ANATOMY OF A PURCHASE AGREEMENT – CLOSING DETAILS

Several years ago, the Occupational Code was amended to provide that a broker need not sign the closing statement if the closing is conducted by a title company. However, this change did not release a real estate broker from all responsibility in connection with a closing. It is still the case that a licensee is required to make certain that the closing is done consistent with the terms of the purchase agreement. This article – the second in a series on purchase agreements – will focus on those provisions in a purchase agreement that deal with closing details.

Selection of Closing Agent/Title Insurer

The selection of the closing/settlement agent is not regulated directly; however, the selection of the title insurance provider is regulated. Under the federal RESPA statute, which only applies to residential transactions, the seller cannot dictate the title insurance company to be used for any title insurance purchased by the buyer. If, as is usually the case, the buyer is paying for the loan title policy, then the seller cannot require that the buyer purchase that title insurance from a particular company. If the owner's policy and the loan policy are issued by different title companies, then there will be separate (split) closings.

What can be done to avoid split closings? In the end, it is a matter of negotiation. In order to avoid a split closing, the seller and the buyer will need to agree on one title company. Case law makes clear that a seller can certainly suggest that the buyer use a particular company. It has also been held that the seller may offer an economic incentive to the buyer for using the seller's preferred title company. It is also true that this RESPA rule applies to sellers only. It is not a RESPA violation for a buyer to ask the seller to buy the owner's policy from a particular title company. All of this being said, when negotiating the terms of a purchase agreement on behalf of a client, Realtors® should focus on the priorities of the client.

Of course, referrals from a real estate licensee to an affiliated title company must include the statutorily mandated disclosure form (and use of the affiliated title company cannot be required).

Property Tax Proration

Real estate taxes are prorated differently in different parts of the state. While not required, parties typically agree to prorate taxes consistent with the custom in the area because presumably that would have been the method used when the seller bought the property. Whenever a Realtor® is working in an unfamiliar geographic area of the state (or using an unfamiliar purchase agreement form), he or she needs to pay particular attention to the tax proration provision. Failure to determine how taxes are customarily prorated in a particular area can be very costly to your client. By way of example, assume a property tax bill issued in September is for $6,000 and that the property is sold in October. If the taxes are prorated in arrears, at closing, the seller will owe the buyer $500. If the taxes are prorated in advance, at closing, the buyer will owe the seller $5,500. (If taxes are prorated on a calendar year basis, the buyer would owe the seller $1,500.)

Personal Property/Fixtures

As Realtors® are well aware, the general rule is that fixtures are automatically included in the sale of a home, while personal property is not. Realtors® often call the Hotline to ask whether a particular item is or is not a fixture. The answer to that question is not always clear. The legal test for determining whether or not something is a fixture (and thus included in the sale) or is personal property, is based on the intent of the person who attached the item to the real estate. The nature of this legal test is such that the question is often debatable. While all purchase agreement forms attempt to address this issue by including a boilerplate list of

"included" property, Realtors® are well advised to work with their clients to identify any "unique" items that should be expressly listed in the purchase agreement as either included or excluded from the sale. At closing, any items that are even arguably personal property should be listed in a bill of sale.

Title Commitment Review

Many (most?) buyers do not understand the value of title insurance or how important it can be to have a title insurance commitment reviewed by a knowledgeable attorney. Title insurance does not insure title against all defects. A title insurance policy will contain "exceptions" based upon the documents of record. An "exception" is a title "defect" that the title insurance will not cover. Some "exceptions" such as a utility easement are routine; other "exceptions" could, for example, give your clients' neighbors the right to use their property or give them a say in how it is used. Most purchase agreements give the buyer a particular period of time after receipt of a title commitment to object to the condition of title. Buyer's agents should make certain that their buyer-client receives both a copy of the title commitment and the exception documents referred to in the title commitment. Buyers should be encouraged to have any title issues reviewed by a knowledgeable attorney before the time deadline to object runs out.

Closing Deadlines

Realtors® often ask what they should tell a client when the closing deadline has come and gone. For example, if the buyer is not ready to close by the agreed-upon date, can the seller terminate the contract and close on their back-up offer for a higher price? Is the answer different if the closing is delayed 1 day versus 10 days? Unfortunately, the answer to a client's questions about the enforceability of the closing deadline is to refer them to an attorney. The current law on this question is so unclear that it would be impossible for a Realtor® to give a seller any

reliable advice. (It is true that if the seller decides to sell to the second buyer and the first buyer files a lawsuit, any home sale will likely be delayed for months, possibly even years, before it gets sorted out by the courts.)

Post-Closing Occupancy

In Michigan, sellers are often permitted to remain in the home for some short period of time after closing. The purchase agreement should spell out that period of time, the daily charge and whether or not the seller is entitled to a partial refund if the seller vacates early. The purchase agreement should also spell out the parties' relative responsibilities in the event of damage to the property during this occupancy period. Both the seller and buyer should be encouraged to discuss this potential liability with their insurance agent. To avoid any misunderstanding, at closing the parties should spell out in writing the specific day and time at which the seller's occupancy rights terminate – *e.g.*, "June 6 at 12:00 noon" rather than "within 18 days." Finally, unless the parties explicitly agree otherwise, the seller's occupancy rights are exclusive. A buyer who wants to begin renovation work while the seller has occupancy is going to want to negotiate that right in the purchase agreement – even if it only involves exterior work.

Conclusion

The closing items discussed above are items that should be worked out before the purchase agreement is signed. Realtors® then have a statutory duty to make certain that the closing documents reflect these agreed-upon terms. If the parties change their minds on any previously agreed-upon provision, a Realtor® should prepare an addendum to the purchase agreement outlining that change, even if the change happens at the closing.

"AS IS" CLAUSES – WHAT DO THEY REALLY DO?

Purchase agreements routinely contain an "as is" clause; that is, a clause that states that the buyers are accepting the property in its present condition. You may recognize the following example:

> Purchaser accepts the property "as is," with no express warranties, written or implied.

In many cases, the "as is" clause appears alongside language in which the buyers acknowledge that they have had the opportunity to inspect the property and to seek professional inspections of the property. So, one might reasonably believe that an "as is" clause protects sellers from lawsuits in which the buyers claim that the sellers misrepresented some condition of the property – particularly where the condition is one that the purchasers might have discovered had they obtained a professional inspection of the property. Michigan courts, however, have not interpreted "as is" clauses this broadly.

