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# REAL ESTATE MATTERS

SPILE, SIEGAL, LEFF & GOOR, LLP

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## Keeping Your Toes Free From Pain

Have you ever felt like a giant hand has picked you up and dropped you into a strange dark room? In many ways that is the sensation many of us in the real estate industry have felt the past couple years. The room is dark, unfamiliar and loaded with obstacles interfering with safe passage. More frustrating, just as the path seems to clear, new obstacles materialize. Quite a few of us have had our toes stubbed during these difficult times.

Over the past month, several obstacles have actually been moved or at least cushioned. Unfortunately, there have also been new obstacles placed in our way. These developments include the following:

### **SB 931**

A significant fear for short sale sellers has been the possibility lenders might pursue them for a deficiency between their loan amount and the amount paid to their lender through the short sale transaction. In fact, many lenders have attempted to convert non-recourse loans into recourse loans through their short sale approval process. SB 931 will provide some relief in this area. If a lender in the first position approves a short sale on or after January 1, 2011, that lender may not pursue a deficiency against the seller. This restriction on the lender applies to any senior loans, including refinance loans. It does not, however, apply to any junior loans. In addition, it does not take place until January 1, 2011 and it is not retroactive.

SB 931 is not the same as SB 1178 which was passed by the Legislature, but vetoed by the Governor. SB 1178 provided for borrowers who refinanced their homes to retain their anti-deficiency protections if all the money from the refinance was put into the home. Since the Governor's veto was the sole reason the bill did not become law, and there will be a new Governor in 2011, efforts to pass a similar law in 2011 are anticipated.

### **Short Sale Information Advisory (C.A.R. FORM SSIA 11/10)**

C.A.R. has created a new information advisory to assist its members, along with buyers and sellers, to identify the myriad of issues and considerations which arise out of short sale transactions. Among the areas which are addressed are: 1) What is a Short Sale; 2) Alternatives to a Short Sale; 3) Lender Agreement to Short Sale; 4) Seller's Continuing Liability on the Debt; 5) Credit Consequences; 6) Potential Improprieties; 7) Tax Consequences; 8) Buyer Considerations; and 9) Broker Role.

Every Realtor should read and fully understand this document. In addition, when first discussing a potential short sale transaction with a client, be it seller or buyer, it would be a wise idea to walk that client, line by line, through this comprehensive document.

**Spile, Siegal, Leff & Goor, LLP • 16501 Ventura Boulevard, Suite 610 • Encino, CA 91436  
(818) 784-6899 [www.spile-siegal.com](http://www.spile-siegal.com) • [counsel@spile-siegal.com](mailto:counsel@spile-siegal.com)**

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### **Short Sale Addendum (C.A.R. Form SSA, 11/10)**

C.A.R. has also modified its Short Sale Addendum. There are three key changes. First, to avoid the risk of an open-ended period for lender approval, the new SSA provides that absent a time period inserted by the parties, the time for lender approval shall be 45 days. Second, the seller is obligated to provide a copy of the lender's term sheets within 3 days of the seller's receipt thereof. Third, all time periods are triggered upon the receipt by the buyer of the lender's term sheet.

As a parenthetical to the new SSIA and the SSA, it is a preferred practice to use zipForms to assure the most current documents are being used. Given the rapid changes, the urgency for using current documents cannot be overstated.

### **C.A.R. Q and A's**

As part of its risk management efforts, C.A.R. authors Questions and Answers on a wide variety of topics. The C.A.R. legal team does a masterful job of taking complicated issues and making them understandable. In the area of short sale transactions, two new Q and A's have recently been released. One is on Short Sale Fraud and the other is on Short Sale Negotiators. Both of these topics are clearly and thoroughly addressed through a series of questions and answers. All Realtors should stay current on the legal issues impacting their profession by regularly reading the Q and A's provided by C.A.R.

### **Holmes v. Summer Appellate Court Case**

While the foregoing developments are likely to ease the burdens faced by Realtors, this recent case creates further risks and uncertainties for them. The Holmes case contains a lengthy dialogue regarding the obligations of Realtors involved in transactions where a seller owes more than the likely sales price of the property. Distilled to its essence, the case holds that it is part of a listing broker/agent's duty of honesty and fair-dealing to advise all buyers, *before they go to contract*, that the seller owes more than the sales price. The Court asserts that it is the right of every buyer to know of this factor as it creates a risk that the seller will not be able to consummate the transaction. The potential scope of this case is still an open question, but it appears the courts are showing an inclination to expand the standard of care for Realtors.

### **Other People in the "Room"**

Whether it is the D.R.E., the Attorney General, the F.B.I. or a number of other regulatory and law enforcement agencies, it is evident that the short sale, foreclosure and loan modification universe is on their radar. In fact some of these agencies have stated that short sale fraud is the number one target on their list. With this mind, all Realtors should recognize that the stakes are probably higher than they have ever been.

### **Final Thoughts**

Given the speed at which changes in this area are transpiring, it is quite possible that there will be further developments by the time you read this article. It is important to draw upon all resources available to remain current on how to best navigate your path. Your vigilance, in this regard, may very well protect your toes from unexpected pain.