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ILLINOIS STATE BAR ASSOCIATION

REAL PROPERTY

The newsletter of the Illinois State Bar Association's Section on Real Estate Law

Options for the client in trouble with real estate: Forbearance to bankruptcy and everything in between

By Erica Crohn Minchella

America is rebuilding. I don't mean that in cliché politician-speak sense, I mean we are literally putting the fundamental pieces of our economy back in place, beginning with the unprecedented imbalances and volatility in the Real Estate market. As we work on a case-by-case basis to give troubled homeowners options for stability, we Real Estate attorneys are at the helm of a nationwide restructuring.

We're expected to look at the big picture for our clients, and because of our knowledge of how individual elements of the system function on the whole; we are the primary source of guidance for distressed homeowners as they make decisions. HUD counselors will only discuss modifications, Real Estate Brokers will only discuss short sales, and lenders will only provide information that is in their best interest.

Even within the law, attorneys concentrate in certain disciplines: if you are a bankruptcy attorney, and that is the way you earn your living, you may tend to provide advice biased toward the filing of a bankruptcy proceeding. If you are a real estate attorney, you might feel more comfortable helping your client through a short sale. This Article is intended to explore all options and

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Real estate ethics corner

By Michael J. Rooney

Two recent disciplinary cases share a number of interesting features, though one arose in the Chicago area and one downstate in Lincoln. In both cases, a Review Board Report was filed on September 2, 2011 and the Illinois Supreme Court entered its final order on November 22, 2011. One member of the Review Board was common to both cases. Both Review Boards recommended censure as the appropriate discipline and both Supreme Court orders imposed the recommended discipline.

The two cases involved lawyers who prepared last wills and testaments for clients involving gifts to the lawyer or to the lawyer's wife. In each case, the lawyer was charged with a violation of Rule 1.8(c) and Rule 1.7(b) of the Rules of Professional Conduct and other violations. *In re: Leonard Mason,* M.R. 24927 (November 22, 2011), Commission No. 09 CH 115. *In re: Andrew Warren Peters,* M.R. 24928 (November 22, 2011), Commission No. 09-SH 43.[1]

In each case, the lawyer had known the client and the client's family for a number of decades. In each case, the relationship between members of the two families was quite close. In both cases, the original gifts contained in the wills prepared by the two lawyers were nominal, but increased in size over the years as later versions of the wills were prepared. In both cases, the Review Board Report was careful to point out that the lawyer did *not* overreach the attorney-client relationship.

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Options for the client in trouble with real estate: Forbearance to bankruptcy and everything in between

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suggest how each client's unique situation ought to dictate the course of action, not the preference of the advisor.

A competent real estate attorney evaluates each client's circumstances in light of various interests and perspectives and offers sound advice. But with so many factors and circumstances, how do we ensure we firmly grasp the specific needs of each client?

It's something I'm asked regularly. How do I discover what I need to know about a client? I've spent years developing a nuanced understanding of how the real estate business functions, but with the many variables of each case, it can be challenging to determine the best course of action. That's why I try to employ a systematic approach to evaluating a client's best interest, a model that consistently guarantees I have the information needed to make recommendations.

What questions should we ask to ensure we know the needs of our clients? A complete understanding of clients' best interest demands we consider both the practical and the emotional, since all of these factors play a role in determining the best outcome for a distressed homeowner.

Here are some questions to consider:

- What is the value of the house?
- When was the loan taken out? (Loans in 1999 were documented very differently – and better – than loans made in 2006)
- What is the structure of the debt?
    - Interest rate
    - Term
    - Number of liens
    - Other liens against the property
    - What is the amount of the debt?
- How far "underwater" are they? Does it make sense to keep the property if there is no value?
- What is the attachment to the home?
    - Kids in school?
    - Someone in the home disabled or dying?
    - Attachment to neighborhood?
    - Is the attachment valid – i.e. does it make sense in the real world
- What time frames would help the homeowner solve their problems?
    - Kids graduating?
    - Party dying?
    - Accumulate cash to solve financial problems?
    - Desire to relocate?
- Who is the lender?
    - Lenders vary in their cooperation by huge degrees. Knowing who the lender is will help you determine what strategies will be the most effective. Bank of America, for instance, has improved many of its programs for loss mitigation. Some smaller servicers don't have a clue—or the staff to resolve a problem if they did have a clue.

