LEGAL ISSUES YOU HAVE TO UNDERSTAND TO STAY OUT OF REAL ESTATE BROKERAGE JAIL!

TRIPLE PLAY CONVENTION

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Barry S. Goodman, Esq.

bgoodman@greenbaumlaw.com
(732) 476-2560

GREENBAUM ROWE SMITH & DAVIS LLP
Metro Corporate Campus One
99 Wood Avenue South
P.O. Box 5600
Woodbridge, NJ 07095-0988
www.greenbaumlaw.com

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A. COPING WITH INDEPENDENT CONTRACTOR STATUS/FAIR HOUSING LAWS

1. Even if a real estate salesperson has an independent contractor agreement with a broker, the salesperson is treated as an employee in New Jersey for purposes of workers' compensation, the Whistleblower Act, wrongful termination and the Law against Discrimination. **TRUE or FALSE?**

2. Under the Fair Housing Act, age-restricted communities can require that at least 80 percent of the owners must be 55 or older. **TRUE or FALSE?**

B. DISCLOSING RELEVANT INFORMATION

3. A listing agent must disclose a mold issue at a house that occurred four years ago even though the owner had it professionally remediated and there have not been any signs of mold since then. **TRUE or FALSE?**

4. A buyer's agent automatically will be liable for three times the buyer's damages and the buyer's attorneys' fees under the Consumer Fraud Act for repeating to the buyer misinformation obtained by the agent from a municipal Clerk about square footage, even if the agent did not know the information was wrong. **TRUE or FALSE?**

5. A buyer's agent has a duty to reveal to the agent's buyers that a person committed suicide in the backyard of the house. **TRUE or FALSE?**

6. If a dual agent knows that the prosecutor sent a notice to the seller that a neighbor is a registered sex offender, the agent has a fiduciary duty to disclose this information if the buyers ask if there are any sex offenders in the neighborhood because they are concerned about the safety of their six-year old daughter. **TRUE or FALSE?**

C. DEALING WITH TEAMS/FAIR CHANCE IN HOUSING ACT

7. A team may operate from an office other than the office of the broker where they are licensed as long as the broker duly supervises the team. **TRUE or FALSE?**

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[*] *Prepared by Barry S. Goodman, Esq. of Greenbaum, Rowe, Smith & Davis LLP for the Triple Play Convention on December 6, 2023.

8. Under the New Jersey Fair Chance in Housing Act that went into effect in January 2022, a landlord and its agent are prohibited from requiring a potential tenant to complete any application that includes any inquiry or asking any applicant about the applicant's criminal record before making a conditional offer to the applicant. **TRUE or FALSE?**

D. NAVIGATING LEAD-BASED PAINT LAWS/NAR LAWSUIT ISSUES

9. Under legislation that went into effect in July 2022, there must be a lead-based paint inspection for one-family, two-family and multiple dwellings at tenant turnover, or within two years, for housing that has not been certified as lead free and was constructed before 1978, except for seasonal rentals of less than six months and multiple dwellings registered with the DCA for at least ten years. **TRUE or FALSE?**

10. As a result of the antitrust lawsuits against NAR, real estate agents should use written buyer agency agreements to protect themselves if the seller does not offer compensation or offers minimal compensation to a buyer's agent. **TRUE or FALSE?**

A

New Jersey Statutes Annotated
Title 45. Professions and Occupations (Refs & Annos)
Subtitle 1. Professions and Occupations Regulated by State Boards of Registration and Examination
Chapter 15. Real Estate Brokers and Salesmen (Refs & Annos)
Article 1. Real Estate Brokers and Salesmen (Refs & Annos)

N.J.S.A. **45:15-3.2**

45:15-3.2. Written agreement; requirement before commencing a business activity; terms; contents

Effective: August 10, 2018
Currentness

a. No broker-salesperson or salesperson shall commence business activity for a broker and no broker shall authorize a broker-salesperson or salesperson to act on the broker's behalf until a written agreement, as provided in this subsection, has been signed by the broker and broker-salesperson or salesperson. Prior to an individual's commencement of business activity as a broker-salesperson or salesperson under the authority of a broker, the broker and broker-salesperson or salesperson shall both sign a written agreement which recites the terms under which the services of the broker-salesperson or salesperson have been retained by the broker.

b. Notwithstanding any provision of R.S.45:15-1 et seq. or any other law, rule, or regulation to the contrary, a business affiliation between a broker and a broker-salesperson or salesperson may be that of an employment relationship or the provision of services by an independent contractor. The nature of the business affiliation shall be defined in the written agreement required pursuant to subsection a. of this section.

Credits
L.2018, c. 71, § 3, eff. Aug. 10, 2018.

Editors' Notes

ASSEMBLY REGULATED PROFESSIONS COMMITTEE STATEMENT

Senate Bill No. 430 (First Reprint)--L.2018, c. 71

DATED: JUNE 11, 2018

The Assembly Regulated Professions Committee reports favorably Senate Bill No. 430 (1R).

This bill eliminates the referral agent license category, which was created pursuant to P.L.2009, c.238, and replaces it by codifying the current business practice of real estate brokers housing real estate salespersons in real estate referral companies. Under the provisions of the bill, the referral agent license category is replaced by a real estate salesperson licensed with a real estate referral company that is supervised by a licensed real estate broker whose real estate brokerage-related activities are limited to referring prospects for the sale, purchase, exchange, leasing or rental of real estate or an interest therein. The bill defines a real estate referral company as a business entity supervised by a real estate broker, separate and apart from any other business entity maintained by the real estate broker, for

the purpose of housing licensed salespersons that strictly engage in the referral of prospects for the sale, purchase, exchange, leasing or rental of real estate or an interest therein solely on behalf of the supervising real estate broker. The bill also expands the definition of real estate broker to include any person, firm, or corporation who supervises a real estate referral company.

The bill maintains operating limitations, which are currently in place for referral agents, for salespersons licensed with a real estate referral company, including:

(1) salespersons licensed with a real estate referral company will not be permitted to be simultaneously licensed as a real estate broker or broker-salesperson; and

(2) salespersons licensed with a real estate referral company will only refer prospects to the real estate broker supervising the real estate referral company through which the salesperson is licensed and will not be licensed with more than one real estate broker or real estate referral company at one time.

The bill provides that the license and renewal applications for a salesperson licensed with a real estate referral company must include a certification signed by the real estate broker confirming that the salesperson and broker have reviewed the restrictions placed on a salesperson licensed with a real estate referral company and that the salesperson acknowledges these restrictions. Furthermore, a salesperson licensed with a real estate referral company is not required to complete continuing education requirements as a condition of license renewal or under any other circumstances.

The bill stipulates that any person licensed as a referral agent through a real estate referral company will be deemed to be a salesperson licensed with a real estate referral company until the next renewal of licenses by the commission. All requirements set forth in the bill with respect to licensure and length of experience as a salesperson licensed with a real estate referral company who seeks to change licensure status must include licensure and length of experience as a referral agent licensed with a real estate referral company, as applicable.

The bill also predicates the disqualification of real estate licenses issued to certain individuals upon the basis of a conviction of any sex offense that would qualify the person for registration under "Megan's Law," or an equivalent statute of another state or jurisdiction. The bill also permits the New Jersey Real Estate Commission to place licensees on probation, suspend or revoke any real estate license, or impose penalties on a real estate licensee, for failure to notify the commission that the licensee has been convicted of any sex offense that would qualify the person for registration under "Megan's Law," or an equivalent statute of another state or jurisdiction. However, the bill stipulates that no provision of the laws concerning real estate licensees (R.S.45:15-1 et seq.), or any supplement thereto, will be deemed to supersede P.L.1968, c.282 (C.2A:168A-1 et seq.). That law provides that a person will not be disqualified or discriminated against by any licensing authority because of any conviction for a crime, unless N.J.S.2C:51-2 or section 7 of P.L.2009, c.53 (C.17:11C-57) is applicable, or unless the conviction relates adversely to the occupation, trade, vocation, profession, or business for which a license, certificate of authority, or qualification is sought.

The bill revises current law so that continuing education courses would be prohibited from being delivered through distance learning or a correspondence course. The bill also establishes two new core continuing education categories for real estate licensee safety, and financial literacy and planning.

The bill codifies two existing provisions of regulations promulgated by the New Jersey Real Estate Commission. First, the bill mandates that two hours of continuing education courses be taken in the topic of ethics. Second, the bill requires a written agreement defining the business affiliation between a broker and a broker-salesperson or salesperson and the terms under which the services of the broker-salesperson or salesperson have been retained by the broker. The bill provides that the business affiliation between a broker and a broker-salesperson or salesperson may be that of an employment relationship or independent contractor relationship.

N.J.A.C. 11:5-4.1

This file includes all Regulations adopted and published through the New Jersey Register, Vol. 51 No. 7, April 1, 2019

§ 11:5-4.1 Licensee business relationship agreements; commissions; accounting to salespersons and referral agents; actions for collection of compensation

(a)Prior to a salesperson or referral agent engaging in any real estate brokerage activity, a broker and the salesperson or referral agent must enter into and sign a written agreement that contains the terms of their business relationship. Such agreement shall contain terms including, but not limited to, the following:

1.The rate of compensation to be paid to the salesperson or referral agent during his or her affiliation with the broker;

2.A promise by the broker to pay to the salesperson or referral agent his or her portion of commissions earned within 10 business days of their receipt by the broker or as soon thereafter as such funds have cleared the broker's bank, or in accordance with another payment schedule explicitly set forth in the written agreement;

3.The rate of compensation payable to the salesperson or referral agent on transactions which close and, if applicable, on renewals which occur subsequent to the termination of the salesperson's or referral agent's affiliation with the broker; and

4.A provision that any future changes to the agreement will not be binding unless the changes are contained in a writing signed by both parties.

(b)A copy of the fully executed agreement shall be provided to the salesperson or referral agent upon the commencement of his or her affiliation with the broker, and the original thereof shall be maintained by the broker as a business record in accordance with *N.J.A.C. 11:5-5.5*.

(c)All compensation paid to brokers shall, unless debited from funds held in escrow in accordance with *N.J.A.C. 11:5-5.1(d)*, be deposited into the general business account of the broker within five business days of their receipt by the broker.

(d)If any monies due a salesperson or referral agent under the terms of the written agreement with their broker are not paid within 10 business days of the broker's receipt of such funds or promptly thereafter upon their having cleared the broker's account, the broker shall provide to the salesperson or referral agent a complete written explanation of the failure to pay such monies.

(e)Within 30 days of the termination of the affiliation of a salesperson or referral agent with a broker, the broker shall provide a complete written accounting of all monies due the salesperson or referral agent as of the date of termination and/or which may become due in the future. If any sums so accounted for are not in accord with the terms of the post-termination compensation clause in the written agreement between the broker and the salesperson or referral agent, the broker shall give a complete written explanation of any difference to the salesperson or referral agent with the accounting.

(f)A broker must maintain copies of the following documents and proof of delivery of the document to the salesperson or referral agent for six years: agreements as described in (a) above; explanations of the failure to pay compensation due a salesperson or referral agent on a timely basis as described in (d) above; and accountings and explanations regarding compensation due a salesperson or referral agent subsequent to the termination of their affiliation with a broker as described in (e) above.

(g) If the Commission confirms that a broker has complied with the requirements imposed by this section, the Commission will not further investigate a complaint alleging the non-payment of a commission by a broker to a salesperson or referral agent unless such complaint is accompanied by a copy of an arbitration decision or the equivalent, or a copy of a judgment of a court of competent jurisdiction secured by the salesperson or referral agent against the broker. Unless appealed, the failure by a broker to pay monies awarded to a salesperson or referral agent under the terms of any such decision or judgment within 30 days of its effective date shall subject the broker to sanctions pursuant to *N.J.S.A. 45:15-17*.

(h) Broker, salesperson and referral agent licensees may only bring or maintain actions in the courts of New Jersey for the payment of compensation due them for brokerage services performed as provided in *N.J.S.A. 45:15-3*.

1.The Commission interprets the language "at the time the alleged cause of action arose" as used in *N.J.S.A. 45:15-3* to mean at the time that the brokerage services which form the basis for the alleged claim to compensation were rendered. For example, at the time when a property was listed for sale or rental by a licensee.

2.The Commission does not interpret the language "at the time the alleged cause or action arose" as requiring that the licensee must have been actively licensed at the time that the compensation allegedly due was to have been paid. For example, the Commission does not construe this language as requiring licensure at the time of the renewal of a lease to enable a claimant to sue for compensation based upon a promise, made or in effect when the lease was originally executed, to pay additional consideration to the claimant in the event that the lease was renewed.

(i) All references to "salesperson" in this section include individuals licensed as broker-salespersons. All references to "non-payment of a commission" in this section shall be construed to include the non-payment of other forms of compensation.

(j) The Commission interprets "employment agreement," "employ," and "employing broker" in *N.J.S.A. 45:15-1* et seq., and this section to permit an employment relationship or an independent contractor relationship between a broker and a broker-salesperson, salesperson, or referral agent.

History

HISTORY:

As amended, R.1976 d.254, eff. August 16, 1976.

See: 8 N.J.R. 336(b), 8 N.J.R. 422(a).

As amended, R.1983 d.471, eff. November 7, 1983.

See: 15 N.J.R. 1343(a), 15 N.J.R. 1865(c).

"Salesman" replaced by "salesperson".

Amended by R.1989 d.424, effective August 21, 1989 (operative November 19, 1989).

See: 21 N.J.R. 1308(b), 21 N.J.R. 2519(a).

Language entirely deleted and replaced with more detailed requirements including essential provisions which must be included in all contracts between brokers and salespersons.

Amended by R.1994 d.57, effective February 7, 1994.

N.J. Stat. § 43:21-19

This section is current through New Jersey 218th Second Annual Session, L. 2019, c. 45, and J.R. 3

LexisNexis® New Jersey Annotated Statutes > Title 43. Pensions and Retirement and Unemployment Compensation (Subts. 1 — 10) > Subtitle 9. Social Security (Chs. 21 — 22) > Chapter 21. Unemployment Compensation (§§ 43:21-1 — 43:21-71)

§ 43:21-19. Definitions.

As used in this chapter (R.S.43:21-1 et seq.), unless the context clearly requires otherwise:

(a)

(1)"Annual payroll" means the total amount of wages paid during a calendar year (regardless of when earned) by an employer for employment.

(2)"Average annual payroll" means the average of the annual payrolls of any employer for the last three or five preceding calendar years, whichever average is higher, except that any year or years throughout which an employer has had no "annual payroll" because of military service shall be deleted from the reckoning; the "average annual payroll" in such case is to be determined on the basis of the prior three or five calendar years in each of which the employer had an "annual payroll" in the operation of his business, if the employer resumes his business within 12 months after separation, discharge or release from such service, under conditions other than dishonorable, and makes application to have his "average annual payroll" determined on the basis of such deletion within 12 months after he resumes his business; provided, however, that "average annual payroll" solely for the purposes of paragraph (3) of subsection (e) of R.S.43:21-7 means the average of the annual payrolls of any employer on which he paid contributions to the State disability benefits fund for the last three or five preceding calendar years, whichever average is higher; provided further that only those wages be included on which employer contributions have been paid on or before January 31 (or the next succeeding day if such January 31 is a Saturday or Sunday) immediately preceding the beginning of the 12-month period for which the employer's contribution rate is computed.

(b)"Benefits" means the money payments payable to an individual, as provided in this chapter (R.S.43:21-1 et seq.), with respect to his unemployment.

(c)

(1)"Base year" with respect to benefit years commencing on or after July 1, 1986, shall mean the first four of the last five completed calendar quarters immediately preceding an individual's benefit year.

With respect to a benefit year commencing on or after July 1, 1995, if an individual does not have sufficient qualifying weeks or wages in his base year to qualify for benefits, the individual shall have the option of designating that his base year shall be the "alternative base year," which means the last four completed calendar quarters immediately preceding the individual's benefit year; except that, with respect to a benefit year commencing on or after October 1, 1995, if the individual also does not have sufficient qualifying weeks or wages in the last four completed calendar quarters immediately preceding his benefit year to qualify for benefits, "alternative base year" means the last three completed calendar quarters immediately preceding his benefit year and, of the calendar quarter in which the benefit year commences, the portion of the quarter which occurs before the commencing of the benefit year.

The division shall inform the individual of his options under this section as amended by P.L.1995, c.234. If information regarding weeks and wages for the calendar quarter or quarters immediately preceding the benefit year is not available to the division from the regular quarterly reports of wage information and the division is not able to obtain the information using other means pursuant to State or federal law, the division may base the determination of eligibility for benefits on the affidavit of an individual with respect to weeks and wages for that calendar quarter. The individual shall furnish payroll documentation, if available, in support of the affidavit. A determination of benefits based on an alternative base year shall be adjusted when the quarterly report of wage information from the employer is received if that information causes a change in the determination.

(2) With respect to a benefit year commencing on or after June 1, 1990 for an individual who immediately preceding the benefit year was subject to a disability compensable under the provisions of the "Temporary Disability Benefits Law," P.L.1948, c.110 (C.43:21-25 et seq.), "base year" shall mean the first four of the last five completed calendar quarters immediately preceding the individual's period of disability, if the employment held by the individual immediately preceding the period of disability is no longer available at the conclusion of that period and the individual files a valid claim for unemployment benefits after the conclusion of that period. For the purposes of this paragraph, "period of disability" means the period defined as a period of disability by section 3 of the "Temporary Disability Benefits Law," P.L.1948, c.110 (C.43:21-27). An individual who files a claim under the provisions of this paragraph (2) shall not be regarded as having left work voluntarily for the purposes of subsection (a) of R.S.43:21-5.

(3) With respect to a benefit year commencing on or after June 1, 1990 for an individual who immediately preceding the benefit year was subject to a disability compensable under the provisions of the workers' compensation law (chapter 15 of Title 34 of the Revised Statutes), "base year" shall mean the first four of the last five completed calendar quarters immediately preceding the individual's period of disability, if the period of disability was not longer than two years, if the employment held by the individual immediately preceding the period of disability is no longer available at the conclusion of that period and if the individual files a valid claim for unemployment benefits after the conclusion of that period. For the purposes of this paragraph, "period of disability" means the period from the time at which the individual becomes unable to work because of the compensable disability until the time that the individual becomes able to resume work and continue work on a permanent basis. An individual who files a claim under the provisions of this paragraph (3) shall not be regarded as having left work voluntarily for the purposes of subsection (a) of R.S.43:21-5.

(d)"Benefit year" with respect to any individual means the 364 consecutive calendar days beginning with the day on, or as of, which he first files a valid claim for benefits, and thereafter beginning with the day on, or as of, which the individual next files a valid claim for benefits after the termination of his last preceding benefit year. Any claim for benefits made in accordance with subsection (a) of R.S.43:21-6 shall be deemed to be a "valid claim" for the purpose of this subsection if (1) he is unemployed for the week in which, or as of which, he files a claim for benefits; and (2) he has fulfilled the conditions imposed by subsection (e) of R.S.43:21-4.

(e)

(1)"Division" means the Division of Unemployment and Temporary Disability Insurance of the Department of Labor and Workforce Development, and any transaction or exercise of authority by the director of the division thereunder, or under this chapter (R.S.43:21-1 et seq.), shall be deemed to be performed by the division.

(2)"Controller" means the Office of the Assistant Commissioner for Finance and Controller of the Department of Labor and Workforce Development, established by the 1982 Reorganization Plan of the Department of Labor.

(f)"Contributions" means the money payments to the State Unemployment Compensation Fund, required by R.S.43:21-7. "Payments in lieu of contributions" means the money payments to the State

Unemployment Compensation Fund by employers electing or required to make payments in lieu of contributions, as provided in section 3 or section 4 of P.L.1971, c.346 (*C.43:21-7.2* or *43:21-7.3*).

(g)"Employing unit" means the State or any of its instrumentalities or any political subdivision thereof or any of its instrumentalities or any instrumentality of more than one of the foregoing or any instrumentality of any of the foregoing and one or more other states or political subdivisions or any individual or type of organization, any partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1936, had in its employ one or more individuals performing services for it within this State. All individuals performing services within this State for any employing unit which maintains two or more separate establishments within this State shall be deemed to be employed by a single employing unit for all the purposes of this chapter (*R.S.43:21-1* et seq.). Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this chapter (*R.S.43:21-1* et seq.), whether such individual was hired or paid directly by such employing unit or by such agent or employee; provided the employing unit had actual or constructive knowledge of the work.

(h)"Employer" means:

(1) Any employing unit which in either the current or the preceding calendar year paid remuneration for employment in the amount of $1,000.00 or more;

(2) Any employing unit (whether or not an employing unit at the time of acquisition) which acquired the organization, trade or business, or substantially all the assets thereof, of another which, at the time of such acquisition, was an employer subject to this chapter (*R.S.43:21-1* et seq.);

(3) Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another employing unit and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection;

(4) Any employing unit which together with one or more other employing units is owned or controlled (by legally enforceable means or otherwise), directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforceable means or otherwise), and which, if treated as a single unit with such other employing unit or interest, would be an employer under paragraph (1) of this subsection;

(5) Any employing unit for which service in employment as defined in *R.S.43:21-19 (i) (1) (B) (i)* is performed after December 31, 1971; and as defined in *R.S.43:21-19 (i) (1) (B) (ii)* is performed after December 31, 1977;

(6) Any employing unit for which service in employment as defined in *R.S.43:21-19 (i) (1) (c)* is performed after December 31, 1971 and which in either the current or the preceding calendar year paid remuneration for employment in the amount of $1,000.00 or more;

(7) Any employing unit not an employer by reason of any other paragraph of this subsection (h) for which, within either the current or preceding calendar year, service is or was performed with respect to which such employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment fund; or which, as a condition for approval of the "unemployment compensation law" for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required pursuant to such act to be an employer under this chapter (*R.S.43:21-1* et seq.);

(8)(Deleted by amendment; P.L.1977, c.307.)

(9)(Deleted by amendment; P.L.1977, c.307.)

(10)(Deleted by amendment; P.L.1977, c.307.)

(11) Any employing unit subject to the provisions of the Federal Unemployment Tax Act within either the current or the preceding calendar year, except for employment hereinafter excluded under paragraph (7) of subsection (i) of this section;

(12) Any employing unit for which agricultural labor in employment as defined in R.S.43:21-19 (i) (1) (I) is performed after December 31, 1977;

(13) Any employing unit for which domestic service in employment as defined in R.S.43:21-19 (i) (1) (J) is performed after December 31, 1977;

(14) Any employing unit which having become an employer under the "unemployment compensation law" (R.S.43:21-1 et seq.), has not under R.S.43:21-8 ceased to be an employer; or for the effective period of its election pursuant to R.S.43:21-8, any other employing unit which has elected to become fully subject to this chapter (R.S.43:21-1 et seq.).

(i)

(1)"Employment" means:

(A) Any service performed prior to January 1, 1972, which was employment as defined in the "unemployment compensation law" (R.S.43:21-1 et seq.) prior to such date, and, subject to the other provisions of this subsection, service performed on or after January 1, 1972, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied.

(B)

(i) Service performed after December 31, 1971 by an individual in the employ of this State or any of its instrumentalities or in the employ of this State and one or more other states or their instrumentalities for a hospital or institution of higher education located in this State, if such service is not excluded from "employment" under paragraph (D) below.

(ii) Service performed after December 31, 1977, in the employ of this State or any of its instrumentalities or any political subdivision thereof or any of its instrumentalities or any instrumentality of more than one of the foregoing or any instrumentality of the foregoing and one or more other states or political subdivisions, if such service is not excluded from "employment" under paragraph (D) below.

(C) Service performed after December 31, 1971 by an individual in the employ of a religious, charitable, educational, or other organization, which is excluded from "employment" as defined in the Federal Unemployment Tax Act, solely by reason of section 3306 (c)(8) [26 U.S.C.S. § 3306] of that act, if such service is not excluded from "employment" under paragraph (D) below.

(D) For the purposes of paragraphs (B) and (C), the term "employment" does not apply to services performed

(i) In the employ of (I) a church or convention or association of churches, or (II) an organization, or school which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;

(ii) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(iii) Prior to January 1, 1978, in the employ of a school which is not an institution of higher education, and after December 31, 1977, in the employ of a governmental entity referred to in R.S.43:21-19 (i) (1) (B), if such service is performed by an individual in the exercise of duties

(aa)as an elected official;

(bb)as a member of a legislative body, or a member of the judiciary, of a state or political subdivision;

(cc)as a member of the State National Guard or Air National Guard;

(dd)as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency;

(ee)in a position which, under or pursuant to the laws of this State, is designated as a major nontenured policy making or advisory position, or a policy making or advisory position, the performance of the duties of which ordinarily does not require more than eight hours per week; or

(iv) By an individual receiving rehabilitation or remunerative work in a facility conducted for the purpose of carrying out a program of rehabilitation of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market;

(v) By an individual receiving work-relief or work-training as part of an unemployment work-relief or work-training program assisted in whole or in part by any federal agency or an agency of a state or political subdivision thereof; or

(vi) Prior to January 1, 1978, for a hospital in a State prison or other State correctional institution by an inmate of the prison or correctional institution and after December 31, 1977, by an inmate of a custodial or penal institution.

(E) The term "employment" shall include the services of an individual who is a citizen of the United States, performed outside the United States after December 31, 1971 (except in Canada and in the case of the Virgin Islands, after December 31, 1971) and prior to January 1 of the year following the year in which the U.S. Secretary of Labor approves the unemployment compensation law of the Virgin Islands, under *section 3304 (a) of the Internal Revenue Code of 1986* (*26 U.S.C. § 3304 (a)*) in the employ of an American employer (other than the service which is deemed employment under the provisions of R.S.43:21-19 (i) (2) or (5) or the parallel provisions of another state's unemployment compensation law), if

(i) The American employer's principal place of business in the United States is located in this State; or

(ii) The American employer has no place of business in the United States, but (I) the American employer is an individual who is a resident of this State; or (II) the American employer is a corporation which is organized under the laws of this State; or (III) the American employer is a partnership or trust and the number of partners or trustees who are residents of this State is greater than the number who are residents of another state; or

(iii) None of the criteria of divisions (i) and (ii) of this subparagraph (E) is met but the American employer has elected to become an employer subject to the "unemployment compensation law" (R.S.43:21-1 et seq.) in this State, or the American employer having failed to elect to become an employer in any state, the individual has filed a claim for benefits, based on such service, under the law of this State;

(iv) An "American employer," for the purposes of this subparagraph (E), means (I) an individual who is a resident of the United States; or (II) a partnership, if two-thirds or more of the partners are residents of the United States; or (III) a trust, if all the trustees are residents of the United States; or (IV) a corporation organized under the laws of the United States or of any state.

(F) Notwithstanding R.S.43:21-19 (i) (2), all service performed after January 1, 1972 by an officer or member of the crew of an American vessel or American aircraft on or in connection

with such vessel or aircraft, if the operating office from which the operations of such vessel or aircraft operating within, or within and without, the United States are ordinarily and regularly supervised, managed, directed, and controlled, is within this State.

(G) Notwithstanding any other provision of this subsection, service in this State with respect to which the taxes required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under the "unemployment compensation law" (R.S.43:21-1 et seq.).

(H) The term "United States" when used in a geographical sense in subsection *R.S.43:21-19 (i)* includes the states, the District of Columbia, the Commonwealth of Puerto Rico and, effective on the day after the day on which the U.S. Secretary of Labor approves for the first time under *section 3304 (a) of the Internal Revenue Code of 1986 (26 U.S.C. § 3304 (a))* an unemployment compensation law submitted to the Secretary by the Virgin Islands for such approval, the Virgin Islands.

(I)

(i) Service performed after December 31, 1977 in agricultural labor in a calendar year for an entity which is an employer as defined in the "unemployment compensation law," (R.S.43:21-1 et seq.) as of January 1 of such year; or for an employing unit which

(aa)during any calendar quarter in either the current or the preceding calendar year paid remuneration in cash of $20,000.00 or more for individuals employed in agricultural labor, or

(bb)for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor 10 or more individuals, regardless of whether they were employed at the same moment in time.

(ii)for the purposes of this subsection any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other entity shall be treated as an employee of such crew leader

(aa)if such crew leader holds a certification of registration under the Migrant and Seasonal Agricultural Worker Protection Act, Pub.L.97-470 (29 U.S.C. § 1801 et seq.), or P.L.1971, c.192 (C.34:8A-7 et seq.); or substantially all the members of such crew operate or maintain tractors, mechanized harvesting or cropdusting equipment, or any other mechanized equipment, which is provided by such crew leader; and

(bb)if such individual is not an employee of such other person for whom services were performed.

(iii) For the purposes of subparagraph (I) (i) in the case of any individual who is furnished by a crew leader to perform service in agricultural labor or any other entity and who is not treated as an employee of such crew leader under (I) (ii)

(aa)such other entity and not the crew leader shall be treated as the employer of such individual; and

(bb)such other entity shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual by the crew leader (either on his own behalf or on behalf of such other entity) for the service in agricultural labor performed for such other entity.

(iv) For the purpose of subparagraph (I)(ii), the term "crew leader" means an individual who

(aa)furnishes individuals to perform service in agricultural labor for any other entity;

(bb)pays (either on his own behalf or on behalf of such other entity) the individuals so furnished by him for the service in agricultural labor performed by them; and

(cc)has not entered into a written agreement with such other entity under which such individual is designated as an employee of such other entity.

(J) Domestic service after December 31, 1977 performed in the private home of an employing unit which paid cash remuneration of $1,000.00 or more to one or more individuals for such domestic service in any calendar quarter in the current or preceding calendar year.

(2) The term "employment" shall include an individual's entire service performed within or both within and without this State if:

(A) The service is localized in this State; or

(B) The service is not localized in any state but some of the service is performed in this State, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

(3) Services performed within this State but not covered under paragraph (2) of this subsection shall be deemed to be employment subject to this chapter (*R.S.43:21-1* et seq.) if contributions are not required and paid with respect to such services under an unemployment compensation law of any other state or of the federal government.

(4) Services not covered under paragraph (2) of this subsection and performed entirely without this State, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to this chapter (*R.S.43:21-1* et seq.) if the individual performing such services is a resident of this State and the employing unit for whom such services are performed files with the division an election that the entire service of such individual shall be deemed to be employment subject to this chapter (*R.S.43:21-1* et seq.).

(5) Service shall be deemed to be localized within a state if:

(A) The service is performed entirely within such state; or

(B) The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the state; for example, is temporary or transitory in nature or consists of isolated transactions.

