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August 2009
Vol. 6 Issue 3
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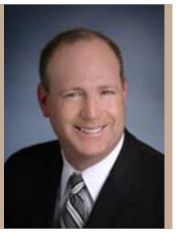
Real *e*-State

An electronic newsletter for real estate professionals

From the desk of:

The Real e-ditor

By: Steven D. Sallen



Aristotle was the first to postulate that nature abhors a vacuum. I know this because I learned it in high school. You probably did too. That principle explains why – in the movies – the bad guys get sucked out of the airplane when they shoot out a window! Of course, it's less obvious how the movie hero manages not to get sucked out, and also manages to take the abandoned pilot controls, and pull the plane out of a death spiral just seconds before crashing into the ground!

It strikes me that these are meaningful analogies for our situation here in southeastern Michigan.

Vacuous leadership has nearly sucked the life from our area. But wait! Some of that "leadership" too has been sucked out. Gone is Kwame Kilpatrick. Gone is Monica Conyers. Gone are the phalanx of dunderheaded auto executives who lead General Motors and Chrysler to the bankruptcy abyss. My dear-departed grandfather would roll over in his grave if he knew what has happened to General Motors, where he devoted more than 40 years of his life (introducing their first computer systems).

After the vacuum bursts, my science teacher taught us that outer atmosphere would rush in to fill the void. Our vacuum has left us with a near-depression. But since nature abhors a vacuum, people and capital should rush in. Where else in the country can you find industrial, office, and retail leasing rates so low? Where else is there such a highly-skilled, ready and (Lord-knows) willing work force? What other state offers the abundant water resources and moderate climate we enjoy here in Michigan?

But if southeastern Michigan is indeed to mount a comeback, it will take time, perseverance and hard work, by our entire state. Will we make it? Well, I put my faith in those 9th grade science principles. Besides, the alternative – Detroit as a ghost town – is too horrible an outcome to contemplate.

Steve Sallen

Receivership As A Solution For Distressed Borrowers, Businesses and Properties

By: Michelle C. Harrell

Receivership was commonly understood to be a negative status for a property or a business. Due to the current economic climate and the financial hardships visited upon countless businesses and properties, receiverships are now being recast as a facilitative tool for marketing, transition and sale for the involved businesses and properties.

A receiver is a person or entity that is appointed by a court to liquidate property (a passive receiver) or to operate and manage an ongoing business (an active receiver) or both. The receiver' duties and authority are defined in the court order of appointment. Receiverships can be commenced for an entity, a business operation or just a parcel of real property. In the past, upon default by a borrower, banks and finance companies would automatically institute foreclosure or forfeiture proceedings, trigger any assignment of rents provision, bid the amount of the debt at the foreclosure sale, and often were forced to take title to the distressed property.

In this economic climate, the typical foreclosure approach will often diminish the total value, if any, realized by the lender because the property cannot be sold or the current market value is nominal in comparison to the debt. Lenders' inventories of lender-owned properties (REO) are bloated with properties that cannot be sold now. Borrowers often do not realistically have the options of refinancing or finding a purchaser. Both borrower and lender can be locked into a downward spiral.

Receiverships provide an alternative for lenders and borrowers. A going concern is more marketable on the average than a shuttered business and the piecemeal sale of a business's equipment and furnishings. Banks and finance companies have found that receiverships are a method for them to take control of a business or property through a competent receiver, continue business operations and cash flow, and market an open, active business while not having to take title to the business or property. In some circumstances, the borrower will cooperate with, and stipulate to, the imposition of a receivership because the borrower is well aware of the realities the borrower faces, and would also like to maximize the value of the collateral. A receivership can be quite invisible to the public so a business or property is not stigmatized and, for all outward appearances, is doing business as usual.

The law relating to receivers provides that a receiver is entitled to counsel to guide the receiver through the web of issues, claims and scenarios that can arise. Receivers are entitled to qualified immunity for their actions if they comply with their duties as granted by the appointing court. Receivers should seek court approval for material decisions affecting the assets or liabilities of the receivership so that the receiver can be protected by the greatest immunity available. With legal guidance, a receiver can avoid or diminish any potential liability for the receiver's actions.

We represent receivers in all aspects of their role as receivers and have the expertise to guide the receiver and the receivership estate through the process successfully. Please contact us if you have a property or business that you think may benefit from the receivership process.

Timing Your Opportunities

by: George V. Cassar, Jr.

How many times have you said to yourself or heard other people say “If I knew then what I know now” or “If only I had done/bought X ten years ago?” Throughout history, the world has passed through economic cycles that experienced all time highs and record lows. Those that prospered the most and are typically recognized as helping to lead such an economy out of the lows are those that had the foresight to recognize opportunities when the timing was right. Are we once again in one of those “times” when we should be seeking out the silver linings? This author certainly thinks so.

