WELCOME TO THE REALTORS® ASSOCIATION OF NEW MEXICO 2014 ANNUAL CONFERENCE

Legal Update

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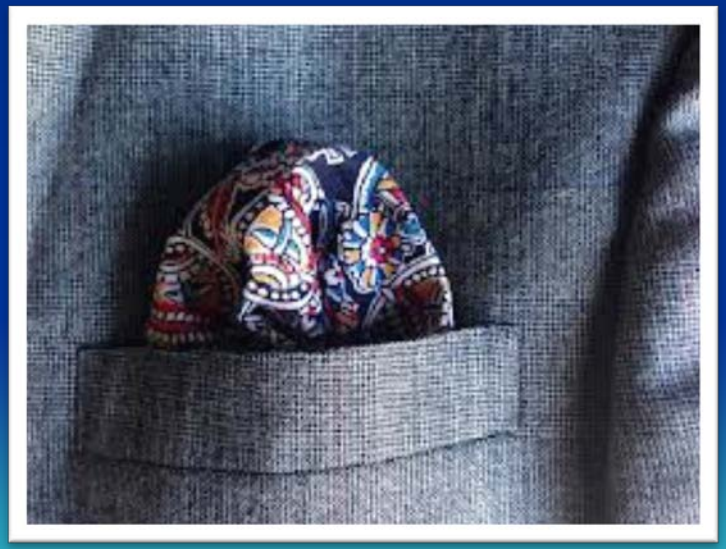
TOPICS COVERED TODAY

- “POCKET” OR “ON-WAIVER LISTINGS
- INDEPENDENT CONTRACTORS VS. EMPLOYEES
- FHA UPDATE
- FORMS: NEWLY RELEASED AND COMING SOON
- CASES FROM NM AND AROUND THE NATION

POCKET LISTING

- Definition:
- – Though not a legally defined term, a “pocket” or off-MLS listing generally refers to a listing taken by a broker that will not be placed in the MLS
- – Hidden in the “pocket”
- – There is a written listing agreement that would otherwise be eligible for/ required to go in the MLS.



POCKET LISTINGS

- NOT NEW, BUT REALTORS® ARE REPORTING THAT OFF- MARKET, ON-WAIVER OR “POCKET” LISTINGS ARE BECOMING MORE COMMON
- BUT, NOW WE HAVE THE INTERNET AND SOCIAL NETWORKING
- REALTORS® NEED TO BE AWARE OF THE ISSUES ASSOCIATED WITH THE DECISION TO KEEP THE LISTING OUT OF THE MLS

POCKET LISTING

- Is it Legal?
  – YES, a pocket listing can be legal... – BUT BEWARE:

  The practice raises a number of legal, ethical and practical red flags that

  must be considered

  and addressed.

POCKET LISTING

- WHAT DO BROKERS NEED TO CONSIDER?

  - MLS RULES
  - CODE OF ETHICS
  - LEGAL OBLIGATIONS AND POTENTIAL LIABILITY
  - INDUSTRY IMPACT

POCKET LISTING

- Complying with MLS Rules
  - Mandatory Submission Required: Usually 2 Days UNLESS
  - Exempted Listing
    If Exempt, Broker Required to Submit a Seller Waiver or Seller Opt-Out Form that is signed by the SELLER: Usually 2 days
  - Waiver either advises Seller of Benefits of MLS or has the Broker warrant that s/he has

    advised the Seller of the Benefits –

    should be done even if not on Waiver

POCKET LISTING

- Code of Ethics
  - Article 1 of the Code of Ethics requires a REALTOR® to “promote and protect the interests of the client.”
  - Article 3 of the Code of Ethics places on a REALTOR® a duty to cooperate.