(6) Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter (*R.S.43:21-1* et seq.) unless and until it is shown to the satisfaction of the division that:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

(7) Provided that such services are also exempt under the Federal Unemployment Tax Act, as amended, or that contributions with respect to such services are not required to be paid into a state unemployment fund as a condition for a tax offset credit against the tax imposed by the Federal Unemployment Tax Act, as amended, the term "employment" shall not include:

(A) Agricultural labor performed prior to January 1, 1978; and after December 31, 1977, only if performed in a calendar year for an entity which is not an employer as defined in the "unemployment compensation law," (*R.S.43:21-1* et seq.) as of January 1 of such calendar year; or unless performed for an employing unit which

(i)during a calendar quarter in either the current or the preceding calendar year paid remuneration in cash of $20,000.00 or more to individuals employed in agricultural labor, or

(ii)for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor 10 or more individuals, regardless of whether they were employed at the same moment in time;

(B) Domestic service in a private home performed prior to January 1, 1978; and after December 31, 1977, unless performed in the private home of an employing unit which paid cash remuneration of $1,000.00 or more to one or more individuals for such domestic service in any calendar quarter in the current or preceding calendar year;

(C) Service performed by an individual in the employ of his son, daughter or spouse, and service performed by a child under the age of 18 in the employ of his father or mother;

(D) Service performed prior to January 1, 1978, in the employ of this State or of any political subdivision thereof or of any instrumentality of this State or its political subdivisions, except as provided in *R.S.**43:21-19** (i) (1) (B)* above, and service in the employ of the South Jersey Port Corporation or its successors;

(E) Service performed in the employ of any other state or its political subdivisions or of an instrumentality of any other state or states or their political subdivisions to the extent that such instrumentality is with respect to such service exempt under the Constitution of the United States from the tax imposed under the Federal Unemployment Tax Act, as amended, except as provided in *R.S.**43:21-19** (i) (1) (B)* above;

(F) Service performed in the employ of the United States Government or of any instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by the "unemployment compensation law," except that to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation law, all of the provisions of this act shall be applicable to such instrumentalities, and to service performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services; provided that if this State shall not be certified for any year by the Secretary of Labor of the United States under *section 3304 of the federal Internal Revenue Code of 1986* (*26 U.S.C. § 3304*), the payments required of such instrumentalities with respect to such year shall be refunded by the division from the fund in the same manner and within the same period as is provided in *R.S.43:21-14 (f)* with respect to contributions erroneously paid to or collected by the division;

(G) Services performed in the employ of fraternal beneficiary societies, orders, or associations operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system and providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association, or their dependents;

(H) Services performed as a member of the board of directors, a board of trustees, a board of managers, or a committee of any bank, building and loan, or savings and loan association, incorporated or organized under the laws of this State or of the United States, where such services do not constitute the principal employment of the individual;

(I) Service with respect to which unemployment insurance is payable under an unemployment insurance program established by an Act of Congress;

(J)Service performed by agents of mutual fund brokers or dealers in the sale of mutual funds or other securities, by agents of insurance companies, exclusive of industrial insurance agents or by agents of investment companies, if the compensation to such agents for such services is wholly on a commission basis;

(K)Services performed by real estate salesmen or brokers who are compensated wholly on a commission basis;

(L)Services performed in the employ of any veterans' organization chartered by Act of Congress or of any auxiliary thereof, no part of the net earnings of which organization, or auxiliary thereof, inures to the benefit of any private shareholder or individual;

(M)Service performed for or in behalf of the owner or operator of any theater, ballroom, amusement hall or other place of entertainment, not in excess of 10 weeks in any calendar year for the same owner or operator, by any leader or musician of a band or orchestra, commonly called a "name band," entertainer, vaudeville artist, actor, actress, singer or other entertainer;

(N)Services performed after January 1, 1973 by an individual for a labor union organization, known and recognized as a union local, as a member of a committee or committees reimbursed by the union local for time lost from regular employment, or as a part-time officer of a union local and the remuneration for such services is less than $1,000.00 in a calendar year;

(O)Services performed in the sale or distribution of merchandise by home-to-home salespersons or in-the-home demonstrators whose remuneration consists wholly of commissions or commissions and bonuses;

(P)Service performed in the employ of a foreign government, including service as a consular, nondiplomatic representative, or other officer or employee;

(Q)Service performed in the employ of an instrumentality wholly owned by a foreign government if (i) the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof, and (ii) the division finds that the United States Secretary of State has certified to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar services performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(R)Service in the employ of an international organization entitled to enjoy the privileges, exemptions and immunities under the International Organizations Immunities Act (*22 U.S.C. § 288* et seq.);

(S)Service covered by an election duly approved by an agency charged with the administration of any other state or federal unemployment compensation or employment security law, in accordance with an arrangement pursuant to *R.S.43:21-21* during the effective period of such election;

(T)Service performed in the employ of a school, college, or university if such service is performed (i) by a student enrolled at such school, college, or university on a full-time basis in an educational program or completing such educational program leading to a degree at any of the severally recognized levels, or (ii) by the spouse of such a student, if such spouse is advised at the time such spouse commences to perform such service that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance;

(U)Service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a

regularly organized body of students in attendance at the place where its educational activities are carried on, as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(V) Service performed in the employ of a hospital, if such service is performed by a patient of the hospital; service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and regularly attending classes in a nurses' training school approved under the laws of this State;

(W) Services performed after the effective date of this amendatory act by agents of mutual benefit associations if the compensation to such agents for such services is wholly on a commission basis;

(X) Services performed by operators of motor vehicles weighing 18,000 pounds or more, licensed for commercial use and used for the highway movement of motor freight, who own their equipment or who lease or finance the purchase of their equipment through an entity which is not owned or controlled directly or indirectly by the entity for which the services were performed and who were compensated by receiving a percentage of the gross revenue generated by the transportation move or by a schedule of payment based on the distance and weight of the transportation move;

(Y)(Deleted by amendment, *P.L.2009, c.211*.)

(Z) Services performed, using facilities provided by a travel agent, by a person, commonly known as an outside travel agent, who acts as an independent contractor, is paid on a commission basis, sets his own work schedule and receives no benefits, sick leave, vacation or other leave from the travel agent owning the facilities.

(8) If one-half or more of the services in any pay period performed by an individual for an employing unit constitutes employment, all the services of such individual shall be deemed to be employment; but if more than one-half of the service in any pay period performed by an individual for an employing unit does not constitute employment, then none of the service of such individual shall be deemed to be employment. As used in this paragraph, the term "pay period" means a period of not more than 31 consecutive days for which a payment for service is ordinarily made by an employing unit to individuals in its employ.

(9) Services performed by the owner of a limousine franchise (franchisee) shall not be deemed to be employment subject to the "unemployment compensation law," *R.S.43:21-1* et seq., with regard to the franchisor if:

(A) The limousine franchisee is incorporated;

(B) The franchisee is subject to regulation by the Interstate Commerce Commission;

(C) The limousine franchise exists pursuant to a written franchise arrangement between the franchisee and the franchisor as defined by section 3 of P.L.1971, c.356 (*C.56:10-3*); and

(D) The franchisee registers with the Department of Labor and Workforce Development and receives an employer registration number.

(10) Services performed by a legal transcriber, or certified court reporter certified pursuant to P.L.1940, c.175 (*C.45:15B-1* et seq.), shall not be deemed to be employment subject to the "unemployment compensation law," *R.S.43:21-1* et seq., if those services are provided to a third party by the transcriber or reporter who is referred to the third party pursuant to an agreement with another legal transcriber or legal transcription service, or certified court reporter or court reporting

service, on a freelance basis, compensation for which is based upon a fee per transcript page, flat attendance fee, or other flat minimum fee, or combination thereof, set forth in the agreement.

For purposes of this paragraph (10): "legal transcription service" and "legal transcribing" mean making use, by audio, video or voice recording, of a verbatim record of court proceedings, depositions, other judicial proceedings, meetings of boards, agencies, corporations, or other bodies or groups, and causing that record to be printed in readable form or produced on a computer screen in readable form; and "legal transcriber" means a person who engages in "legal transcribing."

(j)"Employment office" means a free public employment office, or branch thereof operated by this State or maintained as a part of a State-controlled system of public employment offices.

(k)(Deleted by amendment, P.L.1984, c.24.)

(l)"State" includes, in addition to the states of the United States of America, the District of Columbia, the Virgin Islands and Puerto Rico.

(m)"Unemployment."

(1) An individual shall be deemed "unemployed" for any week during which:

(A) The individual is not engaged in full-time work and with respect to which his remuneration is less than his weekly benefit rate, including any week during which he is on vacation without pay; provided such vacation is not the result of the individual's voluntary action, except that for benefit years commencing on or after July 1, 1984, an officer of a corporation, or a person who has more than a 5% equitable or debt interest in the corporation, whose claim for benefits is based on wages with that corporation shall not be deemed to be unemployed in any week during the individual's term of office or ownership in the corporation; or

(B) The individual is eligible for and receiving a self-employment assistance allowance pursuant to the requirements of *P.L.1995, c.394* (*C.43:21-67* et al.).

(2) The term "remuneration" with respect to any individual for benefit years commencing on or after July 1, 1961, and as used in this subsection, shall include only that part of the same which in any week exceeds 20% of his weekly benefit rate (fractional parts of a dollar omitted) or $5.00, whichever is the larger, and shall not include any moneys paid to an individual by a county board of elections for work as a board worker on an election day.

(3) An individual's week of unemployment shall be deemed to commence only after the individual has filed a claim at an unemployment insurance claims office, except as the division may by regulation otherwise prescribe.

(n)"Unemployment compensation administration fund" means the unemployment compensation administration fund established by this chapter (*R.S.43:21-1* et seq.), from which administrative expenses under this chapter (*R.S.43:21-1* et seq.) shall be paid.

(o)"Wages" means remuneration paid by employers for employment. If a worker receives gratuities regularly in the course of his employment from other than his employer, his "wages" shall also include the gratuities so received, if reported in writing to his employer in accordance with regulations of the division, and if not so reported, his "wages" shall be determined in accordance with the minimum wage rates prescribed under any labor law or regulation of this State or of the United States, or the amount of remuneration actually received by the employee from his employer, whichever is the higher.

(p)"Remuneration" means all compensation for personal services, including commission and bonuses and the cash value of all compensation in any medium other than cash.

(q)"Week" means for benefit years commencing on or after October 1, 1984, the calendar week ending at midnight Saturday, or as the division may by regulation prescribe.

(r)"Calendar quarter" means the period of three consecutive calendar months ending March 31, June 30, September 30, or December 31.

(s)"Investment company" means any company as defined in subsection a. of section 1 of P.L.1938, c.322 (C.17:16A-1).

(t)

(1)(Deleted by amendment, P.L.2001, c.17).

(2)"Base week," commencing on or after January 1, 1996 and before January 1, 2001, means:

(A)Any calendar week during which the individual earned in employment from an employer remuneration not less than an amount which is 20% of the Statewide average weekly remuneration defined in subsection (c) of R.S.43:21-3 which amount shall be adjusted to the next higher multiple of $1.00 if not already a multiple thereof, except that if in any calendar week an individual subject to this subparagraph (A) is in employment with more than one employer, the individual may in that calendar week establish a base week with respect to each of the employers from whom the individual earns remuneration equal to not less than the amount defined in this subparagraph (A) during that week; or

(B)If the individual does not establish in his base year 20 or more base weeks as defined in subparagraph (A) of this paragraph (2), any calendar week of an individual's base year during which the individual earned in employment from an employer remuneration not less than an amount 20 times the minimum wage in effect pursuant to section 5 of P.L.1966, c.113 (C.34:11-56a4) on October 1 of the calendar year preceding the calendar year in which the benefit year commences, which amount shall be adjusted to the next higher multiple of $1.00 if not already a multiple thereof, except that if in any calendar week an individual subject to this subparagraph (B) is in employment with more than one employer, the individual may in that calendar week establish a base week with respect to each of the employers from whom the individual earns remuneration not less than the amount defined in this subparagraph (B) during that week.

(3)"Base week," commencing on or after January 1, 2001, means any calendar week during which the individual earned in employment from an employer remuneration not less than an amount 20 times the minimum wage in effect pursuant to section 5 of P.L.1966, c.113 (C.34:11-56a4) on October 1 of the calendar year preceding the calendar year in which the benefit year commences, which amount shall be adjusted to the next higher multiple of $1.00 if not already a multiple thereof, except that if in any calendar week an individual subject to this paragraph (3) is in employment with more than one employer, the individual may in that calendar week establish a base week with respect to each of the employers from whom the individual earns remuneration equal to not less than the amount defined in this paragraph (3) during that week.

(u)"Average weekly wage" means the amount derived by dividing an individual's total wages received during his base year base weeks (as defined in subsection (t) of this section) from that most recent base year employer with whom he has established at least 20 base weeks, by the number of base weeks in which such wages were earned. In the event that such claimant had no employer in his base year with whom he had established at least 20 base weeks, then such individual's average weekly wage shall be computed as if all of his base week wages were received from one employer and as if all his base weeks of employment had been performed in the employ of one employer.

For the purpose of computing the average weekly wage, the monetary alternative in subparagraph (B) of paragraph (2) of subsection (e) of R.S.43:21-4 shall only apply in those instances where the individual did not have at least 20 base weeks in the base year. For benefit years commencing on or after July 1, 1986, "average weekly wage" means the amount derived by dividing an individual's total base year wages by the number of base weeks worked by the individual during the base year; provided that for the purpose of computing the average weekly wage, the maximum number of base weeks used in the divisor shall be 52.

(v)"Initial determination" means, subject to the provisions of R.S.43:21-6(b)(2) and (3), a determination of benefit rights as measured by an eligible individual's base year employment with a single employer covering all periods of employment with that employer during the base year.

(w)"Last date of employment" means the last calendar day in the base year of an individual on which he performed services in employment for a given employer.

(x)"Most recent base year employer" means that employer with whom the individual most recently, in point of time, performed service in employment in the base year.

(y)

(1)"Educational institution" means any public or other nonprofit institution (including an institution of higher education):

(A)In which participants, trainees, or students are offered an organized course of study or training designed to transfer to them knowledge, skills, information, doctrines, attitudes or abilities from, by or under the guidance of an instructor or teacher;

(B)Which is approved, licensed or issued a permit to operate as a school by the State Department of Education or other government agency that is authorized within the State to approve, license or issue a permit for the operation of a school; and

(C)Which offers courses of study or training which may be academic, technical, trade, or preparation for gainful employment in a recognized occupation.

(2)"Institution of higher education" means an educational institution which:

(A)Admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B)Is legally authorized in this State to provide a program of education beyond high school;

(C)Provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for full credit toward such a degree, a program of post-graduate or post-doctoral studies, or a program of training to prepare students for gainful employment in a recognized occupation; and

(D)Is a public or other nonprofit institution.

Notwithstanding any of the foregoing provisions of this subsection, all colleges and universities in this State are institutions of higher education for purposes of this section.

(z)"Hospital" means an institution which has been licensed, certified or approved under the law of this State as a hospital.

History

Amended 1938, c. 312, § 1; 1938, c. 314, § 1; 1939, c. 94, § 6A; 1940, c. 247, § 3; 1941, c. 374; 1941, c. 385; 1942, c. 2; 1945, c. 73, § 3; 1946, c. 37; 1946, c. 278, § 1; 1947, c. 35, § 4; 1948, c. 318; 1950, c. 304, § 1; 1951, c. 212; 1952, c. 187, § 8; 1953, c. 218; 1955, c. 203, § 3; 1956, c. 65; 1961, c. 43, § 9; 1962, c. 49, § 1; 1963, c. 66; 1964, c. 111; 1967, c. 30, § 7, 1967, c. 30, title; amended 1967, c. 286, § 12; 1968, c. 360, § 1; 1968, c. 366, § 1; 1968, c. 469, § 1; 1970, c. 279; 1971, c. 24; 1971, c. 346, § 10; 1973, c. 94; 1974, c. 86, § 7; 1977, c. 307, § 8; 1979, c. 379; 1984, c. 24, § 12; 1984, c. 216, § 2; 1985, c. 378; 1985, c. 389; 1989, c. 265; 1991, c. 486, § 1; 1993, c. 312; 1994, c. 112, § 2; 1995, c. 234, § 3; 1995, c. 394, § 9; 2001, c, 17, § 2, eff. Jan. 29, 2001; 2002, c. 94, § 2, eff. Nov. 8, 2002; 2009, c. 211, § 1, eff. Jan. 16, 2010; 2017, c. 230, § 1, eff. Aug. 7, 2017.

Annotations

Discrimination Under Fair Housing Laws

BY **BARRY S. GOODMAN, ESQ.**
NEW JERSEY REALTORS® GENERAL COUNSEL

As a New Jersey Realtor®, it is important to stop and consider your own possible biases and make sure that you do not discriminate against anyone who is protected under fair housing laws. For example, can you advertise that a landlord does not accept Section 8 tenants? Should you use credit reports and background checks to screen tenants? Is it appropriate to show an Orthodox Jewish buyer homes in what many consider to be an Orthodox Jewish community?

Discrimination, whether intentional or unintentional, comes in many forms. Let's talk about who is protected and who is not protected and what can be done under the New Jersey Law Against Discrimination ("LAD") and federal Fair Housing Act ("FHA").

Law Against Discrimination

What groups are protected under LAD?

In the real estate context, LAD prohibits landlords, sellers and real estate licensees from discriminating against people based upon race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or affection, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States, nationality or source of lawful income used for a rental or mortgage payment.

What is a source of lawful income?

As an example, although many landlords like to rent to tenants who are receiving Section 8 funds because they are comfortable that the rent will be paid, some landlords for some reason do not want to rent to Section 8 tenants. However, since Section 8 funds are a lawful source of income, a landlord cannot refuse to rent to a tenant solely because the tenant is receiving Section 8 funds. As a result, if you are representing a landlord, you cannot state or imply to a tenant, whether in advertising or otherwise, that the landlord does not want to rent to a tenant who is receiving Section 8 funds.

Fair Housing Act

What groups are protected under the FHA?

The FHA provides that it is unlawful to discriminate in the sale or leasing of dwellings based on race, color, religion, sex, familial status, national origin or disability.

Are there exceptions to the FHA?

There are. The FHA generally does not apply to single-family houses that are sold or rented by an owner who does not own more than three-single family houses, does not reside in the house and was not the most recent resident prior to the sale. However, it applies if such an owner retains a real estate broker.

There also is the "Mrs. Murphy" exception if the owner lives in the building and there are no more than four families living there. In addition, private clubs and religious organizations typically are exempt, as are governmental maximum occupancy requirements.

One final exception is for housing for older persons, which is an exception from "familial status" protection and applies to housing developments for persons who are 55 years of age or older where 80 percent of the occupied units are occupied by at least one person who is 55 or older and for developments solely occupied by persons 62 years of age or older.

This only applies to intentional discrimination, right?

Not really. The United States Supreme Court decided that the FHA not only can be violated if there is intentional discrimination but also if there is a "disparate impact" on one of the protected groups.

What does disparate impact mean?

Let me give you an example. If a landlord directs you not to rent to anyone who has been convicted of a crime, that may seem to be an evenhanded approach to avoid any

discrimination. However, since African Americans are jailed at a rate nearly three times the general population, there would be a disproportionate impact on African Americans if all people who had a criminal record were excluded from consideration. Whether or not you use criminal background checks in evaluating a tenant, you therefore have to be very careful not to rely upon any one basis when you are deciding who is a viable tenant and should rely upon as many different criteria as you can.

Could a licensee be charged with discrimination by showing homes to a family in a neighborhood where people from a similar background live?

Yes. That is known as steering and is prohibited under LAD and the FHA. You always should focus on the property and the physical amenities in the community, such as the schools, shopping, and proximity to highways and other transportation, not the people who live in the community, when recommending homes for a buyer.

What about tenants who want to have an assistance animal live with them but the landlord has a strict no pet policy? How is that handled?

LAD and the FHA require that a landlord allow a tenant to have an assistance animal regardless of the landlord's policy concerning pets. An assistance animal can be a service animal, which must be trained to provide a service, like a seeing eye dog, or can be an animal that will do work, perform tasks, provide assistance and/or therapeutic emotional support for individuals with disabilities, which typically are called support animals. An animal that does not qualify as an assistance animal is subject to the landlord's policy concerning pets, including a no pet policy. A landlord may not charge a fee or deposit for an assistance animal but may charge the tenant for any damages that are caused by the assistance animal.

Who enforces all of this?

In New Jersey, the New Jersey Division on Civil Rights enforces it and, on the federal level, the United States Department of Housing and Urban Development enforces it. Not only can the penalties they impose be severe but the New Jersey Real Estate Commission also could sanction you for violating LAD or the FHA, including taking away your real estate brokerage license.

What advice can you give to licensees to adhere to these policies?

The most important suggestion I can give to you is that you should be very careful what you say and do. Your words and conduct have an impact on people, many of whom have suffered discrimination in their lives and may take your comments or what you do in the wrong way. Of course, any time a landlord or seller indicates a preference to deal with a person in any protected group different than a person in another group, let them know that you are not permitted to do that. If they persist, immediately get advice about how to handle the situation. ■

COMPLYING WITH THE FAIR HOUSING ACT AND LAW AGAINST DISCRIMINATION

By: Barry S. Goodman, Esq.*

I. FAIR HOUSING ACT

- Under the federal Fair Housing Act, which was signed into law April 11, 1968, it is unlawful to discriminate in any aspect of the sale, leasing or financing of dwellings based on race, color, religion, sex, familial status, national origin, handicap, marital status, pregnancy, sexual orientation or gender identity.

A. Protected Classes

1. Race, Color or National Origin

2. Sex

a. Sex discrimination "may occur either by treating one gender less favorably (disparate treatment) or by sexual harassment."

3. Religion

4. Familial Status

a. People cannot be discriminated against because they have children.

b. The Act defines "familial status" as "one or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person."

c. The Act also prohibits discrimination against "any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years."

*Prepared by Barry S. Goodman, Esq., of Greenbaum, Rowe, Smith & Davis LLP, who is General Counsel for the New Jersey REALTORS® and focuses his practice on real-estate brokerage and other real-estate related matters, as well as antitrust suits and corporate shareholders' and partnership disputes.

5. **Handicap**

a. The Act prohibits discrimination based upon a handicap of:

- The buyer or renter;
- A person residing in or intended to reside in the dwelling after it is sold, rented, or made available; or
- Any other person associated with the buyer or renter.

b. Discrimination includes:

- Refusal to permit the handicapped person, at his or her own expense, to modify the premises in order to fully enjoy the premises;
- Refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford the handicapped person equal opportunity to use and enjoy a dwelling; and
- Failure to design and construct multifamily dwellings for first occupancy readily accessible after March 1991.

6. **Marital Status, Pregnancy, Sexual Orientation or Gender Identity**

a. Added by HUD as protected classes.

B. **Exceptions**

1. **Single-Family Houses**

a. The Act generally does not apply to "any single-family house sold or rented by an owner.

b. Exceptions to the single-family house exception:

- Does not cover private individuals who own more than three single-family houses at any one time, including partial interests in single-family houses; and
- If the private individual owner does not reside in the house at the time of the sale or was not the most recent resident prior to the sale, the exception

applies to only one sale within any 24-month period.

c. Most importantly, this exception does not apply if the owner employs:

- The services of "any real estate broker, agent, or salesman";
- The "facilities or services of any person in the business of selling or renting dwellings"; or
- Any "employee or agent of any such broker, agent, salesman, or person."

2. **"Mrs. Murphy"**

a. The Act does not apply to "rooms or units in dwellings containing living quarters occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence."

b. However, the owner of such an exempt residence is still prohibited from making, printing, or publishing "any notice, statement, or advertisement . . . that indicates any preference, limitation, or discrimination" based on any protected characteristic.

3. **Private Clubs and Religious Organizations**

a. The Act does not prevent a religious organization from "limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin."

b. The Act also does not "prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

4. **Maximum Occupancy Requirements**

a. Nothing in the Fair Housing Act "limits the applicability of any reasonable local, State of Federal restrictions regarding

the maximum number of occupants permitted to occupy a dwelling."

5. **Housing for Older Persons**

a. The Act's provisions prohibiting discrimination based on "familial status" do not apply "with respect to housing for older persons.

b. "Housing for older persons" includes:

- Housing provided under any State or Federal Program that the Secretary of HUD determines is specifically designed and operated to assist elderly persons;
- Housing "intended for, and solely occupied by, persons 62 years of age or older"; or
- Housing intended and operated for occupancy by persons 55 years of age or older and where at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older.

C. **Discriminatory Activities**

1. **Steering**

a. Steering is the practice of "directing prospective home buyers interested in equivalent properties to different areas according to their races."

2. **Redlining**

a. Redlining is a practice whereby lenders, appraisers or insurers delineate certain areas of a community as poor-risk areas solely because of their concentration of minorities or low-income households.

3. **Misrepresenting Unavailability**

a. It is unlawful to represent to any person because of a protected characteristic "that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."

4. **Contract Terms**

a. It is unlawful "[t]o discriminate against any person in the terms, conditions, or privileges or sale or rental of a

dwelling, or in the provision of services or facilities in connection therewith" because of a protected characteristic.

5. **Blockbusting**

a. It is unlawful, "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry of prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin."

D. **Disparate Impact Test**

1. In June 2015, the U.S. Supreme Court held that conduct or policies violate the Act if they have a disparate impact on a protected class, even if they are not intentionally discriminatory.

2. Applies if a practice "actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces or perpetuates segregated housing patterns" because of a protected class.

3. Permits aggrieved persons to counteract "unconscious prejudices and disguised animus that escape easy classification."

4. Examples include zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification.

E. **Advertising**

1. It is unlawful "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitations, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination."

2. This prohibition applies to "all written or oral notices of statements by a person engaged in the sale or rental of a dwelling," and includes but is not limited to:

- MLS listings
- Newspapers
- Magazines
- Radio

- Television
- Billboards
- Social media and other internet advertising
- Brochures
- Flyers
- Signs
- Posters
- Banners.

3. Discriminatory notices, advertisements or statements include but are not limited to:

   a. Using words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group of persons because of a protected characteristic;

   b. Expressing to agents, brokers, employees, prospective sellers or renters or any other persons a preference for or limitation on any purchaser or renter because of a protected characteristic;

   c. Selecting media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities because of a protected characteristic; and

   d. Refusing to publish advertising for the sale or rental of dwellings or requiring different charges or terms for such advertising because of a protected characteristic.

4. The relevant consideration is an advertisement's effect on an ordinary, objective reader.

   a. The advertisement should indicate that housing is open to all persons.

   b. The advertisement should not, either directly or indirectly, indicate or suggest a preference or limitation.

   c. The advertisement should avoid using descriptions of the dwelling, its tenants, or its neighborhood that refer, either explicitly or implicitly, to protected characteristics.

5. Advertisements should not contain:

a. Any indication of race, whether it be to describe potential tenants or buyers, people who live in the neighborhood or the owners of the property;

b. Any reference to color to describe people;

c. Any reference to the national origin of any person;

d. Catch words like "restricted," "exclusive," "private," "integrated," "traditional," and "board approval or membership approval required";

e. Directions to the property that refer to well known racial or religious landmarks;

f. Any reference to religion:

- An advertisement that includes the name of a religious entity or a religious symbol may, standing alone, violate the Act;
- However, the advertisement will likely be permitted if it includes a disclaimer that there is no discrimination;
- An advertisement also will likely be permitted if it includes a description of the property (*e.g.*, an apartment complex that includes a chapel without specifying the religion) or services provided at the property (*e.g.*, Kosher meals available); or
- Secular terms referring to religious holidays are typically permitted;

g. Any limitation to a single sex, except where the person renting the unit will be sharing living space with another person.

- Certainly common terms that refer to a person's sex, such as "mother-in-law suite" and "master" are permitted because they are understood to be sex neutral.

h. Any words or images that depict a person who is crippled, blind, deaf, mentally ill, retarded, impaired, handicapped or physically fit, including any reference to no wheelchairs being allowed.

- An advertisement cannot say that the dwelling would be "perfect for a running or biking person," but may state that the property is "near a park";
- Phrases such as "great view," "walk-in closet," "fourth floor walk-up," "jogging trails," and "short walk to the bus stop or a train station" are not prohibited; and
- There is no prohibition against information about the availability of accessible housing for handicapped persons.

i. Any limitation on the number or age of children;

j. Any preference for adults, couples, or singles;

- An advertisement can refer to 'housing for older person" if the housing is in a qualified community.

6. Brokers should avoid advertising in certain types of media that have targeted audiences.

a. Advertisements should not be limited to specific geographic areas associated with specific groups.

b. Advertisements should not be placed only in newspapers or other media that generally reach only a particular segment of the community.

7. Advertisements using human models may violate the Act if all of the models are of the same race or if the advertisements are so homogenous and so repetitive over a period of time to suggest to any ordinary reader that they indicate a preference.

8. HUD's Equal Housing Opportunity Logo and Slogan (or HUD's Publisher's Notice) should be used in all advertising for the sale or rental of housing unless:

a. The advertisement is less than four column inches;

b. The advertisement is in classified advertising where it is less than six column inches; or

c. The HUD Publisher's Notice appears at the beginning of the classified advertising section.

F. **Membership In Trade And Other Organizations**

1. It is unlawful "to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of" any protected characteristic.

G. **Enforcement**

1. **The Department of Housing and Urban Development**

a. Any aggrieved person, or the Assistant Secretary for Fair Housing and Equal Opportunity on his or her own initiative, may, within one year of the occurrence of the discriminatory practice, filed a complaint in writing and under oath with HUD.

2. **Private Persons**

a. The Act permits an "aggrieved" person to commence a civil action in federal or state court within 2 years after the occurrence of a discriminatory housing practice.

- "Aggrieved person" includes:
  - Any person who claims to have been injured by a discriminatory housing practice; or
  - Any person who believes that he will be injured by a discriminatory housing practice that is about to occur.

b. If the court finds that a discriminatory practice has occurred or is about to occur, it may award:

- Actual damages;
- Punitive damages;
- Injunctive relief; and
- Reasonable attorneys' fees and costs to the prevailing party, other than the United States.

c. Real estate brokers have standing to sue under the Act and may intervene as plaintiffs in Fair Housing Act actions.

- Broker's commissions that were lost as a result of a defendant's unlawful discrimination are recoverable as damages.

3. **Private Organizations**

a. An organization may have standing to sue under the Fair housing Act when it can demonstrate that it has:

H. **Penalties**

1. **Penalties available**

a. Compensatory damages, punitive damages, attorneys' fees, and civil fines.

- From $10,000-$50,000 in administrative proceedings, based upon number of previous violations.
- In civil action, $50,000 for first violation and $100,000 for any subsequent violation.

2. **Criminal sanctions**

a. It is a crime when a person "by force or threat of force willfully injures, intimidates, interferes with, or attempts to injury, intimidate, or interfere with" a person whose rights are protected by the Act.

b. A person may be fined or imprisoned for up to one year, or both.

II. LAW AGAINST DISCRIMINATION

A. Provisions Applicable to Real Estate Licensees

1. The New Jersey Law Against Discrimination ("LAD") prohibits a real estate licensee from refusing to "sell, rent, assign, lease or sublease, or offer for sale, rental, lease, assignment, or sublease any real property or part or portion thereof to any person or group of persons or to refuse to negotiate for the sale, rental, lease, assignment, or sublease of any real property or part thereof to any person or group of persons because of"

- Race
- Creed
- Color
- National origin
- Ancestry
- Marital status
- Civil union status

- Domestic partnership status
- Familial status
- Pregnancy or breastfeeding
- Sex
- Gender identity or expression
- Affectional or sexual orientation
- Disability
- Liability for service in the Armed Forces of the United States
- Nationality
- Source of law income used for rental or mortgage payments.

2. Licensees are also prohibited from representing that certain property is not available for "inspection, sale, rental, lease, assignment, or sublease when in fact it is so available to any person or group" because of a protected characteristic.

3. Licensees are also prohibited from representing "that a change has occurred or will or may occur in the composition with respect to [a protected characteristic] of the owners or occupants in the block, neighborhood or area in which the real property is located."

   a. Licensees may not represent or suggest that such a change will lead to undesirable consequences such as "the lowering of property values, an increase in criminal or anti-social behavior, or a decline in the quality of schools or other facilities."

4. Multiple listing services, broker organizations and other services, organizations or facilities related to the business of selling or renting dwellings may not "deny any person access to or membership or participation in such organization, or to discrimination against such person in the terms or conditions of such access, membership, or participation" on account of a protected characteristic.