For example, in one often-cited case, the buyer purchased a home without having it inspected.[1] A year later, the basement started leaking. The buyer removed the paneling from the basement walls and discovered that the walls were bowed-in and cracked. There was also evidence of long-term water leakage and failed attempts at repair. The damage was pervasive enough that the basement walls had been rendered structurally unsound. The buyer sued the seller.

The seller asked the court to immediately throw out the case, arguing that the "as is" clause in the parties' purchase agreement barred the lawsuit. The seller supported her position by pointing out that the Michigan Supreme Court had previously ruled that "as is" clauses

[1] *Lorenzo v Noel,* 206 Mich App 682; 522 NW2d 724 (1994).

"transfer the risk of loss" to the buyer. The trial court judge agreed and threw out the case against the seller. The buyer appealed.

On appeal, the Michigan Court of Appeals acknowledged that, as a general rule, an "as is" clause transfers the risk of loss to the buyer. However, the Court went on to say that the transfer of risk to the buyer only applies to defective conditions in the home that were unknown to both the buyer and the seller. "As is" clauses, the Court said, do not protect the seller where the seller has made a fraudulent representation regarding the alleged defect before the buyer signs the purchase agreement. Likewise, "as is" clauses do not apply if the seller takes steps to fraudulently conceal a defective condition in the property. Here, the Court found evidence that the sellers had known about the leakage and tried to conceal it. The "as is" clause did not protect the seller in this case.

The above case, along with any number of Michigan cases like it, makes clear that under Michigan law, if a buyer files a lawsuit and alleges that the seller made a false statement about the condition of the home or took steps to conceal a defect, the presence of an "as is" clause in the purchase agreement will not get the case thrown out. If the buyer makes these types of allegations, the case will proceed to trial so that a judge or jury can determine whether they believe the buyer's allegations against the seller are true.

Why have an "as is" clause in the purchase agreement at all? Well, because "as is" clauses *are* effective if the seller did not know that the statement he/she made about the condition of the property was false.

Again, by way of example, in one case the buyer of a condominium unit sued the seller after learning that setback requirements and the existing location of a water well and septic

system effectively precluded her from building a two-car garage.[2] Factually, the buyer's claim rested on the seller's husband's comment that "there was plenty of room for a two-car garage" and that he had applied for a permit. The trial court dismissed these claims based on the presence of an "as is" clause in the purchase agreement. And, the buyer appealed.

This time, the Court of Appeals agreed completely with the trial court. The Court noted that this was not a case in which the seller had made a knowingly false statement. Therefore, the Court affirmed the trial court's dismissal of the buyer's claims.

Finally, there are a number of cases involving an "as is" clause in which a court has found against the buyers because it believed that the defect should have been discovered by the buyers if they had had the home inspected – or in some cases – had the home inspected by a more competent inspector. Recent cases have made clear, however, that the buyers' duty to investigate does not apply where, through their own words or actions, the sellers have discouraged the buyers from doing so.[3] Looking at it another way, generally courts will not protect buyers who appear to have avoided obvious clues and/or were otherwise purposefully unaware. But courts will protect buyers against claims by sellers that the buyers should have figured out that the sellers were not being truthful.

[2] *Seit-Olsen v Reliance Appraisals, LLC,* unpublished opinion per curiam of the Court of Appeals, issued April 27, 2006 (Docket No. 264470).

[3] *Jordan v Rynbrandt,* unpublished opinion per curiam of the Court of Appeals, issued March 11, 2021 (Docket Nos. 350289 and 350781).

CONDOMINIUM PURCHASER QUESTIONNAIRES

Buyers who are purchasing a traditional condominium unit need to be aware that there are typically detailed restrictions about what improvements can be made to the exterior of the unit. Changes – even obvious upgrades – involving the exterior of a unit will likely require association approval. Changes that are made without the necessary approvals may need to be undone. This is true even if the work will be costly to undo and even if the unapproved modifications were performed by a prior owner.

Consider the following Michigan case from a couple of years ago.[4] In that case, the buyer, Mary Ryal, had purchased her condominium unit in 2013. In late 2015, the condominium association became aware that alterations had been made to the exterior door of Ryal's condominium unit without permission as required under the condominium documents. The changes included a new paint color, a square door lock, a pewter colored door handle and new, larger address numbers.

The condominium association demanded that Ryal undo the changes so that her door would match the other exterior doors in the project. When Ryal refused to do so, the association imposed fines and threatened litigation. Eventually, the association filed suit. Ryal's defense, in large part, was that she was not responsible because the work had been done by the prior owner and that the door was exactly how it appeared when she purchased her unit in 2013. The court rejected this argument, holding that "whether Ryal made any of the alterations or modifications herself is irrelevant …"

As an aside, it is important to note that the condominium documents here did not include any specific requirements as to the shape of the lock, the size and style of the address numbers or

[4] *Fox Pointe Ass'n v Ryal*, unpublished opinion per curiam of the Court of Appeals, issued July 23, 2019 (Docket No. 344232); 2019 WL 3315364.

the color of the door. The condominium documents stated only that there must be approval of any modification or alterations to the "door …" The court found that this language effectively gave the association the authority to dictate specific requirements concerning the door, door handle, lock and address numbers.

The trial court had ordered Ryal to make the appropriate changes to her entrance door and, in addition, required her to pay the association's legal fees. The Court of Appeals upheld that order and held that Ryal should also pay the association's legal fees incurred in connection with Ryal's appeal of the trial court's order.

The court's decision – that condominium unit owners are responsible for correcting violations even if they did not cause the violations – is not a surprising one. Similarly, a home owner who purchases a home with an existing building code or zoning violation is still responsible for those violations.

One way that condominium unit buyers can protect themselves is to try and ferret out this kind of information from the condominium association prior to closing. An association is only required to provide buyers with information as to unpaid dues assessments. Buyers (and their agents) can use that process to request that the association provide additional information about the unit and the project as a whole. A sample of such a request form is attached. This form not only asks questions about the unit being purchased but also general questions about the overall project. While associations are not required to provide this additional information, in our experience many associations are willing to do so.

