

REALTORS® ASSOCIATION
OF NEW MEXICO
ON THE ROAD

Legal Issues

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TOPICS COVERED TODAY

- THE FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (FIRPTA)
- THE HOA ACT AND HOA FORMS
- PROCURING CAUSE
- LEAD-BASED PAINT DISCLOSURE
- WHAT IT MEANS TO BE A NON-DISCLOSURE STATE
- CASE LAW FROM AROUND THE NATION



FIRPTA

- PUTS ONUS ON BUYER TO PAY THE FOREIGN SELLER'S TAXES
- ALWAYS APPLIES IN COMMERCIAL AND VACANT LAND TRANSACTIONS
- SOMETIMES APPLIES IN RESIDENTIAL TRANSACTIONS -
 - ALWAYS APPLIES IF PROPERTY IS OVER \$300,00
 - SOMETIMES APPLIES WHEN PROPERTY IS \$300,000 AND UNDER



FIRPTA

- IF \$300,000 AND UNDER, IS BUYER USING IT AS A PRIMARY RESIDENCE?
 - YES? - FIRPTA DOES NOT APPLY
 - NO? - FIRPTA APPLIES
 - RANM FORM 2303B - BUYER'S CERTIFICATION



HOA ACT

- HOA ACT APPLIES TO HOAs, BUT DOES NOT APPLY TO CONDO ASSOCIATIONS GOVERNED BY THE CONDO ACT
- CONDOS CREATED AFTER MID 1982 FALL UNDER THE CONDO ACT WHICH REQUIRES SELLERS TO PROVIDE A RE-SALE CERTIFICATE



HOA ACT

- HOA IS DEFINED AS: AN INCORPORATED OR UNINCORPORATED ENTITY UPON WHICH MAINTENANCE AND OPERATIONAL RESPONSIBILITIES ARE IMPOSED AND TO WHICH AUTHORITY IS GRANTED IN THE DECLARATION
- THIS MEANS THAT VOLUNTARY HOAs DO NOT FALL UNDER THE ACT - NO OBLIGATIONS IMPOSED, NO AUTHORITY GRANTED BY A DECLARATION



HOA ACT

- REQUIRED DISCLOSURES UNDER HOA ACT
 - *DECLARATION OF HOA (MAY BE PART OF CC & Rs)*
 - *BYLAWS OF HOA*
 - *RULES OF HOA*
 - *CC & Rs*
 - *DISCLOSURE CERTIFICATE*



RANM HOA FORMS

- RANM FORMS
 - HOA INFORMATION SHEET - RANM FORM 4600
 - HOA DISCLOSURE ADDENDUM - RANM FORM 4650
 - HOA DISCLOSURE CERTIFICATE - RANM FORM
 - NEW FORM - WAIVER OF SOME PORTION OF 7-DAY REVIEW PERIOD



RANM HOA FORMS

- CHANGES ARE COMING
 - DISCLOSURE CERTIFICATE
 - ADDING CHECK BOXES FOR OTHER REQUESTED DOCUMENTS
 - DISCLOSURE ADDENDUM
 - TURNING IT INTO A DISCLOSURE, BUT NOT AN ADDENDUM
 - TAKING OUT INACTIVE HOA PROVISIONS
 - CREATING A LIMITED WAIVER - FOR INACTIVE AND NON-RESPONSIVE HOAs
 - BUYER ACKNOWLEDGMENT
 - BUYER WAIVER
 - HOLD HARMLESS PROVISION



LEAD-BASED PAINT DISCLOSURE

- TIMING
 - LAW SAYS BUYER CAN NOT BE OBLIGATED TO PURCHASE UNLESS AND UNTIL THEY HAVE RECEIVED DISCLOSURES AND RIGHT TO INSPECTION
 - BEST PRACTICE: BUYER ACKNOWLEDGES RECEIPT OF DISCLOSURES, WRITES OFFER AND SELLER ACCEPTS OFFER



