KEEPING IT LEGAL

REALTOR Resource for Handling Short Sales

&

REO Properties

2010 Convention
Celebrating 100 Years

Copyright © 2010 Ohio Association of REALTORS®

Avoiding Liability in the Troubled Waters of Short Sales

Ohio REALTOR – April 2010

by Nathan D. Vaughan, Esq.

The real estate market has changed drastically over the last three years. This change has created a new niche market for REALTORS, the "short sale market." However, this new market is not for the weak at heart. Short sales typically require REALTORS to work longer and harder than traditional sales, while often resulting in less pay. Further, short sales often involve managing unique legal and tax problems for clients, with which most REALTORS have little experience. REALTORS can avoid many of the short sale pitfalls by providing their client disclosures at their initial meeting.

The First Meeting

The potential for liability can arise at the first meeting with the client. Once the REALTOR determines a short sale is likely, he/she should inform their client that a short sale involves a number of legal issues and tax issues which require the professional advice of an attorney and an accountant. In some circumstances, a client may be better off filing bankruptcy or allowing a foreclosure to proceed as opposed to attempting a short sale. The REALTOR cannot provide legal advice and therefore cannot advise the client on what is, or is not, in the client's best legal interests. For example, never instruct a client to intentionally default on their mortgage loan. This could create significant problems for REALTORS if the short sale does not result in a successful sale or a complete forgiveness of the client's loan.

It is also important that the client understand the REALTOR's role in a short sale transaction is to list, market, and sell the property. It is important that the client understand the decision to attempt a short sale should be determined by the client and their legal and accounting advisors. Clearly defining the limits of the REALTOR's role, the expectations of the client, and who is responsible for making the decisions can prevent a number of misunderstandings in the future.

Brokers would be well served to work with their attorney in drafting disclosures for their REALTORS to use with clients considering a "short sale." The disclosures should make clear the REALTOR's limited role in the short sale transaction, provide examples of the issues that must be navigated throughout the short sale process, and finally advise the client to seek the professional advice of an attorney and an accountant to determine if a short sale is the best solution for the client.

Don't assume a client in financial dire straits will not have the ability to access an attorney or an accountant. Many clients have family attorneys or accountants that could provide advice. Additionally, some clients can obtain free legal consultations from a legal aid society or even a bankruptcy attorney. Also, REALTORS should consider adding attorneys and accountants to their network to assist their clientele with short sale advice.

There is nothing worse than a client knocking on your door claiming he was not appropriately advised in the short sale process. While the situation will inevitably be stressful, REALTORS who possess a record of their disclosures, will be able to sleep much better at night.

The Listing

After the client has made the determination to attempt a short sale, the next step is determining a list price for their home. Remember Standard of Practice 1-3, prevents a REALTOR from misleading a client as to the market value of their home. On occasion, a pending foreclosure or sheriff's sale may require the list price to be lower than the fair market value to generate immediate offers. Unfortunately, REALTORS are put in a difficult balancing act to honor their fiduciary obligation to obtain the highest

price for their client, and at the same time, ensuring the transaction can be closed soon enough to avoid the pending foreclosure. It is important that the client understand that listing the price of the home too low can result in the receipt of offers which will ultimately be rejected by the bank. Of course a list price too high will generate no interest, thereby undermining the goals of the short sale.

REALTORS should provide their clients with written disclosures regarding the recommended listing prices for short sale and traditional sales transactions. Be sure the disclosure makes clear that the market analysis is not an appraisal, but rather an estimated listing price based upon the data reviewed by the REALTOR. Provide the client with as many comparable sales as possible and let the client make the decision on what listing price to use. By informing the client of the different list price options, REALTORS can avoid claims that they misinformed the client about the true value of the home or pressured their client into accepting a listing price.

Another way REALTORS can protect their clients and themselves, is to pre-qualify the client for a short sale. Contact the bank with a CMA and obtain an approved sales price prior to putting the property on the market. Of course, time constraints generally make this option unavailable.

Foreclosure Proceedings. At times, the client will contact the REALTOR and advise they just received foreclosure papers. REALTORS are all aware that they cannot provide legal advice to their client, and the REALTOR must ensure that the client is informed of the need to contact an attorney as soon as possible. Due to the number of foreclosures at this time, many courts have online forms for homeowners to defend, and ultimately slow, the foreclosure process. Additionally, clients can obtain legal advice from legal aid societies in their area.
It is very important that the client understand that the REALTOR cannot guarantee a short sale will be closed prior to judgment being taken against the client or the sheriff's sale.

Negotiating with the Lender
Another pitfall REALTORS often confront is negotiating with the client's lender. If possible, REALTORS should try to have the clients deal with their lender directly. This prevents REALTORS from having to manage confidential information and from making representations to the lender which may end up being inaccurate.

