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This month's article discusses how the new VOW Rules have changed the MLS participation qualifications, how homeowners are being scammed regarding property tax reductions and federal stimulus money, some good and bad fallout from the foreclosure market, two interesting cases regarding expanded landlord liability and disclosure of prior construction defect litigation, and an opinion regarding the changed nature of the Multiple Listing Service from closed system to mass marketing.

#### **VOW Rules Change MLS Participation Requirements**

The settlement of the U.S. Department of Justice (DOJ) lawsuit against the National Association of REALTORS® ("NAR") requires all Multiple Listing Services (MLSs) of local REALTOR® Association members of NAR to adopt NAR's new policy and rules governing use of MLS data in connection with Internet brokerage services offered by MLS Participants through a virtual office website (VOW). The new rules will ensure that MLSs are used for what they were originally intended to do – help real estate professionals find buyers for people who want to sell their homes by requiring that MLS members be actively engaged in real estate brokerage.

The new policy and rules change the prior membership qualification requirement of simply being "capable of" offering cooperation or compensation to other brokers. Mere possession of a broker's license is no longer sufficient to qualify for MLS participation. The requirement that an individual or firm offers or "accepts cooperation and compensation" means that the Participant actively endeavors during the operation of its real estate business to list real property of the type listed on the MLS and/or to accept offers of cooperation and compensation made by listing brokers or agents in the MLS. No minimum level of service or number of transactions is required. The key is that the Participant actively endeavor to make or accept offers of cooperation and compensation.

MLSs are required to enforce the new policy and rules. Each member Association must suspend or expel all brokers who do not qualify for membership or participation under the new definition of MLS Participant by May 27, 2009.

Further information on the new Participant definition and the rules applicable to VOWs is available on the News/Blog page of our web site at [www. http://www.glawgroupapc.com](http://www.glawgroupapc.com).

### **Warnings Re Current Market Practices**

#### **Stimulus Scams by Email and Websites**

The Federal Trade Commission's Bureau of Consumer Protection is issuing warnings that email and web site scams are advertising that they can help you get money from the stimulus fund. Official looking images and names of President Obama and Vice President Biden are being used by some scammers to gain the appearance of legitimacy. Consumers are requested to provide personal information or pay money. Making an electronic payment provides credit card information and enables unauthorized charges and identity theft. If bank information is provided, the person's accounts are emptied and identity theft occurs. Clicking on web site links may result in download of malicious software or spyware to enable identity theft.

#### **Property Tax Reduction Scams**

Pursuant to a 1978 amendment to the California constitution, a temporary reduction in assessed value is allowed if the property suffers a decline in value because the current market value is less than the assessed value as of January 1. Under those circumstances, a property owner may request the Assessor review of the property's value.

Unscrupulous companies are taking advantage of the current loss of property values to defraud homeowners. Such companies are sending out mailings to property owners offering to perform services to reduce the owner's property taxes. A charge of several hundred dollars may be requested to file for the property value reduction, and the company may even charge a late fee if the homeowner's application is not made by a specified deadline.

California law requires that this type of solicitation must clearly show that the company is not a government agency and that the services are not approved or endorsed by any government agency. Real estate professionals should advise their clients to carefully scrutinize such solicitations and that information and an application regarding property tax valuation reductions may be obtained directly from the County Assessor.

### **More Foreclosure Fallout – Some Good & Some Bad**

#### **Bad News for HOA Purchasers – Higher Transfer Fees**

Before the glut of foreclosures and REO sales, homeowner associations (HOAs) typically charged about \$200 to transfer ownership to a property in a common interest development (CID). In the current market, these transfer fees are being increased significantly, sometimes to as much as \$500 to \$900. REO Asset Managers are requiring that buyers pay these high transfer fees under language commonly found in the CID and HOA governing documents that buyers are responsible for obtaining and reviewing the CC&Rs at their own expense. Real estate brokers and their agents should not estimate what the HOA transfer fee will be or make statements to the buyer that the transfer fee will be insignificant. An agent who does so might end up paying the difference between the estimate and the actual fee to keep the client happy and close the transaction.

**Good News for Pets – Faster Rescue**

A new pet rescue law is a positive result of the current tough economy and increase in foreclosures that has made it difficult for some pet owners to care for their animals. AB 2949 was the result of an entry in the “There Ought to Be a Law” contest. Pet abandonment has become a common occurrence in some areas. Homeowners may have to move to rental units where pets are not allowed or just may not be able to afford to feed their pets or pay fees to place them in an animal shelter. Animals could be left without food and water for long periods of time before animal control is advised of the problem. Prior to January 1, 2009, animal control usually had to wait an additional 24 to 72 hours after being notified of an abandoned animal to take the pet to an animal shelter. An exception applied to animals needing veterinary care. Animal control officers would ensure the animal had water and food and would then return after the time period expired. The new law requires property owners, including banks, real estate companies and other entities, to notify animal control agencies so that they can immediately rescue abandoned pets at foreclosed properties. Homeowners in distress should plan ahead for their pet’s care by contacting the Humane Society, an animal rescue organization or animal control.

