

# Nash & Lodge, PLLP

## Short Sales: Are You Protecting Your Client's and Yourself?

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## Short Sales:

## Are You Protecting Your Client & Yourself?

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The only thing certain about short sales is that nothing stays the same. Every time you think you get a handle on the process and the issues, everything changes. A couple of years ago it was exceedingly difficult to get a lender to agree to a short sale (or even understand what it was). Then lenders created loss mitigation departments that never said no to a short sale. Today loss mitigation departments are still there and short sales generally are approved but the approval may not come until the last moment. As the lenders continue to be battered they will continue to change how they do things and new issues will arise.

One issue that may be on the horizon is whether the lender will agree to release the remaining debt as a part of the short sale. Many have always assumed that a short sale always included a total release of liability. That is not true. A short sale agreement could just release the mortgage for a sum less than the total amount due and not include a satisfaction of the total debt. In other words, the lender can still sue the mortgagor (generally the homeowner) for the difference. If your seller thought that they were getting out from paying their total house loan, only to find out that they are now facing a lawsuit are not going to be happy and probably will be quick to blame their own real estate agent.

The lender needs not agree to a short sale or to any specific terms. Up until recently I have not been aware any lenders who have attempted to get a short sale agreement that allowed them to later sue the borrower for a deficit. In the last couple of weeks I have run into two situations where the banks have done just that.

In the first situation, the borrower and the borrower's real estate agent had no idea that the lender would pursue the borrower for the difference after the sale. The lender not only sought payment from the borrower after the sale, the lender commenced a lawsuit. The lender says they only intended to release the mortgage, and not to satisfy the entire debt. The borrower says that they would not have agreed to a short sale unless the lender agreed to satisfy the entire debt. Since the case is pending, it will be a while before we find out how this case is resolved.

In the second situation, the lender would not agree to the short sale that included a satisfaction of the loan. Whether the lender will stick to this position or not, I don't know but at least the owner knows the situation and didn't get blindsided after closing.

The key for all real estate agents is to make sure when negotiating the short sale with the lender that it is very clear as to what the terms of the agreement are. There is a tremendous difference between an agreement to "release the mortgage" so the sale can go through and to "satisfy the loan". The former allows the lender to sue the borrower for the difference while the latter prevents the lender from seeking a later recovery from the borrower. The agreement should be clear and in writing. To not have the agreement in writing creates a proof problem if the lender decides to sue the borrower after the closing – what was said, what was intended, etc. A written agreement is not a guarantee that you will avoid a dispute or that you will prevail but it certainly improves your chances a great deal.

Whether running into this issue was an aberration or a sign of a new trend, you need to make sure that you protect your client and yourself and get a clear, written short sale agreement or you will be at risk. As the number of foreclosures continue to climb and the amount of losses that the lenders have to absorb on each short sale continues to grow, the likelier it will be that lenders may begin to balk at agreeing to a short sale that wipes out the total debt. If this happens the lenders would probably target more expensive properties that are facing large deficiencies. The other area where you might run into this issue is with second and third mortgages, especially when held by local banks. They may not be as willing or able to absorb these losses especially if they feel that the borrowers have income or other assets that are worth going after.

While the above issue may or may not become a commonplace issue, I do know that whatever issue we are facing today will not be the same issues that we are facing three months from now.

#### **NOTICE**

The foregoing is not intended to constitute legal advice for any specific circumstance, but is intended to reflect broadly applicable principles, under Minnesota law, relevant to a typical situation. Each set of facts and each contract is, or can be unique; the unique facts and specific language of the contract may require a different legal analysis and may result in a different outcome. Before proceeding in reliance upon this or any other general description of law, consult with an attorney competent in the field of practice relevant to your situation.

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