LEAD-BASED PAINT DISCLOSURE

- BUT WHAT IF BUYER MAKES OFFER BEFORE GETTING DISCLOSURES?
 - AS LONG AS SELLER'S ACCEPTANCE POST-DATES BUYER'S ACKNOWLEDGMENT, THEN SELLER HAS COMPLIED WITH THE LAW OR
 - BUYER CAN PUT IN A CONTINGENCY REGARDING THE DISCLOSURES AND RIGHT TO INSPECTION IN THE PA - NO PENALTY IF BUYER WANTS OUT



PROCURING CAUSE

- DETERMINED ON A CASE-BY CASE BASIS
- MANY FACTORS CONSIDERED, NO ONE FACTOR IS DETERMINATIVE
- INTERPLAY OF FACTORS WHICH TOGETHER DEMONSTRATE THAT THE UNBROKEN EFFORTS OF A SPECIFIC BROKER WERE RESPONSIBLE FOR THE BUYER MAKING THE DECISION TO CONSUMMATE THE SALE ON TERMS ACCEPTABLE TO THE SELLER - THE SALE WOULD NOT HAVE OCCURRED EXCEPT FOR THE EFFORTS OF THIS SPECIFIC BROKER.



PROCURING CAUSE

- FACTORS GROUPED INTO 9 CATEGORIES
 - THE NATURE AND STATUS OF THE TRANSACTION
 - THE NATURE, STATUS AND TERMS OF THE LISTING AGREEMENT OR OFFER TO COMPENSATE
 - THE ROLES AND RELATIONSHIPS OF THE PARTIES
 - THE INITIAL CONTACT WITH THE PURCHASER
 - THE CONDUCT OF THE BROKER OR AGENT
 - CONTINUITY AND BREAKS IN CONTINUITY
 - THE CONDUCT OF THE BUYER
 - THE CONDUCT OF THE SELLER
 - OTHER INFORMATION



PROCURING CAUSE

FACTORS:

<http://www.realtor.org/law-and-ethics/complying-with-federal-regulations/procuring-cause-factors>

WORKSHEET:


<http://www.realtor.org/code-of-ethics/procuring-cause-arbitration-worksheet>



NON-DISCLOSURE

7-38-4. Confidentiality of information.

A. Except as specifically authorized in this section or as otherwise provided by law, it is unlawful **FOR THE SECRETARY, ANY EMPLOYEE OR ANY FORMER EMPLOYEE OF THE DEPARTMENT TO REVEAL TO ANY PERSON OTHER THAN THE SECRETARY, AN EMPLOYEE OF THE DEPARTMENT, A COUNTY ASSESSOR OR AN EMPLOYEE OF A COUNTY ASSESSOR ANY INFORMATION GAINED DURING HIS EMPLOYMENT ABOUT A SPECIFIC PROPERTY OR A PROPERTY TAXPAYER GAINED AS A RESULT OF A REPORT OR INFORMATION FURNISHED THE DEPARTMENT OR A COUNTY ASSESSOR BY A TAXPAYER OR AS A RESULT OF AN EXAMINATION OF PROPERTY OR RECORDS OF A TAXPAYER.**



NON-DISCLOSURE

Except as specifically authorized in this section or as otherwise provided by law, it is unlawful *for any county assessor or any employee or former employee of a county assessor to reveal to any person other than county assessors or their employees or the secretary or an employee of the department any information furnished by the department about a specific property or property owner or any other information gained during that person's employment about a specific property or a property taxpayer gained as a result of a report or information furnished the department or a county assessor by a taxpayer or as a result of an examination of property or records of a taxpayer.*

NON-DISCLOSURE

Information described in this subsection may be released:

(1) that is limited to the information contained in those valuation records that are public records and the identity of the owner or person in possession of the property;

(2) to an authorized representative of another state; provided that the receiving state has entered into a written agreement with the department to use the information for tax purposes only;



