



The Bank is Selling a House - What Now?

Part I: Are banks selling foreclosed (REO/bank-owned) property exempt from disclosure requirements?

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If the calls to the Legal Hotline and questions we get at seminars are any indication, this issue is one of the most widely misunderstood and widely miscommunicated issues REALTORS® currently face in their ordinary course of representing buyers and sellers in residential transactions. Part of the confusion comes from banks, particularly national banks, unfamiliar with state law and disclosure requirements in Minnesota. Minnesota sellers are required to disclose (to the best of their knowledge) material facts which could significantly and adversely affect the ordinary buyer's use or enjoyment of the property. This is required by Minnesota Statutes, and can be found in MN Stat. 513.82 et seq.

Banks sometimes claim that they are exempt from this disclosure, based on language in MN Stat. 513.54, that states the material fact disclosure requirements do not apply when the transaction is a transfer by foreclosure or deed in lieu of foreclosure. In simple terms, this means that a person who loses their home to the bank does not have to make disclosure to the bank. When the bank subsequently sells the property, that bank is a seller like anyone else, and is not exempt from disclosure. With that said, banks can opt for one of the disclosure alternatives, which include providing a qualified third-party inspection or entering a written agreement whereby the buyer waives the disclosure requirements.

Keep in mind, just because the bank demands that the buyer waive the disclosure doesn't mean the buyer has to agree to the waiver. Banks want to sell just like anyone else, and contractual terms are negotiable. It is reasonable and appropriate for a buyer to condition the purchase on the bank providing a third-party inspection of the property, at the bank's cost, or that the bank simply disclose what they know. Sometimes it is in the buyer's interest to have the bank disclose material facts, because on occasion the previous owner or a previous prospective buyer told the bank issues that have now become material facts, which the new buyer may want to know.

The related issue to the material fact disclosure requirement is whether banks are exempt from other disclosure obligations, either because they are selling a foreclosed property, or because they have persuaded a buyer to waive the material fact disclosure. The simple answer to both those questions is "no". Banks, like all sellers, have an obligation under Federal law to disclose lead-based paint hazards, for properties built prior to 1978. This cannot be waived, and banks must complete this disclosure just like anyone else. State law requiring disclosure of wells, septic systems, airport zoning issues, methamphetamine production, valuation exclusions and other applicable laws are also disclosures that are separate and distinct from the material fact disclosure waiver, and cannot be ignored by banks.

When working as a listing agent on behalf of a bank, be sure to inform them of these issues, and advise them to discuss these issues with their attorney. You as a listing agent

are responsible for disclosure as well, so don't be lured into doing everything the bank says just because they say it's so, if you believe it is contrary to law. As a buyer's agent, be sure the buyer is aware that some of these disclosures are mandatory, and they should be comfortable asking the bank to provide what is required.

Stay tuned for Par II in the "Bank as a Seller - What Now" series.