Legal Focus for Leaders

Michigan Association of REALTORS®
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AGENT SELF DEALING – BEWARE

One of the side effects of the recent great recession has been real estate agents' exposure to many real estate owners in dire financial circumstances. These owners are typically not knowledgeable about real estate and are highly vulnerable. Unfortunately, some agents have used these situations to acquire real estate at a steeply discounted price or otherwise profit from people in distress. Unfortunately, the brokers associated with these unscrupulous agents can, under certain circumstances, be held liable for their agents' transgressions. A recent Ohio case demonstrates how easily a broker can fall into this situation. *Auer v Paliath*, 986 NE2d 1052 (Ohio App, 2013).

In this Ohio case, a real estate brokerage firm (the "Firm") and a salesperson associated with the Firm (the "Agent") were sued by a buyer (the "Buyer") for fraudulently inducing her to purchase a number of properties. The Agent had become associated with the Firm through an independent contractor agreement dated August 17, 2006. The independent contractor agreement contained terms with which most REALTORS® would be acquainted.
The independent contractor agreement provided, for example, that the Agent could determine her own business hours and choose her own target clients, marketing techniques and sales methods. Further, the Agent would be responsible for payment of her own taxes, insurance, licensing fees and any other expenses she might incur as a salesperson. The Agent was compensated by the Firm solely from commissions on transactions in which the Firm represented a client as a buyer or seller. All commissions had to be disbursed through the Firm, as required under Ohio law

(as would be the case in Michigan). Under the independent contractor agreement, the Agent was to receive 70% of earned commissions and the Firm was to receive 30%.

In September 2007, the Buyer, a California resident, contacted the Agent to express her interest in a duplex in Dayton, Ohio which the Buyer had seen on an internet website. The Buyer advised the Agent that she was interested in purchasing income properties in order to provide income to herself and her children.

The duplex in Dayton Ohio proved too expensive for the Buyer. However, the Buyer traveled to Ohio to see several other properties. These properties included the following:

- 929-931 Harvard Blvd. (a duplex) ("Harvard Property");
- 117 Belton Street (a single family home) ("Belton Property");
- 2259 Emerson Avenue (12 units) ("Emerson Property"); and
- 1111, 1115 and 1119 Richmond Avenue (each having 4 units) ("Richmond Property").

The Buyer inspected one-half of the Harvard Property and was shown a photograph of the inside of the Belton Property. The Buyer did not see the inside of any of the Richmond Properties.

In September 2007, the Buyer agreed to purchase the Harvard Property for $40,000 and the Belton Property for $20,000. At trial, the Buyer contended that she made those purchases based on representations from the Agent that the properties were worth twice those prices. At closing, the Firm received a commission of $665 for the sale of the Harvard Property and $180 for the sale of the Belton Property. The Buyer contracted with A-1 Property Management

to manage the Harvard Property and Belton Property. A-1 Property Management had been created by the Agent.

The Buyer and the Agent then together created the "Gem City Investment Group" which bought the Emerson Property for $73,000. The Gem City Investment Group then entered into a contract with Miami Valley Home Improvements, LLC to rehabilitate the Emerson Property for $103,000. The Miami Valley Home Improvements, LLC was a company created by the Agent.

In November 2007, a company created by the Buyer, "Rapid Realty Solutions," agreed to purchase 1111 and 1115 Richmond for $40,000 each. The Agent had represented to the Buyer that there was a list of people waiting to rent these units and that the properties could be rehabilitated by January 2008. The Agent also allegedly represented that the properties could quickly be resold for $90,000 each. The sale of these properties closed on December 14, 2007, with the Agent being the only real estate salesperson involved, and the Firm receiving commissions from the sales. The Buyer again contracted with Miami Valley Home Improvements, the Agent's company, to rehabilitate the two Richmond Properties for $23,500 each. The rehabilitation was to be completed by January 30, 2008.

At approximately the same time, the Buyer, through Rapid Realty Solutions, agreed to purchase 1119 Richmond for $60,000. The seller of this property was Miami Valley Custom Homes, Inc., the Agent's company. Miami Valley Custom Homes had purchased 1119 Richmond for $8,500 shortly before selling the property to the Buyer on December 19, 2007. The Firm was the broker for this transaction and received a commission of $3,600.

The Firm returned the Agent's salespersons' license to the State of Ohio on December 7, 2007. The Agent continued as a real estate salesperson under her own company with another individual acting as her broker. The Agent operated a real estate management and rehabilitation company from the same office.

The Agent managed the Buyer's properties until October 2008 and the Agent's rehabilitation company spent the money the Buyer had provided for the rehabilitation of the Emerson Property and two of the Richmond Properties. By August 2008, only one out of the 27 total units that the Buyer had purchased was rented. In October 2008, the Buyer visited each of the properties to determine what work needed to be done and the current condition of the properties. The Buyer found that all of the properties were in disrepair and needed a substantial amount of work.

When the lawsuit began, the Firm immediately took the position that the Agent was an independent contractor and thus, the Firm was not responsible for any of her actions with respect to the Buyer, including the Agent's property management and rehabilitation services.
There appears to have been two primary arguments to support the Firm's position. First, the independent contractor agreement established an independent contractor relationship between the Firm and the Agent. Second, Ohio case law recognized that under Ohio law, a real estate broker and a salesperson could maintain an independent contractor relationship. While the trial court appeared to acknowledge the independent contractor relationship between the Firm and the Agent, it ultimately permitted the case to go to a jury with an instruction that if the jury found that the Agent had fraudulently induced the Buyer to enter into the agreements to purchase the

various properties, the Firm would be vicariously liable for the acts of the Agent. The jury returned a verdict of $135,200 against the Agent and the Firm.

On appeal, the Ohio Court of Appeals agreed with the Firm that under Ohio law, a real estate brokerage firm and a salesperson may establish an independent contractor relationship. Further, the Court also acknowledged that in this case, there had been an independent contractor relationship between the Firm and the Agent. However, the Court of Appeals found that while under Ohio law there can be an independent contractor relationship between a real estate brokerage firm and its salespersons, as to third parties, a firm will be liable for the acts of a salesperson if the salesperson carried out those acts within the scope of his or her activities for the real estate brokerage firm. The Ohio Court stated:

> Because a real estate salesperson is required to be under the supervision of a licensed real estate broker in all of his or her activities relating to real estate transactions, we have held that a real estate broker cannot insulate him or herself from liability for intentional torts committed within a real estate salesperson's scope of employment.

