



November 2009

This month we report on the extended federal tax credit, a bundle of state legislation addressing loan modification fraud, regulating mortgage brokers and appraisers, and other new rules, regulations and laws that will impact real estate professionals in 2010 and 2011. We also summarize an interesting court decision on mold.

NEW LAWS

Homebuyer Tax Credit Extension Signed into Law

Last month we reported on the anticipated approval of the proposed extension of the first-time homebuyer's tax credit. The Worker, Homeownership, and Business Assistance Act of 2009 (Act), was approved by Congress and signed by President Obama and became law on November 6, 2009. Here's a summary of the final provisions.

The Act extends and expands the first-time homeowner's tax credit of \$8,000 that was scheduled to expire at the end of November, 2009. Two additional categories of "first time homebuyers" are now entitled to a tax credit if certain conditions are met.

If you are eligible, you must buy, or enter into a binding contract to buy, a principal residence on or before April 30, 2010, and you must close escrow on the home by June 30, 2010.

The definition of a first-time homebuyer is expanded to include a second group of people. For the \$8,000 credit, you are still considered a first-time homebuyer if you haven't owned a home for the previous three years. The credit is 10% of the purchase price of the home. The full credit will be available for most homes costing \$80,000 or more.

A third category of people are now eligible for a reduced tax credit. The new law provides a credit of up to \$6,500 (\$3,250 for a married individual filing separately) to current homeowners buying a replacement principal residence, as follows: "In the case of an individual (and, if married, such individual's spouse) who has owned and used the same residence as such individual's principal residence for any five-consecutive-year period during the eight-year period ending on the date of the purchase of a subsequent principal residence, such individual shall be treated as a first-time homebuyer."

The previous income limits still apply to purchases on or before November 6, 2009. Previously, there was a phase-out between \$75,000 to \$95,000 yearly for individual filers and \$150,000 to \$170,000 for joint filers. The new law increases the income thresholds. For homes purchased on or after November 7, 2009, the credit phases out for individual taxpayers with modified adjusted gross income between \$125,000 and \$145,000, or between \$225,000 and \$245,000 for joint filers.

There is a limit on the purchase price of \$800,000. In addition a new age restriction has been added. The buyer or the buyer's spouse must be at least 18 years old on the date of closing for purchases on or after November 6, 2009.

If the home ceases to be the buyer's principal residence or if the buyer sells the home or converts it to a business or a rental within three years after the purchase, the credit must be repaid.

To claim the credit, the buyer must file IRS Form 5405 with his or her original or amended tax return and attach a copy of the purchase closing statement. For qualifying home purchases that close in 2010, the buyer has the option of claiming the credit on the 2010 return or on the 2009 return filed by April 15, 2010.

The first-time homebuyer credit is paid to eligible taxpayers even if they owe no tax or the credit is more than the tax owed.

Mortgage Fraud is Now a State Crime

Effective January 1, 2010, Senate Bill 239 makes it a mortgage fraud crime punishable by one year in prison to deliberately make any misrepresentation or omission during the mortgage lending process with the intent of influencing that process. Mortgage fraud against a federally-insured lender is punishable under federal law by a \$1 million fine and one-year in prison.

No More Advanced Fees for Loan Mods

Governor Schwarzenegger signed Senate Bill 94 (Calderon) effective from October 11, 2009 to January 1, 2013, which expands the definition of an "advance fee" and prohibits anyone from collecting an advance fee from a consumer for arranging a loan modification or mortgage loan forbearance services regarding 1 to 4 unit residential properties.

Some advance fees require special handling by real estate agents, such as DRE review and approval of the advance fee agreement and deposit of the fee into a broker's trust account. The new definition prohibits agents from separating advance fees or services into components to avoid the requirements. Other than the exceptions for advertisements in newspapers of general circulation, tenant prescreening fees, and tenant security deposits, advance fees is not defined as: "a fee, regardless of the form, claimed, demanded, charged, received, or collected by a licensee from a principal before fully completing each and every service the licensee contracted to perform, or represented would be performed."

Fees may be collected only after each and every promised service has been fully performed. The service provider must also give the borrower a specified notice that paying a third-party for loan modification services is unnecessary.

Violators risk substantial administrative and criminal penalties --a \$10,000 fine plus one-year imprisonment for individuals or a \$50,000 fine for business. Agreements made and fees collected before October 11, 2009 are not affected.

The following Department of Real Estate forms related to those activities are no longer legal and should not be used:

- Advanced Fee Agreement Instructions (DRE-AF1)
- Advanced Fee Agreement for Loan Modification Services (DRE-AFL)
- Verified Accounting for Advanced Fees (DRE-AFVA)

The new law eliminates the prior exception for attorneys who provide such services.

