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ANTITRUST REFRESHER

A federal antitrust action has two basic elements: (1) a contract or conspiracy that (2) unreasonably restrains trade. The “conspiracy” element is satisfied wherever two or more persons/entities carry out a common plan. If there is a “common plan,” then the only question is whether the effect of that common plan “unreasonably restrains trade.”

Many of you are aware of the antitrust class action filed against NAR in the Spring of 2019. The essence of that complaint is that the NAR MLS rule by which listing brokers are required to make blanket offers of compensation to buyer’s brokers unreasonably restrains trade. The result of this requirement, the Plaintiffs in this case argue, is that the commissions being charged in the industry are much higher than they would be if buyers paid their own agents.

NAR’s position is that this MLS rule does not unreasonably restrain trade, and in fact is actually procompetitive. In responding to this Complaint, NAR has emphasized that under the NAR MLS rule, the compensation offered can be any amount – even a nominal amount. NAR has filed a motion asking the Court to throw out the case. NAR has said publicly that if the case is not thrown out, there is little likelihood of settlement because “the lawsuit strikes at the heart of the MLS system that has greatly benefitted literally millions of home buyers and sellers for 100 years.” The Court has not yet ruled on NAR’s motion asking that the case be thrown out.

The existence of this case presents a good opportunity to briefly review antitrust law. As stated above, the issue in the NAR case is whether the “common plan” as set forth in the MLS rule unreasonably restrains trade. Under federal antitrust law, there are some types of “common plans” that are illegal on their face. In other words, these types activities are illegal whether or not

someone can prove that they unreasonably restrain trade. One of these types of illegal activities involves conspiracies to fix prices – or in the case of Realtors®, conspiracies to fix commissions.

Another example of a “common plan” that is illegal on its face is a group boycott. A group boycott occurs where two or more businesses agree to refuse to do business with a third person. The third person could be a competitor, for example, where two Realtor® firms agree not to do business with another Realtor® firm. The third person can also be a service provider to the Realtor® firms, for example, a title company or a home inspector. The purpose of a group boycott is typically to force a change in the third party’s business practices or to drive the third party out of business.

An Alabama case from the 1980’s provides a good example of an alleged group boycott in the real estate industry.¹ In that case, a real estate firm, Orval Sheppard Real Estate Company, Inc. (“Sheppard”), adopted a flat fee commission structure whereby all sellers were charged a \$1,995 commission, irrespective of the sale price. The Sheppard firm offered \$1,000 of its flat fee to any cooperating broker and, in addition, agreed to take only \$1,000 on any transaction in which it was the cooperating broker, regardless of the actual amount being offered through the MLS. Upon learning of this fee structure, a number of large brokerage firms in the area decided not to cooperate with the Sheppard firm. The Sheppard firm’s listings fell dramatically. The owner of the company sold the Sheppard firm to others who immediately abandoned the flat fee structure. After selling his company, the former owner of the company brought an antitrust suit against the large brokerage firms who had refused to do business with it.

¹ *Orval Sheppard Real Estate Co, Inc v Valinda Freed & Assoc, Inc*, 608 F Supp 354 (MD Ala SD, 1985).

The defendant brokerage firms were successful in this case because the Sheppard firm could not prove that the different firms had consulted with one another about their decision to stop cooperating with the Sheppard firm. In other words, the Court found that there was, in fact, no “common place.” The Court noted that under the law generally, any real estate firm has the right to refuse to cooperate with another real estate firm as long as its “refusal stems from independent decision and not from some agreement tacit or expressed:”

Here, the court finds that the defendant [real estate companies] refused to co-broker with Sheppard Real Estate without consulting with one another. They acted immediately, almost without time to consult with one another and engage in a concerted plan.

Since there was no evidence that the defendant brokerage firms had consulted with one another, there was no antitrust violation.

Realtors® should keep in mind that meetings of trade associations, such as State and local Realtor® associations, are ripe grounds for antitrust conspiracies. A broker or agent who participates in the affairs of an association of Realtors® should never participate in any discussion of the business practices of another Realtor® or Realtor® firm. And this is true even if the focus of the discussion is how the actions of this Realtor® reflect badly on the Realtor® brand. Under no circumstances, for example, should a topic of a local association’s board of directors meeting include a discussion of Realtor® “Y’s” complaints about Realtor® “X’s” business practices. A director who finds himself/herself in the middle of such a discussion should change the topic, and if unsuccessful, leave the meeting.

SPECIAL CONCERNS FOR CLIENTS WHO ARE “DOWNSIZING”

There are a number of concerns common to real estate clients who are downsizing, particularly if they are paying cash for their new home and/or are moving from a single-family home to a condominium unit. This handout is aimed at helping Realtors® better prepare these clients for the issues that they may face.

A. Cash Purchases

1. All clients, but particularly those who are paying cash for their new home, need to be made aware of possible wire fraud schemes. Realtors® should make certain that their clients understand that there are any number of people out there pretending to be title agency employees sending bogus wire instructions to people who have upcoming real estate closings. Clients should be advised never to wire money until they have verified wire instructions via a telephone call initiated by them. Attached is a handout specifically designed to help advise clients and customers about wire fraud scams.

2. Clients who have lived in their home for many years may be paying artificially low real estate taxes as a result of the Proposal A limitations on taxable value. Under Proposal A, until there is an “uncapping” event, annual increases in the taxable value of a home are limited to 5% or the inflation rate, whichever is less. If property values in an area have increased significantly over the years, a longtime homeowner may be paying real property taxes based on a “value” significantly lower than the actual appraised value of the home today. If they are unaware of this fact, their financial plan for retirement may grossly underestimate the real estate tax amount on their new, smaller home.

3. Clients who are paying cash for their new home should make their purchase agreement contingent upon the home appraising at or below the agreed upon purchase price. Ordinarily, this contingency is built into a mortgage contingency – *i.e.*, if the property doesn't appraise, the loan will be denied. If there is no mortgage contingency, then a separate appraisal contingency should be part of the purchase agreement.

4. Many otherwise knowledgeable persons do not understand the value of title insurance or how important it can be to have a title insurance commitment reviewed by a knowledgeable attorney. This is always a good idea but is particularly important when there is no lender looking at the condition of title. Buyers should understand that title insurance does not insure title against all defects. A title insurance policy will contain “exceptions” based upon the documents of record. An “exception” is a title “defect” that the title insurance will not cover. Some “exceptions” such as a utility easement are routine; other “exceptions” could, for example, give your clients' neighbors the right to use their property or give them a say in how it is used.

5. In the typical transaction of a single-family home financed with a mortgage, the lender is likely to require a mortgage survey (or location survey). This type of survey will show the location of the home in relation to the apparent boundary lines of the property. Cash buyers should be encouraged to obtain such a survey, or if construction is anticipated, a more detailed (and more expensive) boundary survey.

6. If a client has or will have more than one home, the client needs to carefully consider which home will be their principal residence. Keep in mind that a home is not someone's principal residence just because they declare it so. A principal residence is someone's “true, fixed and permanent home” as evidenced by a person's driver's license, voter registration card, cancelled checks and other records. (When buying a home out of state that is intended to be a second home,

a buyer should make certain that the closing agent is aware that the buyer does not wish to make that home their principal residence. Filing a homestead election elsewhere can result in a loss of the Michigan PRE even if it was unintentional.)

B. Purchasing Condominium Units

If the new home is a condominium unit, the purchase agreement should be contingent upon the purchaser's review and approval of the condominium documents. Realtors® should encourage their clients to have the condominium documents reviewed by a knowledgeable attorney. Clients who are considering purchasing a condominium should be aware of the following:

1. The condominium documents should spell out in detail which repairs are the association's obligation and which repairs are the responsibility of a co-owner. All projects are different, and it is not necessarily the case that if something is referred to as a "common area," it is maintained by the association. Likewise, it is not always the case that all parts of a unit are the co-owners' responsibility to maintain. Financial planning for retirement will require an understanding of not only a co-owner's dues obligation but also their maintenance obligations under the condominium documents.