In its decision, the Ohio Court of Appeals referred to Ohio law which, like Michigan law, requires that all listings be through a real estate brokerage firm. Further, it referred to Ohio law which requires that commissions may be paid only to a real estate brokerage firm and that a salesperson may only receive commissions from a licensed real estate firm (the same as in Michigan). The Ohio Court of Appeals then determined that the Firm's receipt of a commission from each of the purchases by the Buyer established that the Agent's activities were within the scope of her activities performed on behalf of the Firm.

It would appear under Michigan case law, the Firm could have been held liable for the misrepresentations made by the Agent regarding the values of the various properties, the current condition of the properties, the costs necessary to rehabilitate the properties and the resale value. Real estate brokers should keep in mind that their responsibility to supervise their agents is not simply in order to comply with the Occupational Code, but also to try and make certain that unscrupulous activities are not being done in the name of the firm. Brokers should also be concerned when salespersons expand into related businesses which may or may not be viewed as being within the scope of the salesperson's activities performed on behalf of the firm. It is not clear whether under Michigan law, the Firm also would have been found liable for the Agent's misdeeds through her own property management company and rehabilitation company. Brokers may wish to consider adopting a policy and/or amending their independent contractor agreements to specifically prohibit "moonlighting" activities in which clients of the firm are provided other services. While there is no Michigan case on point, Michigan brokers may want to be in a position to demonstrate that they prohibited their agents from engaging in these activities. Alternatively, brokers may want to require that the agents who do have side businesses take steps to make certain that their clients are aware and acknowledge that the other businesses are not affiliated with the brokerage firm.

DEALING WITH FSBOs – WALKING THE AGENCY TIGHTROPE

I. INTRODUCTION

REALTORS® working with buyers must be particularly cautious when working with a buyer who becomes interested in a FSBO home. Ordinarily, if a REALTOR® wants to get paid on this type of transaction, the REALTOR® will need the sellers to sign a written agreement in which they agree to pay a commission should this particular buyer purchase their home. A REALTOR® can work with a FSBO seller as either a seller's agent or a buyer's agent. The "One Party Agreement" attached as Exhibit A can be used in either situation. It is very important that the REALTOR®'s agency capacity is clearly established early on and that both the buyer and seller understand the REALTOR®'s role. Remember that the law requires agency disclosure before any confidential information is disclosed.

Once agency status is established, a REALTOR® must be very careful to work consistently within that framework while moving the transaction forward to closing. An unknowledgeable and inexperienced seller is likely to look to the REALTOR® for guidance, even where the REALTOR® is representing the buyer. Obviously, it is in the interest of the buyer-client to move the transaction forward, but at some point, the client may conclude that the REALTOR®'s assistance to the seller was so significant as to amount to a breach of the fiduciary duties owed to the buyer. Alternatively, the seller may begin to believe that the REALTOR® has become his agent, in which case the REALTOR® has a potential undisclosed dual agency problem. In either case, the REALTOR® could lose his commission, whether or not either party suffered any actual harm.

II. DISCUSSION

A. Identifying Your Role

Before you produce an agency disclosure form, you first need to be clear in your mind as to the role you will play in this transaction.

If you are working with a buyer-client – *i.e.,* if you have an agency relationship with the buyer, then it is probably unwise to create an agency relationship with the seller as well. While it is certainly legally permissible to do so, as long as you enter into a disclosed dual agency agreement, we believe most REALTORS® would agree that single agency is a much easier role to fill. Remember, you do not need to create an agency relationship with your sellers in order to get paid. Rather, you can simply enter into an agreement whereby the sellers acknowledge that you represent an identified buyer and agree to pay you a commission in the event your buyer purchases their home. Remember to make it very clear to the sellers that even though the sellers will be paying your commission, you will, at all times, be working for the buyer.

What if you do NOT have an agency relationship with the buyer? In this situation, you can either create a one party agency relationship with the sellers or you can work as a transaction coordinator. If you enter into a one party agency agreement with the sellers, you need to make certain that the buyers understand that you now have an agency relationship with the sellers. Even if the buyers were given an agency disclosure form months ago when their search began, a careful REALTOR® may very well want to go back to his buyer customers and give them another agency disclosure form that specifically references this particular home and these particular sellers. Such a form would be particularly helpful should the buyers later claim that based on your prior relationship, they were under the clear understanding that you were representing them in this transaction.

While it is technically possible to act as a transaction coordinator with a FSBO seller, as a practical matter, it will be extremely difficult, if not impossible, unless both the sellers and the buyers are knowledgeable in real estate. Remember that the role of a transaction coordinator is that of a "middleman" – *i.e.,* a person who brings the parties together after which the parties put the deal together themselves. If a REALTOR® is going to serve in this capacity, he or she will need a transaction coordinator agreement, which includes a provision whereby one or both of the parties agree to pay the REALTOR® a commission.

B. Closing the Deal

As REALTORS® are well aware, it can be extremely difficult to close the deal where the seller is unrepresented. FSBO sellers should be encouraged to hire an attorney to assist them in negotiating a purchase agreement and closing the sale. In the likely event that the FSBO seller chooses not to have an attorney, then the REALTOR® must be very careful not to inadvertently create an agency relationship with the seller by advising and assisting the seller in the transaction.

Buyer's agents who customarily present offers to sellers may find these presentations more difficult where the seller is a FSBO. In this situation, REALTORS® should never advise the seller as to the wisdom or reasonableness of a particular provision. A FSBO seller should NEVER be told that a particular clause is "just boilerplate" or that something "is always done this way." While such statements may be viewed as nothing more than persuasive argument where the seller is working with a listing agent who can offer his/her own opinion on such, the statements may be deemed misleading and overreaching where the seller is unrepresented. A REALTOR® is well-advised to always offer a FSBO seller the opportunity to discuss the offer with an attorney.

