Mortgage Assignment Profits System (MAPS) – Attorney Review

A message from Phill Grove:

Thanks for your interest in the Mortgage Assignment Profits System!

On our blog we've already received thousands of questions about Mortgage Assignment, and all of the variations included in the Mortgage Assignment Profits System (MAPS). Thousands of investors are talking about this program, and this has spawned endless questions, excitement, as well as myths, mistruths, or misunderstandings.

I know when I don't understand something about real estate; I don't ask a Realtor, or Investor, or mortgage broker, etc., I ask an attorney! So, I've asked noted Real Estate Attorney Mark Torok, of the Torok Law Firm P.C. in San Antonio Texas to provide a definitive legal analysis based on his extensive real estate legal/investor experience spanning 30 years and, more recently, over 200 MAPS closings!

Below is a January 2010 interview between me, Phill Grove, and Mark Torok, discussing Mortgage Assignments…

Q: Welcome Mark! Can you tell us a little about your experience in this area of real estate?

A: I've been buying and selling real estate on and off for the last 30 years. About 11 years ago we finally moved to a place without snow (we had 166 inches the year we left Erie Pennsylvania!) and began working with USAA in their Insurance Counsel unit. When I prepared my taxes for 2002, I realized I was making more in real estate than the six figures I was making in the corporate world so I decided to go full time into real estate. Since I have been an attorney for almost 30 years, I also decided to open my own 'boutique' law firm to assist investors in their endeavors. Since then, my small 'part time' practice has grown to encompass various lectures, workshops, presentations, and boot camps for real estate investors, as well as finding a way to 'get the deal done, legally and ethically' (and as inexpensively) as possible. Our office has handled well over 400 closings in just the last 3 years, formed over 250 new entities (LLC's and corporations, joint ventures, partnership agreements, etc), and advised over 200 new and some very experienced investors in Texas and other states. We are the only law firm in Texas, and perhaps the entire nation that was and is, exclusively designed and formed to represent real estate investors in their businesses and we have maintained that exclusivity and focus since we were founded in 2004. In addition, I have bought and sold over 40 single family houses and now have a portfolio of over 700 units (either as single family, multiunit rentals, self storage, or as a noteholder/lender on properties I have flipped).

Q: Is a "Mortgage Assignment" the same as an "Assignment of Mortgage"

A: No. When we talk about the 'assignment of a mortgage', we are really talking about the lender assigning their interest to another lender. A Mortgage Assignment might more accurately be named a "Payment Assignment" where one person takes over another borrower's payment obligations. Think of it that way, if that makes it easier to understand. A mortgage assignment is simply the more popular term. Mortgage Assignment has nothing to do with transferring mortgages between lenders. Only a lender can transfer a mortgage. Only a borrower can assign their payment obligation.

Q: Is a Mortgage Assignment the same as "buying subject-to"

A: Primarily, YES! Subject-to is the core component of this strategy. Subject to is the transfer of real property to another while the underlying existing loan remains in place. This is a strategy that investors have been using successfully, safely, and legally for decades. The additional "twist" in mortgage assignment is that instead of investors buying subject-to and taking on that obligation themselves, the investors are simply getting properties under contract 'subject-to' and assigning their contractual interest to others, either investors or the end consumer that want to be able to buy homes that come with financing in place. So, in most cases, Mortgage Assignment, is a combination of subject-to PLUS wholesaling. This is a very clever twist on some existing strategies. Of course, the investor could also keep the property, rent it out, live in it or even sell it on a wraparound note to someone else if they want to.

[Note from Phill: These variations are also taught in the Mortgage Assignment Profits System]

Q: Can you do this legally, even with a non-assumable loan?