S:\docs\1000\C1004\M542\Condo Purchase.docx

CONDOMINIUM UNIT PURCHASER'S REQUEST FOR INFORMATION

To: _____ Condominium Association

Please return to: _____

_____
email address

This request is provided in connection with the pending sale of Unit No. _____ from

_____ to _____

_____
Seller(s) Purchaser(s)

Please provide the following information:

1. Regular assessment amount: $_____ (Circle one:) monthly/quarterly/annually

2. Any outstanding or contemplated special assessments: (Circle one:) yes/no

   If yes, please explain: _____

   _____

   _____

3. Any unpaid assessments, late charges, fines, costs or attorney fees associated with the above unit: (Circle one:) yes/no

   If yes, please explain: _____

   _____

   _____

4. Are there any known existing violations of the condominium documents involving the above unit: (Circle one:) yes/no

   If yes, please explain: _____

   _____

   _____

5. Name of insurance agent/company that provides the association's insurance:

   _____

   _____

   _____

6. Please provide a copy of the following information:

a. Current operating budget/financial statement for the association.
b. Any unrecorded association bylaws/rules and regulations for the association.
c. Minutes from most recent membership meeting.

_____

Signature

_____

Print Name

_____

Print Title

Date: _____

ELECTRONIC TRANSACTIONS – BASIC CONTRACT RULES STILL APPLY

One of the more common Hotline questions continues to be some variation of the following:

> My buyer submitted an offer. The listing agent texted me and told me that the seller had accepted my client's offer and that she would be emailing the final signed purchase agreement later that same day. Two hours later, the listing agent called me and told me the seller had accepted another offer. Doesn't my client have a binding contract?

The answer to this question is "No!" In order to have a binding real estate contract, you need to have a written contract signed by the parties. In order to accept the buyer's offer, the seller must sign that offer, and the signed offer must be delivered to the buyer. There is no binding contract so long as the seller's signed acceptance remains on the seller's kitchen table. This is true even if the buyer is told that the signed acceptance is on the seller's kitchen table. These are longstanding contract principles that were in no way altered by the law allowing for electronic transactions.

Decades ago, real estate practitioners amended purchase agreement forms to provide for binding contracts to be exchanged via fax machines. The Uniform Electronic Transaction Act ("UETA") simply took that concept and adapted it to current technology. UETA provides that parties to a contract can agree that signatures and/or delivery can happen electronically. That is all it does. It does not modify contract law or the rules of offer and acceptance.

In order to create an enforceable contract electronically, the parties must agree to conduct business electronically, and the parties must actually enter into a binding contract. When deciding whether the parties actually entered into a binding contract electronically, courts will focus on intent. In today's world, parties often conduct preliminary negotiations electronically – for example, by text. Courts must distinguish between these electronic preliminary negotiations

and an actual binding contract. In order for there to be a binding contract: (1) the method of electronic delivery must be as agreed; (2) the parties themselves must have signed the contract and (3) it cannot appear that the parties intended to follow up with a subsequent written contract.

Method of Delivery

Where parties have agreed to conduct business electronically, it is not the case that any form of electronic communication is sufficient. When a contract is silent as to the means of electronic delivery, UETA provides that delivery should be made to "an information processing system the recipient uses for the purpose of receiving information of the type sent." Obviously, a party does not want to get into a dispute as to whether they delivered the contract to the other party's correct "information processing system." For this reason, we advise parties to agree in writing as to what specific email address will be used. Realtors®' buy and sell agreement forms typically provide that delivery to the seller shall be in care of the listing agent and delivery to the buyer shall be in care of the buyer's agent. This is consistent with the rules of offer and acceptance in the case of physical delivery of documents. This language does <u>not</u> authorize either agent to bind their client via text or email exchange with the other agent.

Electronic Signatures

Real estate agreements must be signed by the parties. Under UETA, parties may agree to use electronic signatures. UETA provides that the term "electronic signature" includes any method adopted by a person "with an intent to sign." An "electronic signature" would include, for example, a scanned copy of a handwritten signature. There is also software that can capture a person's handwritten signature and embed it into a document. The term "electronic signature" also includes a digital signature which typically does not involve any type of replication of a person's handwritten signature.

Intent of the Parties – Follow-Up Contract?

The parties themselves can enter into an enforceable purchase agreement through an email exchange. The exchange would need to include all of the essential terms of the transaction, and there would need to be signatures.[5] In addition, the court would need to conclude that both parties intended to be bound by the "contract" set forth in the email exchange.

If it appears from the substance of the electronic exchange that the parties anticipated that there would be a subsequent agreement drafted, a court is unlikely to conclude that the email exchange created an enforceable agreement. So, for example, if one of the parties indicates in the email exchange that she will now have her real estate agent (or her lawyer) draft up a contract containing the agreed-upon terms, a court is unlikely to conclude that the email exchange alone created an enforceable contract.

Conclusion

It is often the case that agents will – with the consent of their clients – discuss contract terms prior to preparing a written offer or counteroffer. Sometimes these discussions take place electronically via email or text. Preliminary discussions between agents that take place electronically are no more binding than discussions that take place in person or on the phone. Until the "agreement" is reduced to writing and signed by both clients, there is no binding contract. Realtors® must keep this in mind and make certain that their clients understand this as

[5] Questions have come up as to whether the typed name at the end of an email message qualifies as an "electronic signature." One court in Texas has suggested that it may depend on whether the typed name was "typed purposefully" or "generated automatically." Another court in Texas expressly rejected this distinction finding that "a signature block at the bottom of an email has come to represent what a handwritten signature once represented: a means of identifying the sender, signaling that he or she adopts or stands behind the contents . . . ." A New York court found that the phrase "With kind regards, Michael" typed at the end of an email qualified as an electronic signature because "the sender's act of typing his name at the bottom of the e-mail manifested his intention to authenticate." To avoid any uncertainty, if a party wishes to enter into an agreement via email, the email should clearly evidence an intent to sign, for example, by typing the word "signature" next to the party's name.

well. Clients who were told that they had “a deal” prematurely are typically very unhappy clients.

ESCALATION CLAUSES

Drafting (and using) escalation clauses would be much easier if all purchase offers were the same except as to price. But, of course, that is not the case. A buyer may offer a higher price in order to make his contingent offer more attractive to the seller. A relatively high offer may require significant seller concessions. A buyer making a cash offer may anticipate that the seller will take a lower price. And, of course, there is always a concern that the offer being used by the seller to trigger an escalation clause may not in fact be a bona fide offer.

The trick then is to try and draft an escalation clause that puts that offer on equal footing with the other offers that the seller may receive. Ideally, an escalation clause should only be triggered by a genuinely better offer. Getting to that point – where we are comparing apples to apples – is not an easy task.

