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Managing Residential Short Sales



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I. INTRODUCTION

1. What is a “short” sale?

A “short” sale is a disposition of real estate which is collateral for a mortgage loan where the mortgage holder agrees to accept a payment from a mortgage borrower in an amount that is less than the total amount due under the promissory note executed by the mortgage borrower. Until recently, a typical Massachusetts property owner envisioned that the value of real estate would always appreciate, and that at the time of sale, s/he would receive an offer to purchase from prospective buyer at a price sufficient to pay off all secured debt and closing costs and receive proceeds of sale. That is no longer a certainty.

2. Why are we hearing more about short sales now?

Real estate purchasers who bought property within the past two to five years may have experienced the evaporation of home equity resulting from flattening real estate prices. Others, who purchased or refinanced real estate with so-called “subprime” or exotic loan products, or who may have exhausted the equity value in their holdings through serial refinance transactions or additional secured borrowing, now find that they cannot sell real estate at a profit. Mortgagors who can meet their debt obligations may need to hold their real estate for some time before they can realize a profit. Mortgagors who can their debt obligations may face foreclosure.

3. Trends

According to the Warren Group, the publisher of Banker & Tradesman, “[p]etitions for foreclosure in Massachusetts topped 24,150 in the first 10 months of [2007], up 62.7 percent from the 14,847 filed during the same time period of 2006.”¹ “Lenders filed 2,729 petitions to foreclose in December [of 2007] up 28 percent from the 2,133 filed during the previous December. The December 2007 number is up slightly from the 2,723 petitions filed during November 2007.”²

On January 17, 2008, the Mortgage Bankers Association released a national study showing that found more than 235,000 workouts were initiated by the mortgage industry during the third quarter of 2007. Of those workouts, 54,000 were loan modifications, and 183,000 were formal repayment plans. Approximately 13,000 loan modifications and 90,000 repayment plans were established for **subprime adjustable rate mortgage loans**, in the third quarter of 2007. Roughly, 15,000 loan modifications and 30,000 repayment plans were instituted for borrowers with **subprime fixed-rated loans**.

The MBA report goes on to say that of approximately 384,000 mortgage loans that resulted in foreclosure in the third quarter of 2007:

¹ http://www.wickedlocal.com/ghs-newsservice/regional_news/east/massachusetts/x1059350719

² <http://www.thewarrengroup.com/portal/Solutions/PressReleases/tabid/190/newsid751/436/MA---Mass-Foreclosures-Recorded-in-Jan-Highest-in-Five-Months/Default.aspx>

- 43% were foreclosures of “**subprime**” **adjustable rate mortgage loans**. (The MBA report states further that of these, 18% were foreclosures of investor-owned properties; 21% were cases where the borrower either could not be located or would not respond to repeated attempts by the lenders to contact them; and 40% cases where borrowers did not meet the terms of a repayment plan or loan modification.)
- 21 percent of **subprime fixed- rate mortgage loans** foreclosure starts,
- 17 percent of **prime adjustable rate mortgage loans** foreclosure starts
- 33 percent of **prime fixed-rate foreclosures** started.³

Generally speaking, mortgage defaults seem to be attributable to loss of income, inability to make payments after mortgage rates reset, and overly optimistic real estate investment by both sophisticated and inexperienced buyers.

II. WHAT OPTIONS ARE AVAILABLE TO A SELLER IN DEFAULT?

1. **Forbearance** under a written agreement with the mortgagee. A forbearance agreement normally includes the borrower’s promise pay the delinquent interest and other charges over a certain period of time and to remain current on the mortgage going forward. A forbearance agreement may be an option for mortgagors who succumbed to a temporary event that caused them to fall behind in their mortgage payments. In most cases, the mortgagee looks for two things when considering a forbearance agreement: 1) whether the reason for the initial delinquency was something beyond the control of the borrower such as serious illness or injury, temporary disability or a one-time disruption in income, and 2) whether the borrower’s financial difficulties have been resolved. The mortgagee will seek assurances from the mortgagor that s/he can be counted upon to make regular loan payments as agreed.
2. **Loan Modification** may be a possibility for a mortgagor who is not yet in default and is credit worthy but foresees difficulty in making mortgage payments in the near future. Under a loan modification, the mortgagee may agree to renegotiate either the interest rate or term of the loan in order to reduce the mortgagor’s monthly payment amount. There is a cost for obtaining a modification, however, and it is unlikely that the lender will renegotiate its loan terms if the property owner is in default or unable

³ Sources:

MBA: 235,000 Loan Workouts Initiated During Third Quarter by Paul Jackson January 17, 2008
<http://www.housingwire.com/2008/01/17/mba-235000-loan-workouts-initiated-during-third-quarter/>
<http://loanworkout.org/2008/01/17/countrywide-is-fixing-loans-and-saving-homes-finally/>
<http://www.mortgagebankers.org>.

to accept the lender's proposed modification terms. Once a modification agreement has been executed by both mortgagor and mortgagee, a Modification Agreement setting forth the changes to the original financing arrangements may be recorded with the records of the Registry of Deeds or Registry District of the Land Court where the mortgage is recorded or filed.

3. **Refinancing** the loan may be a possibility for a mortgagor who is not yet in default, is credit worthy, and is able to pay closing costs associated with applying for and closing a new mortgage loan. If the property owner is in default on his or her current mortgage, there is a reduced likelihood that he or she will be able to refinance the mortgage of favorable terms and to retire the existing loan. As a result, a new lender is unlikely to offer a new loan on terms that the property owner is in a position to accept. The refinance transaction will be evidenced by the recording of a new mortgage and the discharge of the retired mortgage.
4. **Foreclosure** is the mortgagee's repossession of the real estate collateral that secures the mortgage loan debt. In Massachusetts, the foreclosure process (where the mortgagor is an individual) entails filing a Complaint with the Land Court or the Superior Court for the county where the land lies to determine if the to be foreclosed-upon borrower is in the military service and therefore entitled to the protections afforded by the federal Servicemembers Civil Relief Act (SCRA). The filing of the Complaint is the state law mechanism by which the foreclosing mortgagee evidences compliance with the SCRA and has nothing to do with the statutory procedure for foreclosing a mortgage by exercising the power of sale under G.L. c. 244. Although failure to comply with the SCRA creates a cloud on title, although it does not invalidate the foreclosure under state law.
5. **Deed in Lieu of Foreclosure** is the mortgagor in default's voluntarily delivery of title to the lender. The mortgagor cannot simply record the Deed and walk away from the property and the loan debt. The lender must agree to accept the Deed in Lieu of Foreclosure.
6. **Short Sale**, as discussed above, is a sale to a bona fide purchaser where each of the mortgage holders (and oftentimes, other secured creditors) agree to accept an amount that is less than full amounts due them.
7. **Foreclosure Rescue** is illegal in Massachusetts. As defined under 940 CMR 25.00 et. seq., a foreclosure rescue "shall be a transaction (a) by which residential property is conveyed where the person conveying the property (hereafter "homeowner") maintains a legal or equitable interest in the property conveyed, including, without limitation, a lease interest, an option to acquire the property, or other interest in the property conveyed; and (b) that is designed or intended by the parties to avoid or delay actual or anticipated foreclosure proceedings against a homeowner's residential property."⁴

⁴ 940 CMR 25.01 Regulations

People in danger of losing their homes are prime targets for foreclosure rescue scams, and the reality is that “[f]raudulent foreclosure rescue transactions [would not occur] without the participation of mortgage lenders and closing attorneys that represented mortgage lenders.”⁵ So, what does a foreclosure rescue look like and what should you as the closing attorney and title insurance agent avoid? Primarily, there are two types of scams, **equity skimming** and **fake foreclosure counseling**.

