Been there

Lessons in Foreclosures and Short Sales from Nevada

Deanne M. Rymarowicz, Esq.
General Counsel
Greater Las Vegas Association of REALTORS®
At the epicenter of the foreclosure and short sale crisis, the Nevada real estate industry—from brokers to regulators—has learned important lessons in dealing with foreclosures and short sales. In this informative and insightful presentation, you will discover how to spot (and avoid!) risks, how to educate licensees on best practices and just what to do with those third party negotiators!

I. Introduction
   A. How did we get here?

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   B. Where are we?

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II. Foreclosures
   A. Face of Foreclosure

   In January 2011 the Nevada Association of REALTORS® released its report of a multi-year, in-depth look at the people affected by foreclosure in Nevada, whether they personally experienced a foreclosure or they live in a neighborhood impacted by foreclosures. (A copy is included in these materials.) Some of the key findings:
• Nearly one-quarter (23%) of those surveyed admitted that they “strategically defaulted” or “walked away” from their home.

• There is a clear disconnect between what the government is trying to offer and what is actually needed for struggling homeowners. Sixty-one percent (61%) of those surveyed had never heard of the HAFA or the home Affordable Foreclosure Alternative program. Only 3% said they used and were helped by the Nevada Foreclosure Mediation program. Less than 50% even knew there was a federal website for foreclosure assistance.

• There is great frustration and confusion in the relationship between homeowners and lenders. Not only are homeowners most likely to blame banks and lenders for the crisis, but this is also the biggest area of frustration in the process.

• There is no solid evidence that vast numbers of those experiencing foreclosure are simply victims. By their own admission in both research and conversations, many homeowners were in untenable financial situations. Many of those surveyed were spending an incredibly unhealthy amount of their monthly income on housing.

• However, due to the presence of two or more significant life events many homeowners were plagued with circumstances largely out of their control, ultimately leading to foreclosure. While many face a significant single life event and manage to overcome the challenge, when two or more events occur simultaneously, homeowners were more likely to experience foreclosure.

1 in every 88 housing units in Nevada received a foreclosure filing in March 2011

*Source: RealtyTrac*
B. Foreclosure Mediation Program

1. Program overview

The State of Nevada Foreclosure Mediation Program (FMP) was created during the 2009 session of the Nevada Legislature in an attempt to directly address the foreclosure crisis and to help keep families in their homes. The program also provides an opportunity for homeowners and lenders to discuss alternatives to foreclosure. Basic eligibility requirements include:

- Owner-occupied residence in Nevada and the primary home of the owners.
- Notice of Default (NOD) filed on or after July 1, 2009.
- Request a mediation within 30 days of receiving the NOD.
- Pay $200 fee (the lender also pays $200).

**Requesting a foreclosure mediation stops all foreclosure proceedings.** Homeowners are required to provide detailed financial information, and the lender is required to participate if the homeowner requests mediation. Lender must participate in good faith and have a representative with authority available at the mediation; telephonic presence is permissible with a representative, typically an attorney, physically present at the mediation. Before the lender may pursue foreclosure, it must obtain and record a certificate from the mediation program.

Possible outcomes include a temporary modification, a short sale approval, a deed-in-lieu of foreclosure or other graceful exit, if the homeowner does not want to, or feasibly cannot, stay in the home.

2. Statistics
III. Short Sales

A. Risk Management issues

1. Disclosures

Long before the Federal Trade Commission’s MARS (Mortgage Assistance Relief Services) rule existed, prudent brokers were requiring certain disclosures.

GLVAR has made its Short Sale Addendum to Purchase Agreement available since the beginning of the short sale market in 2008, and has augmented it with a Short Sale Addendum to Listing Agreement and a Short Sale Lender Approval Addendum. The Lender Approval Addendum has proven to be a very popular form to facilitate the parties’ approval of the lender’s terms. (Copies of these forms are provided for your reference.)