POCKET LISTING

- Article 1 of the Code of Ethics requires a Realtor® to "promote and protect the interests of the client."
  - SO, THE QUESTION IS…WHO IS MAKING THIS DECISION: THE BROKER OR THE SELLER?
- Standard of Practice 1-12 also specifically requires a REALTOR® to discuss with the seller's his or her "company policies regarding cooperation and the amount(s) of any compensation that will be offered…".
  - SO, DID THE BROKER EXPLAIN TO THE SELLER THAT THE BROKER WILL ***NOT*** BE SHARING COMPENSATION AND WHAT THIS MEANS TO THE SELLER?

POCKET LISTING

- Article 3 of the Code of Ethics places on a REALTOR® a duty to cooperate
  - Standard of Practice 3-10 states that the "duty to cooperate established in Article 3 relates to the obligation to share information on listed property, and to make property available to other brokers for showing to prospective purchasers/tenants ***when it is in the best interests of sellers/landlords***." (emphasis added)

POCKET LISTING

- IS IT IN THE BEST INTEREST OF THE CLIENT TO RESTRICT THE AVAILABILITY OF INFORMATION AND SHOWINGS TO OUTSIDE BROKERAGES WITH POTENTIALLY READY, WILLING AND ABLE BUYERS?
- Note: the Duty to Cooperate here pertains to sharing information, etc. and not to the payment of compensation.

POCKET LISTING

- LEGAL OBLIGATIONS AND POTENTIAL LIABILITY -
  - BROKER DUTIES
    - BROKERS OWE HONESTY AND REASONABLE CARE
    - PERFORMANCE OF ANY AND ALL WRITTEN AGREEMENTS MADE WITH THE CUSTOMER OR CLIENT
  - FIDUCIARY DUTIES???

POCKET LISTING

- LEGAL OBLIGATIONS AND POTENTIAL LIABILITY
  - Could pocketing a listing violate broker duties?
    - Yes, if made for the benefit of the listing broker only and not in the seller's best interest.
  - Have you explained the MLS benefits that will be waived?
    - advertising the property to a wide range of people generally helps sellers obtain highest possible price
    - in the MLSs, listing is included in feed to other participants' websites (IDX) and to non-MLS participants' websites that are used by the public when looking for property to buy/lease
    - if kept off the MLS, these people might not be aware that seller's property is for sale

POCKET LISTING

- BOTTOM LINE: HOW DO YOU AVOID BREACHING YOUR BROKER DUTIES?
  - Make sure that a seller understands in a meaningful way the pros and cons of doing a pocket listing, including any options available within the MLS to address their concerns (such as declining Internet display if apprehensive about privacy or non- placement of a lockbox if concerned about security).
  - After full disclosure, make sure seller ***voluntarily*** decides to keep the listing off the MLS.

POCKET LISTING

- LEGAL OBLIGATIONS AND POTENTIAL LIABILITY
  - Listing Clubs or Groups: Keeping seller's listing off the MLS but exposing it to a limited selection of brokers (either inside or outside of the listing brokerage) through a private listing group
    - Legal Risks?
      - Breach of Broker Duties concerns: Is this in the best interest the seller or for the benefit of the listing broker?
      - Other Considerations: Anti-Discrimination and Antitrust Laws

POCKET LISTING

- LEGAL OBLIGATIONS AND POTENTIAL LIABILITY
  - MLS - Built-in Legal Safeguards
    - Open to all licensees – no discrimination
    - Structure and rules adopted with antitrust concerns in mind, including express policies against price-fixing/ setting commissions
    - Evidence of agent's broad exposure of the listing to the open marketplace
  - Private Listing Groups - Speculative Governance Rules:
    - Closed membership
    - Unknown vetting of antitrust concerns in structure
    - Circulated *by* few *fo*r few

POCKET LISTING

- LEGAL OBLIGATIONS AND POTENTIAL LIABILITY
  - Private Listing Groups:
    - Anticompetitive concerns: How is the private listing group operating?
    - If competing brokers agree to work together in formal or informal groups that mandate a minimum commission that must be paid, the price-fixing arrangement is generally a per se violation of the antitrust laws, subjecting all participants to potential liability.
    - Fair Housing/Discrimination concerns: Potential disparate impact claim?
      - For example, if brokers limit their listing exposure to only certain sectors of the market, it may have an alleged discriminatory effect (i.e. reinforcing segregated housing patterns) even when there is no intent to discriminate.