The short sale process will require the client to send in certain financial information to the lender. When lenders request financial information from the client, REALTORS should advise their client to forward the information directly to the lender. The information requested will contain social security numbers, bank account information and income, which increase a REALTOR's obligations to protect this information. Having the client work directly with the lender can help reduce the REALTOR's liability.

Unfortunately, most clients turn to their REALTOR for this service. As a result, when REALTORS are negotiating with lenders, they need to be sure they have an appropriate release signed by their client which allows the REALTOR to speak freely with the lender. The release should also give the REALTOR authority to disclose all information requested by the lender. This will prevent any misunderstanding as to whether or not the REALTOR was authorized to disclose certain information to the client's lender.

REALTORS should also ensure they are not providing any legal advice to their client during this process. The negotiation process can have legal repercussions for the client, and REALTORS must make it clear to their client that the REALTOR is not an attorney, cannot provide legal advice and that the client should consult an attorney.

In the event the REALTOR conveys information to the lender, he or she must understand that transmitting false information to the lender, can get the REALTOR into hot water. A clear disclaimer should accompany any information the REALTOR forwards to the lender, which advises the lender that the REALTOR has neither reviewed nor verified the information and is simply transmitting information

provided directly from the client. Again, make sure you are using your brokerage's approved forms when conveying this information. Of course, REALTORS should never convey information to the lender which they know to be false.

Dealing with Confidential Information
Standard of Practice 1-9 requires REALTORS to keep all information of their clients confidential. This ethical obligation is reinforced by Ohio R.C. §4735.62(I) which requires REALTORS to protect confidential information. Additionally, brokerages are required to maintain written confidentiality policies under R.C. §4735.54.

Does your brokerage's confidentiality policy provide enough protection to protect social security numbers, bank account information, etc.? Does your brokerage's written confidentiality policy cover the protection of confidential information received in electronic form? Hopefully the answer is "yes."

Keep in mind that R.C. §1349.19, requires businesses to provide notifications to clients anytime there is unauthorized access to electronic confidential information. Obligations to protect confidential information continues to increase and REALTORS and their brokers should work with their counsel to ensure they have appropriate policies in place to protect themselves.

Multiple Offers
Due to the length of the closing process, it is not uncommon for offers to trickle in after a seller has already accepted an offer. Standard of Practice 1-7 requires REALTORS to submit these offers to their clients and advise them of the need to seek legal advice before accepting the second offer. REALTORS and sellers can be put into difficult positions when they receive an offer higher than the offer already being considered by their client's lender.

Accepted offers are binding contracts on the seller and accepting two offers can get the seller and potentially the REALTOR, into hot water. To help resolve this issue appropriate contingency language should be included in the purchase agreement to give sellers flexibility in dealing with this situation, such as: "This Agreement is conditioned upon Seller's mortgagee(s) releasing all liens on the property, forgiving Seller of all debt associated therewith, and Seller's mortgagee(s) approving this Agreement. Seller reserves the right to present subsequent offers to Seller's mortgagee(s) for consideration and approval."

Reducing Your Commission
Despite the fact that the REALTORS are doing the bulk of the work, most lenders are demanding REALTORS reduce their commission in short sales. The commission reduction puts REALTORS in the difficult position of choosing between allowing the sale to go forward, or refusing to give up their commission. There is no good solution for this problem. Although tempting, REALTORS should not accept commissions from the client outside of closing, as this could be a violation of the Real Estate Settlement Procedures Act. Further, before authorizing any commission reduction, be sure you have all REALTORS and brokerages on board with the reduction to prevent confusion in the future. Keep in mind that REALTORS cannot reduce their commission as an inducement for the Seller and/or Buyer to enter into the purchase agreement, as the Ohio Division of Real Estate considers such conduct to be an improper inducement. See R.C. 4735.18(A)(14).

REALTORS were provided some relief in 2009 when Fannie Mae and Freddie Mac issued a directive that mortgage servicers were not allowed to require a reduction in commission below 6 percent. However, this directive does not apply to second mortgage holders or private mortgage insurance companies. The Freddie Mac and Fannie Mae Commission Policy is available on line at http://www.realtor.org/realtors/basics_short_sales.

The Approval Letter
The approval letter is the area most likely to create liability for REALTORS. There are generally three different types of approval letters. The first is commonly referred to as a total forgiveness letter and releases the client for the difference between the loan balance and the ultimate proceeds received by the lender in the short sale. While the Mortgage Forgiveness Debt Relief Act will generally prohibit the IRS from imposing income taxes on the amount of the forgiven debt in a short sale there are some exceptions to this rule, so make sure your client understands the need to consult a tax professional for advice on this issue. Again, a clear opening letter to the client advising of the need for legal and accounting advice will help prevent this surprise.