A. Equity skimming

As legal notices of foreclosure appear in public records, homeowners in distress often receive letters and calls promising them assistance. In an equity skimming transaction a so-called “buyer” approaches the homeowner with a promise to pay off an existing mortgage or to deliver a sum of money when the property is sold. The “buyer” may encourage the homeowner to move out quickly and convey the property to him or her. The “buyer” then collects rent for a time, does not make any mortgage payments, and allows the lender to foreclose. In August, the Massachusetts Attorney General’s filed three cases against alleged foreclosure scams involving 46 homeowners.⁶ On September 19, 2007, the Massachusetts Attorney General’s office announced that it had reached a settlement with five lenders regarding these scams. Prosecutions of several attorneys and realtors continue.

B. Fake foreclosure counseling

Phony counseling agencies approach homeowners in default offering to perform so-called “rescue” services such as renegotiating mortgage terms or pursuing a short sale for an inflated fee, whether or not such negotiations are successful—or attempted at all.

⁵ Attorney General Martha Coakley, http://www.mortgagefraudblog.com/index.php/weblog/print_friendly/ag_settles_with_5_lenders_involved_in_foreclosure_rescue_brings_in_4_new_pa/

⁶ Kimberly Blanton, Globe Staff, August 24, 2007

A Comment on Foreclosure, Short Sale, and Predatory Lending

“After decades of redlining practices that starved many urban communities for credit and denied loans to racial minorities, today a growing number of financial institutions are flooding these same markets with exploitative loan products that drain residents of their wealth. Such “reverse redlining” may be as problematic for minority families and older urban neighborhoods as has been the withdrawal of conventional financial services. Instead of contributing to homeownership and community development, predatory lending practices strip the equity homeowners have struggled to build and deplete the wealth of those communities for the enrichment of distant financial services firms. . . .”

“Not all subprime loans are predatory, but virtually all predatory loans are subprime. Some subprime loans certainly benefit high-risk borrowers who would not qualify for conventional, prime loans.”

“Predatory loans . . . charge higher rates and fees than warranted by the risk, trapping homeowners in unaffordable debt and often costing them their homes and life savings.”⁷

The following loan terms are frequently indicia of predatory lending:

- **Balloon payments** that require borrowers to pay off the entire balance of a loan by making a substantial payment after a period of time during which they have been making regular monthly payments;
- **Required single premium credit life insurance**, where the borrower must pay the entire annual premium at the beginning of the policy period rather than in monthly or quarterly payments. (With this cost folded into the loan, the total costs, including interest payments, are higher throughout the life of the loan);
- **Homeowners insurance** where the lender requires the borrower to pay for a policy **selected by the lender**;
- **Fees for services that may or may not actually be provided**;
- **Loans based on the solely on the value of the property** with no regard for the borrower’s ability to make payments;
- **Loan flipping or “churning”**, whereby lenders use deceptive and high-pressure tactics resulting in the frequent refinancing of loans with additional fees added each time;
- **Negatively amortized loans** and loans for more than the value of the home, which result in the borrower owing more money at the end of the loan period than when they started making payments; and
- **High pre-payment penalties that trap borrowers in unaffordable loans.**⁸

⁷ Gregory D. Squires, “Predatory Lending: Redlining in Reverse”
“<http://www.nhi.org/online/issues/139/redlining.html>

With regard to illegal prepayment penalties in Massachusetts, G.L.c. 183 §56 limits the prepayment penalty in an owner-occupied dwelling to the less of “the balance of the first year’s interest or 3 months’ interest whichever is less except, that if anticipatory payment is made within 36 months from the date of the note for the purpose of refinancing such loan in another financial institution, an additional payment not in excess of 3 months’ interest may be required.”

General Laws chapter 183 §56 makes an exception for Federal Housing Administration loans in that “the mortgagor may be required to reimburse the mortgagee to the full amount of any charges, premiums, or fees required by any statute or by any regulation of the Federal Housing Administration to be paid by the mortgagee upon payment of the note before the date fixed for payment.”

In no case is a prepayment fee or additional penalty payable by a mortgagor if the mortgage note is paid in full after 36 months from the date of the note. Further, “[a] mortgagor shall not be required to pay a prepayment fee or penalty for making additional payments toward the principal balance for the term of the loan.” See also G.L.c.167E §6; G.L.c. 183 §56; G.L.c. 140 §90A).

In addition, C.M.R. 940 CMR 8.06 (10) states that it is an unfair or deceptive act or practice for any mortgage lender to charge a prepayment fee which:

- (a) violates G.L. c. 183, s. 56;
- (b) significantly deviates [from] industry-wide standards; or
- (c) is otherwise unconscionable.

8. Demand for Rescission may be possible under federal or Massachusetts Truth in Lending Act (TILA) laws (15 USC seq. 1601, et. seq. and G.L.c. 140D, sec. 1 et. seq., respectively), and may be coupled with a claim under G.L.c. 93A, even after a predatory loan has been discharged. Violations of TILA turn on failure to provide accurate disclosure of finance charges, violations of prepaid interest moratoria, charging fees for services not actually rendered, and failure to provide accurate rescission notices to the borrower. Rescission is available to the mortgagor in default only if s/he was not complicit in any fraud related to the mortgage application or closing and only if loan for which rescission is sought was not a purchase money

⁸ Id.

loan. The mortgagor in default can tender the amount due under the note within twenty days of making the demand for rescission.⁹

III. LENDERS' MOTIVATION FOR SHORT SALE

Although some lenders may seem indifferent to negotiating work outs for residential mortgages, the increase in mortgage defaults and predatory lending/predatory servicing lawsuits may motivate mortgage lenders to work with mortgagors, particularly when the borrower makes an effort to communicate with the lender.

Lenders also understand the administrative costs associated with acquiring real-estate inventory, including the requirement to reserve funds to deal with potential losses related to delinquent and non-performing loans. In the near term there may be impetus for lenders to recast or refinance loans so that they may lower the costs associated with holding foreclosed property and to reduce the amount of their required reserves.

IV. WHO CAN (AND WHO SHOULD) NEGOTIATE A SHORT SALE?

It may seem obvious that the note signatory is authorized to act on his or her on behalf to negotiate with his or her mortgagee to discuss a loan workout. However, the identity of the note signatory is not always the identical to the signatories on the recorded mortgage. Where one spouse is the obligor under the note, for example, the non-obligor spouse may not negotiate the short sale on behalf of the couple without written authority to do so.

Furthermore, all of the parties who executed the promissory note secured by the recorded mortgage must be parties to the short sale negotiation, either in person or by designating one of the note holders or a third party to communicate with the lender.

Therefore, if a note signatory has vacated the real estate leaving a spouse who is not a note signatory in possession of the real estate--or if the note signatories are not in agreement--it will be difficult, if not impossible, to move forward with a short sale negotiation with the lender.