The key points of any short sale disclosure include:
- The creation of a contingency for lender approval of the short sale.
- The brokers and agents have no control over the lender approval of the short sale.
- The lender approval takes time … a lot of time!
- The seller may not be aware of the lender’s conditions until close of escrow.
- If the lender changes material terms, the parties need not accept the lender’s terms.
  … and the big one
- There may be adverse legal, credit, tax and/or economic consequences for the seller.

The rule on disclosures used to be, “disclose, disclose, disclose.” With short sale disclosures, it’s “repeat, repeat, repeat.” The more a seller reads and signs these types of disclosures, the more likely it is he/she may actually understand what they’re doing.

69.1% of residential mortgages in Las Vegas were underwater in Q4 2010

Source: CoreLogic
2. Flopping and merchantable title

When does a short sale buyer have a title that is legally capable of conveyance? Nevada law\(^1\) (and presumably many other states) requires a licensee to disclose the existence of unmerchantable (a.k.a. unmarketable) title, but are they aware of the dangers posed by short sales?

Last year, GLVAR’s MLS enacted a rule to only accept listings where the seller has merchantable title (except a Trustee’s sale that by law has 30 days to record). Also known as “marketable” or good title, merchantable title comprises both legal and equitable title to the property. Until the buyer has both legal and equitable title, the property cannot be listed for sale in the MLS. The new rule approved by the MLS Participants states:

*With one exception noted herein, the MLS shall accept only listings wherein the seller has merchantable title at the time of the listing. For purposes of this rule, merchantable title means that the seller holds both legal and equitable title. The sole exception is a seller who purchased the listed property at a Trustee’s Sale, the title to which may take up to 30 days to record by law.*

There were two main goals in passing the new rule: (1) to ensure proper capture of short sale statistics; and (2) to avoid potential liability of the MLS becoming involved in title disputes and disclosure issues. Of course, other methods of marketing the property remain available, but the buyer/seller should seek legal counsel. In addition, the listing broker should understand what disclosures need to be made in such a situation and determine whether the potential for fraud exists.

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\(^1\) A licensee may not attempt to sell, or offer to sell, any real property with knowledge that the title is unmerchantable unless he notifies the prospective purchaser of that fact before the payment of any part of the purchase price. NAC 645.635.
3. Third Party negotiators

a. Licensure

Any person who act on behalf of a homeowner to negotiate with lenders is required to be licensed. If the person is not a real estate licensee representing the homeowner in a real estate transaction, the person must be licensed as a “Loan Modification Consultant” by the Mortgage Lending Division (MLD) to legitimately perform any third party services between a homeowner and lender. (Attorneys are exempt; their assistants and paralegals are not.) The Nevada Real Estate Division has made it clear that it is incumbent upon the licensee representing the seller to ensure that the person negotiating with the seller’s lender is properly licensed or exempt.

b. Payment

Some short sale listing agents seek to paid “extra” for negotiating with the seller’s lender, or will hire a third party to do the negotiating for them. Many times, these third party or “extra” listing agent compensation appear in an addendum which requires the buyer to pay the negotiator’s fee. Forcing buyers to pay for a third-party negotiator is problematic on several levels:

- Potential RESPA violation because there is no separate agreement between the person charging the fee and the person paying the fee (see HUD letter to National Association of REALTORS® dated January 22, 2010).
- Lender fraud if not disclosed on HUD-1 and/or paid outside of escrow.
- Potential undisclosed multi-party representation, for example when the listing agent claims he’s performing a service for the benefit of the buyer to get the buyer to pay.

GLVAR’s MLS does not allow a listing to state that the seller’s third party negotiator will be paid from the buyer broker’s commission, finding this to be a breach of MLS rules and regulations that provide for unconditional offers of compensation.
B. Educating licensees

Real estate licensees are likely to be a source of information for distressed homeowners, whether the licensee assists the homeowner in a sale or not. Therefore, licensees need to know enough to be a source of informational resources to the public. State regulatory bodies, REALTOR® associations and continuing education providers are three excellent places for licensees to get up to speed on what is available for distressed homeowners.

