

# REALTORS® ASSOCIATION OF NEW MEXICO

LEGAL UPDATE

Presented By:

Ashley Strauss-Martin, Esq.

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# TOPICS COVERED TODAY

- NEW MEXICO
  - NM LEGISLATIVE SYNOPSIS
  - SELLER FINANCING UPDATE
  - RANM PA CHANGES
  - NM REC UPDATE



# TOPICS COVERED TODAY

- FEDERAL/NATIONAL
  - DRONES
  - FRAUD/SCAMS
  - PREPARING FOR TRID
  - CASE LAW UPDATE
- WHAT DO YOU KNOW? – A POP QUIZ



# NM LEGISLATURE

- RANM'S 2015 Legislative Synopsis
  - HOA
  - Home Inspector Licensing
  - Property Tax



# SELLER FINANCING



# SELLER FINANCING UNDER DODD FRANK

- 1-IN-12 EXCLUSION
  - Only available to natural persons, estates and trusts
  - Builder can't use
  - No negative amortization
  - Balloon payment allowed
  - Interest rate - fixed or adjustable rate, but can NOT adjust sooner than 5 years



# 3-IN-12 EXCLUSION

- Available to natural persons, estates, trust and corporations
- Same restrictions as the 1-in-12 Exclusion, PLUS
  - no balloon payments
  - seller must make a good-faith determination of the Buyer's ability to make the required payments



# PROPOSED CHANGES

- 5 per year
- No ATR requirements
- 3 out of the 5 can have a balloon (we want 5; they want 3)
- High Cost Loans fall back under the 3- in-1 rule (HCL -6.5% above prime)





# PROPOSED CHANGES

- Fixed rate for 5 years unless wrapping a prior obligation
- Entities are treated the same as natural persons
- Being Considered: Restrictions on dwelling portfolios – 25?

- .



**RANM  
RES. PA (2104)  
CHANGES**



# RANM FORMS

## 4. PROPERTY.

### A. DESCRIPTION.

Address

City

State/Zip

Legal Description

or see metes and bounds or other legal description attached as Exhibit \_\_\_\_\_, \_\_\_\_\_  
County(ies), New Mexico.

If the legal description of the Property is incomplete or inaccurate, this Agreement shall not be invalid; the legal description shall be completed or corrected to meet the requirements of the Title Company issuing the title policy.

B. TYPE: € Site built € Manufactured housing € Modular € Off-site built € Other:  
\_\_\_\_\_. (See RANM Form 2305 – Information Sheet-Manufactured Housing)

C. OTHER RIGHTS. Unless otherwise provided herein, Seller shall convey to Buyer the following rights **whether appurtenant (attached) or not appurtenant (not attached)** to the Property:

i. ALL wind, solar and water rights; AND

ii. all mineral rights **THAT ARE OWNED BY THE SELLER**. Buyer should be aware that mineral rights in whole or part may have been severed from the Property by Seller or a prior owner of the Property and therefore, are no longer appurtenant to the Property. In this event, some or all of these mineral rights may NOT be owned by Seller and may be held by a third-party. This Agreement does NOT convey any mineral rights held by a third-party. Buyer **SHOULD** seek legal and expert assistance to determine what mineral rights, **IF ANY**, Buyer is acquiring with the Property, to understand how the non-conveyance of any mineral rights or portions thereof may affect Buyer; and to ensure that all mineral rights that will convey with the Property are properly transferred at closing.

# REVISED PARA. 4C

**OTHER RIGHTS.** Unless otherwise provided herein, Seller shall convey to Buyer all existing wind, solar, water and mineral rights appurtenant to the Property. **Seller makes no warranties as to the existence of any of the foregoing “other” rights.**



# REVISED PARA. 4C

- **NOTE TO SELLER: If Seller is retaining any or all of the foregoing "other" rights, Seller should NOT sign this offer; a counter offer is necessary to address retained rights”**



# REVISED PARA. 4C

**NOTE TO BUYER:** Buyer should be aware that some or all of the foregoing “other” rights may have been previously severed from the Property and may be owned by third-persons; those severed rights would not convey to Buyer by way of this Agreement. Buyer **SHOULD** seek legal and expert assistance to determine what rights, **IF ANY**, Buyer is acquiring with the Property, to understand how the non-conveyance of any rights or portions thereof may affect Buyer; and to ensure that all rights that will convey with the Property are properly transferred at closing.