Other than the note signatory, any party authorized in writing by the note signatory, such as a real estate broker or the note signatory's attorney, may negotiate a short sale with the lender on the note signatory's behalf.

Authorized non-attorney third-party negotiators may negotiate short sales subject to the limitations of 940 CMR 25.00 et. seq. Although there is no express prohibition of third-party

⁹ The Attorney General's Office has created a Pro Bono Foreclosure Assistance Hotline for low-income Massachusetts residents who are facing foreclosure. The telephone number for this hotline is (800) 342-5297 or (617) 603-1700. The Massachusetts Division of Banks hotline, (800) 495-BANK, may be able to assist homeowners to obtain a brief delay in foreclosure proceedings. Low-income homeowners wishing to refinance high-interest subprime loans may contact Mass Housing at www.masshousing.com.

short sale negotiation services in the regulation, there is also no express permission for third parties to conduct such negotiations for a fee. The Office of the Attorney General has not yet provided guidance on this point.

V. EVALUATING THE LIKELIHOOD OF SUCCESS

The likelihood of completing a short sale successfully depends on the circumstances surrounding the mortgagor's default and the value of the real estate.

1. The circumstances surrounding the mortgagor's default

Concerning the defaulting mortgagor's circumstances, the answers to the following threshold questions provide the first indications as to whether an application for a short sale transaction is likely to be accepted by a mortgagee: 1) is the Seller presently in default on a first mortgage? 2) Is the Seller's default due to an unavoidable an involuntary hardship that is beyond the Seller's control that can be documented? 3) Is the hardship temporary or is it likely to endure? 4) Was the hardship the precipitating cause of the default? 5) Is the mortgage that is in default a purchase money loan or a loan that was refinanced within the past five years? 6) Is the Seller an owner-occupant or an investor? 7) Does the loan closing package contain indicia of Massachusetts or federal Truth in Lending or G.L.c. 93A violations?

Although the HUD/FHA guidelines do not have direct bearing on most loans that are in default, they provide some insight into what mortgagee's who accept short sale proposals seek:

- The loan must be two months delinquent;
- The homeowner must live in the property;
- The reason for the default on the mortgage must have been unavoidable, involuntary, or beyond the homeowner's control;

2. Value of the real estate

With regard to the value of the real estate, the HUD/FHA guidelines provide some insight into what mortgagees who receive short sale proposals seek to recover from a short sale:

- The real estate must appraise for at least 70 per cent of the unpaid principal balance of the first mortgage;
- The contract price must be at least 95 per cent of the mortgagee's appraised value;
- The net amount to the lender on HUD line 504 after all closing expenses are paid must be at least 87 per cent of the mortgage holder's appraised value.

VI. PREPARING A REQUEST FOR SHORT SALE APPROVAL

As is true with most real estate practice, preparing for a short sale is easier with a checklist. Attorneys representing short sale sellers will need the following letters and statements at the outset of representation:

- 1. Fee Agreement Letter** which sets forth the terms under which counsel for the seller in default agrees to provide legal services. Attorneys who conduct real estate closings may not be in the habit of preparing fee agreement Letters. Because the 940 CMR 25.00 prohibits the collection of an “advance fee” for short sale representation, a fee agreement letter may be best practice with regard to representation of sellers in default. A model letter follows these materials.
- 2. Letter of authorization** is a required writing that allows the mortgage holder for the Seller in default to communicate with persons who are not the note signatory. The letter of authorization must be sent to each lender, and should include the name and professional role of the person who is authorized to speak on the defaulting mortgagor’s behalf. The letter should include: a date, the mortgaged property address, loan reference number, and the property owner’s name, Social Security Number, and contact information. A model letter follows these materials.
- 3. Preliminary HUD-1 Settlement Statement** is a model closing statement that shows best (read: high) estimate all the costs of selling the property as of the date of an anticipated closing date: lien payoffs, title clearing and recording fees, attorney fees, a full broker’s commission, water, sewer, taxes, utilities, betterments, common charges, smoke detector certificate, and so on. If you rely on the seller’s mortgage statements to estimate a payoff amount, add as many days of interest as remain until to the amount of the balance owing on the loan statement.

Line 603 on a preliminary should show “Cash from Seller” that represents money that the Seller would ordinarily be required to bring to the table to satisfy all liens. The goal, after negotiation with all creditors, is to have Line 603 on a final HUD-1 read “0.00”

- 4. Hardship letter** is a statement of facts describes the unavoidable and involuntary hardship that is beyond the homeowner's control and reason why the hardship is the precipitating cause of the default on the mortgage. The seller’s letter should include a request for relief from the lender in the form of the acceptance less than full payment on the underlying mortgage note and a request for cancellation of any deficiency on the note. The mortgagor’s illness or injury, a family member’s illness or injury, involuntary job relocation, job loss, significant income loss, divorce or separation of domestic partners, death of spouse or wage earner, adjustment in mortgage payment or unforeseen increase in living expenses are all within the scope of involuntary hardships. Lenders are not empathetic to hardship flowing from involving dishonesty, intentional acts, or criminal behavior.
- 5. Proof of income and assets** such as original pay stubs, asset account statements, and copies of federal and state income tax returns with all schedules and W-2

forms and 1099-S forms attached, and statements regarding other real estate must be provided to the lender to whom a short sale application is made. Copies of bank statements that show unaccountable deposits, large cash withdrawals, or an unusual number of checks must be fully explained to the lender. The lender may request an accounting for each and every deposit so it can determine whether deposits will continue.

6. Comparative market analysis showing pending and recent sales of similar homes prepared by a real estate broker, with the broker's opinion of the value of the real estate and market analysis of the area and the property, should be included in the short sale application.

7. Offer to Purchase and listing agreement must be presented to the mortgagee. Be prepared for the lender to make a counteroffer to the prospective buyer, to attempt to renegotiate commissions, and to refuse to allow payment of closing costs other than those shown in the 500, 700 and 1200 sections of a **preliminary** HUD-1 Settlement Statement.

VII. CLIENT AND TRANSACTION MANAGEMENT

1. If you are buyer's counsel

Purchasing a short sale property requires patience. An inexperienced short sale buyer may become impatient if he or she is not given a realistic timeline for the seller's short sale approval, and may not understand that walking away from a transaction inappropriately may cause him to lose his or her deposit. Your client could choose to wait for the foreclosure auction to occur, but there is no guarantee that your client will be the successful bidder. And, unlike a purchaser of a foreclosed property at auction, a short sale buyer is assured of clear, record, marketable title, free of liens, and free of tenants.

Even if your client is the successful bidder at auction, there is no guarantee that the foreclosure was properly completed. The Land Court does not review foreclosure documents. Errors in foreclosure process do occur.

In a short sale, your client acquires real estate with clear, record, marketable title at a slightly lower than fair market value. Evaluate whether your client is dealing with the short sale seller in good faith. A buyer who executes a Purchase and Sale Agreement without an intention to consummate a sale is likely to lose his or her deposit. Worse, binding a short sale seller Purchase and Sale Agreement without an intention to consummate a sale may deprive the short sale seller of any real opportunity to find a bona fide purchaser.