A: Absolutely. While every loan these days seems to have a due on sale clause (although I have written some loan documents that don't, for obvious reasons!), there is no <u>requirement</u> that the lender exercise their due-on-sale rights. In fact, most lender are very content just to have the loan brought current and receive payments on the loan as originally intended, even though the payments come from someone else. Usually, when someone talks about an assumption, they are really talking about one person taking over the obligation of another <u>*and*</u> the lender releasing the original person from liability for the loan. That doesn't happen (usually) in what we're doing here. In an assignment, the payments are being transferred to a new borrower while the loan remains in the name of the original borrower. I don't know of any loans that AREN'T assignable-the lender has the option to call it due, but most don't. It's perfectly legal, as long as you use the proper documents and disclosures. And any seller/borrower can assign their mortgage – only the borrower must agree to assign it, not the lender.

Q: So why would a seller/borrower agree to assign their loan to a buyer?

A: In all cases, it's because the seller/borrower has concluded that it's in their best interest to do so. For example, they want to sell the home more quickly…or they want to avoid a foreclosure or short sale, perhaps they simply don't want to have to bring thousands of dollars to the closing table because the home has little or no equity, or they like the idea of receiving cash flow (in the case of a wrap) while someone else takes over the headache of making their payments on a loan. I have personally closed hundreds of transactions using the MAPS strategies, in fact, subject to, owner finance and cash deals are all we will close (life's too short to deal with banks!). Uniformly, the sellers are grateful to have their property sold and they can move on with their life.

Q: So, who is paying the closing costs?

A: In mortgage assignment closings, it's more common for the buyer to pay most or all of these costs. In the traditional 'most common' closing, the closing costs are split roughly fifty/fifty, with both paying the closing fee, the buyer paying the attorney fees, the seller paying doc prep and the recording of the deed paid by the seller and the recording of the deed being paid by the buyer. Title costs are all over the map, I have seen them paid by the seller, by the buyer or divided between them. It is completely negotiable between the parties.

Q: And, the buyer is also putting up a down payment?

A: It's possible but not required. In a mortgage assignment, there is often an "Assignment Fee" and no down payment. Again, it's all in the negotiations. If a seller needs $500 to rent a truck and move out, it might be a good use of investor funds to get the deal done. Usually though, The buyer is only paying closing costs. Now, the MAPS program also teaches how to use other strategies including wrap-around mortgages (wraps). In wrap transactions, a new loan with new terms is created that is subject to the underlying loan (it "wraps' around the underlying loan) , and, yes, usually the buyer pays a down payment in that deal.

Q: Does this work with properties that are "under water" that is, the loan is more than the property is worth?

A: Yes, No, Maybe… Let me explain… The "value" of a house is different to different people. In general, a home, just like anything else, is worth what someone is willing to pay for it. To someone with good credit and willing and able to easily get a loan, the "value" of a home with owner financing is typically less because they have so many homes to choose from (almost all sellers will sell for cash). To someone that can't qualify for traditional lending, the value of a home with owner financing will be quite a bit more. So, yes, someone that can't qualify for traditional lending will pay a premium for a

home and the financing as opposed to someone who can pay cash or get their own loan. How much premium depends on how much they want the home – i.e. how much it's worth to them and the premium may take the form of a higher price, a higher interest rate, higher payments or even a willingness to accept a home that needs work

[Note from Phill: Remember that when you are selling with owner financing, you are selling "terms". The buyer is buying based on how much they have to bring up front and how much they have to pay per month. This is a bit different than buying based on price.]

Q: How can I, an investor, legally sell my interest in these deals?

A: Once both parties have executed the contract, that is, you have a deal, you have a valuable contractual right to proceed with the contract and the other party has a contractual right to do what they promised in the contract (either sell or buy the property). In addition to the contractual rights (and obligations!) the law provides that you have an "equity interest" in the subject property. Anyone that holds a contract to purchase a property has an equitable interest in that property, and as long as your contract does not prohibit the buyer (investor) from assigning their interest then that equitable interest is assignable, and sellable. Most contracts should include an 'and/or assigns' clause to remove any question and I think you'll find that sellers readily agree to it once the purpose of the clause is explained appropriately to a seller will gladly allow an assignment.

Q: What if we use an option contract instead of a purchase contract?