POCKET LISTING

- BREACH OF LEGAL OBLIGATIONS AND POTENTIAL LIABILITY
  - Possible consequences:
    - NMREC : Suspension or loss of real estate license
    - Federal and Civil: Civil suit and possible liability for monetary damages, fines, punitive damages, attorney's fees
  - IS IT WORTH IT?

POCKET LISTING

- RISK MANAGEMENT:
  - MLS provides broad, open, non-discriminatory and transparent exposure to the marketplace
  - Looks out for the best interests of the seller by conducting business in a way most likely to reach more buyers and generate the greatest number of offers at the highest price
  - Complies with the highest ethical and fiduciary duty standards
  - SO THERE BETTER BE A REALLY GOOD REASON NOT TO USE IT!

POCKET LISTING

- RISK MANAGEMENT:
  - AND QBS, YOU BETTER BE TALKING WITH YOUR AB'S ABOUT THIS AND VICE VERSA
  - REMEMBER AB LIABILITY MEANS QB LIABILITY
  - KNOW WHAT YOUR ABs ARE DOING
  - OFFICE POLICY ON THIS?
  - NEW RANM FORM: MLS INFO SHEET

POCKET LISTING

IF YOU DON'T REGULATE YOURSELF, GUESS WHAT?

POCKET LISTING

- THE REGULATORS
- THE TRIAL ATTORNEYS
- THE LEGISLATURE

WILL!

IC V. EMPLOYEE

- WHAT IS THE DIFFERENCE BETWEEN AN INDEPENDENT CONTRACTOR (IC) AND AN EMPLOYEE?
  - EMPLOYEE
    - Employers have a significant degree of control
    - Employers direct when, how, and where employees accomplish their tasks and responsibilities
    - Employers also often provide the necessary “tools of the trade”
  - IC
    - determines when, how and where to perform their work, and is responsible for any necessary tools or equipment necessary to provide the services
  - For legal purposes, the key distinction is in the CONTROL the business exerts over the worker. The more control, the greater the likelihood the worker will be deemed an employee

IC V. EMPLOYEE

QBs can classify their associate brokers as either employees or as independent contractors

IC V. EMPLOYEE

- LAWS AND REGULATIONS
  - FEDERAL
    - IRS has carved out a special statutory non-employee status for real estate professionals, qualifying them as ICs when all of the following requirements are met:
      - Must be a licensed real estate professional;
      - Substantially, all of their payments must be directly related to sales or other output, rather than the number of hours worked; and
      - Their services must be performed under a written contract providing that they will not be treated as employees for federal tax purposes.

IC V. EMPLOYEE

- LAWS AND REGULATIONS
- STATE: NO STATUTORY DEFINITION, BUT
  - NM REC REGULATIONS: Employee: for the purposes of Section 61-29-2 C (1) of the real estate license law, a person employed by an owner of real property, or a person employed by the brokerage acting on behalf of the owner of real property. In determining whether a person is an employee, as opposed to an IC, the REC shall consider the following:

IC V. EMPLOYEE

- LAWS AND REGULATIONS
- STATE: NM REC REGULATIONS:
  - *YOU MAY BE AN EMPLOYEE IF…*
    - the employer withholds income tax from the person's wages, salary, or commission
    - the employer pays a portion of the person’s FICA tax;
    - the person is covered by workers' compensation insurance;
    - the employer makes unemployment insurance contributions on behalf of the person.