B. **New Jersey Real Estate Commission's Implementing Regulations**

1. Licensees are prohibited from printing, publishing, circulating, issuing, displaying, posting, or mailing any statement, advertisement, publication, sign, or form of application that expresses, directly or indirectly, any limitation, specification or discrimination based on a protected characteristic.

2. No licensee may deny brokerage services to any person because of a protected characteristic.

3. No licensee may "participate or otherwise be a party to any plan, scheme or agreement to discriminate against any person" on the basis of a protected characteristic.

C. **Attorney General's Required Notice**

1. When taking a listing for residential property, licensees are required to provide the owner with a copy of the Attorney General's LAD Notice.

2. If the owner refuses to abide by or expresses an intention to violate LAD, the licensee may not accept the listing.

Fair Housing Act: Criminal History-Based Practices and Policies

ARTICLES

APRIL 7, 2016

In the recently issued "Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions", the U.S. Department of Housing and Urban Development ("HUD") urges housing providers to exercise caution when implementing criminal history policies or practices used to make housing decisions.

HUD's guidance comes on the heels of the Supreme Court's decision last summer, which held disparate impact claims are cognizable under the Fair Housing Act.[1] While persons with criminal records are not a protected class under the Act, HUD stresses that criminal history-based barriers to housing have a statistically disproportionate impact on minorities, which *are* a protected class under the Act, and as such, creating arbitrary or blanket criminal-based policies or restrictions could violate the Fair Housing Act ("FHA" or "Act"). To be clear, HUD's guidance does not preclude housing providers from crafting criminal history-based policies or practices, but the guidance makes evident that housing providers should create thoughtful policies and practices that are tailored to serve a substantial, legitimate, and nondiscriminatory interest of the housing provider, such as resident safety or the protection of property.

HUD includes context for its guidance, and offers statistical evidence that the United States minority population experiences arrest and incarceration at rates disproportionate to their share of their population. For instance, HUD asserts that in 2014, African Americans were incarcerated at a rate nearly three times their proportion of the general population.

In the context of criminal history policies or practices, disparate impact liability is determined using a burden-shifting framework that first requires a plaintiff or HUD to prove that the criminal history policy or practice has a discriminatory effect, meaning the policy or practice results in a disparate impact on a group of persons because of their race, national origin or other protected characteristic under the Act. In this step of the process, evidence must be provided that demonstrates that the criminal history policy or practice actually or predictably results in a disparate impact. If successful, the burden then shifts to the housing provider to show that the policy or practice in question is justified. Here, the housing provider must show that the policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory

interest of the housing provider, and further, that the policy or practice actually achieves that interest. Finally, if a housing provider is successful, the burden shifts back to the Plaintiff or HUD to prove that the housing provider's interest could be served by another practice that has a less discriminatory effect.

The determination of whether a criminal history-based policy or practice has a disparate impact in violation of the Act is ultimately a fact and case-specific inquiry. However, HUD's guidance provides insight into how to create a legally defensible policy that does not violate or frustrate the FHA's prohibition on the discrimination in the sale, rental or financing of dwellings or in other housing-related activities. We recommend review of HUD's guidance, but have distilled that guidance to assist in reviewing existing criminal history-based policies or practices or in the creation of a new one:

Criminal History-Based Housing Policies and Practices	
Do's	**Don'ts**
Create tailored criminal history-based policies/practices.	Don't create arbitrary or overly-broad criminal history-based policies/practices.
Be sure to have clear, specific reasoning for the criminal history-based policy/practice that can be supported by evidence.	Don't maintain a policy/practice, or any portion thereof, that does not serve a substantial, legitimate, nondiscriminatory interest.
Exclude individuals only based on criminal convictions that present a demonstrable risk to resident safety or property.	Don't create exclusions based on arrest records alone.
Consider the nature and severity of an individual's conviction before excluding the individual based on the conviction.	Don't create a blanket exclusion of any person with any conviction record.
Consider the amount of time that has passed since the criminal conduct occurred.	Don't provide inconsistent explanations for the denial of a housing application.
Consider criminal history uniformly, regardless of an individual's inclusion in a protected class.	Don't use criminal history as a pretext for unequal treatment of individuals of a protected class.
Treat all applicants for housing equally, regardless of protected characteristics.	Don't use comparable criminal history differently for individuals of protected classes.
Conduct individualized assessments that take into account mitigating factors, such as facts and circumstances surrounding the criminal conduct, age at the time of the	Don't make exceptions to a policy or practice for some individuals, but not make the same exception for another individual based on the individual's inclusion in a protected class.

DON'T FALL IN LOVE WITH LOVE LETTERS

By: Barry S. Goodman, Esq.[*]

It's a hot market and there are multiple offers on properties. What can your buyer do to make your buyer's offer stand out? Should your buyer submit a so-called "love letter" to the seller with personal information in order to make your buyer's offer more compelling? The seller wants as much information as possible before deciding which offer to accept. Should the seller consider love letters from buyers? What policy should a broker have regarding love letters?

Love letters have become very common so that a buyer can try to convince a seller to accept the buyer's offer based upon personalizing the offer. The buyer may include that the buyer can picture the buyer's children playing in the backyard. The buyer might indicate that the house is perfect because it is so close to a church, synagogue or mosque. The buyer also might indicate that she and her wife can see themselves relaxing in the family room.

Although love letters seem harmless on the surface, it almost is inevitable that such love letters will include personal information that will allow the seller to determine if the buyer is in a class that is protected under the Fair Housing Act ("FHA") or the New Jersey Law Against Discrimination ("LAD"). Although the seller may not consciously discriminate against any potential buyer based upon such information, there always is the possibility that this information may affect the seller's decision not to sell the property to a particular buyer. Of course, once the buyer has invested the emotional energy needed to provide a compelling love letter, the buyer has a vested interest in that home. If the buyer's offer is not accepted, the buyer may feel that it was because the seller was discriminating against the buyer because of the buyer's protected status and therefore file a discrimination complaint against the seller. The buyer undoubtedly will include the broker in the complaint.

Under the FHA, it is unlawful to discriminate in the sale or leasing of dwellings based on race, color, religion, sex, familiar status, national origin or disability. However, the FHA generally does not apply to single-family houses that are sold or rented by an owner who does not own more than three single-family houses, does not reside in the house and was not the most recent resident prior to the sale. However, the FHA does apply if such an owner retains a real estate broker.

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[*] Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis LLP, is General Counsel for the New Jersey REALTORS®. He focuses his practice on real estate brokerage and other real estate-related matters, as well as business matters, corporate shareholders and partnership disputes, and municipal practice.

The LAD protects more groups against discrimination. It prohibits landlords, sellers and real estate licensees from discriminating against people based upon race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy or breastfeeding, sex, gender identity or affection, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States, nationality or source of lawful income used for a rental or mortgage payment. However, the LAD has the same exception as the FHA for a single-family house that is sold or rented by an owner, except that the LAD's exception only is for an owner who does not own more than two single-family houses.

As a result of this potential for discrimination that could arise from love letters, the National Association of REALTORS® has provided the following best practices to protect you and your clients from fair housing liability:

1. Educate your clients about the fair housing laws and the pitfalls of buyer love letters.
2. Inform your clients that you will not deliver buyer love letters and advise others that no buyer love letters will be accepted as part of the MLS listing.
3. Remind your clients that their decision to accept or reject an offer should be based on objective criteria only.
4. If your client insists on drafting a buyer love letter, do not help your client draft or deliver it.
5. Avoid reading any love letters drafted or received by your client.
6. Document all offers received and the seller's objective reason for accepting an offer.

It therefore is strongly recommended that brokers develop an officewide policy that they will not accept buyers' love letters on behalf of a seller and that they will advise sellers not to consider love letters. A candid discussion should be held with sellers during the listing presentation and buyers when you begin working with them so that they know you will not accept or participate in drafting love letters because of the potential for discrimination that could result from a love letter.

B

New Jersey Administrative Code
Title 11. Insurance
Chapter 5. Real Estate Commission (Refs & Annos)
Subchapter 6. Conduct of Business

N.J.A.C. **11:5–6.4**

11:5–6.4 Obligations of licensees to public and to each other

Currentness

(a) All licensees are subject to and shall strictly comply with the laws of agency and the principles governing fiduciary relationships. In accepting employment as an agent, the licensee pledges himself to protect and promote, as he would his own, the interests of the client or principal he has undertaken to represent; this obligation of absolute fidelity to the client's or principal's interest is primary but does not relieve the licensee from the obligation of dealing fairly with all parties to the transaction.

(b) Every licensee shall make reasonable effort to ascertain all material information concerning the physical condition of every property for which he or she accepts an agency or which he or she is retained to market as a transaction broker, and concerning the financial qualifications of every person for whom he or she submits an offer to his or her client or principal. Information about social conditions and psychological impairments as defined in (d) below is not considered to be information which concerns the physical condition of a property.

1. A reasonable effort to ascertain material information shall include at least:

i. Inquiries to the seller or seller's agent about any physical conditions that may affect the property; and

ii. A visual inspection of the property to determine if there are any readily observable physical conditions affecting the property.

2. As used in this section, information is "material" if a reasonable person would attach importance to its existence or non-existence in deciding whether or how to proceed in the transaction, or if the licensee knows or has reason to know that the recipient of the information regards, or is likely to regard it as important in deciding whether or how to proceed, although a reasonable person would not so regard it.

(c) Licensees shall disclose all information material to the physical condition of any property which they know or which a reasonable effort to ascertain such information would have revealed to their client or principal and when appropriate to any other party to a transaction. Licensees shall also disclose any actual or potential conflicts of interest which the licensee may reasonably anticipate.

1. With respect to off-site conditions which may materially affect the value of the residential real estate, in all sales contracts involving newly constructed residential real estate they prepare, licensees shall include a statement as set forth below. By including this statement in a contract of sale prepared by the licensee, the licensee shall be deemed to have fulfilled his or

her disclosure obligations under (c) above with respect to such off-site conditions. The statement shall be in print as large as the predominant size print in the document and shall read as follows:

"NOTIFICATION REGARDING OFF–SITE CONDITIONS

Pursuant to the New Residential Construction Off–Site Conditions Disclosure Act, P.L. 1995, c.253 (C.46:3C–1 et seq.), sellers of newly constructed residential real estate are required to notify purchasers of the availability of lists disclosing the existence and location of off-site conditions which may affect the value of the residential real estate being sold. The lists are to be made available by the municipal clerk of the municipality within which the residential real estate is located and in other municipalities which are within one-half mile of the residential real estate. The address(es) and telephone number(s) of the municipalities relevant to this project and the appropriate municipal offices where the lists are made available are listed below. Purchasers are encouraged to exercise all due diligence in order to obtain any additional or more recent information that they believe may be relevant to their decision to purchase the residential real estate. Purchasers are also encouraged to undertake an independent examination of the general area within which the residential real estate is located in order to become familiar with any and all conditions which may affect the value of the residential real estate.

The purchaser has five (5) business days from the date the contract is executed by the purchaser and the seller to send notice of cancellation of the contract to the seller. The notice of cancellation shall be sent by certified mail. The cancellation will be effective upon the notice of cancellation being mailed. If the purchaser does not send a notice of cancellation to the seller in the time or manner described above, the purchaser will lose the right to cancel the contract as provided in this notice.

Municipality .....

Address .....

Telephone Number ".....

The statement shall either be included in the text of the contract itself or attached to the contract as an Addendum.

2. In all residential real estate sale contracts they prepare except contracts for newly constructed residential real estate, licensees shall include a statement as set forth below. The statement shall be in print as large as the predominant size print in the document and shall read as follows:

"NOTICE ON OFF–SITE CONDITIONS

Pursuant to the New Residential Construction Off-site Conditions Disclosure Act, P.L. 1995, c.253 the clerks of municipalities in New Jersey maintain lists of off-site conditions which may affect the value of residential properties in the vicinity of the off-site condition. Purchasers may examine the lists and are encouraged to independently investigate the area surrounding this property in order to become familiar with any off-site conditions which may affect the value of the property. In cases where a property is located near the border of a municipality, purchasers may wish to also examine the list maintained by the neighboring municipality."

The statement shall either be included in the text of the contract itself or attached to the contract as an Addendum.

i. Licensees who possess actual knowledge of an off-site condition which may materially affect the value of residential real estate other than newly constructed properties shall disclose that information to prospective purchasers of such residential real estate affected by the condition. That disclosure shall be made prior to the signing of the contract by a prospective purchaser.

ii. In cases where the licensee did not possess actual knowledge of the presence of an off-site condition which might materially affect the value of the residential real estate, by virtue of including the foregoing statement in a contract of sale prepared by him or her, the licensee shall be deemed to have fulfilled his or her disclosure obligations under (c) above with respect to such off-site conditions.

3. As used in this subsection, the following words and terms shall have the following meanings:

i. "Newly constructed" means any dwelling unit not previously occupied, excluding dwelling units constructed solely for lease and units governed by the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5402 et seq.

ii. "Off-site conditions" refers to the following conditions as set forth in the New Residential Construction Off–Site Conditions Disclosure Act, N.J.S.A. 46:3C–3 (P.L. 1995 c.253), or as amended:

(1) The latest Department of Environmental Protection listing of sites included on the National Priorities List pursuant to the "Comprehensive Environmental Response, Compensation and Liability Act of 1980," 42 U.S.C. §§ 9601 et seq.;

(2) The latest sites known to and confirmed by the Department of Environmental Protection and included on the New Jersey master list of known hazardous discharge sites, prepared pursuant to P.L. 1982, c.202 (N.J.S.A. 58.10–23.15 et seq.);

(3) Overhead electric utility transmission lines conducting 240,000 volts or more;

(4) Electrical transformer substations;

(5) Underground gas transmission lines as defined in 49 C.F.R. 192.3;

(6) Sewer pump stations of a capacity equal to, or in excess of 0.5 million gallons per day and sewer trunk lines in excess of 15 inches in diameter;

(7) Sanitary landfill facilities as defined pursuant to section 3 of P.L. 1970, c.39 (N.J.S.A. 13:1E–3);

(8) Public wastewater treatment facilities; and

(9) Airport safety zones as defined pursuant to section 3 of P.L. 1983, c.260 (N.J.S.A. 6:1–82).

iii. "Residential real estate" means a property or structure or both which will serve as a residence for the purchaser.

(d) Information about social conditions or psychological impairments of a property is not considered information which affects the physical condition of a property. Subject to (d)3 below, licensees are not required by (c) above to disclose such information.

1. As used in this section, the term "social conditions" includes, but is not limited to, neighborhood conditions such as barking dogs, boisterous neighbors, and other conditions which do not impact upon or adversely affect the physical condition of the property.

2. As used in this section, the term "psychological impairments" includes, but is not limited to, a murder or suicide which occurred on a property, or a property purportedly being haunted.

3. Except as provided below, upon receipt of an inquiry from a prospective purchaser or tenant about whether a particular property may be affected by a social condition or psychological impairment, licensees shall provide whatever information they know about the social conditions or psychological impairments that might affect the property.

i. In accordance with N.J.S.A. 10:5–1 et seq. (the "Law Against Discrimination"), licensees shall make no inquiry and provide no information on the racial composition of, or the presence of a group home in, a neighborhood. In response to requests for such information, licensees shall inform the persons making the inquiry that they may conduct their own investigation. This paragraph does not apply to the owner of a multiple dwelling or his agent to the extent that such inquiries are necessary for compliance with N.J.A.C. 13:10.

ii. In accordance with N.J.S.A. 2C:7–6 through 11 ("Megan's Law") and the guidelines promulgated thereunder, licensees shall make no inquiry about and provide no information on notifications from a county prosecutor issued pursuant to that law. In response to requests for such information, licensees shall inform the person making the inquiry that information about registered sex offenders is maintained by the county prosecutor.

(e) In all contracts and leases on residential real estate they prepare, licensees shall include the following statement in print as large as the predominant size print in the document:

MEGAN'S LAW STATEMENT—Under New Jersey law, the county prosecutor determines whether and how to provide notice of the presence of convicted sex offenders in an area.

In their professional capacity, real estate licensees are not entitled to notification by the county prosecutor under Megan's Law and are unable to obtain such information for you. Upon closing the county prosecutor may be contacted for such further information as may be disclosable to you.

(f) Unless directed not to do so in writing by an owner as provided herein, every licensee shall fully cooperate with all other New Jersey licensees utilizing cooperation arrangements which shall protect and promote the interests of the licensee's client or principal. Collusion and discrimination with respect to commission rates and splits are prohibited as provided in N.J.A.C. 11:5–7.5 and 7.6.

1. The obligation to fully cooperate with all other licensees includes the requirements that listing brokers:

i. Notify any Multiple Listing System to which a listing is to be submitted of having acquired the listing within 48 hours of the effective date of the listing;

ii. Transmit to their principal(s) all written offers on their listings submitted by licensees with other firms within 24 hours of receipt of the written offer by their firm; and

iii. Place no unreasonable restrictions upon the showing of properties listed with them to prospective purchasers who are working through cooperating brokers. A requirement that all appointments for showings must be made through the listing broker's office is not considered an unreasonable restriction upon showings.

2. All requirements imposed by the obligation to fully cooperate shall be complied with on all listings unless the client or principal, with full knowledge of all relevant facts, expressly relieves the listing broker from one or more of those requirements in writing. Such a writing shall be signed by the owner and made an attachment to the listing agreement. Such a writing shall be made available for inspection by other brokers upon request.

3. All written listing agreements prepared by licensees shall include a provision as set forth below, which provision shall be in print larger than the predominant size print in the agreement. The provision may be included within the body of the listing agreement or attached to the listing as an addendum to it. Where the provision is made an addendum to the listing agreement it shall be signed by the owner at the same time that the owner signs the listing agreement. Prior to securing the owner's signature on the listing agreement, the listing broker shall specify the complete formula for determining the commission split in the indicated location in the provision.

COMMISSION SPLITS

LISTING BROKERS USUALLY COOPERATE WITH OTHER BROKERAGE FIRMS BY SHARING INFORMATION ABOUT THEIR LISTINGS AND OFFERING TO PAY PART OF THEIR COMMISSION TO THE FIRM THAT PRODUCES A BUYER. THIS IS GENERALLY REFERRED TO AS THE "COMMISSION SPLIT."

SOME LISTING BROKERS OFFER TO PAY COMMISSION SPLITS OF A PORTION OF THE GROSS COMMISSION, USUALLY EXPRESSED AS A PERCENTAGE OF THE SELLING PRICE, LESS A SIGNIFICANT DOLLAR AMOUNT. OTHER LISTING BROKERS OFFER A PORTION OF THE GROSS COMMISSION LESS ONLY A MINIMAL LISTING FEE OR LESS ZERO.

THE AMOUNT OF COMMISSION SPLIT YOUR BROKER OFFERS CAN AFFECT THE EXTENT TO WHICH YOUR PROPERTY IS EXPOSED TO PROSPECTIVE BUYERS WORKING WITH LICENSEES FROM OTHER BROKERAGE FIRMS.

ON THIS LISTING, THE BROKER IS OFFERING A COMMISSION SPLIT OF _____ MINUS _____ TO POTENTIAL COOPERATING BROKERS.

IF YOU FEEL THAT THIS MAY RESULT IN YOUR PROPERTY RECEIVING LESS THAN MAXIMUM EXPOSURE TO BUYERS, YOU SHOULD DISCUSS THOSE CONCERNS WITH THE LISTING SALESPERSON OR HIS/HER SUPERVISING BROKER.

BY SIGNING THIS LISTING AGREEMENT THE OWNER(S) ACKNOWLEDGE HAVING READ THIS STATEMENT ON COMMISSION SPLITS.

4. Should the client or principal direct the listing broker not to cooperate at all with all other licensees, evidence of this intent shall be in writing in the form of a WAIVER OF BROKER COOPERATION as set forth below and signed by the client or principal. Copies of this WAIVER OF BROKER COOPERATION and the listing agreement to which it relates shall be provided to the client or principal and to their authorized representative by the broker. This waiver shall become a part of the listing agreement at the time it is signed, and shall be made available for inspection by other brokers upon request. However, no direction or inducement from the client or principal shall relieve the listing broker of his responsibility of dealing fairly and exercising integrity with all other licensees.

WAIVER OF BROKER COOPERATION

I UNDERSTAND THAT COOPERATION AMONGST BROKERS PRODUCES WIDER EXPOSURE OF MY PROPERTY AND MAY RESULT IN IT BEING SOLD OR LEASED SOONER AND AT A HIGHER PRICE THAN WOULD BE THE CASE WERE MY BROKER NOT TO COOPERATE WITH OTHER BROKERS. I FURTHER UNDERSTAND THAT WHEN MY BROKER COOPERATES WITH OTHER BROKERS, I CAN STILL HAVE THE ARRANGEMENTS FOR THE SHOWING OF THE PROPERTY AND ALL NEGOTIATIONS WITH ME OR MY ATTORNEY MADE ONLY THROUGH MY LISTING BROKER'S OFFICE, SHOULD I SO DESIRE.

However, despite my awareness of these factors, I direct that this property is to be marketed only through the efforts of the listing broker. This listing is not to be published in any multiple listing service. I will only consider offers on this property which are obtained by, and I will only allow showings of this property to be conducted by the listing broker or his or her duly authorized representatives. THE LISTING BROKER IS HEREBY DIRECTED NOT TO COOPERATE WITH ANY OTHER BROKER.

By signing below, the parties hereto confirm that no pressure or undue influence has been exerted upon the owners as to how this property is to be marketed by the Listing Broker.

The owner(s) further confirm receipt of fully executed copies of the listing agreement on this property and of this Waiver of Broker Cooperation form.

Dated: _____

Owner .....

Owner .....

Listing Broker .....

By: Authorized Licensee or Broker .....

(g) If any offer on any real property or interest therein is made orally, the licensee shall advise the offeror that he is not obligated to present to the owner or his authorized representative any offer unless the offer is in writing. Unless a writing containing or confirming the terms of the listing agreement otherwise provides, the licensee shall transmit every written offer on any real property or interest therein presented to or obtained by the licensee during the term of the listing to the owner or his authorized representative within 24 hours of receipt of the written offer by their firm. For the purposes of this section, the term of a listing shall be deemed to expire either on the termination date established in the listing agreement, or upon the closing of a pending sale or lease. If any acceptance of an offer is given orally, the licensee shall secure the acceptance in writing within 24 hours.

(h) Back-up offers shall be handled as follows:

1. As used in this subsection, the term "back-up offer" shall mean a written and signed offer to purchase or lease an interest in real estate which is received by a licensee at a time when a previously executed contract or lease pertaining to the same interest in real estate is pending and in effect, having survived attorney review if it was subject to such review. Offers obtained while a previously executed contract or lease is still pending attorney review are not considered back-up offers and must be presented as provided in (g) above.

2. Whenever a licensee transmits a back-up offer to an owner, the licensee shall advise the owner in writing to consult an attorney before taking any action on the back-up offer, and shall retain a copy of such written notice as a business record in accordance with N.J.A.C. 11:5–5.4.

3. Whenever a licensee receives a back-up offer, the licensee shall notify the offeror in writing that the property to which the offer pertains is the subject of a pending contract of sale or lease and, in the event that the licensee receiving the back-up offer is not licensed with the listing broker, a copy of that notice shall be delivered to the listing broker at the time the offer is presented. The said notice shall not disclose the price and terms of the pending contract or lease. A copy of such written notice shall be retained by the licensee as a business record in accordance with N.J.A.C. 11:5–5.4.

(i) It shall be the duty of a licensee to recommend that legal counsel be obtained whenever the interests of any party to a transaction seem to require it.

(j) At the time of the taking of any listing of residential property, a licensee shall furnish to the owner a copy of a summary of the New Jersey Law Against Discrimination N.J.S.A. 10:5–1 et seq. which summary shall have been prepared and furnished by the Attorney General of the State of New Jersey, shall state the provisions of the Law Against Discrimination, and shall state which properties are covered by this law and which properties are exempt from this law. Should the owner profess an unwillingness to abide by or an intention to violate this law then the licensee shall not accept these listings.

(k) No licensee shall deny real estate brokerage services to any person for reasons of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, sex, gender identity or expression, affectional or sexual orientation, disability, nationality, or source of lawful income used for rental or mortgage payments, and no licensee shall participate or otherwise be a party to any plan, scheme or agreement to discriminate against any person on the basis of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, sex, gender identity or expression, affectional or sexual orientation, disability, nationality, or source of lawful income used for rental or mortgage payments. For the purposes of this subsection, the term "disability" shall have the same meaning as the definition of "disability" codified at N.J.S.A. 10:5-5q.

(*l*) Licensees may engage in brokerage activity in transactions involving the resale of mobile and manufactured homes as provided in N.J.S.A. 39:10–19. Licensees who do so shall be familiar with all laws applicable to such transactions. These laws include N.J.S.A. 39:1–1 et seq. as it applies to the resale of and the transfer of the titles to such motor vehicle units, N.J.S.A. 46:8C–1 et seq., as it applies to the resale of such units when situated in Mobile Home Parks, N.J.S.A. 17:16C–1 et seq., as it applies to the financing of purchases of personal property and New Jersey's Truth in Renting Act, N.J.S.A. 46:8–43 et seq. Licensees who, when involved in transactions of this type, evidence a lack of familiarity with these laws either through acts

of omission or commission shall be subject to sanctions by the Commission for having engaged in conduct demonstrating incompetency, in violation of N.J.S.A. 45:15–17(e).

Credits

Amended by R.1975 d.260, effective August 28, 1975; R.1976 d.10, effective January 13, 1976; R.1979 d.461, effective November 26, 1979; R.1983 d.471, effective November 7, 1983; R.1988 d.69, effective February 16, 1988 (operative March 1, 1988); R.1988 d.412, effective September 6, 1988; R.1993 d.365, effective July 19, 1993; R.1994 d.266, effective June 20, 1994 (operative July 1, 1994); R.1997 d.27, effective January 21, 1997; R.1997 d.275, effective July 7, 1997; R.1998 d.497, effective October 5, 1998; R.2001 d.237, effective July 16, 2001; R.2004 d.130, effective April 5, 2004; R.2009 d.287, effective September 21, 2009.

CHAPTER EXPIRATION DATE

<Chapter 5, Real Estate Commission, expires on February 24, 2023.>

Current through amendments included in the New Jersey Register, Volume 54, Issue 16, dated August 15, 2022. Some sections may be more current, see credits for details.

N.J.A.C. **11:5–6.4**, NJ ADC **11:5–6.4**

End of Document

New Jersey Statutes Annotated
Title 56. Trade Names, Trade-Marks and Unfair Trade Practices
Chapter 8. Frauds, Etc., in Sales or Advertisements of Merchandise (Refs & Annos)

N.J.S.A. **56:8-19.1**

56:8-19.1. No right of recovery against real estate broker, broker-salesperson, or licensed salesperson; requirements

Effective: April 1, 2022
Currentness

Notwithstanding any provision of P.L.1960, c. 39 (C.56:8-1 et seq.) to the contrary, there shall be no right of recovery against a real estate broker, broker-salesperson, or salesperson licensed under R.S.45:15-1 et seq. for the communication of any false, misleading, or deceptive information provided to the real estate broker, broker-salesperson, or salesperson, regarding real estate located in New Jersey, if the real estate broker, broker-salesperson, or salesperson demonstrates that they:

a. Had no actual knowledge of the false, misleading or deceptive character of the information;

b. Made a reasonable and diligent inquiry to ascertain whether the information is of a false, misleading, or deceptive character. For purposes of this section, communications by a real estate broker, broker-salesperson, or salesperson which shall be deemed to satisfy the requirements of a "reasonable and diligent inquiry" include, but shall not be limited to, communications which disclose information:

(1) provided in a report or upon a representation by a person, licensed or certified by the State of New Jersey, including, but not limited to, an appraiser, home inspector, plumber or electrical contractor, or an unlicensed home inspector until December 30, 2005, of a particular physical condition pertaining to the real estate derived from inspection of the real estate by that person;

(2) provided in a report or upon a representation by any governmental official or employee, if the particular information of a physical condition is likely to be within the knowledge of that governmental official or employee; or

(3) that the real estate broker, broker-salesperson, or salesperson obtained from the seller in a property condition disclosure statement, which form shall comply with regulations promulgated by the director in consultation with the New Jersey Real Estate Commission, provided that the real estate broker, broker-salesperson, or salesperson informed the buyer that the seller is the source of the information and that, prior to making that communication to the buyer, the real estate broker, broker-salesperson, or salesperson visually inspected the property with reasonable diligence to ascertain the accuracy of the information disclosed by the seller. In addition to any other question as the director shall deem necessary, the property condition disclosure statement shall include a question specifically concerning the presence of lead plumbing, including but not limited to any service line, piping materials, fixtures, and solder, in the residential property; and

c. If a property condition disclosure statement contained information indicating the seller's awareness of water leakage, accumulation or dampness, the presence of mold or other similar natural substance, or repairs or other attempts to control any water or dampness problem on the real property, the real estate broker, broker-salesperson, or salesperson referred the buyer of the real property to the "Mold Guidelines for New Jersey Residents" pamphlet on the Department of Health Internet website,

or other pamphlet or guidelines deemed appropriate by the director and, if requested by the buyer, provided the buyer with a physical copy of the pamphlet.

Nothing in this section shall be interpreted to affect the obligations of a real estate broker, broker-salesperson, or salesperson pursuant to the "New Residential Construction Off-Site Conditions Disclosure Act," P.L.1995, c. 253 (C.46:3C-1 et seq.), or any other law or regulation.

Credits

L.1999, c. 76, § 1, eff. April 30, 1999. Amended by L.2004, c. 18, § 2, eff. June 10, 2004; L.2021, c. 264, § 1, eff. Nov. 8, 2021; L.2021, c. 268, § 1, eff. Nov. 8, 2021; L.2021, c. 442, § 1, eff. April 1, 2022.

Editors' Notes

2021 Electronic Update

GOVERNOR'S CONDITIONAL VETO MESSAGE

Assembly Bill No. 2685--L.2021, c. 442

To the General Assembly:

Pursuant to Article V, Section I, Paragraph 14 of the New Jersey Constitution, I am herewith returning Assembly Bill No. 2685 with my recommendations for reconsideration.

Assembly Bill No. 2685 amends a provision of the New Jersey Consumer Fraud Act (the "Act") that shields licensed real estate brokers, broker-salespersons, and salespersons ("real estate licensees") from possible civil liability under the Act for communicating false, misleading, or deceptive information that was provided by or on behalf of a property seller. See N.J.S. **56:8-19.1**. For this immunity provision to apply, the real estate licensee must, among other things, have obtained a property condition disclosure statement from the seller and communicated the information in the statement to the buyer. N.J.S. **56:8-19.1**(b)(3). Assembly Bill No. 2685 supplements this provision by adding language directing the Director of the Division of Consumer Affairs ("Director" and "Division") in the Department of Law and Public Safety to require real estate licensees to refer buyers to the "Mold Guidelines for New Jersey Residents" published by the Department of Health ("DOH") - or other guidelines deemed appropriate by the Director - when a property condition disclosure statement indicates a seller is aware of "water leakage, accumulation or dampness, the presence of mold or other similar natural substance, or repairs or other attempts to control any water or dampness problem on the real property."

I commend the sponsors of Assembly Bill No. 2685 for their efforts to ensure that buyers of property with known water-related issues are provided with the opportunity to learn about the dangers of mold and the steps that should be taken to identify and address them. But the approach taken in the bill - mandating the Director to require real estate licensees to refer buyers to the appropriate informative materials - is unlikely to be an optimal means to ensure compliance. Significantly, the Division does not have regulatory authority over real estate licensees, and this legislation does not confer such authority. The protection from civil liability under the Act, however, does provide substantial incentive. Accordingly, this bill would be more effective if it were amended to condition the immunity provided to real estate licensees under N.J.S. **56:8-19.1** upon their compliance with the mold information referral requirement established under the bill, instead of imposing an affirmative requirement upon the Director that the Division lacks the authority to enforce. This alternate approach will meet the sponsors' goal of more effectively

educating vulnerable property buyers about the dangers of mold by providing a robust, meaningful incentive to protect compliant real estate licensees from financial exposure where they might otherwise be held culpable under the Act.

