals knowing what we know, and having argued our case till we are blue in the face and some kid on the other line clearly doesn't care. How can we best advise our clients?

From the seller/borrower's perspective, the seller wants to do what is good for the seller. Selling the property via short sale nets the seller nothing, but at least there is no foreclosure on their record. If any lien holder demands that the seller sign a personal note for any deficiency, then the only people who benefits from the sale going through are: (1) the buyer (i.e., the buyer gets the property) and (2) the lender (i.e., they get a promissory that "maybe" they can collect). The seller receives nothing; the seller does not have the property and now has an unsecured debt. Representing the seller, I would recommend against closing escrow on those terms. From the seller's perspective, the seller is much better off allowing one of the lien holders to foreclose, provided, of course, that the anti-deficiency statute protects the seller. When a short sale "falls apart," the losers are: (1) the buyer (doesn't get the property) and (2) the lien holder (junior lien holders' liens are wiped out and the lender foreclosing now has another foreclosed property to deal with).

If the lender does not want to go along with the short sale, then my recommendations depend on who is asking me.

- a. If the seller asks me, then I would recommend the seller let the property be foreclosed.
- b. If the buyer asks me and the buyer "really" wants the property, then I recommend that the buyer do "something" to save the deal (i.e., pay some cash directly to the lien holder that is refusing to proceed with the short sale or some other incentive).
- c. If the real estate agents ask me, they are suppose to be representing either the seller or the buyer, so my recommendation is the same as above.
- d. If the person renegotiating the loan is asking me (and assuming that person does not owe any fiduciary duties to the seller or buyer), then it is in the loan negotiator's interest for the transaction to close, then I would recommend any (legal and ethical) actions that lead to that result.

At the risk of being redundant, the lien holders don't have to go along with a short sale. The only problem I see with the lenders taking that position is when they initially say they will do a short sale and then they add other material provisions (i.e., unsecured note, etc.) at the last minute before escrow closes and after the buyer and seller have incurred expenses and have detrimentally relied upon the lender's initial agreement to do a short sale.

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