IC V. EMPLOYEE

- STATE: NO DEFINTION BUT…
  - CONSTRUCTION INDUSTRY - WORKER IS AN EMPLOYEE UNLESS S/HE
    - is free from direction and control over the means and manner of providing the labor or services, subject only to the right of the business to specify the desired results;
    - is responsible for obtaining business registrations or licenses required by state law or local ordinance;
    - furnishes the tools or equipment necessary for the job;
    - has the authority to hire and fire employees;
    - receives payment for labor or services upon completion of the performance of specific portions of a project or on the basis of a periodic retainer; and
    - represents to the public that labor/services are to be provided by an independently established business

IC V. EMPLOYEE

- "INDEPENDENTLY ESTABLISHED BUSINESS"
  - labor or services are primarily performed at a location separate from the person's home or in a specific portion of the home that is set aside for performing services;
  - commercial advertising or business cards are purchased by the person, or the person is a member of a trade or professional association;
  - telephone or email listings used for the labor or services are different from the person's personal listings
  - labor or services are performed only pursuant to a written contract;
  - labor or services are performed for 2 or more persons within a period of 1 year;
  - the person assumes financial responsibility for errors and omissions in labor or services as evidenced by insurance, performance bonds and warranties relating to the labor or services being provided.

4 OR MORE OF THE ABOVE MUST BE MET

IC V. EMPLOYEE

- LAWS AND REGULATIONS – STATE
  - NM Courts: “The principal test to determine whether one is an **independent contractor** or an employee is whether the employer has any control over the manner in which the details of the work are to be accomplished. Mere suggestions by the employer or the "directing control essential to coordinate the several parts of a larger undertaking" does not affect the relationship. It is the right to control, not the exercise of it, that furnishes the test.”

IC V. EMPLOYEE

- Having an IC agreement is an important element of establishing an IC relationship with an AB BUT the existence of an agreement is not enough to avoid misclassification. – (NOTE: IC OR EMPLOYMENT AGREEMENT REQUIRED BY NM REGULATIONS)
- BUT Courts and regulatory agencies will look to the reality of the relationship, how the parties interacted, and how much control a QB exerts over the AB in order to determine the true nature of the relationship between the parties

IC V. EMPLOYEE

- ACTIVITIES QBs SHOULD AVOID IN ORDER TO PROPERLY CLASSIFY ABs AS INDEPENDENT CONTRACTORS?
  - Requiring the AB to perform the services during set work hours
  - Requiring the AB to perform the services at a specific location
  - Making attendance at staff meetings mandatory
  - Providing training to the AB
  - Supplying tools and materials to the AB

IC V. EMPLOYEE

- DOES THIS MEAN THAT BROKERS SHOULD NOT SUPERVISE ABs?
- No. In fact, real estate licensing law ***requires*** QBs to maintain a certain amount of supervision over their ABs. Brokers must therefore make sure that they are balancing this requirement with the applicable requirements in state and federal worker classification laws

IC V. EMPLOYEE

- Can a QB provide its ABs with benefits such as health insurance and 401K participation?
  - The provision of employee-type benefits, such as health insurance, vacation pay and 401k participation, can be factors pointing to an employer-employee relationship, rather than that of an IC. The provision of these types of benefits may compromise the argument that the relationship with the AB is that of an IC.

IC V. EMPLOYEE

- WHAT HAPPENS IF A QB MISCLASSIFIES AN AB AS AN INDEPENDENT CONTRACTOR?
  - FEDERAL
    - IRS may levy unpaid payroll taxes, interest, penalties
    - US Department of Labor, the National Labor Relations Board, and the Equal Employment Opportunity Agency have an interest in a business's classification of its workers, and may pursue penalties and legal action against businesses believed to be engaging in worker misclassification
  - STATE
    - businesses may face fines and penalties for violations of state workers' compensation laws, tax laws, and state unemployment compensation law
    - PRIVATE CAUSES OF ACTION

IC V. EMPLOYEE

FOR MORE INFORMATION: http://www.realtor.org/topics/independent-contractor

FHA

- HUD ANNOUNCED THAT IT WOULD ALLOW DUAL-AGENCY IN FHA PRE-FORECLOSURE TRANSACTIONS.
    - Two ABs under same QB or
    - One Broker representing both buyer and seller
- LAST SUMMER HUD EXCLUDED DUAL AGENCY, NAR INTERVENED
- FHA Requirements – October 1, 2014
    - Property Must Be In MLS For 15 Days Before Offers Are Evaluated
    - If Multiple Offers Are Received, Broker Must Forward Offer
        - That Will Result In Highest Net Return to HUD and
        - Meets HUD's Criteria For Bid Requirements
        - True Of Back-up Offers Too
        - Broker Must Retain All Offers Received, Including Those Not Submitted