A buyer's agent who is asked to help the seller prepare a counteroffer may find himself in a difficult situation. It is probably fairly easy to prepare a counteroffer at a seller's dictated price without overreaching or creating the appearance of an agency relationship. But what if the seller wants you to prepare an addendum dealing with post-closing occupancy responsibilities? What if the seller wants to treat your buyer's offer as a backup offer? The farther you stray from the "standard" form, the more difficult it will be for you to prepare clauses dictated by the seller while at the same time representing the buyer's best interests. In some instances, it may be advisable to take the seller's verbal requests back to your client and prepare a new offer on behalf of your buyer-client which contains the term or terms that the seller has requested. In this way, it will be more readily apparent that the clauses are being drafted on behalf of, and in the interest of, the buyer-client.

Of course, as REALTORS® are well aware, the work is not done once the purchase agreement is signed. REALTORS® working with FSBOs often express frustration at the fact that they must do the work of two agents. Of course, the simple fact is that the transaction must move forward and the REALTOR® is typically the only person involved that knows how to get this done. (A REALTOR® may wish to keep this in mind when negotiating his commission amount for a one party agreement.) Again, REALTORS® working with FSBOs as buyer's agents should assist the seller in ministerial matters only. While it is perfectly appropriate for a buyer's agent to order title insurance on the seller's behalf, it is not appropriate for a buyer's agent to advise the seller as to his rights and obligations under the sales contract.

C. Ethical Considerations

Buyer's agents working with FSBO sellers should remember that Article 1 of the Code of Ethics provides that while a REALTOR®'s duty to his client is primary, the REALTOR® also

owes a duty to treat the other party honestly. For example, while it may be in your client's best interest to convince the seller that taxes are "always" prorated a particular way, if it is only the case that taxes are "often" prorated this way, such statement may be deemed a violation of Article 1. As stated previously, FSBOs should never be told that any particular provision is either unimportant or nonnegotiable as a matter of law.

What if the seller is not a FSBO, but a seller that has entered into a limited service agreement with another company? At the outset, the REALTOR® should make certain that he or she has the consent of the listing broker to deal with that broker's client directly. This advice is not only good legal advice, but is also consistent with the REALTORS® Code of Ethics. Article 16 of the Code of Ethics prohibits a REALTOR® from taking any action inconsistent with another REALTOR®'s agency relationship. REALTORS® would be well-advised to ask the limited service broker to fax over written authorization to contact the seller directly. At a minimum, the REALTOR® should obtain the listing broker's verbal consent and then make a note for his file. Once a REALTOR® has authority to deal with the seller directly, the REALTOR® should identify his agency role, either as a buyer's agent or a subagent of the seller. (Where the seller has entered into a limited service agreement with the REALTOR®, the REALTOR® cannot act as a dual agent or a transaction coordinator in the transaction.)
In presenting an offer to a seller with a limited service agreement, a buyer's agent should take the same precautions he would take if the seller was a FSBO.

III. CONCLUSION

When talking directly to FSBO sellers, buyer's agents should make their agency status known early on and are well-advised to remind these sellers of that role from time to time throughout the transaction. While a buyer's agent may assist the FSBO seller with ministerial

tasks, buyer's agents should never offer FSBO sellers advice or attempt to persuade them that a particular provision is either unimportant or nonnegotiable. A "hard sell" approach that may be perfectly acceptable where a seller has his own representation may be deemed to be a misrepresentation where the seller is unrepresented.

EXHIBIT A

One Party Agreement

N-1

Contract Date: _____

Brokerage Firm: _____ ("Broker")

Address of Firm: _____

REALTOR®: _____

REALTOR®'s Email Address: _____

REALTOR®'s Phone # _____ REALTOR®'s Facsimile # _____

Seller(s): _____("Seller")

Seller's Home Address: _____

Seller's Email Address: _____

Seller's Phone # _____ Seller's Facsimile # _____

1. **PROPERTY DESCRIPTION:** Seller is the owner of property located in the ☐ Village ☐ Township ☐ City of _____, County of _____, MI.

Street Address: _____

Legal Description/Tax Parcel ID: _____

_____

_____ (the "Property").

SELLER WARRANTS THAT THE PROPERTY IS NOT PRESENTLY LISTED WITH A LICENSED REAL ESTATE BROKER OR ANY OTHER PARTY.

2. **REPRESENTATION:** Broker has a potential buyer ("Buyer") for the Property, the identity of whom will be disclosed upon the execution of this Agreement. (Check one):

☐ Seller hereby appoints Broker as his/her exclusive agent for purposes of marketing the Property to Buyer.

or

☐ Seller acknowledges that Broker will exclusively represent the Buyer in this transaction. Broker is not representing Seller.

3. **TITLE/YEAR BUILT:** Seller represents title to the Property to be good and marketable title. In addition, (check one):

☐ Seller represents and warrants that the Property was **built in 1978 or later** and that therefore the federally-mandated lead-based paint disclosure regulations **do not apply** to this Property.

or

☐ Seller represents and warrants that the Property was **built before 1978** and that therefore the federally-mandated lead-based paint disclosure regulations **do apply** to this Property.

4. **COMMISSION:** If within _____ (_____) months of the date hereof, Seller sells all or a portion of the Property to Buyer, Seller agrees to pay Broker at closing a fee equal to $_____ and a commission equal to _____% of the sale price.

5. **EXCLUSIVITY:** Seller shall deal exclusively with the Broker for all negotiations with Buyer during the term of this Agreement.

6. **ADVERTISING/SHOWINGS:** Seller acknowledges that Broker will NOT market or advertise the Property for sale. Seller grants Broker permission to show the Property only to the Buyer identified below; all showings to be by appointment only. Seller shall indemnify and hold harmless Broker and Broker's agents from any and all liability for any reason as a result of injury to persons or damage or loss to property arising out of the showing of the Property.

7. **SUBSEQUENT LISTINGS:** Seller's commission obligation hereunder shall apply regardless of whether Seller subsequently lists the Property with another licensed real estate broker or any other party. Seller is advised that if Seller later

enters into a listing agreement to sell the Property with another real estate broker or any other party, Seller should exclude Buyer from said listing agreement. Failure to do so could result in Seller being responsible for two commission payments.

8. **NON-DISCRIMINATION:** It is agreed by the Broker and the Seller, parties to this Agreement, that as required by law, discrimination because of religion, race, color, national origin, age, sex, disability, familial status or marital status by said parties in respect to the sale of the Property is PROHIBITED. Local ordinances may offer protection against additional discrimination.