2. If you are seller's counsel

Managing a short sale requires "soft" skills. Losing a home is a miserable experience and a short sale seller may have unrealistic expectations regarding the amount of time

that it takes to obtain approvals from short sale lender(s). He or she may want to walk away from the transaction and allow a foreclosure to proceed, not understanding that surrendering his or her home or investment property to the auction process does not free him or her of the obligation to pay some of the underlying debt.

Your client should be made aware early on that even if his mortgagee agrees to a short sale, there will be costs associated with the closing that s/he must pay in order to deliver the property to the buyer. The seller and buyer may negotiate who pays:

- **Condominium Fees:** The seller or buyer must pay unpaid condominium fees through the date of closing.
- **Real Estate Taxes:** At closing, the lender is entitled to receive the amount any real estate taxes that were not covered by the seller's tax escrow account.
- **Utilities:** The seller or buyer must pay all water/sewer, electric, gas, telephone, trash, cable fees through the date of closing, and should statements to the closing showing that these bills have been paid.
- **Closing Costs:** The seller's and buyer's recording fees, condominium fees, smoke detector fees, excise stamp.
- **Brokers Fees:** The brokers are entitled to commission in accordance with the listing agreement, which should be included in the Offer, preliminary HUD-1 Statement, and Purchase and Sale Agreement. The commission is typically 5% to 6%. Brokers may be willing to reduce commission to make a short sale work, but this should be your last option to save a transaction, not your first request to make the short sale palatable to the short sale lender.
- **Your Fee:** Negotiating a short sale is labor intensive and requires diligent communication by telephone, facsimile, e-mail, and in-person meetings with your seller. You may charge a fee, but you should discuss this with your client (and Bar Counsel) and put it in a fee agreement letter.
- **Loan Deficiency:** Even if his mortgagee agrees to a short sale, the short sale seller may not be relieved of the underlying loan debt. Each lender who accepts a short sale has sole discretion as to whether to cancel the debt or to pursue an action to collect the difference between the amount that owed and the amount recovered, which is called a "deficiency." Lenders may request—but not require--the short sale seller sign a promissory note for some or all of the deficiency before approving a short sale.

Counsel for the short sale seller must be aware that even in a climate with a record number of defaults, lenders will reject short sale proposals if:

- the short sale seller is not yet in default;

- the short sale seller has not received an offer to purchase from a prospective buyer, the amount offered is so low that the lender will not recover a significant portion of the outstanding mortgage loan debt
- the short sale seller has not submitted a complete and correct loss mitigation package; or
- the short sale seller has assets available that could be liquidated to pay the mortgage.

Seller's counsel should make all parties to the short sale aware that:

- the loss mitigation review process typically lasts from 60 to 90 days at a minimum;
- the seller must be in default to be eligible for a short sale, and should not have made mortgage payments for at least two months;
- the brokers are entitled to a commission for marketing the property;
- the lender may pursue a deficiency;
- the seller must consider filing for Bankruptcy protection;
- the seller must seek advice regarding income tax liability;
- the short sale may be rejected by either mortgagee if there is more than one mortgagee and where one lender demands a payoff amount that is unacceptable to the other.

3. If you are the settlement agent/lender's counsel/title insurance agent

As in any real estate closing, you must review the status of title, notify seller's counsel of outstanding encumbrances, clear the purchase money mortgagee's underwriting objections, and disburse funds.

Where the seller is unrepresented, you must find out who is negotiating the short sale and have the seller to authorize you in writing to communicate with the short sale mortgagee directly so that you may obtain written approval to close the transaction, payoff balances from mortgagees and creditors, and instructions as to how payment of liens must be made.

Where seller is unrepresented and you are both buyer's counsel and settlement agent, be attentive to the signs that you are inadvertently (or purposely) negotiating the short sale on the seller's behalf in order to close the transaction.

Although the **Prohibited Practices Disclosure** at the end of these materials is a suggested form, you may wish to include it if you are the settlement agent for a short sale transaction.

4. Communicating with real estate brokers

While it is true that selling the property without the assistance of a real estate broker will save the amount of the commission and have more to apply toward paying off the loan, a skilled broker provides a level of security for the property owner.

The seller's broker must market your client's property aggressively at comparable value and ask for comparable values of like properties. Real estate brokers are sometimes reluctant to disclose that a property is a short sale on an MLS listing for fear of attracting inordinately low offers. The thought is that if a prospective buyer knows that the seller is in distress, the buyer will try to take advantage of the seller's desperation to negotiate a fire-sale price for the real estate.

The flaw in that thinking is that if the buyer is not aware that the real estate is the subject of a short sale, s/he will be unprepared for the 60 to 90 day minimum wait until closing. In addition, if the broker is in the habit of preparing to Offer to Purchase and the first draft of the Purchase and Sale Agreement, explain to him or her that both the Offer to Purchase and the Purchase and Sale Agreements must include provisions that inform the parties of the short sale lender's right to review the transaction, even after the Purchase and Sale Agreement is executed. Although brokers are typically reluctant to join into Purchase and Sale Agreements, a short sale lender might request them to do so.

5. Communicating with a third-party short sale negotiator

As mentioned previously, and in light of the promulgation of 940 CMR 25.00, is it ever lawful for a “short sale negotiator” who is not an attorney to operate in Massachusetts and receive compensation for preparing a loss mitigation package and negotiating a short sale with a lender on the seller’s behalf? Looking at the regulations as written, and subject to future comment by the office of the Attorney General of the Commonwealth, it may be possible for a third party who is not an attorney to receive compensation for negotiating a short sale where the negotiator:

- Is disclosed to the lender at the outset and shown on a preliminary and final HUD-1;
- Does not accept an advance fee from the seller in default;
- Does not require the seller in default to pay for service if the short sale transaction does not close;
- Does not market the property for sale, i.e. does not act as a real estate broker unless licensed to do so;
- Charges a reasonable fee for service that is shown on the HUD and paid as part of the closing; and
- Does not receive any fee or equity interest in the property at or after the short sale closing.

6. Communicating with the loss mitigation specialist

After you send the authorization letter to the short sale seller’s mortgagee(s), request a loss mitigation package from each of them. Ask each lender’s loss litigation specialist:

- what the lender expects to recover from the short sale;
- if there is an investor who must review the loss mitigation package;
- what the conditions are in the loss mitigation department, and how long the review process will be; and
- what the approval steps are: who reviews the package, when is an appraisal requested, when is the package assigned to a loss mitigation specialist, and so on.

The loss mitigation contact may not be able to disclose how much or how little the lender is willing to accept in a short sale. Further, there may be an investor in the wings that must give final approval to your client’s proposed sale.

VIII. SHORT SALE PROCESS

1. Client intake

The sooner that the seller who is facing default, or who has missed one or two mortgage payments, can request a short sale approval, the better. At an initial intake interview, and after having reviewed section VI above, evaluate the likelihood that the seller will be able to receive short sale approval. Discuss the fee agreement and the authorization letters, find out who the seller's mortgagees and creditors are, and discuss whether to list the real estate with a broker. Discuss the hardship letter and proof of financial condition, and have your client gather the necessary information for you. Only after your client signs an authorization letter permitting you to communicate with his or her mortgagees will you be able to request a loss mitigation questionnaire from each of his or her mortgagees.

