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This month we report on a new SBA loan program, provide a Mini Q&A on Listing / Sales Procedures, review an important court decision regarding broker commissions that violate RESPA, and provide a checklist for qualifying for a loan modification under the President Obama's Home Affordable Modification Program.

#### **SBA ARC Loans to Provide Help for Struggling Small Businesses**

A new loan program was announced on May 18, 2009 by the Small Business Administration ("SBA"). Struggling established, viable, for-profit small businesses that need short-term help to make their principal and interest payments on existing qualifying debt may be eligible to receive some assistance beginning on June 15<sup>th</sup> in the form of deferred-payment loans of up to \$35,000 through SBA guaranteed America's Recovery Capital (ARC) loans. The ARC program was created as a no-interest, deferred payment loan to help small businesses that have a history of good performance, but as a result of the tough economy, are struggling to make debt payments. ARC loans are interest-free to the borrower, 100 percent guaranteed by the SBA, and have no SBA fees associated with them. The SBA Administrator explained that together with other provisions of the Recovery Act, ARC loans will free up capital and put more money in the hands of small business owners when they need it the most, which will help viable small businesses continue to grow and thrive and create new jobs in communities across the country. ARC loans will be disbursed for up to six months. The ARC loan funds may be used for payments of principal and interest for existing, qualifying small business debt including mortgages, term and revolving lines of credit, capital leases, credit card obligations and notes payable to vendors, suppliers and utilities. Repayment begins 12 months after the final disbursement. After the 12-month deferral period, borrowers will pay back the loan principal over a period of five years. ARC loans will be made by commercial lenders, not SBA directly. More information on ARC loans is available at [www.sba.gov](http://www.sba.gov)

#### **Mini Q&A on Listing / Sales Procedures**

We recently received several questions posed by REALTOR® Association members regarding procedures to be followed during the listing and sales period. This information is valuable to review periodically, so we are sharing it with our readers this month. The questions and answers are as follows:

##### **Question #1**

The listing agent and the buyer's agent work for the same brokerage firm. The buyer's agent asked the listing agent for details about the highest and best offer that has been made on the property. The listing agent allegedly revealed that information. The buyer then met that highest price using that information and obtained the property. The buyer then sued the brokerage firm claiming that the two agents were

conspiring to drive up the price of the property. A lawsuit was filed, and the court ruled in favor of the buyer. Was this the correct ruling?

**Answer to Question #1**

Based on the facts provided, and if there was a breach of fiduciary duty, this is probably the correct ruling. Each agent represented a different side in the transaction. The agents' broker is a fiduciary to both the seller and the buyer and has dual responsibilities. It is well settled that certain information is not to be revealed without specific authority of the client. What is not revealed in the question is whether there was any misrepresentation of fact. If either of the two agents misrepresented the actual highest price or offer, the breach of fiduciary duty could actually be fraud.

The ruling of the court appears correct if it is based upon factors that were not made clear in the question. Brokerages that represent multiple parties in a transaction must exercise extra care so that everyone's rights are adequately protected. Files must be fully documented to confirm this was done. Apparently, that was not done in this case.

**Question #2**

Can a listing agent, in response to an inquiry, reveal the price terms and conditions of an offer? Is permission of the seller required?

**Answer to Question #2**

The Code of Ethics, Article 1, states that when representing a buyer, seller, landlord or tenant, REALTORS® pledge themselves to protect and promote the interests of their clients. The Article goes on to require honesty with all parties.

Standard of Practice 1-15, states as follows:

“REALTORS®, in response to inquiries from buyers or cooperating brokers shall, with the sellers' approval, disclose the existence of offers on the property. Where disclosure is authorized, REALTORS® shall also disclose, if asked, whether offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker. (Adopted 1/03, Amended 1/09)” (Emphasis added)

Clearly, the seller will call the shots on what, if anything, can be revealed. The Standard of Practice does not specify whether disclosure of the existence of an offer includes price or other terms and conditions. However, again, that is up to the seller and should be fully discussed with the seller and adequately documented in the broker's file. All information conveyed must be truthful.

The Multiple Listing Service Rules are also virtually identical. MLS Rule 9-2, states as follows:

“Listing brokers, in response to inquiries from buyers or cooperating brokers, shall, with the sellers' approval, disclose the existence of offers on the property. Where disclosure is authorized, the listing broker shall also disclose whether offers were obtained by the listing licensee, by another licensee in the listing firm, or by a cooperating broker.” (Emphasis added)

Once again, the Rule requires seller authorization and applies to all members of the Multiple Listing Service, not just to REALTORS®. What information is revealed is certainly within the sound discretion of the seller after consulting with a real estate professional.

#### **Court Finds Broker Compensation is an Unearned Fee RESPA Violation**

A recent ruling by a federal district court provides brokers with incentives to be cautious in how they characterize the fees and charges for their services. In *Busby v. JRHBW Realty, Inc. d/b/a Realty South*, Vicki Busby (“Busby”) purchased a home using a federally insured loan. Her broker, JRHBW, charged her a \$149 “Administrative Brokerage Commission” (“Fee”), in addition to receiving a commission paid by the Seller. JRHBW charges all of its clients the Fee, regardless of whether the client is a purchaser or seller.

