

Goldilocks & The Foreclosure Protection Act (Part I)

This article is Part I of a two part series explaining the Foreclosure Protection Act and the Real Estate Commission's Foreclosure Property Addendum. Part II is available at [Goldilocks & The Foreclosure Protection Act \(Part II\)](#) by [Jonathan A. Goodman](#), Esq. and [David A. Farus](#), Esq.

Question: *I am listing a property for an owner who is behind in his payments. The mortgage debt secured by the property exceeds its fair market value. The seller has no ability to bring money to the closing to make up the shortfall, so I am trying to sell the property through a "short pay off." An investor buyer has contacted me about writing an offer.*

A. Do I need to use the Colorado Real Estate Commission's "Foreclosure Property Addendum?"

B. What if my seller does not speak English, may I use the foreclosure property Addendum to put together a contract that complies with the foreclosure protection act?

Answer:

In 2006, the Colorado legislature passed Senate Bill 71, which has come to be known as the Foreclosure Protection Act. Among other things, the FPA regulates "equity purchasers," who are essentially real estate investors whose business model involves pursuing residential properties in foreclosure. Equity purchasers are more commonly referred to as foreclosure investors.

One way of thinking of the FPA is that if its provisions are triggered, then the contract between the seller and the equity purchaser needs to be "special." That is, if the FPA is triggered, the contract between the seller and the equity purchaser must comply with the FPA, otherwise there are severe consequences **for the equity purchaser**.

The Real Estate Commission promulgated its Foreclosure Property Addendum to help brokers make the Commission's purchase contract comply with the FPA. Our experience with the Foreclosure Protection Act suggests that brokers already understand how to complete the Addendum. What confuses brokers are the circumstances in which the Addendum can and cannot be used.

One way of thinking about the Addendum is to remember the story of Goldilocks and the Three Bears. Brokers do not need to use the Addendum, and should not use the Addendum, when the deal is too "cold." Brokers cannot use the Addendum when the deal is too "hot." Brokers may only use the Addendum when the deal is "just right"-and few deals are just right.

The purpose of Part I of this article is to help brokers answer the A. question above and understand the situations in which (a) the contract does not need to comply with the FPA and brokers do not need to use the Addendum (the deal is "too cold"); (b) those situations where the contract does need to comply with the FPA, but the deal is too complicated to use the Addendum (the deal is "too hot") and (c) the situations where the contract does need to comply with the FPA and brokers may use the Addendum to make the deal FPA compliant (the deal is "just right").

A deal is too cold when any one of the first three items in the note at the top of the Addendum is not true. The note begins, "This form is to be used only if (1) the Property is in foreclosure; (2) the Property is residential; and (3) the Buyer is not to reside in it for at least 1 year."

1. The Property is in Foreclosure. The mere failure to make payments on a mortgage does not mean that a foreclosure has been commenced. The statute is somewhat unclear about whether the filing of a Notice of Election and Demand with the Public Trustee marks the commencement of the foreclosure, or whether the recording of the Notice of Election and Demand at the Clerk and Recorder's office marks the beginning of the foreclosure. In light of the ambiguity in the statute, however, brokers should deal with the issues conservatively and treat the filing of the Notice of Election and Demand with the Public Trustee as the event which satisfies (1) in the note.

The statement of the question at the beginning of this article does not indicate whether a foreclosure has been commenced. If it has not been commenced, then the FPA is not triggered and the deal is too "cold" to use the Addendum. If the foreclosure has been commenced, we need to consider the other two criteria to determine whether the act applies.

2. The Property is residential. A 250 unit apartment complex is residential. However, the FPA was not designed to protect owners of apartment buildings, and it does not actually apply to all sellers of residential property. The residential criteria is best understood as applying to a home owner who is selling a property that is or was the homeowner's principal place of residence.

If the property in the question is not the current or abandoned home of the seller, then the FPA does not apply (the deal is "too cold") and the Addendum should not be used. If the property is the current or abandoned home of the seller, and if a foreclosure has been actually filed against the property, then the FPA applies unless the buyer is not an equity purchaser.

3. The Buyer is not to reside in the property for at least 1 year. The FPA is not intended to protect homeowners in foreclosure from owner occupant buyers. The FPA regulates Equity Purchasers. If the buyer intends to occupy the property as the buyer's residence for at least one year, then the buyer is thought of as an occupant, the deal is "too cold" and the Addendum should not be used.

Not all investors are equity purchasers, but it is beyond the scope of this article to explain precisely the difference between a garden variety investor and an equity purchaser. Suffice it to say that an equity purchaser is an investor who has a business mode of purchasing residential property in foreclosure from a home owner. If there is ambiguity about whether the buyer is an equity purchaser, the broker should contact her lawyer.

If a broker determines that (1), (2) or (3) in the note at the top of the Addendum does not apply, then the FPA does not apply, the contract does not need to be special, and the Addendum should not be used. The deal is too cold to use the Addendum unless (1), (2) and (3) in the note are all true.

If the broker determines that the FPA does apply, then the broker should study Section 3 of the Addendum to evaluate whether the deal is too "hot" to use the Addendum. The second part of

this article, to be published in the next edition, uses the B. part of the question at the beginning of this article to help brokers evaluate whether the deal is too hot to use the Addendum. If the deal is too hot to use the Addendum, then the contract needs to be prepared by someone other than the brokers.

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