2. Assembling and Submitting the Loss Mitigation Package

Once you have contacted your client's lenders, you or s/he will receive a loss mitigation questionnaire, which is typically a four-page form that asks for the short sale seller's hardship statement and documentation of his or her financial condition.

Have your client fill out a draft questionnaire and review it for omissions or inconsistencies. Have your client complete a final questionnaire and append the hardship statement and documentation of financial condition to it.

Treat the loss mitigation package as if it were a record for an administrative hearing. Include the borrower's name, property address, loan number and Social Security Number on **every** page. Number the pages of the package.

Once you have reviewed each of the seller's completed packages, send them by facsimile to the loss mitigation department of each of the seller's mortgagees.

Within one to five days of sending the packages, call the short sale lender to confirm that the packages have been received. Any time you call the seller's mortgagees, have the homeowner's loan number, telephone numbers, address and zip code in front of you before you pick up the phone. Be persistent but courteous to a fault. The loss mitigation contacts deal with unrepresented homeowners who are in distress all day, every day. You do not serve your client well by fumbling through a file for basic information or browbeating the loss mitigation contact.

If you take care to call the lender at the same time, once a week, and manage the mortgagee's expectations, the likelihood of success increases. In terms of managing the mortgagee's expectations, take care not to make representation to the lender that your client might be willing pay closing costs or sign an unsecured promise to repay part of the deficiency. If you make a suggestion to the lender as to a negotiation point that you have not yet discussed with your client, the lender may make it a

condition of approval—thus backing your client into a corner. Always ask what the lender wants, then talk to your client about options, and THEN bring your suggestions back to the lender. This recommendation also holds for legal fees and broker's commissions; suggesting that the brokers or buyer's attorney may reduce their fees without consulting them is a mistake.

3. Drafting and Negotiating the Purchase and Sale Agreement

Where Purchase and Sale Agreements that are executed in the context of foreclosure or sale of an REO property are usually not subject to negotiation by the buyer, the short sale the seller and buyer have some latitude to negotiate:

- The amount of the deposit at execution of the Purchase and Sale Agreement;
- The allocation of costs associated with closing;
- Mortgage contingency;
- Requirements for extension;
- Requirements for return of deposit;
- Requirements for performance; and
- Condition of the premises.

Both the Offer to Purchase and the Purchase and Sale Agreement must include provisions that inform the parties of the short sale lender's right to review the transaction even after the Purchase and Sale Agreement is executed.

Short sales are unusual in that even fully executed Purchase and Sale Agreements, are subject to the short sale lender's approval. Although brokers are typically reluctant to join into Purchase and Sale Agreements, a short sale lender might request them to do so.

It is not uncommon for the short sale mortgagee to respond with a "counteroffer" asking the buyer to increase his or her offer after the final Purchase and Sale Agreement has been received. Needless to say, the fully executed Purchase and Sale Agreement is an integrated contract and the Buyer is under no obligation to increase his or her offer. Moreover, if the offer is a reasonable one in that it reflects the value of the real estate in light of market conditions, the prospective buyer's refusal to accept the lender's "counteroffer" does not mean that the lender will reject the buyer's offer.

Once the "counteroffer" is rejected, however, the loss mitigation specialist is likely to ask that the short sale seller to execute an unsecured note for an amount that is the

difference between the purchase price and the “counteroffer.” All Massachusetts mortgage loan notes are recourse notes; the seller is not obligated to enter into such an agreement, and the execution of an unsecured note cannot be a condition of a short sale approval.

Buyer’s counsel should also be sensitive to conditions in the market that may affect the buyer’s ability to perform. Loan products and rates change. Investors may change guidelines, pull loan products, or go out of business while the buyer is waiting for the seller’s mortgagee to approve a short sale.

IX. SHORT SALE OUTCOMES: DEFICIENCY, DEBT CANCELLATION, GAIN OR LOSS ON SALE

1. Deficiency

A deficiency occurs when a mortgagee accepts an amount that is less than the outstanding balance due on the mortgage loan. The Lender has the choice of treating the deficiency as an ongoing, unsecured debt or to cancel the debt and consider it a loss. If the lender elects to treat the deficiency as an ongoing, unsecured debt there is no loss the lender.

If the borrower is unable or unwilling to make payment on the deficiency under the promissory note, the lender may file suit in a collection action against the short sale seller to obtain a judgment in the amount of the unpaid balance of the loan. In a foreclosure, the mortgagee who intends to seek a deficiency judgment from the mortgagor must send a notice of intent to do so must be sent by registered or certified mail at least 21 days before the date of the sale. G.L.c.244, §17B. In a short sale, however, it may be sufficient for the lender to state its intention to pursue a deficiency in the short sale approval letter.

2. Debt Cancellation

Because all Massachusetts mortgage loans are recourse loans, residential borrowers are always personally liable for the underlying mortgage loan under the terms of the Note signed at closing. Prior to the January 1, 2007, the Internal Revenue Code treated amount of forgiven mortgage debt as ordinary income that was taxable to the mortgagor. The Mortgage Forgiveness Debt Relief Act of 2007, P.L. 110-142, effective January 1, 2007, eliminated taxation as ordinary income any “ indebtedness discharged [on a] qualified principal residence indebtedness which is discharged before January 1, 2010.”

Prior the enactment of the Mortgage Forgiveness Debt Relief Act of 2007, P.L. 110-142, the amount of the forgiven debt was treated as ordinary income unless:

- the deficiency was discharged in Bankruptcy;
- the borrower was insolvent, as defined under the Internal Revenue Code (liabilities exceed assets) at the time of the cancellation of the debt;

- the debt was secured by a nonrecourse loan; or
- the tax liability from the cancellation of debt on an investment property that could be offset against other business liabilities and expenses.

3. Gain or Loss on Disposition of Property

Just because the short sale seller's debt is cancelled does not mean that the seller is not liable for payment of any tax on the transaction. The Internal Revenue Code treats any disposition of real estate, be it by sale, short sale, foreclosure, delivery of a Deed in Lieu of Foreclosure, as a voluntary conveyance that gives rise to a taxable event.¹⁰ A rough calculation of gain or loss follows the definitions below:

Selling price is the gross amount that seller receives from sale.

Selling expenses are commissions, fees, legal fees, loan charges.

Amount realized is the net amount, i.e. Selling price less Selling expenses.

Adjusted basis is the amount that the buyer pays to purchase property, including some, but not all, settlement costs.

The calculation is expressed as follows: If amount realized is more than the adjusted basis, the difference is a gain to the seller. By contrast, if the amount realized is less than the adjusted basis, the difference is a loss to the seller. If the real estate disposed of is the debtor's primary residence, a loss is not deductible, but a gain is taxable.

It is probable that sellers who purchased real estate within the past five years did so with a relatively high adjusted basis such that the amount realized in a short sale may not yield much of a gain. This may not be the case for sellers who have owned the real estate many years.

If you are not well-versed in taxation, urge your client to speak to his tax return preparer as soon as possible to determine whether or not he will be subject to tax on his/her short sale transaction.

X. BANKRUPTCY

In addition to seeking tax counseling, counsel for sellers in default should evaluate whether filing for Bankruptcy relief is appropriate. Bankruptcy was originally intended to provide "the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). Bankruptcy releases debtors from personal liability from

¹⁰ Source: IRS Publication 523 (2006)

specific debts and prohibits creditors from taking any action against the debtor to collect those debts. That said, the decision to file for Bankruptcy protection should only be made after consultation with a qualified Bankruptcy attorney.

