

LITIGATION

News

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CURRENT DEVELOPMENTS IN REAL ESTATE LITIGATION FOR THE INFORMATION OF OUR BROKER CLIENTS AND CUSTOMERS

CAN REAL ESTATE AGENTS WHO ARE NOT LICENSED APPRAISERS PROVIDE BPOs ?

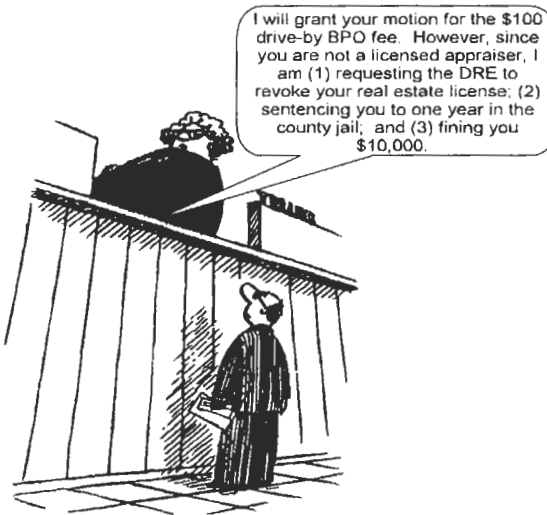
We have received a number of recent inquiries as to whether real estate agents, who are not licensed appraisers, may provide Broker Price Opinions (commonly referred to as a "BPO") even though they are not licensed appraisers.

The BPO, an alternative to an expensive full appraisal, is used by mortgage lenders, owners, and management asset companies to determine a value range of real property usually acquired in foreclosure. If only a drive-by is required, the fee paid ranges from \$40 to \$135. If both an exterior and interior examination is required, the fee ranges from \$50 to \$200. Given the dramatic change in the real estate industry over the last year, agents have been eager to augment their decreased commission income by providing BPOs. There are a number of web sites promoting this activity which indicate that BPOs can be rendered by licensed real estate agents, real estate brokers, and licensed appraisers. At least one of the web sites cautions that some states may require an appraisal license to participate. (<http://www.startbpos.com>.)

It is clear that under California law agents cannot act outside of the supervision of their

broker. However, it also appears that brokers are not authorized to give BPOs. California Business and Professional Code §11301(b), which deals with the Real Estate Appraisers' Licensing and Certification Law, provides that the term "appraisal" does not include an opinion given by a real estate licensee in the ordinary course of his or her business in connection with a function for which a license is required under Bus. & Prof. Code §§ 100130 *et seq.* These functions include the negotiation for the purchase, sale or exchange of real property and mobile homes or a business opportunity; leases of real property; negotiation of loans or collection of payments or perform services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity. None of the functions set forth in the statute indicate that a broker who is not licensed as an appraiser can give an opinion as to value if the broker is not involved in the sale, lease, or financing of the property or business opportunity.

Any person who violates the appraisal license law is guilty of a public offense punishable by imprisonment for not more than one year, or by a fine not exceeding \$10,000, or both. We therefore urge that licensees do not participate in the BPO practice without approval of both their broker and legal counsel.



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BASIC RULES TO CONSIDER WHEN DEALING WITH SHORT SALES, FORECLOSURES, AND LOAN MODIFICATIONS

Recent legislation, litigation affecting foreclosures, attempted loan modifications, and the increase in short sale transactions make it necessary that real estate licensees familiarize themselves with certain basic rules that might be applicable. If any of the following circumstances are involved in a transaction, it is recommended that the issue be referred to an experienced real estate attorney for advice:

● **Judicial Foreclosure.** At any time after a default has occurred, the lender may file a complaint to foreclose the deed of trust or mortgage. If the court finds that the beneficiary is entitled to foreclose, the court will order the property be sold to pay the secured debt, costs, and reasonable attorney fees. A notice of sale must be served on the debtor at least 20 days prior to the sale, must be published for three consecutive weeks, and all persons holding a lien on the property notified by mail. The property is then sold by auction to the highest bidder. (C.C.P. §§ 701.540 - 701.570.)

Under some circumstances a lender may pursue judicial foreclosure to obtain a personal judgment against the debtor in an amount equal to the excess of the unpaid balance of the loan over the net proceeds from the foreclosure auction, or fair market value, whichever is greater, together with costs. The determination of fair value is fixed by the court upon motion by the creditor, which must be filed within three months of the foreclosure auction. Judicial foreclosure is not often used because the borrower has the statutory right of redemption by paying the sale price together with interest for a period of three months after the sale if the sales price satisfied the debt. The redemption period is one year after the date of the sale if there is a deficiency judgment. The right of redemption was enacted to encourage bidders to pay the full value of the property. However, if it appears that the borrower has sufficient assets to satisfy all or a substantial portion of a deficiency judgment, the lender may proceed with judicial foreclosure regardless of the additional time and cost of the proceeding.