9. **SELLER DISCLOSURE:** Seller agrees to provide Buyer with a "Seller's Disclosure Statement" prior to accepting a Buy and Sell Agreement from the Buyer, unless the transaction is exempt under Michigan law. Seller agrees to release and hold harmless Broker and its agents from any liability arising as a result of Seller's failure to comply with Seller's disclosure obligations at law, such obligations to include, but not be limited to, reasonable attorneys' fees and costs.

10. **ELECTRONIC COMMUNICATION:** The parties agree that this Agreement, any amendment or modification of this Agreement and/or any written notice or communication in connection with this Agreement may be delivered by electronic mail or by fax via the contact information set forth above. Any such communication shall be deemed delivered at the time it is sent or transmitted. The parties agree that the electronic signatures and initials shall be deemed to be valid and binding upon the parties as if the original signatures or initials were present in the documents in the handwriting of each party.

11. **OTHER:** _____

_____

_____

_____.

12. **CANCELLATION:** This Agreement can be CANCELLED or REVOKED only by mutual consent in writing.

13. **RECEIPT:** Seller has read this agreement and acknowledges receipt of a completed copy of this Agreement.

Accepted by:

_____ _____

(REALTOR®) (Seller)

For:

_____ _____

(Broker) (Seller)

DISCLOSURE OF IDENTITY OF BUYER

Broker and Seller agree that the term "Buyer" as used in the above-referenced Agreement shall mean:

_____

_____

and his/her/their spouse or other immediate family member and any entity in which he/she/they have a controlling interest.

Accepted by:

_____ _____

(REALTOR®) (Seller)

For:

_____ _____

(Broker) (Seller)

Disclaimer: This form is provided as a service of the Michigan Association of REALTORS®. Please review both the form and details of the particular transaction to ensure that each section is appropriate for the transaction. The Michigan Association of REALTORS® is not responsible for use or misuse of the form, for misrepresentation, or for warranties made in connection with the form.

ELECTRONIC TRANSACTIONS

Almost all states, including Michigan, have passed the Uniform Electronic Transactions Act ("UETA"). UETA provides that if the law requires an agreement to be in writing (such as with a real estate purchase agreement or commission agreement) an electronic record satisfies that law. Additionally, UETA provides that if the law requires signatures (again, as with a real estate agreement or commission agreement), electronic signatures satisfy that law. MCL 450.837.

A. Voluntary Agreement to Conduct Business Electronically

UETA does not require parties to conduct transactions electronically or permit one party to the transaction to impose such a requirement on the other party. UETA simply permits persons to voluntarily agree to conduct business utilizing "electronic records" and electronic signatures. MCL 450.835.

Whenever the question as to the enforceability of an electronic agreement is raised, the first inquiry is whether or not it can be established that both parties agreed to conduct business electronically. Ideally, the parties' contract would include a provision expressly stating that the parties agree to conduct business electronically. Where there is no specific provision in the contract, under UETA, the parties' intent to conduct business electronically must be "determined from the context and surrounding circumstances, including the parties' conduct." MCL 450.835(2).

MAR's new forms will include language whereby the parties agree to conduct business electronically. For example, MAR's new buy and sell agreement form will include the following provision:

> ELECTRONIC COMMUNICATION: As an alternative to physical delivery, the parties agree that this Agreement, any amendment or modification of this Agreement and/or any written notice or communication in connection with this Agreement may be delivered to the Seller in care of the Listing REALTOR® and the Buyer in care of the Selling REALTOR® via electronic mail or by facsimile via the contact information set forth above. Any such communication shall be deemed delivered at the time it is sent or transmitted. Seller represents and warrants that an electronic email address has been provided to Listing REALTOR® from which Seller may receive electronic mail. Buyer represents and warrants that an electronic email address has been provided to Selling REALTOR® from which Buyer may receive electronic mail. The parties agree that the electronic signatures and initials shall be deemed to be valid and binding upon the parties as if the original signatures or initials were present in the documents in the handwriting of each party.

Parties using this form will evidence their intent to conduct business electronically by signing the contract and inserting their email address and/or their facsimile number in the form where indicated. If a buyer or seller does not wish to conduct business electronically, he can simply cross out this paragraph and/or not provide an email address or facsimile number.

B. Electronic Signatures

Once it has been established that the parties agreed to conduct business electronically, the next inquiry is whether the parties actually reached an agreement. Often, particularly in the case of a real estate transaction, that inquiry depends on whether or not the agreement was signed by both parties. UETA provides that the term "electronic signature" includes any method by which

an "electronic sound, symbol or process" is "logically associated" with a contract and 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.

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." *Cunningham v Zurich American Ins Co*, 352 SW3d 519 (Tex App – Fort Worth, 2011). 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 . . . ." *Williamson v Bank of New York* Mellon, 2013 WL 2359577, (Tex App – Dallas, 2013). 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." *Rosenfeld v Zerneck*, 776 NYS2d 458 (2004). 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.

A recent Arizona case involved a buyer's broker contract which had been signed by the buyers, scanned and emailed to the real estate agent. *Young v Rose,* 230 Ariz 433 (2013).

The real estate agent had responded to the buyers' email with her own email saying simply, "Thank you." This "thank you" email message, like all other email messages from the real estate agent, ended with an electronic business card consisting of the agent's name, business address, telephone numbers, website address and photograph.

In this case, the real estate agent had sued the client after the client had closed on a home without paying her a commission. The buyers pointed to the fact that under Arizona law, in order to have an enforceable right to a commission, there must be a written agreement signed by both parties. The buyers argued that because their commission agreement had never been signed by the real estate agent, there was no enforceable contract. The trial court agreed and threw out the real estate agent's case.

On appeal, the appellate court said that the question of whether the real estate agent's "thank you" email constituted an electronic signature was a factual question to be determined based on the context and surrounding circumstances. The appellate court found that the trial court should not have thrown out the case just because there was no "signature" by the real estate agent in the traditional sense and sent the case back to the trial court to determine whether the "thank you" email qualified as an electronic signature under UETA.