Deanne M. Rymarowicz is Legal Counsel to the Greater Las Vegas Association of REALTORS®. Prior to joining GLVAR, Ms. Rymarowicz served as a Deputy Attorney General representing the Real Estate Division and other state agencies. She has been practicing law in Las Vegas for more than 16 years and has an extensive background in commercial litigation and administrative law.

Ms. Rymarowicz received her undergraduate degree summa cum laude from Drake University in Des Moines, Iowa, and her law degree from Drake Law School. She was named as one of “40 Under 40” by In Business Las Vegas in 2006. She enjoys volunteering, networking, entertaining and traveling. She may be reached at Deanne@deannemarie.com or (702) 580-2684.
SHORT SALE ADDENDUM
TO PURCHASE AGREEMENT
(and Joint Escrow Instructions)

In reference to the Purchase Agreement executed by _____________________ as Buyer(s) and _____________________ as Seller(s), dated ____________ covering the real property at ________________________________, the Buyer □ Seller hereby proposes that the Purchase Agreement be amended as follows:

1. Contingent on Existing Lender Approval. Buyer and Seller acknowledge that the Purchase Price is less than the amount of Seller’s existing loan(s) against the Property due and owing to one or more lender(s) and/or lienholder(s) (collectively, “Lender”). Such a transaction is called a “short sale.” Therefore, the Purchase Agreement is contingent upon Seller and/or Seller’s Agent obtaining approval from Lender (“Lender Approval”) to accept an amount less than what is owed on the Property to release Lender’s lien on the Property (subject to parties’ approval; see Section 3 below). SELLER UNDERSTANDS AND ACKNOWLEDGES THAT LENDER APPROVAL MAY BE CONDITIONED UPON ANY OR ALL OF THE FOLLOWING: (A) MAKING A CASH PAYMENT; (B) SIGNING A NEW PROMISSORY NOTE; (C) CONTINUING TO OWE THE LENDER THE UNPAID PORTION OF THE LOAN(S); AND (D) OTHER REQUIREMENTS MADE BY LENDER. Seller shall reasonably cooperate with Lender in the short sale process by providing such documentation as may be required by Lender. BUYER AND SELLER UNDERSTAND THAT LENDER APPROVAL MAY TAKE SEVERAL MONTHS TO OBTAIN, AND NEITHER THE SELLER, THE ESCROW HOLDER NOR THE BROKERS CAN GUARANTEE THE TIMELINESS OF LENDER’S REVIEW, APPROVAL OR REJECTION.

2. Notice of Lender Approval. Seller agrees to provide Buyer with written notice of Lender Approval within two (2) business days of Seller’s receipt of the approval. Seller may use the “Lender Short Sale Approval Addendum” to facilitate this notice. (For clarification, this is not intended to encompass or delay transmission of any subsequent Lender Approval which may be issued to grant an extension at the end of the transaction pursuant to Section 5 herein.)

3. No Guarantee of Lender Approval. Buyer and Seller understand that no Lender is required or obligated to accept a short sale, and that Lender Approval may be revoked at any time prior to COE. In addition, the Parties understand that Lender may require that in exchange for approval some terms of the Purchase Agreement be amended. Neither Buyer nor Seller is obligated to agree to any of Lender’s proposed terms; either Party may, in its sole discretion, reject the amended terms required by Lender. In such event, the Purchase Agreement shall be void and the Parties agree to execute cancellation instructions with ESCROW HOLDER and return EMD to Buyer. NEITHER THE BUYER, THE SELLER, THE ESCROW HOLDER NOR THE BROKERS IN THIS TRANSACTION HAVE ANY CONTROL OVER LENDER APPROVAL, OR ANY ACT, OMISSION OR DECISION BY ANY LENDER IN THE SHORT SALE PROCESS.