FHA

- Sample Pre-foreclosure Addendum Now Includes
  - Both Brokers' Names
  - Allows Broker To Represent Both Sides Of Transaction
  - Has Broker Certifying Compliance With 15-day Period and
  - Has Broker Certifying That S/He Submitted Offer Resulting In Highest Return To HUD – Sample in Back of Packet

FHA

- HAWK – HOMEOWNERS ARMED WITH KNOWLEDGE PROGRAM - REDUCES MORTGAGE INSURANCE PREMIUMS FOR FIRST TIME HOME BUYERS – BUYER HAS NOT BEEN AN OWNER IN A PRIMARY RESIDENCE FOR 3 YEARS PRIOR TO PURCHASE
  - IF BUYER COMPLETES PRE-CONTRACT AND PRE-CLOSING COUNSELING,S/HE WILL RECEIVE A 50 BASIS POINTS REDUCTION IN THE UPFRONT MORTGAGE INSURANCE PREMIUM AND A 10 BASIS POINTS REDUCTION IN THE ANNUAL PREMIUM
  - IF BUYER COMPLETES POST-CLOSING HOUSING COUNSELING AND DOES NOT HAVE DELINQUENCIES GREATER THAN 90 DAYS IN FIRST 18 MONTHS AFTER CLOSING , AN ADDITIONAL 15 POINTS REDUCTION ON THE ANNUAL PREMIUM STARTING IN THE LOAN'S 25TH MONTH

FHA

- NAR CONCERNS ABOUT HAWK
  - ACESS AND TIMING OF COUNSELING
  - AMOUNTOF INCENTIVE :
    - $21 PER MONTH REDUCTION ON $180,000 LOAN, BUT
    - MORTGAGE INSURANCE PREMIUMS HAVE INCREASED $122 PER MONTH ON A $180,00 FHA LOAN SINCE 2010
  - COST OF COUNSELING
    - $300 FOR PRE-CONTRACT
    - $100 FOR PRE-CLOSING
    - $100 FOR POST-CLOSING
  - NAR WANTS TOTAL REDUCTION IN PREMIUMS WITH ADDITIONALREDUCTIONS FOR HAWK PARTICIPANTS

FORMS

- NEW/REVISED FORMS RELEASED
  - HOA
    - BUYER'S WAIVER OF PORTION OF 7-DAY PERIOD (NEW)
    - HOA INFO SHEET (REVISED)
  - COMMERICAL LIEN (ALL NEW)
    - INFO SHEET
    - CLAIM AND NOTICE OF LIEN
    - RELEASE OF LIEN
  - FOREIGN BROKER (ALL NEW)
    - INFO SHEET
    - FOREIGN BROKER AGREEMENT

FORMS

- NEW FORMS COMING SOON
  - MLS INFO SHEET
  - POOL AND SPA ADDENDUM

  - MEDICAL MARIJUANA INFO SHEET
  - BROKER RELATIONSHIP INFO SHEET
    - AGENCY VS. TRANSACTION

FORMS

- NEW HOA WAIVER FORM – COMING SOON
  - INACTIVE AND NON-RESPONSIVE HOAs ONLY
  - BUYER ACKNOWLEDGES WHAT S/HE IS ENTITLED TO
  - SELLER WARRANTS S/HE MADE A REASONABLE ATTEMPT TO OBTAIN THE DOCUMENTS, BUT HOA IS INACTIVE OR NON-RESPONSIVE
  - BUYER GIVEN OPPORTUNITY TO TERMINATE
  - BUYER WARRANTS IT IS HIS/HER DECISION TO MOVE FORWARD TO CLOSING
  - BUYER AGREES TO HOLD SELLER AND BROKERS HARMLESS