Answering these questions should lead to

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a thorough grasp of the context of your client's financial problems. But determining the best course of action is a two-step process, the second of which is evaluating the range of possible legal options in light of the factors at play.

Legal options offer different kinds of relief, and as attorneys it's our role to know the strengths and weaknesses of each. Let me give some examples:

1. Clients who have young children at home can more easily relocate and rebuild credit.
2. Clients who have teenagers in high school may need a solution to leave them in their homes until graduation naturally separates their child from their friends.
3. Illness or imminent death may create a situation where you would want the client to stay in the home for a period of time.
4. Single clients might have an easier time making a transition than a family.
5. Older clients with debt, but equity, might explore the possibility of a reverse mortgage.
6. Younger clients can rebuild credit more easily than older clients.
7. Clients with property values that are underwater, but who have other assets or cash may be better off negotiating a modification of their mortgage and seeking a principal reduction. They might also need to consider how they hold their assets and whether it gives them the flexibility and protection they need.

So with the importance of context in mind, here's an overview of the many options Real Estate attorneys can offer distressed homeowners.

Forbearance

When a borrower went delinquent on their mortgage back in the "old days," the lender would occasionally agree to a forbearance agreement. The borrower would be allowed to catch up on missed payments without threat of foreclosure over a structured, set period of time.

Today, forbearance is usually only an option for older loans for two reasons: (1) Older loans generally imply that there is equity in the property. If the arrearage is due to a single incident, e.g., medical emergency, family emergency, fire where insurance helped pay for repairs, then there is no reason to modify the loan payments, but only a need to catch up the missed payments; (2) older loans are generally not ones that are adjusting to unfeasible amounts, so again, a modification is not realistic. Lenders will consider if the mortgage "makes sense." They take into consideration the balance owed, the interest rate, whether or not there are only a few missed payments or if there was a single event that caused the default that will not occur again and if there's a steady cash flow that will allow for the payment.

Forbearance can be a realistic option if the homeowner comes to you early enough (ha!) or in cases where the payments are not delinquent but taxes have fallen into arrears.

Modification

A modification is a change in the interest rate, payment terms, loan length, and/or a reduction in principal from the original contract between the lender and the borrower.

Because of the sheer magnitude in the number of people under water, loan modifications have become somewhat of a pop-phenom in this post-crisis era. It is my opinion is that a loan should be modified only when it is critical to keep the house. Otherwise, you are subjecting the client to a loan that will never get paid down, will never build equity, and will leave them open to future failure or the need to negotiate a short sale. I refer to this as "renting from the bank".

Although some people have been successful in negotiating a principal reduction for clients, I personally find it impossible to sit on the phone with the lenders to push through a modification and have therefore eliminated that part of my practice. Be aware that the IFDPR has ruled that anyone negotiating loan modifications must be a licensed loan originator. Lawyers are exempt from that ruling, but their staff are not. It is the attorney who must be on the phone with the lender.

Deed in Lieu of Foreclosure

A Deed in Lieu (DIL) is a situation where the lender will accept a Quit Claim Deed to the property in exchange for a release of all liability and the agreement not to foreclose against the property.

I hesitate to use the deed in lieu because it's only slightly less damaging to the homeowner's credit than a foreclosure. Regardless, it is still preferable to a completed foreclosure.

I'll go this route when foreclosure is imminent, the lender has rejected every short sale option I have proposed, and the owner has

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no interest in keeping the property.

Cautionary Tale: I once represented a party that had invested in a condo. They thought they were getting the property from the bank after a foreclosure. They were, instead, getting the property from the bank after the bank got a DIL. The outstanding condo association dues were almost as high as the value of the property. If you are representing an investor buying REO (Real Estate Owned by the Bank), confirm how the lender obtained title.

DIL of foreclosure is only an option if there are no subordinate creditors (e.g., won't work where the property is a Condo where there is association debt). Only a completed foreclosure process will foreclose out subordinate liens.

Short Sale

A short sale is the sale of the real estate where the lender and lien holders agree to take less than what is owed and release their lien. In the best-case-scenario for this option, the lender also agrees to release the claim. Be aware: the release of claim is not always a given with a short sale.

While this isn't always the ideal option (only the broker and lawyer get compensated), it is useful for preserving the owner's credit and typically can lead to a release of the liability.