4. Time Periods. Opening escrow and depositing earnest money shall occur as stated in the Purchase Agreement. The time periods specified in the Purchase Agreement for due diligence, disclosures, inspections and other contingencies shall begin (check one):
   □ as stated in the Purchase Agreement;
   □ one (1) calendar day after the Parties’ mutual written approval of the Lender Approval; –OR–
   □ Other __________________________________________________

Buyer Initials [_______] [_______]  Page 1 of 3  Seller Initials [_______] [_______]
5. Close of Escrow. Buyer and Seller understand that Lender Approval will include an expiration date by which Close of Escrow (“COE”) must occur. A typical Lender Approval is valid for 30 days. The Parties agree to use best efforts to meet the Lender’s COE deadline and understand that any extension(s) must be by mutual written agreement and Lender’s consent. Buyer understands that Lender may impose additional requirements, such as per diem funds to be paid by Buyer, as additional consideration for any extension(s).

6. Other Offers. Buyer and Seller acknowledge that the Seller’s Agent is required by the Multiple Listing Service to place the property in “Contingent” status after the Purchase Agreement is executed, while the transaction is subject to Lender Approval. The Parties understand that additional offers may be received by the Seller’s Agent, which must be presented to the Seller pursuant to Nevada law. Seller may choose to accept such subsequent offers as back-up offers.

7. Buyer’s Right to Cancel. Buyer may cancel the Purchase Agreement for any reason and without penalty any time after □ 45 □ 60 □ 90 □ _______ days from Acceptance if Lender Approval has not been received. Upon Buyer’s cancellation, Seller agrees to execute cancellation instructions with ESCROW HOLDER and return EMD to Buyer.

8. Foreclosure. Seller warrants that, at the time of the Purchase Agreement, a Notice of Default and Election to Sell □ has not –OR– □ has (date: ____________) been recorded against the Property. (Information regarding the foreclosure status of a property is available from the County Recorder where the Property is located.) The Parties understand that the recording of a Notice of Default begins a statutory foreclosure period, which lasts a minimum of three (3) months and twenty (20) days. At the end of the foreclosure period, the Property typically will be sold at a Trustee’s Sale (foreclosure sale) and Seller will lose all rights and interest in the Property. Buyer and Seller understand that if COE does not occur before a foreclosure sale of the Property, the Purchase Agreement shall be void and escrow shall be cancelled. In such event, ESCROW HOLDER is instructed to return EMD to Buyer without any further instruction from the Parties. The Parties agree to forever release and relieve ESCROW HOLDER from any and all responsibility, liability, costs and/or litigation for the return of the EMD under these conditions.

9. Tax Consequences and Advice. A SHORT SALE MAY HAVE SERIOUS AND ADVERSE LEGAL, TAX, CREDIT AND ECONOMIC CONSEQUENCES FOR THE SELLER. Seller agrees to seek advice from an attorney, a certified public accountant or other qualified professional regarding the legal effect and meaning of a short sale and any Lender Approval.

10. Unfulfilled Contingency. If the Lender rejects the short sale, Seller will promptly notify Buyer of the rejection and the Purchase Agreement shall be void due to the unfulfilled contingency and escrow shall be cancelled. In such event, ESCROW HOLDER is instructed to return EMD to Buyer without any further instruction from the Parties. The Parties agree to forever release and relieve ESCROW HOLDER from any and all responsibility, liability, costs and/or litigation for the return of the EMD under these conditions.

11. Other Terms and Conditions: __________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________
All other terms of the Purchase Agreement, including all prior counteroffers and addenda not modified by this Addendum shall remain the same. To the extent that any terms of this Addendum are in conflict with the Purchase Agreement, this Addendum will control. WHEN PROPERLY COMPLETED, THIS IS A BINDING CONTRACT. IF YOU DO NOT FULLY UNDERSTAND ITS CONTENTS, SEEK COMPETENT LEGAL AND TAX COUNSEL BEFORE SIGNING.