The suggested amendments also incorporate recent changes made to the statute pursuant to laws that were enacted late last year.

Therefore, I herewith return Assembly Bill No. 2685 and recommend that it be amended as follows:

* * *

Respectfully,

/s/ Philip D. Murphy

Governor

2021 Electronic Update

ASSEMBLY REGULATED PROFESSIONS COMMITTEE STATEMENT

Senate Bill No. 1047--L.2021, c. 268

DATED: JUNE 14, 2021

The Assembly Regulated Professions Committee reports favorably Senate Bill No. 1047.

This bill amends the law exempting certain real estate licensees from certain damages under the consumer fraud law. Specifically, this bill broadens the current exemption for real estate brokers, broker-salespersons, or salespersons from a right of recovery by persons who suffer any ascertainable loss of money or property, real or personal, by eliminating the current limitation with respect to the right of recovery to punitive damages and attorney's fees.

Current law prevents a person from recovering punitive damages or attorney fees from a real estate broker, broker-salesperson, or salesperson for the communication of any false, misleading, or deceptive information provided to the real estate broker, broker-salesperson, or salesperson by or on behalf of the seller of real estate located in New Jersey, if the real estate broker, broker-salesperson, or salesperson demonstrates that he had no actual knowledge of the false, misleading, or deceptive character of the information and made a reasonable and diligent inquiry to ascertain whether the information is of a false, misleading, or deceptive character.

This bill broadens the exemption to prohibit recovery of any damages if those conditions are met. This bill further eliminates the provision in the current restriction that requires that the communication to real estate brokers, broker-salespersons, or salespersons is made by or on behalf of the seller, and instead, it provides that the communication need only be regarding the real estate.

2021 Electronic Update

ASSEMBLY BUDGET COMMITTEE STATEMENT

Senate Bill No. 829 (First Reprint)--L.2021, c. 264

DATED: JUNE 22, 2021

The Assembly Budget Committee reports favorably Senate Bill No. 829 (1R).

This bill, as amended, requires property condition disclosure statements to include a question concerning the presence of lead plumbing in residential properties.

Under current law, a real estate broker, broker-salesperson, or salesperson is exempt from punitive damages and other penalties under the New Jersey Consumer Fraud Act, P.L.1960, c.39 (C.56:8-1 et seq.) when communicating the condition of a residential property if the broker, broker-salesperson, or salesperson relied on information provided in a property condition disclosure statement. The property condition disclosure statement is the form provided by the seller of residential property to the real estate broker, broker-salesperson, or salesperson in order to disclose certain information prior to the sale of the property.

The bill provides that in addition to any other question that the Director of the Division of Consumer Affairs in the Department of Law and Public Safety may require to be included, the property condition disclosure statement is required to include a question that specifically concerns whether the seller is aware of the presence of lead plumbing, including but not limited to any service line, piping materials, fixtures, and solder, in the residential property. A real estate broker, broker-salesperson, or salesperson who communicates the condition of a residential property to a prospective buyer without obtaining this information from the seller could be liable for providing false, misleading, or deceptive information.

This bill was pre-filed for introduction in the 2020-2021 session pending technical review. As reported, the bill includes the changes required by technical review, which has been performed.

As reported by the committee, Senate Bill No. 829 (1R) is identical to Assembly Bill No. 2135, which was also amended reported by the committee on this date.

FISCAL IMPACT:

This bill is not certified as requiring a fiscal note.

Notes of Decisions containing your search terms (0)
View all 1

N. J. S. A. **56:8-19.1**, NJ ST **56:8-19.1**
Current with laws through L.2022, c. 101 and J.R. No. 3

End of Document

What do I have to disclose about a property affected by Superstorm Sandy?

By Barry S. Goodman, Esq.

You have a listing to sell or lease a home that was affected by Superstorm Sandy. What do you have to disclose about any damage or possible damage resulting from the storm? What is the best way to disclose any information that you do provide? What duty do you have to determine if there has been any damage as a result of the storm? What is the potential liability if you pass along misinformation from the owner?

Superstorm Sandy may have been a catastrophic storm, but the laws that apply to your duties and liabilities have not changed. However, since applying them to Superstorm Sandy may present certain challenges, you must be aware of what your duties and responsibilities are and how they apply to Superstorm Sandy.

The Applicable Laws

Let's start with the basics. The New Jersey Real Estate Commission (REC) requires every real estate licensee to make a "reasonable effort to ascertain all material information concerning the physical condition of every property for which he or she accepts an agency or which he or she is retained to market as a transaction broker." Such a reasonable effort must include not only asking the seller or seller's agent about any physical conditions that may affect the property but also a "reasonable inspection of the property to determine if there are any readily observable physical conditions affecting the property."

As a result, if you accept a listing to lease or sell property affected by Superstorm Sandy, you must ask the owner about any damage related to the storm and do a visual inspection of the property to determine, as best you can, if there was any damage to the property. Any physical damage to the property then must be disclosed to a potential buyer and, if applicable, a potential tenant.

Under the Consumer Fraud Act, if you make any misrepresentation to a buyer or tenant, including innocently passing along a misrepresentation by the owner, you may be liable for treble damages, attorneys' fees and costs. One way to limit that liability would be to use a Seller Property Condition Disclosure Statement (Disclosure Statement) in the manner set forth in Section 19.1 of the Consumer Fraud Act. Under Section 19.1, a real estate licensee is not liable for punitive damages, attorneys' fees or both for communicating any false, misleading or deceptive information provided by or on behalf of the seller if the following two conditions are met:

1. the licensee had no actual knowledge the representation was false, misleading or deceptive; and

2. the licensee made a "reasonable and diligent inquiry" to ascertain if the information was false, misleading or deceptive.

One way to satisfy the "reasonable and diligent inquiry" requirement is to use a Disclosure Statement in the form approved by the Division of Consumer Affairs, as long as the licensee informs the buyer that the seller is the source of the information and, prior to making that communication to the buyer, the licensee "visually inspected the property with reasonable diligence to ascertain the accuracy of the information disclosed by the seller," which is the same standard as required by the Commission's regulations. Of course, the seller, not the licensee, must fill out the Disclosure Statement and the licensee should sign the Disclosure Statement confirming that the licensee has done the visual inspection that the licensee is required to do.

What should I disclose and how should I disclose it?

Although the questions about what should be disclosed and how to disclose it may be fact specific, there are certain general questions that routinely have been asked relating to Superstorm Sandy that easily can be answered based upon REC's regulations and the Consumer Fraud Act's requirements. The following questions and answers therefore will provide general guidelines concerning what should be disclosed and how to disclose it.

How do you answer the question, "Was the property involved in a flood?"

If the property was involved in a flood, or had other significant water damage from Superstorm Sandy, and the agent is aware of that fact, the answer to that question must be "yes." Under the REC's regulations, the agent must disclose "all information material to the physical condition of any property which they know or which a reasonable effort to ascertain would have revealed."

What duty does an agent have to know about storm-related issues? Should agents inquire about how high the water infiltrated the home, what repairs were done and what was done to repair the property, treat mold, etc.?

An agent must make a "reasonable effort to ascertain all material information concerning the physical condition of every property" that he or she accepts for listing as required by the REC's regulations. This includes an inquiry to the seller/landlord and a visual inspection for readily observable conditions. The agent therefore should ask the seller/landlord about these issues and conduct the required visual inspection.

Can you add questions to the listing agreement or seasonal application to get more information about damage or whether the property will be available for the summer season?

There is no prohibition against adding such questions. However, it is advisable for an agent to consult with his/her broker before adding such questions in order to ensure compliance with office policies.

Is there liability for a real estate licensee for passing along information gained from a seller/landlord about storm damage?

No, as long as the information is accurate. However, agents may be liable for failing to relay such information of which they are aware or for passing on misinformation, even if they did not know the information was wrong.

Can additional questions be added to the Disclosure Statement about storm damage, previous flood claims, etc.?

Yes, if, in the agent's opinion, it is appropriate to do so under the particular facts and circumstances of a transaction. However, it is advisable for an agent to consult his/her broker before adding such questions in order to assure compliance with office policies.

If a separate Disclosure Statement that was not approved by the Department of Community Affairs is used, is there liability for a real estate licensee?

The approved Disclosure Statement includes the minimum required disclosures to protect agents from liability for treble damages and attorneys' fees under the Consumer Fraud Act when it is properly used. The use of another form of disclosure would not provide that protection.

Should a disclaimer be included in the MLS that the property has suffered storm damage?

Such a disclaimer is not required. It is recommended that damage from Superstorm Sandy should be treated the same as any other damage to property that is being listed. It should be disclosed, preferably in a Disclosure Statement or at least in some other writing.

What if repairs have been completed by the seller/landlord?

All damage and repairs should be disclosed to a buyer/tenant by the seller/landlord and, to the extent known, by the listing agent in order to avoid any liability.

Since some homes have sustained significant damage as a result of the storm and insurance has not covered all the repairs, not everything has been repaired in those homes and they often are being sold "as is." In this situation, what is the best approach?

The same disclosures should be made whether or not a property is being sold "as is." Failure to disclose or misrepresenting a material fact may be a basis for a buyer to void a contract and seek damages.

Are there any new regulations and other laws that an agent must follow when the agent deals with a property that was affected by Superstorm Sandy?

No. An agent should apply the same principles to any property affected by Superstorm Sandy that the agent would apply to any other property. For example, under the Commission's regulations, the agent must disclose all material information pertaining to the physical condition of the property just like they must for any other property, which must include the agent undertaking a visual inspection of the property and making inquiries of the seller/landlord about the physical condition of the property. All this information then must be disclosed to potential buyers/tenants in the same way it would be disclosed for any other property.

Although Superstorm Sandy presented unique challenges for the people of New Jersey, the duties and obligations of real estate licensees have not changed. Therefore, you must apply the REC's regulations and the rules applicable to the Consumer Fraud Act as you would in any other situation. If you do that, you will steer clear of any legal storm that otherwise would have been created by Superstorm Sandy. ■

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis, LLP, focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders' and partnership disputes. He is the General Counsel for the New Jersey Association of REALTORS®.

Barry S. Goodman, Esq.

Should You Use and Sign Seller Disclosure Statements?

A Q&A with NJ Realtors® Chief Counsel Barry Goodman

Do seller disclosure statements provide more protection or create more liability? Do you need to sign a seller disclosure statement? Do you have to inspect the property if there is a seller disclosure statement? If you do not know the answers to these questions, it is important for you to understand what liability you have for treble damages under the Consumer Fraud Act (the "Act") and how a seller disclosure statement can protect you.

The following questions and answers will hopefully help you understand these issues.

Q **Let's start with the basics. What does the Consumer Fraud Act really provide?**

A The Act includes a very broad phrase that makes it unlawful to use any "unconscionable commercial practices" concerning the advertising and sale or rental of real estate. Such practices include a knowing concealment of a material fact and an affirmative misrepresentation, even if it is made innocently.

A consumer who prevails under the Act is entitled to treble damages (three times the amount of any damages actually suffered by the consumer) and payment of all the consumer's attorneys' fees and costs.

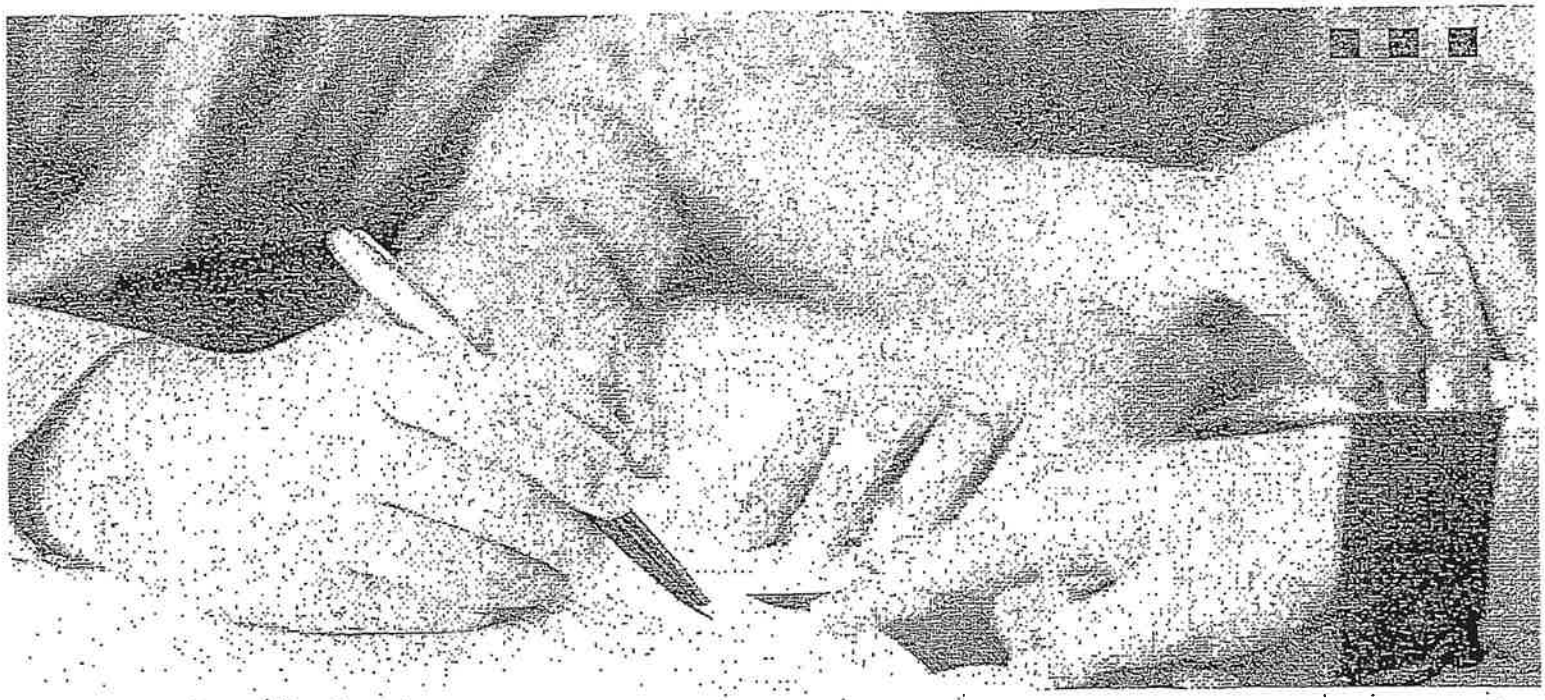
Q **I often include information in the MLS and other advertising from the seller. Are you saying that I might be liable if that information is wrong even though I had no idea that it was wrong?**

A Unfortunately, yes. The New Jersey Supreme Court significantly expanded the liability under the Act for real estate licensees in a case known as Gennari v. Weichert Co. In Gennari, the developer lied to the broker about the quality of material that would be used in the homes being built, the developer's experience, and the level of craftsmanship that would go into building the homes, among other things. When the buyers moved into their new homes, they discovered these lies and sued the developer and broker. The Court held that a broker is liable under the Act for repeating misrepresentations of the seller, even if the broker has no knowledge that the representations are false or deceptive. As a result, the broker in Gennari was liable for treble damages and the buyers' attorneys' fees and costs.

Q **If I am going to be liable for innocently repeating a seller's misrepresentation, why should I provide the seller's representations in a property disclosure statement that the buyer will have as proof of the misrepresentation if the buyer files a lawsuit against me?**

A After the broad interpretation of the Act in the Gennari case, New Jersey Realtors® lobbied for an exception to the Act if a real estate licensee repeated a seller's misrepresentation without knowing it is false or misleading. As a result, the Act was amended to create an exception for real estate licensees in N.J.S.A. 56:8-19.1.

Under this exception, a real estate licensee is not liable for punitive damages, attorneys' fees or both for communicating any false, misleading or deceptive information provided by or on behalf of the seller if the licensee did not have actual knowledge the representation was false, misleading or deceptive, and also made a "reasonable and diligent inquiry" to ascertain if the information was false, misleading or deceptive.



Such an inquiry would have to include but would not be limited to disclosing information from (1) a report or representation by a person licensed or certified by New Jersey, (2) a report or representation by a governmental official or employee if the information is about a physical condition of the property that is likely to be within the knowledge of that person; or (3) the seller in an approved property condition disclosure statement, as long as the licensee (a) informed the buyer that the seller is the source of the information and (b) prior to making that communication to the buyer, "visually inspected the property with reasonable diligence to ascertain the accuracy of the information disclosed by the seller."

As a result, although seller disclosure statements are not mandatory, they provide significant protection for you if they are properly used because you will not be liable for treble damages or the attorneys' fees incurred by the consumer.

Q **Are you now telling me that I have to become an inspector by visually inspecting the property and am liable if I miss something?**

A No, not all. You are not responsible under the Act to perform an inspection the way a home inspector would. However, do not forget that the Real Estate Commission's regulations place a duty on licensees to make a reasonable effort to ascertain all "material" information concerning the physical condition of a property, including inquiries of the seller or seller's agent and conducting a visual inspection of the property. Licensees have the duty to ascertain this information regardless of whether or not a seller disclosure statement is used.

Q **Is that why the seller disclosure statement includes an acknowledgment that the seller's agent visually inspected the property?**

A That's exactly right. All that seller's agents are doing by signing is confirming that they did the "visual inspection" that the Real Estate Commission requires them to do.

Q **What happens if I don't sign the seller disclosure statement?**

A This is a good question. Although there are no cases or other law on this issue, you would run the risk of a court ruling that you are not entitled to the exception for the treble damages and attorneys' fees in Section 19.1 of the Act because you did not properly fill out the statement. Is it worth that risk?

In a final analysis, using seller disclosure statements therefore provides you with significant protections. You should not only have sellers fill them out but also sign them. ■

Megan's Law: To Disclose or Not to Disclose?

By Barry S. Goodman, Esq.

A buyer with a five-year-old daughter is about to make an offer on a house. You have been told that a sex offender who was convicted of molesting a young girl lives next door. If you are the listing agent, what right do you have to disclose this information to the buyer? If you are the buyer's agent, do you have a duty to reveal this information? What if you are a dual agent or a transaction broker?

New Jersey, as well as all other states, the federal government and the District of Columbia, has enacted what is known as "Megan's Law," which governs your obligations concerning the disclosure of sex offenders living in a neighborhood. It therefore is critical for you to understand New Jersey's Megan's Law in order to avoid breaching your fiduciary duty to your client and violating the express mandates of Megan's Law.

Megan's Law arose from a brutal rape and murder in July 1994 of seven-year-old Megan Kanka by a convicted sex offender who had been released from prison and moved into her neighborhood.

New Jersey's Megan's Law

Megan's Law arose from a brutal rape and murder in July 1994 of seven-year-old Megan Kanka by a convicted sex offender who had been released from prison and moved into her neighborhood. Megan's family, the community, the state and, indeed, the nation were outraged that there was no way to know that a sex offender was living in the neighborhood so that Megan's family could have tried to prevent this tragic event.

As a result, the New Jersey Legislature led the way by enacting Megan's Law, which became effective in October 1994.[1] The purpose of Megan's Law is to identify sex offenders who are likely to be recidivists and to alert the public when necessary for the public's safety.[2]

Megan's Law is divided into two distinct components. The first requires certain sex offenders to register with local law enforcement agencies.[3] The second requires notification to the community concerning registered sex offenders who are considered to be a moderate or high risk to commit such offenses again.[4] In addition, the Legislature directed the New Jersey attorney general to promulgate guidelines and procedures for the notification required by the Law.[5]

Under Megan's Law, the prosecutor's office is required to determine whether a sex offender poses a low, moderate or high risk of re-offense. The notice provided to the public depends upon the likelihood that the person will commit the offense again. The three tiers of offenders created by the Law are as follows:

- Tier 1 – Every registrant will at least qualify as a Tier 1 offender under which notification extends only to law enforcement agencies likely to encounter the registrant.
- Tier 2 – Sex offenders who are at a moderate risk of re-offense are classified under this tier, with notice going to law enforcement, school and community organizations, including registered schools, day care centers, summer camps and other community organizations that care for children or provide support to women and/or individuals who are likely to encounter the sex offender.
- Tier 3 – High risk registrants are included in this tier under which members of the public likely to encounter the registrant, such as neighbors, are notified, in addition to all the notices required for Tier 1 and 2 offenders.[6]

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[1] *N.J.S.A. 2C:7-1 to 19.*
[2] *E.B. v. Veniero 119 F. 3d 1077, 1097 (3d Cir. 1997).*
[3] *N.J.S.A. 2C:7-2 to 4.*
[4] *N.J.S.A. 2C:7-5 to 11.*
[5] *N.J.S.A. 2C:7-8a.*
[6] *N.J.S.A. 2C:7-8c.*

Disclosing Information About Sex Offenders

Megan's Law specifically includes certain prohibitions against the use of information about the registration of sex offenders. This includes the use of such information for the purpose of applying for, obtaining or denying any housing or accommodations.[7]

Under the attorney general's guidelines, neighbors are sent notice of a Tier 3 sex offender living in or moving into a neighborhood. However, the notice specifies that the neighbor is prohibited from sharing this information "with anyone who is outside of your immediate household." Thus, sellers are prohibited from sharing this information about a sex offender living in the community with any potential buyer.

The guidelines further provide that "[n]ew residents should be provided with information about such offenders as they would have received had they been a resident at the time the community notification initially took place, unless the offender's Tier classification or the scope of community notification has been changed in the interim to preclude such community notification." Thus, the notice only will be provided after a person becomes a "resident."

Megan's Law also authorizes the State Police to make information available to the public over the Internet about certain sex offenders who are required to register under the Law. This Internet registry includes information pertaining to Tier 3 and, with certain exceptions, Tier 2 sex offenders. It does not include any information about Tier 1 sex offenders.[8] This Internet site contains an unambiguous warning against misusing the information on this site as follows:

> **WARNING:** Any person who uses the information contained herein to threaten, intimidate or harass another, or who otherwise misuses that information, may be subject to criminal prosecution or civil liability.

Real Estate Commission Regulations Concerning Megan's Law

The Real Estate Commission (REC) similarly promulgated regulations dealing with a licensee's duties and obligations under Megan's Law. The REC specifically prohibits real estate licensees from making any inquiry or providing any information about registered sex offenders as follows: "licensees shall make no inquiry about and provide no information on notifications from a county prosecutor issued pursuant to that law [Megan's Law]. In response to requests for such information, licensees shall inform the person making the inquiry that information about registered sex offenders is maintained by the county prosecutor."[9]

The REC also requires that real estate licensees include in all contracts for and leases of residential real estate they prepare the following statement in print as large as the predominant size print in the document:

> MEGAN'S LAW STATEMENT – Under New Jersey law, the county prosecutor determines whether and how to provide notice of the presence of convicted sex offenders in an area.
>
> In their professional capacity, real estate licensees are not entitled to notification by the county prosecutor under Megan's Law and are unable to obtain such information for you. Upon closing the county prosecutor may be contacted for such further information as may be disclosable to you.[10]

Thus, real estate licensees are absolutely prohibited from providing any information about a possible sex offender living in a neighborhood and must refer any inquiries about sex offenders to the county prosecutor, who only will provide the information after the buyer actually has closed title on the property.[11]

Conclusion

As a result, although there may be an emotional desire to advise a buyer who has a five-year-old daughter that a sex offender lives in the neighborhood, real estate licensees are absolutely prohibited from providing such information. Similarly, sellers are not permitted to provide such information to buyers. However, buyers have the absolute right to contact the county prosecutor to find out if there are any sex offenders living in the neighborhood after title has closed. In this way, buyers will be able to take any actions they deem necessary to protect their children and themselves from any sex offender who lives in the area.

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis LLP, is General Counsel for NJAR. He is a trial attorney who focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders and partnership disputes.

Barry S. Goodman, Esq.

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[7] *N.J.S.A. 2C:7-16c.*

[8] *Unfortunately, the Internet registry, which is located at www.state.nj.us\lps\dcf\megan, only is as accurate as the information the sex offenders provide to local law enforcement authorities. Thus, if the sex offender moves and does not notify the local authorities, the information on the Internet will not be accurate.*

[9] *N.J.A.C. 11:5-6.4(d).*

[10] *N.J.A.C. 11:5-6.4(e).*

[11] *In prohibiting the dissemination of any information about a sex offender in the neighborhood until after a buyer has purchased the home, the Legislature had to balance the need of any new homeowner to know about such sex offenders to protect children living in the home and the right of the seller not to have the value of the property plummet through no fault of the seller if a sex offender happens to move into the neighborhood.*

C

State of New Jersey
DEPARTMENT OF BANKING AND INSURANCE
PO Box 325
TRENTON, NJ 08625-0325

TEL (609) 292-7272

PHIL MURPHY
Governor

SHEILA OLIVER
Lt. Governor

MARLENE CARIDE
Commissioner

BULLETIN NO. 22-07

TO: REAL ESTATE LICENSEES AND OTHER INTERESTED PARTIES

FROM: MARLENE CARIDE, COMMISSIONER

RE: REAL ESTATE TEAMS

The purpose of this bulletin is to remind real estate licensees, particularly those on "teams," and the brokers of record who are responsible for managing and supervising, to comply with the Real Estate Broker and Salesperson Act, N.J.S.A. 45:15-1 to -42 ("Act") and regulations, N.J.A.C. 11:5-1.1 to -12.18 ("regulations").

Real estate "teams" are a growing trend in the real estate industry. Real estate teams operate within a brokerage and are generally comprised of two or more real estate salespersons, or broker-salespersons, who cooperate on transactions and pool resources on marketing and administrative staff, and may share commissions and recognition ("team"). Teams are typically led by a salesperson or broker-salesperson as a team leader.

In some cases, a team can appear to operate independent of the brokerage firm through which they are licensed, which may confuse the public. In order to make clear to the public that the team is not a separate brokerage, teams, their team leaders, team members, and their supervising brokers must comply with the Act and regulations.

Licensees are reminded that the employing broker of record is responsible for the supervision of all licensees, regardless of whether a team leader acts as the leader of a team.

N.J.A.C. 11:5-4.2, N.J.A.C. 11:5-4.4. Licensees can only accept compensation, including commissions, from their employing broker, and not a member of their team or their team leader. N.J.S.A. 45:15-16, N.J.S.A. 45:15-17(m).

Further, teams may not operate out of a separate, satellite office, unless such location is properly licensed with the New Jersey Real Estate Commission ("Commission"), and maintained and supervised in accordance with the Act and regulations. Specifically, all office locations must be licensed with the Commission, be properly supervised by a broker of record or a broker-salesperson, maintain normal business hours, and comply with the Act and regulations. N.J.A.C. 11:5-4.4, N.J.A.C. 11:5-4.5, and N.J.S.A. 45:15-12.

In addition, all advertising including all publications, radio or television broadcasts, all electronic media, business stationery, business cards, business and legal forms and documents, and signs and billboards must comply with N.J.A.C. 11:5-6.1. All advertising shall include the name of the individual, partnership, firm or corporation that is on record with the Commission as doing business as a real estate broker. In all advertisements which contain the name of a salesperson or a broker-salesperson, the regular business name of the individual, partnership, firm or corporate broker through whom that person is licensed shall appear in larger print or be displayed in a more prominent manner than the name of the salesperson or broker-salesperson. N.J.A.C. 11:5-6.1

The Commission rules do not prohibit the establishment of webpages by teams. The webpage, however, must comply with the Act and regulations. For example, if the team's webpage is not linked electronically to the webpage of the broker through whom team members are licensed, the webpage shall display the telephone number and may display the street address of the licensed brokerage office from which the individual or team members operate as real estate licensees. That

information shall appear in wording as large as the predominant size wording on the webpage. N.J.A.C. 11:5-6.1.

Finally, licensees are reminded that if a team does not comply with the Act and regulations, the team members may be subject to fines and potential license suspension or revocation. Further, brokers may be subject to fines and license suspension or revocation for failing to appropriately supervise their licensees, including those individuals that are a member of a team.

7/12/2022
Date

Marlene Caride
Commissioner

jd RE teams bulletin/Bulletins

From: "New Jersey Real Estate Brokerage Law" (2022 ed.) by Barry S. Goodman

Section 22-4:7 Use of Criminal Records by Landlords in New Jersey

In June 2021, New Jersey enacted the Fair Chance in Housing Act,[1] which became effective on January 18, 2022. The purpose of the Act is to deal with studies that showed that ex-convicts often are unable to find stable housing and, as a result, recidivism becomes more likely and the public safety is diminished.

