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That's Not My Job

Expanding obligations of real estate agents and brokers in the REO market

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With more bank owned property on the market, real estate agents are often requested to take on responsibility for managing issues they have not historically managed. This is especially true for agents listing bank owned property.

Lenders and their affiliated asset managers have requested agents, in exchange for the listing, to perform tasks such as cleaning, maintaining and securing property. In effect, they are sometimes put in the position of "managing" the property. These properties can be in varying physical condition — some of the properties have been vandalized, while other properties are vacant and in general disrepair. Problems can arise for the listing agents taking on these properties especially given the lender-owner and the asset manager are out-of-state and have no knowledge of the condition of the property. The Listing agent becomes the "eyes" of the Lender and the individual who has the most knowledge about the property.

The listing of REO properties invariably means they are being accessed by agents and clients alike, regardless of what condition they are in. If no maintenance or repairs of the property have been undertaken since the previous occupants left, there could be conditions or dangers which might injure individuals viewing the property. These conditions can be as minor as potential trip hazards or as severe as collapsing or missing stairs. It is incumbent on Listing agents to make sure that conditions that could potentially cause harm are addressed or sufficient notice is given to individuals viewing the property are aware of the potential hazard. Even more importantly, a Listing agent who observes potential dangers should inform their client (the REO owner / bank) of these potential pitfalls and

make a determination regarding whether it remains safe to show the property.

While these activities are not typical real estate agent activities in a "traditional" listing, they nonetheless may be seen as a foreseeable obligation of an agent selling REO property. If the property is in disrepair, the Listing agent may be charged with a duty to inform individuals who enter the home of the potential for harm, or to work with the seller to ensure that the property is not shown until such risks are remedied. Listing agents rarely would have this responsibility in an occupied property, but REO properties present a new issue for consideration, as the absence of a residing owner, may increase the importance of the agent's awareness of dangerous conditions, and may lead to this enhanced duty.

This is not to say that the agent must become the repairman and advance money out of pocket, but the agent needs to inform the seller when a property is not ready to be listed, or when a condition is found which may make continued showings imprudent.

The problems are not only restricted to Listing agents, as buyer's agents could expose themselves to potential liability by bringing buyers to a property that contains dangerous conditions, particularly if such conditions are known or disclosed. Buyer's agents showing REO property to individuals may not be aware of conditions existing in the property but crafty lawyers may argue that the obligation of the buyer's agent is to protect his client. Such an argument might extend to provide that in an REO property the buyer's agent should inquire of potentially dangerous conditions existing in the property. There may be an argument that a buyer's agent must engage in some level of "due diligence" to explore such risks.

Also, one needs to consider the potential for personal injury claims due to injury occurring while visiting the property to determine whether appropriate insurance coverage is in place to protect the agent and the brokerage from such claims. The extent of such coverage will vary, depending upon the insurance policy. Whether such claims are covered under the brokerage company's errors and omissions policy or covered under its general liability policy should be explored. Both of these policies should be reviewed to see if claims of this nature would be covered. Without insurance coverage of some kind, the potential personal risk to an agent and brokerage company increases greatly.

What should agents do to protect themselves from potential liability?

First, the Listing agent should review the contracts they are signing with Lenders, before listing any REO Property. Any and all existing REO listing contracts should be similarly reviewed. Lenders' contracts may include indemnification or hold harmless language to reduce the risk to the REO owner in lawsuits occurring as a result of the condition of the property. Agents should clearly identify what level of responsibility they are undertaking for the lenders they are working for in listing such bank-owned property. In the event the REO owner has incorporated indemnification or risk-shifting language to the real estate brokerage company or agent, the agent and broker should evaluate what risks that presents, in light of the issues above.

Second, the agents and brokerage company should make sure they have the appropriate insurance coverage to provide protection in the event of personal injury or other such liability claims.

Third, you should not take a listing involving a property that is in such poor condition as to increase the likelihood of a personal injury risk to those who access the property, unless a plan has been made to remedy such issues in a manner that is sufficient to properly reduce or eliminate the risk. This should be done by letter or email so there is a document indicating that the agent gave notice to the Lender, properly identifying these conditions.

Fourth, in the event the property is listed and a dangerous or other potentially harmful condition is present, the Listing agent should make clear to any possible viewers of the property, that this condition exists and warn of the necessity to take precautions with respect to that issue so that the condition does not cause harm. This notice should be in writing, so that there is proof the notice has been given.

Finally, real estate agents and especially Listing agents are not obligated to predict problems that may occur with showing bank owned property. Known conditions should be identified and appropriate remedies or warnings should be made. However, Listing agents and buyer's agents are not responsible for predicting the future or speculating about potential dangers if they are not aware of any such risks.

Real estate agents listing or showing REO property need to appreciate that the property may be vacant and in disrepair due to a lack of maintenance. This **lack of maintenance may cause dangerous conditions** to the property which need to be identified by the agent and addressed by the Lender. If the conditions are not addressed, the agent needs to make sure that individuals viewing the property are made aware and that precautions are undertaken to mark off the area. Agents need to see their roles in the

REO market as enhanced (greater responsibility than they may have in a traditional "occupied" home) so as to protect themselves from the potentially enhanced liability.