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Legal Hotline Companion Preview

President's Report

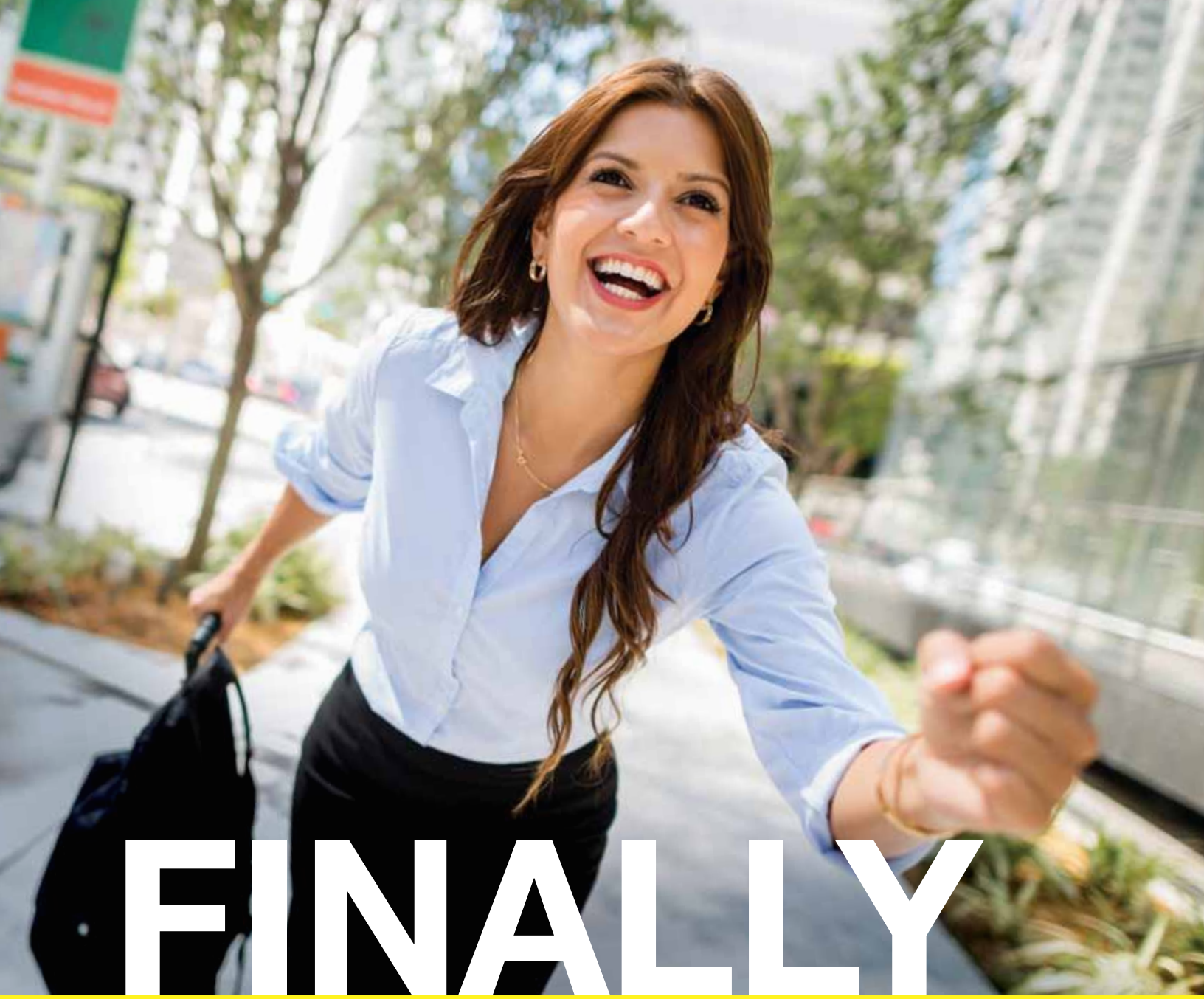
Capitol Report

MICHIGAN RPAC

2020 Major Investors

MARCH 2021

Volume 20 | Number 2



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03.21

{ March | Two Thousand & Twenty One | Volume Twenty | Number Two }

BY E'TOILE L. LIBBETT

Meet the Moment

Spring is just around the corner! As we approach the end of the first quarter of 2021, many are looking forward to a fuller reopening of our economy and increased stability in our various business sectors to support it. Of course, the continued emergence of meaningful treatments and vaccines for Covid-19 are a key piece to this puzzle. But a vibrant housing market remains a significant part of carrying that optimism for our future forward. As Realtors®, we never shy away from the role and responsibility that we undertake in support of our industry, our economy, our community and the best interests of our clients. In short, we are an integral part of this springtime hope and renewal. As such, we must prepare, seek out learning opportunities and set goals that best position us as THE professional resource for buyers and sellers entering the housing marketplace.

Goal setting and education, whether in a sales meeting or as a piece of your own personal and professional journey, are huge drivers for how we all make a living and feed our families. However, if you broaden your view to the community level, every transaction in which we are involved has a tangible and economic impact on the communities we serve. Consider the powerful statistic that a single transaction generates nearly $64,000.00 of additional economic impact into our economy. NAR conducted a study in 2019 that concluded that the real estate industry accounted for $87.8 billion or 16.2% of the gross state product in 2019. This type of impact raises the stakes for our profession. There is no standing on ceremony or resting on laurels, we must constantly remind ourselves of the role we play. We must continue to get the job done – and to do the job right.

To do the job right, we must continue to set ourselves apart. Covid-19 has taught us many valuable and sobering lessons. It has certainly shown that our clients need the kind of care and detail only a well-prepared professional can offer. Being prepared for the unanticipated can be a very daunting task. That is where the power of association comes in. Look to your associations as unique resource libraries. NAR and MR are consistently preparing educational materials and releasing professional development tools to our membership. Dig in and avail yourself of the important value proposition that our volunteer leaders and staff work hard to fulfill.