A: Makes no difference. An option to purchase a home is a valuable contractual and equitable interest in real property. It is the right to purchase specific property at a determinable price within a determinable time. Even though the Texas Real Estate Commission contract we use in Texas to purchase a residential 1-4 family dwelling contains a "termination option", it is really a purchase contract with an option to terminate, much like the termination provisions for a clouded title, unacceptable survey, unaccepted inspection or other condition of the contract. A contract for the sale of real property, whether or not it includes an option, gives the buyer (investor) an equitable interest in the property, period.

Q: Aren't investors acting as a Realtor in these deals?

A: No. An investor holding an executed contract in which the seller is obligated to sell according to terms set out in the contract is acting for themselves when they seek to sell their interest in that contract. Anyone can sell their own property, whether that interest is what is known as "fee simple" (that is all of the rights in a property-such as possession now, quiet enjoyment, etc- what we think of as owning property) or if that interest is merely an option to purchase the property at a later date or

even to acquire the property if certain conditions occur. Of course, if what you have is a possibility that if certain events occur you will acquire a greater interest in the property (such as in a joint tenants with right of survivorship situation where the last one living takes all) the amount someone will pay for that interest can differ significantly.

Of course, if an investor is also a Realtor and wants to act as a Realtor in these transactions and receive a commission –they would specifically sign agreements saying they are a Realtor and that they represent the buyers or sellers as Realtors. Most investors make it clear to everyone that they do not represent another party in the transaction, and that the other party is always free to find an attorney and/or Realtor if they want one. The investor in the deal is just that – an investor that finds properties and then either buys them, or wholesales them to another buyer. Furthermore, when I close these deals, I have all parties specifically sign documents acknowledging that they understand the relationship of all involved in the closing.

Q: Can you wholesale something you don't own?

A: I think the real question most people who ask this question intend is: can you wholesale something that you don't own completely? Of course, that's what selling an option or other interest in property is. If you had to own all of the rights before property could be sold, the oil and gas, and other mineral rights folks would be out of business and property would never be sold. People separate various rights in property all the time, the most common being the sale of mineral rights in property.

With respect to wholesaling, you are selling your contractual right/equitable interest in the property. That's exactly what wholesaling is, and just as with subject-to, investors have been safely and legally doing this for decades. If someone tells you that you can't sell something that you don't own, they don't understand the contractual rights you have and the equitable interest that the contradct creates in the property.

Q: What about the Due on Sales Clause? Does mortgage assignment trigger that?

A: Yes, but the better question to ask is: does it matter? The issue of the due-on-sales clause can be complex. The truth is that there are a variety of activities that a homeowner might do that can trigger the due-on-sale clause. These include leasing or lease-optioning a home, selling it on a wrap or mortgage assignment, or even deeding it to your spouse in a divorce. Technically, when you do one of these things, you are probably triggering this clause in the mortgage which gives the lender the option to call the loan due, which will require the original borrower to have to pay off the current loan or face foreclosure (eliminating the new buyer form title) or the buyer may decide to pay off the underlying lien to keep the property (possibly by getting a new loan). My experience is that it's pretty uncommon for a lender to actually do this. Most times the lender doesn't call the loan. After all, the

lender just wants their payment – they don't want to foreclose on homes – especially homes for which the payments ARE being made.

I haven't found any way to "get around" this clause without disclosure to the lender, despite what other gurus may say. but there are a few things to remember. First, there is no such thing as "due-on-sale jail". Triggering a due on sale clause is not a law or even a requirement in a loan contract, it's just a term in a loan contract. So long as you aren't concealing what you are doing, that is, you are not committing mortgage fraud, you can't be prosecuted criminally for triggering the due on sale clause. While there is some debate as to whether you need to affirmatively tell a lender, and the failure to tell them is fraud, the law is still unsettled in this area and other steps can be taken to remove even the possibility of having to get into that argument.

Secondly, there are things you can do to make it even less likely that a lender will call the loan. For example, when I close mortgage assignment deals I use an extensive set of disclosures – including a disclosure to the lender saying that the home is being sold subject-to the financing remaining in place and giving the lender the opportunity to object. My success rate closing these deals is very high-not once has a lender refused to let the financing remain in place (that I know of) if you tell them before hand (at least doing it the way I teach!).