The second type of approval letter, reserves the lender's right to pursue the customer for any deficiency between the loan balance and proceeds received by the lender. In this situation, the lender simply releases their mortgage and allows the transaction to conclude, but the client remains obligated to pay the loan. Again, this can present a very unwelcome surprise for clients after the closing. The final type of approval letter will require the client to execute a new promissory note for the difference between the proceeds the lender receives and the loan balance. This may allow additional flexibility for the customer to pay down the difference.

Keep in mind that some clients may prefer to keep their home when the balance of their loan is not forgiven. Additionally, some approval letters can put the client in a worse position than had the foreclosure continued. For example, under Ohio law, if an individual's primary residence is the subject of a foreclosure action, any deficiency judgment is only valid for two years. However, this rule does not apply when there is no foreclosure, potentially keeping clients on the hook for the deficiency in a short sale for more than two years. Also, in some counties foreclosures may take up to one year, which allows the client a significant amount of time to live rent free and get back on their feet. Again REALTORS should not provide any legal advice to their clients about the foreclosure process, other than to obtain an attorney.

Insurance
If you still want to engage in short sale transactions after reading this article, what do you need to do? You need to make sure you work with your broker and your broker's attorney to have a clear set of forms designed to disclose the risks associated with short sales and your limited role in the transaction. A full and complete disclosure will resolve the majority of any problems REALTORS will confront with their clients in a short sale. Additionally, REALTORS should work with their broker and the broker's insurance agent to determine the limits of any E&O coverage. Once you know the extent of your coverage, make sure your short sale forms and services provided in your office are covered by insurance. Remember without insurance coverage, REALTORS are forced to defend themselves and be responsible for all of their own attorneys' fees associated with defending the lawsuit.

NOTE: This general summary of the law should not be used to solve individual problems since slight changes in the fact situation may require a material variance in the applicable legal advice.
Nathan D. Vaughan, Esq. is a member of the Real Estate Section at the law firm of Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A. (www.kwgd.com) in New Philadelphia, Ohio. Feel free to contact him with real estate questions at nvaughan@kwgd.com.

Brokers Can List Real Estate Owned Properties

Ohio REALTOR – June 2008

by Peg Ritenour
Vice President
Legal Services

As Ohio brokers struggle with the challenges of selling the large inventory of lender owned properties, a continuing issue has been the point at which brokers can take such listings, place them in the MLS and begin the marketing process. The Ohio Division of Real Estate and Professional Licensing has recently clarified this point for REALTORS.

Lenders usually acquire title to foreclosed properties by purchasing them at the sheriff's sale. Following the auction, the court must confirm the sale. The purpose of this is to confirm that proper procedures were followed. If the sale is confirmed, the court will issue a confirmation order and a sheriff's deed will be issued.

Unfortunately, this is the point at which the process often gets bogged down. Because of the high volume of sheriff's sales, it is currently taking several weeks for the sheriff to issue the deed in the lender's name. However, lenders usually want to list these "REO" properties for sale with a broker and have the broker get them in the MLS as soon as possible.

This has posed a problem for Ohio brokers who have not wanted to run afoul of Ohio license law.

Ohio Revised Code Section 4735.18(A)(20) prohibits a licensee from offering property for sale without the knowledge and consent of the owner or the owner's authorized agent. Historically, the Division has advised licensees that for purposes of this section it interprets the owner to be the person or entity that is indicated on the deed. Thus, licensees were cautioned that they should not take a listing from a lender on an REO property until the sheriff's deed is issued in the lender's name.

Because so many REALTORS are under pressure from lenders to list their properties prior to issuance of the sheriff's deed, OAR asked the Division to clarify this issue. After researching this issue, the Division has indicated that licensees can list a property after confirmation of the sale by the court, but prior to issuance of the deed.

According to the Division, for their protection licensees listing an REO property should ask the lender for a copy of the order from the court confirming the sale and ordering the sheriff to issue a deed to the lender.

Licensees are also reminded that the fair housing language and logo are required to be included in the listing agreement. If the lender is using its own listing form, the licensee will need to attach the fair housing language as an addendum. Also, lenders must be provided with the broker's Consumer Guide to Agency Relationship before the broker markets or shows the property.

A bill that is currently pending in the Ohio legislature is designed to speed up the process of having the sheriff's deed issued and recorded. HB 138 would require confirmation of the sale within 30 days of the sale and recording of the deed within 14 days of payment of the purchase price. This legislation has been passed by the Ohio House and is expected to have been passed by the Senate at the time of publication of this article.

Paperwork Pitfalls of Selling REO Properties

Ohio REALTOR – May 2007

by Peg Ritenour
Vice President
Legal Services

As a result of Ohio's high foreclosure rate brokerages are now selling record numbers of "REO" properties. These are "real estate owned" properties that have been acquired by a lender as a result of a borrower's default and a subsequent foreclosure action. Often Ohio brokers who list these properties are dealing with out-of-state entities that are unfamiliar with Ohio's law and customs. This can result in many difficulties for not only the listing broker and agent, but also cooperating Realtors and the buyers they represent.