There is also the question of how the escalation will work once it is triggered. If the seller notifies the buyer in writing of the new price as calculated per the escalation clause, is that an acceptance? Or a counteroffer? In other words, is the buyer already contractually bound to pay the "escalated purchase price" (assuming it was correctly calculated) or is the buyer not contractually bound unless the buyer signs an addendum agreeing to pay the escalated purchase price? Even if the buyer is contractually bound, upon receipt of the addendum, there is always the possibility that the buyer will disagree with the calculation of the escalated purchase price.

Assume hypothetically that a seller is presented with an offer at a stated purchase price of $350,000, and another offer with a $1,000 escalation provision. Should that seller accept an offer for $350,000, or use the escalation clause and increase the price to $351,000? Is the additional $1,000 worth the risk that the second buyer will treat the Seller's election as a

counteroffer and/or reject the Escalated Purchase Price calculation? Looking at it this way, it would seem that many sellers might choose the bird in the hand.

There is also the possibility of competing escalation clause offers. If sellers have more than one offer with an escalation clause, do the two competing escalation clauses cancel each other? Can the seller use the two escalation clauses back and forth increasing the price each time until reaching the highest cap? What if neither escalation clause has a cap?

And finally, while the risk of including an escalation clause without a cap is obvious, it is also the case that buyers cannot include an escalation cap without disclosing their maximum price. If triggering the escalation clause does not get the seller to the buyer's stated maximum price, it seems unlikely that the seller will accept at that lower price. Isn't a savvy seller – particularly in today's market – going to simply counter at the escalation cap amount?

All this being said, there is certainly no indication that escalation clauses are falling into disfavor. Escalation clauses continue to be commonly used. Too often, there is not enough time and thought put into drafting such a clause. We have attached a sample Escalation Addendum, designed to help both buyers and sellers, and their respective agents, walk through the various issues that should be considered when including an escalation clause in a purchase agreement. While the form is set up with various choices, Realtor® firms may wish to make uniform decisions on these choices and revise the language in the Escalation Addendum accordingly.

S:\docs\1000\C1004\M542\Escalation Clauses.docx

EXHIBIT A

ESCALATION ADDENDUM

This Addendum is attached and made part of the Purchase Agreement dated _____ _____, covering the property located at _____.

1. In the event that Seller receives a bona fide offer to purchase the above property (the "Property") at a price higher than the price contained in Buyer's offer, then Buyer will escalate the Purchase Price and pay $_____ above such bona fide offer, less any and all seller-paid closing costs or concessions. If this escalation provision is invoked, Seller agrees to notify Buyer in writing as to the Escalated Purchase Price amount which notice shall include a copy of the competing bona fide offer.

Calculation of Escalated Purchase Price. **Select all Applicable:**

_____ a. Cap on Escalated Purchase Price. The total Escalated Purchase Price shall not exceed $_____.

_____ b. Exclusion of Contingent Offers. A bona fide offer for purposes of Paragraph 1 above shall not include any offer that is contingent upon the sale of the buyer's home.

_____ c. Exclusion of Other Escalation Offers. A bona fide offer for purposes of Paragraph 1 shall not include any offer containing an escalation clause. IF THIS PROVISION IS NOT SELECTED, A COMPETING OFFER WITH AN ESCALATION CLAUSE MAY RESULT IN MULTIPLE ESCALATIONS THAT ESCALATE TO THE BUYER'S CAP.

_____ d. Appraisal Contingency. Buyer's obligation to purchase the Property at the Escalated Purchase Price is contingent upon the home appraising at or above the Escalated Purchase Price.

_____	_____
Buyer Signature	Buyer Signature
_____	_____
Print Name	Print Name
_____	_____
Date	Date

2. Seller's Response. Attached to this Addendum is a copy of the offer upon which the Escalated Purchase Price of $_____ has been calculated. **Select One:**

_____ a. Acceptance. Seller hereby accepts Buyer's offer to purchase at the Escalated Purchase Price.

_____ b. Counteroffer. Seller hereby offers to sell the Property at the Escalated Purchase Price set forth above, provided however, that unless and until such time as Buyer shall accept this offer by acceptance and physical delivery of this Addendum, Buyer acknowledges and agrees that Seller shall be free at all times to accept any other offer(s) on the Property and, further, that Buyer's acceptance and physical delivery of this Addendum shall be made not later than _____ at _____ (a.m. or p.m.) or Seller's counteroffer shall be irrevocably withdrawn and of no further force and effect.

Seller Signature	Seller Signature
Print Name	Print Name
Date	Date

3. Buyer's Response. Signature of Buyer below is required ONLY in the event subparagraph 2.b. above is selected. By signing below, Buyer accepts Seller's counteroffer and agrees to purchase the Property at the Escalated Purchase Price set forth above.

Buyer Signature	Buyer Signature
Print Name	Print Name
Date	Date

IT'S BEEN ALMOST 35 YEARS: MOST FREQUENTLY ASKED HOTLINE QUESTIONS OF ALL TIME

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

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

2. **QUESTION:** I am a salesperson and I formed a corporation for tax purposes. I have told my broker that I want all future commission checks payable in the name of my company. Is this possible?

   ANSWER: NO. Since salespersons' licenses can only be issued to individuals and brokers can only pay commissions to real estate licensees, salespersons cannot receive commission checks from their broker in the name of a corporation or other entity.

3. **QUESTION:** My sellers are not going to answer any of the questions on the Seller's Disclosure Statement because they have never lived in the residence, but have only used it as a rental. Is this permissible?

   ANSWER: NO. Sellers are not exempt from Seller Disclosure Act requirements just because they have never lived in the property. Sellers who have owned and leased a residence must nonetheless answer the questions on the Seller's Disclosure Statement to the best of their knowledge.

4. **QUESTION:** I represent buyers who entered into a purchase agreement. My buyers were not satisfied with the home inspection and have decided not to buy the home. The purchase agreement clearly states that if the buyers are dissatisfied with the inspection report they can terminate the contract and receive a full refund of their earnest money deposit. The sellers disagreed with the buyers and have stated that they want the earnest money deposit. I'm of the opinion that I can release the money to the buyers based upon the clear language of the purchase agreement. Am I correct?

ANSWER: NO. Since the sellers are making a claim to the earnest money, you cannot release the money to the buyers. The fact that it seems quite likely that the buyers would prevail in any litigation over the earnest money deposit does not mean that you can release the earnest money to the buyers over the objection of the sellers.