2. The condominium documents should also spell out in detail what the association's insurance will cover and what a co-owner's insurance should cover. In the case of a fire, the association's insurance may only cover the unit "shell" or may cover the "standard" unit without any upgrades. A purchaser of a condominium unit should make certain that they provide their insurance agent with a copy of the insurance requirements and, if possible, a copy of the association's insurance policy. It is very important that the co-owner's insurance policy cover what the association's policy does not.

3. The condominium documents will typically have detailed restrictions about what improvements can be made to the exterior of a unit. Items like fences and decks may require the approval of the association or even be outright prohibited.

4. A purchaser of a condominium unit should carefully review the use restrictions typically contained in the condominium bylaws. The number and type of pets that a co-owner may have may be regulated, for example. It is also often the case that the leasing of the unit may be regulated or prohibited.

5. Under the Condominium Act, the purchasers of a condominium unit are liable for any condominium dues that the seller owed the association unless they request a written statement as to unpaid dues from the association prior to closing.

6. A purchaser of a condominium unit may wish to ask for copies of the last few years of minutes of meetings of the directors and the membership. A review of more recent minutes may provide some insight as to current operational issues and concerns.

C. Conclusion

Realtors® should never provide clients with legal advice, but they can help their clients recognize when and where legal advice may be important. If there is no new mortgage involved in the purchase of a home, buyers no longer have a loan officer with a checklist involved in the transaction. It is also true that condominium documents are lengthy and complicated, and when it comes to the relative responsibilities of the association and the individual co-owners, no two projects are exactly alike. The information in this article may help a client recognize some concerns and appreciate the usefulness of legal advice

IMPORTANT REMINDER TO OUR CLIENTS AND CUSTOMERS

While we all appreciate the convenience of transacting business via email, it is very important to remain diligent when doing so.

Unfortunately, the following scenario is not only a real life scenario, but it has occurred on a number of occasions in Michigan alone:

Cash buyer receives closing documents and wiring instructions via email from her buyer's agent. Soon thereafter, the same closing documents and different wiring instructions are received from the same agent. The buyer wires funds in accordance with the second set of wiring instructions only to find that the second email was fraudulent and DID NOT come from her agent. Of course, by the time this is discovered, the money is long gone.

IMPORTANT RULES TO KEEP IN MIND:

1. **If you receive an email containing Wire Transfer Instructions, regardless of who the sender appears to be DO NOT RESPOND TO THE EMAIL! Instead call the Title Company and/or Lender immediately, using previously known contact information and NOT information provided in the email, to verify the Wire Transfer instructions prior to sending funds.**
2. Be suspicious of anyone who suggests that funds should be wired days prior to the closing date.
3. Beware of last minute instructions, particularly if those instructions contradict earlier instructions.
4. Be suspicious of anyone who indicates that they are not available to take telephone calls and can only be reached via text and/or email.
5. Never transfer confidential information over free Wi-Fi.

6. Never trust contact information in unverified emails.
7. When replying to emails, use “Forward” and the addresses from your own address book rather than “Reply” or “Reply All”.
8. Review all emails carefully. Remember that a fake email can appear to be from someone you have been corresponding with regularly. Often (but not always) these types of fake emails can be spotted on the basis of style, tone, grammar and/or awkward sentence structure. Trust your instincts. If a message looks at all suspicious, follow up with a phone call and check it out. It only takes a few minutes.

Clear Cooperation Policy

- I. Once a broker starts marketing a property to the public, he or she has one business day to submit the listing to the MLS.

“Marketing a property to the public” includes yard signs, digital marketing on public facing websites, brokerage website displays (including IDX and VOW), email blasts and multi-broker private networks.

A “business day” excludes Saturdays, Sundays and federal and state holidays.

The standard rationale behind the new policy is that the fact that the listing broker is public marketing a listing shows that they have concluded that cooperating with other MLS participants is in their client’s best interests.

This is a mandatory policy – a local board cannot shorten the deadline or otherwise modify the policy.

The Clear Cooperation Policy only covers listings of property types that require mandatory submission. (Some local MLSs have a policy which provides for voluntary submission of listings for some property types (*e.g.*, vacant land).)

- II. NAR’s “Clear Cooperation Policy” does NOT mean every listing must be submitted to MLS within one business day after signing. MLSs can still have their own rule as to timing of submissions after signing. The policy means only that if a listing is marketed to the public, then the one business day rule goes into effect.

So, for example, an MLS could have a rule that a listing must be submitted within 48 hours of list date or one business day of marketing the property to the public, whichever comes first.

- III. NAR’s “Clear Cooperation Policy” does not prohibit office exclusives.

Even with NAR's "Clear Cooperation Policy," a broker can still have office exclusives, but the marketing of such listings must be limited to other agents within the same brokerage firm. The "Clear Cooperation Policy" is only triggered by "public marketing."

A listing is viewed as being marketed to the public even if it is being marketed to a select group of licensees.

Remember that MLS rules can require listing brokers to submit office exclusives to the MLS together with a form signed by seller directing that listing not be placed in the MLS.

- IV. Even with NAR's "Clear Cooperation Policy," a broker can still have "coming soon" listings. However, if a listing is advertised publicly as "coming soon," it must also be submitted to the MLS. The Clear Cooperation Policy applies to any listing that is or will be available for cooperation. (While a property is in "coming soon" status, neither the seller nor the listing broker may advertise the property anywhere other than as "coming soon.")

A "coming soon" listing refers to a property that is currently unavailable for showing or sale. A property that is currently being marketed to a select group of people is not truly a "coming soon" listing and calling it such is misleading.

In addition to the "Clear Cooperation Policy," an MLS can have its own "coming soon" rules.

Most commonly, MLS "coming soon" rules prohibit any showings or sales during the "coming soon" period.

But some MLSs go beyond that and adopt rules designed to discourage the use of the "coming soon" technique for the purpose of excluding property from the open market.

1. For example, in some MLSs, a “coming soon” period cannot exceed a particular number of days (*e.g.*, 14-21 days).
2. Some MLSs require that any “coming soon” listing have a stated “go active” date – the listing automatically goes “active” at a particular time on the scheduled “go active” date.
3. Some MLS rules provide that listings may not be activated prior to the originally designated “go active” date.
4. Under some MLS rules, a property may only be allowed in “coming soon” status one time with same owner (or one time with the same listing broker) unless the property has been off market for a particular time period (*e.g.*, 60-90 days).

COLD CALLS – FEDERAL AND STATE REQUIREMENTS

Traditionally, many Realtors® have used cold calling as a marketing strategy. Telemarketing, that is, the marketing of goods and services to potential customers over the telephone, has been subject to federal regulation since 1991. Increasingly, telemarketing is being done using automated calls (*i.e.*, dialed by a computer) and/or prerecorded messages (*i.e.*, robocalls). That phenomenon has led to further regulation under both federal and Michigan law.

A. The Telephone Consumer Protection Act

The federal Telephone Consumer Protection Act, also known as the TCPA, was adopted by Congress in 1991 in response to consumer complaints about telemarketer and debt collector phone calls. Since 1991, however, the TCPA has undergone many changes, mainly due to the onset of automated calls, robocalls and text messages sent to cell phones.

Initially, one of the things accomplished under the TCPA was to stop the annoying late night/early morning sales and debt collector calls by prohibiting such calls to residences between the hours of 9:00 p.m. and 8:00 a.m.. In addition, the TCPA required businesses with employees or agents who make sales calls to maintain a company “do not call” list of consumers who specifically asked to not be called by that particular company.