In this article some of the common problems involving the basic paperwork are addressed. These include the listing agreement, agency forms, and disclosure documents.

Fair Housing Language – Ohio license law requires that all listing agreements used by Ohio brokers for the sale of residential or vacant land must contain specific fair housing language. When selling REO properties, the lender often wants to use its own listing agreement. Such a form must contain this mandatory fair housing language. Therefore if it is not in the lender's form, you will need to use an addendum that contains this paragraph.

Agency Forms – Like any other transaction, the lender/seller must be given the listing brokerage's Consumer Guide to Agency at the time of listing. When an offer to purchase is obtained, the Agency Disclosure Statement signed by the buyer must be presented to the seller before the offer to purchase.

One of the difficulties brokers often face when selling REO properties is getting these forms signed. If the realtor is unable to get the necessary signatures, they need to be able to document that they complied with their duty to at least provide these documents to the seller. The realtor should note on the form that the seller would not sign the acknowledgement or the Consumer Guide for the Agency Disclosure Statement. Keeping copies of e-mails in which they ask for the return of signed forms is also recommended.

Lead-based Paint Disclosures – In the sale of residential property constructed prior to 1978, federal law requires that the seller provide the buyer with the lead-based paint disclosure form and the EPA pamphlet. While these forms are not required at a foreclosure sale (i.e. the sheriff's sale), anyone acquiring the property at that sale must provide them upon resale. Thus, a lender who is selling pre-1978 property they purchase at sheriff sale is required to give the subsequent purchaser the mandatory lead-based paint forms.

Ohio Residential Property Disclosure Form – The same is true of Ohio's Residential Property Disclosure Form. Under Ohio law, the form is not required at the sheriff's sale itself. However if the lender is the successful bidder on the property at the sheriff sale, it must provide a form upon later resale of the property. The only exception that exists under Ohio law is if the lender acquired title to the property by accepting a deed in lieu of foreclosure. In that instance the lender would not be required to provide a Residential Property Disclosure Form when it later lists and sells the property.

Therefore it is important for brokers listing such REO properties to determine how the lender acquired title to the property. If the borrower deeded the property back to the lender in order to avoid foreclosure, upon resale the lender isn't required to provide the buyer with a Residential Property Disclosure Form. However, if the lender bought the property at the sheriff's sale, they need to provide

this form to any subsequent purchaser just like any one else buying property at sheriff's sale must do when they turn around and sell it.

In most instances where the lender is required to provide the disclosure form, the lender does not want to do so because of its limited knowledge regarding the condition of the property. If the lender refuses to provide a form to the purchaser, the listing broker should explain that under Ohio law this failure will give the purchaser the right to rescind the purchase contract. This rescission right can be exercised for 30 days after the contract was signed or closing, whichever occurs first. Under Ohio law a buyer who does not receive a Residential Property Disclosure form can waive their right to rescind the purchase contract. Therefore, if the lender refuses to provide such a form, it is advisable to have the buyer acknowledge that they are not receiving the form and waive their rescission rights.

Legal Forum Features Panel Discussion on REO Sales

Ohio REALTOR – February 2008

by Peg Ritenour
Vice President
Legal Affairs

At the Legal Issues Forum during OAR's Winter Conference, a panel of three prominent real estate attorneys answered questions regarding a variety of issues including short sales and REO properties. The attorneys serving on this panel were Kristin Rosan (Madison & Rosan, LLP), Mike Gruber (Zollinger Gruber & Thomas) and Mark Rodio (Frantz Ward LLP).

Following are some of the answers to the questions they addressed.

Q: REALTORs are taking more and more listings on which the property owner is behind on payments or is "upside" (the mortgage exceeds the value of the property). If the lender contacts the listing agent or begins taking an active role in listing issues and negotiations, what should the listing agent do before providing the lender with information or documents?

A: All of the attorneys agreed that the listing agent cannot share any confidential information with the seller's lender without the seller's consent. Such consent should be obtained in writing. In cases where a listing agent knows up front that a short sale will need to be negotiated with a seller's lender, the listing agent can obtain consent from the seller at the time of listing to share confidential information with the lender.

Q: If the property has sold at sheriff sale and the lender was the successful bidder, can the lender list it with a REALTOR before the sale is confirmed? Should the listing agent document that the lender has title?

A: Under the license law, a REALTOR cannot offer property for sale without the consent of the "owner". The Ohio Division of Real Estate and Professional Licensing interprets owner to mean the person or entity who is in the title to the property. Until the Sheriff's sale is confirmed by the courts and the lender receives a sheriff's deed, the lender is not considered by the Division of Real Estate to be the "owner" of the property. As such, a licensee cannot market or otherwise offer it for sale until the lender acquires a sheriff's deed. Licensees should confirm that the lender has received a sheriff's deed before taking a listing.

