

MICHIGAN REALTORS®

2015 Legal Review

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ANY DUTY TO DISCLOSE?

More than one listing Realtor® has found himself in a situation where he believes there is a defect in a property he has listed, but his seller either is in denial about the existence of the defect or simply does not want it disclosed to the buyer. The question then becomes, under Michigan law does the Realtor® have a duty to disclose the defect to a prospective buyer potentially in violation of his or her duty of confidentiality and loyalty to the seller. Further, if the Realtor® does not disclose the defect to the prospective buyer, can the Realtor® be liable to the buyer when the defect is discovered after closing?

The answer to these questions is most easily understood in the context of a hypothetical. Assume Partnership A owns a small shopping center in a small city. Partnership A has used Realtor® B for leasing and other real estate related services for the shopping center for a number of years. Partnership A decides to sell the shopping center and lists it with Realtor® B.

Assume further that Realtor® B does not receive any offers for the shopping center from local buyers. This is likely due at least in part to the fact that the shopping center was built on topography which in effect places it at the bottom of a clay bowl. As the land around the shopping center was developed, the shopping center began to flood regularly each spring. Partnership A and Realtor® B have been to the county drain commissioner's office on at least two occasions over the years seeking a solution to the flooding problem, but have been advised that the problem cannot be fixed. Presumably potential local buyers would have some knowledge of the flooding problem at the shopping center.

Buyer C is from out of town. Partnership A does not provide a seller's disclosure statement both because the shopping center is commercial property not requiring a seller's disclosure statement and because Partnership A has never occupied the property. Buyer C purchases the property from Partnership A in its "as-is" condition with no representations or warranties implied as to the condition of the shopping center. The purchase of the shopping center by Buyer C closes in January. Two months later the shopping center floods after a heavy rainfall. Buyer C then discovers that flooding problems have existed at the shopping center for many years. Buyer C sues the seller, Partnership A and the listing broker, Realtor® B, based on various legal theories.

First, Buyer C sues Partnership A and Realtor® B under a fraud theory. In order to prove fraud against Partnership A and/or Realtor® B, Buyer C must prove the following:

- 1) Partnership A and/or Realtor® B made a material representation;
- 2) The representation was false;
- 3) When Partnership A and/or Realtor® B made the representation, they knew it was false, or, alternatively, they made the representation recklessly without knowledge of its truth as a positive assertion;
- 4) Partnership A and/or Realtor® B made the representation with the intention that Buyer C act upon it;

- 5) Buyer C acted in reliance upon the false representation made by Partnership A and/or Realtor® B; and
- 6) Buyer C suffered damage.

In our hypothetical, neither Partnership A nor Realtor® B made any representations to Buyer C about the condition of the shopping center. They said nothing. To date, there is no Michigan case holding a listing Realtor® liable for simply failing to disclose a defect to a buyer. Michigan courts have found that the imposition of a duty on the listing Realtor® to disclose defects to the buyer, would conflict with the fiduciary duties owed by that listing Realtor® to the seller. Michigan courts have characterized the relationship between a listing Realtor® and a buyer as a “commercially antagonistic.”

Second, Buyer C sues Partnership A and Realtor® B under a theory of innocent misrepresentation. An innocent misrepresentation claim differs from a fraud claim in that Buyer C would not have to prove that Partnership A and/or Realtor® B made a misrepresentation with fraudulent intent or for a fraudulent purpose. In other words, Buyer C would only need to show that Partnership A and/or Realtor® B made a representation they believed to be the truth but that turned out not to be true.

Based upon the facts in our hypothetical, Buyer C’s claim for innocent representation would fail against Partnership A and Realtor® B. It would fail against Partnership A because Partnership A made no representations with respect to the condition of the shopping center. It would fail against Realtor® B for two reasons. Realtor® B made no representations with respect to the shopping center (innocent or otherwise) and Realtor® B was not in privity of contract with Buyer C. An innocent representation claim can only be made in connection with the making of a contract. Buyer C had no contract with Realtor® B.

Third, Buyer C sues Partnership A and Realtor® B under a silent fraud theory. This type of claim is also known as fraud by non-disclosure or fraudulent concealment. Buyer C would claim that Partnership A and Realtor® B engaged in silent fraud because they both knew about the history of the severe flooding problem at the shopping center and failed to volunteer that information to Buyer C prior to closing. Buyer C would maintain that a silent fraud claim is viable where a buyer is able to prove that a seller knew about a defective condition and did not disclose it to the purchaser.

In our hypothetical, Buyer C would lose on a claim of silent fraud or fraudulent concealment against Partnership A and Realtor® B. In order to make a claim for silent fraud against Partnership A or Realtor® B, Buyer C would have to prove that Partnership A and/or Realtor® B were not completely silent with respect to the condition of the property. For example, assume in our hypothetical that Buyer C noticed that the shopping center was built in a bowl and discussed the potential for flooding with Partnership A and/or Realtor® B. Assume further that in those discussions Partnership A and/or Realtor® B indicated to Buyer C that there had been “some dampness” over the years, but nothing substantial. Under those facts, Partnership A and Realtor® B could be liable for silent fraud. In situations where a buyer expresses some particularized concern or makes a direct inquiry, silent fraud will be proven if the seller or the listing Realtor® fails to disclose material facts within their knowledge.

As another example, assume in our hypothetical that prior to putting the shopping center on the market, Partnership A and Realtor® B made a third trip to the county drain

commissioner and were advised that drainage improvements had been made on adjacent property that will eliminate the flooding problem at the shopping center. After the property was listed, in discussions with Buyer A, it is indicated by Realtor® B that there was a flooding problem but that it has been fixed. Thereafter, prior to closing, Partnership A and/or Realtor® B are advised by the county drain commissioner that his prior information was incorrect, *i.e.*, the improvements on the adjacent property will not solve the flooding problem at the shopping center. Again, under these facts, the partnership and Realtor® B could be liable for silent fraud. Under Michigan law, a seller and/or a listing Realtor® have a duty to disclose information if necessary to correct previous representations which, when made, were believed to be true, but which are now known to be false or misleading. A seller or listing Realtor® who fails to do so may be liable for silent fraud.

To make certain that there is no misunderstanding, the analysis above with respect to when a listing Realtor® must make a disclosure to a buyer has absolutely no application when dealing with a listing Realtor®'s duty to disclose to the seller, or a buyer's agent's duty to disclose to the buyer. If there is an agency relationship, the agent has a duty of complete disclosure to his or her principal unless the duty has been modified by contract. For example, if in our hypothetical Buyer C had retained the services of local Realtor® D and local Realtor® D knew that the shopping center suffered severe flooding for many years, Realtor® D would have a fiduciary duty to make that disclosure to Buyer C.

Finally, no discussion of the duty to disclose would be complete without a short discussion of dual agency. If, in our hypothetical, Realtor® B had represented both Partnership A and Buyer C, he would have been put in an impossible position. He would have had a duty of confidentiality and loyalty to Partnership A, as the seller and a duty of disclosure to Buyer C. These duties cannot be reconciled unless Partnership A and Buyer C knowingly consented to dual agency and, preferably, signed a dual agency agreement acknowledging that Realtor® B would not disclose to one party information learned in the agency relationship with the other party.

In sum, a listing Realtor® has no duty under Michigan law to disclose defects to a buyer. If a listing Realtor® makes misrepresentations to a buyer, then he or she could be liable for fraud. If, in response to questions or inquiries from a buyer, a listing Realtor® fails to fully disclose what he or she knows, then he or she could be liable for silent fraud. Further, if a listing Realtor® makes a representation to a buyer and later finds out that the representation is untrue, the Realtor® may be liable for silent fraud if he or she does not correct his or her prior statement.

COMMON CORPORATE QUESTIONS

There are a number of recurring questions posed to association executives (“AEs”) and officers. The answer to many of these questions lies within the Michigan Nonprofit Corporation Act.

Profit or Nonprofit Corporation?

When AEs and officers are looking for answers to corporate questions, the first thing that needs to be determined is what law governs the association. There is oftentimes confusion on this issue which arises from the loose use of terms. On more than one occasion, members believe that an association is organized on a “for-profit” basis. This leads them and their lawyers to believe that the association is governed by the provisions of the Michigan Business Corporation Act. They are often led down this path based upon their understanding that the association is not tax-exempt.

The issue of whether an association has obtained an exemption under Section 501(c)(6) of the Internal Revenue Code does not address this question of whether the association is organized as a profit or nonprofit corporation under Michigan law. An association of Realtors® in Michigan may be organized as a nonprofit corporation but claim no exemption under Internal Revenue Code Section 501(c)(6).

We have checked. Every Realtor® association formally incorporated under Michigan law is incorporated as a nonprofit corporation. Thus, corporate governance questions involving any local Realtor® association in Michigan will be governed by the Michigan Nonprofit Corporation Act (the “Act”).

Disclosure of Information

On occasion, associations receive requests or demands from members for very detailed information about the financial affairs of the association. These requests can include information as to the salary and benefits of employees of the association, specific expenditures by the association, and account balances of the association. Questions arise as to what information associations are required to provide to members and/or what members are entitled to know about the affairs of the association.

Many members somehow believe that the Michigan Freedom of Information Act (the “FOIA”) applies to a nonprofit corporation. There is absolutely no question that the FOIA has absolutely no application to a Michigan nonprofit corporation. The FOIA only applies to governmental entities.

The amount of information an association may be required to provide its members under the Act used to be very limited. However, under the amendments to the Act which became effective in 2015, members may be entitled to much more information. First, as before, Section 487(1) of the Act provides that upon written request by a member, the association shall mail to the member its balance sheet as of the end of the preceding fiscal year; its statement of income for that fiscal year; and, if prepared by the association, its statement of source and application of funds for that fiscal year.

Second, Section 487(2) now provides that a member may, during regular business hours, inspect for any proper purpose a list of the association’s members “and its other books and records,” if the member gives the corporation a written demand describing with

reasonable particularity the purpose of the inspection and the records the member desires to inspect, if the records sought are directly connected with that purpose. This Section defines a “proper purpose” as a “purpose that is reasonably related to a person’s interest as a . . . member.” The member must deliver the demand to the association’s registered office or principal place of business.

If the association does not permit an inspection required under Section 487(2) within five (5) business days after it receives a written demand from a member, or if the association imposes unreasonable conditions on the inspection, the member may go to the circuit court to seek an order compelling the association to permit the inspection.