C. Method of Electronic Delivery

From time to time, we have been asked whether parties must use email or facsimile delivery or whether other electronic delivery methods, such as the exchanging of text messages, can be used. UETA does not attempt to define or restrict the method of electronic transmission. UETA does require that the information be delivered "in an electronic record capable of

retention." MCL 450.838(1). UETA also requires that an electronic record be delivered to the "information processing system that the recipient uses for the purpose of receiving electronic records." MCL 450.845(1)(a) and (2)(a). Obviously, a party does not want to guess as to which "information processing system" is the one that the other party uses for the purpose of receiving "electronic records." Nor does a party want to be in a position of trying to guess which "information processing system" the other party intends to use. For these reasons, parties should not simply agree to conduct business electronically, but should agree as to the specific method(s) of electronic delivery and the address(es) to be used.

D. Time of Delivery

The "electronic communication" provisions in MAR's forms provide that an electronic communication shall be deemed delivered at the time that it is sent or transmitted (as opposed to the time it is "opened" by the recipient). This approach was developed by a MAR task force formed to look at the specific issue and is consistent with the practice in the other states that have enacted UETA.

E. Validation of Signatures

We are often asked about a REALTOR's® obligation to verify an electronic signature. While there is no statute or case law addressing this question, it seems appropriate to examine how we handle documents that have been physically delivered with handwritten signatures. If a fellow REALTOR® hand delivers to you, as listing agent, an offer that has been signed by "Joseph Smith," would you take any steps to verify that "Joseph Smith" signed the document or that "Joseph Smith" even exists? It is likely that you would not. Instead, you would assume that

your fellow REALTOR® had worked with a person who that member knew or reasonably believed to be "Joseph Smith" and that the REALTOR® either witnessed "Joseph Smith" sign the purchase offer or had reason to believe that "Joseph Smith" signed the document.

If you were the selling REALTOR® who had been working with "Joseph Smith" directly, even if you had not actually seen "Joseph Smith" sign the offer, you might rely on the circumstances surrounding the signature – *i.e.,* the fact that you faxed the prepared offer to him at his office, discussed it with him over the phone and then received via email a "pdf" of the document with "Joseph Smith's" signature on it – to conclude that the signature was valid.

If, on the other hand, a REALTOR® arrives at her office one morning and finds a purchase offer in her mailbox from a person she has never dealt with or even heard of, it would seem logical that the REALTOR® should and would take additional steps to verify the identity of the offeror. The same would be true of a purchase offer that has been delivered electronically that showed up out of the blue.

In summary, whether the document is hand-delivered, faxed or emailed to you, whether the signature is a handwritten signature, a scanned copy of a handwritten signature or a digital signature, the extent of the "verification" required will depend on the circumstances. If a REALTOR® is expecting a signed contract from a person she is working with, no additional verification may be necessary. If she receives a contract unexpectedly from a person she had worked with previously, she may want to place a follow up telephone call or email. If, on the other hand, she receives an offer from a person she has never met or spoken with, it is likely that

she will want to investigate the situation further before presenting the offer to the listing REALTOR®.

F. CONCLUSION

There are no hard and fast rules when it comes to electronic transactions. In the case of a dispute, whether or not the parties will be deemed to have an enforceable contract will depend on what the court determines was the intent of the parties. For this reason, when exchanging information electronically, it is extremely important that parties are very clear as to whether or not their intention is to enter into a binding contract.

Michigan Association of REALTORS®
January 2014

FLOOD INSURANCE – LIABILITY CONCERNS

The National Flood Insurance Program ("NFIP") was instituted by Congress in 1968 with a noble goal of reducing the economic and social costs of floods. Unfortunately, the economic viability of the NFIP became a real issue, and all agreed that reform was necessary in order to assure the continued viability of the program. This resulted in the Biggert-Waters Flood Insurance Reform Act of 2012 ("Biggert-Waters"). The goal of this legislation was to restore the financial stability of the NFIP and require property owners in floodplains to assume the "true flood risk." NAR supported the enactment of Biggert-Waters, as the continued availability of affordable flood insurance would directly impact REALTORS® who represented buyers and sellers in flood prone areas.

The Federal Emergency Management Agency ("FEMA") administers the NFIP. The reforms in Biggert-Waters would generally measure risk based on the elevation of property as determined by FEMA. The rate increases caused by Biggert-Waters took effect on October 1, 2013. It cannot be denied that the rate increases caused by Biggert-Waters have substantially impacted some sellers' ability to sell and some buyers' ability to afford properties for which flood insurance is required, *i.e.*, property owners whose lenders require flood insurance through NFIP.

While the public usually associates the necessity for flood insurance with properties located on the coasts of the United States, there is no question that the changes caused by Biggert-Waters could also have a substantial impact on inland states, such as Michigan. According to the Michigan Department of Environmental Quality, as of April 3, 2013, there

were 27,925 flood insurance policies in the State of Michigan. These policies provide coverage in the amount of $4,771,981. Further, since 1978, Michigan's citizens have received $51,188,928 from the flood insurance fund.

NAR is currently working to delay or modify the immediate effects of Biggert-Waters in the form of increased flood insurance premiums under the NFIP. Neither NAR nor any other proponents of Biggert-Waters anticipated that FEMA would take action which would result in such dramatic increases for buyers of properties which require flood insurance. In the meantime, Michigan REALTORS® have sought guidance as to how to handle the sale and purchase of property which may be subject to dramatically increased flood insurance premiums.

REALTORS® Representing Sellers

There is no current statutory or common law obligation on REALTORS® representing sellers to determine whether a listed property is in a floodplain designated by FEMA or will otherwise require flood insurance through the NFIP if a buyer purchases the property.

The Michigan Seller's Disclosure Statement in item 11 under the heading "Property conditions, improvements & additional information" states as follows:

Flood Insurance: Do you have flood insurance on the property?