Under the Act, a housing provider[2] is prohibited from requiring an applicant "to complete any housing application that includes any inquiries regarding an applicant's criminal record prior to the provision of a conditional offer,"[3] which is "an offer to rent or lease a rental dwelling unit to an applicant that is contingent on a subsequent inquiry into the applicant's criminal record, or any other eligibility criteria the housing provider may lawfully utilize."[4] A housing provider also cannot make any oral or written inquiry regarding an applicant's criminal record prior to making a conditional offer.[5]

Before accepting any application fee, a housing provider is required to disclose in writing to the applicant whether or not the housing provider is using any eligibility criteria that includes the review and consideration of criminal history, as well as that the applicant may provide evidence demonstrating inaccuracies in the applicant's criminal record or evidence of rehabilitation or mitigating factors.[6]

There also are restrictions on the use of criminal records to evaluate applicants and to use a criminal record as a basis to withdraw an offer. A housing provider is prohibited, before or after the issuance of a conditional offer, from evaluating an applicant based upon following criminal records: (1) arrests or charges that did not result in a criminal conviction; (2) expunged convictions; (3) convictions that were erased through an executive pardon; (4) vacated and otherwise legally nullified convictions; (5) juvenile adjudications of delinquency, and (6) records that have been sealed.[7]

After a conditional offer has been made to an applicant, a housing provider only may consider a criminal record in the applicant's history that (1) resulted in a conviction for murder, aggravated sexual assault, kidnapping, arson, human trafficking, sexual assault in violation of N.J.S.A. 2C:14-2, causing or permitting a child to engage in a prohibited sexual act or in the simulation of such an act in violation of N.J.S.A. 2C:24-4(b)(3), or any crime that resulted in lifetime registration in a sex offender registry; (2) is for an indictable offense of the first degree that was issued, or if the conviction resulted in a prison sentence that concluded, within the six years immediately preceding the issuance of the conditional offer; (3) is for an indictable offense of the second or third degree that was issued, or if the conviction resulted in a prison sentence that concluded, within the four years immediately preceding the issuance of the conditional offer; or (4) is for an indictable offense of the fourth degree that was issued, or if the conviction resulted in a

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[1] N.J.S.A. 46:8-52 to 64.
[2] A "housing provider" is defined as "a landlord, an owner, lessor, sublessor, assignee, or their agent, or any other person receiving or entitled to receive rents or benefits for the use or occupancy of any rental dwelling unit." N.J.S.A. 46:8-54.
[3] N.J.S.A. 46:8-55(a)(1). The Act includes an exception to this prohibition providing that "a housing provider may consider whether an applicant has ever been convicted of drug-related criminal activity for the manufacture or production of methamphetamine on the premises of federally assisted housing, and whether the applicant is subject to a lifetime registration requirement under a State sex offender registration program." Id.
[4] N.J.S.A. 46:8-54.
[5] N.J.S.A. 46:8-55(a)(2).
[6] N.J.S.A. 46:8-55(b).
[7] N.J.S.A. 46:8-56(a).

prison sentence that concluded, within one year immediately preceding the issuance of the conditional offer.[8]

A housing provider may withdraw a conditional offer based upon an applicant's criminal record only if the provider determines, by a preponderance of all the evidence, "that the withdrawal is necessary to fulfill a substantial, legitimate and nondiscriminatory interest."[9] If the housing provider withdrawals a conditional offer, the housing provider is required to provide the applicant with written notification that includes the specific reason or reasons for the withdrawal of the offer and an opportunity for the applicant to appeal his or her denial by providing evidence to the housing provider that demonstrates inaccuracies in the applicant's criminal record or evidence of rehabilitation or other mitigating factors.[10]

The housing provider also is required to perform an individualized assessment of the application that was submitted in light of the following factors: (1) the nature and severity of the criminal offense; (2) the applicant's age when the criminal offense occurred; (3) how much time has elapsed since the criminal offense occurred; (4) any information provided by the applicant or on behalf of the applicant with regard to the applicant's rehabilitation and good conduct since the criminal offense occurred; (5) the degree to which the criminal offense, if it reoccurred, would negatively impact the safety of the housing provider's other tenants or property, and (6) whether the criminal offense occurred on or was connected to a property that was rented or leased by the applicant.[11]

Within thirty days after the housing provider's notice of withdrawal of the conditional offer, the applicant can request that the housing provider provide the applicant with a copy of all information that the housing provider relied upon in considering the application, including criminal records. This information has to be provided by the housing provider free of charge within ten days after receipt of a timely request.[12]

In addition, a housing provider is prohibited from advertising that the housing provider will not consider any applicant who has been arrested or convicted of one or more crimes or offenses, except for drug-related criminal activity for the manufacture or production of methamphetamine on the premises of federal assisted housing and if the applicant is subject to a lifetime registration requirement under a State sex offender registration program.[13] A housing provider also cannot, unless required by law, distribute or disseminate an applicant's criminal record to any person who is not expected to use the criminal record to evaluate the applicant in a manner consistent with the Act for purposes that are inconsistent with the Act.[14] In addition, a housing provider is prohibited from requiring an applicant to submit to a drug or alcohol test, or to request that the applicant consent to obtaining information from a drug abuse treatment facility.[15]

A housing provider who complies with Act "shall be immune from liability in any civil action arising as a result of the landlord's decision to rent to individuals with a criminal record or who were otherwise convicted of a criminal offense, or as a result of a landlord's decision to not engage in a criminal background screening."[16]

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[8] N.J.S.A. 46:8-56(b).
[9] N.J.S.A. 46:8-56(c)(1).
[10] N.J.S.A. 46:8-56(c)(2).
[11] N.J.S.A. 46:8-56(c)(3).
[12] N.J.S.A. 46:8-56(d).
[13] N.J.S.A. 46:8-58(a).
[14] N.J.S.A. 46:8-58(c).
[15] N.J.S.A. 46:8-60.
[16] N.J.S.A. 46:8-59(a).

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NEW JERSEY REALTORS®

LEAD PAINT LAW

THE *issue*

Lead paint is hazardous and can prove harmful to children, leading to differentiated health issues. For more than two decades, New Jersey Realtors has consistently advocated for common-sense lead remediation to protect the children of the state while also protecting the rights of private property owners. Lead paint was banned in 1977, so when talking about lead we focus on homes built prior to 1978—of which there are more than 1.1 million in New Jersey, many of which are concentrated in poorer, minority, urban communities.

THE *history*

NJ Realtor®s has been engaged on this issue for almost 20 years. The original bill was introduced in 2003 by Sen. Ron Rice and over the years we've worked with many legislators and gubernatorial administrations to ensure that this legislation did not have a detrimental impact on the housing market. In February of 2020 Sen.Teresa Ruiz introduced S1147 which would require that a lead paint inspection take place before the sale of a home or tenant turnover. With our apprehensions about the negative effect on the time it may take to close a sale, and the costs that may be incurred, we reached out to the sponsor of the bill to try and come up with a compromise that would result in a more friendly process towards reaching the goal of remediation.

The bill was later substituted with new language that removed the original time-of-sale requirement. The substitution requires lead inspection once there was tenant turnover at a residence or within two years of the bill's effect date, the need for an inspection would be triggered, and $3.9 million dollars was put aside for grants that property owners would be able to apply for to address the lead-based hazards in the home. The bill also helps to address the lack of lead inspectors in the state by requiring that towns who have a dedicated inspection agency to provide the inspection of the necessary properties. The bill also calls for the Department of Community Affairs to develop materials and a seminar that will be given to relevant stakeholders, like Realtors®, so that they know what is going to be required of them

NEW JERSEY REALTORS®

in the process, and what they can do to help address the issues of lead in homes. The bill was signed by Gov. Murphy on July 22, 2021, and the contents of the bill will go into effect one year from the signing date. This bill will help New Jersey move towards having healthier places to live in, without having property owners incur thousands of dollars in remediation costs.

THE law

Since Gov. Murphy signed S1147 on July 22, 2021, it is now law. The contents are as follows:

- requires lead inspection once there was tenant turnover at a residence or within two years of the bill's effect date, the need for an inspection would be triggered,
- $3.9 million dollars was put aside for grants that property owners would be able to apply for to address the lead-based hazards in the home.
- Addresses the lack of lead inspectors in the state by requiring that towns who have a dedicated inspection agency to provide the inspection of the necessary properties
- calls for the Department of Community Affairs to develop materials and a seminar that will be given to relevant stakeholders, like Realtors®, so that they know what is going to be required of them in the process, and what they can do to help address the issues of lead in homes.
- The bill was signed by Gov. Murphy on July 22, 2021, and the contents of the bill will go into effect one year from the signing date.

The Lead Inspections required upon tenant turnover or within two years of date of law.	$3.9 million set aside for grants to help property owners subsidize lead remediation.	Towns with dedicated inspection agencies will have to provide necessary property inspections.	DCA will provide training and materials to relevant stakeholders.

How does this affect you and your landlords?

This is critical information for your business and you will need to be educated on the nuances of the new law. Once the Department of Community Affairs creates guidelines and trainings, they will be available here. If you have specific questions, you can always reach the Government Affairs Department at 609-341-7100.

NATIONAL ASSOCIATION OF REALTORS®

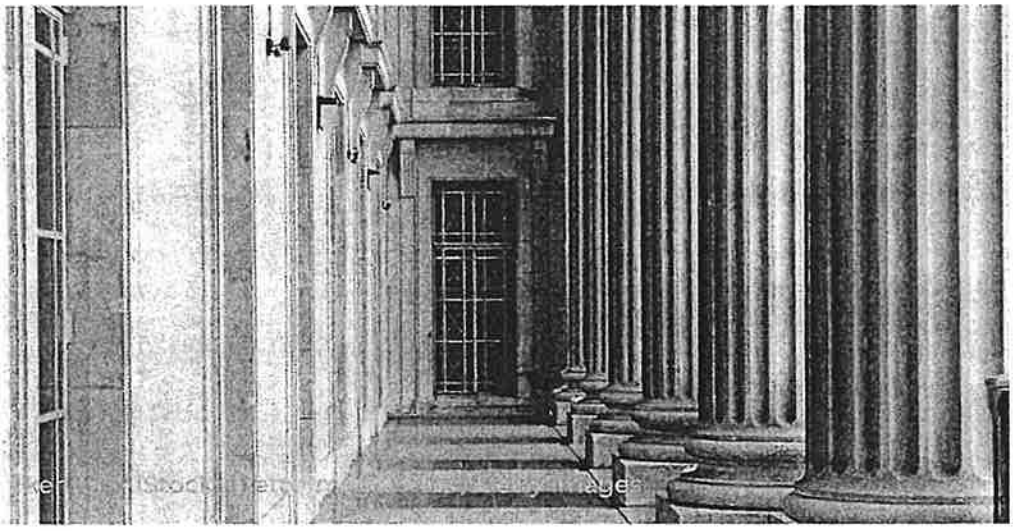
REALTOR® Magazine Real Estate News

NAR: Real Estate Compensation Lawsuits Far From Over

September 6, 2023 Legal, Competition & Opportunity in Real Estate

By: REALTOR® Magazine Staff

The association says it will continue to defend pro-competitive, pro-consumer local MLS broker marketplaces after one co-defendant settles.



Feedback

The National Association of REALTORS® says it will continue arguing its case against two class-action lawsuits challenging real estate compensation structures, even after one of NAR's co-defendants reportedly agreed to a proposed settlement Tuesday.

Anywhere Real Estate, formerly known as Realogy Holdings Corp., agreed to settle all claims against the company in the two cases, known as Sitzer/Burnett and Moehrl, according to news reports. Details of the settlement, which will need court approval, have not been released. No other parties named in the lawsuits, including NAR and several major real estate companies and MLSs, have agreed to settle.

The announcement of Anywhere's settlement comes about a month before the Sitzer/Burnett lawsuit is set to go to trial.

For more resources and information on how local broker marketplaces support home buyers and sellers everywhere, check out competition.realtor for infographics, articles and more.

"Settlement is always an option for any party in litigation. NAR's commitment to defend ourselves in court remains unchanged, and we are confident we will prevail in proving the lawfulness of the rules under attack," Mantill Williams, NAR's vice president of public relations and communication strategy, said in a statement. "Pro-competitive, pro-consumer local MLS broker marketplaces ensure equity, efficiency, transparency and

market-driven pricing options for home buyers and sellers. The practice of the listing broker paying the buyer broker's compensation saves sellers time and money by having so many buyer brokers participating in that local marketplace and, thus, creating a larger pool of buyers for sellers. For buyers, these marketplaces save them the burden of extra costs at closing, enable them to receive professional representation and make homeownership possible for more people."

The lawsuits claim that NAR rules violate antitrust laws and inflate the fees paid to buyer's agents by requiring a listing agent to compensate a buyer's agent for listing a property on the MLS. NAR argues that the lawsuits misrepresent association rules as anticompetitive. The rules direct listing brokers to determine, in consultation with their clients, the amount of compensation offered to a buyer's agent in connection with their MLS listings. Further, NAR says buyer's agents are free to negotiate compensation with the listing broker that is different from what appears in the MLS. Neither NAR nor the MLS has any say in setting broker commissions.

"The U.S. model of independent, local broker marketplaces is widely considered the best value and most efficient model in the world, with no hidden or extra costs and with more complete, verified information compared to other countries," Williams said. "We look forward to arguing our case in court."

NEW JERSEY REALTORS®

NEW JERSEY REALTORS® STANDARD FORM OF EXCLUSIVE BUYER AGENCY AGREEMENT

1. AGENCY: _____ (Buyer) and _____ (Buyer) referred to in this Agreement as "Buyer" hereby designate _____ (Brokerage Firm) as Buyer's exclusive agent, referred to in this Agreement as "Buyer's Agent", for the purpose of searching for, locating, and purchasing real estate by Buyer in the following, _____ (municipality(ies)), pursuant to all of the terms and conditions set forth below.

2. DOES BUYER HAVE A BUSINESS RELATIONSHIP WITH ANOTHER BROKER? ☐ YES ☐ NO
Buyer represents to Buyer's Agent that no other buyer's agency agreement is presently in effect. Buyer agrees not to enter into any such agreement during the term of this Agreement.

3. DECLARATION OF BUSINESS RELATIONSHIP: The real estate license law of the State of New Jersey requires every real estate licensee to declare the basis of the business relationship being established between such licensee and Buyer. Accordingly, **I,** _____ (Name of Licensee) **AS AN AUTHORIZED REPRESENTATIVE OF** _____ (Name of Firm) **INTEND, AS OF THIS TIME, TO WORK WITH YOU** (buyer)
AS A: (choose one)
☐ **BUYER'S AGENT ONLY** ☐ **BUYER'S AGENT AND DISCLOSED DUAL AGENT IF THE OPPORTUNITY ARISES.**

4. TERM: This Agency Agreement shall commence on _____ and shall expire at midnight on the _____ day of _____ or three (3) days after receipt by Buyer's Agent of a written termination notice from Buyer, whichever shall first occur.

5. BROKERAGE FEE: In consideration of the services rendered by Buyer's Agent on behalf of Buyer, Buyer agrees to pay to Buyer's Agent a brokerage fee of _____. The brokerage fee shall be earned, due and payable by Buyer to Buyer's Agent if any property introduced by Buyer's Agent to Buyer during the term of this Agreement is purchased by Buyer prior to the expiration of this Agreement, or within _____ days after the termination of this Agreement. However, except where Buyer's Agent is a disclosed dual agent in which case the entire brokerage fee must be paid by either Buyer or Seller, if the seller of such property authorizes the listing broker to pay a portion of the listing broker's brokerage fee to Buyer's Agent, that portion of such brokerage fee shall be credited against Buyer's obligation to Buyer's Agent as set forth above. In such event, Buyer agrees to pay to Buyer's Agent, at closing, the difference between the amount so received from the listing broker and the total brokerage fee due to Buyer's Agent as referred to in this paragraph, unless, as a term or condition of the contract of sale, the seller has agreed to pay such difference to Buyer's Agent at closing.

6. BUYER'S AGENT'S DUTY: Buyer's Agent shall:
(a) Use diligence in its search to locate a property which is acceptable to Buyer.
(b) Use professional knowledge and skills to assist Buyer to negotiate for the purchase of such property.
(c) Assist the Buyer throughout the transaction and to represent Buyer's best interests.

7. BUYER'S DUTY: Buyer shall:
(a) Provide accurate and relevant personal information to Buyer's Agent regarding Buyer's financial ability to purchase real estate.
(b) Advise Buyer's Agent of any home offered for sale to Buyer where Buyer may have an interest in purchasing such property.
(c) Submit through Buyer's Agent, any offer to purchase or contract on a property which was shown to Buyer by Buyer's Agent.

8. OTHER BUYERS: Other potential buyers may be interested in the same properties as Buyer. It is agreed that Buyer's Agent may represent such other potential buyers whether such representation arises prior to, during, or after the termination of this Agreement. In any such situation, Buyer agrees that Buyer's Agent will not disclose to any other potential buyer the terms of the Buyer's offer or any other confidential information concerning the Buyer and also will not disclose to Buyer the terms of any other buyer's offer or any confidential information concerning the other buyer(s).

Barry Goodman
Phone: (732)549-5600 Fax:

9. DUAL AGENCY: Buyer understands that Buyer's Agent may elect to represent a seller as well as Buyer in the sale a such seller's property. In such event, Buyer acknowledges that Buyer's Agent will be a dual agent, and pursuant to law, will the written informed consent of both the seller and Buyer for the Buyer's Agent to be a Disclosed Dual Agent. Buyer und consenting to the Buyer's Agent to be a Disclosed Dual Agent, there will be a limitation on the Buyer's Agent's ability to the Buyer or seller fully and exclusively. Buyer's Agent, when acting as a Disclosed Dual Agent, will not be able to put e interests ahead of the Buyer's nor the Buyer's interests ahead of the seller's. **Buyer's consent to Buyer's Agent being a Agent shall be deemed to have been given only when the "Informed Consent to Dual Agency" is signed by the Buyer.**

10. Buyer acknowledges receipt of the Consumer Information Statement on New Jersey Real Estate Relationships.

11. Buyer hereby acknowledges receipt of a signed copy of this legally binding Agreement and agrees to be bound by a its terms and conditions.

IF BUYER DOES NOT UNDERSTAND ALL OF THE TERMS OF THIS AGREEMENT, LEGAL ADVICE SHOULD BEFORE SIGNING.

By:

Buyer's Agent

BUYER

BUYER

NEW JERSEY REALTORS®

NEW JERSEY REALTORS® STANDARD FORM OF NON-EXCLUSIVE BUYER AGENCY AGREEMENT

1. AGENCY: _____ (Buyer) and _____ (Buyer) referred to in this Agreement as "Buyer" hereby designate _____ (Brokerage Firm) as Buyer's non-exclusive agent, referred to in this Agreement as "Buyer's Agent", for the purpose of searching for, locating, and purchasing real estate by Buyer in the following, _____ (municipality(ies)), pursuant to all of the terms and conditions set forth below.

2. DOES BUYER HAVE A BUSINESS RELATIONSHIP WITH ANOTHER BROKER? ☐ YES ☐ NO
Buyer represents to Buyer's Agent that no exclusive buyer's agency agreement is presently in effect. Buyer agrees not to enter into any such agreement during the term of this Agreement.

3. DECLARATION OF BUSINESS RELATIONSHIP: The real estate license law of the State of New Jersey requires every real estate licensee to declare the basis of the business relationship being established between such licensee and Buyer. Accordingly, **I,** _____ (Name of Licensee) **AS AN AUTHORIZED REPRESENTATIVE OF** _____ (Name of Firm) **INTEND, AS OF THIS TIME, TO WORK WITH YOU** (buyer)
AS A: (choose one)
☐ **BUYER'S AGENT ONLY** ☐ **BUYER'S AGENT AND DISCLOSED DUAL AGENT IF THE OPPORTUNITY ARISES.**

4. TERM: This Agency Agreement shall commence on _____ and shall expire at midnight on the _____ day of _____ or three (3) days after receipt by Buyer's Agent of a written termination notice from Buyer, whichever shall first occur.

5. BROKERAGE FEE: In consideration of the services rendered by Buyer's Agent on behalf of Buyer, Buyer agrees to pay to Buyer's Agent a brokerage fee of _____. The brokerage fee shall be earned, due and payable by Buyer to Buyer's Agent if any property introduced by Buyer's Agent to Buyer during the term of this Agreement is purchased by Buyer prior to the expiration of this Agreement, or within _____ days after the termination of this Agreement. However, except where Buyer's Agent is a disclosed dual agent in which case the entire brokerage fee must be paid by either Buyer or Seller, if the seller of such property authorizes the listing broker to pay a portion of the listing broker's brokerage fee to Buyer's Agent, that portion of such brokerage fee shall be credited against Buyer's obligation to Buyer's Agent as set forth above. In such event, Buyer agrees to pay to Buyer's Agent, at closing, the difference between the amount so received from the listing broker and the total brokerage fee due to Buyer's Agent as referred to in this paragraph, unless, as a term or condition of the contract of sale, the seller has agreed to pay such difference to Buyer's Agent at closing.

6. BUYER'S AGENT'S DUTY: Buyer's Agent shall:
(a) Use diligence in its search to locate a property which is acceptable to Buyer.
(b) Use professional knowledge and skills to assist Buyer to negotiate for the purchase of such property.
(c) Assist the Buyer throughout the transaction and to represent Buyer's best interests.

7. BUYER'S DUTY: Buyer shall:
(a) Provide accurate and relevant personal information to Buyer's Agent regarding Buyer's financial ability to purchase real estate.
(b) Advise Buyer's Agent of any home offered for sale to Buyer where Buyer may have an interest in purchasing such property.
(c) Submit through Buyer's Agent, any offer to purchase or contract on a property which was shown to Buyer by Buyer's Agent.

8. OTHER BUYERS: Other potential buyers may be interested in the same properties as Buyer. It is agreed that Buyer's Agent may represent such other potential buyers whether such representation arises prior to, during, or after the termination of this Agreement. In any such situation, Buyer agrees that Buyer's Agent will not disclose to any other potential buyer the terms of the Buyer's offer or any other confidential information concerning the Buyer and also will not disclose to Buyer the terms of any other buyer's offer or any confidential information concerning the other buyer(s).

Greenbaum, Rowe, Smith, PO Box 5600 Woodbridge NJ 7095 Phone: (732)549-5600 Fax
Barry Goodman

9. DUAL AGENCY: Buyer understands that Buyer's Agent may elect to represent a seller as well as Buyer in the sale and purchase of such seller's property. In such event, Buyer acknowledges that Buyer's Agent will be a dual agent, and pursuant to law, will have to obtain the written informed consent of both the seller and Buyer for the Buyer's Agent to be a Disclosed Dual Agent. Buyer understands that by consenting to the Buyer's Agent to be a Disclosed Dual Agent, there will be a limitation on the Buyer's Agent's ability to represent either the Buyer or seller fully and exclusively. Buyer's Agent, when acting as a Disclosed Dual Agent, will not be able to put either the seller's interests ahead of the Buyer's nor the Buyer's interests ahead of the seller's. **Buyer's consent to Buyer's Agent being a Disclosed Dual Agent shall be deemed to have been given only when the "Informed Consent to Dual Agency" is signed by the Buyer.**

10. Buyer acknowledges receipt of the Consumer Information Statement on New Jersey Real Estate Relationships.

11. Buyer hereby acknowledges receipt of a signed copy of this legally binding Agreement and agrees to be bound by and comply with its terms and conditions.

IF BUYER DOES NOT UNDERSTAND ALL OF THE TERMS OF THIS AGREEMENT, LEGAL ADVICE SHOULD BE SOUGHT BEFORE SIGNING.

By: _____ _____ _____

Buyer's Agent BUYER Date

_____ _____

BUYER Date

E

Greenbaum Rowe Smith & Davis LLP
COUNSELORS AT LAW

Barry S. Goodman
PARTNER

Woodbridge Office
99 Wood Avenue South
Iselin, New Jersey 08830
T: 732.476.2560
F: 732.476.2561
bgoodman@greenbaumlaw.com

Being a lawyer allows me to fulfill my desire to help people while constantly being challenged to keep up with changing laws, many of which I have had the good fortune to mold through cases I have handled and my drafting of legislation and regulations. I could not be more pleased to be able to counsel my clients about their business and personal issues in an attempt to avoid problems and, when necessary, advocate for them in lawsuits and before regulatory agencies.

Mr. Goodman focuses his practice in commercial litigation, with a particular concentration in real estate and real estate brokerage issues. His experience also encompasses municipal law, antitrust suits, and corporate shareholder and partnership disputes. Throughout his career, a number of Mr. Goodman's cases have resulted in published opinions that set precedents in New Jersey.

Mr. Goodman is approved by the State of New Jersey Department of Banking and Insurance Real Estate Commission as a New Jersey Real Estate Continuing Education Instructor. He lectures frequently to the real estate brokerage community and other industry organizations throughout the state, and has written extensively on topics related to real estate brokerage law.

HONORS & AWARDS

- Recipient of the Middlesex County Bar Association Lawyer Achievement Award (2010)

Departments

Litigation

Real Estate

Practice Groups

Real Estate Brokerage

Education

Rutgers University School of Law, Newark, J.D., 1977

Rutgers College, B.A., *cum laude*, 1973

Bar Admissions

New Jersey, 1978

U.S. District Court, District of New Jersey, 1978

U.S. Supreme Court, 1984

U.S. Court of Appeals, Third Circuit, 1986

Clerkships

Former law clerk to The Honorable Eugene L. Lora, Presiding Judge, New Jersey Appellate Division (1977-1978)

- Recipient of the Rutgers University Alumni Meritorious Service Award (2006)
- Listed in *The Best Lawyers in America©* (a trademark of Woodward/White, Inc.) in the Appellate Practice, Litigation-Real Estate and Commercial Litigation practice areas (2012 – present)
- Selected by *Best Lawyers®* (a trademark of Woodward/White, Inc.) as 2016 Woodbridge "Lawyer of the Year" in Litigation - Real Estate
- Listed in *New Jersey Super Lawyers* (a Thompson Reuters business) in the Real Estate practice area (2011 – present)
- Martindale-Hubbell® Peer Review Rated AV® Preeminent (a trademark of Internet Brands, Inc.) (1988 – present)
- Listed in *Benchmark Litigation* (published by Euromoney Institutional Investor PLC) as a Local Litigation Star - New Jersey in the Antitrust and General Commercial practice areas (2013 – present)
- Listed in *Marquis Who's Who in America* (published by Marquis Who's Who LLC) (2001 – present)
- Following law school graduation, honored with the Eli Jarmel Memorial Prize for public interest litigation

A description of the standard or methodology on which the accolades are based can be found HERE. No aspect of this advertisement has been approved by the Supreme Court of New Jersey.

REPRESENTATIVE MATTERS

- *Conley v. Guerrero* (2017), in which the New Jersey Supreme Court held that an attorney who sends a notice of disapproval of a residential sales contract prepared by a real estate licensee to the broker(s) during the three-day attorney-review period must send it by email, fax, overnight mail or personal delivery
- *Timber Glen Phase III, LLC v. Township of Hamilton* (2015), in which the Appellate Division held that a municipality does not have the authority under the Licensing Act to impose licenses and licensing fees for residential apartment units that provide tenancies for 175 days or more
- *Zaman v. Felton* (2014), in which the New Jersey Supreme Court held that, where a real estate licensee purchases a house that is in foreclosure with the seller having the right to buy back the property and continue to live there through a lease, the transaction may create an equitable mortgage but it is not subject to *In re: Opinion 26* or the Consumer Fraud Act
- *In re: Opinion 26* (1995), in which the New Jersey Supreme Court held that buyers and sellers of residential real estate can receive assistance from real estate and title agents during the closing process, as has been the practice in South Jersey, and do not have to retain a lawyer as has typically been done in North Jersey
- *RE/MAX v. Wassau* (2000), in which the New Jersey Supreme Court held that real estate salespeople are employees for purposes of workers' compensation

- *H.I.P. v. K. Hovnanian* (1996), in which Mr. Goodman successfully represented a developer regarding an advocacy group's claims that a development did not comply with the Fair Housing Act
- *Mortgage Bankers Association of NJ v. NJ Real Estate Commission* (1995), in which Mr. Goodman served as lead counsel. Following a 12-year court battle, the Appellate Division ultimately held that real estate licensees can receive a fee for providing mortgage-related services
- *Reyes v. Egner* (2010), in which the Appellate Division held that a broker for a short-term summer rental is not liable to a tenant who was in the unit for nine days and then fell where a step was higher than the construction code permitted and there was no required handrail on the steps, and the broker therefore is not subject to the same duty to warn visitors as a broker in an open house situation
- *Exit A Plus Realty v. Zuniga* (2007), in which the Appellate Division held that real estate listing agreements are not automatically void, but are only voidable based upon the equities of the case if a real estate licensee violates the Real Estate Licensing Act
- *CBTR v. Twin Rivers Homeowners' Association* (2007), in which the New Jersey Supreme Court held that homeowners' associations' policies regarding expressional activities will be upheld if they are reasonable but may be subject to constitutional scrutiny if they are unreasonable
- *Danvers Motor Co. v. Ford Motor Co.* (2005), in class action antitrust suit, the United States Third Circuit Court of Appeals held that dealers challenging Ford's nationwide incentive and satisfaction program stated particularized harm by alleging payments against their will and relinquishing control of dealership operations to satisfy constitutional standing requirements
- *New Jersey Association of REALTORS® v. New Jersey Department of Environmental Protection* (2004), in which the Appellate Division held that a regulation requiring deed notices concerning environmentally contaminated sites be sent to the Association for distribution by its members to the public was void ab initio because it violated the New Residential Off-Site Conditions Disclosure Act
- *Gordon Development Group v. Bradley* (2003), in which the Appellate Division held that there only is one attorney-review period for both the buyer and the seller in a residential real estate transaction in New Jersey that begins when the fully executed contract has been delivered to both the buyer and the seller
- *Danvers Motor Co. v. Ford Motor Co.* (2002), in which the United States District Court held that class action antitrust plaintiffs must have particularized injuries to have Article III standing under the United States Constitution
- *Inter-City Tire and Auto Center v. Uniroyal* (1988), in which Mr. Goodman successfully defended a distributor in an antitrust suit who allegedly had conspired to monopolize a certain market and fix prices
- *G&W v. Borough of East Rutherford* (1995), in which Mr. Goodman prevailed before the Appellate Court in an antitrust action precluding his client from competing for business in a certain municipality
- *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.* (1993), in which the United States District Court held that an automobile dealers association can participate in case as amicus curiae if the individual

dealership that was a party in the lawsuit was not adequately represented by counsel and the association will not be an advocate for one of the parties

- *State v. Arace Brothers* (1989), in which Mr. Goodman represented a trade association and certain individual defendants against allegations by the Attorney General that over the course of 25 years, the defendants had allocated public contracts among themselves in violation of the Antitrust Act
- *New Jersey v. T.L.O.* (1985), in which the United States Supreme Court rendered a landmark decision circumscribing the scope of searches and seizures in public schools
- *The Hospital Center at Orange v. Cook* (1981), in which the Appellate Division held that a hospital is barred from suing indigent patient for fees where the hospital failed to advise a patient she was eligible to apply for free medical care under a federal program for which the hospital already had received funding

UNIQUELY NJ

- General Counsel, New Jersey REALTORS®
- General Counsel and past President, United Way of Hunterdon County
- Vice Chairman, Hunterdon Medical Center Board of Trustees
- Board of Trustees, Hunterdon Healthcare System; Member, Executive Committee; Chair, Strategic Planning Committee; Member, Committee on Trustees; former Chair, Quality Committee
- Member, New Jersey State Bar Association; Real Property Trust and Estate Law Section, Civil Trial Bar Section, Antitrust Law Special Committee
- Member, Federal Bar Association of the State of New Jersey
- Member, Middlesex County Bar Association
- Member, Hunterdon County Bar Association
- Member, New Jersey Institute of Local Government Attorneys
- Former Chair, Interest on Lawyers' Trust Accounts (IOLTA) Fund of the Bar of New Jersey
- Former member, New Jersey Supreme Court Professional Responsibility Rules Committee
- Former Trustee, Trial Attorneys of New Jersey
- Past President, Rutgers-Newark Law School Alumni Association

MORE ACTIVITIES & EXPERIENCE

- Member, American Bar Association; Litigation Section, Real Property, Trust and Estate Law Section

PUBLICATIONS & ALERTS

Author, ***New Jersey Real Estate Brokerage Law***
(New Jersey Law Journal Books, 2011-2017)

Contributor, 2017 Real Estate Update: Trending Issues & Topics of Interest
Greenbaum, Rowe, Smith & Davis LLP Client Alert, March 2017

Author, A Question of Security
New Jersey Realtor®, April 2016

Author, Are You Ready for the New Statewide Sales Contract?
New Jersey REALTOR®, November/December 2015

Author, New Jersey REALTORS® Prevails In Case Limiting Municipal Licensing Fees
New Jersey REALTOR®, October 2015

Author, What Do I Have To Disclose About a Property Affected by Superstorm Sandy?
New Jersey REALTOR®, August 2013

Author, Does a Broker's Failure to Have a Written Commission Agreement Doom Its Commission Claim Under the Statute of Frauds?
New Jersey Lawyer, December 2012

Author, Are You Complying With The Americans With Disabilities Act?
New Jersey REALTOR®, January/February 2012

Author, Clarifying the Muddy Waters Concerning CMA's BPOs and Appraisals
New Jersey REALTOR®, September 2011

Author, What Duty Do You Have To Inspect Seasonal Rentals?
New Jersey REALTOR®, June 23, 2011

Author, Marketing Through Social Media: Do You Understand the Risks?
New Jersey REALTOR®, April 2010

Author, Rebates For Buyers: Are They Right For You?
Designated REALTOR® Update, Winter/Spring 2010

Author, Lead Paint Disclosures: Watch Out For The Traps!
New Jersey REALTOR®, May 2009

Author, Maneuvering Through The Attorney-Review Minefield
The Middlesex Advocate, November 2008

Author, Opinion 26 Revisited
New Jersey REALTOR®, July 2008

Author, Does A Violation Of The Licensing Law Void A Listing Agreement?
New Jersey REALTOR®, November/December 2007

Author, Why Are Seller Disclosure Statements Important To You, Buyers And Sellers?
New Jersey REALTOR®, June 2007

Author, Beware The Sellers' Bonus
New Jersey REALTOR®, October 2006

Author, Twin Rivers: Why The Appellate Division Got It Wrong
New Jersey Lawyer Magazine, October 2006

Author, Megan's Law: To Disclose Or Not To Disclose?
New Jersey REALTOR®, September 2006

Author, Promotions in New Jersey: Be Careful What You Offer!
New Jersey REALTOR®, October 2005

Author, Are You In Compliance With Recent Identity Theft Regulations?
New Jersey REALTOR®, September 2005

Author, What To Do If The Listing Broker Offers A Minimal Commission
New Jersey REALTOR®, May 2005

Author, Are Seller Disclosure Statements Right For You?
New Jersey REALTOR®, August 2004

Co-Author, Twin Rivers Was a 'Fundamental Test Case' For Applying Constitutional Limits to a Homeowner Association. And the Association Won.
Common Ground, July/August 2004

Author, Does the State Constitution Apply To the Governance of Homeowners Associations?
Community Trends, July 23, 2004

Author, NJAR Wins Lawsuit Voiding DEP Regulation
New Jersey REALTOR®, May 2004

Author, Court Decisions on Attorney Review Will Affect Your Practice
New Jersey REALTOR®, October 2003

Author, Maneuvering Through the Attorney Review Minefield
New Jersey REALTOR®, August 2001

Author, What Rights Do Real Estate Brokers Have To Assert A Lien To Protect Their Commissions?
New Jersey REALTOR®, August 2000

Protect Your Right to an **Equitable Lien**

BY **BARRY S. GOODMAN, ESQ.**

A dispute has arisen about the seller paying your commission for securing the buyer. Have you taken the steps necessary to ensure that your right to an equitable lien will be fully enforceable?

