



FDIC LOAN LOSS AGREEMENTS DRIVE LENDERS AWAY FROM GOOD FAITH LOAN MODIFICATION

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Combination of Insider Deals and FDIC Coverage

On February 8, 2010 commentators at Think Big Work Small (TBWS) published an online [video](#) that caused quite a stir. I've been looking for an explanation of what factors seemingly compel lenders to pursue short sale or foreclosure remedies over loan modification and this presentation led me to some answers.

In the case of Indy Mac, which failed in July, 2008, was taken over by the FDIC in March, 2009, and immediately sold to One West Bank,(OWB) there are some interesting added variables to consider. TBWS obtained and made available for download the following documents:

- Master Purchase Agreement Among Indy Mac, FDIC and OWB 03/18/2009
- Shared Loss Agreement Between FDIC and One West 03/19/09
- Indy Mac Loan Sale Agreement 03/19/2009

The deal is described as follows:

- 1) One West is owned and/or operated in material part by former Goldman Sacks VP Steve Mnuchin and billionaires George Soros and John Paulson.
- 2) First trust deeds owned by Indy Mac are purchased at 70% of Unpaid Principal Balance (UPB)
 - a. Home Equity Lines of Credit are purchased at 58% of UPB
- 3) FDIC covers 80% to 95% of losses on foreclosure or short sale
 - a. Loss is based on original loan balance rather than what One West paid
- 4) An actual example based on a reported transaction via [Summit Home Consultants](#) in Scottsdale, AZ was:

1	Borrower owes \$478,000 UPB + 6 months charges/costs	\$485,200
2	OWB purchases at 70%	\$334,600
3	Short sale net to OWB is	\$241,000
4	Loss on sale is difference of UPB and short sale net	\$244,200
5	FDIC pays 80% of loss (item 4)	\$195,360
6	Add short sale net and FDIC payment	\$436,360
7	Profit to OWB is gross proceeds less purchase price (6-2)	\$101,760
8	Borrower is required to sign promissory note for debt wipe out	\$ 75,000

Notes on Loan Sale Agreement (LSA)

2.01(a) **Terms and Conditions** – OWB obtains all rights in the loans subject to specific exclusions.

(v) All rights must be identified within 180 days of Closing Date (i.e. the time passed as of October, 2009)

2.01(c) **Assumption of Liabilities** – There is a Schedule 2.01(c) that describes details of assets and liabilities associated with each loan. Of interest for present purposes is the provision that *OWB becomes liable for listed and additional claims, suits and demands involving foreclosure, bankruptcy, and sundry other matters that commonly arise involving real property*. Now that more than 60 days have elapsed from the Closing Date, FDIC and OWB must mutually agree as to which of them is liable.

2.01(d) **Excluded Liabilities** – OWB is NOT responsible for claims arising out of this Loan Sale Agreement or related documents, or for claims arising against FDIC or Indy Mac before the Closing Date [see sub (viii)]

2.02 **Purchase Price** – The total UPB of all loans multiplied by a percentage set forth in **Schedule 2.02**. According to the video, this is 70% for first trust deeds and 58% for HELOCs and confirmed by the schedule which is attached to the LSA

2.14 **Retained Claims** FDIC keeps the right to any claims against Indy Mac Officers, Directors or others liable through the failed entity.

3.01 **Transfers** Paper is transferred in the customary manner while loans registered with MERS are transferred electronically.

5.01 **Servicing of Loans** OWB must comply with all applicable laws in the servicing of the loans after the Closing Date including the Fair Debt Collection Practices Act [15 USC § 1692 et seq].

5.02 **Collection Agencies and Contingency Contracts** OWB must honor all collection agency and attorney contracts that FDIC had in place on any of the loans.

5.03 **Insurance and Guaranteed Loans** OWB is responsible to ensure that servicers are acceptable to any Government Authority providing a guaranty, that all insurance and/or guarantees remain in effect, and that everything that needs to be done to keep them in effect is done.

