

Bankruptcy FAQ's

Your guy at the legal corner is becoming increasingly concerned about a fundamental lack of understanding, at all levels, including affiliates, regarding the effect of bankruptcies on the sale of real estate.

Is this really a big deal?

VREB and VPAR will be the least of your concerns: not only might you forfeit your commission, you can go to JAIL if you help a seller in bankruptcy sell real estate outside of the bankruptcy court's approval. The bankruptcy court takes this very seriously.

How do I know my seller is in bankruptcy?

Simple, they tell you. Or even better, you ask: either as a regular part of your listing process or because there is some signal that ought to trigger the question, e.g. really behind on payoff, foreclosure on hold, etc.

I would recommend you make it a regular part of your listing process. Ask them, write down the answer. And don't accept "yes, but everything is ok and I don't have to worry about it." Rather, then ask for the name of their bankruptcy attorney and get documentation to that effect: if it is true he or she will have it.

Why do I need to know my seller is in bankruptcy?

Simple: it cannot be sold with the court's permission. And this happens automatically, there doesn't have to be an order saying they can't sell it. In point of fact, it is the other way around – you need something saying they can.

And you need to know this early because: (a) if they are in bankruptcy and you don't make accommodation for this in the contract then your sellers will have made a material misrepresentation under the current language of the REIN contract, and (b) it will take some lead time to obtain bankruptcy court approval to sell.

And, did I mention your listing and your commission might not be approved?

Isn't this someone else's job?

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Legal Corner

Well, yes and no. First, the seller should know they can't sell their house at their discretion when it is in bankruptcy. Second, the settlement agent can independently check to see if the seller is in bankruptcy via the PACER system. But the professional dealing with them first (not to mention before the contract is signed) is you, their smart, wise, and experienced agent.

Ok, so I ask and the answer is yes. What do I do?

One of two basic things will happen. Either the bankruptcy trustee will abandon the property because there is insufficient equity to make it worth a sale from the creditors' standpoint, in which case you will be able to take the listing and proceed; or, the trustee will take control of the property and the trustee will control the sale, in which case it will be for the trustee and the court to determine the manner of sale including, most importantly for you, who lists the property, how much, commission, expenses, etc.

Trust me, this is one area where it is NOT better to beg for forgiveness than to ask for permission.

Jail? Really? C'mon.

Absolutely, while I can't speak for all trustees, their attorneys, and the court, I can tell you that if they find out that you as a listing agent knew the seller was in bankruptcy and you permitted a false affidavit (recall the customary seller's closing affidavit asks whether they are in bankruptcy) to be submitted they are going to be very, very concerned.

So isn't it best not to know after all?

Perhaps you missed the part about your client's best interests?

Who do I call for help?

I am not a bankruptcy attorney, but I know more than a few excellent ones. Call or email me and if it is beyond giving you basic direction in connection with a closing or sale, I'll help you find the right attorney. Please feel free to email me at bdlytle@lytlelaw.com if you have any other questions or comments.

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