AND FOR  
THE NEW  
TRID  
RULES



# BROKER'S E-MAIL AND LICENSE NUMBER

**THE FOLLOWING IS PROVIDED FOR INFORMATION PURPOSES ONLY.  
BROKERS ARE NOT PARTIES TO THIS AGREEMENT.**

## BUYER'S BROKER

Buyer's Broker Name                      **Buyer's Broker's License No.**                      Buyer's Broker's Qualifying Broker's Name

Buyer's Brokerage Firm                      **Buyer's Broker's E-mail Address**                      Office Phone                      Fax

Buyer's Brokerage Address                      City                      State                      Zip Code

By (Print)                      Email Address                       Broker is is not a REALTOR®

## SELLER'S BROKER

Seller's Broker Name                      **Seller's Broker's License No.**                      Seller's Broker's Qualifying Broker's Name

Seller's Brokerage Firm                      **Seller's Broker's E-mail Address**                      Office Phone                      Fax

Seller's Brokerage Address                      City                      State                      Zip Code

By (Print)                      Email Address                       Broker is is not a REALTOR®



# BUYER AND SELLER AUTHORIZATIONS

- Unless otherwise instructed in writing, Seller and Buyer hereby authorize the Title Company, Lender, Escrow Agent and their representatives to provide a copy of any and all loan estimates, closing disclosures, other settlement statements and title documents with respect to the real estate transaction that is the subject of this Agreement to the Seller's and Buyer's respective Brokers. This does not authorize the delivery of any Buyer documents to Seller's broker or vice-versa. Each party further authorizes his/her respective Broker to be present for the Closing.



NMREC



# NM REC

- RULES TASK FORCE WORKING ON SEVERAL ISSUES, INCLUDING:
  - BROKER DUTIES - ETHICAL & PROFESSIONAL CONDUCT, SEPARATE SET FOR TENANTS
  - CLARIFYING PM IS AGENT OF OWNER
  - ADVERTISING – ADD QB LICENSE NUMBER - SIZE OF BROKERAGE NAME AND PHONE
  - EDUCATION – 36 HRS WITH A CORE COURSE REQUIREMENT ANNUALLY AND 4HRS OF ELECTIVE COURSES EVERY 3 YEARS
- APPRAISERS' REQUEST



# DRONES



# DRONES

- Can NOT use unmanned aerial systems (UAS) for commercial purposes without acquiring a Section 333 Waiver from the FAA
  - Case-by-case determination
  - In all cases where one has been issued, recipient has had a pilot's license
  - More information – [www.realtor.org](http://www.realtor.org)



# FAA PROPOSED RULES

- OPERATOR CERTIFICATION
  - UAS OPERATOR MUST PASS AN INITIAL AERONAUTICAL KNOWLEDGE TEST AND OBTAIN AN UNMANNED AIRCRAFT OPERATOR CERTIFICATE
  - DO NOT NEED A PILOT'S LICENSE



# FAA PROPOSED RULES

- AIRCRAFT REQUIREMENTS
  - AIRCRAFT REGISTRATION
  - OPERATOR MUST MAINTAIN UAS IN CONDITION FOR SAFE OPERATION
  - OPERATOR MUST CONDUCT A PRE-FLIGHT INSPECTION TO CONFIRM UAS IS IN SAFE WORKING CONDITION



# FAA PROPOSED RULES

- OPERATIONAL LIMITATIONS
  - UAS MUST WEIGH LESS THAN 55 LBS.
  - REMAIN IN VISUAL LINE OF SIGHT OF THE OPERATOR/VISUAL OBSERVER ALWAYS
  - MAY NOT OPERATE OVER ANY PERSON NOT DIRECTLY INVOLVED IN THE OPERATION
  - MAY ONLY OPERATE FROM THE OFFICIAL LOCAL SUNRISE TO SUNSET
  - MAX. HEIGHT – 500 FT ABOVE GROUND







**FRAUD**

# WIRE FRAUD - PREVENTION

- Avoid sending sensitive financial information via email.
- Use encrypted email.
- Educate clients about fraud.
- Contact the intended wire recipient immediately prior to sending funds to confirm wiring instructions.
- Do not rely on contact information or web addresses in unverified emails.