5. **QUESTION:** Once a transaction falls through, does a broker need to get a written release from both parties before releasing the earnest money deposit?

ANSWER: NOT ALWAYS. The law only requires a written release be signed if there has been a dispute over the deposit. Once a broker is aware that both sides claim a deposit, the law prohibits the broker from disbursing the funds without a written agreement signed by both parties or a court order. (Some purchase agreements require a release in all instances.)

6. **QUESTION:** My seller tried to terminate my listing agreement two months before it expired. After I said "no," the seller will no longer answer my calls/texts or permit any showings. Isn't my seller required to honor the listing agreement and continue to work with me?

ANSWER: NO. The law says that a person must either honor their contract or be potentially liable for breach of contract damages. But you cannot force a seller to continue to work with you. The law on damages in the event of the seller's wrongful termination of a listing agreement is complicated, so you should consult with an attorney.

7. **QUESTION:** I am a buyer's broker. My buyer received a counteroffer from the sellers that stated that the buyer had until 12:00 noon on Saturday to respond. On Friday, I received a text from the listing agent stating that the sellers were withdrawing their offer. Can the sellers withdraw the counteroffer before its stated expiration?

ANSWER: YES. Generally unless and until an offer is accepted, it may be withdrawn prior to its stated expiration.

8. **QUESTION:** My buyer submitted an offer. The listing agent texted me and told me that the sellers had accepted my client's offer and that the agent would be emailing the final signed purchase agreement later that same day. Two hours later, the listing agent called me and told me the sellers had accepted another offer. Don't my clients have a binding contract?

ANSWER: NO. Your buyers do not have a binding contract unless and until the signed agreement is delivered to the buyers (or to you as their agent). A text (or phone call) from the listing agent is not sufficient. Do not tell clients that they have a deal until you have actually received the signed contract.

9. **QUESTION:** I have received three different offers on a home that I have listed for sale. My seller would like me to share the economic terms of one offer with another potential buyer and give that buyer an opportunity to submit a new, better offer. Isn't this confidential information?

ANSWER: NO. The terms of an offer received by a seller are not confidential information and may be freely shared. Information known to both sides of a potential transaction is not confidential information.

10. **QUESTION:** Can I advertise a program whereby I agree to donate $400 to the local high school booster club for every home I list and sell?

ANSWER: MAYBE. If the promotion is advertised broadly in the community (for example, in the local newspaper), the promotion is probably permissible. If, on the other hand, the promotion is advertised only in the local booster club's newsletter, it may be viewed as an unlawful referral fee. In the latter case, the booster club may be viewed as referring business to you in exchange for a referral fee. The fact that the booster club is a community service program does not change the analysis.

BUYER'S LOVE LETTERS

It cannot be said too often that ordinarily sellers are not required to treat competing buyers equally. A seller can, for example, give some, but not all, competing buyers a second

chance to make a better offer. A seller can also choose one buyer over another because that buyer is an avid gardener or a favorite local librarian. In today's competitive market, some buyers are including introductory letters – often referred to as "love letters" – with their offers. In these "love letters," the buyers attempt to convince the sellers that they should be selected to be the next caretaker of the sellers' beloved family home.

Realtors® need to be aware that this practice has significant legal implications. Assume, for example that a buyer's "love letter" explains that the writer and her husband are avid gardeners who fell in love with the sellers' home at first site because it reminded them of the writer's childhood home. Assume further that the writer also mentions that the home would be perfect for the couple and their two children who are enrolled in St. Michael's Elementary School only two blocks away.

The sellers who receive this letter are put in a difficult position. Under the law, sellers cannot select one buyer over another based on marital status, familial status, religion etc. Sellers cannot choose these buyers for any of these reasons, nor can they reject these buyers for any of these reasons. Now that the sellers have this information about the buyers, whether they accept this offer or another offer, someone could claim that the decision was discriminatorily motivated.

Sellers who receive "love letters" from more than one buyer are in an even more precarious position. Imagine, for example, if these same sellers also had a "love letter" from a different buyer who explained that he and his same sex partner are now retired and that the sellers' home would be perfect for the next chapter of their lives. Sellers who find themselves in this predicament would need to be very careful to treat the competing buyers equally. Any choice must be based upon wholly objective criteria. A seller in this situation should no longer feel free to select one buyer over another based upon their love of gardening, for example.

It would certainly be possible to write a "love letter" without mentioning any protected classes under the Fair Housing Act or similar State and local laws. A buyer could, for example, write a letter describing their love of gardening and/or the architectural style of the home. But, many (most?) "love letters" are not so limited. Afterall, the purpose of a love letter is to try to make the seller comfortable with the writer and convince the seller that the writer is the person who truly appreciates the seller's home. Few of us tell "our story" without mentioning, in passing, details suggesting gender, marital status, age etc.

In light of these concerns, Oregon recently passed a statute requiring a listing agent to "reject all communications [from a buyer] other than the customary documents in a real estate transaction." The stated purpose of this new law is to "help a seller avoid selecting a buyer based on the buyer's race, color, religion, sex, sexual orientation, national origin, marital status or familial status. . . ."[6]

The time to discuss this practice with your seller is at the time of the listing. Sellers should understand the concerns involved and be reminded that the law prohibits them from choosing (or rejecting) a particular buyer based upon any of the protected classes. A well-informed seller may decide that they do not wish to see any "love letters" and instruct the listing agent not to forward any such letters to them. The attached form can be used to help facilitate that discussion. Realtors® are discouraged from agreeing to preview "love letters" on the seller's behalf in order to filter out the problematic ones. Mistakes can be made.

PICK ME!

In these days of multiple offers, many buyers and their agents are trying to come up with creative ways to increase the chances that their clients' offer will be the chosen one.

[6] ORS 696.805(7).

1. Any number of buyers are trying to make their offers more desirable to sellers by waiving the inspection contingency. The risk in doing so is obvious – a buyer who waives an inspection contingency may end up with a home that needs costly repairs. In this situation, the buyer's chances of recovering against the seller may be remote. Over the years, Michigan courts have thrown out a number of cases against sellers on the theory that had the buyer even bothered to get a competent inspection, the defect would have been discovered. Buyers who cannot recover against the seller may turn their attention to their buyer's agents. For this reason, it is very important that a buyer's agent is able to show that their buyer-client knowingly assumed the risks.