Those of you that virtually attended our Achieve Leadership Conference in late January received some great substance on leadership best practices and the necessity of fostering a culture of fair housing compliance in our respective brokerages. You were also asked to carry that information forward to your networks. Whether it's utilizing NAR's Fairhaven fair housing simulation, hammering consistency with the Michigan Realtors® Fair Housing Checklist or fine tuning a social media policy to stay on the right side of the law, the resources are there for your full engagement. Your clients deserve it. Your brokerage deserves it. Your growth as professionals demands it. If you are reading this and wondering where to look, please contact Michigan Realtors® today to get connected.

A big part of professional life is reinforcing the knowledge that we gain. It's not good enough to read a book and recall the general plot details months later. As Realtors®, we should learn and seek out knowledge because one day we may have to be the teacher. We have such a tremendous opportunity that goes hand-in-hand with our many responsibilities as a Realtor®. May we always respect that fact and arrive at the moment prepared. As George Mumford, the acclaimed sports & performance psychologist once said in reference to Michael Jordan, "respond from the center of the hurricane, rather than reacting from the chaos of the storm." Tap into your potential and AIM HIGH! ●

> As Realtors®, **WE NEVER SHY AWAY** from the role and responsibility that we undertake in support of **OUR INDUSTRY, OUR ECONOMY, OUR COMMUNITY AND THE BEST INTERESTS OF OUR CLIENTS.**

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COMING EVENTS

April 28, 2021
2021 Broker Summit
Virtual Event

September 28-30, 2021
2021 The Convention
Grand Traverse Resort & Spa, Acme

Find Michigan Realtors® on your favorite social networking sites:

BY BRAD WARD, ESQ., VICE PRESIDENT
OF PUBLIC POLICY AND LEGAL AFFAIRS

Untitled

(An article about mobile homes)

Anyone that has dealt with a mobile home on an individual parcel knows that the sales process is rarely easy. It's made even more difficult if the deal requires an Affidavit of Affixture, and another level of complexity if the title to the mobile is missing or not on record with Michigan's Secretary of State. For almost 20 years, Michigan has offered a process, albeit not an easy one, for retitling mobile homes in order to obtain an Affidavit of Affixture. This past July, the Secretary of State's office issued internal guidance that is adding a level of difficulty to buying and selling mobile homes on individual parcels. This new process adds time and money and is holding up deals across the state. The Michigan Realtors® Public Policy Committee is making it a priority to tackle this early on in this legislative session.