# WIRE FRAUD - PREVENTION

- Use up-to-date firewall and anti-virus technologies.
- Avoid opening suspicious emails.
- Clean out your email account on a regular basis.
- Change your usernames and passwords on a regular basis.
- Implement hard-to-guess passwords with a combination of letters, #s and symbols.



# DAMAGE CONTROL

- Change usernames and passwords.
- Contact clients and other impacted parties.
- Report fraud to the Federal Bureau of Investigations via their Internet Crime Complaint Center:  
:<http://www.fbi.gov/scams-safety/e-scams>



# DAMAGE CONTROL

- Report fraud to the Federal Trade Commission:  
<https://www.ftccomplaintassistant.gov/#crnt&panel1-1>
- Brokers should report fraud to RANM and local REALTOR® association.



# RENTAL SCAM

## SETTING UP RENTAL FRAUD ALERT

NAR Legal Department How-to Video:

<http://www.realtor.org/videos/how-to-protect-your-property-listings-from-rental-scams>



# Rental Fraud: Steps To Take

- Take a screen shot of the advertisement
- Contact local police
- Contact affected clients
- Contact the website publisher unless otherwise instructed by law enforcement



# Rental Fraud: Steps to Take

- Contact the Internet Crime Complaint Center: <http://www.ic3.gov/default.aspx>
- Contact the FTC: <https://www.ftccomplaintassistant.gov/#crnt&panel1-1>
- Contact RANM and your local REALTOR® association





**NEW  
TILA/RESPA  
INTEGRATED  
LOAN DISCLOSURES  
OCTOBER 3, 2015**



# TRID

- 2 NEW FORMS: LOAN ESTIMATE AND CLOSING DISCLOSURE
  - LOAN ESTIMATE REPLACES TRUTH-IN-LENDING STATEMENT AND RESPA'S GOOD FAITH ESTIMATE
  - CLOSING DISCLOSURE REPLACES FINAL TRUTH-IN-LENDING STATEMENT AND HUD-1



# TRID

- LOAN ESTIMATE

- Given 3 days after submission of loan app.
  - may be received later than 3 days
- At least 7 days before closing
- Provides Summary of Key Terms and Estimated Loan and Closing Costs
- Easier Comparison of Different Programs
- No Fees Charged until Loan Estimate given and Consumer wants to proceed (except credit reports)

# TRIGGERS FOR LOAN ESTIMATE

- Name
- Income
- Social Security number (so the lender can check credit)
- Address of the home an estimate of the home's value (typically the sale price)
- Amount they want to borrow



# TRID

- CLOSING DISCLOSURE
  - Provided 3 days *before* closing, but some changes requires new disclosure
    - Waiver of waiting period permitted in bona fide financial emergencies: Written statement by consumer; No printed forms
  - Summarizes Final Loan Terms & Costs
  - Provides Detailed Accounting of Transaction
  - Lender responsible, but may use Settlement Agent

# NEW CD REQUIRED

- LIMITED CHANGES REQUIRE A NEW DISCLOSURE AND 3-BUSINESS DAY WAITING PERIOD:
  - Increase by more than  $\frac{1}{8}$  of a percent for regular loans (most fixed-rate loans) or  $\frac{1}{4}$  of a percent for irregular loans (most adjustable loans).
  - Lenders have been required to provide a three-day review for these changes in APR since 2009.



# NEW CD REQUIRED

- A prepayment penalty is added, making it expensive to refinance or sell.
- The basic loan product changes, such as..
  - a switch from fixed rate to adjustable interest rate; or
  - to a loan with interest-only payments

# NO NEW CD REQUIRED

- Walk-through issues, such as a broken refrigerator or a missing stove, even if they require seller credits to the buyer
- Most changes to payments made at closing, including the amount of the real estate commission, taxes and utilities proration, amounts paid into escrow
- Typos found at the closing table





# TRID

- Definition of “Business Day” - Two Definitions
  - Loan Estimate to consumer within 3 business days of application – defined as
    - day on which the creditor’s offices are open to the public to carry on substantially all functions
  - Closing Disclosure
    - all calendar days except Sunday and certain federal holidays



# VARIATIONS

## – CANNOT INCREASE

- Creditor's or mortgage broker's charges for own services
- Services provided by an affiliate Settlement Service Provider (SSP)
- Charges for services for which creditor/mortgage broker does not permit consumer to shop



# VARIATIONS

–CAN INCREASE BY NO MORE THAN 10%

- Recording fees
- The consumer is permitted by the creditor to shop for the third-party service, and the consumer selects a third-party service provider on the creditor's written list of service providers.