NON-DISCLOSURE

(3) to a state district or appellate court or a federal court or county valuation protests board:

(a) in response to an order made in an action relating to taxation in which the state or a governmental unit is a party and in which the information is material to the inquiry; or

(b) in any action in which the department or a county is attempting to enforce the provisions of the Property Tax Code [Article 35 to 38 of Chapter 7 NMSA 1978] or to collect a property tax or in any matter in which the taxpayer has put the taxpayer's own property valuation or liability for taxes at issue;



NON-DISCLOSURE

- (4) to the property owner or a representative authorized in writing by the owner to obtain the information;**
- (5) if used for statistical purposes in a way that the information revealed is not identified or identifiable as applicable to any property owner or person in possession of the property;**
- (6) to a representative of the secretary of the treasury or the secretary's delegate pursuant to the terms of a reciprocal agreement entered into with the federal government for exchange of such information; or**
- (7) to the multistate tax commission or its authorized representative; provided that the information is used for tax purposes only and is disclosed by the multistate tax commission only to states which have met the requirements of Paragraph (2) of this subsection.**

NON-DISCLOSURE

B. The secretary, any employee or any former employee of the department or any other person subject to the provisions of this section who willfully releases information in violation of this section is guilty of a misdemeanor and shall be fined not more than one thousand dollars (\$1,000) or imprisoned for a definite term of less than one year or both. Any person convicted of a violation of this section shall not be employed by the state for a period of five years after the date of conviction.



NON-DISCLOSURE

- MLS - RULES

- MLSs can't prohibit participants from using MLS information, including sale prices, for the authorized purposes of the MLS, i.e., BPOs and Appraisals even if the MLS categorizes the information "confidential"
- But, participants have no authority to transmit information about other participants listings - either while the listing is active or after its sold - to unauthorized users such as third-party sites
- And in both "disclosure" and "non-disclosure" states - MLS Rules prohibit use of MLS information for purposes other than the authorized purposes of MLS. They also prohibit retransmission to unauthorized parties.



NON-DISCLOSURE

- BROKER DUTIES
 - CONFIDENTIALITY LIMITED TO
 - WRITTEN AGREEMENTS WITH CUSTOMER - BROKER DUTY C
 - INFORMATION LEARNED THROUGH PRIOR AGENCY RELATIONSHIP - BROKER DUTY I
 - SELLER WILL TAKE LESS OR BUYER WILL PAY MORE - BROKER DUTY J



CLOSING DISCLOSURE

- BUT.....
 - BEFORE DISCLOSING....THINK ABOUT YOUR ON-GOING RELATIONSHIP WITH YOUR CUSTOMER/CLIENT



YOU BE THE JUDGE

- TEXAS - Q: whether a buyer's representative was liable to his clients for inaccurate square footage information.
 - listing broker, the local government appraisal district, and the Buyer's Representative had all represented that the size of the property's living area as 2,722 square feet.
 - While viewing the property, the Buyers remarked that the property seemed smaller than their 2600 square feet residence, but the Buyer's Representative had responded that this was because the property had an open floor plan.



YOU BE THE JUDGE

- Following the purchase, Buyers had the property re-measured, actual size of the property was 1,967 square feet, 757 smaller than had been advertised.
- Buyers filed a lawsuit against Buyer's Representative and the Brokerage, alleging violations of the state's consumer fraud and deceptive trade practices law, misrepresentation, and breach of fiduciary duty.
- Trial court found in favor of Buyer's Representative and Brokerage, and Buyer appealed.

YOU BE THE JUDGE

- Court of Appeals: Did Buyers suffer any harm from their purchase of a home with a smaller square footage than advertised.
- Buyers could only demonstrate harm if the value of the property was not as valuable as represented to them.
- Buyers had failed to produce any evidence showing that property had a lesser value than the purchase price, and so had failed to allege a cause of action for violations of the consumer fraud statute or misrepresentation.