Foreclosure Defense

If the foreclosure is filed while you are waiting for another solution, make sure you look at the loan documentation. This will be critical as you analyze the client's best interest.

There are defenses to foreclosures and there are times when you need to project what will happen in a foreclosure case to best advise the client to sell, give a DIL, or fight.

Sometimes, the best solution for a homeowner is to just hang on as long as possible. The foreclosure process can take a long time. It allows them to put aside funds or live on the limited funds they have for as long as possible. Sometimes they just need to get kids through a school year. A client's individual circumstances are an important consideration.

Other times the loan documentation is a mess and there are legitimate defenses because the lender is not entitled to maintain a foreclosure against the property. For instance, sometimes, lenders file suit before the assignment of the mortgage and note have taken place; sometimes the party bringing the suit is a Trust that closed the acceptance of new mortgages before the mortgage belonging to your client was transferred to the Trust; sometimes the lender attempting to foreclosure was not registered with the State of Illinois and has no right to proceed at all. These are legitimate defenses that could prevent the Plaintiff from going to judgment.

Worth considering: If the mortgage is not legitimate, aren't you still left with the debt? How do you get rid of the debt? You can't go bankrupt on it if you have a house with no lien on it. (What if the client went bankrupt before the foreclosure was filed or proceeded very far). You have to consider the consequences of your success defending a foreclosure case.

Negotiated Settlement with Subordinate Lien Holders

Sometimes the only, or best, solution is to negotiate with the lien holders. Realize there can be judgment lienholders in addition to mortgage holders. You must consider whether the client has a second mortgage, condo association or judgment or tax lien creditors. They will have to figure into negotiations for a short sale and will prevent the lender from being able to accept a DIL.

Some second lien holders are now suing on the Note, realizing that it is unlikely that they will see any equity in the properties that they have liens against. Citi, Harris and Bridgeview have all sued clients I represent.

I attempt to settle these by offering a lump sum payment. My strategy is to remind the creditor that if my client files a chapter 13, their lien can be stripped out. I try to get my client to come up with the funds equal to the amount the creditor would get in a chapter 13 over time, as a lump sum—reduced based on the present value of money.

I have settled a case based on the fact that there simply wasn't any other money to get other than the amount I was offering. I allowed the case to go to judgment and then made the same offer I had made before judgment, advising the creditor that I was willing to put my client through a citation to discover assets. Interestingly enough, I was never asked to produce a single document.

Chapter 13 Lien Stripping

Chapter 13 Bankruptcy is the only law that allows a mortgage—only a subordinate mortgage—to be "stripped down" to the equivalent of the current value in the property and be paid a percentage of the balance of the debt—depending on what they would get in a Chapter 7 bankruptcy. The Debtor then has to pay a percentage of that value, based on the manner in which their plan is proposed (e.g., they would pay amount of the value of the property against which the lien remains—if no value remains, then they would pay 10 percent). The catch is this only works if the debt doesn't exceed the ceiling in Chapter 13s for secured and unsecured debts and the Debtors could not have already gotten a Chapter 7 discharge.

Chapter 7 Bankruptcy

The biggest advantage of Chapter 7 is that it discharges or wipes out most debt. Discharging charge card debt, for instance, may make the mortgage payment affordable or may show a lender from whom they are seeking a modification that they can now afford the payments if modified.

But this can also create a problem if the Debtor wants to do a modification because if they "reaffirm" the debt (agree to pay according to the terms to which they originally agreed), then they have agreed to continue on with the same mortgage and will remain liable for the mortgage if the lender ultimately forecloses.

Chapter 11

A Chapter 11 is a reorganization for debtors whose debts exceed the debt limits allowed in a Chapter 13. This can be used for investors with numerous or larger properties, or ones with commercial properties.

I use Chapter 11 for single asset investors or other real estate investors who are in over their heads. Generally, the plan is to allow the orderly liquidation of the real estate instead of the forced liquidation the bank is requiring to get the highest possible value and limit personal liability. Chapter 11 is also a reasonable option if there is a property worth saving and it would just take some time to cure payments.