5.05 **Loans in Litigation** OWB must secure attorneys and take responsibility for the conduct of any litigations that were commenced against Indy Mac and/or FDIC before the Closing Date.

5.08 **Loan Related Insurance** OWB must make certain that it is substituted as loss payee on any insurance in force on any loans it purchases and in the event of failure to do so, it is solely liable for any loss after the Closing Date due to lapse or cancellation of the insurance.

5.13 **Notice to Borrowers** A timely joint “Hello” and “Goodbye” letter must be sent to each Borrower by OWB in compliance with RESPA. This letter is subject to review and approval by FDIC.

5.16 **Release of Seller** Any and all claims OWB may have against FDIC or Indy Mac, and/or any of their Officers, Directors, Agents, Employees, Attorneys or others associated with them are fully and unequivocally released.

(b) OWB may not extend, renew, compromise, settle or release any loan for less than payment in full unless FDIC or any of its Agents or Assigns are released in full.

5.17 **Borrower as Purchaser** The loan may not be sold back to the Borrower without the same release of FDIC and Indy Mac, et al.

5.18 **HELOC’s** Must continue to be funded by OWB with respect to Disbursements of Principal pursuant to Unfunded HELOC Commitments and FDIC is obligated to reimburse in exchange for participation interests (see Attachment H).

(b) To the extent permitted by law, any HELOC, to the extent there is a decline in value of the security or if the Borrower’s credit score goes down, must be terminated or expended. If OWB opens any line of credit under a HELOC after the closing date, it is solely responsible and FDIC has no obligation or reimbursement.

5.19 **Repurchase of Charged Off Loans** If a loan on which a loss share payment has been made is charged off, FDIC may, at its option, repurchase the loan at UPB less the charge off amount.

5.20 **Loan Modification Program** *All Servicing Released Loan Modifications in progress as of Closing Date must be completed by OWB, and it must honor all loan modification commitments that were made before the Closing Date.* FDIC Loan Modification Program terms may be changed and OWB must comply unless after 01/02/09 there would be violation of law or any applicable Servicing Agreement, or if NPV at then current interest rate is less than NPV at the interest rate prior to the change. ***FDIC will cover all losses incurred in a Loan Modification pursuant to the Loss-Share Agreement. OWB must report on its handling on loan modifications in progress and meet FDIC***

Program requirements so long as FDIC financing remains outstanding and/or the loan remains subject to the Loss Share Agreement. If OWB receives any fees under any government or GSE sponsored program it must use them to further the purposes of the program.

5.22(b) **Cooperation** After the Closing Date, OWB can enter into a financing with the Federal Home Loan Bank or other third party, or securitize any Loan and FDIC will cooperate in effectuating the transaction.

6.01(c) **Warranties and Representations** FDIC makes no representation for itself or on behalf of Indy Mac that no Defect exists as to any Loan, even if it, or anyone associated with FDIC, knew or should have known of a Defect, and **no such knowledge may be used as evidence of fraud, misconduct or bad faith**, and FDIC is fully released –

- (i) **Except for the remedies in § 7.01,**
- (ii) This extends to loan originators, appraisers, and any other party involved in origination and/or servicing, and
- (iii) Underwriting deficiencies (liar loans)

6.09 **Asset Level Statements With Respect to Loans** FDIC makes the following statements with respect to the Loans sold.

6.09(b) **Original Terms Modified** Any loan term modifications are set forth in Schedule 6.09(b), which may include candidates for modification under Guidelines.

6.09(f) **Validity of Loan Documents** Each loan is a valid obligation of the maker and enforceable as to its terms except for

- (i) bankruptcy, or
- (ii) **equitable principles** that may apply

6.09(i) **Predatory Lending Regulations** FDIC certifies that none of the loans sold to OWB are predatory per the Home Equity and Protection Act of 1994, and/or classified as “high cost”, “threshold”, “covered” or described by other terminology reflecting that the loan is predatory per state, federal or local law.