But prospering from the silver lining doesn’t always equate to buying low and selling high. It isn’t always about finding the best deal or getting in on the ground floor of something great. Many of you reading this have already been there, done that. No, the issue for you now, to quote Sean Connery from his great role in The Untouchables, is “What are you prepared to do?” Once you’ve taken stock of what assets you have, what condition your investments are in, and what you hope to hold onto for future appreciation (re-appreciation), etc., – once you are comfortable that you have done all you can to position your company to sustain itself during this economic downturn/ recession/credit crunch, now may be the time to consider making some gifts. Yes, gifts.

The current economic environment provides some excellent opportunities for wealth transfer. Lower interest rates and depreciated values on assets that are intended to be held for the long term may allow you to transfer more assets to heirs at a lower cost in terms of federal gift tax, not to mention potential income tax savings when shifting assets to heirs who may be in a lower tax bracket. How? On the simplest level, you are able to gift a greater percentage of assets that are valued lower today than you would have been able to do five years ago for the same property. For example, if your real estate was worth $2 million five years ago you would have been able to gift one-half of your interest with your available $1 million gift tax exemption amount. Today with that same property worth, perhaps, $1 million you can gift the entire interest in the property for the same $1 million gift tax exemption amount. Again, assuming the intent is to keep the property for some period of time until the value returns, all of that future appreciation will now occur outside of your estate. Assuming an effective taxable estate tax rate of 50%, that is a $500,000 tax savings on the $1 million of re-appreciation, over the result if you simply keep that same property in your estate until it is again worth $2 million and willed to your heirs. The situation is the same with a closely held business or other investments where you want to give away more, with less impact on your estate. With a little more planning, you may even be able to remove assets from your estate, gift tax free and at values that may be significantly less than the assets’ current value.

> ***“Lower interest rates and depreciated values on assets that are intended to be held for the long term may allow you to transfer more assets to heirs at a lower cost in terms of federal gift tax, not to mention potential income tax savings when shifting assets to heirs who may be in a lower tax bracket.”***

On a more complex level, techniques are available not only to take advantage of depreciated values, but the current low interest rate environment as well. The value of certain types of gifts is determined using an applicable federal interest rate or “AFR” from tables issued by the IRS. The AFRs change monthly based on yields on U.S. government obligations. Therefore, the value of a gift can vary from month to month. A drop in rates can make certain estate planning techniques more attractive. And, given that we are currently experiencing unprecedented low AFR interest rates, it is safe to say that we have an unprecedented opportunity for future estate planning, and wealth preservation.

Popular estate planning techniques that rely on the AFR include Grantor Retained Annuity Trusts (GRATs), Charitable Remainder Annuity Trusts (CRATs), Self Cancelling Installment Notes (SCINs), Intentionally Defective Grantor Trusts IDGTs) and Qualified Personal Residence Trusts (QPRTs). QPRTs are traditionally not as effective when the AFR is lower, but the highly depressed housing market is making QPRTs an effective estate planning tool at this time as well. These techniques all work to either reduce or, at a minimum, “freeze” the value of your estate at current depressed values while shifting future appreciation, and, consequently, future estate tax liability on that appreciation, out of your estate for estate tax purposes. The bottom line: More can be provided for your heirs by simply reworking the assets you already own through proper planning.

To learn more about any of these techniques, most of which are simple to explain but slightly more difficult and technical to implement, contact me or your Maddin Hauser lawyer.

Now that you know, what are you prepared to do?

> “If you think small things don’t matter, try spending the night in a room with a mosquito.”
>
> Dalai Lama

New Foreclosure Legislation Aims To Aid Homeowners

by: Danielle M. Spehar

Effective July 5, 2009 under a series of three newly enacted bills (Public Acts 29, 30 and 31 of 2009), homeowners facing foreclosure may be entitled to an additional period of 90 days to work with their lender on modifying their existing mortgage loan. These new laws impact only foreclosure sales of property claimed as a principal residence exempt from tax under the homestead exemption (MCL 211.7cc).

Public Act 29 prohibits a party from commencing a foreclosure by advertisement action if (i) specified notice procedures have not been followed or the applicable time limits have not expired; (ii) the borrower has timely requested an FDIC workout meeting and 90 days have not passed after the notice was mailed; or (iii) the parties have agreed to modify the loan and the borrower is not in default under the modified agreement. Provided, however, these restrictions apply only to proceedings in which the first notice of foreclosure was published within two years after the effective date of the Act.