Chapter 11 as a Defense to Appointment of a Receiver

Chapter 11 is also a defense to a motion for the appointment of a Receiver in a foreclosure proceeding. Under this type of bankruptcy, the Debtor is the "Debtor in Possession," which is the equivalent of being the "Trustee." Unless the Debtor in Possession is engaged in criminal or fraudulent activity, there is no basis for appointing a Trustee, so the Debtor remains in the position of the

Trustee and continues to manage the property itself

In bankruptcy, if it is determined that the Debtor is mismanaging the property, a Chapter 11 Trustee can be appointed and that individual can ask that a party be brought in as a Receiver to manage the property. But if it appears that the Debtor is managing the property properly, the court will not allow an appointment of a Receiver.

If a Receiver had been in place for more than 120 days before the chapter 11 is filed, it is likely they will be allowed to remain in place (provided that they are managing the property properly).

There are also two other defenses to appointment of a Receiver. The first is when refinancing is imminent (i.e. days away), the second is when it is not likely that the Plaintiff can prevail on its complaint.

Tax Implications

It's imperative to consider the tax implications when evaluating the merits of Chapter 11 for your client. The forgiveness of debt does not always allow for the forgiveness of tax debt. Right now, IRS Rules do not allow for the imposition of a tax obligation for the forgiveness of debt from a short sale, foreclosure, DIL on personal residences when the funds were used for the purchase or rehabilitation of the property.

There is also no forgiveness [imposition?] of debt tax obligation if the client is insolvent at the time of the debt forgiveness. "Insolvency" can mean different things to different investors, so make sure to consult your tax professional.

If the forgiveness of debt does not fall into those categories, then a DIL or short sale may create a tax obligation. You must consider whether it is better to have a tax obligation on 1/3 of the debt forgiven or have the entire deficiency still owed. On the other hand, consider timing. Will the deficiency cause the Defendant to need to file a bankruptcy? They would be better discharging the deficiency of the debt than having a tax liability for debt forgiveness, since the taxes won't be dischargeable until three years after they are assessed and returns are filed.

Some Advice for Clients Purchasing REOs

For clients purchasing REOs, there are a few simple but important steps that will ensure a smooth process. First, check the docket or the court file to determine that the defendant has been properly served and if the defendant submitted to jurisdiction and defended.

If not, you should assess whether a Defendant could return later to claim an interest in the property. Review the title closely to see what is not being insured against. Also, you should check real estate tax bills to assure that there are no lingering past bills that aren't showing up—(did a previous tax purchaser keep paying bills going forward so it doesn't appear that the taxes are in default?)

Next, determine if there was a deed by foreclosure or was it a Deed in Lieu. If a DIL, you must do your own due diligence, as there can be claims against the property of which the lender may not be aware - e.g. condo assessments. The class of property (Single Family Home or Condo) could have implications as well. Is there a Homeowners' Association that could make a claim for arrears or special assessments?

Also, be wary of lenders making unreasonable demands given the condition of the property. Make sure your client is making a good business decision—not an emotional one. Sometimes the excitement of finding a "good deal" can blind buyers to the potential complications that could make it a horrible one. I usually insist my client gets an inflation endorsement to their title insurance policy and if they are going to do any repairs, a construction endorsement as well.

If you are not versed in all of the areas of law that you need to advise a property owner with a distressed property, locate practitioners in your area who are versed in the area in which you are weak. It will provide an opportunity for cross-referrals and will allow you to become conversant in areas previously unfamiliar to you. Just make sure that you are looking at all the possible options for your client. Your clients ability to rehabilitate financially and possibly save their property will be dependent on your being multi-dimensional in your approach to their problems. ■

Real estate ethics corner

Continued from page 1

It is also interesting to note the reaction of the two lawyers. Mr. Mason, who received a bequest in a specific dollar amount, reduced his gift when it became clear medical and other expenses had reduced the size of the estate of the client, jeopardizing other bequests. In the case of Mr. Peters, the bequest was to his wife, who renounced any interest in the estate when the professional misconduct issues first arose. These responses can be contrasted dramatically with those of many lawyers who, even after have been found to have violated ethical rules by a Hearing Board and a Review Board continue to deny any ethical lapses whatsoever.

Each case, however, also provides an individual lesson for practicing attorneys. The *Mason* case compares the former version of Rule 1.8(c) with the new Rule effective as of January 1, 2010. The former Rule 1.8(c) provided: "A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child sibling or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee." The former Rule was applicable at the time Mr. Mason prepared a will which gave Mr. Mason a specific amount of money.

