



BANKRUPTCY LISTINGS

NOT JUST A SHORT SALE, KNOW THE RULES

By Jim Hochman

As the dust settles on one of the rougher periods in recent commercial real estate markets, it's back to business, perhaps in a more conventional setting. Owners are mostly breathing a sigh of relief, but there remain a few failed developments, first in mortgage foreclosure, then under the jurisdiction of a bankruptcy court. The pattern is familiar, unfortunately, with the mortgage lender finally ready to acknowledge a bad loan and take the hit. The lender begins foreclosure, but the property owner, fighting till the last, finally files for protection under the bankruptcy code to stay the inevitable foreclosure decree and resulting sale, whether by Sheriff's auction or even sale by the bank's receiver.

Brokers succeed when they see what can happen, going forward, rather than wringing their hands over what might have been. There is a buyer, perhaps a developer, or even a user for that property, so you seek a sale listing. Anything is better than the abject defect of the sheriff's gavel, so why not give that die hard broker a chance?

You vaguely recall from years past, that selling a property controlled by the bankrupt owner (the "Debtor" or "Debtor in Possession") or even through the court appointed trustee, isn't all that simple. Yes, you have a motivated seller, but there are other parties, the mortgage lender and likely other creditors, who seek some or all of the proceeds.

Debtors, through counsel, even the trustee, recognize the value of a coordinated marketing plan, but getting that listing isn't all that easy.

First, if the creditors' claims (secured debt such as mortgagees and unsecured claims as well) easily exceed the market value of the property, the chances of having proceeds sufficient to pay your sale commission after payment of all debts are low. But wait, you wonder, my efforts aren't the problem, my efforts (and the buyer you hope to procure) are part of the solution. Where is the fairness?

I may not often equate the U.S. Bankruptcy Code with fairness and reason, but there is hope for the broker who brings the solution, if he does things by the rules, meaning the Bankruptcy

Rules. The Bankruptcy Code allows the Debtor or Trustee to hire professionals to render services to the Estate, and with a proper petition and court approval, the professional's fees will be treated as an administrative expense of the estate, in essence allowing the successful listing broker to "jump the line" past secured and unsecured creditors, toward the head of the line. Done properly, your fee will come from gross sale proceeds ahead of the other creditors. Here is what you need to do, either to get your new listing approved, or to have your existing (pre-Bankruptcy) listing approved.

First, the trustee's or debtor's counsel will prepare the application for your (or your firm's) approval as exclusive sales agent for the property. You will be asked to execute an affidavit of disinterestedness (yes, that is a word!) to support your application. You will want to review (and with the help of your own counsel) determine that your listing if approved by the Court, affords you sufficient protection. You may be asked to support the application with your own affidavit setting forth your experience and qualifications. In some cases, you may even be asked to testify in court in support of your credentials.

Next, in the absence of objection or in the court's discretion, your application will hopefully be approved and the listing agreement should contain, either in the agreement itself or by addendum, the following aspects of protection:

1. You are the exclusive sales agent;
2. Your fee is fixed at a set rate;
3. You are to be paid after approval of the contract:
 - a. From sales proceeds;
 - b. Without further order of court;
 - c. As an administrative expense of the Estate; and
 - d. On the chance that sales proceeds are insufficient, then your fee or the unpaid balance will come from other assets of the estate.

Let's assume you market the property and produce an offer. The offer must first be accepted by the trustee or debtor, and then the deal must next be approved by the court, with the creditors weighing in to approve or disapprove the deal. One of three things will happen:

a. The contract is approved, you go to closing, and you collect your fee from proceeds; or

b. The court chooses to use your offer as the starting point, or as a stalking horse, and schedules an auction, to see if a better price can be achieved. Your exclusive listing is your protection that even your contract sparks bidding and leads to a higher offer, it is still a sale of your listed property. This is why it is imperative that your listing be an exclusive listing.

c. In fairness, it is possible, albeit unlikely, that the court in approving either the initial deal or the new deal obtained at auction, that the court will deem your fee "improvident," legalese for too high, and seek to reduce the fee. This is rare, but in the court's discretion, it could occasionally happen.

However, there is still a contract, and a sale, and a commission – if you have boldly gone where others have hesitated. Be warned, however, that seeking to market property which is subject to the bankruptcy court's jurisdiction without first getting court approval to list the property and court protection of your fee as an administrative expense leaves you at the mercy of the other creditors – which is not a good place to be. Your fee, if not approved in advance, may well be denied.

If you do it the right way, with counsel and the court's approval, this is worthwhile business. If you do it the wrong way, you will likely learn an expensive lesson. ■

The SIOR Diversity Working Group

The SIOR Diversity Working Group was established in 2011 by Nancy Morse, SIOR, CCIM, and Angela West, SIOR, MCR. The group's mission is to expand women, minorities, and other diverse groups within SIOR.

Goals of the Diversity Working Group:

- Sponsor Diversity Working Group Events at the World Conferences
- Create outreach programs for diversity candidates
- Research partnerships with professional organizations
- Seek out diversity practices from industry organizations



The Diversity Working Group has hosted events at designation courses with attendees and local prospective members. Female membership has increased by 50 percent in four years.

The Diversity Working Group has held the following at the SIOR World Conferences:

- Luncheon held in Chicago with Christine Kelley, CFO, from JLL
- Panel discussion focusing on diversity in the industry
- Two breakfast meetings with speakers
- An afternoon tea
- Two cocktail receptions, one sponsored by City National Bank
- Reserved seating areas where women gather for lunch
- Two walking tours



Interested in joining The SIOR Diversity Working Group? Please contact Sumner Crosby at scrosby@sior.com or 202-449-8234 for more information.