These new laws provided some parameters. However, consumers still complained. In particular, consumers were unhappy that they were required to make a separate “do not call” request with each individual telemarketer. So, in 2003, the TCPA rules were revised to establish a *national* “**do not call**” registry. Under this nationwide registry, consumers can register their

phone numbers at www.donotcall.gov or by calling 1-888-382-1222. Consumers can register residential land lines and cell phone numbers. Once a number is added to the “do not call” registry, it remains on the list until: (1) the consumer removes it himself/herself; (2) the number is disconnected; or (3) the number is reassigned. With very few exceptions (such as debt collectors, charities, political callers and survey takers), no one can initiate a telephone solicitation to a residential telephone number who has registered that number on the national “do not call” list. As a result, businesses who make sales calls must register with the Federal Trade Commission, download the “do not call” registry and remove those numbers listed in the registry from their calling lists. It is illegal to use the national registry for any purpose other than preventing calls to numbers on the registry.

One exception to the “do not call” law, that has received a fair amount of attention, is the “existing business relationship” exception. Under this exception, a real estate broker or other business may place live telemarketing calls (but not automated calls or robocalls) to a consumer with whom it has an “established business relationship.” There are two kinds of “established business relationships.” One is based on a consumer’s purchase or lease of a business’s goods or services within the 18 months preceding a telemarketing call. The 18-month period runs from the date of the last payment, transaction, or shipment between the consumer and the business. A business can call these past clients or customers regardless of whether or not they are on the national “do not call” registry. The other type of “established business relationship” is based on a consumer’s inquiry regarding a company’s goods or services and exists for three months starting from the date of that inquiry. This exception enables businesses to return calls to interested prospects for a limited period of time even if their telephone numbers are on the national “do not

call” registry. However, with either of these relationships, if the consumer asks that a business stop calling him or her, the business must honor that request.

Robocalls, prerecorded or autodialed calls, including text messages, are prohibited unless the call recipient has given his or her prior written consent. When obtaining prior written consent, a telemarketer must disclose to the individual that giving permission will allow the telemarketer to make autodialed robocalls and/or text messages and that providing consent is not a condition of any purchase. Both disclosures must be clearly displayed at the time the telemarketer seeks written consent. In addition, among other technical constraints, robocallers must provide an interactive “opt-out” mechanism during each robocall which allows the consumer to immediately advise the caller to “stop calling” and must state clearly, at the beginning of the message, the identity of the business or individual that is responsible for initiating the call.

The TCPA may be enforced in at least three different ways. First, every one of the 50 states has the right to sue offenders of the TCPA on behalf of their citizens. Second, anyone may file a complaint with the Federal Communications Commission, which has the power to assess penalties against violations of the TCPA. And, finally, any individual may sue any offending telemarketer in federal or state court for money damages. A consumer can recover up to \$500 in damages for each violation. And, if a court determines that the telemarketer willfully or knowingly violated the TCPA, a consumer can recover up to \$1,500 per violation. Most recently, the Federal Communications Commission was authorized to impose civil penalties of up to \$10,000 per call for robocalls which intentionally violate the TCPA. Obviously, running afoul of the TCPA can have serious monetary consequences.

There is, however, a way that companies can protect themselves from simple mistakes which result in TCPA violations. Specifically, there is a “safe harbor” created under the TCPA whereby a telemarketer will not be subject to penalties or sanctions for erroneously calling a consumer who is on the national “do not call” registry. In order to invoke the protections of the “safe harbor,” the company must:

- establish and implement written procedures to honor the “do not call” requests of consumers.
- train its personnel in those procedures.
- maintain a company-specific “do not call” list.
- use and maintain records which document a process for preventing calls to any and all “do not call” lists which, at a minimum, involves the use of the national registry downloaded within 30 days of the date any call is made.
- monitor and enforce compliance with its established “do not call” procedures.

In addition, obviously, the call must have been made by mistake. By establishing and maintaining these conditions, companies can protect themselves against thousands of dollars of potential penalties under federal law.

B. Michigan Telemarketing Laws

The Michigan Legislature adopted the federal “do not call” registry as its own official registry and all of the requirements and restrictions that go with that registry. In addition, Michigan established a ‘code of conduct’ for Michigan telemarketers through its adoption of the Michigan Home Solicitation Sales Act, also known as the MHSSA.

Similar to the TCPA, the MHSSA prohibits telephone solicitations to a consumer on the national “do not call” registry or to a consumer who has requested that he or she not receive calls from that company. Companies cannot make false or misleading statements in order to induce the purchase of their goods or services. And, at the beginning of a sales call, the caller must state their name and the name of the business on whose behalf the call is made. The Michigan law extends the “no calls” timeframe by one hour from 9:00 p.m. to 9:00 a.m. and makes it a misdemeanor to violate this prohibition. In addition, with few exceptions, the MHSSA prohibits *all* calls using a recorded message. Fortunately, one of the exceptions is “[a] sale of services by a real estate broker or salesperson licensed by the department of consumer and industry services.” (To be clear, real estate licensees are not exempt from the MHSSA in its entirety; they are only exempt from the prohibition against all calls using a recorded message.) Damages available under the MHSSA include the greater of actual damages or \$250.00 and reasonable attorney fees.

C. Conclusion

Firms who have agents that do telemarketing should reacquaint themselves with the national do not call registry and the other “do not call” regulations. There are exceptions under these rules for consumers with whom a caller has an existing business relationship. Even then, however, if the existing customer requests no further calls, the firm must honor that request. The damages for ignoring the “do not call” requirements can quickly add up, and violations can result in the imposition of significant penalties.

DIVIDED LOYALTIES

One of the primary fiduciary duties owed by real estate agents to their clients is the duty of loyalty. If an agent's loyalties are divided due to their own personal interests or their representation of multiple parties, the agent must obtain their client's informed consent. It is not enough to just disclose the fact that the agent's loyalties are divided; rather, the agent must disclose all relevant facts and circumstances behind the agent's divided loyalties.

A. Dual Agency

Perhaps, the most common conflict of interest involves a dual agency situation – *i.e.*, where the same agent represents both the seller and the buyer. Many agents are under the mistaken impression that a consensual dual agency relationship eliminates all fiduciary responsibilities. This is not true. It is certainly true that a dual agent cannot disclose confidential information about one client to the other client. However, if there is material information that is not confidential, the agent has a duty to disclose that information even if the other party would prefer that the agent does not. If, for example, a broker is aware that the school district is considering closing the neighborhood school, the broker is obligated to disclose that information to the buyer. This information is not confidential. Withholding this type of information from a buyer would not likely be perceived as a neutral position, but rather an action for the benefit of the seller-client.

An Ohio case involving the listing of a single-family home provides a useful illustration as to a dual agent's continuing fiduciary responsibilities.² In that case, the first purchase contract on the home had fallen through after the inspection showed numerous structural and foundational defects in the home. The sellers then performed some repair work and the listing agent continued

² *Hubbard Family Trust v TNT Land Holdings, LLC*, 9 NE3d 411 (Ohio App, 2014).

to list the home for sale. A second purchaser put an offer on the home which was accepted by the sellers. The listing agent acted as a dual agent in this second transaction. Although the second purchase contract also called for an inspection, it never took place. After the transaction closed, the purchaser discovered numerous defects in the home and filed a lawsuit against the real estate agent in which she alleged that she had breached her fiduciary duties by failing to disclose known defects.

The Ohio court found that in her dual agency capacity the agent owed a duty to disclose to each client “all non-confidential information material to the transaction.” The Court went on to find that since the agent knew about the numerous structural and foundation concerns raised in the first inspection, she should have told the second purchaser that a prior purchaser had raised “critical concerns regarding the structural and foundational integrity of the home.” Critical to the holding in the Ohio case was the finding that the information from the earlier inspection was not “confidential information.” The fact that the sellers may not have wanted the agent to share this information with the second purchaser did not mean that the information was “confidential.” While it was information learned in the course of an agency relationship, it was not information the agent learned from her seller-clients, but rather from the first purchaser.