If when the member goes to circuit court, he or she is seeking to inspect the books and records of the association beyond just a list of the association’s members, then the burden is on the member to establish that the inspection is for a proper purpose and that the documents sought are directly connected to that purpose. If, on the other hand, the member simply seeks to inspect a list of members of the association, then the association has the burden to establish that the inspection of the member list is for an improper purpose or that the member list is not directly connected with that purpose. The circuit court is granted broad discretion to determine what documents may be reviewed by the member, if any, to prescribe the conditions and limitations on the inspection and to order such other relief as the court deems appropriate.

It should be noted that Section 487(4) also grants a director the right to examine any of the association’s books and records for any purpose reasonably related to his or her position as a director. If the association does not permit the director to review the association’s books and records, then the director may also go to the circuit court, which may exercise its discretion to permit the director to inspect any and all books and records and to prescribe conditions and limitations on that inspection.

Finally, if a member or a director is required to go to court in order to obtain access to the association’s records and if the circuit court orders the inspection of the records demanded by the member or director, then the court is required to order the association to pay the member’s or director’s costs, including reasonable attorneys fees, incurred in obtaining the order. The only exception will occur if the association proves that it failed to permit the inspection by the member or director in good faith because it had a reasonable basis to doubt the right of the member or director to inspect the records demanded.

In sum, pursuant to Section 487(1), if an association receives a request in writing by a member for the association’s balance sheet for the preceding fiscal year or its statement of income for that year or its statement of source and application of funds for that year (assuming that one exists), the association should mail those documents to the member. If an association receives a demand from a member to inspect a list of the members, the association should make the list available for inspection within five (5) business days. Finally, if an association receives a written request for a member to examine other books and records of the association and the association does not want to comply with the request, it is strongly recommended that the association forward the request to its legal counsel to determine if there is a good faith basis for withholding any or all of the requested records. Otherwise, if the member goes to the circuit court and obtains an order requiring inspection of the requested documents, the association could be required to pay the member’s costs and reasonable attorneys fees in obtaining the order. Prior to withholding any requested records,

the association should have an opinion from its legal counsel that it can refuse the inspection in good faith because it has a reasonable basis to doubt the right of the member to inspect the requested records.

What Records Must Be Maintained?

If members can, upon a minimum of five (5) days written demand, review minutes of member meetings, question then arise as to whether minutes must be maintained for member meetings and what those minutes should look like or contain.

Section 485 of the Act simply requires that a nonprofit corporation keep “books of records of account and minutes of the proceedings of its . . . members, board, and executive committee, if any.” The term “if any” at the end of this sentence in the statute has been informally interpreted by lawyers as meaning “minutes of the proceedings of members, board and executive committee, if any such proceedings have been held.” A conservative interpretation of the statute would result in the conclusion that some form of minutes should be kept for all meetings of the members, board of directors and executive committee, assuming an executive committee exists.

There is absolutely no legal requirement with respect to the composition or content of minutes of a meeting of members, board of directors or executive committee. It has been recommended for some years that the minutes set forth the formal actions and record any abstention or votes if requested by a voting participant.

Who Runs This Association?

Some members have the mistaken belief that Realtor® associations are organized as participatory democracies and that all substantial questions should be resolved by a membership vote. The Act does not support this view of the governance of a nonprofit corporation.

Section 501(1) of the Act provides that the business and affairs of a nonprofit corporation shall be managed by, or under the direction of, its board of directors, except as otherwise provided in the Act or in the corporation’s articles of incorporation. The Act goes on in Section 505(1) to require that a board of directors consist of at least three (3) persons, but that the number of directors shall be specified in the bylaws of the corporation, unless the articles of incorporation fix a number.

Obviously, an association can establish in its bylaws a number of decisions which must be approved or ratified by the members of the association. For example, a number of associations require that the membership approve the sale of any real estate owned by the association. As another example, many associations’ bylaws require membership approval for expenditures by the association in excess of a specified amount. All that being said, the bottom line is that the Act places management of the association’s affairs squarely on the board of directors.

Removal of a Director

At times, members of a board of directors or members of an association become dissatisfied with the performance of one or more members of the board of directors. They want to know how a member of the board of directors can be summarily dismissed from the board. In reviewing this issue, the first place to look is the bylaws or articles of incorporation

of the association. As an example, many associations have a provision calling for the dismissal of members of the board of directors if they are absent without an acceptable excuse for a specific number of meetings.

The provisions in Section 511(1) of the Act governing the removal of a member of the board of directors are fairly straightforward.

First, a member of the board of directors can be removed by a majority vote of the members entitled to vote at an election of directors for any reason or no reason at all. This provision makes sense, inasmuch as if a member of the board of directors is elected by a majority vote of the members, he or she can also be removed by a majority vote of the members entitled to vote at an election of directors. The Act as amended in 2015, now provides that an association's articles of incorporation could limit the removal of a director only for cause. The association would need to amend their articles of incorporation to create this limitation.

Second, Section 511(2) also provides that a member of the board of directors may be removed with cause by a vote of the majority of the directors then in office. More than once, this provision has been misconstrued to permit the board of directors of a Realtor® association to vote a member of their board out of office. This provision only applies if a nonprofit corporation is organized upon a directorship basis under the Act. **There are currently no Realtor® associations in Michigan organized upon a directorship basis under the Act** and, therefore, this provision would not apply.

In sum, if members of a board of directors or members of an association wish to remove a member of the board of directors, they should look to the association's bylaws and articles of incorporation. The Act only permits the removal of a member of the board of directors through the election process.

The Officer is Not Doing Her Job

Members sometimes complain that an officer of an association is not properly carrying out his or her duties as an officer of the association. Members want to know what a specific officer is required to do under Michigan law. A description of the duties of a president, secretary or treasurer are not to be found under the Act.

Section 531(1) of the Act specifies that the officers of a nonprofit corporation shall consist of a president, secretary, treasurer and, if desired, a chairperson of the board, one or more vice presidents, and such other officers as are described in the bylaws or determined by the board of directors of the association. Further, two or more offices may be held by the same person, although that officer cannot execute, acknowledge or verify an instrument of the association in more than one capacity.

Section 531(4) addresses the duties of officers of a nonprofit corporation. This statute specifies that an officer, as between that officer, other officers and the nonprofit corporation, has the authority and shall perform those duties in the management of the corporation "as may be provided in the bylaws or determined in accordance with a resolution of the board that is not inconsistent with the bylaws."

Section 541 of the Act does require that a director and officer discharge the duties of that position in good faith and with the degree of care that an ordinarily prudent person in a like position would exercise under similar circumstances.

There are safe harbors for officers and members of the board of directors when considering complex information or rendering decisions on difficult issues. Section 541 provides that in discharging his or her duties, an officer or director is entitled to rely upon information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by any of the following:

1. One or more directors, officers or employees of the nonprofit corporation whom the director or officer reasonably believes to be reliable and competent in the matters presented;
2. Legal counsel, public accountants, engineers or other persons as to matters the director or officer reasonably believes are within the person's professional or expert competence; or
3. A committee of the board of which he or she is not a member if the director or officer reasonably believes that the committee merits confidence.

It should be noted that the above three safe harbors for an officer or director do not apply if an officer or director has knowledge concerning the matter in question that would make reliance otherwise permitted to be unwarranted. For example, if a financial matter is before the board of directors and a member of the board of directors was a CPA with expertise in the matter before the board, that board member may not be able to rely upon an opinion offered by the association's outside accounting firm.

Who Gets to Attend the Meeting?

There are times when it is discovered that a member intends to attend a board of directors meeting and there is concern that the member may either bring up an inappropriate topic or behave inappropriately. The question arises as to whether the member must be permitted to attend the meeting. Some AEs have expressed concern that the Michigan Open Meetings Act (the "MOMA") requires that the member be permitted to attend the board of directors meeting.

First, the MOMA has absolutely no application to any meetings held by an association of Realtors®. The MOMA only applies to publicly incorporated bodies, *e.g.*, a township board of trustees or a city council.

Second, the Act does not require that a nonprofit corporation make its board of directors meetings, committee meetings, or any meeting other than a general membership meeting open to the members of the nonprofit corporation. The Act is simply silent on this issue.

Finally, if an association of Realtors® wishes to have a policy on permitting or not permitting members to attend board of directors meetings or other committee meetings, it may do so by addressing the subject in its bylaws. If an association of Realtors® wishes to control its agenda and prohibit general discussions of unknown topics by members who attend board of directors meetings, the association may wish to consider adopting a bylaw which permits a member to notify the association in advance of their desire to attend the board of directors meeting and the subject upon which he or she wishes to address the board of directors. If it is determined that the subject matter is appropriate, then the member would

be permitted to attend only that portion of the meeting at which he or she would be allowed to address the board.

Conclusion

Under the Act, a nonprofit corporation is run by its board of directors. The Act generally allows each association to establish its own rules of governance in its bylaws. In 2015, the requirements for providing information to members were significantly broadened. The possible risks in denying information to members have increased as well.

EARNEST MONEY DEPOSITS AND FAILED TRANSACTIONS

Almost every day, the Michigan Realtor® Hotline receives at least one call from a Realtor® who is holding an earnest money deposit (or “EMD”) on a failed transaction. This article contains a number of rules that hopefully should help guide Realtors® who find themselves in this situation.

Consider the following hypothetical:

A purchase agreement has a financing contingency. The home does not appraise anywhere close to the agreed-upon purchase price, so the buyer’s loan application is denied. Buyer terminates the purchase agreement. Seller is so angry about the low appraisal, he refuses to sign the broker’s standard release form authorizing the release of the EMD to the buyer.

What do the Realtors® involved in this transaction need to know?

1. A Realtor®’s “standard” release form typically provides that the buyer and seller release each other and the real estate brokers involved from any liability relating to the transaction. While it is a good business practice to obtain such a release, a Realtor® cannot condition the release of an EMD on the signing of such a release.
2. A Realtor® can condition the release of the EMD on the signing of a release form that is nothing more than an agreement as to which party is to receive the EMD. However, the law does not require such written authorization. The law says only that a broker cannot release an EMD “for which the buyer and seller have made claim.” In other words, if both the seller and the buyer claim to be entitled to the EMD, then the Realtor® must hold the EMD.
3. The rule that the Realtor® must hold the EMD if there is a dispute over who is entitled to the EMD applies even if one of the parties is clearly wrong.
4. The rule that the Realtor® must hold the funds if there is a dispute refers to a dispute over the EMD. It is not necessary that buyer and seller have resolved all of their differences. Assume that a seller announces that he is breaking the sale contract, will not sell his home, and immediately authorizes the release of the EMD to the buyer. In that situation, the EMD may be released to the buyer even if the buyer intends to sue the seller for breach of contract (provided the release is not conditioned on the buyer waiving all claims against the seller). For purposes of the Occupational Code and Rules, the question is only whether the parties disagree over who is entitled to the EMD.