The Review Board Report points out that Rule 1.8(c) was amended and the current version now provides: "A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship." The Review Board cited cases from Pennsylvania and South Carolina, and an Advisory Opinion of the Indiana

Commission of Judicial Qualifications for the proposition that a close, familial relationship is not necessarily a biological one.[2]

The Review Board Report in the *Peters* matter also points out that it is not always necessarily true that a violation of Rule 1.8(c) involves a violation of former Rule 1.7(b). The Administrator had argued that a lawyer could not violate Rule 1.8(c) without also violating Rule 1.7(b), but the Review Board pointed out a case where the Administrator charged a violation of Rule 1.8(c) but not a violation of Rule 1.7(b). The Review Board also pointed out that Mr. Peters testified to counseling the client about the conflict of interest, pointing out that other beneficiaries might raise the issue later, and found that the client had consented and that the lawyer had properly concluded the representation would not be adversely affected.

The Review Board Report did not discuss the provisions of the new Rule 1.7, but it would seem the changes to Rule 1.7 do not require a different result.[3] Although the new Rule 1.7 is reorganized and reworded, it seems to permit the same result as was reached in *Peters*.

Both cases, however, are cautionary tales for practitioners involved in preparing wills or other instruments providing for "substantial" gifts to themselves or to family members. Yes, some clients will insist, even after the lawyer provides admonishment and counseling, encouraging the client to seek independent legal advice. If so, the careful practitioner might want to read carefully the entire Review Board Report in *Peters* and have a couple of well-respected judges interview the client—just in case. ■

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1. This case was previously before the Supreme Court on a petition for discipline on consent with both sides recommending censure, but the Court denied the petition and remanded for a hearing.

2. It should also be noted that in both *Mason* and *Peters* there was extensive testimony concerning the closeness of the longstanding relationship between the families of the lawyers and their clients.

3. "RULE 1.7 Conflict of Interest: Current Clients

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- The representation of one client will be directly adverse to another client; or
- There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person pr by a personal interest of the lawyer.
- Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- The representation is not prohibited by law;
- The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- Each affected client gives informed consent."

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March

Thursday, 3/1/12- Chicago, ISBA Chicago Regional Office—eTechnology in the Courthouse: Present and Future. Presented by the ISBA Bench and Bar Section. 1:30-4:45.

Thursday, 3/1/12- Live Webcast—eTechnology in the Courthouse: Present and Future. Presented by the ISBA Bench and Bar Section. 1:30-4:45.

Friday, 3/2/12- Chicago, ISBA Chicago Regional Office—Legal Trends for Non-Techies: Topics, Trends, and Tips to Help Your Practice. Presented by the ISBA Committee on Legal Technology. 9-4:30.

Monday, 3/5/12- Chicago- ISBA Chicago Regional Office—Foundations, Evidence and Objections. Presented by the ISBA Tort Law Section. 9-12:30.

Monday, 3/5/12- Webcast—Clients, Ethics and Negotiations. Presented by the Alternative Dispute Resolution Section. 1:30-3:00.

Monday, 3/5/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association. 2:30-3:30.

Tuesday, 3/6/12- Teleseminar—Defending Against IRS Audits & Collections, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 3/7/12- Webinar—Advanced Tips for Enhanced Legal Research on FastCase. Presented by the Illinois State Bar Association. 2:30-3:30.

Wednesday, 3/7/12- Teleseminar—Defending Against IRS Audits & Collections, Part 2. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 3/7/12- Bloomington-McLean County Museum of History—2012 Ethics Extravaganza for Government Lawyers. Presented by the ISBA Committee on Government Lawyers. 12-4.

Friday, 3/9/12- Quincy, Quincy Country Club—General Practice Update 2012: Quincy Regional Event. Presented by the ISBA Bench and Bar Section; co-sponsored by the Adams County Bar Association and the ISBA General Practice Section. 8-5.

Tuesday, 3/13/12- Teleseminar—Business Planning With Series LLCs. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 3/14/12- Chicago, ISBA Chicago Regional Office—Medical CO-Ops: A Plan for Physicians to Contract Directly with Patients and Employers to Become their Health Insurer. Presented by the ISBA Health Care Section. 11-12.

Wednesday, 3/14/12- LIVE Webcast—Medical CO-Ops: A Plan for Physicians to Contract Directly with Patients and Employers to Become their Health Insurer. Presented by the ISBA Health Care Section. 11-12. ■

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