For those of you unfamiliar with these mobile home deals, I am not talking about homes that exist within your traditional park community. These homes are located on individually titled parcels and are many times found on foundations with utilities, septic fields, decks, or full-on additions. Unless you got in the crawl space to see the chassis, you probably wouldn't recognize them as a mobile home at all. Regardless of how built-out it is, a mobile home is personal property with a Vehicle Identification Number and a title. When selling these properties, lenders require an Affidavit of Affixture, meaning that the sale requires the title to the mobile home to be combined with the title to the real property.

Many of these mobile homes do not have their original titles on record with the Michigan Secretary of State's (SOS) office, so when the Affidavit of Affixture process became law some 20 years ago, it allowed for retitling of mobile homes under Section 30a of the Mobile Home Commission Act. This section allowed the person seeking title to use a surety bond to indemnify the department, or any interest holder of the mobile home, against any expenses or losses. The surety bond process soon became the most commonly used method for securing title to allow the sale to go through. Then the process got 2020'd.

Last year, a lawsuit was filed against the SOS by owners of a mobile home located in a mobile home park/community. Mobile homes in communities remain separately titled as personal property and the lot in the park is often leased from the park owner. The lawsuit alleged that the homeowner's right to due process had been violated when the park owner used the surety bond process to retitle the home that they deemed "abandoned." In other words, the park owner took possession of the mobile home through the surety bond process without any notice to the owner of the home. It was on the filing of this lawsuit (not a court decision) that the SOS reversed course on the surety bond process and issued guidance to their branches that court orders would be required instead of surety bonds. Under the guidance, the court order requirement also applies to mobile homes on individual parcels.

Upon issuance of the new guidance, Michigan Realtors® staff reached out to the SOS office to discuss setting up two separate processes; one for homes located within a park, the other for homes located on individual parcels. Despite best efforts, the SOS legal team remains entrenched in their guidance that the surety bond process no longer applies. Even their explanation of the court order process on their website fails to recognize that mobile homes exist outside of parks and communities. This new guidance is now holding up deals across the state, and for those that have gone through the court order process, taking months to complete at costs north of $2000.

Legislation was introduced during the waning weeks of last year's legislative session to establish a new process for mobile home park owners to retake abandoned homes. Michigan Realtors® worked with the Michigan Manufactured Housing Campground and RV Association to include language in the proposal to clarify that the surety bond process under Section 30a still applies to homes located outside of a park/community, clearly defining a separate process for securing titles on mobile homes located on individual parcels. Unfortunately, the legislative clock ran out last year before the bills could make their way to the Governor's desk and will have to be reintroduced this year.

Michigan Realtors® remains committed to resolving this issue quickly. Given the reluctance of the SOS to acknowledge that there are two distinctly separate scenarios for which a new title is needed, the fastest route remains through the legislature. In the meantime, we have identified a few law firms across the state that can handle the court order process. If you are in need a court order to resolve a transaction, please feel free to reach out to us.

To get **REALTOR® PARTY MOBILE ALERTS**, text "Realtor" to 30644 .

A NEW TWIST IN THE FIGHT TO PROTECT SHORT-TERM RENTALS

For those of you familiar with this column, you've read a fair amount about protecting short-term rental rights around our great state. As we hit the ground running this legislative session, the need for short-term rental protections has never been more pressing.

As a literal case in point, the Michigan Realtors® Legal Action Committee recently approved involvement in a short-term rental case arising out of St. Clair Shores. The case directly addresses the issue that Michigan Realtors® has raised over and over – the reinterpretation of existing ordinances to prohibit long-accepted activity. The difference is that the property owner in this particular case faces a criminal conviction for their short-term rental. Although the courts have not yet fully recognized the need for a meaningful definition of "short-term rental" as a permitted residential use, the Legal Action Committee felt that they may recognize the gravity of the issues involved when criminal charges weigh in the balance.