5. Once there is a dispute, the Realtor® does need a written agreement in order to release the EMD. The Realtor® does not need (and cannot require) a full release of all claims, but simply a written agreement over the disbursement of the EMD.
6. The fact that the buyers and sellers do not agree on the release of the EMD does not prevent the sellers from relisting their house. If there is no disagreement over the fact that the purchase agreement has been terminated, then the sellers can and should relist their house. (If on the other hand, the buyers indicate that they intend to try and enforce the purchase contract, then the sellers should talk to a lawyer before obligating themselves under a second sales agreement.)
7. There is a process – called an “interpleader” action – whereby a broker can turn over the EMD to a court and have the court decide whether the buyer or seller is entitled to it. However, the process requires the broker to file a lawsuit and, therefore, the broker will need to hire an attorney to interplead an EMD. Michigan Realtor®’s online law library has an “Interpleader Packet” designed to assist broker’s counsel in doing so.
8. If the EMD is less than \$5,500, the sellers or buyers may ask the small claims court to issue an order directing the release of the EMD or awarding them the EMD.
9. EMDs that are “dormant” (*i.e.*, unclaimed for a period of 3 years) must be turned over to the State. The filing deadline is July 1 of each year and Realtors® can face interest and significant penalties if they fail to do so. An article discussing the escheats process in detail is available online in the Michigan Realtor®’s law library.

FIRPTA AFFIDAVITS – A NEW TWIST

For decades, at closings, sellers have been required to sign an affidavit certifying that he/she is not a foreign person. This practice is based upon a federal statute, the Foreign Investment in Real Property Tax Act (“FIRPTA”), that requires persons who buy property from foreign persons or entities to withhold a portion of the sale proceeds and pay them to the IRS to cover the seller’s potential tax liability. FIRPTA applies to all commercial property and to residential property with a value of over \$300,000. While purchasers have the primary responsibility for complying with this law, real estate agents and lawyers involved in the transaction are also responsible for compliance.

If a seller is not a “foreign person,” then no withholding is required. In order for a purchaser to be protected, a non-foreign seller is typically required to sign an affidavit stating that he or she is not a foreign person (*i.e.*, a “FIRPTA affidavit”). If the seller certifies that he/she is exempt (*e.g.*, a United States citizen or a United States green card holder), nothing else is required. A purchaser is entitled to rely on the seller’s affidavit, unless the purchaser or his agent has actual knowledge that the affidavit is false. If a seller cannot provide, or is unwilling to provide, a “FIRPTA affidavit,” then the purchaser must make certain that 10% of the “amount realized” by the seller in the transaction is withheld. The “amount realized” is generally the amount paid for the property. If the purchaser does not obtain an affidavit or withhold 10% of the sale price, then the purchaser could be responsible for the foreign seller’s unpaid taxes on the transaction.

It came to our attention recently that at least one Michigan title company is asking purchasers to sign a form at closing purporting to release the title company from any FIRPTA compliance responsibility. An example of such a form is attached. Since this “release” is contained in a closing form entitled “FIRPTA affidavit,” it is easy to see how a Realtor® could overlook it. Realtors® are cautioned to keep an eye out for this type of affidavit. (In the ordinary course, only sellers should be signing a FIRPTA affidavit and the fact that the purchaser is being asked to sign the FIRPTA affidavit should be a red flag.) Under no circumstances should purchasers sign a release such as the one contained in Part D on the attached Form.

EXHIBIT A

Foreign Investment in Real Property Tax Act (FIRPTA) Affidavit of Disclosure
(Internal Revenue Code Section 1445)

Instructions: Section A and EITHER Section B, C or D (as applicable) must be completed and signed on ALL transactions involving a sale/transfer.

A

Notice Regarding "Foreign Investment in Real Property Tax Act"
Section 1445 of the Internal Revenue Code

Effective January 1, 1985, Section 1445 of the Internal Revenue Code, requires that every Buyer of real property from a foreign seller, withhold ten percent of the gross purchase price and transmit that sum to the IRS for application against the Seller's tax liability.

Certain exceptions may apply, such as the purchase by a buyer of a property acquired for use as the buyer's residence and the amount paid is \$300,000.00 or less. Also, the Buyer may rely on an Affidavit from the Seller as shown below, subject to certain limitations.

If withholding is required, and the Buyer fails to make the necessary withholding, FIRPTA states that the Buyer shall be responsible for the payment.

Title Agency is not authorized by law to advise you on this tax matter. We suggest that you consult with your attorney or tax advisor.

This form must be signed and returned by each named Buyer and Seller, or by an authorized agent for each named Buyer and Seller.

B

Certification of Non-foreign Status
(Individual)

Section 1445 of the Internal Revenue Code provides that a transferee (buyer) of a U.S. real property interest must withhold tax if the transferor (seller) is a foreign person. To inform the transferee (buyer) that withholding of tax is not required upon my disposition of a U.S. real property interest, I _____, certify the following:

1. I am not a non resident alien for purposes of U.S. income taxation;
2. My U.S. taxpayer identification number (Social Security Number) is on file with Title Agency; and
3. My home address is _____.

I understand that this certification may be disclosed to the Internal Revenue Service by the transferee and that any false statement I have made here could be punished by fine, imprisonment or both.

Under penalties of perjury, I declare that I have examined this certification and, to the best of my knowledge and belief, it is true, correct and complete.

C

Certification of Non-foreign Status
(Corporation, Partnership, Transferor Estate)

Section 1445 of the Internal Revenue Code provides that a transferee (buyer) of a U.S. real property interest must withhold tax if the transferor (seller) is a foreign person. To inform the transferee that withholding of tax is not required upon disposition of a U.S. real property interest by:

(Signatory), the undersigned hereby certifies the following on behalf of _____
(Transferor).

1. Transferor is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulation);
2. Transferor's employer identification number is _____; and
3. Transferor understands that this certification may be disclosed to the Internal Revenue Service by transferee and that any false statement contained herein could be punished by fine, imprisonment or both.

Under penalties of perjury, I declare that I have examined this certificate and, to the best of my knowledge and belief, it is true, correct and complete, and I further declare that I have the authority to sign this document on behalf of the Transferor.

D

Instructions Regarding the Withholding of Tax on
Dispositions of United States Real Property Interests

You have informed us that effective January 1, 1985, the Internal Revenue Code was amended by adding new Section 1445, which requires the transferee to deduct and withhold a tax equal to thirty-five (35) percent of the amount realized on the disposition of a United States Real Property Interest by a foreign person; that the transaction that is the subject matter of this escrow may fall within the requirements of Section 1445; and that we should independently contact our lawyer or tax advisor to determine how to proceed under the circumstances.

We have elected to deal with the applicability or non-applicability of Section 1445 outside of the escrow and, therefore, instruct you that you should not concern yourself with the application of Section 1445 to this transaction.

SPECIAL ASSESSMENTS PAYABLE IN INSTALLMENTS

The Michigan Legislature recently amended the Township Improvement Act to address the situation whereby all future installments of a special assessment must be paid in full when a house is sold. Under this legislation, if a special assessment is payable in installments, the lien covers only the particular installment that is due.

The problem with the legislation is that it doesn't come close to covering all types of municipal special assessments. There are twenty or so different statutes authorizing local governmental units to impose a special assessment. The new legislation only covers assessments imposed by townships (not by cities or counties) and not even all township assessments. It is also not clear whether the change covers future installments of an existing special assessment or only assessments imposed after the legislation was enacted.

Some purchase agreement forms condition the responsibility for payment of a special assessment on whether or not it is a lien. For example:

SPECIAL ASSESSMENTS which are a lien on the property before the date of Closing will be paid by SELLER.

The potential ramifications of using such a proration clause is perhaps easiest to explain through the use of a hypothetical. Assume a county drain commissioner specially assesses a property \$15,000 and permits the property owner to pay the special assessment in 15 annual installments of \$1,000. Under the Drain Code, the entire amount of the special assessment would be a lien against the property, whether it is in the first year, tenth year or fifteenth year.

Assume that a township makes a special assessment against this same property in the amount of \$15,000 under the Township Improvement Act and permits the property owner to pay the special assessment in 15 annual installments of \$1,000. At any given time, the lien against the property would be no more than \$1,000, *i.e.*, the installment due in the year of sale.

If this property is sold in the third year of the county drain special assessment, the lien would be for \$12,000 which the seller would be required to pay at closing. If the sale is in the third year of the special assessment under the Township Improvement Act, the only lien on the property that the seller would be required to pay would be the \$1,000 installment due in the year of sale.

In order to avoid this confusion, Realtors® are encouraged to use purchase agreements that do not condition responsibility for future installments of a special assessment on whether or not the installments are currently a lien on the property. A purchase agreement form can simply refer to responsibility for "all future installments of any special assessment" without reference to whether or not these installments are "a lien." For example:

SPECIAL ASSESSMENTS: All special assessments for municipal improvements shall be paid by the Seller, provided, however, that in the event a special assessment is payable in installments, current and future installments shall be allocated between Seller and Buyer using the same method for the proration of real estate taxes; or paid in full by Seller at closing.

By using an assessment provision that avoids the lien discussion, parties can avoid having to figure out whether all future installments of a particular assessment currently are or are not a lien on the property.

CFPB – WHERE ARE WE NOW?

On July 21, 2011, the Consumer Financial Protection Bureau (the “CFPB”) took over RESPA enforcement from HUD. Since that time, according to its own records, CFPB has initiated or participated in 67 enforcement actions. The CFPB’s own record of its enforcement actions is attached to this article as Exhibit 1. The CFPB reports having collected payments to consumers and fines totaling \$6,765,789,588.

While at the time it took over enforcement of RESPA, the CFPB adopted the regulations previously promulgated by HUD, it is apparent to many that the CFPB’s interpretations of at least some of those regulations differs from HUD’s prior interpretations. The purpose of this article is to review those enforcement actions which address, directly or indirectly, the activities of Realtors® and other settlement service providers with whom they do business (*e.g.*, title agencies, mortgage brokers, lenders) to determine where the CFPB is enforcing RESPA in the same manner as HUD; where the CFPB appears to be enforcing RESPA with a different view than HUD; and where the CFPB may be heading in the future.