B. Competing Purchasers

A second type of conflict of interest arises when one agent represents two buyers who are interested in the same property. This was the situation in a Michigan case brought by an unsuccessful purchaser of real property, Abdel-Hak, who claimed that but for the actions of his buyer’s agent, he would have been able to purchase property worth \$700,000 for only \$500,000.³

³ *Abdel-Hak v Saad (In re Saad)*, 319 BR 147 (ED Mich, 2004).

It turned out that the successful purchaser of the property had been represented by the same buyer's agent. Moreover, this second buyer worked in the same office as, and was allegedly related to, the buyer's agent. Abdel-Hak had not known that his buyer's agent was representing another potential buyer of the property until after his offer had been rejected. Abdel-Hak was also upset because it appeared that the competing buyer may have been aware of the terms of Abdel-Hak's offer at the time he submitted his own offer.

The Court found that the real estate agent's failure to disclose that he would not be acting solely as Abdel-Hak's agent for purposes of presenting an offer on the property was a material misrepresentation. The Court noted that under longstanding Michigan law, "a real estate agent is a fiduciary and it is not permissible for him to act in opposition to his principal."

Many, if not most, buyer's agency forms used in Michigan give the buyer's agent the authority to represent two buyers who are interested in the same property. Realtors® who find themselves preparing offers for two buyer-clients who are interested in the same home should not rely solely on this clause. Instead, both buyers should be advised of the current situation so that they understand that they cannot rely on the buyer's agent to advise them as to the appropriate terms of their offer. It is not enough for the buyers to know of the possibility of a conflict of interest. They must also be made aware when such a conflict actually exists so that they can adjust their conduct accordingly.

C. Self Dealing

A third type of conflict of interest arises when an agent has a personal interest in the transaction. In a North Carolina case, for example, a broker had told his buyer-client, Gosai, that

he had a “friend” who owned a piece of property that was for sale.⁴ After Gosai viewed this property, he had his buyer’s broker prepare an offer to purchase. The offer to purchase stated that the broker was acting as a dual agent. It was only after closing that Mr. Gosai discovered that the broker was the actual owner of the property.

In this case, the fact that the broker had described his role as a “dual agent” did not shield him from liability. The Court held that a broker can neither purchase from nor sell to his client unless the client consents “with full knowledge of all the facts and circumstances.” It was not enough for the broker to advise the buyer that he had divided loyalties. Instead, the buyer was entitled to know that the broker was, in fact, the seller. The Court held further that since the broker had sold the property to his client without the client’s informed consent, the transaction was presumed to be fraudulent. The buyer did not need to prove that fraud had occurred. Instead, the broker had the burden of showing that he had not taken advantage of his client and that he had acted throughout in a fair, open and honest manner. In this particular case, the broker could not meet that burden.

Obviously, Realtors® should never conceal their ownership interest in a property a client wishes to purchase. First of all, failing to disclose a direct or indirect ownership interest violates both the Occupational Code and the Code of Ethics. Secondly, a Realtor® cannot serve as a dual agent in a transaction in which the Realtor is either the buyer or the seller. Remember that entering into a dual agency relationship does not terminate all of a Realtor®’s fiduciary duties owed to a client. A Realtor® cannot satisfy those fiduciary obligations if he or she is also a party to the transaction.

⁴ *Gosai v Abeers Realty and Development Marketing, Inc*, 166 NC App 625 (2004).

A New York case provides a good example of how and when the relationship changes when a listing agent purchases her client's property.⁵ The case involved a listing agent who entered into a contract to purchase her client's cooperative apartment after several failed attempts to sell it to third parties. At the time the apartment was initially listed, the sellers had told the listing agent that their preference would have been to buy the neighbor's unit and combine them. As it turned out, the former listing agent was able to buy the neighbor's apartment soon after she closed on her former clients' apartment. The former clients then sued her claiming that she had breached her fiduciary duties owed to them by failing to disclose the fact that the neighbor had changed her mind and was now willing to sell her apartment. The listing agent was able to convince the Court that she had not discovered that the neighbor had changed her mind about selling her apartment until after the purchase agreement with her former client had been signed (but before closing). The Court found that at the time the listing agent learned that the neighbor was willing to sell her apartment, she no longer owed her client any fiduciary duties.

The case would have come out differently if the listing agent had discovered that the neighbor was willing to sell even one minute prior to the signing of the purchase agreement. A listing agent who is considering the purchase of her client's home, but has not yet signed a purchase agreement, owes that seller-client the full range of fiduciary duties. Until the purchase agreement is signed, full and fair disclosure would require that the listing agent disclose the fact that the neighbor is now willing to sell the adjacent apartment. The fiduciary relationship terminates when the purchase agreement is signed. At that moment, the parties' relationship switches from principal/agent to seller/buyer. Should the sellers later decide they were taken advantage of, the

⁵*Dubbs v Stribling & Associates*, 712 NYS2d 19 (2000).

burden will be on the listing agent to establish that she satisfied her fiduciary duty of loyalty (with full and fair disclosure) up until the moment the purchase agreement was signed.

D. Conclusion

A conflict of interest situation is not wholly resolved simply by signing a dual agency agreement or other waiver type instrument. Such an instrument is necessary, but it is only the start. Realtors® must remember that a waiver is only enforceable if the Realtor® has made “full and fair disclosure” of all relevant information regarding the conflict. Moving forward, the Realtor® will continue to owe both clients a duty to disclose all material information that is not confidential information. A Realtor® cannot maintain an agency relationship with a client if the Realtor® themselves is competing with that client – for example, buying from the client, selling to the client or putting in an offer on the same property. Moreover, Realtors® should never try to maintain an agency relationship with two competing parties if they have a prior close personal or business relationship with one of the two parties.

A DOZEN THINGS EVERY REALTOR® SHOULD KNOW ABOUT EARNEST MONEY DEPOSITS

1. Neither the law nor the Code of Ethics dictates whether the listing office or the selling office holds the EMD. Regardless of which real estate office holds the EMD, the role of the escrow agent is a neutral role. Even if it is a buyer's agent that acts as the escrow agent, they would have a duty to disclose to the seller if the EMD check bounced.

2. There is no law that regulates the amount of an earnest money deposit. A purchase agreement without any earnest money deposit is enforceable (although rare). An earnest money deposit is not always refundable and may be nonrefundable at the outset or may become nonrefundable after the happening of a particular event such as an inspection (again, rare in residential transactions).

3. A seller and buyer can agree that any third party will hold the EMD. If a third party (*i.e.*, a non-real estate licensee) holds the EMD, the third party is not subject to the Occupational Code/rules on handling EMDs. If a third party is to hold the EMD, a REALTOR's® responsibility is to deliver the check to the named escrow agent within 2 banking days of receiving notice of acceptance by all parties.⁶

4. If a REALTOR® holds the EMD, then the REALTOR® must comply with Occupational Code/rules governing EMDs. A salesperson cannot hold the EMD check until there is a binding contract, but instead must turn over the EMD check to his broker "upon receipt."⁷ The broker, on the other hand, is not required to deposit the check into its trust account immediately.

⁶ MCL 339.2512(1)(k)(vii).

⁷ MCL 339.2512(1)(k)(ii).

A broker must deposit the EMD in its trust account within 2 banking days after the broker has received notice that there is a binding purchase agreement.⁸

5. A seller and buyer can agree, for example, that the EMD check will not be provided by the buyer to the buyer's agent until the inspection contingency is waived. A seller/buyer cannot agree that an EMD check in the buyer's broker's possession will not be deposited until the inspection contingency is waived.