New HUD Fee Disclosure Rules

On January 1, 2010, the new U.S. Department of Housing and Urban Development regulations go into effect so that actual fees at closing can easily be compared to estimates given borrowers when applying for a mortgage loan. All closing costs must be clearly stated on a revised and consumer-friendly version of the good-faith estimate form given to borrowers within three days of applying for a mortgage. The new rules divide fees into three categories:

1. Fees that cannot increase from upfront estimates to closing, including lender or broker's mortgage origination, processing, and underwriting charges, as well as lender or broker's "points" based on the interest rate quoted and local transfer taxes.
2. Fees that can increase as much as 10% from upfront estimates, including services such as appraisals, title insurance, and recording fees from local governments.
3. Fees that can increase without limit because the amount is difficult to predict in advance, including homeowners insurance, daily interest charges on the loan, and initial deposits by the borrower into an escrow account.

"Buyer's Choice" Law

With the passage and immediate implementation of Assembly Bill 957, it is now California law that sellers of 1 to 4 unit residential properties are barred from requiring a buyer to use a particular title insurer or escrow provider as a condition for purchase of a property. Such prohibitions already existed under the federal Real Estate Settlement Procedures Act (RESPA). Typically, REO sellers dictate the conditions for sale, including specifying the escrow and title companies. In the current market where there are often upwards of 35 offers on a single property, offers requesting non-lender selected service providers are simply not presented to or reviewed by the lenders. So long as the seller provides written notice to the buyer of the right to make an independent selection, the new law's requirement is met. Buyers are likely to follow accept the seller's choice of service providers. Besides making the offer more attractive to the lender seller, there are advantages to using the lender's title and escrow companies who are experienced with REO transactions.

Homestead Exemption Increased

Assembly Bill 1046 takes effect on January 1, 2010. The exemption protecting a homeowner's equity from judgment creditors is increased to \$75,000 for individuals, \$100,000 for married couples or family units as specified, and \$175,000 for persons over 65 years, disabled, or over 55 years with limited income as specified.

New C.A.R. Membership Benefits - WINForms® / zipForm®6 / ePUBS™

WINForms® is changing to zipForm®6, which has new easy-to-use navigation software features. C.A.R. announced that in late November members who have already downloaded and installed

WINForms software will be entitled to a free upgrade to zipForm®6. Also, starting on January 1, 2010, ePUBS™ will be available as a C.A.R. membership benefit. Log onto <http://www.car.org/winforms/ePUBXWF/ePUBXBuyNow> to see an introductory half-hour webinar.

Mortgage Broker Fiduciary Duty and Restrictions Starting Jan 2010

AB 260, one of the most comprehensive new mortgage reform laws in the nation, takes effect on January 1, 2010. AB 260 (Lieu) creates a statutory fiduciary duty for a mortgage broker making a loan on a 1 to 4 residential property to put the borrower's economic interest above his or her own interests and prohibits lenders and brokers from making false or misleading statements relative to the terms of a subprime loan.

The bill's author, Assemblymember Ted Lieu, states on his website: "The law is designed to bring trust and security back to the state's mortgage market, protect borrowers from the most abusive lending practices that caused the foreclosure crisis, and reassure the secondary market that loans bought in California are sound. ... Fraudulent mortgage practices have not only devastated California's economy and caused record unemployment, they have also triggered a national and international financial meltdown. ... This new law cracks down on some of the most abusive lending practices and places significant safeguards on the industry to ensure this crisis never happens again."

Specific provisions of this bill include: prohibiting the steering of borrowers into higher-priced loans that are more risky than lower-interest, fixed-rate loans for which the borrower had actually qualified; banning negative amortization loans where the loan gets larger the longer the borrower holds the loan; and putting strict caps on prepayment penalties.

Registration of Appraisal Management Companies

Senate Bill 237 takes effect on January 1, 2010 in response to Fannie Mae and Freddie Mac adoption of the Home Valuation Code of Conduct (HVCC). Starting in 2010, the Office of Real Estate Appraisers (OREA) has regulatory oversight over and must implement a registration system for appraisal management companies. The new law clarifies that withholding or threatening to withhold an appraisal fee or future appraisal business, and promising future business, promotions, or compensation constitutes improperly influencing the appraisal process by anyone with an interest in a real estate transaction and is prohibited conduct under the law.

Extension of 60 Day Notice to Terminate Tenants

The current law requiring landlords to give tenants a 60-day notice to terminate a month-to-month residential tenancy will not "sunset" as scheduled on January 1, 2010. Rather than reverting to the prior 30-day notice, the law has been extended indefinitely. The 60-day notice does not apply to fixed-term leases. Foreclosures properties are subject to other laws. A 30-day notice to terminate is sufficient if the tenant has occupied the property for less than a year or if the property is sold and certain requirements are met (see the CAR Form Notice of Termination of Tenancy).