7.01 **Defective Loans** can be cured by the FDIC or OWB, eg by adjusting the purchase price, or requiring OWB to correct in which event FDIC pays the cost of the cure, or FDIC can buy it back.

7.02(e) **Conditions Precedent to Remedy** include a requirement that OWB service the loan per reasonable standards and guidelines.

7.07 **Predatory Loan Defects** give the FDIC the right to repurchase the loan at a predetermined Repurchase Price.

7.08 **Seller Loss Limits** give the FDIC the right to stop providing the remedy of par 7.07 when its aggregate payments to cure defects, including by repurchase, exceed OWB's aggregate purchase price.

10.13 **No Third Party Beneficiaries** This Agreement affords no rights to Borrowers, Co-Lenders or other third parties.

10.15 **Termination** This Agreement terminates upon execution of the Master Purchase Agreement. [**Consideration of the Master Purchase Agreement is deferred**]

Attachments consist of forms, schedules and exhibits mostly in blank except for **Schedule 2.02** where the purchase prices for the Loans (70% - 58%) as mentioned in the video is confirmed.

Shared Loss Agreement (SLA)

The Shared Loss Agreement (SLA) controls over the Loan Sale Agreement if ever their terms are in conflict. It is an exhibit to the Loan Sale Agreement.

DEFINITIONS

“Charged Off Loans” are those that were fully charged off by Indy Mac Federal Bank (the name given Indy Mac Bank after the FDIC takeover in July, 2008). As of 01/02/09.

“Charge Off Loss” Calculated according to regulatory requirements and Guidelines, limited as to accrued interest per Exhibit 2E

“Commencement Date” is the same as Closing Date

“Cumulative Loss Amount” is the sum of Monthly Loss Amounts

“Cumulative Shared Loss Amount” is the excess of Cumulative Loss Amount over First Loss Amount

“Customary Servicing Procedures” means, with respect to a Shared-Loss Loan, the procedures that OWB customarily employs and exercises in servicing and administering mortgage loans for its own accounts and the servicing procedures established by Fannie Mae or Freddie Mac, which are in accordance with accepted mortgage servicing practices of prudent lending institutions.

“Final Shared Loss Amount” is 10 years from the earlier of the Commencement or Portfolio Sale Date (same thing for all intents and purposes)

“First Loss Amount” is *20% of UPB on aggregate Shared Loss Loans on loans listed on Attachment A to the LSA which OWB agrees to realize before FDIC makes any payments pursuant to section 2.1(d).*

“Foreclosure Loss” is the amount calculated by formula on Exhibit 2a after OWB completes a foreclosure.

“Guidelines” means the Statement on Loss Mitigation Strategies for Servicers of Residential Mortgages (September 2007), issued by the federal financial institutions regulatory agencies and the Conference of State Bank Supervisors, the Statement on Working with Mortgage Borrowers (April 2007), issued by the federal financial institutions regulatory agencies, the Home Equity Line of Credit Account Management Guidance (August 2008), issued by the Office of Thrift Supervision, and the Program, each as may be amended or supplemented from time to time.

“Loan Sale Loss” is the loss realized on the sale of a Shared Loss Loan by OWB to an unaffiliated third party *with the FDIC’s consent* per Section 2.6. It is calculated as UPB less net sale price. For a Restructured Loan it is NPV of cash flows on the Restructured Loan less net sale price PLUS loan principle payments recovered by OWB since the restructuring date. Exhibit 2d is a sample calculation.

“Monthly Loss Amount” is the sum of all Losses for any Shared Loss Month

“Monthly Shared Loss Amount” is the change in Cumulative Shared Loss during any given month

“Program” means *any of the following mortgage loan modification programs:*

(a) for modifications currently in process or initiated within the first 90 days following the signing of this Agreement, the modification program previously approved by the Board of Directors of IndyMac Federal Bank, FSB in Conservatorship;

(b) the FDIC’s Mortgage Loan Modification Program, a copy of which is set forth in Exhibit 5 to this Agreement; and

..any other modifications either to an individual or to a group of borrowers, with *prior written consent of the FDIC.*

“Qualifying Loan” means a Shared-Loss Loan (i) secured by collateral that is owner occupied on which the mortgagee has a first priority lien and (ii) with respect to which either (x) the borrower is at least 60 days delinquent or (y) a default is reasonably foreseeable.