6. Trust account must be a non-interest bearing demand account. Checks must be signed by a broker or associate broker. Broker may not commingle its own funds in the trust account (except for up to \$2,000 to avoid service charges).⁹

7. Broker must maintain duplicate records for its trust account: (i) a chronological record of all receipts/distributions from that account; and (ii) a transaction specific record.¹⁰

8. If funds are in a real estate licensee's trust account and if there is a dispute over the EMD, the EMD must remain in the trust account until buyer and seller have agreed in writing or there is a court order directing the disbursement of the EMD. This rule only applies where there is a dispute over the EMD. The real estate licensee can also interplead the funds with the court.¹¹ If there is no dispute, the Occupational Code permits a licensee to release the EMD without a signed release. (Some purchase agreement forms require a signed release in all cases.)

9. A REALTOR® cannot condition the release of an EMD on the sellers/buyers releasing the REALTOR® from any liability in connection with the transaction.

⁸ MCL 339.2512(1)(iii)-(v).

⁹ MCL 339.2512(1)(k)(iv)-(v); Rule 313.

¹⁰ MCL 339.2512(1)(vi); Rule 313.

¹¹ Rule 313(5).

10. A purchase agreement may be considered terminated even if there is still a dispute over the EMD. The fact that there is a dispute over the EMD does not prevent the sellers from re-listing or the buyers from looking for a new home.

11. It is not always the case that a purchaser can walk away from a transaction with no adverse consequences other than the forfeiture of the EMD. Many purchase agreements provide that in the event of the buyer's default, the sellers can keep the EMD and sue the buyer for damages. REALTORS® are not entitled to keep abandoned EMDs; rather, the funds escheat to the State of Michigan. Failure to do so can result in the broker having to pay significant fines.

**OFFER AND ACCEPTANCE – TEN CONCEPTS
EVERY REALTOR® SHOULD KNOW**

1. A seller who receives an offer can accept, reject, counter or do nothing. A seller with multiple offers is not required to consider them in any particular order, or treat all of the offers “fairly.”
2. An offer to purchase real estate cannot be accepted orally. A buyer does not have an enforceable contract when the listing agent calls and reports that the seller has signed the buyer’s offer. Acceptance requires a signature and delivery of the signed acceptance.
3. A buyer does not have an enforceable contract when the listing agent emails the buyer’s agent and reports that the seller has signed the buyer’s offer. Again, acceptance requires a signature and delivery of the acceptance.
4. Generally, an offer or counteroffer can be revoked at any time before it is accepted. This is true even if the offer contains a stated expiration date. MR’s Buy and Sell Agreement says that the offer will expire on the particular date stated or upon seller’s receipt of revocation from the buyer, whichever comes first. This has always been the case – the language is intended to make clear that the offer can be revoked before the stated expiration date.
5. An offer can be revoked orally. So if a listing agent does call to report that the seller has signed the buyer’s offer, the buyer could avoid a binding contract by simply responding at that point that he was revoking his offer. (The buyer would be orally revoking the offer before the written acceptance was delivered.)
6. A buyer cannot simultaneously accept and materially change a seller’s counteroffer. Any alteration which changes the obligations of a party in any respect is “material.”
7. Once an offer is countered, it has been rejected. A seller who has countered a buyer’s offer cannot go back and “accept” the buyer’s offer as originally proposed.
8. Under Michigan’s Uniform Electronic Transaction Act (“UETA”),¹² electronic delivery is valid so long as it can be determined that the parties had agreed to conduct business electronically.
 - a. Where there is no specific language in a contract providing for electronic delivery, the parties’ intent must be determined “from the context and surrounding

¹² MCL 450.837.

circumstances.” To avoid future disputes, it is preferable to simply include an express provision agreeing to electronic delivery.

- b. If parties agree to electronic delivery, the UETA provides that the delivery must be made to “the processing system that the recipient ordinarily uses for the purpose of receiving electronic records.” Again, to avoid future disputes as to whether the correct “system” was used, the contract should expressly state what delivery system/address will be used.
 - c. Under UETA, an “electronic signature” includes any symbol or process used by a person and intended as a signature. A signer does not need to replicate an actual signature so long as the intent to sign is clear.
 - d. Most forms, including MR’s forms, provide that an electronic communication shall be deemed delivered at the time it is sent or transmitted (as opposed to the time that it is “opened” by the recipient).
9. Where the parties agree to conduct business electronically, use of language such as “original to follow” may create ambiguity as to when the contract becomes binding – whether upon the transmission of the electronic signature or upon the follow-up delivery of the original. For this reason, use of this language is not recommended.

A “bottom line” signature is not required in order for there to be an enforceable contract. The “bottom line” signature serves only as verification that the signed purchase agreement has, in fact, been provided to the buyer as required under the Occupational Code. Even if the buyer refuses to sign the “bottom line” of the purchase agreement, it is nonetheless binding and in full force and effect.

USE OF REALTOR® MARKS

Realtor® marks include the words, “REALTOR®,” “Realtor®,” and the Realtor® block “R” logo. The Realtor® marks were registered with the United States Patent and Trademark Office in 1949. Realtor® marks let people know that someone is more than just a real estate practitioner; that such real estate practitioner adheres to a strict Code of Ethics that protects clients, the public and other real estate agents. It is a valuable membership benefit that distinguishes members from other licensees.¹³

Each Realtor® member is authorized to use Realtor® marks with their individual name. It is the case, however, that members are licensed to use the Realtor® mark only in the context of identifying themselves as a member of NAR. The primary concern is that the term “Realtor®” not be used generically as a substitute for “real estate broker” or “real estate agent.” Compliance with this limitation can be tested by substituting the term “member” for the term “Realtor®.” If the meaning is unchanged by this substitution, then the term, “Realtor®,” is appropriately used. Consider, for example, the following statement:

I make my living as a “Realtor®.”

If we substitute the word “member” for the word “Realtor®” the statement reads as follows:

I make my living as a “member.”

¹³ NAR’s preferred form of the word is “REALTOR®” – all caps with the registered trademark symbol. (To type “®,” hold down the ALT key while typing 0174 on the number pad on the right side of your keyboard.)

Obviously, a person makes a living as a real estate agent, not as a “member.” Therefore, the statement, “I make my living as a “Realtor®,” is not an appropriate use of the Realtor® mark.

A member may not use Realtor® marks when identifying their relationship to a team. So, for example, a Realtor® mark cannot be used in a team name such as “John Doe Realtor® Team.”

A Realtor® mark cannot be used in the name of a firm, but may be used in connection with the firm name. So, “John Doe Realtors®, Inc.” is not permitted, but “John Doe Inc.” can identify his firm as a Realtor® firm if he separates his firm name with punctuation. For example: “John Doe Inc., Realtors®” or “John Doe Inc. – Realtors®.”

The term, “Realtor®,” may be used as part of a domain name so long as it refers to a member or a firm (and not a team). With usernames, email addresses and domain names, it is not necessary to separate the member’s name or firm name with punctuation. “jdoerealtors@gmail.com” would be an acceptable email address.

Local and state associations may use geographic locations with the Realtor® mark, but individual members and firms may not. So, “Up North Association of Realtors®” is acceptable, but “Smith Family UP North Realtors®, Inc.” is not.

A member may not combine the Realtor® mark with words like “my” or “your.” So, for example, “YourFavoriteRealtor@gmail.com” is not an acceptable email address. A Realtor® mark cannot be used adjacent to a descriptive word or phrase. The following are examples of improper uses because they use a descriptive term in connection with a Realtor® mark:

bestRealtor®.com

hometownrealtor®@gmail.com

Number1realtor®.com

A non-member salesperson of a Realtor® firm cannot use the Realtor® mark even if it is used in connection with the firm name.