Q: If a REALTOR has a listing that has been foreclosed upon and the lender contacts the listing agent and says they're taking over the listing, what steps should the listing agent take (i.e. new listing, new disclosure documents)?

A: First, the listing agent needs to confirm that the lender has actually obtained title to the property. Assuming that it has, then the listing agent should have a new listing agreement signed by the lender. The listing agent also needs to provide the lender/seller with its company's Consumer Guide to Agency Relationships and have the lender sign property disclosure documents. These would include the Ohio Residential Property Disclosure form and the lead-based paint disclosure form and EPA pamphlets if the property was built before 1978.

Q: Does a lender selling property have to complete an Ohio Residential Property Disclosure form? If so, what should the REALTOR do if the lender refuses or says they are exempt? Can the lender provide their own form instead of using Ohio's disclosure form?

A: The only exception that exists under Ohio law is if the lender acquired title to the property by accepting a deed in lieu of foreclosure. In that instance the lender would not be required to provide a Residential Property Disclosure form when it later lists and sells the property. However if the property

was sold at a sheriff's auction and the lender was the successful bidder on the property at the sheriff sale, it must provide a form upon later resale of the property.

In most cases where the lender is required to provide the disclosure form, the lender does not want to do so because of its limited knowledge regarding the condition of the property. If the lender refuses to provide a form to the purchaser, the listing broker should explain that under Ohio law this failure will give the purchaser the right to rescind the purchase contract. This rescission right can be exercised for 30 days after the contract was signed or closing, whichever occurs first.

In some instances a lender may have its own disclosure form that is different than the Ohio version. While the lender can provide their own disclosure form to the buyer if they wish, this will not satisfy Ohio law or eliminate the buyer's rescission rights.

Q: Lenders are notorious for not returning the Agency Disclosure form. Is it sufficient to just indicate in your records that the lender didn't return the forms? What if you are a dual agent and they don't sign the Agency Disclosure form?
A: If the lender does not return the listing broker's "Consumer Guide to Agency Relationships" it is sufficient to note on the Consumer Guide that the lender did not return it. It is also recommended that you document your request that the lender sign it (i.e. e-mail asking for it).

As to the Agency Disclosure Statement, the same process should work as long as you document in your file that you have presented the Agency Disclosure Statement and keep e-mails asking for the lender to sign and return it.

The attorneys serving on the panel at the Legal Issues Forum agreed that if you are acting as a dual agent in the transaction, this process is not sufficient. That is because under Ohio law you must have the consent of both parties to act as a dual agent. If you cannot obtain the lender's signature on the Agency Disclosure Statement, you cannot act as a dual agent. This will require you to terminate your representation with one of the two parties. Most likely that will be the buyer. Such a termination should be done in writing.

Q: Can a broker provide information regarding seller concessions in a contract to an appraiser who is doing an appraisal on another property and wants to make sure this "comp" is accurate?
A: Because such information is confidential it can't be disclosed without the consent of your client. Thus if you represent the seller you need the seller's consent. If you acted as a dual agent representing both parties, the consent of both the seller and buyer is necessary.

Q: The license law requires that records be kept for three years. For litigation purposes, do you recommend they be kept longer?
A: All of the attorneys on the panel recommend that their clients only keep their records for the minimum the license law requires: three years. Brokers should consult with their own attorney and/or CPA regarding their personal recommendations.

Agent Found In Violation of License Law for Improper Handling of REO Listings

Ohio REALTOR – February 2010

by Lorie Garland
Vice President
Legal Services

Do you list properties for an asset management company? Have you agreed to provide general maintenance duties such as cleaning, grass cutting, and snow removal for the properties? If so, how are you and the companies performing these duties paid? Are you complying with the real estate license law requirements? The Ohio Real Estate Commission (OREC) recently found an agent in violation of the license law provisions for not properly handling REO listings.

In this case, an agent entered into listing/management agreements with three asset management companies. These agreements provided that the agent assumed the "care, custody and management" of the companies REO properties. This included agreeing to re-key the locks and to perform general property maintenance such as cleaning, grass cutting, and snow removal. The agent hired a contractor, Mr. McDonald, to perform the general maintenance for the REO properties. The agent did not have a written agreement with Mr. McDonald regarding the property maintenance.

The asset management companies paid the agent directly for managing their REO properties. Checks covering payment for property management services were made payable to the agent and deposited into the agent's personal bank account. The agent would then pay Mr. McDonald from his personal checking account for the maintenance work on the properties.

Mr. McDonald was not paid for some of the maintenance work he performed on the REO properties and sued the agent for the money he was owed. Mr. McDonald prevailed in the case with the court ordering judgment against the agent in the amount of $3,928.00 plus interest.