# VARIATIONS

- VARIATIONS GREATER THAN 10% PERMITTED
  - Services required where consumer can shop and chooses SSP that is not on lender's list
  - Prepaid interest
  - Property insurance premium
  - Escrow amounts, impound reserves



**CFPB**

**5 Steps To  
Prepare Your  
Clients**



# STEP 1

- Encourage your clients to think through mortgage choices first
  - **Engaged** homebuyers are more likely to select a mortgage loan that meets their needs and presents few surprises during underwriting.
  - The **pre-application** timeframe is critical and gives clients a chance to decide on a **loan type and down payment amount** before they are focused on a closing date.



# STEP 1

- Make sure your clients **feel comfortable** they **can afford** the home and feel **confident in their ability to receive a mortgage loan** approval for the required amount.
- Encourage prospective homebuyers to **review their credit reports early** in the process. Through early review, they can find and **correct errors** to potentially raise their credit score and reduce their cost of borrowing.



# STEP 2

- Once a property has been identified, encourage your clients to apply for Loan Estimates from multiple lenders
  - Loan Estimates no longer require written documentation, so encourage your clients to compare offers from several lenders. This will **avoid second guessing** whether they got the best deal.





# STEP 2

- Clients who **understand market** rates are more likely to feel confident about their choices and work proactively and collaboratively with their lender.
- Loan Estimates are most useful when your clients define the requested mortgage type and **compare “apples-to-apples”** Loan Estimates



# STEP 3

- Make sure your clients indicate their intent to proceed
  - Lenders have **different policies** about what your clients need to do to successfully move an application forward from the Loan Estimate stage into active processing, when the appraisal and other verifications typically begin.



# STEP 3

- **Talk to lenders** serving your area to learn about those policies and discuss lender requirements with your clients to be **confident that your clients have an active mortgage application underway.**



# STEP 3

- Your clients might request a Loan Estimate and then feel like they're done—but Loan Estimates **expire after 10 business days**.
- If your clients do not complete the steps required by the lender to **express their intent to proceed**, their applications could be closed as incomplete and they'll likely need to start over with a new application.



# STEP 4

- Be the source of accurate and timely information about the property and transaction
  - Open lines of communication help prevent needless confusion and delays



# STEP 4

- Make sure your clients have detailed information they can share with their lender about property taxes, homeowner's association fees, condominium association fees, and the estimated cost for homeowners insurance
- Although the lender likely needs to verify these costs later, accurate numbers now can prevent revised Loan Estimates later.



# STEP 4

- If anything about the transaction changes, **communicate those changes promptly to everyone** involved and confirm the information has been received.
- The **lender determines** whether the change requires a revised Loan Estimate.



# STEP 4

- Confirm the lender and the closing company have the **buyer's and the seller's real estate broker information**. Because this information appears on the Closing Disclosure, they both need **correct and complete** information.





# STEP 5

- BUSINESS PRACTICES CAN VARY FROM LENDER TO LENDER. SO FIND OUT –
  - **WHO** PROVIDES THE CLOSING DISCLOSURE AND
  - **WHEN AND HOW** YOUR CLIENT CAN EXPECT TO RECEIVE IT AND
  - HOW ANY **LAST-MINUTE CHANGES** ARE HANDLED.



# STEP 5

- Previously HUD-1s were most often provided by a settlement agent, attorney, or closing company. **This may not be the case for the CD.**
- Lenders may choose to prepare and deliver the CD to your client directly **through the mail, in-person, or electronically** (if your clients have given permission for electronic delivery).

# STEP 5

- Find out if the lender or the closing company has a **required timeframe for any change requests**.
- Keep in mind that no matter who prepares or provides the CD, **the lender is accountable for its accuracy** and approves the final version.