Blue and gold are the official Realtor® block “R” colors; however, members may use any two colors that sharply contrast. Members and member boards may not use the Realtor® logo block “R” in the absence of identification of the member, the firm or the member board. The Realtor® logo block “R” may be used on merchandise such as t-shirts and pens so long as the item also includes a member’s name or firm name. Members cannot use the Realtor® block “R” as part of a company name, for example, as the “R” in “Ron’s Realty.” A member may not combine the block “R” with additional design elements or otherwise personally “stylize” the Realtor® block “R.” There are also rules on the typeface, size and relative spacing of the elements in the block “R” logo. Rather than create their own block “R” logo, Realtors® are encouraged to download the logo from <https://www.nar.realtor/logos-and-tBtrademark-rules/the-realtor-logo>.

SELLER'S EARLY TERMINATION OF EXCLUSIVE RIGHT TO SELL AGREEMENT

It is important to keep in mind that sellers can always terminate an exclusive right to sell agreement; the question is what damages, if any, the sellers may owe the listing broker as a result. Put another way, an early termination of a listing may be a breach of contract, but that does not mean that the sellers would ever be required to continue to work with the listing broker. Rather, because of their breach, sellers may owe the listing broker damages.

In determining if the sellers owe damages, the question is whether the sellers' early termination is, in fact, a breach of contract. If the sellers terminate the listing in bad faith in order to avoid paying a commission, then such termination is a breach of contract. For example, if the sellers terminated the listing agreement and then sold the property to a buyer who had been introduced to the property during the listing, then the termination is likely to be deemed to be in bad faith. Likewise, if it can be shown that discussions/negotiations between the sellers and the eventual buyer began before the sellers terminated the listing agreement. In either case, a court is likely to conclude that the termination was done for the sole purpose of avoiding a commission and therefore that the seller's termination was a breach of contract.

But what if at the time the seller terminates the listing agreement, there is no buyer in sight? Here, the analysis is more complicated. A listing agreement between a seller and a listing broker creates a principal/agency relationship. Under agency law generally, a principal may revoke the authority of his agent "at his mere pleasure or caprice."¹⁴ Over the last 100 years or so, Michigan

¹⁴ *Seelye v Broad*, 379 Mich 289; 150 NW2d 785 (1967).

courts have struggled with the applicability of this general rule to situations where sellers have provided a real estate broker with a stated period of time in which to find a purchaser for their property.

Since the 1960s, the analysis has focused on whether the listing broker can show substantial performance of the duties imposed upon him/her by the listing contract (even though the listing broker has not yet produced a buyer). Where the listing broker has expended time, effort or money in attempting to find a purchaser for the property, Michigan courts have found that the broker has provided sufficient consideration such that the seller may not unilaterally terminate the listing contract.¹⁵ It has been held, for example, that a seller did not have the unilateral right to terminate a listing contract after the broker had spent \$5,000 on promotion and advertising of the property.¹⁶ The fact that the listing contract is found to be irrevocable does not mean that the sellers are obligated to continue to work with the listing broker until the end of the term of the listing contract. If the contract is irrevocable, then the sellers' early termination will be a breach of contract, making them liable for damages.

Of course, if the listing broker breaches the listing agreement first, then the sellers can terminate the listing agreement without liability. A listing broker may be deemed to be in breach, for example, if the listing broker does not advertise/promote the property as agreed upon in the listing agreement. Likewise, for example, the listing broker may be deemed to have breached his duty of confidentiality if he has disclosed the sellers' "bottom line" price to a potential buyer.

¹⁵ *Ladd v Teichman*, 359 Mich 587 (1960).

¹⁶ *H.M. Seldon Co v Carson*, 11 Mich App 613 (1968).

In either example, it is likely that the sellers would be entitled to terminate the listing agreement without liability.

Assuming that the sellers' termination of the listing contract is, in fact, a breach of the listing contract, what is the proper measure of damages? If there has been an actual sale of the property, the commission amount is the proper measure of damages. If the broker has produced a buyer who is ready, willing and able to purchase the property on the terms set forth in the listing agreement and the seller has refused to sell, then, again, the commission amount is the proper measure of damages. But what if no buyer has been produced by the broker and no sale has been made by the seller within the listing period? In this instance, a listing broker is entitled to lost profits only if it can show that it was reasonably certain that it would have earned its commission without the action of the seller. And this is a significant burden. It was not enough, for example, for the broker to testify that there was "a greater than usual interest in the property."¹⁷ If the listing broker cannot meet this burden, then the broker's damages will be limited to reimbursement for expenses the broker has incurred in promoting the property.

Keep in mind that the fact that a listing broker cannot require the sellers to continue to work with him/her through the end of the listing does not mean that the listing broker is required to provide sellers with a release if requested to do so. If your sellers demand a termination, you can certainly acknowledge such termination while at the same time making clear that you view such termination to be a breach of your listing contract. A note along the following lines should suffice:

Pursuant to your request, I have withdrawn your listing from the MLS and will remove my sign/lockbox on or before [date]. Please be advised, however, that I consider such termination to be a

¹⁷ *HM Seldon Co v Carson*, 29 Mich App 643; 185 NW2d 842 (1971).

breach of contract. By honoring your request, I am in no way waiving my rights under the listing contract.

In this way, the listing broker can preserve his/her legal rights. If the sellers decide they no longer wish to sell the home, a listing broker can accommodate this request by keeping the listing agreement in place but agreeing not to market the property.

A cooperating broker has no remedy against a seller who breaches a listing contract. A cooperating broker has no contractual relationship with the seller. A cooperating broker's right to a commission is through the MLS and is enforceable against the listing broker only. Under the MLS and professional standards rules, if the transaction fails to close for any reason, a cooperating broker has no right to a commission for the listing broker. If the transaction with the cooperating broker's client eventually closes, then the cooperating broker's remedy, if any, is against the listing broker through the arbitration process.

Finally, if the sellers breach one listing contract and then list with another broker who is eventually paid a commission, the first listing broker cannot file an arbitration to collect its commission from the second listing broker. The first listing broker's sole remedy for the sellers' breach of contract is against the former seller-client.

CONCLUSION

Realtors® often inquire as to whether or not they should pursue a seller who has breached a listing contract. Realtors® should, of course, consult with legal counsel, but certainly any discussions should include a damages analysis. If the sellers terminated the listing contract soon after it was signed, before the listing agent spent any time, effort or money in presenting the property, then a court is likely to conclude that the contract was revocable and the sellers do

not owe damages. Even if the contract was irrevocable, if the sellers did not actually sell the property after their breach, then it is unlikely that a listing broker will recover anything other than expense reimbursement.

SELLER DISCLOSURE ACT RESPONSIBILITIES OF NON-OCCUPANT SELLERS

In a recent Michigan case, the sellers of a home, the Zimmermans, were suffering from dementia and living in an assisted living facility.¹⁸ Their daughter, Lynn, who lived out of state, had her parents' power of attorney and was handling the sale of the home on their behalf. As part of that transaction, the daughter filled out the seller's disclosure form despite the fact that she knew "practically nothing about the home." On the seller's disclosure form, Lynn answered many of the questions "unknown" and, despite the form's instructions, left several questions blank.

The eventual buyers of the home discovered a number of defects after they moved in and sued, claiming that the information in the seller's disclosure form had been fraudulent. Interestingly, and presumably because the daughter had signed the seller's disclosure form in her capacity as attorney-in-fact, the court looked for evidence that "anyone in the Zimmerman family" had been aware of the alleged defects. Since the buyers had no evidence that any family member was aware of any of the alleged defects, the buyers' case was thrown out.

While the sellers prevailed in this case, the court's analysis could have led to an unfair result. Suppose that prior to their illness, the parents had been aware of one or more of the defects, but that this information was unknown to Lynn. Would it then be the case that the Zimmermans would be liable because their daughter unknowingly failed to disclose the information in the seller's disclosure form?

¹⁸ *Locher v Estate of Bradley M. Zimmerman*, unpublished opinion per curiam of the Court of Appeals, issued February 18, 2020 (Docket No. 346566); 2020 WL 815781.