☐ Buyer  ☐ Seller  Date

☐ Buyer  ☐ Seller  Time

Acceptance:

☐ Buyer  ☐ Seller  Date

☐ Buyer  ☐ Seller  Time

Prepared by: ___________________________  ___________________________

Agent’s Name  Phone
ADDENDUM TO LISTING AGREEMENT—SHORT SALE

This Addendum is hereby made a part of the Listing Agreement between __________________________ as Seller and __________________________ as Broker, dated _________________ regarding the real property at ______________________________________ (“the Property”).

1. Acknowledgement of Short Sale. Seller acknowledges that Broker has informed Seller that the current fair market value of the Property may be less than the amount of Seller’s loan(s) and other debts against the property due and owing to one or more lender(s), lienholder(s) and/or others with a financial interest in the Property (collectively, “Lender”). This situation is called a “short sale.” Lender may be willing to accept an amount less than what is owed on the Property. Seller understands that any sale of the Property will be contingent upon Lender approval, and the terms of such approval may not be known until Close of Escrow. Furthermore, such terms may or may not be favorable to the Seller. Seller acknowledges that Lender is not required or obligated to accept a short sale. Broker has no control over Lender approval, or any act, omission or decision by any lender in the short sale process. Seller understands that Lender’s approval may take several weeks or months to obtain, and Broker cannot guarantee the timeliness of Lender’s review, approval or rejection. Seller Initials [______] [______]

2. Seller Options. Seller understands that there may be disadvantages to a short sale. Seller is advised to explore other options with Lender (and other appropriate professionals, such as attorneys, accountants, and qualified housing and credit counselors) such as loan modification or revised repayment plan; refinancing with Lender or another lender; bankruptcy; or voluntary deed-in-lieu of foreclosure. These options may have adverse consequences and the Seller must decide what option is best for his/her individual situation. If Seller decides to pursue another option, Seller agrees to immediately inform Broker. Seller Initials [______] [______]

3. Consequences of Short Sale. A short sale may have legal, tax and credit consequences. A short sale may be reported to credit reporting agencies and may adversely affect Seller’s credit score. Even if Lender agrees to a short sale, Lender may not agree to forgive the entire debt. Seller may be required to pay the difference as a personal obligation (judgment). Where a portion of a debt is forgiven, the relief of debt may be considered as taxable income. Lender may issue a 1099 form to Seller and provide that information to the Internal Revenue Service. Seller acknowledges that Broker cannot provide legal, tax or credit advice. Therefore, Seller agrees to seek advice from an attorney, a certified public accountant or other professional regarding the credit, legal and tax consequences of a short sale. Seller Initials [______] [______]

4. Amount Owed. Seller agrees to cooperate with Broker, escrow and title companies and Lender to determine the amount of debt against the Property including, but not limited to, purchase money loans, home equity loans, homeowner association fees and/or fines, property taxes and other liens. Seller Initials [______] [______]

5. Foreclosure. Seller understands that failure to make loan payments may result in foreclosure of the Property by Lender. Seller represents that a Notice of Default and Election to Sell □ has not –OR– □ has (date: ________________) been recorded against the Property. If a Notice of Default has not been recorded against the Property as of the date of this Addendum, Seller agrees to notify Broker.
within five (5) business days of receipt of such a notice. Seller understands that the recording of a Notice of Default begins a statutory foreclosure period, which lasts a minimum of three (3) months and twenty (20) days. Seller understands that if the Property is not sold to a buyer before a foreclosure sale of the Property, Seller will lose all rights and interest in the Property. Seller understands that Broker cannot stop a foreclosure. Seller Initials [______] [______]

6. **Seller’s Duties.** Seller shall reasonably cooperate with Broker and Lender in the short sale process by providing documentation as may be required by Lender to review and approve the short sale request. Such documents may include (but are not limited to): current appraisal, tax returns, pay stubs, bank statements, financial statements, broker/agent authorization, medical records or other evidence of a financial hardship. Seller authorizes Broker to communicate with Lender regarding the details of Seller’s loan and the approval of the short sale. Seller agrees to respond to Broker timely, completely and accurately. **Broker shall not verify any information provided by Seller and Seller agrees to defend, indemnify and hold Broker harmless for same. Seller Initials [______] [______]**