It is important to keep in mind that CFPB enforcement actions are primarily based upon Section 8 of RESPA, 12 USC § 2607 (“Section 8”). A complete copy of Section 8 is attached to this article as Exhibit 2. Subsections (a) and (b) of Section 8 provide as follows:

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

A. Things that Remain the Same

1. Rent as kickback for referrals.

In the matter of Fidelity Mortgage Corporation and Mark Figert (January 15, 2014), Fidelity Mortgage originated federally related residential mortgage loans in the St. Louis metropolitan area. Figert and a predecessor company to Fidelity Mortgage made a written proposal to a Missouri bank where they would enter into a “joint venture.” It was agreed that the bank would outsource its residential mortgage lending to Fidelity Mortgage by referring customers seeking loans. In turn, Fidelity Mortgage would lease an office at the bank allegedly needed to meet with borrowers, complete loan applications and close loans.

Figert and Fidelity Mortgage entered into a lease agreement with the bank, but refused to agree to a flat monthly rental payment. Instead, the rent was tied to Fidelity Mortgage’s total loan volume and its purported use of the office space. They ultimately negotiated a daily rental rate of \$200 as well as an exclusivity clause requiring the bank to

promote Fidelity Mortgage and vice versa. The leased office was an interior office surrounded by bank personnel and leased from March, 2012 through November, 2012. During that time Fidelity Mortgage originated about 20 loans and collected \$27,076 in origination fees from those loans. Fidelity Mortgage paid the bank monthly rent amounts ranging from \$800 to \$2,000 with an average of \$1,350 per month. Relying on a 1996 policy statement from HUD for determining whether above-market rent might be a "disguised referral fee," the CFPB focused on the "general market value" of the property, rather than the value of the property to a settlement service provider. In other words, the rent being paid should be equal to the rent that a non-settlement service provider would pay for the same amount of space in a comparable building.

In this case it was found that monthly rents for comparable space ranged from \$600 to \$900 per month (compared to the \$800 to \$2,000 that had been paid by Fidelity Mortgage). Accordingly, Fidelity Mortgage and Mark Figert were found to be in violation of Section 8. Fidelity Mortgage was required to disgorge the \$27,076 of origination fees. In addition, it agreed to pay CFPB a civil money penalty of \$54,000.

2. Sham Joint Ventures.

In the matter of Paul Taylor, Paul Taylor Homes Limited, and Paul Taylor Corp. (May 17, 2013), it was argued that Paul Taylor, a Texas builder and his home building company, Paul Taylor Homes Limited and its general partner, Paul Taylor Corp., had violated Section 8.

In 1999, Taylor and Stratford Mortgage Services, a subsidiary of Benchmark Bank, entered into a joint venture to establish Stratford Mortgage Services, LC ("Stratford"). Stratford Mortgage Services and Taylor each contributed \$25,000 to Stratford's capitalization in exchange for a 50% ownership interest. The purpose of the joint venture was to conduct mortgage originations through Stratford.

Taylor referred his building customers to Stratford for mortgage origination services. Thirty-two loans were originated through Stratford as a result of referrals made by Taylor. Stratford conducted no origination business outside of the referrals sent to it by Taylor. Stratford did not advertise itself to the public. Benchmark Bank funded the loans originated through Stratford. Benchmark Bank conducted the underwriting, processing and closing functions for Stratford. Stratford did not have its own office. All essential functions were performed by employees of Benchmark Bank. During the relevant time period, Taylor received periodic distributions from Stratford based on his ownership interest totaling \$106,194.20. (During this same time period, Taylor had formed another joint venture with the same structure with another lender and had collected another \$12,000.)

The CFPB determined that the distributions made to Taylor did not fall under Section 8's "safe harbor" for affiliated business arrangements because Stratford did not constitute a bona fide provider of settlement services. Instead, they were deemed to be part of a sham controlled business arrangement as described in HUD's Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements.

Taylor was required to disgorge \$118,194.20.

The analysis in this matter would have equal application to joint ventures between real estate brokerage firms and title agencies.

3. Fake Employees.

In the matter of Stonebridge Title Services, Inc. ("Stonebridge") (June 12, 2014)

a New Jersey title insurance agency claimed to have employed several salespersons to solicit title insurance business for Stonebridge. These employees had developed relationships with entities, typically law firms, and referred those entities to Stonebridge for title insurance and related services. Pursuant to the written agreements between Stonebridge and these employees, the employees would receive commissions for each title insurance order placed by a firm that the employee had referred it to Stonebridge. The commission payment amounts were based on the value of the title insurance premiums multiplied by an agreed upon percentage. From 2008 through 2013, Stonebridge paid out approximately 40% of its title insurance premiums to these employees. The employees did not perform any title services or any other non-referral services for Stonebridge for which they were to be compensated.

Obviously, Section 8 (a) generally prohibits compensating a person for referring business. However, it is not a violation of Section 8 for an employer to pay its own employees for referral activities. In this case, however, the CFPB found that although they had been treated as "employees" for tax purposes and had received W2s, they were actually independent contractors because Stonebridge did not have the right or power to control the manner and means by which these persons performed their duties.

Stonebridge agreed to pay a civil money penalty of \$30,000 to the CFPB.

B. New Ground

1. Affiliated Business Arrangements.

In the matter of JRHBW Realty Inc. doing business as RealtySouth, TitleSouth, LLC ("RealtySouth") (May 24, 2014), the CFPB broke new ground with respect to what constitutes a violation of Section 8 when dealing with affiliated businesses. RealtySouth had an affiliated business, TitleSouth, LLC ("TitleSouth") which provided title insurance. In addition, TitleSouth Closing Center was an operating division of TitleSouth which provided closing services.

RealtySouth strongly encouraged its real estate agents to use the affiliated companies of RealtySouth, including, particularly, TitleSouth. In certain instances, RealtySouth's agents were told that they were required to use TitleSouth.

Beginning in March, 2011 until May, 2012, RealtySouth used a preprinted form of purchase agreement that expressly directed the title and closing services to TitleSouth. Paragraph 5 of the 2011 purchase agreement form provided:

Title Insurance. Seller agrees to furnish Buyer a standard form owner's title insurance policy issued by TitleSouth, LLC in the amount of the purchase price. . .

Paragraph 18 of the 2011 purchase agreement form was entitled "Selection of Closing Agent," and provided:

Buyer and Seller hereby agree that the closing of this transaction shall be conducted by the TitleSouth Real Estate Closing Center and agree to share equally the closing fees for this transaction.

After being contacted by the CFPB, RealtySouth changed the terms regarding title insurance and closing services in its preprinted purchase agreement form. Paragraph 5 of the

2012 purchase agreement form provided:

The title insurance policies specified herein shall be obtained from (check one) TitleSouth; Other.

Paragraph 17 of the 2012 purchase agreement form provided:

The closing of the transaction contemplated by this contract shall be performed by (check one) TitleSouth Closing Center; Other.

As required by RESPA, RealtySouth had provided consumers with an "Affiliated Business Arrangement Disclosure Statement" ("ABA Disclosure") with both the 2011 and 2012 purchase agreement forms. Unfortunately, the CFPB found that RealtySouth's ABA Disclosure was not in the format prescribed by the regulations and therefore did not comply with RESPA. The CFPB found that RealtySouth's ABA Disclosure did not use capital letters or any other way of highlighting the message that consumers were free to shop around and obtain their settlement services from other providers. The CFPB also found that RealtySouth's ABA Disclosure did not properly set apart the disclosure, but instead hid that message among a list of descriptions of seven businesses affiliated with RealtySouth.

The CFPB also took issue with marketing statements contained in the ABA Disclosure which proclaimed the benefits and value of RealtySouth's affiliated businesses. Examples cited in the Consent Order were:

[We] at RealtySouth believe our affiliates provide superior service, value, and convenience; we believe that our affiliates' charges are reasonable and are competitive with the amounts charged by others for the same services; and [w]ith competitive, reasonable rates, coupled with the smooth and efficient manner in which the transaction will be handled, the affiliates of RealtySouth are in a unique position to provide you with exceptional value and service in handling your transaction.

(When RealtySouth had become aware of the CFPB's concerns with its ABA Disclosure, it had immediately changed its ABA Disclosure to address the concerns raised.)

In the Consent Order in this case, the CFPB broke "new ground" on at least two (2) issues. First, the CFPB ordered RealtySouth to use an ABA Disclosure Form in the exact format of Appendix D of 12 CFR § 1024, a copy of which is attached to this article as Exhibit 3. The CFPB ordered that RealtySouth's ABA Disclosure "... shall contain no additional marketing statements or any other statement or content that materially interferes with, detracts from, contradicts, or otherwise obscures the required disclosures."

Second, RealtySouth was ordered to insure that all of its "training materials, manuals, continuing education materials, and any other documents that provide guidance to RealtySouth agents, emphasize that agents cannot require the use of any affiliate in real estate transactions. . ."

Obviously, Realtors® with affiliated businesses should review all of their materials to make certain that no claim can be made that they require consumers to use their affiliated businesses. If Realtors® with affiliated businesses have engaged in these types of activities, they

should cease immediately.

The Order entered by the CFPB does not specifically address the use of a preprinted form which requires a seller and buyer to use a specific title company. This suggests that RealtySouth's modification of its purchase agreement to permit a consumer to select either TitleSouth or "Other" is acceptable to the CFPB. Realtors[®] using purchase agreement forms with a preprinted reference to their affiliated businesses should, at a minimum, modify the form to add "Other" as an option. However, Realtors[®] should be aware of the press release issued by the CFPB when it publicized the Consent Order. This press release stated:

RealtySouth's preprinted form purchase contracts, which its agents provided to homebuyers preparing to make an offer on a home, either explicitly directed or suggested that title and closing services be conducted by its affiliate, TitleSouth.

It would appear that the safest course may be to remove any reference to an affiliated title company in a preprinted form of purchase agreement.

2. Marketing Service Agreements.

In the matter of Lighthouse Title, Inc. (September 25, 2014), the CFPB broke new ground with respect to the viability of marketing service agreements under RESPA. This case resulted in a "Consent" Order by which a Michigan title company agreed to pay \$200,000 as a penalty for entering into marketing services agreements ("MSAs") with real estate brokerage firms which the CFPB found to violate Section 8.

Subsection (c) of Section 8 permits payments of compensation for goods actually furnished or services actually performed. Historically, it was generally believed that this provision permits a real estate broker to be paid for marketing a title company's services, so long as the compensation paid is not tied to the amount of business actually referred. In the past, HUD at least impliedly, if not expressly, found these arrangements to be lawful under RESPA.