At the time of the original drafting of the Seller's Disclosure Statement, there was a debate as to whether the question posed to a seller should be "Is the property in a floodplain?" or "Do you have flood insurance?" The choice to ask about flood insurance was made on the basis that it seemed more likely that a seller would know if he or she had flood insurance because the requirement would be imposed on them by their lender under the NFIP. Due to the perceived

inaccuracy or vagueness of FEMA flood maps, there was a concern that sellers would innocently misrepresent that they were not within a floodplain based upon an inaccurate map or a misreading of a FEMA map. Obviously, with a potential for substantially increased rates to buyers, it is important that sellers carefully fill out this question on the Seller's Disclosure Statement. It should be noted that if sellers originally purchased their property for cash or have paid off a prior mortgage, they may not carry any flood insurance and could truthfully answer the question "no." This in turn could lead to an assumption by a buyer that the property is not within a floodplain and will require no flood insurance at any cost.

It would appear that the only source of potential liability for listing brokers in Michigan to buyers for a failure to advise of increased flood insurance premiums would arise under Michigan common law for fraud. Under Michigan law, a listing broker may be liable to a buyer if the following occurs: (1) the broker made a material representation to a buyer (*e.g.*, the property was not within a floodplain and does not require flood insurance); (2) the representation was false (*e.g.*, the property was within a floodplain and does require flood insurance); (3) the REALTOR® knew the representation was false when made or made the representation recklessly, without the knowledge of its truth and as a positive assertion (*e.g.*, the REALTOR® had looked at a FEMA map and saw whether the property was within a floodplain or, alternatively, never made any investigation and simply made the statement); (4) the representation was made by the REALTOR® with the intention that the buyer act in reliance upon it; (5) the buyer did act in reliance upon it; and (6) as a result, the buyer suffered injury (*i.e.*, bought a home with flood insurance premiums which were not affordable).

There are at least two reasons why these types of claims should rarely arise. First, there is absolutely no reason why a listing REALTOR® would or should make any representations to buyer with respect to a property being within a floodplain or being subject to a requirement for flood insurance through NFIP. Second, if as is typical, the buyers are financing the purchase of the property through a federally-insured lender, they would be advised before closing that flood insurance through the NFIP was required for the property. In other words, even if buyers claimed that the listing REALTOR® had told them that the property was not within a FEMA floodplain or did not require flood insurance, the buyers would discover the truth from their lender prior to closing. Obviously, this discovery would not occur in situations where a buyer is paying cash or the seller is financing the sale of the property through a land contract or purchase money mortgage.

REALTORS® Representing Buyers

Although there has not been sufficient time for any court to consider claims asserted by buyers against buyers' agents with respect to unanticipated and unaffordable flood premiums, the general concern among Michigan REALTORS® seems to be that a buyer will purchase a property and learn after closing that his or her required annual flood insurance premium is not the $600.00 which was previously paid by the seller, but $10,000. As indicated above, this would seem to be a highly unlikely event if the purchaser is financing the property through a lender who by law must require the flood insurance through NFIP if the property is within a floodplain. Nonetheless, there can be no argument that under Michigan law, a buyer's agent has a fiduciary duty to disclose all known material facts to a buyer.

Fortunately, there are a number of practical steps which can be taken by REALTORS® representing buyers to avoid any problems with unanticipated high flood insurance premiums. First, REALTORS® could amend their buyer agency agreements to include among the disclaimed items any knowledge of the location of the property within a floodplain or any requirement for flood insurance.

Second, REALTORS® should approach the issue of flood insurance in the same way they deal with the issue of the proximity of sex offenders. In the latter instance, REALTORS® have consistently been advised that they should inform buyers of the existence of the sex offender registry and that the buyers should consult that registry if they have a concern. The same is the case with regard to the potential location of a property within a floodplain as determined by FEMA. FEMA maintains the website http://www.floodsmart.gov/floodsmart/. This website contains a "One-Step Flood Risk Profile" which permits a user to insert the address of a property and obtain an immediate determination and receive a response: "THIS PROPERTY IS HIGH-RISK" and "You live in or near a Special Flood Hazard Area" (in which case flood insurance is a likely requirement) or "THIS PROPERTY IS MODERATE-TO-LOW RISK" (and there would be no required flood insurance). This site goes on to provide the names of insurance agents within the area of the property who can answer a buyer's questions with respect to flood insurance. Obviously, REALTORS® representing buyers should direct those buyers to this website.

Conclusion

There seems to be no question that the increased insurance premiums under Bigger-Waters has and continues to cause concerns for REALTORS® who are selling properties in high-risk areas in Michigan. If REALTORS® take care in dealing with sellers and buyers on this issue, it will simply be an economic issue and not a legal liability issue.

Michigan Association of REALTORS®
January 2014

KEEPING THE REGULATORY ACRONYMS STRAIGHT (MLOLA, SAFE, MARS, RESPA and MAP)

This article is intended to help REALTORS® differentiate between several regulations with confusing acronyms. The article does not include a detailed analysis of the various regulations, but instead includes only brief descriptions intended to help REALTORS® identify the correct regulation for a particular situation. We have included cross-references to other sources where REALTORS® can find a more detailed analysis of the appropriate regulation.

I. MLOLA – Mortgage Loan Originator Licensing Act (SAFE Act – Secure and Fair Enforcement for Mortgage Licensing Act)

A. Hypothetical

REALTOR® Smith has a client who regularly buys REOs, fixes them up and then sells the refurbished homes on land contract. REALTOR® Smith needs to familiarize himself with the MLOLA requirements.

B. Summary

MLOLA is the Michigan statute enacted pursuant to the federal SAFE Act. This legislation is aimed at "originators" of residential mortgage loans. People who are in the business of making residential mortgage loans must be licensed as "mortgage loan originators." Sellers who provide financing (via land contract or purchase money mortgages) must be licensed "mortgage originators" if they are involved in four or more of these types of transactions per year. (Certain personal and familial transactions are exempt.) A seller who provides seller financing on more than ten loans per year may also need to be licensed under the Mortgage Brokers, Lenders and Servicers Licensing Act ("MBLSLA"). A real estate broker assisting such

a seller need not be licensed as a mortgage loan originator unless he or she charges a separate fee for handling the seller financed transaction. A seller cannot avoid licensure by working with a REALTOR® who is licensed under the MLOLA unless the REALTOR® is also licensed under MBLSLA.

For more information about MLOLA, see:
www.michigan.gov/documents/difs/Mortgage_Loan_Originator_and_Seller_Financing_FAQs_438151_7.pdf.