As an alternative to waiving an inspection in its entirety, in order to make their offer more attractive to the seller, buyers may wish to limit their inspection in some way.

For example, buyers could forgo their right to request concessions based upon the results of the appraisal:

> Buyer's offer is contingent upon a satisfactory inspection at Buyer's expense within ____ days. Upon receipt of the inspection, Buyer shall have the following two options only: (a) terminate this Agreement in writing; or (b) proceed to close pursuant to the terms hereof. Failure to terminate this Agreement in writing within the stated timeframe shall constitute a waiver of this contingency.

The buyers could limit the right to terminate only to situations where there is a major defect:

> Buyer's offer is contingent upon a satisfactory inspection at Buyer's expense within ____ days; provided, however, that Buyer may not terminate this Agreement based on the results of the inspection unless it reveals a single defect the estimated repair cost for which is in excess of $_____.

Alternatively, buyers could agree to forfeit their earnest money deposit in the event the inspection results were unsatisfactory:

> Buyer's offer is contingent upon a satisfactory inspection at Buyer's expense within ____ days. If the inspection reports are not satisfactory, Buyer may terminate this Agreement by providing written notice to Seller within said timeframe, in which case the earnest money deposit shall be released to Seller and neither party shall have any future rights or obligations hereunder.

2. Another increasingly common method of making an offer more desirable to the seller is to provide an "appraisal guaranty" in which the buyer agrees to cover all or some of the shortfall in the event the appraisal comes in lower than the sale price. There is nothing wrong with this approach – although, based on the calls we get, it is often the case that these clauses are not carefully drafted. It is difficult to draft "one size fits all" appraisal guaranty language that works with all purchase agreements. Many purchase agreement forms do not actually contain an appraisal contingency clause. With these forms, the only way the results of an appraisal can stop the transaction is if it prevents the satisfaction of the loan contingency. For this reason, it may be necessary to add an appraisal contingency in order to provide for an "appraisal guaranty." One possibility:

> Notwithstanding any other provisions herein, this Agreement is contingent upon the Property being appraised at a value equal to or higher than (select one):
>
> (a) ☐ the sale price
>
> (b) ☐ $_____ (Buyer shall pay the balance of the sale price, together with the loan down payment amount, in cash)

As an aside, there appears to be a misconception out there that if the difference between the appraisal and the sale price exceeds the appraisal guaranty amount, then the seller is required to sell at the lower price. This would not be the case unless your purchase contract expressly provides for such a price reduction. Ordinarily, under these circumstances, the buyer's only recourse would be to terminate the agreement (or agree to pay the difference).

3. Some buyer's agents have proposed offering the listing agent some kind of bonus for "prioritizing" their client's offer. Such a practice could be a problem for both the listing agent and the buyer's agent. First, it is arguably a breach of fiduciary duty for a listing agent to try to encourage a seller-client to accept a particular offer because it would result in a benefit to the listing agent. Moreover, under the Code of Ethics, a listing Realtor® has an ethical obligation to present all offers "objectively." Finally, the Occupational Code prohibits a salesperson from accepting a commission from anyone other than his own broker.

Alternatively, the buyer's agent could enhance his/her client's offer by offering a commission rebate to the seller. DLARA takes the position that payment by a licensee directly to a buyer or seller is not an illegal referral fee.

4. Some buyers have tried to get the seller's attention by offering a sizable nonrefundable earnest money deposit. This is certainly permissible. Keep in mind that if the purchase agreement simply says that the earnest money deposit is nonrefundable, the assumption is that it is nonrefundable in all instances. So, for example, if the buyers cannot get financing or the inspection contingency is not satisfied, the buyers can get out of the transaction, but they will forfeit the deposit. If a buyer does not intend that the deposit be nonrefundable in all instances, then the purchase agreement needs to spell that out.

When considering a nonrefundable deposit, remember also that currently courts tend to enforce time deadlines in contracts quite strictly. So, if a buyer agrees to a sizable nonrefundable deposit and for some reason the loan process is delayed beyond the agreed-upon closing date, the seller may try to declare the purchase agreement terminated and the deposit forfeited. (After all, these days the seller is not likely to have any trouble selling the home to someone else.)

5. We have also heard of buyers who have become so discouraged that they decide to put in offers on more than one home at a time. Again, the risk is obvious – such buyers may find themselves contractually obligated to buy more than one home. In today's market, buyers may assume that if the worst happens and they end up with purchase contracts on two different homes, they will be able to quickly resell one of those homes. But if not, remember that the damages for breach of contract are typically the difference between the actual value of the home and the agreed-upon price, which in today's market could be significant.

6. A simpler approach to making an offer more desirable to a seller may be for the buyer to offer to assume some of the seller's closing costs. Just as a seller may agree to pay all or some of the buyer's closing costs, a buyer may agree to pay some or all of the seller's closing costs. For example, a buyer wishing to prepare an offer that stands out from other offers could agree to pay some or all of seller's listing commission obligation, state and local transfer taxes and/or the owner's title insurance policy.

We have included a form Acknowledgment and Release that buyers' agents may use to establish a record as to their buyers' informed decisions.

ACKNOWLEDGMENT AND RELEASE

Buyer(s):_____

Broker: _____

Agent: _____

Property Address: _____

In an attempt to submit an offer that is more attractive to the seller(s), we have instructed our Realtor® to do one or more of the following:

☐ Not to include an inspection contingency in our purchase agreement. We understand that an inspection is customary and that by waiving an inspection we may be purchasing a home that requires costly repairs.

☐ To provide that our earnest money deposit will be nonrefundable. We understand that this means that we will forfeit these funds if we are unable to close by the agreed-upon date.

☐ To include a provision whereby we agree to cover any shortfall between the sale price and the appraised value of the home up to a stated amount. We understand that this means that we may be paying more for our home than it is currently worth.

In any of these events, we knowingly accept the risk(s) involved and hereby release Broker and Agent from any and all liability or responsibility for any adverse consequences that may result from our decisions.

This acknowledgment and release will also apply to any offers on other properties that we may submit through the Broker/Agent.

_____

Buyer's Signature

_____

Buyer's Signature

_____

Date

SHOW YOUR WORK

Brokers often ask about recordkeeping – both the types of records they are required to keep and the length of time they are required to hold onto those records.