This case really is an example of unfair local control. Instead of seeking out a balance that respects the private property rights of all owners, they seek to reinterpret existing ordinances to prohibit practices that have a longstanding tradition in Michigan. We will certainly update you on the progress of this case. While the case is pending, we will continue to work hard with lawmakers and stakeholders to protect vacation-rental rights and look towards reasonable regulation. We believe the first step in this process is to amend the Michigan Zoning Enabling Act to define "short-term rental" as a residential use, permitted in all residential zones. This approach certainly doesn't absolve property owners from responsible rental practices, but it does provide consistency and shines the light on fair and uniform regulation through existing enforcement tools to address nuisances like noise, over-occupancy, parking issues and trash. We look forward to an extremely busy legislative season.

Please follow along for breaking news through our social media and E-news publications. Additionally, be the first to receive legislative Call for Action alerts on your mobile device by texting the word "REALTOR" to 30644.

COMING SOON TO YOUR MAILBOX

The 2021 publication of the *Michigan Realtors® Legal Hotline Companion!*

The *Legal Hotline Companion* was created as a comprehensive resource to address common legal questions that Realtors® face in their day-to-day business. This publication consists of questions, posed by Realtor® members, and answers provided by your Legal Hotline attorneys.

On behalf of your Michigan Realtors® Legal Team, we're pleased to offer readers a first look at some of the FAQ's featured in this year's edition. The full the 2021 *Legal Hotline Companion* will be available this spring.

As always, we thank you for taking an active role in your legal education. We think you'll find this year's publication to be a valuable resource in navigating your industry questions.

If property is owned by an LLC, who can sign the purchase agreement on behalf of the LLC?

There is no law as to who can sign on behalf of any LLC. Authorization depends on what the particular LLC's operating agreement says. Some LLCs have an appointed manager and some are managed by majority vote of the members. Often the sale of property is treated as an extraordinary event requiring the consent of more than a majority of the members.

My seller received an offer with an escalation clause. The highest offer that the seller received was contingent upon the sale of the buyer's home. Does that type of offer trigger an escalation clause, or must it be disregarded because of the home sale contingency?

An offer with a home sale contingency would not be disregarded unless there is language in the escalation clause that says so. Buyer's agents should be careful when drafting escalation clauses if they want to exclude certain types of offers (or adjust for seller concessions).

My buyer's lender has selected an appraiser who I believe is geographically incompetent. I am afraid the home won't appraise and my client's loan will be denied. Can I ask my client's lender to select another appraiser who is more familiar with the area?

NO. Federal law prohibits real estate licensees from being involved in the selection of an appraiser for any transaction in which the licensee will receive a commission.

The purchase agreement says that if my buyer clients are turned down for a mortgage, my buyers are entitled to their earnest money deposit back. That is exactly what happened, but the seller objected so my broker won't release the earnest money deposit. Why isn't the contract enforced as written?

The purchase agreement is to be enforced as written, but the law says that in the event of a dispute, a court, not a real estate licensee, is responsible for interpreting the contract.

I am a licensed agent, and I will be out of town for one week on vacation. One of my buyers wants to see a home while I'm out of town. Would it be legal for my unlicensed assistant to arrange to accompany my buyer-client on a tour of the home? My assistant would not write an offer or even attempt to answer any questions about the home during the showing.

NO. Historically, DLARA has taken the position that only licensed agents can show property.

I represented the buyer in a transaction that did not close because the seller defaulted. I clearly produced a ready, willing and able buyer. Can I collect a commission from the seller?

NO. You did not have a contract with the seller. Your contract was with the listing broker through the MLS. Under MLS rules (and the Code of Ethics and Arbitration Manual), a cooperating broker has no right to a commission if the transaction does not close for whatever reason.

I am representing a buyer that entered into a purchase agreement to buy a house being sold by the trustee of an estate. During our inspection, we discovered that the house had a termite infestation. When we asked the seller about it, we discovered that the seller had learned of possible infestation from a previous buyer who terminated their contract. Was the trustee seller required to disclose the existence even though exempt from the Seller Disclosure Act?

NOT NECESSARILY. While sellers may choose to disclose known defects, in Michigan, sellers generally have no legal duty to volunteer information about a home other than the requirements imposed by the Seller Disclosure Act. (Sellers may not deliberately conceal known defects or make statements about the condition of a home that are incomplete or misleading.)

