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Agents Have No Duty to Submit Short Sale Offers – Surprised?

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In the course of my speaking to and networking with short sale practitioners in numerous markets across the nation I regularly encounter those who have a completely false impression with respect to who owes which duties to whom in the course of a short sale transaction. More specifically, many agents (both on the selling and buying sides of transactions) erroneously think that ALL short sale offers must be presented to lenders – nothing could be further from the truth!

While all real estate law is subject to individual State legislation and interpretation, and while several areas of law come into play in the course of a real estate transaction (e.g.: contract law, agency law, etc.) there are general principles and practices that can be said to apply. Generally speaking, the laws work like this:

- The listing agent for a property owes their fiduciary duties (care, confidentiality, obedience, accountability, loyalty, and disclosure) to the principal/client, who is virtually always the OWNER of the property.
- ALL offers must be presented to the OWNER of the property.
- The OWNER decides which offer(s) to accept, reject, or counter, based solely on the OWNER'S personal criteria, which may, or may not be price (e.g.: A fast sale may be more important to the owner than a top dollar sale. Similarly, a cash, "as-is" offer may be perceived by the

owner to be a better bet than a higher priced offer that has to go through financing and inspection approvals).

For some reason, I find that a very large number of practitioners treat Short Sale transactions as if they were already REO transactions. Such confusion leads to wrong decisions with respect to the presentation of offers, and complicates and prolongs an all too often already complicated and time consuming process. Given these general principals, and in order to answer the question of whether all offers must be presented to a short sale lender, let's explore the differences between Short Sale and REO/Bank Owned transactions

In an REO transaction the lender has already foreclosed on the property, which means that the LENDER is the OWNER of the property. If we apply the three general principals outlined above to an REO transaction we see that:

- The listing agent for the property owes their fiduciary duties to the LENDER.
- ALL offers must be presented to the LENDER.
- The LENDER decides which offer(s) to accept, reject, or counter, based on the LENDER'S own criteria.

In a Short Sale transaction, while the lender may have initiated the foreclosure process, the BORROWER is still the OWNER of the property. If we apply the three general principals outlined above to a Short Sale transaction we see that:

- The listing agent for the property owes their fiduciary duties to the BORROWER (not the lender).
- ALL offers must be presented to the BORROWER (not the lender).
- The BORROWER (not the lender) decides which offer(s) to accept, reject, or counter, based solely on the BORROWER'S personal criteria, which may, or may not be price (e.g.: In the case of a short sale situation,

where interest, fees, and legal costs continue to accrue until the property is sold, a fast sale may be more important to the borrower than a top dollar sale. Similarly, a cash, "as-is" offer may be perceived by the borrower to be a better bet than a higher priced offer that has to go through financing and inspection approvals).

Clearly, in the case of a Short Sale, the agent works for the borrower and the borrower makes the decisions as to which offer(s) to accept, reject, or counter. Once a decision to accept an offer is made by the BORROWER, only then is the offer forwarded to the lender. The transaction proceeds as does any other with respect to subsequent offers that may come in – once an offer is accepted, the borrower is "under contract" (subject to third party approval by the lender) and they do not continue to entertain offers. Yes, they may accept an offer as a "back-up," but a back-up offer only comes into play when/if the initially accepted offer falls apart, and only then would it be forwarded to the lender.

The lender is merely a third party "approver" of the transaction – they are not "a party to" the transaction. This is an important distinction! The lender simply has the right to reject, or accept the offers that the borrower chooses to forward. You must remember that a short sale is a completely voluntary attempt by a borrower to avoid a foreclosure -- a borrower does not have to opt for a short sale. That being the case, if a borrower is under no obligation to even attempt a short sale, how in the world could it be said that a lender has a right to be presented an offer?

Now that you understand the borrower's obligation to present offers vis-à-vis the lender, let's shift gears and specifically focus on the short sale listing agent by first asking some questions about the general obligations of real estate agents to their clients, and then extrapolating the answers to short sale agents specifically.

Generally speaking, would it ever be tolerated for the agent of a client to act AGAINST the best interests of that client? Would it ever be tolerated for the agent of a client to act on behalf of a party who was acting expressly AGAINST the interests of their client? The answers of course are that, "Such acts would never be tolerated!"

That said, how could it be possible for the agent of a borrower to be compelled to work for the lender? Isn't the lender working for THEIR OWN best interests, and not those of the borrower?

Clearly, the lender is working for their own best interests, which are directly adverse to the borrower's interests (after all, the lender is either in the process of, or threatening to foreclose on the borrower's property, which is about as adverse a situation as there is). Given the nature of an agent's fiduciary duties to their clients, the agent for a borrower MUST do all that is legally within the scope of their representation to PROTECT the borrower from the lender and to advocate on behalf of the BORROWER'S position, not the position of the lender. There is nothing wrong with this – this is exactly what an agent is hired to do!

Now that it's been explained to you, doesn't it make sense?

Do you see how you have been mistaken if you thought that all short sale offers had to be presented to the lender? If you are a listing agent, do you see how presenting all short sale offers to the lenders could constitute a breach of your fiduciary duties to your clients? If you are a buyer's agent, do you see that you have absolutely no right whatsoever to DEMAND that your buyers' short sale offers be presented to lenders?

The bottom line is this: A borrower has no obligation to present all short sale offers to a lender, which means that a borrower's agent has no obligation to present all short sale offers to a lender, which means that a buyer's agent has no

right to demand their short sale offer be presented to the lender. To transact under any other premise is to misunderstand the process completely