Mr. McDonald filed a complaint with the Division of Real Estate and Professional Licensing (Division) and an investigation was conducted regarding the agents relationship with the asset management companies and Mr. McDonald. The first issue addressed was with regard to the agent's signing of the listing and management agreements for four properties. The agent signed as the broker on two of the agreements and as the sub-broker on the other two agreements. These agreements also did not include the name of the brokerage with whom the agent was licensed. The license law provides that no person shall act as a broker without being licensed as such and that an agent can only operate under the auspices of his broker. The OREC found the agent engaged in misconduct when he held himself out as a broker without having a broker's license.

The next issue investigated by the Division was that the agent was paid directly for management duties performed under the listing and management agreements. The license law prohibits an agent from collecting money in connection with a real estate transaction, except in the name of and with the consent of the broker with whom he is licensed. The OREC

found that the agent engaged in misconduct when he accepted payments for management duties in his own name, instead of the name of his broker.

The Division also looked at the agent's relationship with Mr. McDonald. The agent did not have a written maintenance agreement with Mr. McDonald. The Canons of Ethics provides that for the protection of the parties, a licensee should reduce all financial obligations and commitments regarding real estate transactions to writing. The OREC found that the agent had delegated his REO property management responsibilities to Mr. McDonald and that this delegation constituted a real estate transaction which should have been in writing. The agent's failure to reduce his agreement with Mr. McDonald to writing constituted incompetency and a failure to exercise reasonable skill on behalf of his clients, the asset management companies.

The last issue the Division addressed was the judgment the court issued against the agent for the money he owed Mr. McDonald for maintenance performed on the properties. The license law provides that an agent can incur disciplinary sanctions if there is an unsatisfied judgment against the agent that arose out of the agent's conduct as a licensee. At the time the agent's conduct was under investigation by the Division, the agent had paid the principal amount of the judgment but not the interest. The OREC found that this constituted an unsatisfied final judgment and therefore subjected the agent to disciplinary sanction.

The OREC revoked the agent's real estate license. However, the revocation has been stayed pending the agent's request for reconsideration before the OREC. The reconsideration is scheduled for February.

In this case, the property maintenance duties were part of the listing agreement and therefore had to be performed through the brokerage. The agent delegated the maintenance duties to Mr. McDonald. This resulted in ongoing and substantial payments to Mr. McDonald for the work he performed. In these situations, the Division will consider the amount of work and payment received in determining whether a maintenance agreement is required to be in writing. The Division has indicated that simply hiring someone to mow the grass or re-key a property would not require a written agreement. The extent of the work a contractor will perform is considered in determining whether a written agreement is necessitated to adequately protect your client.

Another question this case raises, is whether an agent can pay the bill owed the person who cuts the grass or the utility company servicing the property and then be reimbursed directly for this expense by the asset management company? The Division has indicated that this can be done. If an agent chooses to personally pay this expense and then be reimbursed by his client, this would not be a violation of the license law. However, the agent should consider the possibility that he might not be reimbursed by his client. Some asset management companies have very strict requirements for reimbursement and if the requirements are not met, i.e. the bill is submitted too late, the agent may not be reimbursed. Licensees should consider this in determining whether to front a client's bill.

Update on the Ohio REO Property Management Case

Ohio REALTOR – April 2010

by Lorie Garland
Asst. Vice President
Legal Services

The February Ohio REALTOR included an article (Agent Found In Violation of License Law for Improper Handling of REO Listings) discussing the Ohio Real Estate Commission's (OREC) revocation of a real estate agent's license for failure to properly handle the management of listed REO properties. At the time that article was written, the agent had filed a motion for reconsideration with the OREC. The OREC has recently considered this motion.

In this case, the agent entered into listing/management agreements with three asset management companies. The agreements required the agent to perform general maintenance duties on the properties. The agent hired a contractor to perform those duties.

The agent did not have a written agreement with the contractor.

The asset management companies paid the agent directly for the property management services. These checks were made out to the agent and deposited in the agent's personal bank account. The agent then paid the contractor.

The contractor was not paid for some of the maintenance work he performed on the properties and sued for the money he was owed. The contractor prevailed in the litigation and was awarded a judgment in the amount he was owed, plus interest. The contractor also filed a complaint with the Division of Real Estate and Professional Licensing (Division). At the time the agent's conduct was under investigation by the Division, the agent had paid the principal amount of the judgment, but not the interest.

Upon investigation of the complaint, the Division charged the agent with five counts of violation of the license law provisions. The agent was charged with the following:

1. Acting like a broker without a broker's license;
2. Misconduct for collecting money for performing property management services in his own name instead of the brokerage name;
3. Misconduct for failing to have a written maintenance agreement with the contractor;
4. Failure to exercise reasonable skill and care in his duties to the asset management companies by failing to have a written maintenance agreement with the contractor; and
5. Having an unsatisfied judgment against him for the maintenance work performed by the contractor.