YOU BE THE JUDGE

- Buyers alleged that the Buyer's Representative had breached his fiduciary duty by failing to discover the true square footage for the property.
- Buyer's Representative argued that there was no evidence that he knew the property's true square footage or had a duty to measure the property.



YOU BE THE JUDGE

- The court found that there was no evidence that the Buyer's Representative had any knowledge that the stated square footage for the property was inaccurate.
- Ruled in favor of the Buyer's Representative. Buyer appealed.
- And... **What do you think?**



YOU BE THE JUDGE

- Appellate Court Affirmed

YOU BE THE JUDGE

- Supreme Court of South Carolina: issue: listing broker's failing to reveal to buyer that there was a competing bid on the property.
 - Offeror made offer on property
 - Sellers and Offeror made and initialed numerous changes to the Offer and exchanged multiple counteroffers
 - Offerors called Broker and said they had forgotten to include a contingency term in their latest counteroffer.
 - Broker discussed the additional term with Sellers, and then left a voice mail for Offerors stating that Sellers accepted the additional term, and instructing Offerors to negotiate the change in their counteroffer and leave it, along with a check for \$1,000 earnest money, at Broker's office.



YOU BE THE JUDGE

- Offerors did so on the next day, and Broker immediately called Sellers to arrange finalization of the deal. However, because some of Seller's partners were out of town, they planned to wrap up the deal early in the upcoming week.

YOU BE THE JUDGE

- On Sunday, a new prospective purchaser called Broker and stated that he wanted to buy the property.
- After Broker informed Purchaser that there was an existing offer on the property, Purchaser made a cash offer with no contingent terms and an earlier closing date.
- After hanging up with Purchaser, Broker called Sellers to inform them of Purchaser's offer, and to ask Sellers whether she should inform Offerors of the new bid.
- Broker also told Sellers that she was afraid that if she did tell Offerors of Purchaser's bid, Sellers could lose both offers.
- Sellers instructed Broker not to say anything to Offerors about the new offer.



YOU BE THE JUDGE

- Sellers accepted Purchaser's offer
- Broker informed Offerors that Sellers had accepted another offer
- Offerors proceeded to file a lis pendens lien on the property in the amount of \$3,000, and sued Sellers and Broker on numerous counts, including fraud and violations of the South Carolina Unfair Trade Practices Act.
- Offerors stated in their suit that Broker had misrepresented the viability of their Offer, had owed Offerors a duty of care to communicate truthful information to Offerors, and had breached that duty by failing to disclose the competing offer to them.
- They also contended that Broker had a duty to inform them earlier that Sellers had not signed their final offer.



YOU BE THE JUDGE

- Offerors sought to close on the property and recoup the \$3,000 they claimed represented the time and effort they had expended between the time Offerors sent their final counteroffer and the time Sellers rejected their counteroffer and closed the deal with Purchaser.
- At trial, the court granted summary judgment in favor of Broker and Sellers. Offerors appealed, and the appellate court affirmed.
- OFFERORS APPEALED AGAIN.

YOU BE THE JUDGE

COURT SAID.....

That Offerors were not clients of Broker, and the circumstances of the negotiation between the parties “did not imply a ‘trust and confidence’ between the parties” that would give rise to a duty to disclose another offer.

That unfair or deceptive act claim could only survive under the state’s law when the act in question affected the public interest. Here, stated the court, the act affected only the parties to the transaction.



YOU BE THE JUDGE

BUT.....

The Code of Ethics and Standards of Practice of the National Association of REALTORS®, Standard of Practice 1-15, states that “REALTORS®, in response to inquiries from buyers or cooperating brokers shall, with the sellers’ approval, disclose the existence of offers on the property. Where disclosure is authorized, REALTORS® shall also disclose, if asked, whether offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker.” (Adopted 1/03, Amended 1/09).

YOU BE THE JUDGE

Arizona Court of Appeals: Brokerage's failure to disclose the presence of a registered sex offender in the neighborhood

After discovering that their neighbor was a sex offender, Sellers decided to list their house and move.