"Recovery Amount" means, with respect to any period prior to the Termination Date, the amount of collected funds received by OWB that (i) are collected from a borrower or other third-party in respect of a foreclosed Loan *subsequent to the reimbursement of OWB by the FDIC for a Foreclosure Loss* in respect of such Loan, (ii) are collected from a borrower or other third-party in respect of a Charged-Off Loan ..., (iii) *are gains realized from a Section 4.1 or Section 4.2 sale of Shared-Loss Loans for which OWB has previously received a Restructuring Loss payment from the FDIC*, or (iv) are received from any source other than as described in clauses (i), (ii) or (iii) above in respect of any Shared-Loss Loan ... which represents a payment under any insurance, guaranty or similar arrangement.

"Restructuring Loss" means the loss on a modified or restructured loan measured by the difference between (a) the principal, Accrued Interest, unreimbursed Advances and third party fees due on a loan prior to the modification or restructuring and (b) the net present value of estimated cash flows on the modified or restructured loan, discounted at the Then-Current Interest Rate. Each Restructuring Loss shall be calculated in accordance with the form and methodology specified in Exhibits 2b(i) and 2b(ii) and shall be measured after taking into account all subsidies or other payments received by OWB that are intended to be for the benefit of the borrower with respect to such modified or restructured loan under any government sponsored program affecting the Shared-Loss Loans.

"Restructured Loan" means a Shared-Loss Loan for which OWB has received a Restructuring Loss payment from the FDIC.

"Short-Sale Loss" means the loss resulting from the Purchaser's agreement with the mortgagor to accept a payoff in an amount less than the balance due on the loan. Each Short-Sale Loss shall be calculated in accordance with the form and methodology specified in Exhibit 2c.

"Stated Threshold" means 30% of the aggregate UPB of the Shared-Loss Loans as shown on the Loan Schedule attached to the LSA at Attachment A.

2.1 Shared-Loss Arrangement.

(a) **Loss Mitigation and Consideration of Alternatives.** For each Shared-Loss Loan in default or for which a default is reasonably foreseeable, OWB shall undertake, or shall use reasonable best efforts to cause third-party servicers to undertake, reasonable and customary loss mitigation efforts in compliance with the Guidelines and Customary Servicing Procedures. OWB shall document its consideration of foreclosure, *loan restructuring* (if available), charge-off and short-sale (if a short-sale is a viable option and is proposed to OWB) alternatives and *shall select the alternative that is reasonably estimated by OWB to result in*

the least Loss. OWB shall retain all analyses of the considered alternatives and servicing records and allow the FDIC to inspect them upon reasonable notice.

(b) **Monthly Certificates.** Not later than fifteen (15) days after the end of each Shared-Loss Month, ..., OWB shall deliver to the FDIC a certificate, signed by an officer of OWB involved in, or responsible for, the administration and servicing of the Shared-Loss Loans whose name appears on a list of servicing officers furnished by OWB to the FDIC (a "Servicing Officer"), setting forth in such form and detail as the FDIC may reasonably specify (a "Monthly Certificate"):

(A) *a schedule substantially in the form of Exhibit 1 A* listing:

(i) each shared-Loss Loan for which a Loss is being claimed, the related Loss amount for each Shared-Loss Loan, and the total Monthly Loss Amount for all Shared-Loss Loans;

(ii) the Cumulative Shared-Loss Amount as of the beginning and end of the month;

(iii) the Monthly Shared-Loss Amount;

(iv) *the result obtained in clause (v) multiplied by 80%, which is used to compute the amount to be paid by the FDIC or OWB, as applicable, under **Section 2.1(d) of this Agreement**, or the result in clause (v) multiplied by 95%, if the Stated Threshold has been met;*

(v) the amount the FDIC recovers based on the calculations in **Exhibit 1 B**, listing each loan for which a recovery was received during the month and the Recovery Amount, with the amount the FDIC recovers calculated at the same percentage at which the related Loss was reimbursed by the FDIC; and

(vi) the net amount due from the FDIC after deducting the amount it recovered from the amount of reimbursable Losses due to OWB.