The OREC found a violation on all five counts. The penalty assessed was revocation of the agent's license on counts 1, 2, 4, and 5 and a civil penalty of $2,500 on counts 3 and 4.

The agent filed a motion for reconsideration of the order with the OREC. Upon reconsideration, the OREC modified the order but only with respect to the penalty assessed for the count 5 violation. Instead of revocation of the agent's license for the contractor's unsatisfied judgment, the OREC instead assessed a penalty of $1,500. The agent has now appealed the OREC order to the Court of Common Pleas.

Federal Law Protects Tenants from Foreclosed Property

Ohio REALTOR – July 2009

by Lorie Garland
Assistant Vice President
Legal Services

A federal law was recently enacted to protect tenants residing in foreclosed properties from eviction. The Protecting Tenants of Foreclosure Act was enacted on May 20, to protect residential tenants who became victims of their landlord's foreclosure.

In Ohio, when a property is foreclosed upon, the successful bidder at the sheriff's sale becomes the owner of the property after the sale is confirmed by the court. Prior to the new federal law, if the property was a rental property, the new owner could terminate the tenant's right to occupy the property even if the tenant was in full compliance with the terms of their lease. In some instances, the first time the tenants learned their landlord was losing the property through foreclosure was when they were asked to vacate the premises.

The Protecting Tenants at Foreclosure Act addresses this problem by requiring that tenants in foreclosed properties be given a 90-day notice prior to eviction and in some cases provides tenants with the ability to stay in the property for the term of their lease.

The federal law requires the new owner (the successful bidder at the sheriff's sale) to provide a bona fide tenant with a 90-day notice prior to the tenant being evicted. A bona fide tenant who has an existing lease on the property has the right to continue as a tenant for the remainder of the lease term, with two exceptions.
The first exception allows a purchaser at a sheriff's sale who will reside in the property with the right to terminate the tenant's occupancy upon 90-day notice.

This exception could also be used by a lender or investor who buys a home that is tenant occupied at a sheriff's sale and then sells the home to a buyer who will live in the property. The tenants could be given the 90-day notice and their right to occupy the home would terminate on the date of the sale to the owner occupied buyer.

The second exception is that the new owner of the property may terminate the tenant's right to occupy the unit if the tenant does not have a lease (a month-to-month tenancy) or if the lease is terminable at anytime upon notice. Again, the 90-day notice to the tenant is required.

The rights provided by this law apply to bona fide tenancies or leases. A lease or tenancy is considered bona fide only if:

1) The tenant is not the mortgagor;
2) The lease is the result of an arms-length transaction; and
3) Fair market rent is being paid for the unit.

While this new federal law provides certain rights to tenants of foreclosed properties, it does not terminate any obligations of the tenants under the terms of their lease or Ohio's landlord tenant laws. This includes the tenant's obligation to continue to pay rent to the new owner of the property during the term of their tenancy. If the tenant stops paying rent he can be evicted.

The new law does not affect the requirements for termination of any federal or state subsidized tenancy

or any state or local law that provides longer time periods or other additional protections for tenants. The federal law and its protections expires on Dec. 31, 2012.

Ohio currently does not have a state law specifically addressing tenant rights in a foreclosed property. However, there are bills pending in the Ohio legislature that address these issues.

These bills are being reevaluated to determine if there is a need for state regulation in light of the new federal law. Local regulations should also be reviewed to determine if they provide additional protections to tenants in foreclosed properties.

Bill Improves Ohio's Foreclosure Process

Ohio REALTOR – September 2008

by Lorie Garland
Asst. Vice President
Legal Services

Ohio is experiencing a significant increase in foreclosures. Homeowners are defaulting on their mortgages in record numbers. Some would argue that this is due to subprime lending. Others blame it not only on poor lending practices, but also the economy in general, including Ohio's loss of jobs.

Experts can debate the cause, but the result of the increase in foreclosures has been felt statewide, including crowded court dockets and busy sheriffs.

A lender who initiates the foreclosure process will ask the court to issue an order to sell the property which results in a sheriff sale being conducted. Often the lender is the successful bidder at the sheriff sale.

After the sale, the court will review the sale procedures and if conducted properly, will confirm the sale and direct the sheriff to prepare the deed. Due to the high number of foreclosure filings in some parts of Ohio, it can take months to have a sale confirmed and the sheriff's deed issued. HB 185, which goes into effect on Sept. 9, was enacted to speed up this process.

Prior to HB 185, Ohio law did not provide a specific timeframe for the court to confirm a sheriff sale. HB 185 provides that when a sheriff's sale has been conducted and the sheriff notifies the court that the property has been sold, the court will review the sale proceedings and if conducted properly, will confirm the sale within 30 days.

When the court confirms the sale it will direct the sheriff to prepare the deed in the name of the successful bidder. In some counties, it would be months before the successful bidder would obtain the deed. When the deed was issued, some buyers (i.e. out-of-state lenders) would not timely file the deed. HB 185 addresses both of these issues.