FORMS

- UPDATED HOA FORMS
  - DISCLOSURE CERTIFICATE – ADDED BOXES FOR OTHER DOCUMENTS SELLER MAY NEED TO OBTAIN FROM HOA
  - TURNED HOA ADDENDUM INTO A HOA SELLER'S DISCLOSURE THAT IS INITIATED BY THE SELLER

NM CASE LAW

- NEW MEXICO SUPREME COURT: *ZHAO V. MONTOTYA AND FALLICK V. MONTOTYA*
  - ISSUE: DOES "TAX LIGNTENING" VIOLATE NM STATUTE AND NM CONSTITUTION?
  - COURT HELD: TAX LIGHTENING IS ALLOWED UNDER BOTH NEW MEXICO STATUTORY LAW AND UNDER THE NEW MEXICO CONSTITUTION

FEDERAL LAW

- OHIO BROKER SENTENCED TO MORE THAN 10 YEARS IN PRISON FOR ROLE IN MORTGAGE FRAUD SCHEME
  - Builder Bob built 6 luxury properties and listed them for FMV. When he couldn't sell, he experienced financial difficulties
  - Broker Tom introduced Shady Jo (previously convicted of mortgage fraud) to Builder Bob saying that Shady Joe had a system to get properties sold
  - Shady Joe and Broker Tom had 2 straw buyers lined up, but properties would have to be re-listed at higher prices
  - Straw buyers didn’t have to come up with money b/c Shady Joe paid the down payments. Shady Joe had title company state on HUD-1 that down payment came from buyers
  - All mortgages went into foreclosure – LOSS: $3.3 MILLION

FEDERAL LAW

- BROKER TOM ALSO HAD TO PAY $3 MILLION IN RESTITUTION
- BUILDER BOB WAS SENTENCED TO 2 YEARS AND ORDERED TO PAY $3 MIL IN RESTITUTION
- ONE OF THE BORROWS GOT 1 YEAR AND ORDERED TO PAY $1.1 MILLION IN RESTITUTION
- NO WORD ON OTHER BORROWER OR ON SHADY JOE…….YET

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 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
- NO BREACH OF DUTY

YOU BE THE JUDGE

- South Carolina: Issue: listing broker's failure 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….WELL???

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 KEEP IN MIND…..

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: 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.

YOU BE THE JUDGE

- California: Issue: Where a listing salesperson and a buyer's rep are both licensed under the same broker, do they each owe the same fiduciary duties to both parties to the transaction?
  - Listing broker was a licensed AB with Colwell Banker
  - Public record information stated property was 9,434 sq. ft. – THIS WAS KNOWN TO LISTING AB
  - Nonetheless, relying on a letter from the architect, the listing broker stated in the MLS that the property was 15,000 sq. ft. & made a flyer saying the same

YOU BE THE JUDGE

- Few months later, couple made offer and asked Listing AB for verification of square footage and were given the architect's letter
- The couple requested a certificate of occupancy, but none was available. Deal fell apart
- When Listing Broker re-listed he put square footage at "0/O.T." meaning zero square feet and other comments
- New Buyer comes along, Buyer's Rep also from CB
- Buyer arranged showing at which Listing Broker gave Buyer a flyer
- Buyer purchased home. Later learned of true sq. footage.
- Sued Listing Broker and QB for breach of fiduciary duties
- Listing Broker said "I didn't work for you. Didn't owe you, Buyer, FD"
- Trial Court agreed with Listing Broker
- Buyer appealed

What do you think?