(B) for each of the Shared-Loss Loans for which a Loss is claimed for that Shared-Loss Month, a schedule showing the calculation of the Loss Amount using the form and methodology shown in Exhibit 2a, Exhibit 2b(i), Exhibit 2b(ii), Exhibit 2c, or Exhibit 2e, as applicable.

(C) for each of the Restructured Loans where a gain or loss is realized in a sale under Section 4.1 or Section 4.2, a schedule showing the calculation using the form and methodology shown in **Exhibit 2d**.

2.1(c) Requires OWB to provide a monthly data download to the FDIC with full particulars on the status of each loan, including...

(ii) An Excel or similar file for real property held as a result of foreclosure on a Shared-Loss Loan listing:

(A) Foreclosure date

(B) Unpaid loan principal balance

(C) Appraised value or BPO value, as applicable

(D) Projected liquidation date

2.1 (d) Payments With Respect to Shared-Loss Loans.

(i) **Losses Under the Stated Threshold.** Not later than thirty (30) days after the end of each calendar quarter, the FDIC shall pay to OWB, an amount equal to **eighty percent (80%)** of the sum of the **Monthly Shared-Loss Amounts** ...
[Per definitions, there are no Shared Loss Amounts until after “First Loss Amount” (20% of UPB) is realized by OWB]

Loss Amounts and FDIC Recoveries for such subsequent calendar quarter.
The money goes back and forth between FDIC and OWB based on comparison of recoveries for which the respective parties are responsible and losses in each month.

2.1(e) Limitations on Shared-Loss Payment. Only relates to whether OWB has complied with its contractual and reporting requirements to the satisfaction of FDIC.

2.6 Sale or Assignment of Shared-Loss Loans. The FDIC shall be relieved of its obligations with respect to a Shared-Loss Loan upon payment of any Loss Amount with respect to such Shared-Loss Loan or upon the sale of a Shared-Loss Loan by OWB to an unaffiliated person or entity, if the FDIC gives prior written consent

3.2 Duties of OWB

(a) In performance of its duties under this Article II, OWB shall or shall cause any Affiliate or shall use reasonable best efforts to cause any third-party servicer to:

(i) manage and, administer each Shared-Loss Loan in accordance with its usual and prudent business and servicing practices and Customary Servicing Procedures;

(ii) exercise its best business judgment in managing, administering and collecting amounts owed on the Shared-Loss Loans;

(iii) use commercially reasonable efforts to *maximize recoveries* with respect to Losses on Shared-Loss Loans without regard to the effect of maximizing collections on its assets or on any of its Affiliates that are not Shared-Loss Loans;

(iv) retain sufficient staff to perform its duties hereunder; and

(v) comply with the terms of the Guidelines for any Shared-Loss Loans meeting the requirements set forth therein. Subject to the approval of the FDIC, the OWB may propose exceptions to the Program for a group of Loans with similar characteristics, with the objectives of (1) minimizing its losses and those of the FDIC and (2) *maximizing the opportunity for qualified homeowners to remain in their homes with affordable mortgage payments.*

(b) Any transaction with or between any Affiliate of OWB with respect to any Shared-Loss Loan including, without limitation, the execution of any contract pursuant to which any Affiliate of OWB will manage, administer or collect any of the Shared-Loss Loans, shall be subject to the prior written approval of the FDIC.