HB 185 requires the foreclosing lender's attorney to prepare the deed and deliver the deed to the sheriff no later than seven days after confirmation of the sale.
The sheriff will then record the deed with the county recorder's office within 14 days of the date the buyer pays the balance of the purchase price.

The sheriff will collect the recording fee, along with the deposit on the purchase price from the buyer at the time of the sale. The balance of the purchase price must be paid by the buyer within 30 days of confirmation of the sale. If the balance is not paid within 30 days, the court may find the buyer in contempt.

The court may then forfeit the sale of the property and any deposit made on the sale or issue any other punishment the court considers appropriate.

In the past, it has sometimes been difficult to locate the buyer or the person employed by the buyer who has authority to make decisions with regard to the property. This may be the case when an out-of-state lender is the successful bidder at the sheriff's sale.

Local municipalities with housing code orders on the property were having trouble locating the individual with the lender who could address the city orders.
To address this issue, HB 185 requires a buyer to supply more personal information, including their name, address and telephone number.

If the buyer is a business organization, the buyer must provide the contact information for the buyer's employee who has been designated to receive notices or inquires about the property. The information provided is a public record and open to public inspection.

A buyer's failure to provide this information to the sheriff may be grounds for the court to set aside the sale.

Confirmation of the sale constitutes a judicial finding that the buyer submitted the required information.

HB 185 will speed up the foreclosure process by providing a set time in which the court must confirm a sale; the buyer pay the balance of the purchase price; and the sheriff record the deed.

This new law also makes it easier to contact the buyer of a foreclosed property and will certainly improve Ohio's foreclosure process.

Court Rules on 'Foreclosure Rescue' Services

Ohio REALTOR – January 2010

by Peg Ritenour
Vice President
Legal Services

The increased number of foreclosures in the past few years has resulted in an outgrowth of businesses offering "foreclosure rescue" services, many of them with questionable business practices.

Since last May, the Ohio Attorney General's Office has issued over 30 cease and desist orders to companies suspected of operating scams and has filed more than ten lawsuits against foreclosure rescue companies.

This past summer, the Ohio Supreme Court issued a decision that raised another concern about such businesses, namely the unauthorized practice of law.

The case was initiated by the Cincinnati Bar Association against Foreclosure Solutions, LLC, a Cincinnati-area business owned by Timothy Buckley. This company monitored the foreclosure actions filed in Ohio courts and sent mailings to the homeowners offering assistance to negotiate the loan with their lender and to get the foreclosure action dismissed.

As part of its services, Foreclosure Solutions paid a law firm to file an answer to the foreclosure lawsuit on behalf of the owner.

The homeowner paid Foreclosure Solutions a fee ranging from $700 to $1,100 and gave Foreclosure Solutions power of attorney to negotiate with their lender.

Homeowners were not counseled by Foreclosure Solutions or by the attorney it hired regarding any other legal options, such as filing bankruptcy. Instead, its sole approach was to delay the foreclosure, while it attempted to negotiate a settlement with the lender.

As a result of their involvement in this business, the attorneys hired by Foreclosure Solutions were disciplined by the Ohio Supreme Court for professional misconduct. This resulted from the attorneys' failure to assess the individual needs of the homeowners to determine their best course of legal action.

The Supreme Court also found the attorneys acted improperly by aiding Foreclosure Solutions in the unauthorized practice of law.

As to Foreclosure Solutions and its owner, the Ohio Supreme Court ruled unanimously that it had practiced law without being licensed. Buckley argued that he had not filed pleadings or appeared in court on behalf of the homeowners.

The Supreme Court, however, did not find this to be persuasive. Instead, the Court stated, "We have repeatedly held that non-lawyers engage in the unlawful practice of law by attempting to represent the legal interests of others and advise them of their legal rights during settlement negotiations."

In this case, the Supreme Court found that Foreclosure Solutions and Buckley had engaged in the unlicensed practice of law and the fact that he acted under the authority of a power of attorney did not change that conclusion. The Court enjoined Foreclosure Solutions and Buckley from practicing law,

specifically barring him from advising others on the terms and conditions of settlement in negotiations to avoid pending foreclosure proceedings. It also levied a $50,000 fine.

This case underscores that non-lawyers, including REALTORS, need to be aware of the limitations on the service they can provide to homeowners facing foreclosure. Specifically, REALTORS® should be careful not to counsel or advise sellers of their legal options or to advise them of their rights in settlement negotiations with a lender or after a foreclosure action has been filed.

At OAR's 2010 Winter Conference Legal Issues Forum, Susan Choe, Section Chief of the Attorney General's Consumer Protection Section, will address foreclosure scams, the unauthorized practice of law and other issues. The Legal Issues Forum will be on Sunday, Jan. 10, from 4:00pm to 5:30pm.