● **Foreclosure Under Power of Sale.** Most deeds of trust, mortgages, and installment sale contracts (contracts for deed) contain a power of sale provision which gives the lender an alternative remedy to court foreclosure. Upon demand by the lender/beneficiary, the trustee must commence the foreclosure process by recording a notice of default and election to sell (Civil Code §2924). The notice

of default must be mailed within 10 business days after recordation to the trustor/borrower and all other persons who have requested notice. Certain other persons, such as junior lien holders, must be mailed the notice within one month after recordation.

Notice of sale cannot be given by the trustee until at least three calendar months have elapsed since the notice of default was recorded. The sale may be



**Spencer Scheer, Esq., Specialist
In Real Estate Foreclosure Problems**

conducted after 20 days have expired from the date of publication, posting, and mailing the notice of sale (Civil Code §2924f). Given these time limitations, the sale is usually conducted four months after notice of default has been recorded.

Spencer Scheer, Esq., who represents secured creditors throughout California, recently appeared before the Marin County Bar Real Estate Section and pointed out that under some circumstances the California Foreclosure Prevention Act (Civil Code §2923.52), requires that 90 days be added to the existing three months which must elapse between the notice of default and the notice of sale. The purpose of the statute is to allow the parties to pursue a loan modification to prevent foreclosure if: "(1) The loan was recorded during the period of January 1, 2003, to January 1, 2008, inclusive, and is secured by residential real property; (2) the loan at issue is the first mortgage or deed of trust that the property secures; (3) the borrower occupied the property as the borrower's principal residence at the time the loan became delinquent; and (4) the notice of default has been recorded on the property."

Scheer noted that the 90-day extension does not apply if the mortgage servicer has adopted a loan modification program which includes features set forth in Civil Code §2923.53, and has been approved by the Commissioner of Corporations or Commission of Financial Institutions. Scheer also

made members aware of the increase in recent litigation challenging foreclosure proceedings on numerous grounds including alleged violations of the Truth In Lending Act, the Real Estate Settlement Procedures Act, Home Owners Equity Protection Act, common law fraud, and many other basis. It is clear that while borrowers can seek loan modification themselves, they need to consult with competent legal counsel when challenging the legality of the foreclosure proceeding.

● **Antideficiency Legislation.** During the Great Depression several laws were enacted regarding foreclosure sales. Those regarding deficiency judgment restrictions have remained in force. There are two situations in which the restriction applies:

(1) **Purchase Money Debt.** If the debt is secured by a purchase money mortgage a personal judgment against the debtor is prohibited. If the mortgage is in favor of the seller the prohibition applies regardless of the type of property involved. However, if the loan is by a third party the antideficiency rule applies only if the property is residential consisting of not more than four dwellings, at least one of which is occupied by the purchaser. (Code of Civil Procedure §580b.) The proceeds of the loan must be given for and in fact used for paying all or part of the purchase price, and be secured by the property purchased.

(2) **Power of Sale.** Under Code of Civil Procedure §580d, a deficiency judgment cannot be rendered if the property is sold under a power of sale contained in the mortgage or deed of trust. As pointed out in *Miller & Starr, California Real Estate* (3d ed) section 10:214, "When the secured debt is foreclosed judicially, the beneficiary can recover a deficiency judgment if the debt is not 'purchase money,' but the trustor also has a right to redeem the property after the sale when there is a deficiency judgment. By comparison, when there is a nonjudicial foreclosure under the power of sale, the trustor does not have any right of redemption. Therefore, the legislature has denied the beneficiary the right to collect a deficiency judgment in those cases where the trustor cannot redeem."

● **Possible Tax Consequences.** If a debt is cancelled or forgiven in the course of a short sale, foreclosure, or debt modification, the cancelled amount may be subject to income tax under both federal and state law.

If the debt is non-recourse, that is, subject to antideficiency rules, forgiveness does not result in tax on the cancelled debt.

In addition, the Mortgage Debt Relief Act of 2008 specifies certain conditions under which a

federal tax is not applicable. The exclusion applies to: (1) debt forgiven from 2007 through 2012, up to \$2 million or \$1 million if married and filing separately; (2) the forgiveness of debt must relate to debt used to buy, build, or substantially improve the debtor's principal residence, or to refinance debt incurred for those purposes.

California also enacted similar relief from state income tax for debt forgiven in 2007 and 2008. A proposal to extend this relief as set forth in AB 1580 was vetoed by the Governor on October 11, 2009. Consequently, unless the loan is subject to antideficiency rules, or new legislation is enacted, the cancelled debt is subject to state tax.