Cases Interpreting A Broker's Right to an Equitable Lien

Equitable liens for brokers were created by the court in 1987 because the transaction never would have closed but for the efforts of the broker. An equitable lien, which does not get recorded, attaches to the property from the date the sales contract is signed and then, at closing, to the closing funds. In deciding whether or not to create an equitable lien, courts look at such factors as if there is any contractual provision in the listing agreement, sales contract or lease providing for such a lien, the custom and practice of the industry, and the conduct of the parties.

Courts have refined the parameters of an equitable lien over the years. For example, the New Jersey Supreme Court held that a broker was not entitled to an equitable lien on rents received by the buyer of property that had tenants procured by the broker where the commission agreement did not provide for a lien and the buyer did not assume responsibility to pay the commissions in the sales contract. In addition, the broker did not provide any evidence that it was the custom and practice regarding commercial leases for a broker to have any right to encumber rent payments after the closing.

Another court held that an equitable lien is valid against judgment creditors who record a lien after the equitable lien becomes effective. However, a broker's equitable lien is not superior to liens that were recorded before the date the equitable lien became effective. Another decision provided that a bona fide buyer takes title free of any equitable lien. A federal court also noted that a broker's equitable lien does not attach to the funds that the buyer will use to purchase the property.

Finally, a court recently held that a broker was not entitled to an equitable lien on funds at the closing where the funds had been released to a lender pursuant to a recorded mortgage. The court indicated that there was nothing in the listing agreement that the proceeds at the closing would be security for payment of the commission and that the lender was not unjustly enriched by having been paid at the closing.

Conclusion

As a result, in order to protect the right to an equitable lien, a broker should include in the listing agreement that the broker has a right to an equitable lien for the commission. Wording along the following lines is suggested:

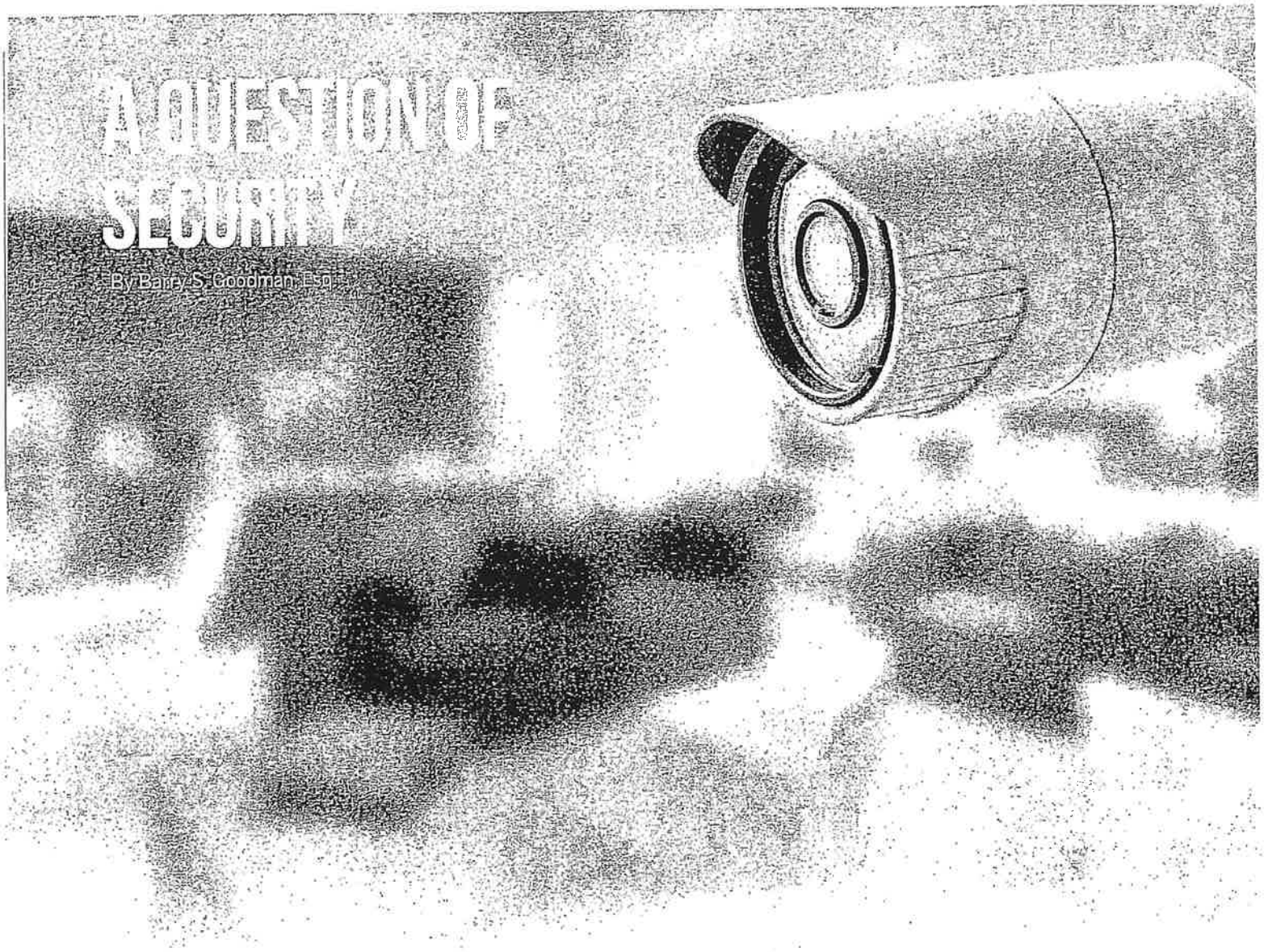
> Owner agrees that Broker will have an equitable lien for Broker's commission on the property beginning when a sales contract is signed and then on the proceeds at the closing. If the property is leased, then Broker will have an equitable lien on rental payments for any commissions due to Broker and, if the property is then sold, on the proceeds at the closing for any commissions then due. If Owner sells the property, Owner will include in the sales contract that buyer will assume all obligations under this Agreement, it being agreed that this Agreement will be binding on Owner's successors and assigns.

Finally, where there is a possible dispute about the broker being paid its commission at the closing, it is recommended that the broker confirm in writing to the parties and whoever is closing title that the broker has an equitable lien on the proceeds and expects to be paid at the closing or, at the very least, that the commission will be held in escrow. If the commission is released to another party, whoever released the funds may be liable to pay the commission. ■

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis LLP, is General Counsel for the New Jersey REALTORS®. He focuses his practice on real estate brokerage and other real estate-related matters, as well as business matters, corporate shareholders and partnership disputes, and municipal practice.

A QUESTION OF SECURITY

By Barry S. Goodman, Esq.



You have just listed a house for sale or lease that has a security camera or other video or audio taping equipment, often called "nanny cams." What responsibility do you have to disclose the existence of the security camera system to potential buyers or tenants who lease the house? Can the seller record conversations between buyers and their agents when they walk through the house? Can the landlord have the security camera system working after the tenant has taken occupancy? Do the buyers and tenants have any right to an expectation of privacy not to be recorded?

It is extremely important for you and the property owner to know what can and cannot be done when there are security camera systems in the house. In deciding what to do, it is important to distinguish between potential buyers who are walking through the house and tenants who have moved in.

Potential Buyers Walking Through The House

A seller who has a security camera system in the house likely would want to keep it on when potential buyers and buyer's agents are walking through.

However, the security system may very well record conversations between a buyer and the buyer's agent about an interest in purchasing the house, including possibly how much the buyer would be willing to pay. The question therefore arises whether or not the security system has to be disclosed to the buyer and the buyer's agent.

The New Jersey Real Estate Commission informally has taken the position that the listing agent does not have a duty to disclose there is a security camera system in place. However, if the listing agent is asked about a security system, they must, of course, provide an honest response.

In addition, if the listing agent becomes a disclosed dual agent, the listing agent in all likelihood has a fiduciary duty to the buyer to disclose there is a security camera system that would be videotaping and/or recording conversations. As a result, if there is any possibility the listing agent will become a disclosed dual agent, the listing agent should discuss with the seller when the listing agent obtains informed consent to disclosed dual agency that the security system will have to be disclosed. In fact, it is recommended they discuss simply disclosing the use of the security camera system to all buyers as part of a marketing strategy since a security system likely would increase the value of the house.

Use Of Security Cameras Where the Property Is Leased To Tenants

Although the same rules would apply to potential tenants who are walking through a property, once a tenant moves into the property, there are vastly different privacy expectations that the tenant understandably would have. Use by the landlord of a security camera system inside, and possibly outside, the house after the tenant has moved in likely would violate the tenant's privacy rights and subject the landlord to civil damages and possibly even criminal charges.

As a result, if there are security cameras on the property, they should be disabled and not used during the term of the tenancy, unless only the tenant has the use of the security system. In light of the potentially serious implications of improperly using a security camera during the tenancy, New Jersey Realtors® has added the following provision to its lease.

SECURITY CAMERAS:

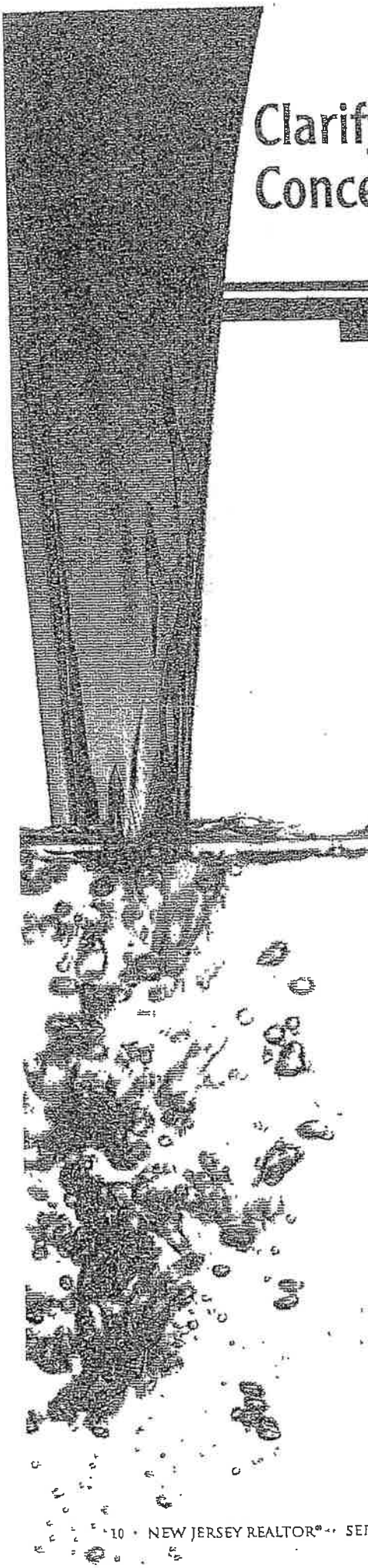
❑ Applicable ❑ Not Applicable

If there are any security cameras on the Property, including but not limited to what often are called "nanny cams" or other video or audio taping equipment, the Landlord represents that the security cameras will be disabled and not functioning during the Term of this Lease unless only the Tenant has the use of the security system and neither the Landlord nor any other party has access to or the use of it. The Landlord acknowledges that any use or access to the security system by the Landlord or any other party during the tenancy may constitute an invasion of privacy of the Tenant and subject the Landlord to civil damages and criminal charges.

What to Remember

Although there typically does not appear to be a duty to disclose to buyers and buyer's agents that there is a security camera system in the house, it probably would be in your best interest and in the best interest of the seller to disclose its existence. However, when the property is being rented, care should be taken to ensure the security camera system is not improperly used by the landlord during the term of the tenancy. ■

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis, LLP, focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders' and partnership disputes. He is the General Counsel for New Jersey Realtors®.



Clarifying the Muddy Waters Concerning CMAs, BPOs and Appraisals

By: Barry S. Goodman, Esq.

Although you have prepared Comparative Market Analyses (CMAs) for buyers and sellers, lenders may have recently asked you to prepare Broker Price Opinions (BPOs) or even appraisals. Can you, as a real estate licensee, prepare BPOs or appraisals? What is the difference between CMAs, BPOs and appraisals? How does the NATIONAL ASSOCIATION OF REALTORS® (NAR) Code of Ethics affect your ability to prepare CMAs, BPOs or appraisals for other parties?

Although CMAs, BPOs and appraisals can be useful tools for buyers, sellers and lenders, you must understand what rights you have to prepare them in New Jersey. This article therefore will provide you with some background and guidelines for clarifying the muddy waters in which you must operate if you want to provide CMAs, BPOs or appraisals.

Regulations Governing CMAs

The New Jersey Real Estate Commission (NJREC) specifically allows real estate licensees to provide CMAs[1]. Although the NJREC does not define a CMA, one definition is that CMAs "are used to help establish a realistic price range for homes. A CMA usually includes a review of comparable properties in the immediate area currently on the market or that have recently sold[2]."

After clearly stating that a CMA is not an appraisal, the NJREC's regulations require that every CMA must provide a disclaimer as follows:

> Any written comparative market study or analysis (CMA) provided by a licensee to a consumer shall include a statement indicating that the CMA is not an appraisal and should not be considered the equivalent of an appraisal. The said statement shall appear in print as large as the predominant size print in any writing reporting the results of the CMA[3].

Thus, there can be no question that real estate licensees in New Jersey are permitted to prepare CMAs for consumers as long as the licensee includes the required statement in the CMA.

Preparation of BPOs

Although neither the NJREC's regulations nor any other regulations or statutes in New Jersey specifically use the term "BPOs," federal law does. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, BPO is defined as:

> an estimate prepared by a real estate broker, agent, or sales person that details the probable selling price of a particular piece of real estate property and provides a

> varying level of detail about the property's condition, market, and neighborhood, and information on comparable sales, but does not include an automated valuation model, as defined in Section 1125(c).[4]

Dodd-Frank allows lenders to consider BPOs prepared by real estate licensees but prohibits lenders from using BPOs as the primary basis to determine the value of a piece of property for the purpose of loan origination for a residential mortgage loan secured by the property if the purchase is a consumer's principal dwelling.[5] Thus, Dodd-Frank makes it clear that, under federal law, lenders can use BPOs prepared by real estate licensees under certain circumstances.

It should be noted that, although BPOs historically were prepared for lenders, while CMAs historically were prepared for buyers and sellers, that distinction recently has become blurred. The reality is that CMAs nationally are increasingly being referred to as BPOs.

Limitations on the Preparation of Appraisals

Under the New Jersey Real Estate Appraisers Act, appraisals[6] typically only can be prepared by licensed or certified appraisers. More specifically, the Appraisers Act prohibits any person who is not certified from referring to any appraisal or other valuation that he or she performs on real estate as a "certified appraisal" and, similarly, if the person is not licensed as an appraiser, from describing such an appraisal or other valuation as a "licensed appraisal[7]."

However, the Appraisers Act specifically provides that it shall not "be construed to preclude a person not licensed or certified pursuant to this act from giving or offering to give, for a fee or otherwise, counsel and advice on pricing, listing, selling and use of real property, directly to a property owner or prospective purchaser if the intended use of the counsel or advice is solely for the individual knowledge of or use by the property owner or prospective purchaser[8]." Thus, not only can such advice be provided by real estate licensees but it can be used by the property owner or prospective purchaser for whatever purpose he or she deems appropriate.

Significantly, the Appraisers Act permits lenders to use "appraisals" that have not been prepared by certified or licensed appraisers under certain circumstances:

> A State or federally chartered bank, savings bank or savings and loan association may obtain and use appraisals made by a person who is not certified or licensed pursuant to [the Real Estate Appraisers Act] in any circumstance where the underlying transaction is a federally related transaction for which federal law and regulation do not require that a certified or licensed appraiser be used[9].

Since appraisals can be considered by lenders under such circumstances, it certainly would appear that CMAs and BPOs prepared by real estate licensees also can be considered by those lenders as long as no federal law or regulation requires that a certified or licensed appraiser be used. As noted above, one example of such a requirement would be under the Dodd-Frank Law, which does not permit BPOs to be used as the primary basis for a lender making certain loans. Indeed, real estate licensees may very well be better off not preparing any "appraisals," as opposed to CMAs or BPOs, for a lender in order to avoid violating any federal or other laws of which they are unaware.

NAR's Code of Ethics

Article 11 of NAR's Code of Ethics prohibits REALTORS® from undertaking "to provide specialized professional services concerning a type of property or service that is outside their field of competence unless they engage the assistance of one who is competent on such types of property or service, or unless the facts are fully disclosed to the client." Standard of Practice 11-1 then explains that REALTORS® are permitted to provide opinions of value or price to third parties provided certain information is included as follows:

When REALTORS® prepare opinions of real property value or price, other than in pursuit of a listing or to assist a potential purchaser in formulating a purchase offer, such opinions shall include the following unless the party requesting the opinion requires a specific type of report or different data set:

1) identification of the subject property
2) date prepared
3) defined value or price
4) limiting conditions, including statements of purpose(s) and intended user(s)
5) any present or contemplated interest, including the possibility of representing the seller/landlord or buyers/tenants
6) basis for the opinion, including applicable market data
7) if the opinion is not an appraisal, a statement to that effect

Thus, subject to applicable laws, REALTORS® are permitted to provide such opinions or value of price as long as they have the necessary competence, which could include but is not necessary limited to: knowledge of the market place where the property is located, experience with the property type that is being evaluated, and adequate access to necessary information concerning comparable prices or values. As a result, NAR now has a "Broker Price Opinion Resource (BPOR)" certification for REALTORS® who prepare BPOs.

Practical Tips

Although the NJREC's regulations only refer to CMAs and not to BPOs, it is strongly recommended that, if a real estate licensee prepares a BPO, the licensee should include the CMA statement required by the NJREC advising that the BPO is not an appraisal and should not be considered the equivalent of an appraisal. If the BPO is being prepared for a lender online, such language can be placed in the comment section of the BPO before it is sent to the lender

In addition, under the Real Estate Licensing Act, all payments for real estate related services provided by salespersons must be made to the broker. As a result, salespersons are not permitted to receive any payment directly for providing BPOs, CMAs or appraisals.

Finally, an issue has arisen whether or not a real estate licensee should provide appraisers with BPOs, CMAs or comparable sales or prices that the licensee has prepared. Real estate licensees have a fiduciary duty to their clients to provide such analyses or opinions to an appraiser whenever it is deemed to be in the best interest of their clients. Certainly, this could include where there is a "fly by" appraisal by an appraiser who is not familiar with the area, resulting in an appraisal that does not reflect the true value of the property. Although it is then up to the appraiser whether or not to use this additional information, a thorough appraiser would most likely want to have as much relevant information available in order to ensure that the appraisal is as accurate as possible.

Conclusion

Real estate licensees therefore are allowed under certain circumstances to prepare CMAs, BPOs and even appraisals. However, caution should be exercised not to provide such price or value opinions in circumstances that are not permitted under state law, federal law and NAR's Code of Ethics. ■

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith, & Davis LLP, focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders' and partnership disputes. He is the General Counsel for the New Jersey Association of REALTORS®.

Barry S. Goodman, Esq.

[1] See N.J.A.C. 11:5-6.1(m)3.

[2] NAR's Instructor and Student Manual entitled "BPOs: The Agent's Role in the Evaluation Process," at p. 109, quoting http://www.mrktusa.com/glossary.htm.

[3] N.J.A.C. 11:5-6.1(m)3.

[4] H.R. 4173 at §1126(b).

[5] H.R. 4173 at §1126(a).

[6] The NJREC defines "appraisal" as used in its regulations as having "its technical meaning as a study and analysis by an appraiser authorized by law to perform appraisals of New Jersey real estate to ascertain fair market value by using a process in which all factors that would fix price in the market place must be considered." N.J.A.C. 11:5-6.1(m)3. In addition, "appraisal" is defined in the Real Estate Appraisers Act as meaning "an unbiased analysis, opinion or conclusion relating to the nature, quality, value or utility of specified interest in, or aspects of, real estate. An appraisal may be classified by subject matter into either a valuation or an analysis. A 'valuation' means an estimate of the value of real estate or real property and an 'analysis' means a study of real estate or real property other than a valuation." N.J.S.A. 45:14F-2.

[7] N.J.S.A. 45:14F-21a, b.

[8] N.J.S.A. 45:14F-21c.

[9] N.J.S.A. 45:14F-21f.

Featured EDITORIAL

WHAT RIGHTS DO REAL ESTATE BROKERS HAVE TO ASSERT A LIEN TO PROTECT THEIR COMMISSIONS?

by Barry S. Goodman, Esq.

The closing is fast approaching and the sellers have just indicated that they do not believe you have earned a commission. As a result, even though you have an executed listing agreement, the sellers have instructed the title agent or attorney who will handle the closing not to pay your commission or place any money in escrow with regard to your commission. What rights do you, as a licensed real estate broker, have to place a lien on the closing proceeds so that your commission will be paid or, at the very least, put in escrow until the dispute has been resolved?

General Background Concerning Liens

The general rule in most states, including New Jersey, is that a listing agreement between the broker and seller is for personal services and does not "run with the land or, more appropriately, with title to the land."[1] In fact, brokers in New Jersey and virtually all other states have no statutory right to file a lien to ensure that their commission is paid.[2]

Courts in New Jersey therefore have focused on whether or not brokers have an equitable lien on the property or the proceeds from the sale of the property to protect their commissions. An equitable lien is "a right of a special nature in a fund (or property) and constitutes a charge or encumbrance upon the fund" or property.[3] The New Jersey Supreme Court has explained that, generally, "(the) theory of equitable liens has its ultimate foundation...in contracts, express or implied, which either deal with or in some manner relate to specific property, such as a tract of land..."[4]

In determining whether or not a broker has the right to assert an equitable lien, the overriding issue is whether or not the parties intended for the broker to have such a lien. In rendering their decision, Courts will look at such factors as whether or not there is any contractual provision in the listing agreement, sales contract or lease providing for such a lien, the custom and practice of the industry, the conduct of the parties (including correspondence between the parties), etc.

Equitable Liens On The Property and Sales Proceeds

The key case in New Jersey dealing with a broker's right to an equitable lien to protect its commission is Cohen v. Estate of Sheridan.[5] In Cohen, liens on the property exceeded the purchase price. The buyers therefore filed suit seeking a declaration by the Court that the commissions due to the listing and selling brokers were not a lien on the property that had to be satisfied so that the buyers could receive clear title. The Court rejected the buyers' position and held that the brokers had an equitable lien on the property until closing and on the funds due to the seller at closing, stating that the broker is entitled to the protection of an equitable lien on the property of the seller until closing (to protect against any unscrupulous activity on the part of the seller) and, at closing, to an equitable lien on the fund due to the seller.[6]

Equitable Liens Regarding Leases

Subsequent to Cohen, the New Jersey Supreme Court was faced with whether or not a broker had the right to assert an equitable lien on rent payments due under commercial leases for a shopping center. The case, VRG Corp. v. GKN Realty Corp.,[7] involved a commission agreement that provided for the broker, VRG, to be paid its commission in an amount "equal to six (6%) percent of each monthly gross base rental payment under the initial term of such lease." When the shopping center was sold, the seller filed for bankruptcy and the new owner, GKN, refused to pay any further commissions to VRG.

The Court examined several factors to determine whether or not the parties intended for the broker to have an equitable lien on the rent payments. For example, the Court found that the commission agreement did not provide for such a lien but only provided that the broker would be paid at the rate of six (6%) percent of the rental payments. In addition, the broker had demanded that the remainder of its commission be paid at the closing, which undermined its claim that it believed that it had an equitable lien on the rent payments. Furthermore, the sales contract did not provide for GKN to assume responsibility for payment of the commissions. Finally, there was no evidence that it was customary practice regarding commercial leases for the broker to have a right to encumber rent

continued on page 8

What Rights Do Brokers Have

continued from page 6

payments. As a result, the Court held that VRG had no right to an equitable lien on the rent payments.

Other Issues Relating to Brokers' Liens

Other cases have refined the scope of a broker's right to an equitable lien. In one case, it was held that an equitable lien under a listing agreement is valid against subsequent judgment creditors.[8] Another Court held that a broker's equitable lien is not superior to previously recorded liens, including by way of example, mortgages and mechanics' liens.[9] Similarly, a Court held that a bonafide purchaser who perfects title to the property takes the title free of any equitable lien by the broker.[10] A federal court also noted that a broker's equitable lien does not attach to the funds that the buyer ultimately will use to purchase the home.[11]

Conclusion

Thus, absent a showing that the parties intended otherwise, real estate brokers in sales transactions have an equitable lien on the property until closing and on the proceeds to be paid to the sellers at the closing. Similarly, brokers may have an equitable lien on rent proceeds if the broker can demonstrate that the parties intended that there should be such a lien.

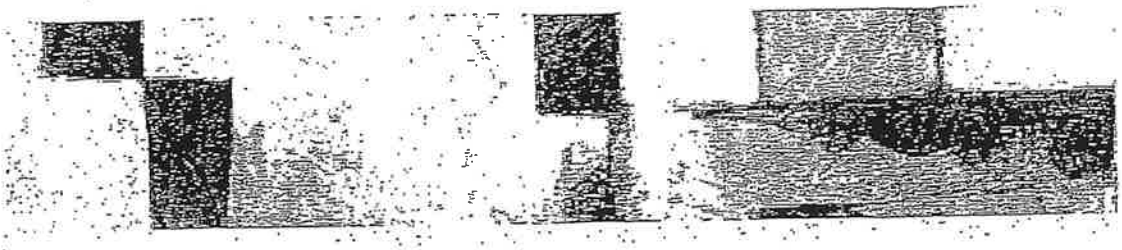
As a result, where an attorney or title agent who is closing the title fails to pay the broker's commission from the closing proceeds (or put the money in escrow if there is a dispute), the person handling the closing (and his/her company or firm) may be liable for the commission, especially where the broker has provided written notice of its right to an equitable lien on those proceeds. It therefore is in the best interest of the person handling the closing to place any amount in dispute concerning the commission in escrow pending resolution of the dispute.

It therefore is recommended that listing agreements provide in clear and unambiguous terms that the broker has an equitable lien on the property to be sold and on the proceeds from the sale of the property and/or the rent payments, which will be paid before the seller/landlord receives any money. Brokers may want to provide written notice to the attorney or title agent closing title of their right to an equitable lien, and certainly should provide such a notice if there is any question whether or not the sellers intend to pay their commission.

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith, Ravin, Davis & Himmel LLP, is a trial attorney who focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders' and partnership disputes.

1. Barlowe Burke, Jr., Law of Real Estate Brokers § 6.2, at 6:8 n1 (2d ed. 1992).
2. See In re L.D. Patella Construction Corp., 114 B.R. 53, 58-59 (Bkrcy. D.N.J. 1990). See also N.J.S.A. 46:16-1 (statute lists all documents relating to a real estate closing, including sales contracts, that are recordable but does not include listing agreements); N.J.S.A. 46:16-2 (instruments affecting title to real estate are recordable).
3. In re Hoffman, 63 N.J. 69, 77 (1973).
4. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 546 (1994), quoting John N. Pomeroy, Treatise on Equity Jurisprudence § 1234, at 695 (Spencer W. Symons 5th ed. 1941).
5. 218 N.J. Super. 565 (Ch. Div. 1987).
6. d. at 570 (citation omitted).
7. 135 N.J. 546 (1994).
8. In re L.D. Patella Construction Corp., 114 B.R. 53, 58 (Bkrcy. D.N.J. 1990).
9. Burke v. Hoffman, 28 N.J. 467 (1958).
10. Bridge v. Midlantic National Bank, 18 F 3d 195 (3d Cir. 1994).
11. Batt v. Scully, 168 B.R. 541, 550 (D.N.J. 1994). No reported New Jersey cases have dealt with a broker's right to assert an equitable lien where the broker is a buyer broker.

enbaum Rowe
Smith & Davis LLP
COUNSELORS AT LAW



ARE YOU IN COMPLIANCE WITH RECENT IDENTITY THEFT REGULATIONS?

By Barry S. Goodman, Esq.
This article appeared in the August 2005 issue of New Jersey REALTOR® magazine.

Have you ever taken a social security number on a sales contract to prequalify a buyer or as part of a lease application? How about driver's license numbers? Credit or debit card information? Bank account numbers? Under recently enacted federal and State laws, such information now is regulated for all businesses, including real estate brokers. As a result, if you ever take such personal information, you must be aware of your legal obligations for the proper disposal of the information and what you have to do if there ever is an unauthorized access to the information. You also will have to carefully safeguard the use of Social Security Numbers ("SSNs").

Background

As we all know, identity theft is becoming a major problem. Victims can have their good names and credit ruined and spend years trying to repair the damage that was done to their credit histories.

As a result, on the federal level, the Fair and Accurate Credit Transactions Act of 2003 ("FACTA") was passed empowering the Federal Trade Commission ("FTC") to promulgate rules concerning the proper disposal of personal financial information. As a result, the FTC has created the "Disposal Rule," which became effective on June 1, 2005.

Similarly, the New Jersey Legislature now has passed the Identity Theft Prevention Act, which will become effective January 1, 2006.[1] This Act not only deals with the disposal of personal financial information but also imposes notice requirements if there is a breach of security and sets forth specific restrictions on the use of SSNs.[2]

Disposal of Consumer Credit Information

Under the federal Disposal Rule, any person or entity, which would include a real estate broker, who maintains or possesses information taken from consumer reports for a business purpose must properly dispose of such information. A broker therefore cannot simply throw documents, disks or other material containing personal credit information into the garbage.

The FTC, while acknowledging that there is no such thing as "perfect destruction," has required that businesses must take "reasonable measures" when disposing of consumer information. Examples that the FTC has provided of proper disposal include (1) burning, pulverizing or shredding papers; (2) deleting or erasing electronic media; and (3) using document disposal companies.

