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Buyer Beware…..
A Buyers Guide to Navigating Foreclosure Mine Fields

Prices may look attractive and the subliminal thought of benefiting from someone else's misfortune may be psychologically appealing, however, that doesn't mean a buyer should let their guard down when negotiating with a bank over a REO (Real Estate Owned) property recently acquired through foreclosure.

Although banks have a fundamental desire to unload a non-performing asset from their books, ***buyer beware***, banks can be extremely difficult to work with.

Below is a list of ten common pitfalls buyers should be aware of when purchasing foreclosed properties from banks.

1. **Proof of Funds**… accompanying virtually every offer on a foreclosed purchase the bank will insist on either proof of funds if the offer is a cash purchase or alternatively, a pre-approval letter from a lender (if the offer contains a mortgage contingency). Buyer beware, do not let your guard down to this seemingly innocent request.

   Quite often I have witnessed prospective buyers innocently provide their most recent confidential bank statement or account from AG Edwards or Raymond James which reflects considerably more funds than the actual offer price. In virtually each and every instance when this has occurred the bank has countered the offer significantly higher after having been shown the poker hand that the prospective purchaser has surplus resources.

   The same mistake often occurs when a pre-approval letter is issued by a bank offering to qualify the buyer for an amount in excess of the purchase price. In each and every instance, it is essential to obtain a specific pre-approval letter for each offer.

2. **Bank Mandated Addendums** … after an agreement in principal is reached between the buyer and the seller the deal is not complete without a comprehensive addendum specific to that lender. This addendum is onerous and can be full of mine fields. The one common thread that all bank addendums contain is express language which provides that no changes or alterations can be made to the addendum. It is essential that the addendum is carefully scrutinized and reviewed by an attorney.

3. **Illusory Contracts**… all bank addendums are illusory contracts. An illusory contract is one in which one party's obligations are very real and the other party's obligations are not. Unfortunately, foreclosure addendums are one sided with no mutuality of obligation or mutuality of remedy. Quite often banks are entitled to continue to accept additional offers up to the date of closing. Secondly, if a bank fails to close on the transaction, the buyer has contractually agreed that the buyer's sole remedy will be a refund of all deposits paid. Comparatively, should a buyer fail to close for any reason, the buyer forfeits all deposits paid to date.

4. **AS IS… Means "As Is."** bank contracts bring new meaning to the Latin phrase *caveat emptor* which stands for "let the buyer beware." In fairness to banks, they were not owners in possession of the property. However, they may not have an affirmative duty to disclose any defects they are aware of. The Florida Supreme Court Case of *Johnston v Davis* mandates that sellers must affirmatively disclose any items that are not readily observable that may materially affect the value of the property.

   As a result of no legal obligation to disclose, it is essential that an inspection be performed immediately after the contract is accepted. Typically most bank addendums allow the buyer 5 days to perform and object to an inspection. If any major defects are found, the bank typically will not agree to any credits. The buyer's sole remedy will be to exercise their inspection contingency and be released from the contract and have their deposits refunded.

5. **Bank Mandated Title Companies… Should Frighten any Buyer.** In virtually all addendums, the bank will require that the purchaser utilize the banks own title company. This is an excellent example of the "fox guarding the hen house." Title companies are never local, often located out of state and are not your friend. By utilizing the services of their own title company, they often unwittingly create adversary relationships with the buyer that persist until the transaction hopefully closes.

6. **Excess Settlement Fees and Mistakes…** Beware that the bank owned title companies may charge excessive settlement fees. Banks seek to lure buyers in the door by offering to pay for the cost of title insurance. I recently had a closing where the title insurance was approximately $600.00 however, the banks title company charged the buyer in excess of $900.00 in search fees, settlement fees, escrow fees and related expenses. Buyers need to be willing to challenge these companies on "exorbitant fees." Most times when challenged, the bank title company will reduce their fees dramatically.

   Mistakes are often plentiful. Quite often documents are prepared out of state. Florida is very specific, deeds, unlike the majority of other states, require two witnesses in addition to a notary. Numerous times banks have prepared deeds without the requisite witness requirement. Additionally, many charges that are contractual seller charges are artfully shifted to the buyer. Unfortunately, most common mistakes always tend to favor the bank.