# WHAT HAS CHANGED

- Once your clients indicate their intent to proceed, lenders can charge fees, BUT...
  - Previously, lenders may have requested credit card info or post-dated check to be charged or cashed later before intent to proceed
  - No longer permissible. Payment information can be obtained only after the lender provides the Loan Estimate and your clients have expressed their intent to proceed.

# WHAT HAS CHANGED

- So, lenders may require your clients to provide payment for an appraisal, application, or other loan processing fee immediately **after or as a part of confirming the intent to proceed** with the application; before beginning the appraisal, processing, verification or underwriting processes.



# WHAT HAS CHANGED

- To provide a CD 3 business days before the closing that reflects all of the terms of the transaction, settlement agents and creditors need as much information from the buyer, the seller and the agents about the transaction **as far in advance of closing as possible.**



# WITH THAT SAID

- Most settlement issues, such as adjustments to seller credits to account for repairs, that are currently addressed as late as the day of closing can continue to be handled at closing without requiring a new 3 business-day review period.



# EMBRACE THE DEADLINE

- TRID IS EFFECTIVE FOR APPLICATIONS RECEIVED ON OR AFTER OCTOBER 3, 2015
- FURTHER DELAY IS NOT LIKELY, THOUGH LENIENCY MAY BE AND NAR CONTINUES TO FIGHT FOR A GRACE PERIOD AND A DELAY TO THE RULE





# CFPB

- <http://www.consumerfinance.gov/know-before-you-owe/real-estate-professionals/smooth-on-time-closings/>



# CASE LAW



# CASE LAW

- *Am. Ins. Ass'n v. United States Dep't of Hous. & Urban Dev.*, (US DISTRICT COURT, D.C. Nov. 7, 2014)
  - In 2013, HUD promulgated a final rule (“Rule”) that allowed plaintiffs to bring claims pursuant to the Federal Fair Housing Act (“Act”) under a DISPARATE-IMPACT THEORY.



# CASE LAW

- **Examples:**
- An apartment complex only allows people with full-time jobs. This bars disabled veterans and other people with disabilities who may not be able to work full-time, even though they can afford the apartment. The complex could instead consider all income to assess someone's ability to afford rent.
- A broker only works with buyers with advanced degrees or a certain income level; this may disproportionately eliminate a group of people.



# CASE LAW

- Formerly, HUD's rules had only recognized direct housing discrimination claims, but a disparate-impact theory would allow a party to allege certain housing practices had a discriminatory effect even when there was no evidence of a discriminatory intent.
- The disparate-impact theory is recognized in many of the federal circuits for Act claims but has not yet been considered the Supreme Court of the United States.



# CASE LAW

- The American Insurance Association (“AIA”), an insurance trade association, filed a lawsuit challenging HUD’s authority to create the Rule.
- AIA argued that the Act only addresses intentional discrimination, and therefore HUD lacked the statutory authority to create the Rule.



# CASE LAW

- Administrative law requires a government agency to have statutory authority to create rules.
- HUD argued that support for its authority can be found in the statutory language, but the court disagreed.



# CASE LAW

- All of the verbs included in the statute (refuse, make, deny, discriminate) indicated that Congress intended to prohibit intentional housing discrimination, and the court found no language in the statute to support HUD's disparate-impact theory nor was there any support found in the Congressional record.





# CASE LAW

- Thus, the court ruled that HUD lacked the statutory authority to create the Rule.
- Finally, HUD argued that the Rule was simply an acknowledgement that the disparate-impact theory was accepted already in most federal circuits.



# CASE LAW

- The court stated that this did not give HUD the authority to create the Rule, and also found that most of these rulings predated a decision by the Supreme Court on how to analyze a disparate impact theory that may have changed the analysis used in these earlier decisions. Therefore, the court vacated the Rule



# CASE LAW

- *Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, (U.S. June 25, 2015)
  - The Supreme Court of the United States addressed the issue of whether the federal Fair Housing Act ("FHA") prohibits housing decisions that have a disparate impact. The Court, in a 5-4 ruling, held that disparate-impact claims are cognizable under the FHA.