II. MARS – Mortgage Assistance Relief Services

A. Hypothetical

REALTOR® Jones specializes in short sales. REALTOR® Jones charges his seller client a commission on the sale of the home as well as a short sale negotiator fee. REALTOR® Jones needs to familiarize himself with the MARS Rule.

B. Summary

MARS is a federal regulation adopted by the FTC to protect homeowners from mortgage relief scams or what the regulators describe as "bogus operations that falsely claim that, for a fee, they will negotiate with the consumers' mortgage lender or servicer to obtain a loan modification, a short sale or other relief from foreclosure." A MARS provider is required to make certain disclosures in each and every communication it has with the consumer. MARS providers are prohibited from collecting any fee until they have provided the consumer with a written offer that is acceptable to the consumer.

For more information about the MARS Rule, see
www.mirealtors.com/content/referencelibrary.htm.
"Understanding The New FTC Regulation of 'Mortgage Assistance Relief Services' Providers."

III. RESPA – Real Estate Settlement Procedures Act

A. Hypothetical

REALTOR® Green has been approached by a mortgage company who wants to pay REALTOR® Green for preparing mortgage applications for REALTOR® Green's buyer clients. REALTOR® Green needs to familiarize himself with the RESPA requirements.

B. Summary

RESPA is a 35-year old federal statute enacted to protect consumers of residential mortgages from deceptive trade practices. The federal statute and the regulations adopted pursuant to the statute focus on closing costs and settlement procedures. Section 8(a) of RESPA prevents unearned "kickbacks" for the referral of business. Section 8(b) of RESPA prevents someone from attempting to circumvent 8(a) by setting up some type of sham fee-splitting arrangement. Under RESPA, a service provider can share a fee with another service provider only if such fee is for "services actually performed."

For more information about Section 8 of RESPA, see:
www.realtor.org/topics/real-estate-settlement-procedures-act/glossary;
www.realtor.org/ae/manage-your-association/association-policy/respa-faq; and
www.mirealtors.com/content/upload/AssetMgmt/Documents/RESPA%20and%20Home%20warranty%20Program.pdf

IV. MAP Rule – Mortgage Acts and Practices

A. Hypothetical

REALTOR® Brown has been contacted by a mortgage company who has asked him to distribute materials describing a particular loan program to his buyer clients. REALTOR® Brown needs to familiarize himself with the MAP Rule.

B. Summary

The MAP Rule is a federal rule governing all persons – including real estate licensees and home builders – who provide information about a specific lender's mortgage loan product to a consumer. Under the MAP Rule, REALTORS® who provide clients and customers with information about a specific lender's product are held responsible for accuracy of the information provided, even if the information was prepared by the lender. The MAP Rule makes clear that a "misrepresentation" includes the omission of critical information about a mortgage product – for example, the fact that there will be an adjustment to the interest rate during the life of the loan. The MAP Rule also contains recordkeeping requirements whereby all "covered communications" must be retained for a period of two years.

For more information about the MAP Rule, see **www.mirealtors.com/content/upload/AssetMgmt/Documents/legallinesNov11.pdf.**

SELLER DISCLOSURE – A SHOCKER

Last year's MAR legal update included a discussion of the Michigan Seller Disclosure Act ("SDA"). This topic was selected because last year marked the 20th year since the SDA was enacted.

The legal update handout on the topic was basically a celebration of the successful implementation and application of the SDA over the past 20 years. The SDA was designed to document disclosures by sellers as to what they know about the property they are selling in order to reduce the likelihood of lawsuits from buyers based on alleged misrepresentations. Despite repeated challenges, we were happy to report that the SDA had been properly interpreted and applied by the appellate courts on all of the following issues:

1. The SDA did not create any new causes of action or claims against sellers or REALTORS®. The only remedy under the SDA for buyers is to terminate a binding purchase agreement if a seller's disclosure statement is not timely delivered or the seller has not otherwise complied with the SDA.

2. A seller cannot be found liable for an innocent misrepresentation in a seller's disclosure statement because the SDA provides that a seller is "not liable for any error, inaccuracy or omission in any information delivered pursuant to this act if the error, inaccuracy or omission was not within the personal knowledge of the [seller]."

3. It is not a violation of the SDA if, after the seller's disclosure statement is completed and provided to a buyer, something changes before the closing to render the statement inaccurate. The Court of Appeals has held that the duty to amend does not apply to all questions in the seller's disclosure statement, but only as to changes in the "structural, mechanical, appliance systems."

4. Omitting information or providing false information in a seller's disclosure statement may be used as evidence of common law fraud, but in order to recover, buyers are required to demonstrate that they reasonably relied upon the misrepresentation.

Over the last 20 years, a number of attempts have been made to persuade Michigan courts to permit buyers to sue sellers and REALTORS® for money damages under the SDA. MAR has

always been successful in opposing such attempts. Thus, there was great shock when, in an unpublished decision released on November 5, 2013, the Court of Appeals at least arguably opened the door to claims for money damages against sellers and REALTORS® under the SDA. *Bowman v Greene*, Court of Appeals No. 308282 (the "Bowman Case").

The Bowman Case involves an appeal from a jury verdict in amount of $483,195.18 against a real estate brokerage firm and an associate broker of that firm based on claims of fraudulent misrepresentation, silent fraud, negligent misrepresentation and **violation of the SDA!** In 2004, the Bowmans had purchased a condominium unit in a redeveloped 100-year-old factory building where chemicals had been previously dumped into the ground. These chemicals included industrial solvents that contained trichloroethylene ("TCE"), a carcinogen. According to the opinion of the Court of Appeals, in order to deal with the TCE levels, the developer of the condominium project had installed a vapor barrier over the affected ground area. The vapor barrier required the use of a blower and constant maintenance.

In 2001, the developer had hired an associate broker ("Associate Broker") with real estate brokerage firm ("Defendant Brokerage Firm") to market the condominium project.
The Associate Broker prepared a marketing brochure which stated "the property has been addressed under current Michigan cleanup requirements through a grant from the [DEQ]."