Q: So, when you close MAPS deals, you tell the Lender the property is going to be sold with the financing remaining in place (and the due-on-sales clause triggered)?

A: Sure, I tell them! We regularly send a letter to the lender before we buy subject-to that says "we're buying the property subject-to…here is the next payment (or arrears, or payment on the principal)…please let us know if you object within 15 days of the date of this letter and return the check if you plan to call the loan…" Banks really hate to return money (particularly on a non-performing asset in the case of a loan in arrears) and we have yet to see a payment returned. Now… I know that for this answer, some other attorneys have other opinions - some recommend not disclosing to the lender and using complicated transactions involving trusts or other vehicles. Be very careful with these. Not all states have the same laws. You need to ensure you are compliant with your state laws. I just find it safer to go ahead and disclose it, (how can anyone claim they didn't know if you sent them a letter outlining what you are doing?!?), and I've have great success in doing so with the letters and documents we have developed.

[NOTE FROM PHILL: The lawyers and title companies in different states that close these deals have slightly different closing paperwork. In many of our past deals, we have not confirmed or denied the transfer of title to the lender, for example. We certainly never "conceal" the transfer. Like Mark, I have also had a 100% success rate. I like Mark's approach a lot, and consider it the safest and most conservative approach out there]

Q: Do you use standard closing documents – like HUD-1's?

A: Yes.

Q: So, Mortgage Assignment is legal?

A: Of course. Subject-to is legal. Wholesaling is legal. Mortgage Assignment is subject-to + wholesaling, and it is absolutely legal (so long as you do it right!).

[NOTE FROM PHILL: I would also add that I believe it's not just legal, but it's the most moral and ethical alternative. In most instances, the buyers and sellers we work with are in difficult situations and they REALLY APPRECIATE that we give them options that nobody else even tells them about (because they simply don't know better)! Truly win-win-win!!]

Q: What about Alternatives to Mortgage Assignment?

A: The MAPS system contains training and paperwork for Lease/Options, Wraps, Short Sales, Equity Holding Trusts, and others. The system is "strategy agnostic" – it teaches all of the alternatives and explains pros and cons of each. No strategy is perfect for every situation, and in every state, but they all have their place and can make investors a lot of money, when used appropriately.

[NOTE FROM PHILL: The reason that we market "Mortgage Assignment" as the "lead strategy" is because after using all of these alternatives, it's clear that this is the one that is working THE BEST in the current market environment and is appropriate and legal. Of course we also include training on all of the alternatives, and of course training on finding the deals, negotiating the deals, coaching on how to do this, etc. – this is a complete system, it even includes an online marketplace tool – a key component! It's not just a package of contracts like some people advertised when offering a "system"]

Q: Can't the seller just do this themselves?

A: They certainly could, but most of the time the sellers don't even know these options exists and that of course creates opportunities for investors and Realtors that have this specialized knowledge. I would say also that the risk of doing these wrong can result in disastrous consequences. If someone has the specialized knowledge, legal training, and real estate training and experience, then it is possible to do these themselves. What this program offers, and attorney's like myself offer, is the right way to do them, simply, effectively and well within the bounds of the law and ethics.

Q: Can't the seller just lease or lease-option the home?

A: They certainly could, however a lease or lease option carries a whole set of problems and responsibilities that many (most) sellers don't want to deal with, particularly in Texas, where we have the most onerous lease option laws in the country. Being a landlord is not something most want to do, but if they don't know better that's exactly what will happen doing leases or lease options. These transactions also usually violate the due-on-sales clause (i.e if the lease is for more than 3-years, which is normal) or an option is included, so for many sellers, this is clearly not a better alternative.

[NOTE FROM PHILL: My approach, when dealing with sellers, is to give them their options and let them choose. In this market, mortgage assignment is the most popular solution for most]

Q: How about the S.A.F.E. Act enacted by the federal government and the various states?