The most technical of the three bills, Public Act 30, requires a foreclosing party to serve on the borrower a written notice containing specified information, including the designation of a contact person who would have the authority to make modification agreements and notice that foreclosure proceedings would not be commenced for 90 days if the borrower requests a meeting with the designated person. A foreclosing mortgagee is also required to include a list of approved housing counselors with the notice, which must be served by first-class and certified mail, and be published once as required for publishing notice of a foreclosure sale. The borrower may bring an action to enjoin the foreclosure if the required notice is not mailed. The Act requires the borrower to contact a housing counselor if he or she wants to work out a modification, and requires the counselor to schedule a meeting with the mortgagee's designated contact person. If the borrower and the designated contact person had previously agreed to modify the mortgage loan as provided, these requirements do not apply unless the borrower has complied with the modified loan terms for one year or if the mortgage holder or servicer has qualified the loan for participation in the trial period necessary to obtain a loan modification agreement under the Home Affordable Modification Program administered by the U.S. Treasury Department.

Finally, Public Act 31 provides that if a borrower has contacted a housing counselor but the process has not resulted in an agreement to modify the mortgage loan, the borrower, counselor, or designated person must determine whether the borrower qualifies for a loan modification and, if the borrower qualifies, calculate a modified payment amount under the FDIC workout program.

> *"Public Act 29 prohibits a party from commencing a foreclosure by advertisement action if (i) specified notice procedures have not been followed or the applicable time limits have not expired; (ii) the borrower has timely requested an FDIC workout meeting and 90 days have not passed after the notice was mailed …"*

Collectively, the impact of the new legislation is that lenders must attempt to work out a modification of the mortgage loan, and foreclosure proceedings are frozen for 90 days for homeowners who offer to work with their lender.

Invitation to Participate

To The Local Real Estate Brokerage Community

Do you have a real estate question rolling around in your brain you would like us to answer?

Is there a topic you would like to see us cover?

Offered here for the first time to those receiving our newsletter, we invite you to write us at:

realestatenews@maddinhauser.com

To submit your question or topic which will be featured in our next issue!

Please submit your question or topic no later than August 31, 2009

Evaluating REO Opportunities: Managing Expectations By Filtering Fact From Fiction

by: Kasturi Bagchi

Are you thinking about entering into a listing agreement with a bank for an "REO" or helping a customer buy an "REO"? Before you do, here are some things that you should know. On websites and advertisements, the term "REO" has become synonymous with "real estate owned" by the bank after an unsuccessful sale at a foreclosure auction where no one bids. The reality is that it is a regulatory term of art applicable to a broader category of assets. "REO" stems from the regulatory phrase "Other Real Estate Owned" coined in The Depository Institutions Deregulation and Monetary Control Act of 1980. Under this act, banks are only permitted to hold real estate other than their own bank premises for limited periods of time and earnings from such other real estate must be reported separately. Notably, as published in a handbook of the Comptroller of the Currency Administrator of National Banks, "certain troubled loans secured by real estate are considered to be 'in substance foreclosures' and are also treated as other real estate owned. An in substance foreclosure situation is generally characterized by a borrower with little or no equity and the sale of the property being the only source of repayment." Consequently, in an "REO" listing, the borrower may still be in possession and have legal title to the property. For purposes of complying with federal laws, a property may be labeled as an "REO" even though the bank technically does not have legal title to the premises.

"Because an "REO" asset can be titled with the bank or the mortgagor in default, you should confirm who is in title to make sure that the correct party signs the listing agreement and thereby mitigate the risk of losing out on a commission."

Because an "REO" asset can be titled with the bank or the mortgagor in default, you should confirm who is in title to make sure that the correct party signs the listing agreement and thereby mitigate the risk of losing out on a commission. If the bank is actually in title then there is no question that the listing agreement should be executed between you and that bank. However, if preliminary inquiries through tax bills show that the mortgagor is still the owner of record, it may make sense to have both the bank and the mortgagor sign the listing agreement. Taking this step may protect you in the event the mortgagor still exercises its right to redeem the property from the bank and then flips the property.

What incentive would a mortgagor in default have to cooperate and join a lender in a listing agreement with you? With declining property values, proceeds from sales are generally insufficient to pay off the loan in full and results in a deficiency for which the mortgagor in a recourse loan situation is generally liable. In order to reduce the liability for the deficiency, a mortgagor may be willing to do a lot of things to make the realization process easier for the bank.

Knowing that an REO is a distinction created for banks for compliance with federal requirements also helps set the stage for marketing these types of properties. The perception is that banks are desperate to get rid of inventory. The reality that has emerged in recent times is that lenders are motivated to reduce their inventory of REO assets to maintain compliance with holding periods and avoid paying carrying costs; but they still seek to get the highest price possible and are not looking to simply dump real estate cheaply.

These conflicting interests ultimately will compel banks to discount pricing to some degree on REO. In return, however, banks will generally demand an "as-is" sale with no representations or warranties and perhaps a very limited inspection period. If a deal looks too good to be true, a potential buyer should do as much homework on the condition of the property as they can given the "as-is" nature of these deals. In advance of making an offer, the agent for the potential buyer can help with this homework by asking the listing agent if any due diligence reports exist (such as title, inspection reports, and environmental reports), if there are any repairs or deferred maintenance that the bank is willing to do, and how long does the bank take to accept the offer. Recognizing that the "REO" market has its advantages and disadvantages will help you form a realistic strategy for such assets.