1. Chapter 7 Liquidation

When an individual may files for Bankruptcy protection under Chapter 7, the debtors' assets are subjected to the jurisdiction of the Bankruptcy court. The Chapter 7 trustee reduces the debtor's assets to cash and makes distributions to the debtor's unsecured creditors to satisfy debts. The distribution of the debtor's assets are limited by the priority rights of secured creditors to the debtor's assets and by the debtor's right to retain property that is shielded by statutory exemptions, such as a declaration of Homestead. Chapter 7 Bankruptcy cases are typically no-asset cases where there is little or no nonexempt property, and the Massachusetts homestead declaration shields up to \$500,000.00 of the equity value of the debtor's principal residence. G.L.c. 188, §§1, 1A. As a result, liquidation of assets is not usual, and the debtor receives a discharge from personal liability for certain debts within a few months after filing the Bankruptcy petition.

Chapter 13 Adjustment of Debts of an Individual with Regular Income

Because the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCA) requires the application of a means test to determine whether the individual debtor qualifies for relief under Chapter 7. A debtor may instead be obliged to file a Chapter 13 petition, which is designed for an individual debtor who has a regular source of income.

Chapter 13 enables the debtor to keep a valuable asset, such as a house, and allows the debtor to propose a plan to repay creditors over a specified time period, which is typically three to five years. At the inception of a Chapter 13 case, the court holds a confirmation hearing to review and the Debtor's proposed repayment plan. If the plan is approved, the Debtor must make payments to creditors through the trustee. The benefit of such a filing is that creditors may not pursue lawsuits, garnishments, and other debt recovery actions against the Debtor while the plan is in effect. Once the debtor completes the payments set forth under his repayment plan, the court issues a discharge from liability for personal debts.

A. Bankruptcy in the Context of Foreclosure

The effect of Bankruptcy is that it wipes out any personal liability for deficiency under the mortgage note. However, the Bankruptcy does not necessarily relieve the debtor from tax liability resulting from a gain incurred by the disposition of real estate.

With regard to the timing of Bankruptcy filing, a pre-foreclosure Bankruptcy triggers an Automatic Stay of Foreclosure. Because a mortgagee must obtain a judgment of

Relief from Automatic Stay from the Bankruptcy Court to proceed with a foreclosure, some debtors choose to file a pre-foreclosure Bankruptcy to delay relocation. By contrast, other debtors may wait to file for Bankruptcy protection until after the foreclosure is completed in order to hasten the process.

B. Bankruptcy in the Context of Short Sale

If a debtor files for Bankruptcy protection prior to a short sale, the disposition of the real estate that is not abandoned will require the Bankruptcy Trustee's approval. In general, the Trustee's approval will not be withheld if there is no equity to be had for other creditors. In addition, the Trustee will probably not avoid mortgage payments, condominium fee payments and the like as preference payments.

C. Pending Bankruptcy Legislation

There are several bills pending that would amend BAPCA, which I list in the chronological order of their filing below:

The Emergency Home Ownership and Mortgage Equity Protection Act of 2007 introduced by Representative Brad Miller, D.-N.C., on September 20, 2007, as H.R. 3609, limits the exemption that prevents bankruptcy courts from modifying a mortgage on a debtor's principal residence and eliminates the credit counseling requirement when foreclosure has been initiated. On Oct. 4, H.R. 3609 was referred to the full House Committee on the Judiciary.¹¹ **Latest Major Action:** 12/12/2007 House committee/subcommittee actions. Status: Ordered to be Reported (Amended) by the Yeas and Nays: 17 - 15.

The Helping Families Save Their Homes in Bankruptcy Act of 2007, was filed on October 3, 2007, by Senator Richard Durbin, D-Ill., as S. 2136. The bill would eliminate the prohibition on modification of a mortgage on a debtor's principal residence and would permit the bankruptcy court to modify or "cram down" a mortgage on a debtor's principal residence by determining the repayment period and interest rate. **Latest Major Action:** 12/5/2007 Senate committee/subcommittee actions. Status: Committee on the Judiciary. Hearings held.

The Home Owners' Mortgage and Equity Savings Act or HOMES Act also introduced on October 3, 2007 by Senator Arlen Specter, R-Pa., as S. 2133, would amend Section 1322(b)(2) of the U.S. Bankruptcy Code so that a bankruptcy court could reduce the principal amount of a loan secured by a debtor's principal residence if an income test is met. Senate Bill 2133 would also permit the court to waive prepayment penalties and prohibit adjustments to the interest rate of adjustable-rate mortgages. However, S. 2133 is would only allow the reduction of principal if the lender and the homeowner agree. **Latest Major Action:** 10/3/2007 Referred to

¹¹ 1-2 Mealey's Mortgage Lending 21 (2007) Volume 1, Issue #2 (November 2007)

Senate committee. Status: Read twice and referred to the Committee on the Judiciary.

The HOMES Act, introduced on October 9, 2007 by Representative Steve Chabot, R-Ohio, as H.R. 3778 is substantially the same as S. 2133 above. **Latest Major Action:** 11/2/2007 Referred to House subcommittee. Status: Referred to the Subcommittee on Commercial and Administrative Law.

Foreclosure Prevention Act of 2008, submitted as S. 2636 on February 13, 2008, is Senate Majority Leader Harry Reid's, D-Nev., bill which incorporated provisions of Senator Richard Durbin's S. 2136, , into a broader piece of legislation. The bill includes \$200 million dollars for pre-foreclosure counseling and authorization for state housing finance authorities to issue \$10 billion in additional mortgage revenue bonds to refinance subprime loans and provide mortgages for first-time home buyers. **Latest Major Action:** 2/14/2008 Read the second time. Placed on Senate Legislative Calendar under General Orders. Calendar No. 577.

For current status on these bills, see <http://thomas.loc.gov/>.

MODEL FEE AGREEMENT LETTER

Date

Mr. /Ms. Seller Client
123 Main Street
Municipality, MA 00000

Re: Preparation of Purchase and Sale Agreement and Deed for Short Sale
123 Main Street, Yourtown, MA 00000

Dear Mr./Ms. Client:

Thank you for your request to have me assist you with the “short sale” of your 123 Main Street, Municipality, MA 00000 (the “Property”). I will do all I can to help you obtain approval of the short sale of your Property from both lenders, but I cannot guarantee that your mortgagee(s), will approve your request.

This letter describes the terms under which you and I have agreed that I will provide legal services to you. This letter also serves to summarize what service I have been able to complete on your behalf as of today.

Cost of Legal Services and Time of Payment of Fee:

I have agreed to represent you for [a flat fee of _____/for a fee of _____hour.] I [will/will not] bill you for administrative tasks, travel, postage, copying done in the ordinary course of corresponding with you, or for maintaining your file.

I will, however, bill you for services provided to you as they are rendered, and I will furnish you with a statement of charges to you on the 15th of each month. My service to you will terminate upon the closing of your short sale, subject to the conditions in this letter.