7. **Disclosure of Short Sale.** Seller acknowledges that Broker is required by the rules and policies of the Multiple Listing Service to identify the Property listing as a short sale. Seller authorizes Broker to further disclose to prospective buyers and their agent(s) that the transaction is likely to be a short sale and the terms of the sale may be subject to Lender approval. Broker shall have no liability for any loss, damage or harm to the Seller from any such communication. **Seller Initials [______] [______]**

8. **Additional Terms.** __________________________________________________________________________
___________________________________________________________________________________
___________________________________________________________________________________
___________________________________________________________________________________
___________________________________________________________________________________

All other terms of the Listing Agreement not modified by this Addendum shall remain the same. To the extent that any terms of this Addendum are in conflict with the Listing Agreement, this Addendum will control. **WHEN PROPERLY COMPLETED, THIS IS A BINDING CONTRACT. IF YOU DO NOT FULLY UNDERSTAND ITS CONTENTS, SEEK COMPETENT LEGAL AND TAX COUNSEL BEFORE SIGNING.**

**SELLER:**

Seller’s Signature ____________________________ Seller’s Signature ____________________________
Printed Name: _______________________________ Printed Name: _______________________________
Date: ______________ Time: ____________ Date: ______________ Time: ____________

**BROKER:**

Designated Licensee Signature ____________________________ Date: ______________
Printed Name: _______________________________
Broker’s Signature ____________________________ Date: __________________
Printed Name: _______________________________
LENDER SHORT SALE APPROVAL ADDENDUM
(and Joint Escrow Instructions)

In reference to the Purchase Agreement ("Agreement") executed by _____________________________ as Seller(s) and ______________________________ as Buyer(s), dated _____________________ covering the real property at ___________________________________________, which is contingent upon approval from Seller’s mortgage lender(s), lienholder(s) and/or others with a financial interest in the Property ("Lender Approval"), the Seller hereby provides the Buyer with a copy of the Lender Approval from _____________________________, attached hereto. (Note: This Addendum is only effective if the Lender Approval is attached.) If Seller or Buyer do not understand the terms of the Lender Approval, he/she should seek independent legal advice.

1. SELLER’S RESPONSE: Seller has reviewed and understands the attached Lender Approval and responds as follows:

☐ Seller **removes the contingency** in the Agreement as to the above-named Lender only and requests the Buyer’s Response within three (3) days of the date of this Addendum. Seller reserves the right to cancel the Agreement if the Buyer fails to timely respond.

–OR–

☐ Seller **declines the terms of the Lender Approval** and hereby cancels the Agreement and escrow transaction. Escrow Holder is hereby authorized to release Earnest Money Deposit (EMD) to the party from whom they were received, without further written instruction. In compliance therewith, Escrow Holder and Title Company are hereby discharged and forever released and relieved of any and all responsibility, liability, costs and/or litigation for the return of the EMD.

_____________________________ ____________
Seller Date

_____________________________ ____________
Seller Time

2. BUYER’S RESPONSE: Buyer acknowledges receipt of the Lender Approval, has reviewed the terms of the Lender Approval and responds as follows:

☐ Buyer **agrees to proceed** with the transaction.

–OR–

☐ Buyer **rejects the new requirements and/or changed terms** in the Lender Approval and hereby cancels the Agreement and escrow transaction. Escrow Holder is hereby authorized to release Earnest Money Deposit (EMD) to the party from whom they were received, without further written instruction. In compliance therewith, Escrow Holder and Title Company are hereby discharged and forever released and relieved of any and all responsibility, liability, costs and/or litigation for the return of the EMD.

_____________________________ ____________
Buyer Date

_____________________________ ____________
Buyer Time