# CASE LAW

- The effect of the Supreme Court's decision will largely be felt by housing developers, multi-unit property managers, lenders and government agencies. To the extent that a real estate professional serves in one of these capacities, particular attention should be paid.



# CASE LAW

- While the result of this decision will unlikely affect real estate professionals to any great extent, there is potential for a real estate professional to be subject to disparate-impact liability where a real estate professional adopts a policy that causes a disparate impact on a protected class.



# CASE LAW

- For example, if a real estate professional were to adopt a policy that the real estate professional would only show properties to individuals with advanced degrees, and a plaintiff were able to establish that this policy caused a disparate impact on minorities, a real estate professional could potentially be held liable for violating the federal Fair Housing Act.



# CASE LAW

- In addition, for real estate professionals that also operate as property managers or housing developers, consideration should be given to the effect of any adopted policy related to these activities to ensure that the policy does not have any unintended disparate impact on a protected class under the Fair Housing Act.



# YOU BE THE JUDGE

- ***Anderson v. Coldwell Banker Residential Brokerage Co.*** 2014 Cal. App. (November 21, 2014)
  - In 2008, David Anderson (“Buyer”) purchased an undeveloped lot in an unincorporated portion of Malibu, intending to build a residence on the land.
  - William Moss, a broker with CB Residential represented Buyer in the transaction.



# YOU BE THE JUDGE

- The PA contained numerous admonitions to the Buyer regarding his responsibility to determine the suitability of the lot for his intended purposes, including the statement that Broker was not responsible for verifying any “laws, ordinances, zoning, or governmental permits,” and that Buyer should investigate “whether these matters affect Buyer’s intended use of the Property.”



# YOU BE THE JUDGE

- After executing the PA, Buyer began preparations to build on the lot.
- In 2010, with development still in the proposal phase, the County of Los Angeles determined that the lot had been illegally subdivided in 1956, but allowed that if the CA Coastal Comm. (CCC) approved Buyer's proposed development it would thereafter legalize the lot.

# YOU BE THE JUDGE

- The CCC refused to approve the development unless Buyer agreed to purchase a second lot and permanently designate it as undevelopable in order to mitigate the environmental impact of the proposed development.
- Buyer could not afford the additional financial burden of this requirement, and abandoned the development.

# YOU BE THE JUDGE

- In 2011, Buyer sued Broker, alleging
- Broker fraudulently concealed the possibility that the property was not legal
- And Broker negligently breached a duty to investigate and disclose material facts about the lot, including failing to discover a dotted line around the property boundary on the assessor's map that indicated a possible problem with the lot.



# YOU BE THE JUDGE

- Broker filed a motion for summary judgment, which was granted by the court
- In order to show fraud on the part of the Broker, Buyer had to demonstrate that Broker had “intentionally suppressed a known material fact that the defendant was under a legal duty to disclose.”



# YOU BE THE JUDGE

- The court determined that Buyer failed to present any evidence indicating this
- Furthermore, the Broker had no duty to predict that the CCC would require a second parcel purchase in order to develop the lot, nor did Broker have any information prior to the deal that would indicate that the CCC would impose such a requirement.

# YOU BE THE JUDGE

- On the negligence count, the court held that Broker's statutory duties under CA law were to "conduct a reasonable visual inspection of the property and investigate all material facts affecting its value and desirability."



# YOU BE THE JUDGE

- Such duties do not extend to a duty to inspect public records or permits, nor do these duties relieve buyers or sellers of their duty to protect their own interests “by consulting professionals and carefully reading all agreements to assure that they adequately express the parties’ understanding of the transaction.”





# YOU BE THE JUDGE

- Thus, held the court, Broker had no responsibility to note the dotted line on the assessor's map indicating a possible legal problem with the property, or to otherwise research the public records regarding the property.



# YOU BE THE JUDGE

- The court also pointed out that while parties to a transaction may contractually expand a real estate professional's duties to include items such as researching public records, this was clearly not the case in the present matter.



# YOU BE THE JUDGE

- The PA agreement set forth in no uncertain terms the parties' intent to conform to California statutory limitations regarding Broker's duties during the transaction
- Buyer appealed and appeals court

.....