New Jersey's Identity Theft Prevention Act follows the federal Disposal Rule but adds some wrinkles. The Act defines acceptable means of destruction as including "shredding, erasing or otherwise modifying the personal information in those records to make it unreadable, undecipherable or nonreconstructable through generally available means," which essentially follows the federal requirements. However, New Jersey has expanded the definition of what consumer information must be properly destroyed once the record no longer is needed. Such personal consumer information includes any records that contain an individual's first name (or first initial) and last name linked with any one or more of the following:

1. social security number;

2. driver's license number or State identification number; or

N.J.A.C. 11:5-6.1

This file includes all Regulations adopted and published through the New Jersey Register, Vol. 49 No. 20, October 16, 2017

New Jersey Administrative Code TITLE 11. INSURANCE CHAPTER 5. REAL ESTATE COMMISSION SUBCHAPTER 6. NEW JERSEY PROPERTY-LIABILITY INSURANCE GUARANTY ASSOCIATION ASSESSMENT PREMIUM SURCHARGE

§ 11:5-6.1 Advertising rules

(a) Unless otherwise set forth herein, subsections (b) through (o) below shall apply to all categories of advertising including all publications, radio or television broadcasts, all electronic media including E-mail and the Internet, business stationery, business cards, business and legal forms and documents, and signs and billboards.

1. Individuals operating as sole proprietors and licensed as employing brokers shall conspicuously display on the exterior of their maintained place of business their name and the words "Licensed Real Estate Broker".

2. Firms licensed as corporate or partnership brokers shall conspicuously display on the exterior of their maintained place of business their regular business name and the name of the individual licensed as their broker of record and the words "Licensed Real Estate Broker".

(b) All advertising of any licensed individual, partnership, firm, or corporate broker shall include their regular business name which for the purposes of these rules, shall mean the name in which that individual, partnership, firm or corporation is on record with the Commission as doing business as a real estate broker. All advertising by a referral agent, a salesperson or a broker-salesperson shall include the name in which they are licensed and the regular business name of the individual, partnership, firm or corporate broker through whom they are licensed. If such advertisements contain a reference to the licensed status of the person placing the ad, their status as a referral agent, a salesperson or a broker-salesperson must be indicated through inclusion of a descriptive term as provided in (e) below. A referral agent or salesperson may not indicate in any advertisement or otherwise that he or she is licensed as a broker-salesperson.

1. In all advertisements which contain the name of a referral agent, a salesperson or a broker-salesperson, the regular business name of the individual, partnership, firm or corporate broker through whom that person

Does a Broker's Failure to Have a Written Commission Agreement Doom Its Commission Claim Under the Statute of Frauds?

by Barry S. Goodman

You are about to close on the sale of commercial real estate for your client when a real estate broker suddenly appears, making a claim for a commission. Although your client, the seller, advises you that he talked to the broker, he does not recall whether they confirmed in writing that the broker would be paid a commission for introducing the seller to the buyer.

In New Jersey, under the statute of frauds, does the agreement have to be in writing for the real estate broker to have a valid commission claim? Is the broker entitled to be paid a commission if there only was an oral understanding concerning the payment of a commission? Can a broker avoid the statute of frauds by claiming the seller tortiously interfered with the broker's right to earn a commission? If there was no agreement concerning the amount of commission to be paid, can the broker sue for *quantum meruit*?

Whether you handle real estate transactions or represent real estate brokers, the answers to these questions are critical in determining if a broker has the right to payment where there is a dispute concerning whether the broker satisfied the requirements to claim a commission under the statute of frauds.

Requirements of the Statute of Frauds

The statute of frauds in New Jersey requires that a real estate broker must memorialize in writing any agreement to be paid a commission for the sale of real estate in order for the agreement to be enforceable. N.J.S.A. 25:1-16, which is the section in the statute of frauds dealing with real estate brokers, has three provisions that govern whether or not a real estate broker is entitled to be paid a commission.

Under N.J.S.A. 25:1-16(b), a real estate broker who acts as an agent or broker on behalf of a buyer or seller regarding the transfer of an interest in real estate, which includes any lease interest for less than three years, is entitled to be paid a commission only if the broker's authority is "given or recognized in a writing signed by a principal or the principal's authorized agent" before or after the property is transferred, and the "writing states either the amount or the rate of commission."[1]

The only exception to Section 16(b) is where a broker acts pursuant to an oral agreement that falls within the requirements of N.J.S.A. 25:1-16(d). Under Section 16(d), a broker who acts pursuant to an oral agreement with a principal is entitled to be paid a commission if two requirements are met. First, the broker must serve the principal with a written notice stating that "its terms are those of the prior oral agreement including the rate or amount of commission to be paid" within five days after making the oral agreement with the principal and before the transfer or sale of the real estate. Second, the broker must either effect the transfer or sale, or in good faith enter into "negotiations with a prospective party who later effects a transfer or sale" before the principal provides the broker with any written rejection of the oral agreement between the parties.

Finally, N.J.S.A. 25:16(e) sets forth the specific requirements for service of the notice by a real estate broker under the statute of frauds. The notice must "be served either personally, or by registered or certified mail, at the last known address of the person to be served."

Courts Usually Require Strict Compliance

Courts in New Jersey generally have held that, "[t]o the extent a broker wishes to rely on the protections of the statute of frauds to claim entitlement to a commission, he or she must strictly comply with the statute's requirements."[2] As a result, in order for a real estate broker to claim a commission based upon any contractual theory, the broker must adhere to the strict requirements of the statute of frauds.

In one case, *C&J Colonial Realty v. Poughkeepsie Savings Bank*,[3] the Appellate Division held that a series of correspondence between the broker and the owner concerning the commission was insufficient to satisfy the statute of frauds because there never was a clear understanding regarding the amount of the commission to be paid or the basis of the payment. Under

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that the plaintiff [the broker] expected to be paid."[12] Under these circumstances, the broker would be entitled to the reasonable value of the services it provided.

Conclusion

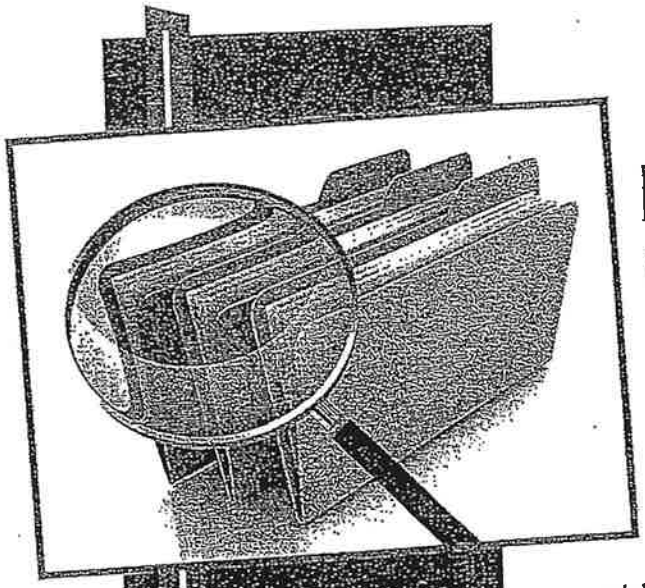
Whether you are handling a real estate transaction in which a broker is making a claim for a commission or you are representing a real estate broker, it is important to first analyze whether or not the broker has a writing that satisfies the statute of frauds. If not, you will have to determine if the broker has any independent tort or *quantum meruit* claim for the commission.

Correctly analyzing these issues will prevent problems at the closing, or allow you to provide proper advice to any real estate broker you represent who claims to be entitled to a commission.

Endnotes

1. For purposes of N.J.S.A. 25:1-16(b), "the interest of a mortgagee or lienor is not an interest in real estate," and therefore this section of the statute of frauds is inapplicable to such a mortgagee or lienor.
2. *Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W. L.L.C.*, 368 N.J. Super. 382, 396 (App. Div. 2004).
3. *C&J Colonial Realty, Inc. v. Poughkeepsie Savings Bank, FSB*, 355 N.J. Super. 444 (App. Div. 2002).
4. *See, e.g., R.A. Intile Realty Co. Inc. v. Raho*, 259 N.J. Super. 438 (Law Div. 1992); *Myers v. Buff*, 45 N.J. Super. 318 (App. Div. 1957).
5. *See Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W. L.L.C.*, 368 N.J. Super. 382, 391 (App. Div. 2004); *R.A. Intile Realty Co. Inc. v. Raho*, 215 N.J. Super. 438 (Law Div. 1992).
6. *National Newark & Essex Bank v. Housing Auth. of the City of Newark*, 75 N.J. 497 (1978).
7. *Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W. L.L.C.*, 368 N.J. Super. 382 (App. Div. 2004).
8. *Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W. L.L.C.*, 368 N.J. Super. 382 (App. Div. 2004).
9. *McCann v. Biss*, 65 N.J. 301 (1974).
10. *Louis Schlesinger Co. v. Wilson*, 22 N.J. 576 (1956).
11. *Weichert Co. Realtors v. Ryan*, 128 N.J. 427 (1992).
12. *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 438 (1992).

***Barry S. Goodman**, a partner in the law firm of Greenbaum, Rowe, Smith, & Davis LLP, focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders' and partnership disputes. He is the general counsel for the New Jersey Association of REALTORS®.*



Lead Paint Disclosures: Watch Out for the Traps!

By Barry S. Goodman, Esq.

An investigator from the U.S. Environmental Protection Agency (EPA) walks into your office and says, "Give me all of your closing files for the last year and, if any of them have any lead paint disclosure violations, we're going to fine you $11,000 for each violation." You quickly start to wonder: Is it a problem that the seller signed the Lead-Based Paint Disclosure (the Disclosure) after the buyer? What about the listing I had when the bank owned the property and refused to sign a Disclosure? Was it okay that, as a buyer's agent, I had the buyer sign the Disclosure blank? Was there anything special I had to do regarding the house I listed with lead paint that had renovations? Does the Disclosure have to be in all of my rental files, too?

EPA investigators have aggressively been going into offices, including those in many areas of New Jersey, without notice and reviewing files for violations. All brokers and salespersons must make sure that they dot their i's and cross their t's concerning lead paint issues or face significant sanctions, including jail, for each violation.

EPA investigators have aggressively been going into offices, including those in many areas of New Jersey, without notice and reviewing files for violations. All brokers and salespersons must make sure that they dot their i's and cross their t's concerning lead paint issues or face significant sanctions, including jail, for each violation. Below is a typical conversation I might have with a broker or salesperson concerning compliance with these rules.

THE REASONS FOR DISCLOSURE

Q: *Why do I have to provide Disclosures concerning lead paint?*

A: Because Congress passed the Residential Lead-Based Paint Hazardous Reduction Act of 1992, (the Act), also known as Title X, to protect people, especially children, from exposure to lead that was in paint, dust and soil. The Act directed the EPA and U.S. Department of Housing and Urban Development to issue regulations requiring disclosure of certain information about lead-based paint and lead-based paint hazards in residential sales and leasing transactions for housing built before January 1, 1978. The regulations, which became effective in 1996, include most private housing, public housing, housing receiving federal assistance and federally-owned housing.

Q. *Are there any types of housing that are not affected by this Act?*

A. There are. These exceptions include dwellings where the sleeping area is not separated from the living area, such as lofts, efficiencies and studios; residential leases of 100 days or less, such as vacation homes and short-term rentals; housing designated for the elderly or handicapped, unless children under the age of six reside or are expected to reside there; rental units that have been inspected by a certified inspector and found to be free of lead-based paint; sales at foreclosure; and renewal leases where disclosure already has been made and no new information is available.

Q. *Does the Act apply to mobile homes, manufactured homes or timeshares?*

A. The short answer is "yes." The Act applies to them even if it is known or believed that they do not contain any lead-based paint unless, of course, one of the exceptions applies, such as a lease of 100 days or less.

Real Estate Agents' Responsibilities

Q. *Isn't it the sellers' or landlords' responsibility to comply with the Act?*

A. Of course. However, it is your responsibility as their agent to inform them of their obligations under the Act. In addition, you can be responsible if they fail to comply.

Q. *What if they withhold information from me?*

A. You will not be responsible for information they withhold from you.

Q. *I understand the Disclosure has to be provided to the buyer/tenant. Do I have to provide them with the original of the Disclosure signed by the seller/landlord?*

A. No. You can provide them with a copy executed by the seller or landlord. Just make sure the seller or landlord signs the Disclosure before it is given to the buyer or tenant.

Sellers' or Lessors' Responsibilities

Q. *Since I have to inform sellers and lessors about their responsibilities under the Act and make sure they comply, what do they have to do?*

A. There are five specific things that a seller or lessor must do:

1. Disclose all known lead-based paint and lead-based paint hazards, as well as all reports they have about lead on the property;
2. Provide buyers/tenants with the EPA pamphlet entitled "Protect Your Family From Lead In Your Home;"
3. Include the required warning language concerning lead in the sales contract or lease, and provide the statement signed by all the parties attesting that the seller/landlord has complied with all notification requirements, which the seller/landlord, agent and buyer/tenant must sign and date with the seller/landlord being required to sign before the buyer/tenant;
4. Retain the signed Disclosures for three years as proof of compliance. (However, since New Jersey Real Estate Commission regulations require that most documents in the broker's files be maintained for six years, you should keep the Disclosure for six years); and
5. Sellers (but not landlords) must provide the buyer with an opportunity to test the property for lead within a ten-day period but the sellers and buyer can agree to lengthen or shorten this period and the buyer has the right to waive it.

Q. *Who pays for the tests that the buyer can conduct?*

A. That is up to the parties. They can agree that either the seller or the buyer will pay, assuming that the buyer decides to do the tests. The key is that the seller must provide the buyer with the opportunity to test.

Q. *I had a situation where a bank owned the property and refused to sign a Disclosure. What was I suppose to do?*

A. That obviously is a difficult issue. Although there is an exemption for property sold in foreclosure, when the bank obtains property in foreclosure but then sells it, there no longer is any exception. As a result, the safest thing probably would be not to take the listing if the bank will not sign. However, if you decide to keep the listing, I would suggest you send a letter to the bank by certified and regular mail confirming you advised a bank representative (identify the representative) that the bank is required to sign the Disclosure but the bank refused. In addition, send a letter to the buyer advising the buyer that the bank refused to sign the Disclosure and the buyer can test for lead.

Q. *What should I do if I am a buyer's agent and the seller's agent has not provided me with a Disclosure?*

A. Well, if the seller's agent either refuses or simply has not provided it to you, you should send a letter to the seller's agent confirming this. You also should advise the buyer in writing that you requested but were not provided with it and that the buyer has a right to perform the lead-based paint test within 10 days.

Renovations

Q. *Are there any specific federal laws that deal with renovations to properties that have lead-based paint?*

A. Beginning April 2010, federal law will require that contractors performing renovations, repairs and painting projects that in any way disturb lead-based paint in homes, childcare facilities and schools built before 1978 will have to be certified and follow specific work practices to prevent lead contamination.

Q. *Does this mean that the owner will have to undertake renovations?*

A. No. This only will apply when renovations, repairs or painting projects are undertaken in housing that is subject to the Act.

Investigations and Penalties

Q. *Let's start with whether or not EPA investigators have the right to come into my office and demand documents. Do they?*

A. They do not have any right to come in unannounced to inspect documents in your office. However, they do have subpoena power. As a result, if you refuse to allow them to look at documents, you can expect that they will serve a subpoena on you and that you will have to comply with the subpoena.

Q. *Can they require me to produce all my business records?*

A. The law appears to indicate that they only can require you to produce documents relating to lead-based paint and lead-based hazards. You have the option whether or not to produce other business records.

Q. *What if there is some technical violation that they find in the file, such as the buyer signed the lead-based paint disclosure before the seller signed?*

A. Regardless how technical or minor the violation is, civil penalties can range up to $11,000 for each violation and actually can include imprisonment if the court deems the violation to be significant enough to warrant your going to jail.

New Jersey Law

Q. *Are there any New Jersey laws that affect what I will have to do to comply with the Act?*

A. Good question. None of the disclosure requirements under the Act are affected by New Jersey law. However, New Jersey has its own maintenance and inspection requirements for lead-based paint that you should become familiar with if you are dealing with a property that has lead-based paint.

Q. *Give me some examples of what New Jersey wants me to do.*

A. Well, if you are representing the landlord, you may be responsible for abatement of lead-based paint in the interior of a dwelling unit that is occupied by children, especially if any of the children already have had lead poisoning. In addition, although one-and two-family rental units were exempt from such lead paint maintenance and inspection requirements in New Jersey, a new law signed into effect on January 8, 2008 removed the exemption for such rental units. Although New Jersey is not yet enforcing these requirements until the Department of Community Affairs promulgates rules to implement them, you will have to at least register such properties with the Bureau of Housing Inspection and maintain those properties in a lead-safe condition.

Conclusion

As you can see from this dialogue, sloppy paperwork concerning lead-paint disclosures and your other responsibilities regarding lead-paint issues not only is unacceptable but may lead to significant fines and jail time. It therefore is incumbent upon you to ensure that you have the seller/landlord properly sign the Disclosure before it goes to the buyer, inform the seller/landlord of all of the seller's/landlord's obligations, and ensure that the seller/landlord actually complies with those obligations. If you do so, then you will not have to worry about EPA investigators showing up at your office for a surprise review of your records and undoubtedly will be able to sleep better at night.

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith, & Davis LLP, focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders' and partnership disputes. He is the general counsel for the New Jersey Association of REALTORS®.

Barry S. Goodman, Esq.

REFERRAL FEES BY BARRY GOODMAN

MORE ONLINE
To read other recent court decisions, access the *Letter of the Law* newsletter via the **Current Links** at *REALTOR.org/realtormag.*

States act on surprise fees

If you've ever been hit with an after-the-fact referral fee, you know the letdown. You've worked hard to help a relocating buyer and you're already mentally spending your commission when a relocation company calls demanding that you pay a referral fee for the buyer. You had no idea the buyer was working with a relocation company.

Do you have to pay the after-the-fact referral fee? What are your rights if the relocation company threatens to cut off its benefits to the buyer if you don't pay?

Brokers commonly pay referral fees to other practitioners and to relocation companies for referrals of buyers, sellers, lessors, or lessees. Real estate professionals often associate after-the-fact referral fees with instances in which a relocation company demands a fee after a salesperson has created a relationship with a client, even when the relocation company didn't refer the buyer or seller to the salesperson in the first place.

Although you may not have any legal obligation to pay the fee, many licensees feel pressure to when a relocation company threatens to withhold benefits—such as paying moving expenses—from the buyer or seller.

To address the problem, at least 10 states have enacted laws regarding the fees. Typically, these laws require that there be not only an actual introduction of the client by the referring broker but also a written referral-fee contract between the licensees. These states also prohibit paying referral fees to any person or entity, including a relocation company, that isn't a duly licensed broker.

A New York law, which takes effect in February 2003, prohibits licensees from demanding or receiving a referral fee or compensation after a listing agreement has been signed, an offer to purchase has been accepted, or a buyer agency agreement has been signed. The only exception to these rules: reasonable cause for payment.

What's reasonable cause? A recently enacted Connecticut regulation provides some guidance. The Connecticut rule prohibits licensees from demanding a referral fee unless there's an actual business introduction, a subagency relationship, a contractual referral-fee relationship, or a contractual cooperative brokerage relationship.

Other states, such as Alabama, Colorado, Idaho, Illinois, Kansas, Louisiana, and Tennessee, also require reasonable cause for referral fees. In Idaho, a written contract concerning the referral fee must exist before the seller signs the listing agreement,

1,094,751 active lawyers live in the United States. 71.4% are male.

Source: American Bar Association

or the buyer signs the representation agreement or a purchase offer.

Iowa similarly prohibits requesting a referral fee after a listing agreement has been signed or a purchase offer has been accepted.

Further, to protect relocating consumers from companies that threaten to reduce benefits if a referral fee isn't paid, many states—such as Alabama, Idaho, Kansas, Kentucky, Louisiana, New York, and Tennessee—have passed laws prohibiting such interference in client-licensee relationships. Other states, including Connecticut, Illinois, Kansas, and Kentucky, prohibit counseling a client to amend or terminate an agency agreement in order to receive a referral fee.

Even with the trend to prohibit, or at least narrowly limit, after-the-fact referral fees, you can still take steps to protect yourself from a relocation company or other licensee demanding such a fee.

- Routinely check with buyers and sellers at your first meeting to determine if their move is related to their job. If so, ask if their employer is providing relocation benefits.
- If buyers and sellers are receiving relocation benefits, determine the relocation company's referral fee policy and what benefits it offers to the employee.
- If you agree to pay an after-the-fact fee, get the specifics in writing and signed by both parties.
- Advise buyers and sellers in writing that you'll be paying the referral fee, and specify the amount. Provide this disclosure when you begin representing the buyers or sellers or as soon as you agree to pay the fee. Such a disclosure is not only a good business practice, but also a way to ensure your compliance with applicable state laws or real estate commission regulations.
- If you're a broker, make your salespeople aware of the need for a written agreement with the relocation company or other broker and a written disclosure to the referred party.
- Unless you have a blanket referral agreement with a relocation company or another broker, be sure you have a separate agreement for each transaction.

In light of the trend toward limiting after-the-fact fees, you should feel comfortable insisting that relocation companies have a fee agreement with you upfront. Then, if you're surprised with an after-the-fact fee demand, consult with your attorney. You might just find that it's illegal for the relocation company to collect. RM

Goodman is an attorney and partner in the law firm Greenbaum Rowe Smith Ravin Davis & Himmel LLP, Woodbridge, N.J. You can reach him at bgoodman@greenbaumlaw.com.

What Duty Do You Have to Inspect Seasonal Rentals?

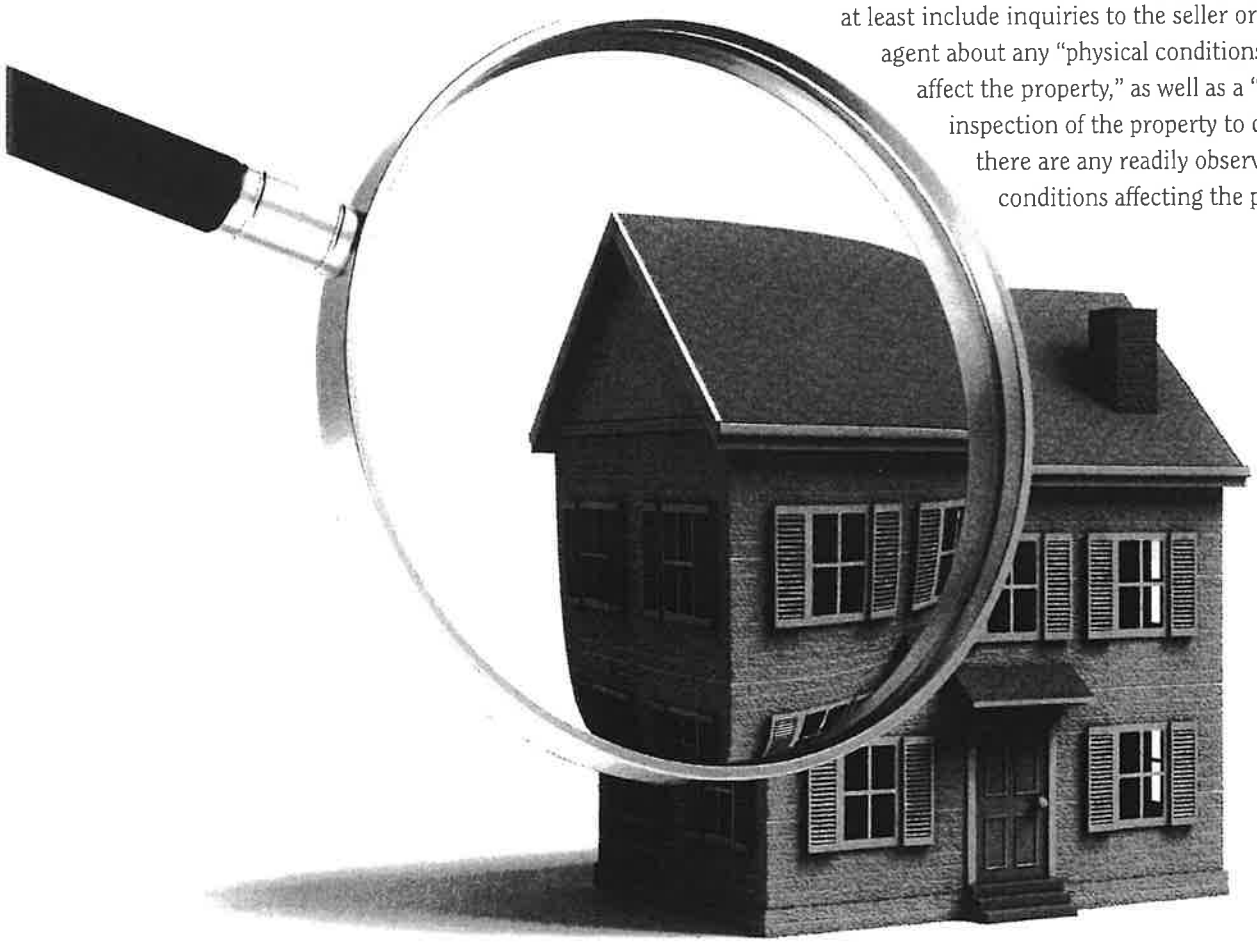
By Barry S. Goodman, Esq.

You are looking forward to what you hope will be a busy season for seasonal rentals. However, do you know what duty you have to inspect the premises for obvious and not so obvious defects that could cause whoever is renting the premises to suffer an injury? Could you be liable if there are construction defects, such as missing handrails or steps that are higher than the construction code permits? What level of inspection does the Real Estate Commission require? Is the duty to inspect a seasonal rental any different than the duty to inspect an open house?

A recent decision, Reyes v. Egner, deals with these questions. Whether you represent landlords, tenants, or both, it is critical that you understand what duty you have to inspect a seasonal rental for possible defects.

THE REAL ESTATE COMMISSION'S REQUIREMENTS

The N.J. Real Estate Commission's regulations require that every real estate "licensee shall make reasonable effort to ascertain all material information concerning the physical condition of every property for which he or she accepts an agency or which he or she is retained to market as a transaction broker."[1] Such a "reasonable effort" must at least include inquiries to the seller or the seller's agent about any "physical conditions that may affect the property," as well as a "visual inspection of the property to determine if there are any readily observable physical conditions affecting the property."[2]



The Commission defines "material information" as including where "a reasonable person would attach importance to its existence or non-existence in deciding whether or how to proceed in the transaction, or if the licensee knows or has reason to know that the recipient of the information regards, or is likely to regard it as important in deciding whether or how to proceed, although a reasonable person would not so regard it."[3] Of course, real estate licensees must reveal such material information not only to their own client but, "when appropriate to any other parties to a transaction,"[4] including to a tenant of a seasonal rental.

DUTY TO INSPECT AND WARN VISITORS IN AN OPEN HOUSE

In one of the key cases dealing with a real estate licensee's duty to inspect premises, the N.J. Supreme Court decided in Hopkins v. Fox & Lazo, REALTORS®[5] that a licensee has a duty to warn about property defects to potential home buyers and members of the public who attend an open house the licensee conducts. This duty extends "only to defects that are reasonably discoverable through an ordinary inspection of the home undertaken for purposes of its potential sale."[6] Significantly, the Court added that "[t]he broker is not responsible for latent defects that are hidden and of which the broker has no actual knowledge."[7]

In Hopkins, a person visiting an open house fell and was injured when she did not see that there was a step down because the floor covering on the step and both floor levels were the same pattern of vinyl. Of course, the woman who fell had never been to the house before going to the open house that day. Under such circumstances, the Court held that both the real estate licensee and the homeowner could be liable for the injury.

DOES HOPKINS APPLY TO SEASONAL RENTALS?

The key issue in Reyes v. Egner was whether or not the Hopkins decision concerning open houses should be extended to seasonal rentals. Since the N.J. Supreme Court's decision ultimately turned on the facts in Reyes, those facts are critical to understand the outcome of the case.

In Reyes, Colombia Reyes ("Colombia") decided to rent a three-bedroom house for two weeks over the Labor Day holiday in Stone Harbor. Prudential Fox & Roach listed the rental, which was owned by Harry and Holly Egner, and provided a one-page form lease that Colombia and the Egners signed. The rent was $4,050 and the Egners paid Prudential a commission of 12 percent of that amount.

The rental premises has an elevated rear deck that is adjacent to the master bedroom, is approximately four-feet wide and leads to a six-step stairway that connects it to the ground below. The deck can be accessed through sliding glass doors from the master bedroom, which opens to a small wooden platform on the top of the deck. The platform is about seven inches below the bottom of the sliding glass door and there is another six and a half inch drop from the platform to the deck. The deck's wooden boards and the platform run in the same direction and essentially are the same color, which is similar to the wood coloring in the master bedroom. There also are no handrails attached to either the platform or the deck. Both the height of the step exiting the master bedroom and the lack of handrails appear to have been construction code violations. Colombia did not visit the property or take any visual tour of the property before moving in with her parents and other guests. On the ninth day of their stay in the house, Colombia's father, Hermes Reyes ("Reyes"), opened the sliding glass doors for the first time to go out onto the deck. He said he was unaware that there was a drop and, when he lost his balance, there was no handrail for him to grab. As a result, he fell down the stairs onto the ground and suffered severe injuries. Reyes and his wife then filed suit against the Egners and Prudential.

THE APPELLATE DIVISION'S SPLIT DECISION

After the trial court held that neither Prudential nor the Egners owed any duty of care to conduct a reasonable inspection of the property for the protection of Reyes, the Appellate Division partially reversed, holding that the lessors, the Egners, owed a duty of care to Reyes but that the broker, Prudential, did not. With regard to the Egners, the Appellate Division held that such a lessor can be liable "even in the absence of a lessor's concealment, if the plaintiff demonstrates that the lessor has failed to disclose a condition 'which involves unreasonable risks of physical harm to persons on the land' if '(a) the lessee does not know or have reason to know of the condition or risk involved, and (b) the lessor knows or has reason to know

of the condition, and realizes or should realize the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk."[8] The Court also noted that the fact that the injuries were caused by possible construction code violations was not the determinative but could be used as evidence at trial.[9]

With regard to Prudential, the Appellate Division rejected Reyes' argument that the Hopkins decision concerning the duty of real estate licensees to inspect and warn in an open house situation should be extended to this case. The Court noted that, in Hopkins, the N.J. Supreme Court specifically indicated that "the broker is not a guarantor of the safe condition of the premises" and that "the broker's duty 'does not replicate the more comprehensive duty owed by homeowners,' especially since they do not have the same intimate knowledge of the structural flaws or physical defects in the premises as the homeowners."[10]

In addition, the Appellate Division indicated that Prudential only undertook a "limited scope" of responsibility by agreeing to advertise the property, collect rent and make emergency repairs. Moreover, the "walk-through" of the house that the Prudential agent did months earlier when she represented the Egners in the purchase of the property satisfied the Commission's duty to inspect the premises at the time of sale.[11]

The Appellate Division also rejected Reyes' contention that the statement in the Consumer Information Statement (CIS) that a seller's agent "must disclose defects of a material nature affecting the physical condition of a property which a reasonable inspection by the licensee would disclose"[12] was applicable. The Court noted that the Commission's regulations exempt the CIS requirement for residential rentals for not more than 125 consecutive days.[13] As a result, Court declined to extend the Hopkins decision and invited the N.J. Supreme Court to do so if it believed that would be appropriate.[14] The N.J. Supreme Court then agreed to review the decision as to Prudential.