YOU BE THE JUDGE

- The appellate court reversed the trail court saying that a dual agency realtionship had been created by merit of two salespersons licensed under the same QB representing a buyer and a seller AND each salesperson owes not only his/her *own* client those fiduciary duties, but also owes them to the other salesperson's (ABs) client.
- Jury could determine that Listing Broker breached his fiduciary duties to buyer by failing to tell its principal (Buyer) all the information known about sq. footage

YOU BE THE JUDGE

- WASHINGTON – COULD BROKER SUSTAIN DEFAMATION SUIT AGAINST PERSONS POSTING NEGATIVE COMMENTS ABOUT BROKER ON-LINE?
  - Posters were homebuilders who ended a business relationship with Broker b/c they didn't like Broker's representation of other homebuilders
  - Posters wrote on-line review of Broker saying they would never recommend doing business with Broker and questioning his ethics and business practices
  - Broker filed suit
  - Posters filed a motion to dismiss under Washington's SLAPP statute: a law designed to help defendants defeat "Strategic Lawsuits Against Participation" - abusive, meritless lawsuits filed with the intention of drowning defendants in court costs and silencing their future expression

YOU BE THE JUDGE

- UNDER WASHINGTON'S SLAPP STATUTE, IN ORDER TO SUCCESSFULLY DEFEAT A LAWSUIT, THE DEFENDANT MUST PROVE
  - that lawsuit is based on communication in a public forum AND
  - issue of public concern
- Court said: THIS IS NOT AN ISSUE OF PUBLIC CONCERN; THIS IS A PERSONAL DISPUTE BETWEEN THE PARTIES

YOU BE THE JUDGE

- The appellate court reversed saying that “the public has a signifcant interest in the conduct of real estate professionals, who often conduct their business in the capacity of a fiduciary and that Poster’s review was therefore directly connected to an issue of public concern”
- Broker said b/c he represented other homebuilders, this was an attempt by Posters to hurt their competitors
- Broker looked to CA’s Anti-SLAPP statute that carved out an exception for business competitors
- But WA Court said, “our anti-SLAPP statute does not have such a carve out”
- Case was sent back for further proceedings

YOU BE THE JUDGE

- NM's anti-SLAPP Statute NMSA 38-2-9.1
- A. Any action seeking money damages against a person for conduct or speech undertaken or *made in connection with a public hearing or public meeting in a quasi-judicial proceeding before a tribunal or decision-making body of any political subdivision of the state* is subject to a special motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment that shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation.

YOU BE THE JUDGE

- NEW JERSEY – ISSUE: DID BROKER VIOLATE STATE LAW PROHIBITING REBATES?
  - Broker advertised “1% cash-back bonus to prospective buyers seeking to build a new home”
  - Buyers were instructed to print out a coupon and to present it to seller-builders when the buyer went to the seller-builder and to tell the seller-builder that the Broker was the Buyer’s rep, thus entitling Broker to a commission
  - Broker did not accompany Buyer to the build sites, nor did Broker have an agreement with the seller-builder

YOU BE THE JUDGE

- NEW JERSEY – ISSUE: DID BROKER VIOLATE STATE LAW PROHIBITING REBATES?
  - At the time, NJ law said “no rebate, profit, compensation or commission to an unlicensed person”
  - Broker said that coupon was only an advertisement; it only “offered” a rebate and the actual payment of the rebate was made by the seller-builder; therefore, no violation of law
  - Admin. Law Judge found and Ct. Affirmed that
    - Broker was trying to circumvent law by using the seller-builder as a middleman and Broker was actually paying rebate and
    - Broker was acting in a way that demonstrated “unworthiness, incompetency, bad faith or dishonesty” in violation of state law

YOU BE THE JUDGE

NEW JERSEY REC –

FINED BROKER $123,500

AND

REVOKED HIS LICENSE

FOR 5 YEARS

NM LAW APPLIED

- WHAT ABOUT REBATES IN NM?
- CAN BROKER GIVE REBATE TO BUYER? SELLER
- FORM OF REBATE?
  - CASH
  - GIFT CARDS
  - NEW WASHER/DRYER
- BEFORE/AFTER CLOSING?
- DONATIONS TO CHARITY?
  - OF YOUR CHOICE OR
  - OUT OF EVERY COMMISSION

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AUGUST, 2014

THANK YOU!