You have the right to question my fees within a reasonable time once you receive my invoice. If you have a question concerning my fee, I will make every effort to resolve any questions that you may have promptly. In accordance with 940 CMR 25.00 et. seq. and the Massachusetts Rules of Professional Conduct, specifically Rules 1.5 and 1.16, I will not ask you for an advance fee or legal retainer in this matter. An advance fee is any money or consideration paid in advance of actually receiving services.

Summary of Service:

I will:

- prepare loss mitigation packages for your first mortgage holders, and submit them to your lenders for their approval;

- prepare a Purchase and Sale Agreement and Deed for your review, making additions or corrections to them, and making sure that the Purchase and Sale Agreement and Deed are properly executed by you;
- communicate by telephone and in writing with the real estate brokers in this transaction; negotiate with your mortgage holders; and communicate with the buyer's counsel and the settlement agent who represents the buyer's purchase money lender;
- assist you at closing;
- refer you to Bankruptcy counsel to discuss whether filing a petition for Bankruptcy relief is appropriate for you.

Costs Associated with Your Short Sale Transaction:

Your mortgage holders may agree to accept a payment from you that is less than the total amount due under the Notes that you signed when you purchased the Property, but I cannot guarantee such a result. You must also understand that even if each of your lenders should agree to a short sale of your Property, there may be costs associated with the closing that you must pay in order to deliver the Property to the buyer free of liens. Generally, the seller of real estate is required to pay:

- **Condominium Fees:** Prior to closing, you must pay the condominium fees through the date of closing. You may be required to pay the condominium fees at least five days before the closing so that the Buyer's attorney can obtain a certificate to show that no condominium fees are owed on the Unit.
- **Real Estate Taxes:** Prior to or at closing, you must pay past due and current real estate taxes that were not covered by your tax escrow account.
- **Utilities:** Prior to or at closing, you must pay all water/sewer, electric, gas, telephone, trash, cable fees through the date of closing. You may be required to bring statements to the closing showing that these bills have been paid.
- **Recording fees:** The cost of obtaining and recording such instruments as may be necessary to clear record title, such as Mortgage Discharges, are the Seller's responsibility. These costs are paid out of the proceeds of the sale, and will be shown on the HUD-1 Settlement Statement that you will execute at closing.
- **Deed excise stamp:** The cost of the Deed excise stamp is the Seller's responsibility. This cost is paid out of the proceeds of the sale, and will be shown on the HUD-1 Settlement Statement that you will execute at closing.
- **Brokers' commission:** The real estate brokers' commission, which must be disclosed to the short sale lender and should be shown in the listing agreement for

the Property, is paid out of the proceeds of the sale and will be shown on the HUD-1 Settlement Statement that you will execute at closing.

Please be aware that while it may be possible to negotiate that the buyer pay some or all of these charges on your behalf, I cannot guarantee such a result.

You may also be required to pay:

- **Taxes:** Internal Revenue Service treats any disposition of real estate, be it by sale, short sale, foreclosure, delivery of a Deed in Lieu of Foreclosure, as a voluntary conveyance that gives rise to a taxable event. I strongly advise you to speak to your tax return preparer as soon as possible to determine whether you will incur a gain or loss on the sale of your real estate and whether you will incur tax liability on this transaction.
- **Deficiency:** Each lender who accepts a short sale may reserve the right to collect the difference between the amount that you owe and the amount that you paid, which is called a “deficiency.” I will request that the lenders include a written statement that they will not attempt to collect a deficiency from you, but I cannot guarantee such a result.

My Commitment to You:

I am committed to providing you with excellent legal representation. I will consult you if it appears that the novelty or difficulty of any matter or the circumstances of your short sale closing require further discussion about my ability to represent you. Just as you value my time and effort on your behalf, I will take care to consult you before I proceed on any matter. Please bear in mind that my ability to represent you depends upon your responsiveness to my communication with you.

Communication with You/Continuation of Services:

If we are unable to reach agreement or to communicate with one another, or if you indicate that you wish to discontinue my services prior to your closing, I reserve the right to withdraw as your counsel, to discontinue services to you, and to receive payment for services rendered to you in accordance with this fee agreement Letter. If you have any questions at all, please do not hesitate to call me.

Sincerely,

Attorney

The undersigned hereby acknowledges receipt of a copy of this fee agreement letter from _____ dated _____, understands and agrees with its terms and

acknowledges that no payment has been requested by _____, or tendered to him/her, for undertaking the above-described matters.

Client

**MODEL DISCLOSURE REGARDING THIRD-PARTY NEGOTIATION OF
SHORT SALE AND PROHIBITED PRACTICES UNDER 940 CMR 25.00**

I _____, Esq. am an attorney licensed to practice in the Commonwealth of Massachusetts, with an office address of _____.

I am the Settlement Agent representing the purchase money lender, _____, in the sale of the property located at _____ by _____ to _____ under the Purchase and Sale Agreement dated _____.

I have informed you, the Seller, orally and in writing that you may consult with an attorney of your choice to represent you in this transaction.

All fees related to this transaction are shown on the HUD-1 Settlement executed at closing, all parties to this transaction are disclosed on the HUD-1 Settlement Statement for this transaction, and no separate or alternate HUD-1 Settlement Statement has been executed in connection with this transaction.

I have provided you with a copy of **940 CMR 25.00** regarding prohibited “foreclosure rescue practices” printed here:

25.01: Definitions

“**Foreclosure Rescue Transaction**” shall mean a transaction (a) by which residential property is conveyed where the person conveying the property (hereafter “homeowner”) maintains a legal or equitable interest in the property conveyed, including, without limitation, a lease interest, an option to acquire the property, or other interest in the property conveyed; and (b) that is designed or intended by the parties to avoid or delay actual or anticipated foreclosure proceedings against a homeowner’s residential property.

“**Foreclosure-Related Services**” shall mean any goods or services related to, or promising assistance in connection with: (a) avoiding or delaying actual or anticipated foreclosure proceedings concerning residential property; or (b) curing or otherwise addressing a default or failure to timely pay, with respect to a residential mortgage loan obligation. Foreclosure-Related Services shall include the offer, arrangement or placement of a residential mortgage loan, or other loan, when those goods or services are advertised, offered or promoted in the context described in (a) and/or (b) immediately above.

25.02 Prohibition on Foreclosure Rescue Transactions and Advance Fees for Foreclosure- Related Services

(a) It is an unfair or deceptive act in violation of M.G.L. c. 93A, § 2(a) to, for compensation or gain or for potential or contingent compensation or gain, whether at the time of the transaction or in the future, engage in, arrange, offer, promote, promise, solicit participation in, or carry out a Foreclosure Rescue Transaction in the Commonwealth or concerning residential property in the Commonwealth. Nothing in this subparagraph (a) shall be

interpreted to prohibit Foreclosure Rescue Transactions that are not carried out for compensation or gain or for potential or contingent compensation or gain, including, by way of example, such transactions engaged in between or among family members or arranged by a non-profit community or non-profit housing organization.