**Good News for REO Buyers - RESPA Prohibits Mandatory Title Policy Purchase**

A rule that is frequently ignored in the current REO saturated market is that the lender seller may not require the buyer to purchase title insurance from a specified title insurance company for a purchase of a 1-to-4 residential unit with a federally-related mortgage loan as defined in the Real Estate Settlement Procedures Act (RESPA). Regardless of the lender’s policies or procedures, REO transactions are not exempt from RESPA. The lender may not condition the sale of the property on the purchase by the buyer of the title insurance policy. To do so puts the lender at risk of being liable to the buyer for three times the charges made for the insurance. Complaints for violation of this or other provisions of RESPA may be made to the U.S. Department of Housing and Urban Development (HUD) at [www.hud.gov/offices/hsg/sfh/res/respamor.cfm#HE2](http://www.hud.gov/offices/hsg/sfh/res/respamor.cfm#HE2).

**Cases of Interest****Condo Defect Disclosure Requires Disclosure of Related Lawsuits**

Mr. Samuelson owned a condo unit and was the Treasurer for the HOA in charge of the repairs made to the complex for intermittent water intrusion problems. The HOA had previously sued the developer for design and construction defects in 1986. A contractor made repairs to the affected areas in 1992. In 1996, the HOA sued that contractor for ineffective work. In 1998, a second contractor made repairs and told Samuelson that it could only solve a portion of the problem. Samuelson’s own unit was not affected by the defects.

In 2002, sixteen years after the first lawsuit and 6 years after the second lawsuit, Samuelson sold his unit. He disclosed on a Transfer Disclosure Statement that he was aware of flooding, drainage or grading problems and water intrusion during heavy rains. He told the buyers in a conversation that repairs were made in 1998 to solve the water intrusion problem. The buyers didn’t learn of the lawsuits until three years after escrow closed when the garage flooded. The buyers sued for negligence and misrepresentation. Samuelson sought to have the case dismissed on summary judgment for lack of a triable issue of fact.

On February 17, 2009, the California appellate court in *Calemne v. Samuelson* ruled against Samuelson. The court explained that once essential facts are disclosed a seller is not under a duty to provide details that would merely serve to elaborate on the disclosed facts. Here, however, the existence of the two lawsuits was the very type of material information that a potential buyer would find seriously affected both the desirability and value of the property. Additionally, disclosing that repairs were made by the HOA in the absence of providing information about the context in which the repairs were made could be characterized as a partial disclosure.

### **Trend Expanding Landlord Liability under Principal-Agent Relationship**

Landlords should think twice before asking tenants to perform services on their behalf. Mr. and Mrs. Perez learned that after a court found them responsible for over \$100,000. The 3<sup>rd</sup> Appellate District Court of Appeal continued the trend to expand landlord liability by recently holding that a landlord may be liable for his tenant's actions because the tenant is deemed to be the landlord's agent. In the case of *Barba v. Perez, Mendoza*, a musician at the Tropical Club in Lodi and occasional aide to Mr. Perez, was moving into an apartment above the Club. The Club's business manager and wife of the Club's owner, Mrs. Perez, had asked Mendoza to move the old refrigerator out to make room for a new one. When Barba came by to visit Mrs. Perez, she asked him to help Mendoza move the refrigerator. While moving the refrigerator down the stairs, Barba was injured. He was taken to the hospital and had surgery for a broken ankle. He later sued for more than \$70,000 of medical expenses and lost wages. The jury found that Mendoza was negligent and acting as the agent of Mr. and Mrs. Perez, who ended up being responsible for the \$117,053 in medical expenses and loss of income. Perez appealed arguing that Mendoza was not their agent. The appellate court disagreed and found that no written agreement is required for an agency relationship to exist: "Proof of an agency relationship may be established by 'evidence of the acts of the parties.'..." It is a factual question for the jury or court to decide. The major characteristic of an agency relationship is the right to control the agent; the power to terminate the services of the agent gives him the means of controlling the agent's activities. The right to immediately discharge involves the right of control. Mendoza was a tenant, sometimes performed at the Club, and was an occasional employee. Mrs. Perez could have discharged him from the task of moving the refrigerator. The court reasoned that a reasonable jury could find that Mendoza was subject to Mrs. Perez's control and supervision and was therefore acting as her agent at the time of the injury. Landlords should consider the potential cost of an injury or other damages to a tenant compared to the cost of hiring a qualified person to handle the task.

### **Opinion: MLS – Closed System or Mass Marketing?**

Inman News recently published an article by Kris Berg, broker-owner of San Diego Castles Realty, in which the point was artfully made that "the MLS is really not just between agents anymore." We thought that message really hits the mark, so we are restating the gist of it here. Some of our readers have been real estate professionals long enough to have used "real estate shorthand" in their MLS listings. Acronyms like CLAFATS (call listing agent for appointment to show) or BTVAB4COE (buyer to verify all before close of escrow). That was all well and good in the past when the MLS was a system for and between agents. However, today's MLS is a form of mass marketing that is read by buyers, not just other agents. Besides missing the opportunity to meaningfully communicate with a potential buyer, agents do a disservice to the real estate profession as a whole when their MLS listings contain misspelled words ("Wayne's coating" for wainscoting, or "stainless steal" for stainless steel appliances),

or obvious errors (300 bathrooms), or references to supplements that are available only to other agents. Also, unattractive photographs that show messy housekeeping can have the same negative impact. So, we concur with author Berg and recommend agents exercise care in writing text and selecting photographs of their MLS listings. A bad impression affects the industry as a whole.

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