"Anything's possible if you've got enough nerve." J.K. Rowling

Listing Foreclosed Properites:
How Redemption Rights Affect The Timing of Sale

by: Mark E. Plaza

With the continuing credit crunch, lenders are looking increasingly to the broker community to market the inventory of foreclosed properties. With this increasing demand, brokers must be mindful of redemption rights and how they impact the timing of the sale.

Who is entitled to exercise redemption rights? Michigan law provides for a property to be redeemed even after someone successfully bids at a foreclosure auction. Those permitted to redeem include “[t]he mortgagor, the mortgagor’s heirs, executors, or administrators, or any person lawfully claiming from or under the mortgagor or the mortgagor’s heirs, executors, or administrators . . . .” MCL § 600.3140(1). Therefore, not only can the formerly down on his luck borrower get the property back but it is not altogether uncommon for a junior mortgagee to redeem the property to protect its mortgage interest.

How is the property redeemed? For a property to be redeemed, payment must be made in the amount of at least “the sum that was bid for the entire premises sold, with interest from the date of the sale at the interest rate provided for by the mortgage, together with the amount of the sheriff’s fee paid by the purchaser under section 2558(2)(q), and an additional $5.00 . . . if the payment is made to the register of deeds.” MCL § 600.3240(2). The purchaser is to attach an affidavit to the Sheriff’s Deed identifying the amount required to redeem, plus any per diem amounts, as well as the redemption deadline. In addition, if supported by the requisite affidavits and documents, the redeeming party may also be required to pay “taxes assessed against the property, amounts necessary to redeem senior liens from foreclosure, condominium assessments, homeowner association assessments, community association assessments, or premiums on an insurance policy . . . .” MCL § 600.3240. If the mortgage is redeemed, the Register of Deeds is to identify that the property as “Redeemed” and destroy the Sheriff’s Deed. MCL §§ 600.3130, 3232, and 3244. If not redeemed, the Sheriff’s Deed becomes operative. MCL § 600.3236.

When can the redemption rights be exercised? The time in which a property may be redeemed is usually within six months from the date of the foreclosure sale. MCL § 600.3140(1). This six month redemption period applies to mortgages on commercial and industrial properties as well as all multifamily residential properties in excess of 4 units. MCL § 600.3240(7). The six month period also applies to mortgages on “residential property not exceeding 4 units and not more than 3 acres in size, if the amount claimed to be due on the mortgage at the date of the notice of foreclosure is more than 66-2/3% of the original indebtedness secured by the mortgage . . . .” MCL § 600.3240(8). For all other mortgages, the redemption period is one year. MCL § 600.3240(12).

However, if a residential property not exceeding 4 units is determined to be abandoned pursuant to section 3241 or 3241a, the redemption period can be reduced to three months, one month, or thirty days depending on which section applies and the percentage of indebtedness outstanding. MCL § 600.3240(9) - (11). In addition, the redemption period can be altered for a number of other reasons, including, but not limited to, a claim made by the United States, an agreement between the parties, fraud, and a failure to timely record a Sheriff’s Deed.

When dealing in foreclosed properties, do not get caught off guard. Establishing the expiration of redemption rights is essential to forming other critical dates for the potential buyer, particularly, the closing date. Knowing this information ahead of time can protect your buyer’s goal of closing and keeping the deal of the decade.

> ***“Michigan law provides for a property to be redeemed even after someone successfully bids at a foreclosure auction.” …***
>
> ***“Therefore, not only can the formerly down on his luck borrower get the property back but it is not altogether uncommon for a junior mortgagee to redeem the property to protect its mortgage interest.”***

“Is is better to believe than to disbelieve.
In so doing, you bring everything to the realm of possibility”
Albert Einstein

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On This Date In Michigan History
June 24, 1962

Detroit Tigers Play Longest Game in Baseball History

The twenty-two inning game against New York lasted seven hours. Yankee Jack Reed hit a two-run homer, the only one of his 222-game career, in the top of the twenty-second inning to beat the Tigers 9—7. ***Courtesy of Michigan History***

Disclaimer: The material contained in this newsletter is not legal advice; you should consult an attorney for legal advice regarding your specific situation.
Nothing herein creates or is intended to create an attorney-client relationship between Maddin Hauser or any attorney employed by Maddin Hauser with any person.
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> ***"Be courageous. I have seen many depressions in business. Always America has emerged from these stronger and more prosperous. Be brave as your fathers before you. Have faith! Go forward!"***
>
> *~Thomas A. Edison~*