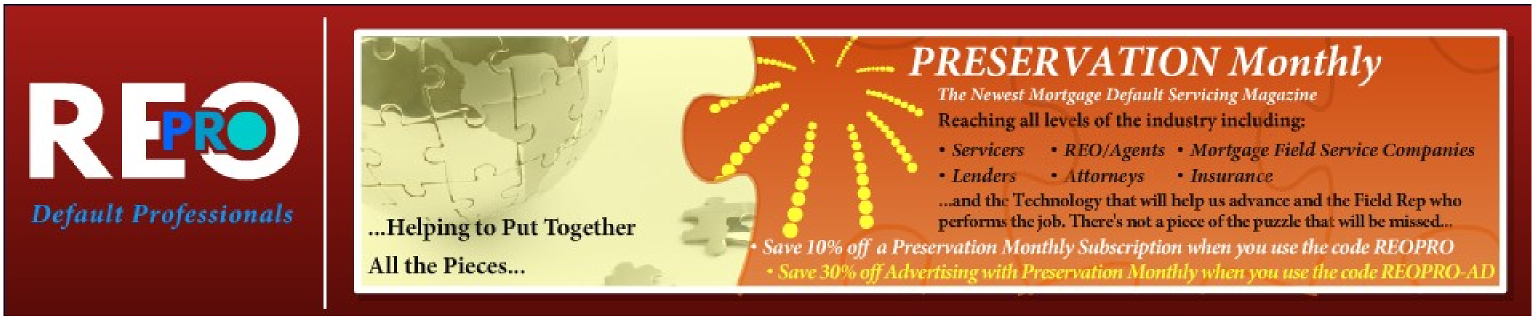

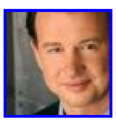

The Short Sale Dilemma - Understanding Fiduciary Responsibility

- Posted by [Allan S Glass](#) on January 24, 2010 at 3:00pm
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In the most simple of terms a real estate agent serves a fiduciary responsibility to the client. This legal and ethical relationship of confidence and trust bonds the client to the agent in reliance of protection and aid during the transactional process. For the real estate broker and agent, the fiduciary responsibility is a clearly defined relationship requiring specialized knowledge, dutiful care, and pragmatic repose.

Traditionally, the mechanics of a real estate transaction allow for a seller to financially gain by selling their asset to the highest bidder. In these cases the broker/agents role includes advising on how to best position the property for sale, qualifying the potential buyers, negotiating for the highest price, and maneuvering through the logistics of escrow. But what happens when profit is removed from the equation?

What is a Realtor's® fiduciary responsibility in a short sale?

First and foremost, a real estate professional should understand how the term is defined. According to the 2004 edition of California Real Estate Practice by Lowell Anderson, Daniel S. Otto, and William H. Pivar, a fiduciary duty is one of good faith and trust. "The agent must be loyal to his or her principal, placing the principals interest above those of the agent. An agent's actions, therefore, cannot be inconsistent with the principals interests. The agent cannot act in a self-serving manner to the detriment of his or her principal."

According to the National Association of Realtors a fiduciary responsibility is like an OLD CAR. the acronym used to account for the six duties outlined by NAR. These responsibilities include:

1. Obedience - the duty to promptly obey and follow all legal instructions of the principal
2. Loyalty - the duty to act in the best interest of the client, putting their interests above others, including your own
3. Disclosure - the duty to disclose all relevant facts affecting decisions of the principal during the transaction
4. Confidentiality - the duty to safeguard a principals secrets, unless doing so violates disclosure laws
5. Accounting - the duty to account for all funds and proceeds entrusted to you by the principal
6. Reasonable Care and Diligence - the duty to use all of your real estate skills in pursuit of the principals affairs, including the responsibility of

knowing when you are beyond your scope of knowledge

Two Transactions

Short sales actually involve two separate transactions that occur simultaneously. The first is a real estate transaction, where the defaulted seller enlists a Realtor® to find a ready, willing, and able buyer to purchase real property. Most agents are very qualified to handle this part of the equation as it falls squarely within the scope of expertise shared by all. Like most other non-short sale transactions the agents and brokers are paid for this work by way of a real estate commission earned upon the successful completion of a sale.

The second transaction in the short sale process is a financial transaction. This occurs between the principal and the one or more lien-holders with financial claim against the real estate in question, over and above the net purchase price offered by a buyer in the first transaction mentioned above. Unfortunately many Realtors® attempting to handle this transaction do not have the technical expertise nor the experience to dutifully represent the principal in this matter. This transaction has legal ramifications, tax consequences, and can carry significant financial impacts. Additionally, unless an agent imposes a negotiation fee, paid by the lender on the HUD-1, they do not get paid for the work on this second transaction.

Understanding Who is the Client

In a world of REO’s it’s sometimes lost on the listing broker that his or her client is not the bank during a short sale. Quite the contrary. If you were to ask a loss mitigation representative at your local bank how they view a defaulted seller requesting a short payoff you might be surprised to find that the relationship is considered adversarial. Anything and everything collected by the banks representatives can and will be used against the defaulted seller when negotiating a settlement.

Effective customer representatives, asset managers, and loss mitigation specialists while sometimes warm and pleasant are building the banks case against your client with each and every financial document you share. You are not working together to find a solution. They are looking for ever last possible dime they can extract from your client before writing off the balance as a loss. Agents would be well advised to understand the dynamics of this relationship and exercise the utmost care with their approach in negotiating debts.

What Constitutes the Best Offer?