Buyers informed Sellers that they wanted to live in a safe neighborhood because they had small children.

Buyers also asked Sellers why they were moving, to which Sellers responded that they “wanted to be closer to friends.”



YOU BE THE JUDGE

Buyers and Sellers entered into a dual representation agreement with DMB Realty (“Brokerage”), and Buyers bought the home and moved in.

Six months later, Buyers discovered their neighbor’s status as a registered sex offender.

Buyers sued Sellers and Brokerage. The count against Brokerage alleged that Brokerage had breached its fiduciary duties to Buyers by failing to disclose the presence of the sex offender, thereby essentially favoring the Sellers’ interests over theirs.



YOU BE THE JUDGE

Dual representation agreement stated that, pursuant to Arizona law, neither Sellers nor Brokerage was “obligated to disclose that the Subject Property is or has been ...located in the vicinity of a sex offender.”

In addition, the property disclosure statement signed by Buyers contained an almost identical notice on its cover page AND



YOU BE THE JUDGE

Arizona statute said: “*no criminal, civil or administrative action may be brought against a transferor or lessor of real property or a licensee for failing to disclose that the property is [...] located in the vicinity of a sex offender.*”

Purchase agreement section titled “Inspection Period” stated that “*if the presence of sex offenders in the vicinity [...] is a material matter to the Buyer, it must be investigated by the Buyer during the [14 day] inspection period.*”

Based on these facts, the trial court dismissed all counts -
Buyers appealed

YOU BE THE JUDGE

- On appeal, Buyers pointed to language in the representation agreement that stated that the dual nature of the representation “*does not relieve [Brokerage] of any legal obligation to disclose all known facts which materially and adversely affect the consideration to be paid.*”
- Buyers said Notice did not waive Brokerage’s fiduciary duty to notify Buyers of the “adverse fact” of the sex offender’s presence, but rather served merely as an informational statement about AZ law.
- ***WHAT DO YOU THINK?***



YOU BE THE JUDGE

The court held that the Notice and other language pertaining to sex offender disclosure in the transactional documents should have reasonably alerted Buyers to their need to follow up on the matter on their own, and

By signing the representation agreement Buyers had expressly agreed that Brokerage was not liable for a breach of its fiduciary duties for failure to disclosure of the neighborhood sex offender.



YOU BE THE JUDGE

- The appellate court reversed dismissal of one count against Sellers: a claim of common-law fraud based on Buyers' assertion that Sellers had made overt false statements to Buyers about the safety of the neighborhood and their motivation for selling.
- Court held that while the Notice protected defendants from nondisclosure of the sex offender, it did not allow for material misstatements designed to induce a purchase based on false information.
- The fraud count against Sellers was remanded to the trial court for further proceedings.

US SUPREME COURT

- **ISSUE:** challenge to the aggregate contributions under federal law that individuals may make to campaigns and committees.
- Federal law limits the amounts of federal election-related contributions that an individual may contribute during a two-year election cycle. Currently, the base limits are as follows: \$2600 per election for each candidate (or \$5200 total, for both the primary and general elections); \$32,400 per year to a national party committee; \$10,000 per year to state or local party committee; and \$5000 per year to a political committee. The total limits were \$48,600 for candidates and \$74,600 to committees for the two-year election cycle.



US SUPREME COURT

- The Supreme Court of the United States reversed the trial court and declared the aggregate contribution limits unconstitutional.
- An individual's First Amendment right to participate in the political process by supporting candidates of his/her choice outweighed the government's anti-corruption interest in establishing aggregate contribution limits and so reversed the trial court.



RANM LEGAL HOT LINE

1-877-699-7266

LEGALHOTLINE@NMREALTOR.COM

MONDAY – FRIDAY

9:00 TO 1:00 PM



RANM
LEGAL ISSUES
LAS CRUCES, NM
JUNE, 2014

THANK YOU!