The daughter in this case was not required to fill out a seller's disclosure form just because she had her parents' power of attorney. The power of attorney gave her authority to act on her parents' behalf; it did not give her the authority (or ability) to make representations on their behalf. And, of course in this instance, her parents were in no position to complete the seller's disclosure form themselves. While the Seller Disclosure Act does not address this latter situation, if it is known to you that your seller is not competent to testify, then do not ask them to complete the seller's disclosure form. Indicate in the MLS that the form is "unavailable" and (very) briefly explain the situation to potential purchasers. Again, there is no express exception under the statute in the case of legally incompetent sellers; the legal analysis is simply that in this situation, performance is impossible.

Suppose that the Zimmermans died before their home was sold. If their estate sold the home, then the transaction would be exempt from the Seller Disclosure Act. No form is required in the case of a transfer by a nonoccupant fiduciary in the course of administering an estate.¹⁹ (Nor is the estate required to provide a form indicating that the sale is "exempt.")

On the other hand, suppose Lynn Zimmerman herself took title to her parents' home after her parents died. Lynn's subsequent sale of the home is not exempt even if she never moves in and puts it up for sale immediately. Could Lynn simply fill out the seller's disclosure form indicating that she "has never lived in the home and knows nothing about the condition?" Yes, but only if it is actually true that she knows nothing about the condition of the home. Just because a seller has never lived in a home does not excuse the seller from disclosing what he or she does know. So, for example, if one of Lynn Zimmerman's parents had complained to her about the

¹⁹ MCL 565.953(d).

leaking basement, she would have an obligation to disclose that information. Likewise, if the basement had leaked while she was visiting. Note that in this instance, the focus would not be on what the parents had known about the condition of the home but what Lynn Zimmerman herself had known.

When completing a seller's disclosure form, sellers (and Realtors®) must remember that it is fraudulent to assert that you have no knowledge as to the condition of something if, in fact, it is not true. If, for example, the sellers know that their roof leaks, it is fraudulent to represent that it does not leak. It is no less fraudulent for the sellers to represent that they do not know if the roof leaks. Both statements are false.

To summarize, remember that the fact that sellers have never lived in the home does not relieve them of their obligation to provide a seller's disclosure form. It is not enough to say that they have never lived in the home as these sellers would still have an obligation to complete the seller's disclosure form. Such sellers could indicate that they have never lived in the home and that they know nothing about the condition of the home, so long as that statement is actually true. It would seem to be a rare instance in which a seller who has never lived in the home would have absolutely no knowledge as to the answers to any of the questions on the seller's disclosure form. A landlord who has never lived in a home, for example, is nonetheless likely to know quite a bit about the condition of a home. A seller who has purchased a home for the purpose of renovation and resale is also likely to know quite a bit about the condition of the home.

And lastly, no one, not even a person with the seller's power of attorney, should ever fill out a seller's disclosure form on the seller's behalf.

WHOLESALING: A RISKY BUSINESS MODEL

The basic business model for wholesaling is pretty straightforward. It usually involves distressed properties. It is perhaps most easily described through the use of a hypothetical. Assume that Sam Smith wishes to make money from real estate but has very little spare cash. He uses his funds to solicit the purchase of properties from persons who have a need to sell. He places signs in his area indicating that he will buy homes for cash. He also sends out letters to persons who may be highly motivated to sell, such as persons whose residences are in foreclosure. His efforts result in him being contacted by the owner of 123 Elm Street who needs to sell her property as soon as possible. Sam enters into a purchase agreement with the owner to purchase the property for \$30,000 cash within thirty days. The purchase agreement contains a clause which permits Sam to assign his position as buyer to a third party without the consent of the owner. Further, the purchase agreement contains a contingency which permits Sam to lawfully terminate the purchase agreement at any time during the 30-day period, typically by using an inspection period which runs for all 30 days.

Upon entering into the purchase agreement, Sam immediately begins marketing 123 Elm Street to third parties. He contacts known possible investors, advertises over the internet and places a sign in the yard of 123 Elm Street. His goal is to find a third party who will buy 123 Elm Street for \$35,000. If Sam can find such a person, he will assign his interest in his purchase agreement with the owner and pocket the \$5,000 difference. If he cannot find such a cash buyer within the 30-day period, he will exercise the contingency in the purchase agreement and terminate his transaction with the owner.

A number of Realtors® have asked whether wholesaling is lawful and if so, what are the rules? At the outset, Realtors® who are considering this business model should recognize the optics. It is certainly true that as a general matter, contracts are enforced as written. On the other hand, many would argue that no property owner would ever enter into this type of transaction if they actually understood it. That is, no one would agree to sell their property if they understood that the only way their buyers will go through with the transaction is if they find someone willing to pay them more. Many persons looking at this transaction would assume that there must have been some type of deception that would cause a property owner to enter into such a one-sided contract. The fact that the property owner was facing foreclosure or otherwise in financial distress adds support to this view.

But, before we discuss possible challenges to the overall business model, there are a number of hard and fast rules. Realtors® involved in wholesale transactions must, at a minimum, strictly comply with the following rules:

1. Assuming Sam does more than 5 of these types of deals during a 12-month period, he must have a real estate license.
2. When Sam approaches the owner of 123 Elm Street, Sam must make very clear at the outset that Sam is not there as a potential agent for the seller, but on his own behalf. If an agency relationship is established, even for a brief period of time, it cannot later be “converted” into a wholesale transaction without full disclosure – “I am only going to buy this property from you if I find someone that will pay me more than I am paying you.”
3. Sam may not provide the owner with a market analysis or otherwise offer an opinion as to the value of the property.

4. Sam must disclose to the owner in writing that he is a real estate licensee before he enters into a purchase agreement to buy 123 Elm Street.
5. When advertising the home for resale, Sam must do that in the name of, and under the supervision of, his real estate broker. At all times, it must be clear that the broker's "client" in this transaction is Sam and not the current owner of 123 Elm Street.

Even assuming that Sam and his broker can successfully establish that they complied with all of the above requirements, the wholesale transaction is still subject to challenge. Again, while it is certainly true that one party to a contract has no duty to explain the contract or disclose their motives to the other side of the contract, a contract that has been "fraudulently induced" will not be enforced.

There are also additional issues raised by Sam's status as a real estate licensee. In our hypothetical, while Sam is a real estate licensee, he is not working as an agent for the owner of 123 Elm Street. Certainly, a court looking at this transaction would require that it have been made clear to the owner of 123 Elm Street from the outset that Sam was representing himself and was not looking out for her interests. Assuming that Sam can get past this hurdle, the question becomes whether a court would hold Sam to some higher standard as a result of his status as a real estate licensee.

The Occupational Code contains a number of provisions aimed at making certain that real estate licensees do not use their expertise to take advantage of buyers and sellers. Rule 333(1), for example, precludes a licensee from "directly or indirectly" misrepresenting material facts. Under the wholesaling business model, at the time Sam enters into the purchase agreement with the owner of 123 Elm Street, he has no intention of fulfilling the terms of the purchase agreement unless he

successfully finds a third-party buyer within the 30-day period. If Sam does not disclose this fact to the owner of 123 Elm Street at the time he makes the offer, it could be argued that he has at least indirectly misrepresented a material fact, i.e., he will walk away if he cannot find a third-party buyer. It is also the case that someone could argue that this type of transaction – by which the owner agrees to a base price and the real estate licensee receives everything above and beyond that base amount – is nothing more than a disguised net listing arrangement which, of course, is prohibited by the Occupational Code.

Finally, Realtors® and their brokers should understand that because there is no agency relationship between the broker and the owner of 123 Elm Street, if she sues, it is unlikely that the broker's errors and omissions insurance policy will cover her claim. As a general matter, claims arising out of the purchase of property by an agent are excluded from coverage.