In 2002, Kirk Van Horn had purchased a condominium unit in the project. In 2004, Van Horn contracted with the Defendant Brokerage Firm and Associate Broker to resell his condominium unit. Prior to buying Van Horn's unit, the Bowmans met the Associate Broker and Van Horn at the unit and they agreed to have the Associate Broker serve as their agent as well. Mr. Bowman testified that while he was viewing the unit, he specifically asked the Associate

Broker whether there were any "environmental issues" ongoing with the building itself. He further testified that the Associate Broker assured him that there were none. He also contended that Van Horn was present at the meeting and gave the same assurances. In addition, the Bowmans were provided with a seller's disclosure statement in which Van Horn indicated there were no "environmental problems" on the property.

The Bowmans agreed to purchase Van Horn's condominium unit for $360,000. Prior to the closing, the DEQ sent a letter to the Developer, the Associate Broker and all of the residents of the condominium project regarding both the status of the site and the marketing brochure that had been prepared by the Associate Broker. According to the Court of Appeals' opinion, in the letter, the DEQ advised that the land under the condominium project remained "highly contaminated with chlorinated solvents in the soil and groundwater, and metals in the near surface soils." The DEQ's letter also stated that the marketing brochure "does not represent the facts regarding the contamination and is misleading to the reader. The contamination has not been cleaned up." The Bowmans were not made aware of the DEQ letter.

The Bowmans learned about the contamination at the site approximately one year after buying Van Horn's condominium unit. In the meantime, the Developer declared bankruptcy and the condominium association became responsible for the costs associated with monitoring the pollution and maintaining the vapor barrier. The Court of Appeals' opinion indicates that at the time of trial, the City of South Haven was covering those costs, but there was no guaranty that the City of South Haven would continue to cover those costs in the future.

At trial, the Associate Broker testified that she had been present when the vapor barrier was installed at the site, and had reviewed documents from the Developer regarding the

contamination of the site. The documents reviewed by the Associate Broker described the presence of TCE and other chemicals and heavy metals on the site. The Associate Broker testified she did not provide the documents to the Bowmans, but would have done so had they asked her. The Associate Broker further testified that she thought it was safe to live at the condominium unit based on the information she had received from the Developer and the City.

The jury found against the Associate Broker and Defendant Brokerage Firm and awarded the Bowmans $483,195.18 in damages. On appeal, the Court of Appeals first affirmed the trial court's decision against the Defendants on the fraud and negligent misrepresentation claims. The Court of Appeals then considered the claim made under the SDA.

As to the SDA claim, on appeal the Defendant Brokerage Firm and Associate Broker first contended that such claim was barred by the statute of limitations. The Court of Appeals found that there was no limitations period set forth in the SDA, and therefore applied the "catch all" six-year statute of limitations. (There is, of course, no limitations period set forth in the SDA because, as the Court of Appeals has previously held on numerous occasions, there is no claim for money damages based upon a violation of the SDA.)

The Court of Appeals next considered the Defendant Brokerage Firm's and Associate Broker's argument that the SDA only applied to the condominium unit and did not apply to the other portions of the condominium project which were contaminated. Focusing on the use of the word "property" within the SDA and the purposes of the seller's disclosure statement as set forth in the statement, the Court of Appeals held that the contaminated soil on the land where the condominium was situated should have been disclosed in the SDA. In other words, the Court of Appeals found that disclosure under the SDA was not simply limited to the condominium unit

itself. The Court of Appeals concluded that the Defendant Brokerage Firm and Associate Broker "acted in concert" with the Seller, Van Horn, in the violation of the SDA by concealing the contamination through an inaccurate seller's disclosure statement.

It is unknown why the Defendant Brokerage Firm and Associate Broker did not raise the defense that there is no separate claim for money damages under the SDA based on the numerous prior Court of Appeals' opinions that stand for this proposition. While asserting such a defense would not have avoided the damages based on the fraud and negligent misrepresentation claims, presumably it would have defeated the claim for damages under the SDA. Further, since it appears that the Defendant Brokerage Firm and Associate Broker did not raise this defense at the trial court, an appeal to the Michigan Supreme Court would be fruitless.

The Bowman Case is an unpublished decision which is not binding on any other court, including the circuit courts. That being said, it is anticipated that the existence of the Bowman Case will now cause legal counsel for buyers to attempt to make claims against sellers and REALTORS® under the SDA. Some years ago after MAR had obtained a favorable decision from the Michigan Supreme Court exempting REALTORS® from application of the Michigan Consumer Protection Act, there were still occasions where a REALTOR®'s counsel would fail to raise the defense. MAR addressed this problem by widely publicizing the existence of the exemption for REALTORS® under the MCPA and providing REALTORS®' counsel with an MCPA "survival kit." It would appear that as a result of the Bowman Case, a similar effort may be necessary to combat claims by buyers for money damages under the SDA.

Seller Financing Addendum to Exclusive Listing Contract (Residential Property)

This is an addendum to a Listing Contract dated _____, 20_____

between _____ ("Seller")

and _____("Brokerage Firm")

for the Property located at: _____ ("Property").

It is acknowledged by the parties hereto that the Seller may provide financing or extend credit to a buyer through the use of a land contract or other arrangement by which the Seller extends credit which is secured by a mortgage or an equivalent consensual security interest on a residential dwelling or on land on which the buyer intends to construct a residential dwelling ("Seller Financing").

Seller understands that neither Brokerage Firm nor any person affiliated with Brokerage Firm can provide legal advice or financial advice with regard to Seller Financing. The process and terms of Seller Financing may be subject to both federal and state regulation, including but not limited to the Michigan Mortgage Loan Originator Licensing Act, the Michigan Mortgage Brokers, Lenders, and Servicers Licensing Act, the Federal Secure and Fair Enforcement for Mortgage Licensing Act, the federal Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act ("Regulation Z"). This list of potentially applicable federal and state law(s) and regulations is not exhaustive. Seller is advised to consult with an attorney as to any transaction involving Seller Financing. There can be substantial penalties and adverse consequences if a Seller fails to comply with applicable federal and state laws and regulations when providing Seller Financing.

Listed by: _____ _____
REALTOR® Seller

Agent for: _____ _____
Brokerage Firm Seller

Date: _____ Date: _____

Disclaimer: This form is provided as a service of the Michigan Association of REALTORS®. Please review both the form and details of the particular transaction to ensure that each section is appropriate for the transaction. The Michigan Association of REALTORS® is not responsible for use or misuse of the form, for misrepresentation, or for warranties made in connection with the form.