# YOU BE THE JUDGE

- AFFIRMED TRIAL COURT
- NO BROKER LIABILITY



# CASE LAW

- Compare this outcome to the court's unusual ruling *in* **McDermott v Related Assets, LLC ( NY September 16, 2014)**
- New York court determined that the listing Broker had a responsibility to check the public records and discover inaccurate information provided by seller.




# CASE LAW

- The majority of states' laws conform to the *Anderson v. Coldwell Banker Residential Brokerage Co.* ruling, and do *NOT* require real estate professionals to research public records.



# CASE LAW

- NEW MEXICO LAW – *Amato vs. Rathbun Realty*, 98 NM 231 (Ct. App. 1982)
    - Rathbun was buyer's broker
    - Buyer was looking for investment property
    - Buyer alleged broker said property only needed cosmetic repairs to become income producing
    - Buyer purchased property and soon after closing, property was condemned & destroyed
- 

# CASE LAW

- Broker argued “only liable for actual knowledge”
- Broker’s said her only knowledge was from MLS and Listing Broker
- Buyer’s broker said she did not make any independent representations, but
- Buyer said his broker said it could be “a big money maker if fixed up”





# CASE LAW

- In this case, broker was working as an agent, so Court held broker had fiduciary duties – utmost care
- Court recognized difference between fraud (intentional misrepresentation) and negligent misrepresentation which is explained as follows:



# CASE LAW

- “One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise **reasonable care or competence in obtaining or communicating the information.** (Emphasis added.)”



# COURT ALSO HELD

- “Another factor leading us to the conclusion that a broker has the duty to exercise reasonable care or competence in obtaining or communicating information is that they are a licensed, regulated group
- The purpose of the Act is to regulate and, thus, protect the public against abuses which can occur within the real estate business

# COURT ALSO HELD

- It is incumbent upon the broker to have a general knowledge of the building code and the zoning ordinances which deal with the particular property being offered for sale or which is being purchased.
- But we do not hold that this knowledge in any way relates to hidden or latent defects.



# CASE LAW

- Once duty was established, sent back to trial court to determine if broker breached duty & made independent representations
- IMPORTANT ISSUES -?
  - Agency -
  - Fact that broker offered opinion on the property -
  - At that time, no cautionary/advisory language



# CASE LAW

- *Gang v. Re/Max Champions*, (Ohio Ct. App. Oct. 20, 2014)
  - AB brought suit against QB for not releasing the AB's listings to him when he left the brokerage
  - QB argued that Exit Policy agreed to by AB did not require QB to do so
  - But QB had not been consistent in his enforcement of Exit Policy

# COURT HELD

"It is a basic principle of contract law that a party to a contract who would benefit from a condition precedent to its performance may waive that condition."

Thus, Broker waived its right to enforce its exit policy against AB by consistently failing to enforce it with its other ABs



# COURT HELD

AB relied on QB's established business practice of ignoring its own exit requirements for departing ABs and upheld the award of \$68,000 for breach of contract against Broker





# CASE LAW

- *Schoembs v. Schena (Massachusetts Superior Court, Jan. 23, 2015)*
  - the disclosure statement for the house the buyers were considering stated there had been “a major settlement” of its foundation years earlier
  - Buyer’s broker offered to contact an inspection company and attend the inspection himself, as the buyers were unable to attend.



# CASE LAW

- Inspector noted slanting in the floor and cracking in the foundation, but was unable to inspect part of the foundation because he could not access the entire foundation.
- Broker recommended that the buyers consult with a structural engineer if they wanted the cracks and slanting floors investigated further.
- Buyers did not consult anybody else and bought the house



# CASE LAW

- They later noticed cracks in the foundation, and, six years after closing, sued the broker, the sellers, the seller's broker, and the inspector
- The claims against the buyer's broker were based on the broker's recommendation of the inspection company



# CASE LAW

- The broker contended that the merger doctrine precluded the claims.
- The merger doctrine bars claims based on the provisions of a purchase agreement after the deed has been conveyed, unless those provisions are included in the deed.



# CASE LAW

- Court held that since the purchase agreement compensated the brokers for their services, the negligence claims against the salesperson could survive because of his alleged failure to check the inspection company's qualifications
- Sent back to trial court for further proceedings.