In its Consent Order, the CFPB did find that in its MSAs, Lighthouse Title had based the fee amounts to be paid to a brokerage firm, in part, on how many referrals it had received from the firm and the fees generated from those referrals. The CFPB considered this fee structure arrangement to be in violation of Section 8. In the Consent Order, the CFPB listed the following objections:

1. The title company had entered into the MSAs because it believed that if it did not enter into MSAs with these real estate brokers, they would refer business elsewhere. The fees paid under the MSAs were set at least in part by whether other title companies were paying these real estate brokers for marketing services.
2. The title company did not determine the fair market value of the services to be provided under the MSAs or, after the arrangement was in place, check to see if the real estate brokers were actually providing these services.

3. The real estate brokers referred more business to the title company after the MSA was signed than they did previously.

The CFPB suggested that the MSAs would have been deemed to be in violation of Section 8 even if the fees paid were found to be at fair market value for the marketing services provided. According to the CFPB, the MSA itself was a thing of value provided to brokers in return for referring business. In other words, whatever the payment structure, the title company's agreement to hire marketing services from the broker violated Section 8 because the arrangement was only being offered because the broker referred business to the title company.

In addition to imposing a \$200,000 fine, the Consent Order required the title company to terminate all of its MSAs and agree not to enter into any new MSAs. The prohibition against future MSAs is so broad that it even prohibits the title company from buying advertising on any real estate broker's website. Under the Consent Order, the Michigan title company is only allowed to purchase advertising from someone who does not provide settlement services (*e.g.*, a newspaper or magazine). Finally, while the Consent Order was not directed at the real estate brokers who had received the fees, in discussing the case after the fact, CFPB officials have not ruled out the possibility of pursuing real estate brokers in the future, noting that both sides of any illegal Section 8 arrangement have potential liability under the law. In other words, Section 8 of RESPA prohibits the receipt as well as the payment of referral fees.

It is not clear from the Consent Order involving the Michigan title company whether the CFPB considered any of the stated objections alone to be enough to find a Section 8 violation or whether the focus was really on the combination of factors. If, in fact, each and every factor listed violates Section 8, then it would appear that MSAs between two settlement service providers (title companies, mortgage brokers, lenders, brokers, etc.) are no longer permissible.

The CFPB's current position on MSAs may be best illustrated by its response to a large lender's recent announcement that it was terminating all of its MSAs. In response, the CFPB issued the following statement:

[This] decision to exit all marketing services agreements is an important step for the mortgage industry towards ensuring compliance with [the Real Estate Settlement Procedures Act ("RESPA")] and freeing up more choices for consumers. We are concerned that such agreements can carry significant legal risk for companies and undermine transparency for consumers. Companies should take note of today's action and consider carefully whether their own business practices comply with the consumer protections provided under the law, which bars kickbacks for customer referrals.

Enough said.

C. Looking Forward

1. Scope.

In the matter of NewDay Financial, LLC (February 10, 2015), the CFPB provided a clear indication as to how broadly it views the activities that fall within Section 8. NewDay Financial, LLC was primarily in the business of refinancing home loans through a program under which the VA guarantees a portion of home loans taken out by persons eligible for VA benefits. From 2010 through 2014 a third-party broker company contracted directly with a Veteran's Organization (who is unnamed in the Consent Order). Through agreements between NewDay Financial, the third-party broker and the Veteran's Organization, NewDay Financial was designated as the Veteran's Organization's exclusive recommended lender. NewDay Financial drafted and sent advertising communications both by mail and electronic mail to members of the Veteran's Organization, with the Veteran's Organization approval. These communications were identified as being from the Veteran's Organization and promoted the relationship between NewDay Financial and the Veteran's Organization. In addition, these communications encouraged and recommended the use of NewDay Financial's mortgage products to members of the Veteran's Organization.

In consideration for the Veteran's Organization's endorsement of NewDay Financial, NewDay Financial paid the third-party broker company a monthly "licensing fee" of \$15,000. In addition, for each member of the Veteran's Organization who contacted NewDay Financial to inquire about a reverse mortgage and who completed mandatory counseling, NewDay Financial paid the Veteran's Organization \$75 and the third-party broker company \$100 as "lead generation fees." Further, for each member of the Veteran's Organization referred to NewDay Financial who sought refinancing and for whom a credit report was pulled, NewDay Financial paid the Veteran's Organization \$15 and the third-party broker company \$20 as "lead generation fees." At no time did the members of the Veteran's Organization become aware of the contractual relationship between NewDay Financial, the third-party broker company and the Veteran's Organization or that payments were being made by NewDay Financial to the Veteran's Organization and the third-party broker company.

The CFPB determined that NewDay Financial had engaged in "unfair, deceptive, or abusive" act or practices in violation of 12 USC § 5536(a)(1)(B) of the Consumer Financial Protection Act. The CFPB went on to find that NewDay Financial had also violated Section 8(a) of RESPA.

The activities which the CFPB listed as constituting violations of Section 8(a) included, first, the fact that NewDay Financial had mailed advertising communications to members of Veteran's Organization with the Veteran's Organization's approval. Second, pursuant to the agreement between the parties, members of the Veteran's Organization who called its call center for information on mortgage products were referred to NewDay Financial. Third, the third-party broker company maintained a website that was linked to the Veteran's Organization's website and was identified as being part of the Veteran's Organization website. The members of the Veteran's Organization who visited the third-party broker's website were referred to NewDay Financial through a text "recommending" NewDay Financial as a source for home loans. Finally, NewDay Financial made 3,900 payments to the Veteran's Organization and the third-party broker company including the \$15,000 monthly payments and the "lead generation fees."

As part of the Consent Order, NewDay Financial was required to pay a civil money penalty of \$2,000,000 to the CFPB.

2. Statute of Limitations and Computation of Damages.

The first RESPA decision from the Director of the CFPB, Richard Cordray, was rendered in the matter of PHH Corporation, et al (June 4, 2015). The arrangement at issue in this case involved PHH, a mortgage lender, setting up a subsidiary to sell reinsurance to mortgage insurers. PHH referred mortgage insurance business on its loans to the mortgage insurers who purchased reinsurance from its subsidiary. While the activities involved in this case involve mortgage insurers and mortgage reinsurers and thus are of little direct consequence to Realtors® and their affiliated businesses, there are two (2) issues which do have general application to any person facing a charge under RESPA.

First, when HUD administered RESPA, it could not bring quasi-judicial administrative proceedings against an alleged violator of RESPA, instead HUD had to go to a court for a decision by federal judge. The CFPB not only can go to court, but also has the power to pursue an alleged RESPA violator through an administrative proceeding heard by an administrative law judge (“ALJ”) employed by the CFPB. Any appeal from a decision by the ALJ would be heard by the Director of the CFPB.

In the PHH Corporation case, the activities and payments which were the source of the RESPA violations had begun in 1994 and continued through March 31, 2013. The Respondent, PHH Corporation, took the position that the CFPB was bound by the 3-year statute of limitations for “actions brought by the Bureau” under RESPA. In essence, PHH Corporation took the position that it could not be found liable for any RESPA violation for activities occurring before 2010.

The ALJ held that the statute of limitations did not apply when the CFPB challenges a RESPA violation in an administrative proceeding. Director Cordray agreed. The ALJ and the Director found that the RESPA statute of limitations only applied to the CFPB if it brings an enforcement action in a court. Director Cordray noted that the statute itself refers to “actions” and that “actions” only describes proceedings initiated in a court, not to administrative proceedings.

The Director did limit the reach of the CFPB in this case. He reasoned that in the past, HUD had no ability to commence administrative proceedings. The only way HUD could proceed was through an action in court; thus, the 3-year statute of limitations would apply if HUD still enforced RESPA. The Director reasoned that since the CFPB took over enforcement of RESPA on July 21, 2011, the CFPB would only pursue RESPA violations against PHH Corporation for the 3 years leading up to July 21, 2011, *i.e.*, on or after July 21, 2008. The CFPB did not acknowledge any principle of law regarding this gratuitous limitation.

The bottom line is that until overturned by a court (if ever), the CFPB takes the position that there is no statute of limitations when it seeks to enforce RESPA through administrative proceedings.

Note should also be taken of the way damages were calculated against PHH Corporation and its related entities. Recall that in this case, PHH Corporation through a subsidiary, provided reinsurance to mortgage insurers for which it received premiums. During the time period at issue, PHH Corporation’s subsidiary actually paid out claims based on the reinsurance. Further, PHH Corporation’s subsidiary also returned a portion of the reinsurance premium to the mortgage insurers. Finally, PHH Corporation claimed that at least

a portion of the premiums paid to its subsidiary for reinsurance was for value. Thus, in calculating any damages, PHH Corporation argued that the amounts paid out in claims, the premiums returned to the mortgage reinsurers, and the value of the reinsurance provided to the mortgage insurers should be deducted.

The Director determined that regardless of whether the price the mortgage insurers had paid to PHH Corporation's subsidiary was inflated or was set at the fair market value, PHH still benefited because its subsidiary received business from mortgage insurers which it otherwise would not have received. The Director determined that none of the payments made to the subsidiary for reinsurance were "bona fide" because payments cannot be "bona fide" if tied in any way to the referral of business.

In the end, PHH Corporation was required to disgorge every cent of premium it had received from the mortgage insurers from July 21, 2008 through March 31, 2013. This amount totaled \$109,188,618. It should be noted that the Director opted not to impose a civil monetary penalty on PHH Corporation.

D. Conclusion

The CFPB is zealously enforcing RESPA. It may do so either by proceedings in a court or in an administrative proceeding. If it proceeds in an administrative proceeding, it takes the position there is no statute of limitations, *i.e.*, someone could be called to an administrative trial to answer for actions undertaken in the 1990s. Realtors[®] who are in arrangements with any settlement service provider which involve the payment of funds from the settlement service provider to the Realtor[®] should closely examine those relationships to make sure they do not run afoul of RESPA as interpreted by the CFPB.