(b) It is an unfair or deceptive act in violation of M.G.L. c. 93A, § 2(a) to solicit, arrange, or accept an advance fee in connection with offering, arranging or providing Foreclosure-Related Services; provided, however, that this subsection shall not prohibit a licensed attorney from soliciting, arranging or accepting an advance fee or retainer for legal services in connection with (i) the preparation and filing of a bankruptcy petition, or (ii) court proceedings, to avoid a foreclosure. Provided further, however, that a licensed attorney accepting an advance fee or legal retainer must comply with all applicable laws and regulations pertaining to such fees, including the Massachusetts Rules of Professional Conduct, specifically Rules 1.5 and 1.16. For purposes of this section, an advance fee is any money or consideration paid in advance of actually receiving services. If the Foreclosure-Related Services at issue concern the offer, arrangement or placement of a residential mortgage loan by a licensed mortgage broker or licensed mortgage lender, then this section (b) shall not prohibit the solicitation, payment or acceptance of a loan application fee provided that the fee conforms with all applicable laws and regulations, including any rules or regulations of the Commissioner of Banks.

25.03 Marketing of Foreclosure-Related Services

It is an unfair or deceptive act in violation of M.G.L. c. 93A, § 2(a):

(a) to advertise, offer or promote the availability of Foreclosure Rescue Transactions or services related to Foreclosure Rescue Transactions;

(b) to advertise, offer or promote Foreclosure-Related Services if the person so promoting intends to provide Foreclosure-Related Services by offering, engaging in, arranging, promoting, promising, or soliciting participation in, a Foreclosure Rescue Transaction;

(c) to advertise, offer or promote Foreclosure-Related Services without disclosing, clearly and conspicuously, (i) the precise goods and/or services offered and to be provided by the promoter of Foreclosure-Related Services, and (ii) a precise description of how the promoter will assist persons in avoiding or delaying foreclosure or curing or otherwise addressing a default or failure to timely pay a residential mortgage loan obligation.

(d) for a licensed mortgage broker or licensed mortgage lender to advertise, offer or promote Foreclosure-Related Services, where the goods or services promoted concern the offer, arrangement or placement of a residential mortgage loan (*i.e.*, replacement financing), without complying with all laws and regulations that apply to the marketing of mortgage loans, including, without limitation, the regulations of the Commissioner of Banks (209 CMR 32.00 et seq.) and the Office of the Attorney General (940 CMR 8.00 et seq.).

Attorney/Settlement Agent

I, the undersigned Seller, hereby acknowledge that I have received, read, and understand the above **DISCLOSURE REGARDING THIRD-PARTY NEGOTIATION OF SHORT SALE AND PROHIBITED PRACTICES UNDER 940 CMR 25.00** given to me by Attorney/Settlement Agent.

Date: _____

Client

MODEL AUTHORIZATION TO COMMUNICATE WITH LENDER
ON BEHALF OF SELLER IN DEFAULT

Date

By facsimile only
First Bank
1010 Default Way
San Diego, CA 00000-0000
Attn.: Loss Mitigation Department/Default Risk Management

By facsimile only
Second Bank
1010 Recourse Lane
Dallas, TX 00000-0000
Attn.: Loss Mitigation Department/Default Risk Management

Re: Mr. /Ms. Seller Client, 123 Main Street, Yourtown, MA 00000-0000
First Bank Loan No.:
Second Bank Loan No.:
SSN:

Dear Sir or Madam,

This letter follows my telephone conversation with you regarding the negotiation of the "short sale" of the property that I own at 123 Main Street, Yourtown, MA 00000.

I am the signatory on the note that is secured by the Mortgage dated ____ and recorded _____. I have received an offer to purchase my property from _____ in the amount of \$_____, contingent upon written approval by _____ as the first mortgage holder and by _____ as the second mortgage holder.

By this letter, I authorize you to communicate with my attorney, who is _____, Esq. by telephone, facsimile, e-mail, and in writing so that I may complete this sale no later than _____. His/her contact information is as follows:

Ms. Counsel, Esq., 123 Her Office Location, Yourtown, MA 00000
Telephone: _____ Facsimile: _____ e-mail address: _____

If you have questions regarding this letter, please contact me at the telephone numbers below:

Home: _____ Cell: _____

Sincerely,

Mr./Ms. Client

**MODEL SELLER's RIDER TO PURCHASE AND SALE
AGREEMENT**

BUYER understands and agrees that the sale of the Premises is the subject of a "short sale" meaning that the SELLER has made a request to his first mortgagee, _____, and to his second mortgagee, _____, to accept loan payoff amounts for each loan that is less than the amount due under the terms of each lender's Note.

BUYER further understands and agrees that SELLER's performance under this Purchase and Sale Agreement is conditioned upon:

- 1) first mortgage's approval of the BUYER's offer in the amount of \$ _____;
- 2) second mortgagee's approval of the BUYER's offer in the amount of \$ _____;
- 3) that the amount of proceeds due SELLER or the amount of cash due from SELLER shown on Line 603 of a final HUD Settlement Statement at closing shall not exceed zero and 00/100 dollars (\$0.00), meaning that SELLER shall neither take proceeds from the sale of the Premises nor be required to bring funds to closing to consummate the sale of the Premises to the BUYER; and
- 4) SELLER shall not under any circumstances be obligated to pay real estate taxes, condominium fees, utilities or other expenses related to the maintenance of the premises prior to closing.

BUYER understands and agrees that SELLER may extend performance under this Purchase and Sale Agreement until approval of the "short sale" is obtained from each lender.

BUYER understands and agrees that SELLER may continue to accept so-called "back up" offers until SELLER receives written confirmation of BUYER's unconditional purchase money mortgage loan approval.

BUYER understands and agrees that if SELLER is informed that one or both of his mortgagees do not approve a "short sale" of the Premises, this Purchase and Sale Agreement shall be null and void, SELLER shall not be obligated to perform, and BUYER's deposit shall be promptly returned to him in full.

BUYER understands and agrees that s/he shall diligently comply with lender's requests for information needed to approve his or her purchase money mortgage loan application, and in the event that s/he is unable to obtain a mortgage loan commitment by the date set forth in Paragraph 26, or the extension of such date as mutually agreed by the BUYER and SELLER, BUYER shall not be entitled to the

return of his deposit unless s/he provides SELLER with lender's letter stating that: 1) BUYER complied with all of lender's requests for information; 2) that the mortgage loan application was declined; 3) that the lender declined the BUYER's applications for conditions beyond BUYER's reasonable control; and 4) the conditions that BUYER was unable to meet. BUYER understands and agrees that his/her failure to respond timely to lender, refusal to provide information to lender, or failure to pursue a commitment for a purchase money mortgage loan shall not entitle him/her to the return of his or her deposit.

MODEL BUYERS'S RIDER TO PURCHASE AND SALE AGREEMENT
REGARDING EXTENSION OF CLOSING

BUYER understands and agrees that SELLER may extend performance under this Purchase and Sale Agreement until written approval of the "short sale" contemplated under this Agreement is obtained from each lender.

In the event that BUYER's rate lock should expire such that the BUYER's rate of interest is increased by more than .25% or in the event that BUYER's lender shall require a down payment for the purchase of the Premises greater than 5% of the Purchase Price accepted by the SELLER's first and second mortgage holders, then, provided BUYER shall provide SELLER with a copy of the lenders letter setting forth said changes within 24 hours of having received communication of said change(s), this Purchase and Sale Agreement shall be null and void, BUYER shall not be obligated to perform, and BUYER's deposit shall be promptly returned to him in full.