As I mentioned above, a defaulted seller walks away from a completed short sale with the same amount of money in their pocket regardless of the purchase price. Zero, zilch, nada. The short lender in the transaction will, as condition of their approval, specifically address this point and strictly prohibit the defaulted seller from any form of financial gain. As is the case in most distressed sales, the best deal is often not the highest priced offer, rather it is the offer that presents the greatest “surety of closing” to both the distressed seller and bank accepting the loss. My point here is not to contend that price is completely irrelevant; rather i’d suggest when reviewing multiple offers, consider how much staying power the potential buyers possess along with other intangible assets like buying / investing experience, and patience.

I’ve seen short sales completed in less than 90 days and I’ve heard of short sales that have taken longer than a year to complete. In most cases, the difficulty in closing a short sale is keeping an interested buyer motivated to close. It is not uncommon for retail buyers to submit offers on several short sale listings hoping at least one in the group will be approved by the lender absorbing the loss. The unfortunate reality is that many families cannot wait for months to make a housing decision. Parents need to accommodate work needs, kids have school schedules, and families, especially in this market, have other options.

How to Get the Ball Rolling - Offer Tactics

The short lender has no interest in discussing a short sale transaction unless a qualified offer is in hand. To address this issue, temptation sometimes drives a distressed seller and their agent to submit an offer, any offer, to the bank even if the buyer isn’t real. The use of “straw buyers” is a dangerous practice and walks an agent and their client down a slippery slope. Even if the principal suggests or demands the use of these tactics, the agent has a fiduciary duty to be obedient along the letter of the law. It is the agents responsibility to be aware of both legal and illegal practices and inform the client when such lines are crossed.

Only substantiated offers from real buyers should be accepted and/or submitted to the lender with a completed short sale package. If a home is languishing on the market, an agent has a responsibility to investigate and inform the seller what may be causing the problem, why buyers have not written offers, or why agents are avoiding showing their property. If a defaulted seller has waited too long into the foreclosure process to allow for normal marketing time, the agent has a responsibility to price the listing appropriately to allow for maximum interest from the buying community.

Putting it All Together

Fiduciary responsibilities require a broker / agent to enact a responsible business plan incorporating a full awareness of the real estate process. Understanding what can be done legally, determining who exactly is the client, discerning the clients objectives, protecting client interests, and diligently advocating on their behalf are primary to the agent / client relationship. Although the agents expertise and experience are relied upon for guidance through the real estate transaction, the agents fiduciary duty is to put the clients interest and desires above their own.

Short sales present a unique set of circumstances that likely contradict common practice due to the absence of profit for the principal, and the cumbersome financial transaction that accompanies the real estate sale. Broker / agents taking short sale listings bear the burden of responsibility to their clients to know when they are in over their heads. It’s not enough to simply declare yourself a short sale expert because distressed assets are the only properties selling in your marketplace.

Brokers and agents must understand the primary objective of the seller in a short sale is to avoid foreclosure. This objective is met only if and when a bonafide offer from a real buyer is submitted and approved by the lender modifying a debt. If you take a short sale listing, the bank is not your client and is not working in tandem with your principal to accomplish their goal. It is incumbent upon the broker / agent to understand this adversarial relationship, protect the interests of their client, and maintain a modicum of confidentiality on their behalf. A broker / agent who accepts a short sale listing must be willing to put subjective viewpoints aside and present all potential options objectively to the client. Finally, a broker / agent must understand from both the buyer and seller's perspective the correct legal procedures necessary to complete the sale of property in imminent default.

The responsibility is great, but the reward of helping a client avoid foreclosure is even greater. If you educate yourself, understand the process, remain objective, and focus on the client's goals your fiduciary duty can easily be maintained.

Allan S. Glass is a real estate broker in Los Angeles, California specializing in REO and Short Sale transactions. Allan is also a featured blogger on Realtor.com. The ASG Real Group has over $1 billion and 17+ years of transaction experience.

Tags: fiduciary, realtor, responsibility, sales, short

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 Comment by George Kenner on January 28, 2010 at 11:44pm

This is a very well written article, it is full of information filled with theory and high ethical values. The real world is however colliding with this theory every day. The DRE in Ca. does not have the funds to investigate, and proving wrong doing can be very difficult if not impossible.

We are in a real mess with what is going on, I could argue almost any case from both sides but were we are now is in a situation where the largest property holders are Banks and if we don't do everything we can to find some common ground for our clients there is no way we can move forward through this difficult economic time and everything has to go to Court. Our clients are making hard decisions in under the gun situations and we are right there with them, having the rules change as quickly as the regulators can write new ones.

Today I read where everyone is still arguing and searching for information about Banks that have arranged for off HUD -1 Settlements. How can anyone do a perfect job for their client in a short sale today? Every time I read something like this article it makes me think of a being a police officer who is goes to work everyday and has to bend the rules to do his job, there is always a way to do it better, especially given hindsight removing the pressure of the heat of battle.

This article was great in that it made me think, but now I have to go back to an imperfect world where the color of the economy is making things very gray, not the black and white of a better economy. Our clients goals, needs and desires change many times during a typical "Short Sale Transaction"

To extract one sentence from this article

"Brokers and agents must understand the primary objective of the seller in a short sale is to avoid foreclosure."

I deal with clients everyday that just want out of the situation of the looming problem over their head. The stress is killing them. They don't care if its Foreclosure, Short Sale, or Deed in Lieu they want some sense of their life back. They made a mistake or are involved in one of someone else making, and they don't care what their future credit report reads. If you think Foreclosure is bad, think of the B word, Bankruptcy.

The moral issue and its dynamic are changing, people are considering what they can get out of a short sales. Look at HAMP and FAP and the other Federal programs that are providing "move out" money. Many of the clients I deal with want that money more than they care about a Foreclosure, they don't care about avoiding losing the property in Foreclosure they want to get the move out money and stay rent free as long as possible, because they don't have jobs. Again the real world is getting in the way of theory as we write this portion of American History.