An agent licensed in the state of California referred a buyer to me. Can I pay that agent a referral fee?

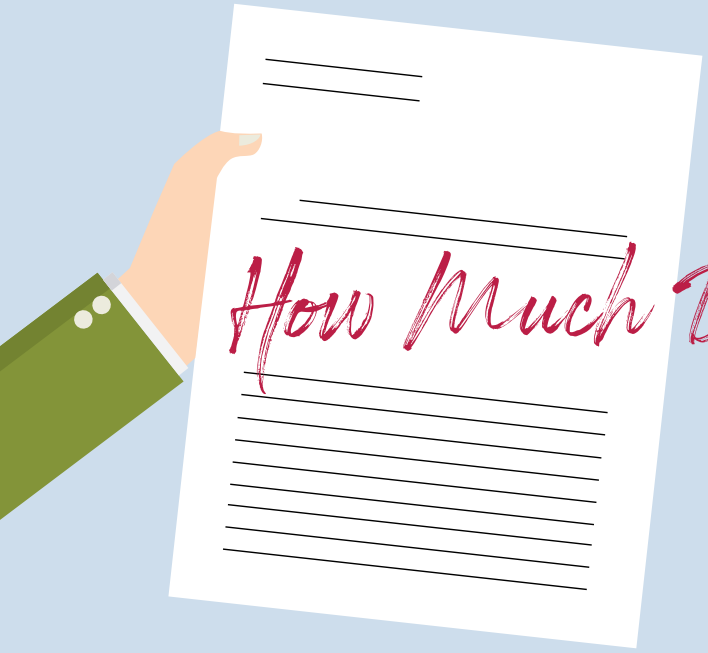
YES. A Michigan broker can pay an out of state agent a referral fee provided the out of state agent does not represent either the buyer or seller in a Michigan real estate transaction.

I am a commercial broker. Are the Occupational Code's advertising requirements applicable to the sale of commercial property?

YES. The law is applicable to any advertisement to buy, sell, exchange, rent, lease or mortgage real property or a business opportunity by a real estate broker. There is no exception for commercial property or commercial brokers.

My buyer put in an offer on a home. The listing agent texted me and told me that the price offered was so low that the seller was not going to counter. The listing agent and I exchanged text messages back and forth while consulting verbally with our respective clients. Eventually, we agreed on a price. The listing agent's last text to me was "Looks like we have a deal." Now I am told that the sellers have accepted another offer. Can they do that?

YES. In order to have a binding agreement for the sale of real estate, there must be a written agreement signed by the parties – in this case, the buyer and seller. Conversations between the agents via phone/text/email can move the negotiations forward quickly but you must always keep in mind that these are preliminary discussions that are not binding. ●



SELLER'S **DISCLOSURE** STATEMENTS

How Much Disclosure Is Enough?

BY GAIL A. ANDERSON, ESQ.

What if a seller (who is not exempt) refuses to provide a seller's disclosure statement or provides a seller's disclosure statement that is only partially completed? There is no mechanism by which a buyer or a buyer's agent can force a seller to complete a seller's disclosure statement. Under the Seller Disclosure Act, if a seller's disclosure statement has not been provided, the buyer's sole remedy is to choose not to go through with the sale of the home. And this option is available right up until closing. But what if the seller provides a seller's disclosure statement, but only answers half of the questions? There is an argument (but no definitive law) that by providing only a partially completed form, the seller has not complied with the statute and that therefore that buyer can terminate the purchase contract at any point up until closing.

Once the closing occurs, does the buyer have any remedy if, for example, the basement leaks but the seller had not answered that particular question on the seller's disclosure statement? The law in Michigan is clear that such a buyer could bring an action for silent fraud. A person is liable for silent fraud if she fails to disclose something that she had a legal duty to disclose. The Seller Disclosure Act creates that legal duty. Unless a seller is exempt under the Seller Disclosure Act, the seller has a duty to answer all of the questions on the seller's disclosure statement. A seller cannot avoid liability by choosing not to answer a particular question or questions.