About One West Bank

From CBS – LA News “[Sale of Indy Mac to One West Completed](#)” 03/19/09

This newly formed federal savings bank was formed by an investor group composed of billionaires George Soros, Michael Dell and several other entities, including Paulson & Co. The purchase price was \$13.9B, for \$23.5B in assets, composed of \$6.4B deposits and \$20.7B in loans, apparently less \$2.6B in 2008 4th quarter losses, and discounted \$4.7B. [Nothing like being off a few billion one way or another – these are the figures in the article] The FDIC anticipated insurance losses of \$10.7B.

About Steven T. Mnuchin

[Forbes.com](#) lists Mr. Mnuchin as a Director of Sears Holdings Corporation by title, but clarifies in the biography that he is the CEO of IMB HoldCo, LLC – the purchaser of Indy Mac Federal Bank’s banking operations since January, 2009. He is also Chairman and CEO of Dune Capital which has an interlocking relationship with Paulson & Co.

Mr. Mnuchin is listed as a recipient of all notices under the LSA at the OWB office in Pasadena. That place is virtually impenetrable to loan modification applicants. Correspondence gets referred to IndyMac Mortgage Services in Kalamazoo, MI where you’re only allowed to speak with customer service representatives. Someone named **Brandon Latman** signs loan modification rejection letters as First Vice President of IndyMac Mortgage Services but he too is unreachable.

About George Soros

Excerpts from [Wikipedia](#):

Public predictions

Soros’ May 2008 book, *The New Paradigm for Financial Markets*, described a “superbubble” that had built up over the past 25 years and was ready to collapse. This was the third in a series of books he’s written that have predicted disaster.

In February 2009, George Soros said the world financial system had effectively disintegrated, adding that there was no prospect of a near-term resolution to the crisis.^[22] “We witnessed the collapse of the financial system[...]It was placed on life support, and it’s still on life support. There’s no sign that we are anywhere near a bottom.”

View of potential problems in the free market system

Despite working as an investor and currency speculator, he argues that the current system of financial speculation undermines healthy economic development in many

underdeveloped countries. Soros blames many of the world's problems on the failures inherent in what he characterizes as [market fundamentalism](#). His opposition to many aspects of globalization has made him a controversial figure.

[Victor Niederhoffer](#) said of Soros: “Most of all, George believed even then in a [mixed economy](#), one with a strong central international government to correct for the excesses of self-interest.”

Soros claims to draw a distinction between being a participant in the market and working to change the rules that market participants must follow. According to [Mahathir bin Mohamed](#), Prime Minister of [Malaysia](#) from July 1981 to October 2003, Soros — as the hedge fund chief of Quantum — may have been partially responsible for the economic crash in 1997 of East Asian markets when the Thai currency relinquished its peg to the US dollar. According to Mahathir, in the three years leading to the crash, Soros invested in short-term speculative investment in East Asian stock markets and real estate, then divested with “indecent haste” at the first signs of [currency devaluation](#).^[52] Soros replied, saying that Mahathir was using him “as a scapegoat for his own mistakes”, that Mahathir’s promises to ban currency trading (which Malaysian finance officials hastily retracted) were “a recipe for disaster” and that Mahathir “is a menace to his own country”.^[53]

In an interview regarding the [economic crisis of 2008](#), Soros referred to it as the most serious crisis since the 1930s. According to Soros, market fundamentalism with its assumption that markets will correct themselves with no need for government intervention in financial affairs has been “some kind of an ideological excess”. In Soros’ view, the markets’ moods — a “mood” of the markets being a prevailing bias or optimism/pessimism with which the markets look at reality — “actually can reinforce themselves so that there are these initially self-reinforcing but eventually unsustainable and self-defeating boom/bust sequences or bubbles”.^[54]

About Paulson & Co

[BusinessWeek](#).com Snapshot and People

John Alfred Paulson (no relationship to the former Treasury Secretary Hank Paulson) is the President and serves on the Board of Directors. This employee owned company provides services to pooled investment vehicles. It represents banks and thrifts. It utilizes event driven strategies. Alan Greenspan, PhD is also on the Board of Directors, although his primary affiliation is with Deutsche Bank, AG.