While a number of states impose detailed record-keeping requirements on real estate brokers,[7] the only types of records that Michigan license law regulates are the broker's trust account records. Under Michigan license law, a broker with a trust account is required to maintain both a chronological record covering all transactions and a per transaction record that only records the deposits and checks issued in connection with one particular transaction. The specific information that must be recorded is listed on Exhibit A hereto. License law specifically requires that these trust account records must be kept a minimum of 3 years.

Of course, license law is not the only consideration. In the event at some time in the future a Realtor® is faced with a licensing complaint, lawsuit or other dispute, the Realtor® is going to want to be able to produce records from that transaction. The law contains rules – known as statutes of limitation – which act as lawsuit deadlines. Once the appropriate statute of limitation has run, a party can no longer file a lawsuit based on that transaction or occurrence. Since the longest generally applicable statute of limitations period is 6 years, lawyers generally recommend that their broker-clients maintain records for a minimum of 7 years. If records are stored electronically, they should be stored in a secure location protected by a back-up system.

Many brokers' record retention policies only provide for the retention of the final contracts such as the final purchase contract and the applicable closing documents. This is not the best policy. In many lawsuits, the most relevant document is not the final contract but the drafts that led up to the final contract and/or the communications that went along with these drafts.

[7] For example, California, Washington, Maryland, Illinois and North Carolina.

Assume, for example, that a purchaser is having second thoughts about not having the home inspected and claims her buyer's broker did not advise her properly. It will be useful to be able to produce the final purchase agreement that was signed in which the purchaser waived the inspection. It will be even more useful to be able to produce earlier offers in which an inspection was included but subsequently removed at the request of the buyer and/or the emails the buyer's agent sent to the purchaser explaining the risks of waiving an inspection.

In situations such as this one, hopefully, the Realtor® has advised his or her client on the risks of various options from which the client made their own choices. If there is a disagreement down the road, the Realtor® is going to want to be able to prove that these communications took place. (We can assure you that to protect themselves, lawyers retain every draft of a document in their files, along with every email to the client explaining the changes that were made and why.)

Keep in mind that it is not only completed transactions that end up in litigation. Realtors® are encouraged to maintain records not only on closed transactions but also on failed transactions, listings that never sold and other interactions that fell short of a completed sale.

At the end of the retention period, all records should be disposed of properly. Under Michigan law, records containing personal data such as social security numbers or other financial information must be shredded or otherwise destroyed "so they cannot be read, deciphered or reconstructed through generally available means."[8]

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[8] MCL 445.72; 445.81.

EXHIBIT A
Rule 313 Excerpt

GENERAL LEDGER (one record of all funds from all transactions)

For all funds **received**, the record must include all of the following information:

(a) The date that the funds were received and the date of deposit.

(b) The name of the party who provided the funds.

(c) The amount of the funds received and deposited and the method of payment.

For all funds **disbursed**, the record must include all of the following information:

(a) The name of the party to whom funds were disbursed.

(b) The date of the disbursement.

(c) The check number.

(d) The purpose of the disbursement.

(e) The amount of the disbursement.

The broker's general ledger record must reflect the **current account balance** of each account maintained and must be made available to the department upon request.

TRANSACTION LEDGERS (a separate record for each transaction)

(a) For funds **received**, the record must include all of the following information:

(i) The names of both parties to a transaction.

(ii) The property address or brief legal description.

(iii) The dates and amounts received.

(b) For funds **disbursed**, the record must include all of the following information:

(i) The date of the disbursement.

(ii) The name of the payee.

(iii) The check number.

(iv) The amount of the disbursement.

WHOLESALING REVISITED

Last year's convention topics included a discussion of "wholesaling." By "wholesaling," we mean where a buyer enters into a contract to purchase property with a seller and then immediately markets that property to other buyers. A "wholesaler," unlike a "flipper," does not actually take title to the property or only takes title for a very short period of time – typically hours rather than days.

Over the past year, we have received a number of follow-up questions about this practice. Some members want to know why the practice is not simply illegal. Others point to the number of seminars out there and conclude that it must be a legitimate business model. Based on all of the interest in this topic, we felt that it was appropriate to follow up this year. Unfortunately, the analysis is not as straightforward as we would all like it to be.

Consider the following hypothetical. A buyer enters into a contract to purchase a home for $50,000 and close within 60 days. As soon as the purchase contract is signed, the buyer immediately begins looking for someone who will buy this same home for $60,000.

On its face, this is a straightforward legal transaction. Some states, including Michigan, require such buyer to have a real estate license if they sell their own real estate on a regular basis.[9] But assuming that this is not a violation of license law, it is not against the law to try to sell real property that you have under contract but have not yet closed on.

Whether a particular wholesaling transaction is questionable depends on how it was structured. What was the seller told? What happens if the initial buyer cannot find a second buyer? If the first buyer will purchase the home whether or not a second buyer is found, then again, this appears to be a straightforward above board transaction. This is true unless the

[9] Individuals who sell real estate for themselves as a "principal vocation" – defined as more than 5 real estate sales in any 12-month period – are required to be licensed. MCL 339-2502b.

first buyer initially had a fiduciary relationship with the seller – or the seller reasonably believed that there was such a relationship. A licensee who has a fiduciary relationship with a seller cannot then purchase that seller's property with the intent of making a profit.

But what if the "wholesale" buyer does not intend to close the transaction unless they can find a second buyer? It is often the case that in a "wholesale" transaction the first buyer structures the contract with the seller so that they can walk away from the transaction if they cannot find a second buyer. If the contract states that the first buyer can walk away under those circumstances (and perhaps forfeit their earnest money deposit), then again the transaction appears to be wholly above board.

On the other hand, what if the first buyer's "out" is hidden within another contingency? For example, what if, for this purpose, the contract is structured to include an unusually lengthy inspection contingency? There is nothing "illegal" about a lengthy inspection clause – even one that runs right up until the day of closing. Moreover, it is often the case that an inspection contingency clause is drafted in such a way so that it does not require the buyer to justify their claim that the inspection results were unacceptable. (There are certainly other situations where a buyer has terminated a purchase agreement pursuant to an inspection clause based on a decision that had nothing to do with the condition of the property.)

Does this mean that a "wholesale" buyer can enter into a purchase contract and then use the inspection contingency to terminate the contract if he is unable to find a second buyer at a higher price? On the other hand, what if the "wholesale" buyer <u>does</u> find a second buyer and the seller objects to the profit the "wholesale" buyer is making on the resale? In either case, if challenged, will a court simply enforce the contract as written or have sympathy for the seller and examine the underlying transaction? It is unlikely that any seller would sign a purchase

contract if they understood that the only way the buyer will actually close on the sale is if they can resell the property for a profit before they ever take title. But how far would a court go to protect a seller who signed a legally binding contract that he/she obviously did not understand?