7. **Documentary Stamps… a**ll standard form contracts in the State of Florida require the seller to pay the documentary transfer tax. In fact, in absence of written agreement, to the contrary, Florida Statutes obligate the seller to pay for and affix to the deed documentary stamps in the sum of seven dollars per thousand. Many lenders, particularly Wells Fargo, recently have become very sneaky in passing this expense along to buyers. Even though it is a seller's statutory requirement this item can be agreed upon to be paid by the buyer. Generally speaking, the addendum is not worded to reference documentary stamps, rather the addendums are skillfully drafted to indicate the buyer will be responsible for any taxes due on the transfer of title.

8. **Insurable Title does not Necessarily Mean Marketing Title…** all bank addendums only provide the bank deliver insurable title.

   Insurable title may come with a host of defects. However, despite these defects, a title insurance underwriter weighs the risks involved and allows the title agent to issue a title policy even though there may be blemishes and potential problems down the road. Ironically, should the value of the property increase dramatically, the buyer is only protected to the extent of the original purchase price.

In contrast, marketable title is a title that is clean, has no defects that will come up again in a future title examination when the property owner attempts to obtain financing or more importantly tries to sell the property. Accepting insurable title could result in problems which need to be addressed at a later date resulting in both time and money.

This distinction is important because virtually every resale contract provides language to the effect "Title to the property shall be good and marketable with legal access, subject only to the following exceptions…"

On more than one occasion I have had frustrated sellers lose their sale because the title was not marketable. Title companies often gamble that the issue will not come up again or will be overlooked or they may offer to reinsure the property – an unacceptable solution. When problems do arise at a later date they are often more difficult to resolve requiring corrective documents in the chain of title. For this very reason it is prudent to conduct a title search independent of the bank's title company.

9. **Bank Title Policies Contain Loopholes…** Unfortunately, all title policies are not created equal! When buying property from a bank the title policy typically lists exceptions (exclusions) from coverage. They may seem insignificant to an untrained eye, but be careful as they could prove financially disastrous. Below are three recent examples of experiences I personally encountered with proposed bank title policies.

   Case #1. A preliminary title search independent of the bank's title company revealed that the bank did not properly serve all the correct parties in the foreclosure process. When the bank offered a title policy it overlooked this glaring problem. As a result, if the Buyer had closed with the Bank's Title Policy they would have been in for a surprise when they elected to sell as title was not clear or marketable.

   Case #2. A review of proposed closing documents and title policy, revealed an exception to governmental liens from the title policy's coverage. The bank's closing agent stated it was standard practice to exclude this from coverage. Antennas went up and an independent search discovered there were government fines outstanding in excess of $70,000... all of which would not have been covered by the title policy.

Case #3. It is generally recommended a buyer should obtain a survey and elevation certificate when purchasing a single family home. In this instance, the elevation certificate revealed improvements located below the flood plane level. An independent letter sent to the local zoning department revealed that previous fines had been levied and the former owner had been mandated to remove approximately 1,000 square feet of the non-conforming improved living space. The bank was not aware, did not disclose this and the bank's title policy would not have covered this issue.

10. **Closing Dates Mean Nothing….** except if you are in default. When entering into a contract for bank owned property, don't book your plane tickets yet. It is typically the exception rather than the rule that banks are prepared to close on time. In fairness to most bank title companies, they are overworked, understaffed and unorganized. Unfortunately, there is no remedy available under the contract or no penalty if the lender is unable to have the seller documents prepared and executed in time for closing.

    However, bank contracts clearly require buyers to close on time and often seek to invoke penalties of $250.00 to $500.00 a day if a buyer is unable to close on the original closing date. This is another example of what is sauce for the goose is clearly not sauce for the gander. Unfortunately, since banks will not allow you to amend their contract addendums in any way shape or form, there is no remedy other then to beware of this very real possibility.

In summary, when buying property from banks, it is strongly advisable to obtain the services of a real estate attorney. After all, the bank has engaged the services of numerous attorneys to carefully review and artfully draft addendums so they are completely one sided and in favor of the bank. To counter this, it is important to be aware what their addendums contain and be willing to call out the bank or their title company whenever a boundary line is crossed…***Buyer Beware!***