It has been noticed that Deutsche Bank securitizes One West loans and is sometimes designated as the new owner. Servicing stays with IndyMac Loan Servicing in Kalamazoo, MI.

Blog Comments

CA Consumer asked why OWB doesn't just offer principle reductions as part of its loan modification programs if the FDIC is footing the bill?

This comment further argues that OWB engages in bait and switch tactics, and wants someone to file a class action.

My response: Banks abhor the notion of principle reductions as a fundamental threat to the stability of contracts they enter. They contend this will lead to increased loan costs for everybody. That may be true, but we haven't calculated what impact the FDIC will have on loan costs as it raises premiums to cover its expenditures. These are not decisions that should be made by lobbyists.

There have been proposals to give the Bankruptcy Courts the ability to order "cram downs", which are principle reductions forced upon creditors who lack 100% security for their credit. The banking lobby has persuaded Congress to stay away [see NY Times by Stephen Labaton 04/30/2009 "[Senate Won't Let Judges Fix Mortgages in Bankruptcy](#)". Bankruptcy courts are able to order "loan stripping" as to junior trust deeds no longer supported by security in the debtor's residence due to decline in value.

TOO_Cute thinks we're paying the banks to foreclose on us. They foreclose and get government (stimulus) money at today's value. They can sit on the property and sell it for more later. This is why we have a shadow inventory. Were it not for the stimulus money they'd be more serious about loan modifications.

My response: Having reviewed the LSA and the SLA it appears there are provisions for OWB to receive FDIC money in the event of charge off, short sale, loan restructuring (loan mod) and foreclosure. I've seen lenders just as dead set on foreclosure when the FDIC isn't involved. The impetus for this may be that

(a) it's too much bother to deal on a long term basis with entrenched borrowers, and/or

(b) a loan modification is more difficult to work through than a short sale or foreclosure where all the work is done by outside vendors and the outcome is quick, clear (no better way to get clean title) and final.

(c) doubtful they'd want to sit on it to make a gain later as that would have to be repaid 80% to the FDIC any time before the SLA is terminated or within 10 years of the Closing date, whichever is earlier. Moreover, the value is apt to go down as the property remains vacant, gets vandalized, incurs substantial carrying costs (taxes, insurance, maintenance, administrative) and/or there is further short term deterioration in the housing market.

TerryS states the video content is not true, that the 80% loan loss coverage is only on loans sold at par, not at discount.

My response: Nowhere in the paperwork reviewed is there a provision for payment to the FDIC of full price for a loan. To the contrary, there's and exhibit to the LSA confirming the contentions that first trust deeds are discounted to 70%, and HELOCs are discounted to 58%.

GA Appraiser feels that this is an unintended consequence of regulation. Refer to [Senator Johnny Isackson's talk](#) about how we need to start looking at the causes and effects behind our economic dilemma to help bring about a recovery.

My response: Sen Isakson addresses the “mark to market” concept, a dichotomy between sale value and replacement cost in many residential markets (replacement cost is now often greater than sale price – he wants appraisal guidelines revised), a rule from the US Treasury in the first week of February, 2010 requiring banks to respond to a short sale proposal within 10 days, and the FDIC offer to banks assuming loans they've taken over to pay losses after the first 20% [ie, the Program we're discussing]. There is no criticism of the FDIC program in his video.

In this relationship between FDIC and OWB there is a procedure similar to what was contemplated for handling toxic assets acquired from banks with TARP funds. Initially the Department of the Treasury was going to buy up to \$24T of troubled assets. When that legislation passed 10/03/2008 the toxic loans were to be sold at auction to private investors and institutions. This quickly proved impractical as these loans are illiquid and difficult to value. Within a couple of weeks that plan changed to buying preferred stock and/or warrants in banks. Then on 03/23/2009 new Treasury Secretary Geithner announced the Public – Private Investment Plan (P-PIP) to buy toxic assets from any bank's balance sheet. *FDIC is involved in this by providing 85% guarantees on purchased loans.* The program has been criticized by leading economist Paul Krugman as creating a hidden subsidy that is split among asset managers (such as OWB), bank shareholders (after the bankers have skimmed fat salaries and bonuses from the top) and creditors.