While presumably the equities in this situation fall on the side of the seller, it is true that in many of these cases, ruling for the seller could require a court to stretch some well-established basic principles of contract law. Such principles include "contracts are to be enforced as written" and "parties to a contract are presumed to understand what they are signing."

But it is also true that a judge who is sympathetic to such a seller would have some legal arguments available to him or her. For example, if the first buyer is a real estate licensee, the court may examine the relationship between the seller and the first buyer. Was it clear to the seller from the start that the real estate licensee was not representing the seller, or did the seller reasonably rely on the licensee's advice? Is the transaction a disguised "net listing" transaction that is prohibited by the Occupational Code? Whether or not the seller is a licensee, a sympathetic judge could also conclude that, under the circumstances, the first buyer had no right to terminate the purchase contract under the inspection contingency clause.

A few states and cities have begun trying to regulate wholesalers. Several states have amended their real estate license laws to specifically state that the sale of a contract for the purchase of real estate (also) requires a real estate license.[10] The City of Philadelphia has adopted a wholesaler licensing requirement and a disclosure requirement aimed at helping sellers find resources to help them determine the fair market value of their home prior to signing a sales contract with a licensed wholesaler.

In all events, a wholesale transaction can easily lead to a protracted legal fight, the optics of which will not be great for either the agent involved or their broker. Whatever time-tested

[10] See, for example, 59 Oklahoma Statutes 2011, Section 858-301; 225 Illinois Code, § 454/1-10.

legal principles are involved, asking a court to enforce a contract that no one would knowingly sign is a very awkward position to be in. Brokers who have agents in the wholesaling business also need to understand that, as a general matter, claims arising out of the purchase of property by an agent are excluded from the broker's insurance coverage.

SUPERVISION OF ADVERTISING – NOT JUST AN OCCUPATIONAL CODE CONCERN

Realtors® are aware that Michigan license law contains advertising rules designed to make sure an individual or team name is not more prominent than the broker's name. Realtors® are also aware that Michigan license law requires that a salesperson's advertising – as well as all other business practices – must be supervised by an associate broker. But what sometimes gets forgotten is that these are not just Occupational Code requirements. There are real liability concerns for both the salesperson and the broker. If a salesperson's advertising does not make clear that the salesperson is working for the brokerage, in the event of a lawsuit, the salesperson may be personally liable (in addition to the firm), and the broker's insurer may deny coverage for the firm.

A. Advertising Rules Refresher[11]

All real estate advertising must include the licensed name of the broker. This requires that a broker use the name on file with DLARA. The broker's logo or franchise name is not sufficient. If the broker has an assumed name on file with DLARA, the broker can advertise in that name. In addition to the broker's name, the advertising must include either the broker's telephone number or street address.

If the advertising includes the name of an individual salesperson or team, the type size used for the broker's name must be **at least as large** as the type size used for the individual licensee's or team name. The names do not need to be in the same font or color, and it is not the case, for example, that if the salesperson's name is in bold type then the broker's name must also be in bold type. The rules do not regulate the size of the type for the phone number/address.

When comparing the type size of the name of the associate broker, salesperson or team (what we will refer to as the "Licensee") with the type size of the name of the employing broker (what we will refer to as the "Firm"), DLARA has said either of the following tests may be used:

[11] MCL 339.2512e.

Test No. 1. The height of the block containing the name of the Licensee may not exceed the height of the block containing the name of the Firm; or

Test No. 2. The point size of the majority of letters in the name of the Licensee may not exceed the point size of the tallest word in the name of the Firm.

An advertisement that satisfies either test is compliant. It is not necessary to satisfy both tests. The purpose behind having two separate tests is to preserve the goal of the advertising rule – that is, to make sure that the advertising makes clear what company is doing the advertising – while at the same time, providing licensees with creative flexibility. Remember that these are minimum requirements. A Firm can always adopt more stringent requirements than the law dictates.

B. Piercing the Corporate Veil

What many Realtors® may not fully appreciate is that advertising in the name of the company is not only an Occupational Code requirement. If an individual agent or team does not advertise in the name of the company, the individual agent (or team member) may be personally liable for any judgment arising out of the agent's business.

If, for example, I respond to a solicitation to list my home from "Team Smith" and later find out that "Team Smith" is a group of agents within "XYZ Realty Corporation," a court may hold the "Team Smith" agents personally liable for any damages I incur relating to my listing. The analysis of this issue under the law is fairly straightforward. In order for me to be forced to look only to a company's assets for any damages, it must be shown that at the time I contracted for service, I was aware – or should have been aware – of the fact that that I was dealing with a corporation.

A number of states have statutes that prohibit an individual or team from advertising "in a way that suggests that the individual or team is an independent real estate brokerage." Other states require that the firm name be "more prominent" than the name of the individual agent or

team. By regulating relative type size, Michigan adopted a more objective approach. That being said, Michigan Realtors® should keep in mind that in addition to complying with the relative type size requirement, for liability reasons, licensees also need to make certain that the advertising makes clear that the agent or team is part of the real estate company and not a separate entity. For example, a team name that uses the word "group" or "company" may be viewed as suggesting that the team is an independent entity. Even if such advertisement complies with the Occupational Code's relative type size requirements, a court could nonetheless find that in this situation, the team members are not protected by their brokerage firm's corporate shield.

C. Insurance Coverage

The fact that the court allows someone to pierce the corporate veil does not mean that the brokerage firm is off the hook. It just means that the individuals are additional defendants along with the brokerage firm. And advertising that does not comply with the Occupational Code requirements may impact the broker's insurance coverage. A broker's errors and omissions policy covers activities performed **in the name of the company**. Where, for example, the listing advertising does not make clear that the home is being listed by the brokerage firm (as opposed to the individual agent and/or team), the insurer may take the position that the work was not being performed in the name of the company. If a lawsuit arises in connection with this listing, the insurer may try to deny coverage on this basis.

D. Conclusion

Both brokers and their salespersons have good reasons to make certain that their advertising makes clear that the business is being conducted by the brokerage firm. In the event

of a lawsuit, it is in everyone's interest that the liability, if any, be limited to the broker entity and that the broker entity's insurance cover the claim.