Exhibit 1

Details and Impacts of CFPB Enforcement Actions						
Company Involved	Why	Number of consumers helped	Fines to others	Payment to Consumers	Fines to CFPB	Total
Residential Credit Solutions (July 30, 2015)	Block consumer attempts to save their homes from foreclosure			\$1,500,000	\$100,000	\$1,600,000
Paymap Inc. and LoanCare, LLC (July 28, 2015)	Deceptive advertising	125,000		\$33,400,000	\$5,100,000	\$38,500,000
Student Financial Aid Services, Inc. (July 23, 2015)	Illegal recurring billing scheme			\$5,200,000		\$5,200,000
Discover Bank (July 22, 2015)	Illegal student loan servicing practices	100,000		\$16,000,000	\$2,500,000	\$18,500,000
Citibank (July 21, 2015)	Illegal credit card practices	7,000,000		\$700,000,000	\$35,000,000	\$735,000,000
American Honda Finance Corporation (July 14, 2015)	Discriminatory auto loan pricing and compensation practices			\$24,000,000		\$24,000,000
Affinion Group Holdings, Inc., and Intersections Inc. (July 1, 2015)	Unfairly charging consumers for credit card add-on products they did not receive	79,000		\$6,855,000	\$9,100,000	\$9,955,000
Syndicated Office Systems, LLC (June 18, 2015)	Mishandling consumer credit reporting disputes	10,000	\$5,400,000	\$500,000		\$5,900,000
Security National Automotive Acceptance Company (June 17, 2015)	Aggressive debt collection tactics against servicemembers			\$278,000		\$278,000
Guarantee Mortgage Corporation (June 5, 2015)	Illegally paid branch managers in part on the interest rates of loans they closed			\$109,000,000		\$109,000,000
PPH Corp (June 4, 2015)	Illegally referred consumers to mortgage insurers in exchange for kickbacks			\$2,000,000		\$2,000,000
RPM Mortgage (June 4, 2015)	Steering consumers into costlier mortgages	2,000	\$18,000,000			\$18,000,000
Hoffman Law Group (May 29, 2015)	Deceptive Collection of Illegal Advance Fees		\$11,750,579	\$10,000,000	\$6,000,000	\$27,750,579
Provident Funding Associates (May 28, 2015)	Discriminatory Mortgage Pricing		\$9,000,000			\$9,000,000
PayPh (May 29, 2015)	Illegally signed up consumers for unwanted online credit		\$15,000,000	\$10,000,000		\$25,000,000
Sprint and Verizon (May 12, 2015)	Unauthorized Charges on Customers' Mobile Bills		\$120,000,000		\$38,000,000	\$158,000,000
Nationwide Biweekly Administration, Inc., Loan Payment Administration LLC (May 11, 2015)	Deceptive mortgage payment program			\$662,500		\$662,500
Genuine Title, LLC and individuals (April 29, 2015)	Mortgage kickback scheme			\$49,000,000	\$7,500,000	\$56,500,000
Regions Bank (April 28, 2015)	Unlawful overdraft practices	200,000				
Green Tree Servicing (April 21, 2015)	Miscrediting borrowers trying to save their homes			\$48,000,000	\$15,000,000	\$63,000,000
Fort Knox National Company and its subsidiary (April 20, 2015)	Charging hidden fees to servicemembers			\$3,100,000		\$3,100,000
T Thomas Development of MM, Inc. (April 14, 2015)	Illegal tax refund scheme	1,500		\$254,267	\$138,000	\$692,267
BNK Financial (April 9, 2015)	Deceptive mortgage advertising				\$250,000	\$250,000

OF Capital Retail Bank (June 19, 2014)	Illegal and discriminatory credit card practices	746,000		\$225,000,000	\$3,500,000	\$228,500,000	<ul style="list-style-type: none"> •Cease deceptive marketing practices •End discriminatory credit practices •Notify credit reporting agencies of new information •Forgive debt of accounts not receiving debt relief offers 	DOJ
SunTrust Mortgage, Inc. (June 17, 2014)	Systemic mortgage servicing misconduct	48,000		\$540,000,000	\$30,000	\$540,000,000	<ul style="list-style-type: none"> •Must establish additional homeowner protections 	DOJ, HUD, and 49 state general attorneys
Stonebridge Title Services, Inc. (June 12, 2014)	Illegal kickbacks for mortgage referrals							HUD
RealtySouth (May 28, 2014)	Mortgage disclosure violations		\$500,000			\$500,000	<ul style="list-style-type: none"> •Stop deceptive marketing •End unfair billing practices •Submit to independent review 	
Bank of America (Apr. 9, 2014)	Illegal credit card practices	1,900,000	\$25,000,000	\$727,000,000	\$20,000,000	\$772,000,000	<ul style="list-style-type: none"> •Prohibited from from carrying out certain activities until submission of compliance plan •End unfair billing practices 	OCC
Fidelity Mortgage Corporation (Jan. 16, 2014)	Funnelling illegal kickbacks to banks		\$17,076		\$54,000	\$81,076		
American Express subsidiaries (three total) (Dec. 23, 2013)	Illegal credit card practices	335,000		\$59,500,000	\$9,600,000	\$69,100,000	<ul style="list-style-type: none"> •Stop deceptive marketing •End unfair billing practices •Submit to independent review •Improve oversight of third party vendors 	FDIC, OCC
National City Bank (PNC acquired this bank) (Dec. 23, 2013)	Discriminatory mortgage pricing	76,000		\$35,000,000		\$35,000,000	<ul style="list-style-type: none"> •Must set up settlement administrator 	DOJ
Ally Financial Inc. and Ally Bank (Dec. 20, 2013)	Discriminatory auto loan pricing	235,000		\$80,000,000	\$18,000,000	\$98,000,000	<ul style="list-style-type: none"> •Must set up settlement administrator •Monitor or eliminate dealer markups 	DOJ
Dowen Financial Corporation and Owen Loan Servicing (Dec. 18, 2013)	Deceptions and shortcuts in mortgage servicing	185,000		\$2,125,000,000		\$2,125,000,000	<ul style="list-style-type: none"> •Stop robo-signing official documents •Adhere to significant new homeowner protections 	
GE Capital Retail Bank and its subsidiary, GE Credit (Dec. 10, 2013)	Deceptive health care credit card enrollment tactics	1,000,000		\$34,100,000		\$34,100,000	<ul style="list-style-type: none"> •Enhance consumer disclosures •Improve consumer experience with service providers 	
Cash America International, Inc. (Nov. 20, 2013)	Robo-signing in debt collection law suits	14,000		\$14,000,000	\$5,000,000	\$19,000,000	<ul style="list-style-type: none"> •Dismiss pending collections lawsuits •Improve internal compliance systems 	
Respublic Mortgage Insurance Corporation (Nov. 15, 2013)	Illegal kickbacks to mortgage lenders in exchange for business				\$100,000	\$100,000	<ul style="list-style-type: none"> •May not enter into any new captive mortgage reinsurance arrangements •May not obtain captive reinsurance on any new mortgages for ten years •Must comply with new monitoring and make reports 	
Carle & Coyle Mortgage, LLC (Nov. 7, 2013)	Steering consumers into costlier mortgages	9,400		\$9,232,896	\$4,000,000	\$13,232,896	<ul style="list-style-type: none"> •End unlawful compensation practices •Retain records of compensation 	
Chase Bank USA, N.A. and JPMorgan Chase Bank N.A. (Sept. 19, 2013)	Illegal credit card practices	2,100,000		\$309,000,000	\$20,000,000	\$329,000,000	<ul style="list-style-type: none"> •End unfair billing practices •Submit to an independent audit •Improve oversight of third party vendors 	
U.S. Bank and one of its nonbank partner companies, Desires Financial Services (D+S) (June 27, 2013)	Improper fee disclosure to clients in the MILES auto loan program	90,000		\$6,500,000		\$6,500,000	<ul style="list-style-type: none"> •Stop deceptive practices •Stop requiring the use of allotments •Improve disclosures •Must submit a redress plan that the CFPB must approve 	
Texas homebuilder, Paul Taylor (May 17, 2013)	Kickbacks		\$118,194			\$118,194		
Gonworth Mortgage Insurance Corp., United Guaranty Mortgage Insurance Co., and Mortgage Guaranty Insurance Corp. (April 4, 2013)	Improper kickbacks to mortgage lenders				\$15,400,000	\$15,400,000	<ul style="list-style-type: none"> •End practice •Compliance with monitoring and reporting 	
Payday Loan Debt Solution (December 21, 2012)	Unlawful fees in debt settlement			\$100,000	\$5,000	\$105,000		state Attorneys General of New Mexico, North Carolina, North Dakota, and Wisconsin and the State of Hawaii Office of Consumer Protection
American Express subsidiaries (three total) (Oct. 1, 2012)	Violations of a number of consumer protection laws	250,000		\$85,000,000	\$14,100,000	\$99,100,000		
Discover Bank (Sept. 24, 2012)	Deceptive telemarketing and sales tactics	3,500,000		\$200,000,000	\$7,000,000	\$207,000,000	<ul style="list-style-type: none"> •Stop deceptive marketing •Submit to independent audit 	FDIC