BROKER'S RIGHT TO A COMMISSION MAY NOT DEPEND ON CLOSE OF ESCROW

In the recent case of *RC Royal Development and Realty Corporation v. Standard Pacific Corporation* (2009) 09 CDOS 12312, the court held that close of escrow is not a condition precedent to the broker's right to a commission. In this case a prospective buyer entered into an agency agreement with a licensed real estate broker where it agreed to pay a commission of 1.5% of the gross sales price concerning a particular condominium development. A sales contract was entered into for two parcels for the sale price of \$116 million, the buyer depositing \$1 million who then added an additional \$5 million as earnest money.

The agreement contemplated that the transaction would close with five business days of the issuance of a temporary certificate of compliance. The certificate was never issued, the market suffered a serious reversal, and the buyer never acquired the property. The buyer forfeited \$4 million to the seller and refused to pay a commission. The trial court held that the commission was payable only upon close of escrow, which never occurred.

The appellate court reversed. The agency agreement provided that the commission was payable on purchase, and "purchase" was defined in the contract to include any "transaction through which [buyer] would acquire a direct or indirect beneficial interest in the property." The close of escrow was not a condition for entitlement to a commission but, rather, a limitation on the time of payment.

SOLVING THE APPRAISAL PROBLEM

D. \$ _____ **NEW FIRST LOAN:** CONVENTIONAL, FHA, VA, Other financing acceptable to Buyer:
 FIXED RATE: For _____ years, interest not to exceed _____%, payable at approximately \$ _____ per month (principal and interest only), with the balance due in not less than _____ years.
 ARM: For _____ years, initial interest rate not to exceed _____%, with initial monthly payments of \$ _____ and maximum lifetime rate not to exceed _____%.
 Buyer will pay loan fee or points not to exceed _____.
 Lender to appraise property at no less than purchase price prior to loan contingency removal. The parties agree that the appraiser will be suitably experienced in the geographic location of the property. This requirement is satisfied if the appraiser has conducted three or more property appraisals in the City or Zip Code in which the property is located. Distressed properties will not be used as comparables.
 If FHA or VA, Seller will pay _____% discount points. Seller will also pay other fees and costs, as required by FHA or VA, not to exceed \$ _____.

As noted in the last issue of Litigation News, the new rules governing appraisals of properties set forth in the Home Valuation Code of Conduct, however well intentioned, have created serious problems regarding valuation. Often the appraiser lacks experience or competency in the area involved, resulting in appraisals that can delay or even defeat a pending transaction.

The Real Estate Appraisers Association has suggested that in order to avoid transactions from "falling out," the following clause be inserted in the purchase contract: "Lender to use an experienced, local appraiser."

While the suggestion is a good one, the language leaves open the question of what constitutes an "experienced" or "local" appraiser. Professional Publishing has modified its appraisal clause to more specifically address these issues. The underlined provisions set forth above have been added to section 1D.

Since the lender or the appraisal management company are not parties to the contract, there is a question as to whether they would be bound by the language. However, the provision does make all of the parties aware of the problem, and the requirement of good faith and fair dealing might impose upon the lender the obligation to adhere to the requirement in obtaining an appraisal.

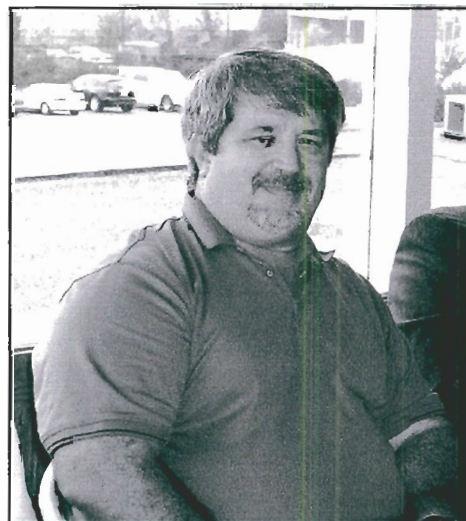
RESOLVING TITLE PROBLEMS

The Real Estate Section of the Marin County Bar Association was recently benefited by a seminar conducted by Randy Fry exploring the current state of the title industry. Randy, who also acts as an expert witness in real estate litigation, emphasized that in boundary line disputes the least expensive action is to "move the fence" rather than try to get a boundary line adjustment.

One of the increasing title problems involves elder abuse -- where children take control of the parents' property, refinance it, and buy a boat.

Escrow officers that assist the children may be subject to prosecution.

Identity theft is also becoming prevalent where the con artists assume the identity of the owners and other persons involved, get loans secured by the property, and disappear with the funds.



Randy Fry, Marin Land Title Consulting

It was noted that agents and attorneys representing buyers should be certain to point out the differences in coverage between the title insurance policies. The Professional Publishing Standard Residential Sales Contract (Form 101-R CAL) contains the following language in this regard:

"NOTE: In addition to coverage under a standard CLTA policy, the ALTA Owner's Policy, or CLTA Homeowner's Policy of Title Insurance may offer additional coverage for a number of unrecorded matters. Buyer should discuss the type of policy with the title company of their choice at the time escrow is opened."

If the form is not used, this language should be added in an addendum.