The present framework is superficially valid in encouraging loan modification equally with other alternatives, but it ignores the obvious penchant for following the easiest path to quick profits. The structure also keeps its inner workings a secret between the FDIC and OWB. Quick and easy profits are not achieved by the cumbersome process of restructuring and administering modified loans. OWB's strategy may be to resolve as many of these loans as possible by foreclosure or short sale, securing tidy profits as shown, to dispose of the really difficult ones by sale to third parties and ultimately finish with a portfolio sale.

First Loss Amount points out that OWB must first absorb a 20% loss on loans purchased before loss sharing kicks in.

My response: This is true, and that fact was omitted from the video (see the definitions of “First Loss Amount”, “Cumulative Loss Amount” and “Cumulative Shared Loss Amount” and excerpts from Section 2.1d of the SLA above). A number of commentators shrugged this off, observing that it doesn’t much matter because the video is not a hypothetical, it’s a real case. FDIC issued a response to the video claim it hadn’t paid OWB a penny as yet. One must imagine that they are scrambling to get to that 20% loss threshold so they can begin reaping the benefits of the SLA.

BH points out that absorbing the first 20% of losses is not a big deal for OWB. After all, they got a 30% discount on first trust deeds coming in, and a 58% discount on HELOCs. The quick profits are a much more appealing business proposition than grinding out 5% or 6% payments over time on a performing loan.

My response: In the case study OWB made a gain of \$101,760 on an investment of \$334,600 over roughly 6 months time. Aside from attempting to collect on the \$75,000 promissory note, there are no tail end commitments. I’m sure OWB would prefer that the hapless borrower in this case files a Chapter 7 bankruptcy, thus relieving them of the need to engage in collection activity in order to turn 80% of any net proceeds over to the FDIC pursuant to the Loss Recovery provisions in the SLA. Getting into a restructured loan could mean 2% to 3% interest, monthly reporting to the FDIC for up to 10 years, and prospects for having to repay FDIC if there turns out to be a “**Recovery**” in the form of payments.

Dave has tried to buy a short sale property where the loan balance is \$1.3M for \$1M and the bank won’t accept unless the borrower signs a \$300K promissory note. Looks like OWB would rather foreclose than do a short sale.

RG chimed in with this analysis –

OWB purchase price for \$1.3M loan at 70% discount	\$910,000
Net on short sale at \$1M assuming 8% closing costs	\$920,000
FDIC pays 80% of the loss on \$1.3M UPB less \$920K net on sale	\$304,000
OWB gain is \$10K on the short sale and \$304K from FDIC	\$314,000
Proposed borrower promissory note	\$300,000

My response: It has now been close to a year so the gain would have taken twice as long as the video example to realize a 34% profit. The SLA requires best efforts at maximizing collections so OWB is compelled to demand the promissory note. This is an example of an unintended consequence – the banks are more comfortable with foreclosure. That’s where they can get even greater profits out of the process [see New York Times “[Lucrative Fees May Deter Efforts to Alter Loans](#)” by Peter Goodman, 07/29/2009]

Conclusion

There's a whole lot more to this that will need to be deferred for future articles. On the legal side, there has to be court action by aggrieved individuals who can benefit from courts' discretion to award injunctive (i.e. stop foreclosure) and other equitable relief (e.g. cancel the debt – see “NY Court Cancels Indy Mac Loan Due to Misconduct on the [Interactive Law Blog](#)”) in addition to damages,

- Since it is so important to line up your evidence and do a lot of preparation at the earliest moment, we want you to **CONTACT US** right away. We continue to offer a free 20 minute consultation where we can assess your situation early and determine whether litigation or bankruptcy is appropriate, and we have vast resources to assist you in your self-help endeavors or representing you in obtaining relief.