National Corrective Group (March 30, 2015)	Deceptive threats and intimidation of consumers					\$50,000	\$50,000	\$50,000	<ul style="list-style-type: none"> •Will put an end to illegal activities •Will require new consumer disclosures and oversight of the bounced check program 	
All Financial Services, Flagship Financial Group, American Preferred Lending (February 12, 2015)	Deceptive mortgage advertising									
NewDay Financial (February 10, 2015)	Deceptive mortgage advertising and kickbacks									
Continental Finance Company, LLC (February 4, 2015)	Illegal credit card practices	98,000		\$1,700,000		\$250,000	\$250,000	\$250,000	<ul style="list-style-type: none"> •Prohibited from engaging in illegal practices •Subject to federal supervision for the first time •Must offer private student loans for seven years •Must halt lawsuits and improper debt collection practices •Must reverse negative information from borrowers' credit reports •Must implement new consumer protections 	U.S. Department of Education
Corinthian Colleges/ECHC (February 3, 2015)	Payday Student Lending Scheme									
Wells Fargo and JP Morgan Chase (January 22, 2015)	Illegal mortgage kickbacks			\$11,100,000		\$24,630,000	\$24,630,000	\$35,730,000		Maryland Attorney General
Freedom Stores, Inc., Freedom Acceptance Corporation and Liberty Credit Services LLC (December 18, 2014)	Illegal debt collection practices against servicemembers			\$2,500,000		\$100,000	\$100,000	\$21,600,000	<ul style="list-style-type: none"> •Banned from further violations of the law •Subject to monitoring by the CFPB 	North Carolina Attorney General, Virginia Attorney General
Union Workers Credit Services (December 17, 2014)	Deceptive marketing of a sham credit card							\$0	<ul style="list-style-type: none"> •A lawsuit against the company 	
Sprint Corporation (December 17, 2014)	Allowing unauthorized third-party charges							\$0	<ul style="list-style-type: none"> •A lawsuit against the company 	
College Education Services (December 11, 2014)	Debt relief scams on student loans					\$25,000	\$25,000	\$25,000	<ul style="list-style-type: none"> •Owners are banned from engaging in any debt relief businesses 	
Premier Consulting Group, LLC (December 4, 2014)	Illegally charging for upfront fees for debt-settlement services never received					\$69,075	\$69,075	\$69,075		Florida Attorney General
DriveTime (November 19, 2014)	Harassing debt collection tactics and inaccurate reporting to credit reporting agencies					\$8,000,000	\$8,000,000	\$8,000,000	<ul style="list-style-type: none"> •Must end its unfair debt collection tactics •Must fix its credit reporting practices •Must arrange for harmed consumers to obtain free credit reports 	
Franklin Loan Corporation (November 13, 2014)	Steering consumers into costlier mortgages	1,400		\$730,000				\$730,000	<ul style="list-style-type: none"> •Will end incentivizing loan officers to upcharge consumers •Must take action to update consumer credit reports 	
M&T Bank (October 9, 2014)	Deceptive advertising for checking accounts	99,000		\$2,900,000		\$200,000	\$200,000	\$3,100,000	<ul style="list-style-type: none"> •Must terminate immediately any existing market servicing agreements with companies in a position to refer business to Lighthouse •Prohibited from entering into new NDAs with violators •End all investigation mortgage servicing violations •Stop acquiring default servicing rights from third parties •Engage in efforts to help borrowers preserve their homes 	
Lighthouse Title (September 30, 2014)	Mortgage kickback agreements			\$27,500,000		\$10,000,000	\$10,000,000	\$37,500,000		
Flagstar Bank (September 29, 2014)	Violations of mortgage servicing rules	6,500							<ul style="list-style-type: none"> •End unfair billing practices •Improve oversight of third party vendors •Cease charging other companies to collect illegal fees from consumers •Will be subject to monitoring by the CFPB •Required to make reports to the CFPB to ensure their compliance •Fix errors •Change business practices •Help consumers obtain free copies of their credit reports 	
US Bank (September 25, 2014)	Illegal billing practices	420,000		\$48,000,000		\$5,000,000	\$5,000,000	\$57,000,000		
Global Client Solutions (August 25, 2014)	Helping companies charge consumers illegal upfront fees			\$6,000,000		\$1,000,000	\$1,000,000	\$7,000,000		
FIRST INVESTORS Financial Services Group Inc. (August 20, 2014)	Distorting consumer credit records					\$2,750,000	\$2,750,000	\$2,750,000	<ul style="list-style-type: none"> •Help consumers obtain free copies of their credit reports 	
USA Discounters LTD (August 14, 2014)	Fee scam targeting servicemembers; deceptive marketing	70,000		\$350,000		\$50,000	\$50,000	\$400,000	<ul style="list-style-type: none"> •End unfair and deceptive practices •Stop charging SBA-related fees •Stop advertising unavailable mortgage rates •Cease charging illegal fees 	
Ameriwave Mortgage Corporation & affiliate Novo Appraisal Management Company (August 12, 2014)	Deceptive mortgage lending scheme			\$14,800,000		\$6,000,000	\$6,000,000	\$20,800,000	<ul style="list-style-type: none"> •Update credit reporting agencies and notify servicemembers and other consumers of debt status •Cease co-consumer lending •End its practice of using illegal debt collection tactics and harassment in its dealings with customers •Stop pressuring consumers into cycles of debt 	13 State Attorneys General
Rome Finance (July 29, 2014)	Predatory lending scheme targeting service members	17,000		\$92,000,000		\$1	\$1	\$92,000,001		
Ace Cash Express (July 10, 2014)	Illegal and harassing debt collection tactics			\$5,000,000		\$5,000,000	\$5,000,000	\$10,000,000		

Capital One Bank (July 18, 2012)	Descriptive marketing tactics	2,000,000	\$140,000,000	\$25,000,000	\$165,000,000	*500 descriptive marketing *Submit to independent audit
Total		20,406,800	6,246,612,663	310,401,076	6,765,789,588	

Exhibit 2

12 U.S.C.

United States Code, 2011 Edition

Title 12 - BANKS AND BANKING

CHAPTER 27 - REAL ESTATE SETTLEMENT PROCEDURES

Sec. 2607 - Prohibition against kickbacks and unearned fees

From the U.S. Government Printing Office, www.gpo.gov

§2607. Prohibition against kickbacks and unearned fees

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone, within 3 business days after the referral by telephone,¹ (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or

(5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Bureau, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Bureau and Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Bureau, the Secretary, or the attorney general or the insurance commissioner of any State may bring an action to enjoin violations of this section. Except, to the extent that a person is subject to the jurisdiction of the Bureau, the Secretary, or the attorney general or the insurance commissioner of any State, the Bureau shall have primary authority to enforce or administer this section, subject to subtitle B of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5511 et seq.].

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.

(Pub. L. 93-533, §8, Dec. 22, 1974, 88 Stat. 1727; Pub. L. 94-205, §7, Jan. 2, 1976, 89 Stat. 1158; Pub. L. 98-181, title IV, §461(b), (c), Nov. 30, 1983, 97 Stat. 1231; Pub. L. 100-242, title V, §570(g), Feb. 5, 1988, 101 Stat. 1950; Pub. L. 102-54, §13(d)(4), June 13, 1991, 105 Stat. 275; Pub. L. 104-208, div. A, title II, §2103(c)(2), (d), Sept. 30, 1996, 110 Stat. 3009-400; Pub. L. 111-203, title X, §1098(6), (7), July 21, 2010, 124 Stat. 2104.)

REFERENCES IN TEXT

The Consumer Financial Protection Act of 2010, referred to in subsec. (d)(4), is title X of Pub. L. 111-203, July 21, 2010, 124 Stat. 1955. Subtitle B of the Act is classified generally to part B (§5511 et seq.) of subchapter V of chapter 53 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

AMENDMENTS

2010—Subsec. (c)(5). Pub. L. 111-203, §1098(6), which directed substituting “Bureau” for “Secretary”, was executed by making the substitution for “Secretary” the first time appearing, to reflect the probable intent of Congress.

Subsec. (d). Pub. L. 111–203, § 1098(7)(A), inserted “Bureau and” before “Secretary” in heading that had been supplied editorially.

Subsec. (d)(4). Pub. L. 111–203, § 1098(7)(B), added par. (4) and struck out former par. (4) which read as follows: “The Secretary, the Attorney General of any State, or the insurance commissioner of any State may bring an action to enjoin violations of this section.”

1996—Subsec. (c)(4). Pub. L. 104–208, § 2103(c)(2), substituted “affiliated business arrangements” for “controlled business arrangements”.

Subsec. (c)(4)(A). Pub. L. 104–208, § 2103(d), amended subcl. (A) generally. Prior to amendment, subcl. (A) read as follows: “at or prior to the time of the referral a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with the referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred, except that where a lender makes the referral, this requirement may be satisfied as part of and at the time that the estimates of settlement charges required under section 2604(c) of this title are provided.”

Subsec. (d)(6). Pub. L. 104–208, § 2103(c)(2), substituted “affiliated business arrangements” for “controlled business arrangements”.

1991—Subsec. (c)(5). Pub. L. 102–54 substituted “Secretary of Veterans Affairs” for “Administrator of Veterans’ Affairs”.

1988—Subsec. (c)(5). Pub. L. 100–242 substituted “clause (4)(B)” for “clause 4(B)”.

1983—Subsec. (c). Pub. L. 98–181, § 461(b), redesignated cl. (4) as (5), added cl. (4) and provisions following cl. (5), as so redesignated, relating to arrangements which shall not be considered a violation of cl. (4) (B).

Subsec. (d)(2). Pub. L. 98–181, § 461(c), substituted provisions setting forth the liability of persons violating the prohibitions or limitations of this section for provisions setting forth liability, in addition to penalties provided in par. (1), of persons violating subsecs. (a) and (b) of this section, plus costs and attorney’s fees.

Subsec. (d)(3) to (6). Pub. L. 98–181, § 461(c), added pars. (3) to (6).

1976—Subsec. (c). Pub. L. 94–205 added cls. (3) and (4).

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the designated transfer date, see section 1100H of Pub. L. 111–203, set out as a note under section 552a of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 98–181 effective Jan. 1, 1984, see section 461(f) of Pub. L. 98–181, set out as a note under section 2602 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–205 effective Jan. 2, 1976, see section 12 of Pub. L. 94–205, set out as a note under section 2602 of this title.

TRANSFER OF FUNCTIONS

Federal Home Loan Bank Board abolished and functions transferred, see sections 401 to 406 of Pub. L. 101–73, set out as a note under section 1437 of this title.

¹ *So in original.*

Exhibit 3

Title 12 — Chapter X — Part 1024 — Subpart C — Appendix

Title 12: Banks and Banking
PART 1024—REAL ESTATE SETTLEMENT PROCEDURES ACT (REGULATION X)
Subpart C—Mortgage Servicing

APPENDIX D TO PART 1024—AFFILIATED BUSINESS ARRANGEMENT DISCLOSURE STATEMENT FORMAT NOTICE

To: _____

From: _____

(Entity Making Statement)

Property: _____

Date: _____

This is to give you notice that [referring party] has a business relationship with [settlement services provider(s)]. [Describe the nature of the relationship between the referring party and the provider(s), including percentage of ownership interest, if applicable.] Because of this relationship, this referral may provide [referring party] a financial or other benefit.

(A.) Set forth below is the estimated charge or range of charges for the settlement services listed. You are NOT required to use the listed provider(s) as a condition for [settlement of your loan on] [or] [purchase, sale, or refinance of] the subject property. THERE ARE FREQUENTLY OTHER SETTLEMENT SERVICE PROVIDERS AVAILABLE WITH SIMILAR SERVICES. YOU ARE FREE TO SHOP AROUND TO DETERMINE THAT YOU ARE RECEIVING THE BEST SERVICES AND THE BEST RATE FOR THESE SERVICES.

[provider and settlement service] _____

[charge or range of charges] _____

(B.) Set forth below is the estimated charge or range of charges for the settlement services of an attorney, credit reporting agency, or real estate appraiser that we, as your lender, will require you to use, as a condition of your loan on this property, to represent our interests in the transaction.

[provider and settlement service] _____

[charge or range of charges] _____

ACKNOWLEDGMENT

I/we have read this disclosure form, and understand that referring party is referring me/us to purchase the above-described settlement service(s) and may receive a financial or other benefit as the result of this referral.