Conclusion

Absent some type of fraudulent inducement, contracts are enforceable as written even if extremely one-sided. Under this general rule of law, a buyer can enter into a real estate purchase contract that is terminable at will at any time prior to closing. But a person holding a real estate license who approaches a seller is in a different position. The Occupational Code imposes certain obligations on a real estate licensee designed to protect sellers. Compliance with these requirements arguably makes it harder for a real estate licensee to act as a wholesaler than it is for a non-licensee. And, of course, a person who engages in more than five real estate sales in a 12-month period must have a real estate license.

This article is intended to reach not only licensed salespersons who are engaging in wholesaling or thinking about doing so, but also the brokers with whom they are affiliated. Under

Michigan law, brokers are generally required to supervise the salespersons affiliated with them and may be held responsible for a salesperson's failure to comply with the law. It is also the case that a claim based upon an agent's wholesaling activities is likely not covered by the broker's insurance. For these reasons, brokers should concern themselves with the wholesaling activities of their salespersons.

You're Always Being Tested

This past April we celebrated Fair Housing Month. While this important observance typically serves as a marker for reflection, education, and continued aspiration, there is no doubt that 2020 has a much different and more solemn feeling. With the horrific killings of George Floyd, Breonna Taylor, and Ahmaud Arbery, we remain in the midst of various expressions of outrage over police brutality. These expressions have also sparked important discussions about systemic inequalities under the law. As Realtors®, this spotlight on inequality is particularly disturbing. Such injustice flies in the face of the personal and heightened commitment to equality under Article 10 of the Realtor® Code of Ethics. As standard bearers, Realtors® regularly challenge and hold themselves responsible to engage in training and self-assessment within the brokerage. Sadly, some Realtors® have also been involved in troubling examples of disparate treatment of home buyers and sellers based on protected classifications.

In November of 2019, Newsday published an expose after a three-year investigation into the real estate market in Long Island, New York. The findings, established through matched fair housing testing, strongly indicate the existence of racial bias, steering, and other discriminatory behavior by real estate licensees and sellers. For anybody reading this article, I would strongly urge you to read and watch the report. It can be found at <https://projects.newsday.com/long-island/real-estate-agents-investigation/>. It is a compelling case study not only due to the findings – but it is also compelling for the subtle ways that some of this behavior can occur. And while Long Island, New York is a long way from Anytown, Michigan, the investigation and the findings present Realtors® everywhere with a moment of pause to reflect upon measures to protect and promote equal service, while guarding against instances of bias.

Some years ago, I wrote an article for the “Michigan Realtor®” magazine about fair housing testing and education. It was written from the perspective of a new attorney seeking a knowledge base on fair housing education, compliance, and enforcement. At that time, one thing stood out to me that still resonates to this day. It centers on the notion that some real estate licensees believe that they can “spot” a fair housing advocate that is testing for compliance. After reviewing the Newsday investigation and the number of instances where testing found unequal treatment, this notion of trying to spot a tester remains a confounding one. That is, as a guiding principle, a Realtor® is always best served by engaging with customers and clients as though the Realtor® is always being tested and not trying to spot a tester. The brokerage would be well served by instilling the “you’re always being tested” mindset as a business principle. Such an approach to service, whether with a customer or client, strikes me as an important one for a brokerage because it speaks to fair housing, but also strong customer and client service overall.

Acknowledging that such a constant state of self-awareness can be difficult to sustain, brokerages are very much encouraged to implement compliance programs and reminders. One such tool is the implementation of a Fair Housing Checklist within the office. It should be a document that is reducible to a single page. However, it should identify in a very straightforward manner the things that a typical compliance program would address.

The Checklist

1. COURTESY – It is important to work through exactly how a prospective client is received by either the office support staff or the salesperson. This is true, regardless of whether the venue is an office or in the field. Are all prospective clients offered the same reception? How long must they wait before someone offers them services? How responsive are agents when they receive a

voicemail or an email from a prospective client? In the initial meeting or discussion, are prospective clients offered brochures and/or literature? Are they offered immediate services regarding showings of homes or are they told that someone will phone them either that day or the next day for potential showings? With regard to courtesy, the law requires that all clients and home seekers be treated alike. If equal professional services are offered to all, there should be no problems. Customer service is a truly universal concept and it should be well-executed when it comes to fair housing law. From a broker's perspective, an agent's responsiveness should be consistent and exceptional.

2. INTERVIEWING – Getting a handle on the housing market that the prospective client is hoping to enter is a particularly sensitive situation. During the interview process, it is imperative that every prospective client is being asked the same questions concerning price range, type of housing preference, type of features desired. If the prospective client takes charge of the interview and narrows the housing search on their own accord then the agent should attempt to search accordingly and within the law – always remembering, however, to document the search process. Additionally, if the agent mostly facilitates the search, remember, if specific inquiries are made of some, they should be made of all.

And perhaps most importantly, educate agents of the dangers of making assumptions about the housing needs of a customer or client. In the real estate context, these assumptions are at the heart of nearly every instance of unconscious bias. Unconscious bias (aka implicit bias) is often defined as prejudice or unsupported judgments in favor of or against one person or group. These biases can present themselves without warning and with even the best intentions. An agent should always be mindful of the way they approach an interview and avoid interjecting assumptions,

remembering that such assumptions are going to be born out of the agent's perspective – not that of the customer or client. An illustration of this misstep would be an agent telling a client or customer “this neighborhood you're looking at is great, but I think you may be more comfortable **in...**”

3. HOUSING AVAILABILITY – It is important for a salesperson to be aware of the number of available housing choices that are ready for immediate viewing. This is especially true with low inventory levels. For many agents, this comes down to entering criteria into the computer and receiving a detailed list of options. Be certain to include all homes that fit within the criteria given to you by the client. Also, do not assume that the client understands the way in which the search may be altered by the slightest variable. If a home meets the buyer's preference, do not omit showing it. Be careful to suggest the identical number and types of homes to all persons regardless of background – or take care to explain the reasons why the given criteria may have created limitations in possible listings. Note: The content, quality and quantity of the information provided as well as the level of service provided to all prospective clients should be equal – or well documented as to any deviation. Consistency is key.

4. LOCATION – Show all prospective clients the same locational choices unless you are specifically requested to show homes only in certain areas. All homes that fit the buyer's preferences must be shown to give as wide a freedom of choice of housing as possible. It should be the buyer's request and not your suggestion that determines the areas in which housing is sought – otherwise, you open the door for a potential fair housing claim. Requests for information and comments related to area schools should be objective and prospects should be referred to source documents to do their own inquiry.

5. **FOLLOW-UP PLAN** – This is arguably the most important thing to keep in mind. Out of sight should not be out of mind. Make sure the plan is consistent regarding all. If your brokerage has the practice of requesting contact information for a call back and receives the information but doesn't make a call back to a prospective client then it is necessary to look at the function of that internal policy. If the request is made for contact information and the prospective client does not have a phone or does not wish to give that information then it should be noted by the salesperson that the prospective client did not leave information for a follow-up.

Embrace Training and Different Perspectives

Upholding Fair Housing Law, along with the Realtor® commitment to equal housing opportunity, is not as simple as common sense. The Newsday investigation is a sobering reminder that brokerages should never take compliance for granted. Regular education and ready reminders are helpful in fostering a culture of compliance within the brokerage.

In early June, the National Association of Realtors® partnered with the Perception Institute to develop a powerful training video to address unconscious bias. As we strive for continued progress and housing opportunity, I encourage you to have the entire brokerage watch “Bias Override: Overcoming Barriers to Fair Housing.” That video is available on NAR website at the following link: <https://www.nar.realtor/videos/bias-override-overcoming-barriers-to-fair-housing>. A brokerage's openness to new ideas and teaching methods will go a long way towards ensuring that fair housing education and awareness is part of the brokerage culture.