Mortgage Loan Originator Regulations Coming in Dec 2010

To comply with the creation of a Nationwide Mortgage Licensing System and Registry under new federal law, Senate Bill 36 was enacted to take effect in December 2010. It defines a mortgage loan originator as any person who takes for compensation or gain an application for a mortgage loan or offer or negotiates terms for a mortgage loan for a 1 to 4 residential property. Real estate agents are excluded if they are not compensated by a lender or mortgage loan originator and only engage in selling, buying, or leasing activities. Notice must be given to the DRE by January 31, 2010 or within 30 days of a broker or the broker's salespersons starting loan activity (making, arranging, or servicing loans secured by 1 to 4 residential property).

Mechanic's Lien Law Changes Are Coming in 2011

Governor Schwarzenegger recently signed Assembly Bill 457 which modifies the California Mechanic's Lien Law (Civil Code sections 3084 and 3146). This new legislation includes two important changes that will not take effect until January 1, 2011.

- The definition of "mechanic's lien" is expanded to include a Notice of Mechanic's Lien. The Lien and the Notice will both be required to be served on the property owner. Failure to serve the lien and the notice of lien would render the lien unenforceable as a matter of law. A proof of service signed by the lien claimant will also be included as part of the mechanic's lien.
- The current law allows, but does not require, the plaintiff to record of a *Notice of Lis Pendens* (Latin for action pending) when the plaintiff files a lawsuit to enforce a mechanic's lien. The recording and filing of the *Notice of Lis Pendens* within 20 days of the filing of the lawsuit becomes mandatory under the new law. This will provide constructive notice of the lawsuit to any purchaser or lender.

NEW CASE

Landlord Win when Mold Evidence Lacking

Darcee Dee moved into a Los Angeles apartment in January 2001 and soon began to experience various health issues. Her symptoms included dizziness, fatigue, diarrhea, vomiting, bloody nose, migraines, itchiness, redness on her feet and hands, confusion, chills, depression, hair loss, stomach, back, head and neck aches, the absence of menstruation, problems with breathing, tightness in her chest, excessive heartburn, burning skin, food sensitivities, hives, and eye infections. Darcee complained to PCS Property Management, LLC ("PCS"). In May, PCS had Scope Laboratories perform mold tests. The tests detected the presence of stachybotrys, a type of mold *capable of producing mycotoxins*. In June of that year, Darcee moved out of the apartment. Additional tests by another company confirmed other types of mold were present.

Darcee sued PCS. Experts testified that her health conditions were caused by mold growing in and near her apartment. PCS filed motions to exclude the test results and the expert testimony. The trial court agreed with PCS. Darcee appealed. The Appellate Court agreed with the trial court and excluded the testimony of the physicians who attributed Darcee's various problems to exposure to mycotoxins caused by mold. Here's why:

The basic facts from the trial court included the following: Molds, even toxic molds, do not cause illness and reactions. Reactions are caused by mycotoxins which may under some conditions be produced by the molds. The tests detected mold, but not the presence of mycotoxins. The presence of mycotoxins was *inferred* from the results of specialized blood and other tests that Darcee alleged showed she had been exposed to mycotoxins. Those tests were done by the testifying physician. The trial court found that the test results did not meet the legal requirements for admissibility as evidence because, “the only laboratory in the world that does this testing is the doctor’s. The work is not generally accepted in the relevant medical community as being capable of identifying exposure to mycotoxins.” The trial court also said “what I heard was in the main speculation,” and that there was insufficient “evidence of a causal connection” between Darcee’s problems and exposure to mycotoxins.

The Appellate Court’s opinion began with this statement: “Mold is a fungus which is essentially everywhere. Almost every breath we take contains mold spores” The Appellate Court agreed with the trial court’s holding and added that “an expert’s opinion that something could be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist ... does not provide any assistance to the jury.”

The case went back to the trial court and the jury found in favor of PCS and awarded over \$330,000 in court costs.

The author of this month’s newsletter is Sylvia J. Simmons, Attorney with THE GIARDINELLI LAW GROUP, APC. She can be reached at Sylvia@glawgroupapc.com or 951/ 245-9163.

THE GIARDINELLI LAW GROUP, APC

Riverside County Office
31772 Casino Drive, Suite C
Lake Elsinore, CA 92530
951 / 245-9163

Orange County Office
1601 East Orangewood Avenue, Suite 175
Anaheim, CA 92805
714 / 978-2060

This article is a copyrighted publication and may not be reproduced or transmitted in any form or by any means without written permission. This article does not necessarily reflect the point of view of the Association or other person or entity who publishes it. This article provides legal information abridged from statutes, court decisions, and administrative rulings and contains opinions of the writers. Legal information is not the same as legal advice, which is the application of law to an individual’s specific circumstances. Although every effort is made to ensure the information is accurate and useful, it is recommended that you consult with a lawyer to obtain professional assurance that the information provided and your interpretation of it is appropriate for a particular situation. To request further information or to comment on this article, contact The Giardinelli Law Group, APC, at jvg@glawgroupapc.com, or 951/ 245-9163 and visit our website at www.glawgroupapc.com