Busby filed a lawsuit against JRHBW claiming that the Fee violated the Real Estate Settlement Procedures Act (“RESPA”) (a federal law designed to prevent consumers from paying unnecessarily high settlement costs in a real estate transaction). Busby claimed that JRHBW did not provide any services to support the Fee. Busby sought to have the lawsuit certified as a class action involving all other individuals, including both buyers and sellers, who paid the Fee in a transaction involving federally insured loans. The trial court denied the motion for class certification, and on appeal that decision was reversed. The appeal court stated that a Section 8(b) lawsuit could occur when no real work is done in exchange for the Fee or the Fee exceeds the reasonable value of the services actually provided. The trial court then certified the lawsuit as a class action and ruled in favor of Busby and the class she represented and found that JRHBW had not identified settlement services to support the Fee.

Both the trial court and the appellate court looked at 2001 “Statement of Policy” (“SOP”) issued by the U.S. Department of Housing and Urban Development (“HUD”) on Section 8(b) claims, which includes in the definition of an unearned fee the circumstance when “one settlement service provider charges the consumer a fee where no nominal or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.” JRHBW argued that the Fee supported costs for regulatory compliance, providing office facilities, website enhancements, and increased access to information for clients. All their clients were charged the Fee, which was separate and in addition to the commission and was not split with the firm’s salespeople. JRHBW claimed the Fee actually reduced the commission costs to consumers and represented the costs of doing business with the brokerage firm.

The court disagreed and found that most of the services identified by JRHBW were not settlement-related and did not necessarily benefit clients like Busby and that Busby’s “no services provided” argument prevailed. The court believed that settlement services for which JRHBW could collect a fee were those fees related to the closing of a real estate loan, and that the services identified by JRHBW, such as an enhanced website, did not constitute settlement services. The court also ruled that many of the identified services were covered by the commission paid to JRHBW at the closing, so the Fee constituted a duplication of the commission and was not a RESPA-compensible settlement service charge. The court held the Fee was a violation of RESPA Section 8(b) and entered judgment in favor of Busby and the class she represented.

Counsel for NAR has opined in a report on this case that this unfortunate holding is incorrect because the court’s analysis of RESPA is flawed and because the court misapplied the mandate previously handed down in the case by the 11<sup>th</sup> Circuit Court of Appeals. “It is undisputed that RESPA is not a fee-

setting statute. Since a brokerage may charge a percentage based commission or a flat rate for its services, there is no principled basis to construe RESPA to prohibit charging a percentage plus a flat rate." The court's confusion likely stemmed from the fact that the total compensation was shown in two places on the settlement form, with each bearing a separate label (percentage commission and ABC Fee). These two factors caused the court to reject the brokerage firm's explanation that the ABC Fee represented nothing more than a price increase being charged for the firm's brokerage services. Believing the firm had already been paid for the brokerage services by the percentage commission, the court was looking for a different, specific service or set of services of benefit to the buyer in return for the ABC Fee. Finding none, it concluded that no settlement services were provided for the ABC Fee."

This case is not over yet. An appeal is expected. A clarification from HUD on this issue has been requested by NAR.

Until the matter reaches a final decision, brokers should exercise caution when characterizing their compensation. Identifying separate portions of what is all compensation and separately listing components of the broker's compensation in different parts of a contract with the consumer or in different places on a settlement statement exposes the brokerage firm to claims that each separately labeled charge represents a fee for a separate service and may be found to be a RESPA Section 8(b) violation. Broker compensation disclosures should clearly show that both the commission-based component and the flat fee component collectively represent payment for actual services provided by the brokerage. These combined amounts should be disclosed in the 700 section of the HUD-1 as the broker's compensation. Avoid identifying any particular fee as being for a separate service if it is part of the broker's compensation for services rendered.

#### **Loan Modification Check List**

RealtyTimes recently provided the following bullet point checklist of eligibility requirements that were published in a report by the Treasury Department for homeowners to qualify for relief under President Obama's Home Affordable Modification Program. Applications will be accepted until December 31, 2012. Incentive payments under the Program will continue up to five years after the date of entry into the Program.

The government guidelines for eligibility are as follows:

- Mortgage must have originated on or before January 1, 2009.
- Home must be an owner-occupied primary residence (verified with tax return, credit report, and other documentation such as a utility bill) this program is not designed for investor-owned properties.
- Home must be a single family 1-4 unit property (includes condominiums, cooperatives, and manufactured homes affixed to a foundation and treated as real property under state law).
- Home may not be vacant or condemned.
- Borrowers in bankruptcy are not automatically excluded from consideration (this differs from SB 1137)
- Borrowers in active litigation regarding the mortgage loan can qualify for a modification without waiving their legal rights.
- First lien loans must have an unpaid principal balance (prior to capitalization of arrearages) equal to or less than:

- 1 Unit: \$ 729,750
  - 2 Units: \$ 934,200
  - 3 Units: \$1,129,250
  - 4 Units: \$1,403,400
- Foreclosure actions are suspended during the trial period or while borrowers are considered for alternative foreclosure prevention options. If homeowners fail to qualify, foreclosure proceedings may resume.
  - No minimum or maximum LTV ratio for eligibility purposes.
  - Loans are eligible for only one loan modification under the program.
  - Subordinate liens (such as second mortgages or home equity loans or lines of credit) are included in the Front-End DTI calculation, but they are included in the Bank-End DTI calculation.
  - Services should follow any existing express contractual restrictions with respect to solicitation of borrowers for modifications.

Homeowners should consult with a loan modification specialist to determine if they are likely to qualify. For loan modification services information, contact The Giardinelli Law Group, APC at the email and phone numbers below.

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