

What is a Short-Sale?

A short-sale transaction is the process of selling your home for its current market value **and** negotiating to settle the outstanding mortgage debt with your lender for less than you actually owe. Ideally, if everyone involved does his/her job properly, you would be able to sell your home for its current market value, have the lender pay for all of the costs involved in doing so, and also get released from the remaining mortgage debt owed. Unfortunately this is a lot easier said than done. This article will illustrate the different errors and intricacies that often occur during the short-sale process and will explain why having an attorney on your side can have an enormous impact on your financial well-being, your levels of stress, and your future.

First, let's list the parties involved in a short sale:

1. Buyer
2. Buyer's Realtor
3. Buyer's Lender
4. Your Realtor
5. Your Lender
6. Your Lender's Attorney
7. Title Company or Closing Agent
8. Clerk of Court
9. Judge (If foreclosure action is instituted.)
10. Borrower/Seller (You)

The first step in a short-sale is putting your home on the market. As a general rule, you must hire a licensed realtor to list your home on the Multiple Listing Service (MLS). If you try to "sell by owner" your lender will likely deny the short-sale. It is extremely important that you choose a realtor experienced with *short-sales in Florida*, as the transaction is much more complicated than the usual procedure for buying/selling property. In addition, you should consider having an attorney carefully review all documents prior to executing a contract for sale or submitting an application to the lender. A tiny mistake could cost you a lot of money and a lot of time and could result in loss of the buyer, or even worse, an outright denial by the lender.

Another common rule involved, which seems counterintuitive, is that a lender usually requires default by the borrower, often for as long as 90 days, in order to even consider a short-sale offer. This brings us to one of the most popular questions asked in our practice: **Why does the bank require me to be delinquent on my mortgage to approve a loan modification, short sale or deed-in-lieu of foreclosure?**

To understand this seemingly unusual requirement you must first place yourselves in the bank's investors' shoes. Why should the lender approve a short-sale or another

workout if *you* can afford your home? From the lender's standpoint, if you are paying the mortgage, you can afford the home. On the other hand, if the borrower is not making payments and can explain a valid hardship resulting in the default, the lender will then consider a workout to protect its own interests and cut its losses. Keep in mind that the lender may require a contribution from the borrower towards the purchase price in a short-sale, which is usually due at closing.

Next, you must receive a reasonable offer to purchase your home. Once the offer is made it must be submitted to your lender for consideration. This is where the process gets tricky and where realtors, owners and buyers make costly mistakes: paperwork gets misplaced or lost, important clauses in the contracts and/or applications are left blank, offers get submitted to the wrong department, or even worse, a release of the remaining mortgage debt is not requested nor granted, which makes the seller liable for any difference. Unfortunately, realtors or non-attorney "short-sale negotiators" often make mistakes that can be financially devastating to the borrower/seller or fatal to the transaction. An attorney can review all necessary documents and handle all negotiations between the parties, thereby greatly reducing the odds an error will occur.

If there is a second mortgage or home equity line on the home as well, the transaction becomes even more difficult as the second lien must be released in order for a short-sale to work. The second lien usually must be settled by the borrower, either by payment in full or with a negotiated amount. An attorney can aid you in lowering the amount required to be paid for release of the lien, or negotiate a payoff to the second loan into the original offer/price.

Once your short-sale package is complete and properly submitted, your lender will take approximately 30-45 days to assign the offer to a negotiator. However, all time-periods and procedures are contingent on the individual lender involved. Most banks and their investors are very backed up with short-sale offers due to the current state of the economy and real estate market. It is crucial that you have an advocate to follow up with your lender to ensure your transaction goes as smoothly and quickly as possible.

Once the offer is accepted, the buyer closes on the house using a title company or closing agent to complete the deal. If the transaction was negotiated properly, after payment is submitted to the lender, you should get to walk away free and clear from the mortgage debt. A release from the debt is much harder to obtain when negotiating the short sale without an experienced, assertive attorney. **Your lender will only act in its best interests** and a foreclosure defense attorney is best qualified to argue the benefits that a release from a deficiency would have on both parties.

Another little-known factor that influences the lender's decision is the existence of an insurance policy on your mortgage. If there is a policy in place, it would cover any of the

lender's loss from a short-sale. Even if you do not have PMI, it is possible that your lender took out a policy on its own, though the lender will not share this information with you.

Apart from any deficiency amount that could remain, another important issue often overlooked during the short-sale process is the imminent or pending foreclosure lawsuit. Short-sales take months to finalize and it is very likely that your lender will institute an action against you to foreclose on your home during this time, even if you are attempting diligently to work out a solution with the bank. The foreclosure lawsuit acts as a backup for the bank, in case a workout is not obtained.

Many people that do not hire an attorney to negotiate the short sale or for defense in a foreclosure lawsuit believe they can get the short sale approved before the lender's attorney can foreclose on the home. This is simply WRONG and a very risky gamble. Delays in short-sale transactions occur all the time and a default judgment can be obtained in regard to the foreclosure action. If the short-sale falls through and no response was submitted to the court, the borrower waives any rights or defenses he/she may have had and may face a deficiency judgment.

An uncontested foreclosure action can be finalized in just a few months. However, if you hire a foreclosure defense attorney to defend the lawsuit, the process often takes much longer, which gives you more time to live in the home and work out an alternative to foreclosure with your lender.

In Florida, if you fail to respond to a foreclosure complaint within 20 days of the date of service, you are subject to entry of a default judgment against you. A deficiency judgment can still be sought in the court action, and if granted, would be collectable against the Defendant Borrower and his/her assets and wages for 20 years. An attorney can negotiate the short-sale with your lender, while at the same time appearing for and defending you in the foreclosure lawsuit.

In sum, there are many parties and procedures involved in a short sale, and costly mistakes often happen. If a mistake is made in the process, you have to start all over again. The costs of hiring an attorney are miniscule compared to the debt at hand and the potential for a foreclosure judgment. A foreclosure attorney can fight the foreclosure while working out a solution with your lender, so that you, the borrower, can "walk-away" legally and with the peace of mind that the transaction was completed correctly and pursuant to all applicable laws.

Sarah E. Peart, Esq.
Attorney at Law

www.peartlaw.com or www.foreclosuredefensefla.com