The fact that the sellers have never lived in the home does not relieve them of the obligation to answer the questions on the seller's disclosure statement. Often, such sellers do not answer any specific questions but simply indicate on the form that they have never lived in the home. Of course, just because the sellers have never lived in the home does not necessarily mean that they know nothing about the condition of the home. In fact, it would seem to be a rare instance in which a non-occupant owner would have no knowledge as to the answers to any of the questions on the seller's disclosure statement. A landlord who has never lived in a home, for example, is nonetheless likely to know quite a bit about the condition of the home. If the basement leaks and the landlord-seller knew about the leak, he will be liable for silent fraud if he failed to answer that specific question on the seller's disclosure statement.

A seller is required to answer all of the questions on the seller's disclosure statement honestly. But once the seller does that, it is generally the case that the burden is then on the buyer to investigate further. Michigan courts have not been very receptive to buyers' lawsuits over defects that had, in fact, been disclosed on the seller's disclosure statement.

In one recent case, for example, the buyers had sued the sellers

when they discovered a number of defects after closing, including water damage and significant improperly-done repair work. It was subsequently discovered that there had been a fire in the home several years before it had been sold. While the sellers had not specifically mentioned that fire in their seller's disclosure statement, they had answered the following question in the affirmative:

> *Are you aware of any of the following:*
> *Major damage to the property from fire, wind, floods or landslides*
> *unknown_____ yes_X__ no_____*

Since the sellers had answered this question truthfully, the Michigan Court of Appeals held that it had then become the responsibility of the buyers to inspect the property to determine the nature and extent of the damage.

It should be pointed out that, in this case, the sellers had not provided any response to the form's request for an explanation if the answer to any of the itemized questions was "yes." In fact, as noted by the court, the explanatory statements following this line item had been "whited out." Under similar circumstances, a Texas court recently held that the seller was required to provide an explanation after indicating "yes" to a question regarding "previous flooding into the structure." The Texas court's view was not only that an explanation was required, but also that such explanation must be complete. It would seem unlikely that a Michigan court would reach the same conclusion. The language in the Michigan statutory form does not indicate that the explanations are mandatory. Moreover, "explanations" are generally viewed not as questions that must be answered but as an opportunity for the seller to explain why the defect should not be viewed as a deal-breaker.

Michigan courts have frequently been called upon to determine whether a seller's explanation as to a defect was fraudulent. Even an explanation that is true on its face may be fraudulent. In a case decided last fall, for example, the sellers had written "New Roof Sept. 2010 – had previous leak" on the seller's disclosure statement. As pointed out by the court, "this language could reasonably be viewed as suggesting that there was only a single previous leak and the leak was remedied by the installation of a new roof in 2010." In actuality, there had been numerous leaks over many years. Moreover, the seller had admitted in her deposition that she knew the roof replacement had nothing to do with the water intrusion problem. The Court of Appeals found that the statement about the new roof, while technically true, was in fact, a misrepresentation.

To summarize, a seller cannot avoid liability by "skipping" a question on the seller's disclosure statement. If the sellers know their basement leaks, the sellers will have committed fraud if they say the basement does not leak. They will also have committed fraud if they say they do not know whether the basement leaks or do not answer the question at all. On the other hand, buyers should be advised to review the seller's disclosure statement very carefully and to investigate even the most casually mentioned disclosures. Buyers need to understand that once a disclosure has been made, as a general rule, unless the explanation is viewed to be intentionally misleading, the burden falls on the buyer to investigate further.

From the Realtors®' perspective, whether representing the seller or the buyer, they should make sure their clients understand the significance of the seller's disclosure statement. Sellers should be encouraged to take as much time as they need to complete the form. Buyers should be advised to review the form carefully and to follow up on any questions or concerns they may have. Finally, Realtors® should never allow themselves to be part of the decision-making process as to any alleged defect.

> There is **NO MECHANISM** by which a buyer or a buyer's agent **CAN FORCE A SELLER** to complete a seller's disclosure statement.

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Mark Baker
2012

Dan Elsea
2010

Beth M. Foley
2012

Pat Vredevoogd Combs
2006

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2010

Dale Zahn
2015

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Teri Spiro
2008

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