A: The S.A.F.E. Act was intended to crack down on predatory lending, but like most legislation, it has had the unintended consequence of limiting what investors can do with respect to even discussing financing. In effect, it prohibits discussions about financing unless you are a licensed residential loan originator or are subject to the exceptions in the Act. In a transaction in which a new loan and terms are being negotiated, such as a wrap, an investor may need legal advice to stay compliant. For a pure mortgage assignment, where no new loans or terms are being created, the S.A.F.E. act is less of a concern.

[Note from Phill: We teach all about the SAFE act in our program, when we discuss the alternative strategies, such as wraps, that fall under the SAFE act.]

Q: And what are the exemptions in the Act?

A: We have studied the S.A.F.E. Act extensively, reading early drafts and testimony when it was passed and we have come up with a comprehensive list of exemptions and applications of the Act and have developed a process that actually makes financing easier for the investor as the Act provides a reason for the investor to avoid discussing financing. We do so as an attorney with the client in a very transparent fashion, and take on the liability under the Act on behalf of the investor because we are exempt from the Act as attorneys when we provide the financing discussion as an ancillary service to our client. We have done so in over 100 transactions in the last 8 months in the course of our representation of our clients.

Q: How can I limit my liability?

A: Close the transaction with an attorney that knows how to do this and has closed at least 20 of these transactions and can generate good disclosures for your state. We can handle closings all over

Texas and the U.S. or refer you to other attorneys that can help. Just give me a call and we'll see if we can help. By the way, we don't charge our clients for routine phone calls because we want them to contact us with questions so we can keep them out of trouble before it happens. As a side benefit, we often are able to put something in our documents that addresses a particular situation, so we use the questions we get to make our documents better for everyone.

Q: How can I handle the issue when a seller is reluctant to trust me to make the underlying mortgage payment when I am the buyer?

A: One way is way is to use a third party to collect and process the payments. As part of our services to our clients, we will take the payments, make the payment to the underlying lender, tax authorities, insurance agent, etc, provide reports to the parties, prepare the 1098's that go out (calculating the interest, principal, etc), monitor the account and send demand letters and handle collections up to and including the foreclosure, provide payoffs and other services as needed to service the loan(s).

Q: Sloan Processing sounds expensive. Is it?

A: Actually what I described is a pretty typical account that we handle for a one time $35 set up charge and $15 per month processing fee. The 1098's are included as are the disbursements (up to 9 payees) and the other services noted.

Q: What other services do you offer?

A: We offer most services that a real estate investor could want, from document preparation and negotiation assistance to closing the transactions, to servicing the loan, to asset protection. For instance, closings are almost always less than $1000 all in (usually less than $900!), including documents, representation, escrow services, recording fees, FedEx, notary, etc (except for title insurance). Our asset protection and entity formation in Texas for example, is $986 all in, including consultation, filing fees, corporate books, operating agreement or bylaws, corporate seal, transfer ledger, certificates, minutes of the organizational meeting, sample minutes throughout the year and acting as the registered agent for a year afterwards. Our goal is to take care of the things most investors don't like to do so they can concentrate on the things they do like, such as finding properties, negotiating deals, and buying and selling properties, but most of all making money!!

Q:What about your fees for other services?

A: We live and breathe real estate investing and we're very good at it. We've been to all the gurus from Donald Trump to the local ones (believe me, some local ones are better than the national

ones!!). We have developed legal processes and systems over the years that allow us to do those things the investors want efficiently and expeditiously. Because of that, we are able to be very low cost compared to other attorneys. So we think we're better at it and less expensive too!

Q: Are there any services you don't offer?

A: Yep. If it's not real estate related, we don't do it. So if you need a divorce, want to adopt, are hurt in a car accident or want to sue your cousin for slandering you at the family thanksgiving meal, you'll need to find another attorney to help you.

Q: Thanks Mark!!

Final Note from Phill:

Mark Torok is one of the speakers at the Mortgage Assignment Profits System (MAPS) Workshop that all of our MAPS students are invited to attend. Come see him live and learn how he can become part of your "powerteam" to do these deals. He will also be giving free training talks to our MAPS students through online seminars.