Signature _____

[INSTRUCTIONS TO PREPARER:] [Use paragraph A for referrals other than those by a lender to an attorney, a credit reporting agency, or a real estate appraiser that a lender is requiring a borrower to use to represent the lender's interests in the transaction. Use paragraph B for those referrals to an attorney, credit reporting agency, or real estate appraiser that a lender is requiring a borrower to use to represent the lender's interests in the transaction. When applicable, use both paragraphs. Specific timing rules for delivery of the affiliated business disclosure statement are set forth in 12 CFR 1024.15(b)(1) of Regulation X. These INSTRUCTIONS TO PREPARER should not appear on the statement.]

LEGAL LIABILITY UPDATE

I. INTRODUCTION

Every year, our legal update includes a separate article which discusses a few recent cases decided elsewhere around the country. While obviously these cases are not governed by Michigan law, they have been selected for the lessons they provide.

II. DISCUSSION

A. FRAUD CLAIMS

This year's convention materials include a discussion of Michigan law as it relates to claims of fraud by nondisclosure. In Michigan and elsewhere, mere nondisclosure does not amount to fraud; rather, there must be a circumstance which imposes a duty to speak. One circumstance where this occurs is when a party voluntarily makes a disclosure. A party who voluntarily assumes a duty to speak must make a full and fair disclosure as to the matters about which he speaks.

This issue came up last year in a case out of California involving the 2006 sale of a half-acre of vacant commercial land in a town outside of Los Angeles. *Saffie v Schmeling*, 224 Cal App 4th 563 (2014). Included in the listing broker's sales brochure for the property was the following language:

This parcel is an earthquake study zone but has had a Fault Hazard Investigation completed and has been declared buildable by the investigating licensed geologist. Report available for serious buyers.

The Fault Hazard Investigation cited in the listing had been prepared on, and was clearly labeled, "May 20, 1982." The report, prepared by a registered geologist, stated that it "finds no evidence of an active fault," and included an approval letter from the county planning department. The buyer obtained a copy of the report through his buyer's broker who, in turn, had obtained it from the listing broker.

The buyer then closed on the sale and soon after learned that the county considered the 1982 report obsolete and would require a new report. The new report found that buyer's proposed use of the property was cost-prohibitive. The buyer sued the seller and both the listing broker and the buyer's broker. The trial court found the buyer's broker liable for breach of fiduciary duty and negligence but threw out the case against the listing broker. The buyer appealed the court's decision to throw out the case against the listing broker.

The California appellate court agreed with the trial court. While it was arguable that the listing broker's statement that the property had been declared "buildable" was misleading given the length of time that had passed, the court found that by actually providing a copy of the report to the buyer, the listing broker had cured any such mischaracterization.

It is important to keep in mind however, that the case was thrown out as to the listing broker, but not as to the buyer's own broker, who had been found liable. Central to the court's finding in favor of the listing broker was the fact that a listing broker owes no fiduciary duties to a buyer. Obviously, this is not the case with a buyer's broker. The buyer's broker's

liability in this case would have turned on whether or not a reasonably competent buyer's broker would advise her buyer-client to rely on a 25-year-old report. The trial court apparently concluded that she would not.

While a listing broker can be liable for failing to make a full and fair disclosure as to matters about which he has chosen to speak, it is also the case that a buyer cannot turn a blind eye and then claim that he or she was deceived. In *Saggese v Beazley Company Realtors*, 155 Conn App 734 (2015), a buyer purchased a lot advertised as "lakefront," but which actually had a common lawn area located between the lot and the water's edge. The common lawn area was shown on the subdivision plat and had been discussed with the buyer. Moreover, prior to closing, the sellers had advised the buyer that there was pending litigation involving the use of lawn area, but that the lawsuit did not involve the property that the buyer was purchasing. The buyer had been given the docket numbers for the pending litigation.

After closing and after learning the nature of the back lot owners' rights in the common lawn area, the buyer sued the listing agent for fraudulent nondisclosure. The buyer's position was that while the listing agent had made certain disclosures about the common lawn, she had not been entirely forthcoming about the rights of the back lot owners or the nature of the litigation.

The trial court found in favor of the listing agent and the Connecticut appellate court agreed. The court found that the buyer could have discovered the nature of the litigation and the rights of the subdivision residents to use the common lawn through "reasonable inquiry:"

All of the material information was in the [buyer's] possession, but neither she nor her agents made proper use of it. That failure cannot be laid at the feet of the [listing agent].

In order to prevail on a fraud claim, a party must be able to show that he reasonably relied upon the false statement to his detriment. An interesting twist on that requirement was presented in *Sundberg v TTR Realty, LLC*, 109 A3d 1123 (2015). In this case from the District of Columbia, the buyers claimed that after they signed a residential purchase contract, but before the closing, the listing agent intentionally provided false information and withheld material information about a construction project that was scheduled to occur across the street. The buyers claimed that they would not have purchased the residence had they been truthfully informed about the planned construction project.

The listing agent argued that the case should be dismissed because the alleged misrepresentation occurred after the execution of the residential purchase contract and that, therefore, the buyers could not have reasonably relied on the alleged misrepresentations when deciding to purchase the residence.

The buyers responded that had they been informed, they would have breached the contract. The buyers argued that a party to a contract has a right to breach that contract and that a "contractual obligation is not necessarily an obligation to *perform* but rather an obligation to *choose* between performance and compensatory damages."

The District of Columbia's Court of Appeals held for the listing agent, finding that a party has no "right" to breach a contract and that the buyers could not rely on such a "right" in support of their detrimental reliance argument. Since the allegedly false statements about the construction project were made after the buyers had obligated themselves to buy the

residence, they could not claim they had been defrauded.

B. COMMISSION CLAIMS

Listing agreements typically provide that the commission is earned when the listing broker produces a buyer who is “ready, willing and able” to purchase the property at the listed price (or on other terms acceptable to the seller). Ordinarily, a buyer who turns out not to have the financial wherewithal to purchase the property presumably would not be deemed “able” to purchase the property and, thus, the broker who found such a buyer would not be entitled to a commission.

A recent case in Wisconsin involved a one-party listing agreement that stated that the broker was entitled to a commission if the named party entered into an “enforceable contract” to purchase the property. *Ash Park, LLC v Alexander & Bishop, Ltd*, 2015 WL 4079192. The named buyer entered into a purchase agreement for \$6.3 million, but when its potential tenant walked away, the buyer breached the purchase contract and refused to close. The seller sued the buyer for specific performance and won. Despite the court order directing the buyer to close on the purchase of the property, the buyer failed to perform and threatened bankruptcy. Eventually, the buyer and the seller settled their dispute for \$1.5 million.

The listing broker then sued the seller to collect the commission allegedly owed pursuant to the one-party listing agreement. The trial court found for the sellers, finding that while the purchase contract was “enforceable *in law*,”

The reality of it is the realtor brought to these sellers a buyer who couldn't afford to buy the property

In the end this contract was not enforceable *in fact* [and, therefore, the broker was not entitled to a commission].

The broker appealed and the Wisconsin Court of Appeals overruled the trial court, concluding that the phrase “enforceable contract” was a plain and ambiguous term meaning a contract where there is a remedy for a breach. When the seller appealed, the Wisconsin Supreme Court also found in favor of the broker, stating:

Ultimately, the court's role ‘is not to make contracts or reform them but to determine what the parties contracted to do.’ ‘It is not the function of the court to relieve a party to a freely negotiated contract of the burdens of a provision which becomes more onerous than had originally been anticipated.’

The seller could have protected itself, the Wisconsin Supreme Court noted, by more carefully drafting the listing agreement so as to condition the broker’s right to a commission on an actual closing.

At issue in *Cityscapes Dev, LLC v Scheffler*, 2015 WL 3649307, was a listing agreement with a protection period clause. While the ultimate purchaser entered into the purchase contract during the protection period, the protection period clause was not enforceable because it did not comply with Minnesota law. The listing broker then tried to enforce the terms of a letter that the seller had sent to the listing agent after the listing had expired, but before the buyer had signed the purchase agreement. In the letter, the seller had stated:

Inasmuch as you have contacted representatives of [the ultimate

buyer] regarding purchase of the subject parcels, this will confirm that we agree to pay the agreed-upon commissions should your contact result in a sale.

The Court found that this written promise was not enforceable because it was signed after the broker had performed. In order for a contract to be enforceable, the Court held, there must be consideration and that a promise based on past consideration is not enforceable.

EXAMPLES OF SOME PITFALLS OF BUYING PROPERTY AT ONLINE AUCTIONS

- (1) Title search/commitment information provided may be of no value.

Recent title work provided online included the following “exceptions:”

“Easements, claim of easements or encumbrances that are not shown in the public record.”

“Covenants, restrictions and easements of record.”

If that wasn’t enough, the commitment also stated that:

“This commitment is issued for informational purposes only. The Company’s liability under this commitment shall in no event exceed the amount paid for the _____.”

This is particularly problematic if the deed will be a quit claim deed or a covenant deed (as is often the case).

- (2) Typically, the successful bidder is required to make a nonrefundable deposit equal to ten percent (10%) of the purchase price. Sale is typically not contingent upon financing, inspection, title examination “or any other matter whatsoever.”
- (3) Property interest being sold may not be fee title interest. For example, the Lender may be selling its interest in the property during the redemption period. In one case, a successful bidder thought he was buying a duplex and bid \$100,000. Actually, he was only buying the lender’s interest in property, which was still subject to the borrower’s right of redemption. Redemption price was \$75,000. Unsuccessful bidder bought redemption rights from the borrower and the successful bidder was required to take \$75,000 for property rights he had purchased for \$100,000.
- (4) The documents provided to bidders usually include a form purchase agreement that the successful bidder must sign. In most auctions, the terms of that agreement are not negotiable, so they should be reviewed by an attorney *before* the auction. If the successful bidder refuses to sign the form purchase agreement, he typically forfeits his deposit. Purchase agreements for auction properties are very one-sided in favor of the seller and often include such terms as:

The seller disclaims any knowledge of whether the disclosure documents it provided before the auction are complete or even true.

The time to inspect the property or review any documents ends at the time of the auction – before the purchase agreement is even signed.

Any time prior to closing, the seller can terminate leases for the property or enter into new ones without the buyer's consent.

If there are past due rents, the purchaser must pay seller at closing and receive the right to collect from the tenants in the future.

Any representations or warranties by the seller are only good for 30 days after closing, and the buyer cannot take any action if it has not objected by then.