# YOU BE THE JUDGE

- *PH West Dover Props. v. Lalancette Eng'rs* (Vermont Supreme Court, 2015)
  - Seller's disclosure statement for an inn stated that the seller was not aware of any current problems with the roof and there were no problems with flooding, drainage or grading
  - When the broker secured the listing, however, she called an earlier prospective purchaser to see if she wanted to talk about buying the inn.



# YOU BE THE JUDGE

- The person allegedly told the broker she had seen flooding in the parking lot and the roof had major problems and could collapse.
- An inspection report stated that the roof showed signs of wear and should be kept under observation. The report also made specific recommendations about the roof.



# YOU BE THE JUDGE

- A buyer purchased the property and a few months later sued the broker alleging that she had misrepresented the condition of the property.
- The trial court ruled that the statements from the prior potential purchaser were too vague to provide notice to the broker, and the buyer already knew the roof needed work and should have inquired further.





# YOU BE THE JUDGE

BUYER APPEALED AND THE  
APPELLATE COURT HELD.....



# YOU BE THE JUDGE

- A real estate licensee does NOT have a duty to independently verify the seller's representations about the property unless the licensee is aware of facts indicating the seller's representations are false



# YOU BE THE JUDGE

- The prior purchaser's reasons for not buying the inn were insufficient to put the broker on notice because they were too vague.
- “[t]o require the [licensee] to relate every nonspecific and unattributed rumor to subsequent buyers would be unreasonable.”



# YOU BE THE JUDGE

- Because the buyers knew that the roof needed replacement within a few years (from inspection report) and that leaks around the chimney needed immediate attention, they could not recover damages from the broker



WHAT  
DO  
YOU  
KNOW  
?



# WHAT DO YOU KNOW?

- BROKERS WORKING AS TRANSACTION BROKERS OWE THEIR CLIENTS/CUSTOMERS:
  - A. HONESTY AND REASONABLE CARE
  - B. ALL NMREC BROKER DUTIES
  - C. FIDUCIARY DUTIES
  - D. B AND C



# WHAT DO YOU KNOW?

- WHICH PARTY GETS TO CHOOSE THE TITLE COMPANY?
  - A. THE BUYER, UNLESS THE SELLER IS WILLING TO PAY FOR THE TITLE INSURANCE AND COSTS
  - B. ALWAYS THE SELLER
  - C. IT'S NEGOTIABLE - PER THE CONTRACT
  - D. ALWAYS THE BUYER



# WHAT DO YOU KNOW?

- NM IS A NON-DISCLOSURE STATE – THIS MEANS...
  - A. SELLERS DON'T HAVE TO DISCLOSE PROBLEMS WITH THE PROPERTY
  - B. NOBODY CAN DISCLOSE THE SALES PRICE OF PROPERTY
  - C. SALES PRICE INFO FOR PROPERTY IS NOT OF PUBLIC RECORD
  - D. B AND C





# WHAT DO YOU KNOW?

- BUYER'S BROKERS ARE ALLOWED TO REBATE ALL OR PART OF THEIR COMMISSION BACK TO THEIR BUYERS
  - TRUE
  - FALSE



# WHAT DO YOU KNOW?

- IN THE CASE OF A SHORT SALE, THE PARTIES HAVE A LEGALLY BINDING CONTRACT WHEN:
  - A. THE LENDER APPROVES THE SHORT SALE AND THE SELLER NOTIFIES THE BUYER
  - B. THE PARTIES SIGN THE CONTRACT
  - C. THE PARTIES SIGN THE CONTRACT AND DEPOSIT EARNEST MONEY



# WHAT DO YOU KNOW?

- UNDER FIRPTA, THE BUYER NEEDS TO OBTAIN A NON-FOREIGN SELLER AFFIDAVIT IF -
  - A. IT'S A COMMERCIAL TRANSACTION
  - B. IT'S RESIDENTIAL TRANSACTIONS \$300,000 OR UNDER AND BUYER IS NOT GOING TO USE IT AS HIS PRIMARY RESIDENCE
  - C. IT'S A RESIDENTIAL TRANSACTION OVER \$300,000
  - D. IT'S A VACANT LAND TRANSACTION
  - E. B AND C
  - F. A, B, C AND D



# RANM LEGAL HOT LINE

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*THANK YOU!*