THE SUPREME COURT'S FACT-SENSITIVE DECISION NOT TO EXTEND HOPKINS

In a 3-3 decision (with one Justice recusing herself),[15] the N.J. Supreme Court affirmed the Appellate Division's decision that the Hopkins duty of care to warn about any reasonably discoverable dangerous conditions in a house does not extend to a real estate licensee handling a short-term lease of a summer rental under the facts of this case. The Court concluded that the decisive issue was that Reyes had been in the property for nine days before he fell, which allowed him "ample opportunity" to inspect and discern the physical defects that might be on the property.[16]

The Court explained that its "holding in Hopkins did not suggest an intent to require that a REALTOR® provide an ongoing guaranty of a property's safety, nor was it designed to protect occupants of a property from personal responsibility for awareness of their surroundings and the dangers inherent in those surroundings."[17] Significantly, the Court also noted that the duty imposed by the Commission to make a reasonable effort to ascertain all material information pertaining to the physical condition of a property and to disclose it as required in the regulations "does not extend to the imposition of liability in the scenario presented in this matter, where a tenant has, for nine consecutive days, been in possession of and in residence at the rental property."[18]

The three dissenting Justices contended that, although a broker would have a right of indemnification against the owner of the property, Reyes should be permitted to also sue Prudential.[19] The dissent therefore would have imposed "a duty on brokers, such as Prudential, to inspect and warn short-term renters of reasonably discoverable dangers on the premises."[20]

CONCLUSION

As a result of the decision in Reyes, there presently is no duty for a real estate licensee to inspect a seasonal rental property and to warn renters about any defects that they discover. However, caution is advised in light of the fact-sensitive decision of the N.J. Supreme Court that in large part was based upon the fact that Reyes was in the rental property for nine days before he fell. It is unclear if the N.J. Supreme Court would have reached the same decision if Reyes had fallen within the first few hours of moving into the seasonal rental.

It therefore is strongly advised that real estate licensees continue to make reasonable efforts to ascertain all material

information concerning the physical condition of every seasonal rental property and to disclose any potentially dangerous conditions that they discover. It also is recommended that you include in listing agreements, and in a written disclosure to renters, that you are not inspecting or warranting the condition of the property and that the renter should do a walk-through of the property before signing the lease and, certainly, before taking occupancy. Finally, you should include in all listing agreements for seasonal rentals that the owner will defend and indemnify you if a lawsuit is brought by any person for injuries that arise from the condition of the property.

Even if there is no duty to inspect and warn, it still makes sense for you, as a real estate professional, to also recommend to the owner that the owner correct any defects of which you are aware and to advise potential tenants about any such problems. Such common sense steps will help to ensure that you will have minimized any possibility of liability for injuries in a short-term rental. ■

[1] N.J.A.C. 11:5-6.4(b).
[2] N.J.A.C. 11:5-6.4(b)1.
[3] N.J.A.C. 11:5-6.4(b)2.
[4] N.J.A.C. 11:5-6.4(c).
[5] 132 N.J. 426 (1993).
[6] Id. at 448.
[7] Id. at 448-449.
[8] Reyes v. Egner, 404 N.J. Super. 433, 456 (App. Div. 2009).
[9] Id. at 458.
[10] Id. at 464.
[11] Id. at 466.
[12] N.J.A.C. 11:5-6.9(h).
[13] N.J.A.C. 11:5-6.9(d)2.
[14] Reyes v. Egner, 404 N.J. Super. 433, 466-467 (App. Div. 2009).
[15] Any decision by the NJ Supreme Court to overturn an Appellate Decision opinion must be by majority of the Justices of the Court voting on the matter. Where there is a 3-3 decision, the ruling of the Appellate Division is deemed to be affirmed.
[16] Reyes v. Egner, 201 N.J. 417, 421-422 (2010).
[17] Id. at 421.
[18] Id. at 422.
[19] Id. at 429-431.
[20] Id. at 435.

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith, & Davis LLP, focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders' and partnership disputes. He is the General Counsel for the New Jersey Association of REALTORS®.

Opinion 26 Revisited

By Barry S. Goodman, Esq.

As a real estate agent, you know that you have an obligation to provide a notice to buyers and sellers that they have a right to hire an attorney. This notice must appear as the cover of any sales contract you prepare. However, is that all you have to do to satisfy the mandates of the case known as Opinion 26? If the buyer or seller does not hire an attorney, what can you do to assist a buyer or seller to ensure the transaction will close? What do you have to do to satisfy your obligations under Opinion 26 even if the buyer and seller hire attorneys?

Although you undoubtedly are familiar with the requirement that you provide the Opinion 26 notice to buyers and sellers, you also must be familiar with your other responsibilities under Opinion 26, as well as the opportunities that Opinion 26 provides to you to assist buyers and sellers when they decide not to incur the cost of hiring a lawyer.

Background

In 1995, the New Jersey Supreme Court decided in *In re: Opinion No. 26* that it is in the public interest to permit buyers and sellers of residential real estate to choose whether or not to incur the cost of hiring a lawyer. If they choose not to hire a lawyer, then real estate brokers and salespersons (collectively referred to as "brokers" in this article) and title agents can provide certain assistance in the title closing process as long as the broker provides the mandatory notice to the buyer and seller advising them of their right to hire a lawyer.

Opinion 26 originally was issued by the Committee on the Unauthorized Practice of Law ("UPL Committee") in response to a request by the New Jersey State Bar Association to prohibit what is known as the "South Jersey Practice." Under this practice, real estate brokers and title agents have provided assistance to buyers and sellers in South Jersey who have not retained an attorney to represent them in the title closing process for over half a century. In Opinion 26, the UPL Committee declared that such assistance by brokers and title agents constitutes the unauthorized practice of law.

Brokers in South Jersey were outraged by this decision since they believed it would severely impact real estate sales in South Jersey where many of the 60-75 percent of buyers who choose not to incur the cost of hiring a lawyer do so to be able to afford to buy a home. In addition, South Jersey brokers sought to preserve their role as the "quarterback" of the transaction, including setting a "time of the essence" closing date in the contract, so that the parties (and brokers) will have certainty as to when the settlement will take place.

A cornerstone of the Court's decision was its requirement that a written notice be provided by the broker to every buyer and seller before they sign a broker-prepared contract of sale and that the notice must be attached as the cover page of the contract.

NJAR® agreed to support South Jersey brokers and advocate the right of buyers and sellers to choose whether or not to hire an attorney. After NJAR® convinced the New Jersey Supreme Court to stay Opinion 26 so that a full record could be created upon which the Court could decide whether or not to uphold the UPL Committee's decision, the Court appointed a Special Master to conduct a trial concerning the propriety of the South Jersey Practice.

After a lengthy trial, the Special Master recommended to the Supreme Court that the South Jersey Practice be permitted as long as there was a disclosure to buyers and sellers about their right to hire an attorney and other requirements were met. The Supreme Court then rendered its decision permitting the South Jersey Practice to continue with certain conditions.

The Supreme Court's Decision

The Court emphasized that its decision to permit brokers and title agents throughout New Jersey to assist buyers and sellers who choose not to hire a lawyer was based upon the "public interest." In determining the public interest, the Court balanced the Court's belief that many aspects of the South Jersey Practice constitute the practice of law and that buyers and sellers would be well served to hire a lawyer against the fact that there was no evidence that any harm had befallen the public as a result of the South Jersey Practice.

The Court noted that the South Jersey Practice also appears to save money for consumers who choose not to incur the cost of attorney's fees. It concluded that "the parties must continue to have the right to decide whether those savings are worth the risks of not having lawyers to advise them in what is almost always the most important transaction they will ever undertake."

A cornerstone of the Court's decision was its requirement that a written notice be provided by the broker to every buyer and seller before they sign a broker-prepared contract of sale and that the notice must be attached as the cover page of the contract. If the written notice is not given, then the broker will be deemed to have engaged in the unauthorized practice of law, which can subject the broker to criminal sanctions and civil liability for any damages.

In addition to providing the required notice, the Court set forth specific requirements for brokers who assist buyers and sellers in lawyerless closings that brokers must carefully follow.

Permitted, Required and Prohibited Conduct by Real Estate Brokers

The following list provides the requirements set forth by the Court in Opinion 26 and some guidelines concerning the assistance that a broker can provide to buyers and sellers in the title closing process.

1. **Preparation of Contract.** A broker has the right to prepare the contract of sale. However, the broker must include the Opinion 26 notice advising the buyer and seller about their right to hire an attorney as the cover page of the contract when the contract is delivered to the buyer and seller.
2. **Advice Regarding Notice.** The broker must personally advise the buyer and seller to read the notice before signing the broker-prepared contract.
3. **Broker's Copy of Notice.** Although the Supreme Court did not require that the broker obtain a copy of the notice signed and dated by the buyer and seller, it is strongly recommended that the broker have the buyer and seller sign and date a copy of the notice so that the broker can bring it to the closing. This practice will help to avoid any later claim that the notice was not properly provided.

4. **Notice if Contract Not Personally Delivered.** If the broker does not personally deliver the broker-drawn contract, then the broker must contact the buyer and seller regarding the mandatory notice by speaking to them personally or by telephone. Even in this circumstance, it is strongly recommended that the broker then obtain a signed copy of the notice indicating when and how the buyer and seller were provided with the notice. If this is not feasible, it would be prudent for the broker to send a letter to the buyer and/or seller by certified mail, return receipt requested, stating how and when the notice was provided.
5. **Ordering Title Search.** A broker is permitted to order the title search on behalf of the buyer when the buyer has chosen not to hire an attorney.
6. **Inspections and Tests.** The broker can order and assemble all necessary tests and inspections, as well as the survey, when the buyer is not represented by an attorney. Similarly, if the seller is not represented by an attorney but has a responsibility to provide certain documents, such as a certificate of occupancy or a smoke detector certificate, the broker can arrange for these documents.
7. **Deed and Affidavit of Title.** The broker can arrange for an attorney to prepare the deed and affidavit of title for the seller but cannot prepare either of these conveyancing documents.
8. **Clearing Up Title Exceptions.** A broker can assist the seller in clearing up routine exceptions to title, which are known as Type 1 exceptions (preprinted items in all title reports that deal with such issues as marital status and name changes) and Type 2 exceptions (judgments, tax liens and other money liens that typically are paid at the closing). However, a broker is prohibited from assisting in clearing up Type 3 exceptions (easements, covenants and the like) and Type 4 exceptions (other serious legal objections to title). The broker has a duty to recommend that the parties retain an attorney to deal with any unusual or serious exceptions in the title report.
9. **Necessity of Notice at Closing.** Since the title agent must ask the buyer and seller at the settlement if and when they received the mandatory notice, it is recommended that the broker bring the notice signed and dated by the buyer and seller to the closing to avoid any problems.
10. **Recommending an Attorney.** Although the Court did not impose any new duty on brokers to recommend an attorney, it re-emphasized the existing duty under Real Estate Commission regulations for a broker to recommend an attorney whenever the situation appears to warrant it.

Conclusion

NJAR®'s victory in this matter allowed brokers throughout New Jersey to provide assistance to buyers and sellers that historically only had been provided in South Jersey. Indeed, the Supreme Court's decision unquestionably created opportunities for brokers, including increased control over the closing process and the timing of the closing, and permitted certain buyers who choose to save the cost of attorney's fees to purchase homes they otherwise may not have been able to purchase.

Competitive forces and a difficult real estate market may very well necessitate that all brokers in New Jersey be able to assist buyers and sellers who choose not to hire a lawyer. As a result, all brokers should become familiar with the Court's requirements in Opinion 26. ■

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis LLP, is General Counsel for NJAR®. He is a trial attorney who focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders and partnership disputes.

Barry S. Goodman, Esq.

NEW JERSEY REALTORS® PREVAILS IN CASE LIMITING MUNICIPAL LICENSING FEES

By Barry S. Goodman, NJ Realtors® Legal Counsel

In December 2011, Hamilton Township passed an ordinance imposing a licensing fee on all apartments that are rented for more than 30 days, including single-family homes. The annual fee for each apartment was initially $100, but the fee was reduced to $85 and later reduced even further to $65. This ordinance affected approximately 1,100 units in Hamilton Township, including 498 apartment units at the development owned by Timber Glen. Timber Glen objected to the licensing fee — which would have cost the company $32,370 per year based upon the $65 fee per unit — and filed a suit challenging the ordinance.

New Jersey Realtors® won a significant victory for tenants and the rental industry when the court held that municipalities are limited in the licensing fees they can charge for apartments. In the case, *Timber Glen Phase III, LLC v. Township of Hamilton*, the Appellate Division held that municipalities can only impose a licensing fee with regard to residential rental units if they are rented for a term of less than 175 consecutive days by a person having a permanent residence somewhere else. As a result, a licensing fee that was imposed by Hamilton Township on Timber Glen and other apartment owners was rendered invalid. This ruling applies to all municipalities in New Jersey.

Since a municipality only has the authority that is vested in it by statute or the New Jersey Constitution, Hamilton Township argued that it had the authority to impose the licensing fee under what is known as the Licensing Act, which contains broad language that allows municipalities to license "hotels, boarding housings, lodging and rooming houses, trailer camps and camp sites, motels, furnished and unfurnished rented housing or living units and all other places and buildings used for sleeping and lodging purposes." Timber Glen, on the other hand, argued that an Amendment to the Licensing Act in 1998, which contains narrow language concerning the scope of a municipality's authority to license and impose fees for rental units, should be applied rather than the broader section upon which Hamilton Township relied. The narrower section of the Licensing Act allows municipalities to impose license fees with regard to "the rental of real property for a term less than 175 consecutive days for residential purposes by a person having a permanent place of residence elsewhere."

After the trial court ruled in favor of Hamilton Township, Timber Glen appealed. New Jersey Realtors® filed an amicus application supporting the position of Timber Glen and also arguing that the additional licensing fees would be passed on to tenants, who already were struggling to afford the high rents for apartments in New Jersey, especially in these difficult economic times. The New Jersey Apartment Association and the New Jersey Builders Association also appeared on behalf of Timber Glen. The New Jersey League of Municipalities appeared as an amicus on behalf of Hamilton Township's position.

The Appellate Division reversed the trial court's decision and held that the narrower language limits the broader language in the Licensing Act. Thus, municipalities can only impose a licensing fee with regard to a residential rental that is for a term of less than 175 consecutive days by a person with a permanent residence elsewhere. The court held that if it were to adopt Hamilton Township's argument, there would have not been any need to add the narrower language to the Licensing Act since it already would have been part of the broader language that Hamilton Township relied upon. The court refused to render the narrower language meaningless.

As a result, if you live or work in a municipality that imposes improper licensing fees for residential apartments, it is strongly suggested that you contact your local board or Bruce Shapiro, New Jersey Realtors®' local government and Regulatory Affairs Coordinator. ■

Are You Complying with the Americans With Disabilities Act?

By Barry S. Goodman, Esq.

Has one of your sellers ever said to you that his vision is so bad that he could not read the listing agreement? Maybe one of your buyers has said that she is hard of hearing and could not understand what you were saying about the offer that you were about to submit to the seller. What obligation do you have if a person in a wheelchair is unable to get into your office because there is a small step at the front door? Does the number of people working in your office affect how you must deal with these issues?

The United States Department of Justice recently revised its regulations implementing the Americans With Disabilities Act ("ADA") dealing with such issues[1]. The new regulations took effect on March 15, 2011, except with regard to the new standards for access to buildings that will take effect March 15, 2012. All real estate brokers and salespersons therefore must know what their obligations are when dealing with somebody who has a covered disability.

BACKGROUND OF THE ADA

Title III of the ADA prohibits discrimination against any person with a disability by businesses that provide goods or services to the public, which are called places of "public accommodation" in the ADA[2]. Such places of public accommodation include a "sales or rental establishment," which encompasses a real estate brokerage office. A person is considered to have a "disability" under the ADA if he or she has any physical or mental impairment that substantially limits one or more of the person's major life activities or has a record of or can be regarded as having such an impairment[3]. Although this is a very broad definition, the most common issues in places of public accommodations are a person's vision or hearing, or a person being in a wheelchair.

Under the ADA, a real estate brokerage office is required to take "steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services."[4] The only exception would be if the brokerage office can demonstrate that "taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense."[5] The ADA applies to places of public accommodation regardless of the number of employees or salespersons in the office.

APPLYING THE ADA TO REAL ESTATE TRANSACTIONS

Real estate licensees are required to provide people who are blind or have low vision with all relevant documents in a format that the person can use, such as on a computer disk or audio cassette. As explained by the Department of Justice, "[i]t may be effective to e-mail an electronic version of the documents so the client can use his or her screen-reading technology to read them before making a decision or signing a contract. In this situation, since complex financial information is involved, simply reading the documents to the client will most likely not be effective. Usually a customer will tell you which format he or she needs. If not, it is appropriate to ask."[6] The bottom line is that the auxiliary aids and services that the broker provides must ensure effective communications with the person who has the disability.

Similarly, if a person is deaf or has some other hearing impairment, a real estate licensee likely will have to arrange for someone to provide sign language or for an oral interpreter because of the complexity of the issues involved in a real estate contract. The new regulations specifically permit the use of new technology, which could include video remote interpreting (often called "VRI"), which is a service that allows for video conferencing of an interpreter who is at another location. Exchanging written notes with a person who has a hearing impairment may be sufficient if the communications are less complex than reviewing a sales contract or lease.

ADA OFFICE ACCESSIBILITY REQUIREMENTS

The new ADA regulations revise the 1991 standards covering architectural barriers in existing buildings. If a building complies with the 1991 standards, then no modification will be required unless there are renovations to the building that alter any of the elements.

However, if the building has architectural barriers that do not comply with the 1991 standards, then the broker will have the choice of complying with the 1991 or 2010 standards if the renovation is done before March 15, 2012. After March 15, the building will have to be brought up to the 2010 standards if they are "readily achievable."

Some examples of architectural barriers that must be removed or remediated are replacing an entrance that has a step or steps with a ramp or providing an alternate accessible entrance, widening doorways to accommodate wheelchairs, installing accessible door hardware, creating access from parking areas, making bathrooms accessible, and widening aisles throughout the office so that persons in wheelchairs can move around the office.

The regulations specifically provide that "grandfather provisions" that often are found in local building codes do not exempt businesses from their obligations under the ADA. It therefore is recommended that brokers consult with an architect or some other professional far in advance of March 15, 2012 to ensure that their offices comply with these standards.

ADA COMPLIANCE FOR COURSE WORK

Any private entity that offers examinations or courses for real estate licenses must comply with the ADA not only in providing the courses but also with regard to access to and within the school. This would include providing auxiliary aids and services where applicable, such as for blind, deaf or speech impaired persons. However, the ADA specifies that the school is not required to provide students "with personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses, or hearing aids; or services of a personal nature including assistance in eating, toileting, or dressing."[7]

CONCLUSION

Any time that you, as a real estate licensee, become aware that a person has a covered disability that would effect that person's ability to understand documents or what is being discussed, it is important for you to ask the person what can be done to allow the person to more fully participate. Often, the person will be able to take care of the issue him or herself, even though you cannot require the person to do so.

You have an obligation to comply with the ADA to ensure that person's participation unless compliance would create an undue burden for you. As a result, you have to provide necessary auxiliary services and aids, as well as have accessible offices, so that persons with covered disabilities can fully participate in and understand all necessary aspects of a real estate transaction that you are handling.

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith, & Davis LLP, focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders' and partnership disputes. He is the General Counsel for the New Jersey Association of REALTORS®.

Barry S. Goodman, Esq.

1. The Department of Justice has put out a booklet entitled "ADA Update: A Primer For Small Business" summarizing the new regulations, which can be found at http://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.htm.

2. 42 U.S.C. § 12181, et seq. There are five sections in the ADA: (1) Title I prohibits discrimination by employers who have 15 or more employees; (2) Title II prohibits discrimination by state and local governments and transportation authorities; (3) Title III prohibits discrimination in places of public accommodation; (4) Title IV covers telecommunications; and (5) Title V includes miscellaneous provisions. A real estate broker who has 15 or more employees, including salespersons, should consult an attorney about Title I since employment law under the ADA is beyond the scope of this article.

3. (1) The phrase *physical or mental impairment* means –

   (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory (including speech organs); cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine;

   (ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

   (iii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism;

   (iv) The phrase physical or mental impairment does not include homosexuality or bisexuality.

   (2) The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

   (3) The phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

   (4) The phrase is regarded as having an impairment means—

   (i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;

   (ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

   (iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

   (5) The term disability does not include—

   (i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

   (ii) Compulsive gambling, kleptomania, or pyromania; or

   (iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

4. 36 C.F.R. § 36.303(a). Examples of auxiliary aids and services include the following:

   (1) Qualified interpreters; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; on-site or through video remote interpreting (VRI) services; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

   (2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

   (3) Acquisition or modification of equipment or devices; and

   (4) Other similar services and actions.
   36 C.F.R. § 36.303(b).

5. 36 C.F.R. § 36.303(a). A business's overall resources (rather than a comparison to the fees paid by the customer meaning the interpreter) determine what constitutes an undue burden. If a specific communications method would be an undue burden, a business must provide an effective alternative if there is one."

6. The United States Department Justice, "ADA Update: A Primer For Small Business," at p. 6. The United States Department of Justice, "ADA Update: A Primer For Small Business," at p. 7.

7. 36 C.F.R. § 36.306.

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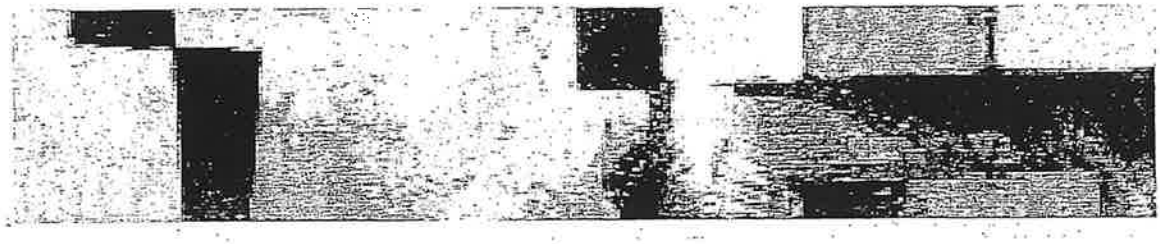

MARKETING THROUGH SOCIAL MEDIA: DO YOU UNDERSTAND THE RISKS?

Barry S. Goodman*

This article originally appeared in the April 2010 edition of *New Jersey REALTOR®*.

It seems as though everybody is blogging or otherwise using social media to market themselves. Why should you be any different? Marketing through social media can be a cost effective replacement or supplement to newspapers ads, postcards and other mailings. It doesn't cost you anything but time and you can use it to promote open houses, get clients, solicit new agents for an office, and stay in touch with agents who currently are in your office.

Whether you are a fan of Facebook, LinkedIn, RealTown, Twitter or any other website for blogging, there are significant legal issues that you, as a broker or a salesperson, must keep in mind in order to avoid a lawsuit or sanctions being imposed by the New Jersey Real Estate Commission (the "Commission") or some other agency.

WHAT IS SOCIAL MEDIA?

Social media is an extremely broad term that can relate to any online communications, which could include blogging, emails, or any website that allows for interfacing. The National Association of REALTORS® ("NAR") has defined "using social media" generally as meaning "posting or uploading content to all types of interactive electronic communications including but not limited to websites, weblogs, social networks, discussion boards, and listserves."

LEGAL IMPLICATIONS OF SOCIAL MEDIA USAGE

Any time you use social media as a marketing tool, there are numerous legal risks that are involved. Such marketing may include merely referring to yourself as a REALTOR® or real estate licensee, giving real estate advice, advertising or otherwise marketing properties, soliciting buyers or sellers, or simply providing information that relates to your role as a real estate licensee.

For example, whenever you undertake such marketing, you should ensure that you are fully complying with the Commission's regulations concerning advertising and treat such communications in the same way you would if you were speaking to someone face-to-face, including avoiding any misleading or deceptive comments that could trigger a violation of the Consumer Fraud Act, (and its mandatory award of treble damages and attorneys fees). For example, if you are providing information about a house in a blog, make sure that you not only disclose all material information pertaining to the physical condition of the property as required under the Commission's regulations but that you also clearly identify yourself as a salesperson, broker-salesperson or broker and indicate your regular business name, as well as the regular business name of the individual, partnership, firm or corporate broker through whom you are licensed in the form required by the Commission.

In addition, NAR's Code of Ethics fully applies to social media usage pursuant to Standard of Practice 1-2. This includes but is not limited to statements that you might make in a blog about properties and other agents. For example, Article 2 of the Code provides that "REALTORS® shall avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property or the transaction...." In addition, Article 15 provides the following prohibition against statements concerning competitors: "REALTORS® shall not knowingly or recklessly make false or misleading statements about competitors, their businesses, or their business practices."

You also should be aware that the term "REALTOR®" is trademarked. As a result, NAR has indicated that certain uses of REALTOR® are acceptable as a name under which you blog, such as when you use it in connection with your actual name (e.g., janesmithrealtor, realtorjsmith, realtorjanechicago) but that it is unacceptable to use REALTOR® in connection with fictitious names (e.g., chicagorealtor, realtormom, hotshotrealtor, cyberrealtor, janechicagorealtor).

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Moreover, there are numerous other legal issues that can arise from blogging:

- **Defamation** - In addition to violating the Code of Ethics with regard to comments about other agents, you should be careful not to make any unsubstantiated statements about other licensees, buyers, sellers, or anyone else since you could be faced with a defamation lawsuit. Even if you think you are anonymously posting the statements under a pseudonym, it might be possible for the defamed person to find out who posted the slanderous remarks.

- **Testimonials** - The Federal Trade Commission passed regulations that went into effect December 1, 2009, requiring that all testimonials or other endorsements reflect the honest opinions and true experience of the endorser. If the endorser is being paid, whether through free products or monetary compensation, or there is some other material connection between the advertiser and the endorser, this must be disclosed. Fines can be imposed for up to $11,000 per violation and the violator could be required to reimburse consumers for all financial losses stemming from the inappropriate testimonials.

- **Identity Theft** - Not all people who you admit into your circle of virtual friends really will be interested in your marketing efforts. Be careful what you include in your blogs since the information may very well be viewed by people who are seeking to steal your identity or may be disseminated beyond your friends to other people who are seeking to steal it.

- **Broker Liability** - If a salesperson posts a blog that violates any law, a broker may very well be liable for that blog. Brokers therefore should have reasonable policies in place that are uniformly enforced concerning salespeople using blogs.

- **Creation of Client Relationships** - Be careful if you are soliciting buyers and sellers through a blog. You should make sure that you timely provide a Case Information Statement to a potential client and otherwise comply with all Commission regulations concerning such buyers and sellers.

- **Discrimination/Harassment** - Brokers should have written office policies prohibiting any discrimination or harassment and immediately should investigate and stop any discrimination or harassment, whether in a blog or otherwise.

- **Invasion of Privacy** - The law is evolving with regard to whether or not an employer has any right to review blogs of employees. This issue may depend upon whether or not a computer, blackberry or the like supplied by the employer was used. Courts also have looked at whether or not the employer obtained the password for a blog from the employee through any type of coercive means.

- **Antitrust** - As with any form of communication, you should avoid discussions in blogs with other licensees about commission rates or other business terms that potentially could be construed as attempting to conspire or agreeing to fix such rates or terms, which would violate antitrust laws.

ENJOY BLOGGING BUT AVOID THE RISKS

Social media can be a very powerful marketing tool but you have to assume that the entire world will read your blog, including other agents, brokers, buyers, sellers, the Commission, etc. Even personal postings that have nothing to do with real estate might be used by buyers, sellers and potential employers in the future to decide whether or not to hire you. As a result, be careful what you post. Indeed, if the posting is in any way real estate related, then you must be even more careful to comply with all of the rules and regulations of the Commission and other State and Federal agencies, as well as NAR's Code of Ethics.

In order to ensure such compliance, brokers should have a written policy concerning the use of social media by their salespeople. It is recommended that the policy be signed by the broker's agents at least once a year, be included in the office personnel handbook, and be discussed at least once a year in an office meeting. The policy also should be consistently enforced, including but not limited to disciplinary action for violating the policy.

The bottom line is BLOG BUT BLOG RESPONSIBLY!

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*Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith, & Davis LLP, focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders' and partnership disputes. He is the General Counsel for the New Jersey Association of REALTORS®.

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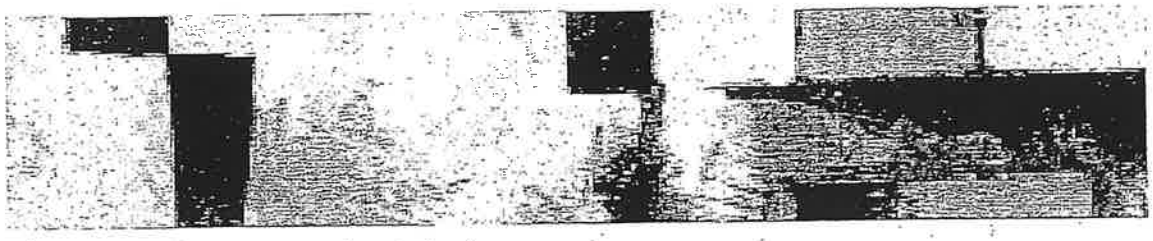

REBATES FOR BUYERS: ARE THEY RIGHT FOR YOU?

Barry S. Goodman*

Buyers approach you about representing them to find a home in New Jersey and immediately tell you they expect you to pay them a rebate from part of your commission before they will agree to let you represent them. Can you pay a rebate to buyers in New Jersey? What about the sellers? If you can pay any rebate, what conditions must you meet as a real estate licensee before you pay any such rebate?

The questions and answers below will provide you with the information you need to decide whether or not you should offer rebates.

THE PROHIBITION AGAINST REBATES

Q: Aren't rebates to buyers and sellers prohibited in New Jersey?

A. They historically have been prohibited. Section 17(k) of the Licensing Act prohibited licensees from paying any rebate, profit, compensation or commission to anyone who does not have a real estate license. The only exception was for free, discounted or other services or products that are allowed under Section 17(i) of the Act.

Q: Has the law changed?

A: You bet it has! Section 17(k) of the Act recently was amended to allow real estate brokers to pay rebates to buyers under certain conditions. However, the Act still prohibits rebates to sellers.

Q: Why was this amendment passed?

A: A broker who operated in many other states where rebates to buyers are allowed had a model of representing buyers and providing them with a rebate of a portion of its commission on the transaction. They argued that buyers should have the right to negotiate commissions in much the same way as sellers can negotiate the commission in the listing agreement. In these difficult economic times, the Legislature decided that such rebates were pro-consumer and, as a result, passed this legislation, which the Governor signed into law.

Q: So you are saying that only a broker can provide a rebate and that the rebate only can be provided to buyers?

A: That's correct. Only a real estate broker, not a real estate salesperson, broker-salesperson or referral agent, can provide a rebate. In addition, the law is very clear that the rebate only can be paid to buyers, not sellers, lessors or lessees.

Q: If I decide to give rebates to buyers, does it have to be in writing or can I continue to have a verbal relationship with my buyers?

A. Any agreement to provide a rebate to buyers must be in writing and entered into at the onset of the brokerage relationship with the buyers. The writing can be a written document, an electronic document or a buyer agency or other agreement.

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Q: Are there any tax implications for the buyers if they receive a rebate?

A: There may very well be. The broker providing the rebate therefore must recommend to the buyers that the buyers contact a tax professional concerning the tax implications of receiving the rebate. It also is recommended that the broker get information from the buyers to provide the buyers with a 1099 tax form.

Q: Do I have to tell the listing agent that I am providing a rebate to the buyers?

A: Yes. Any broker providing a rebate to buyers must disclose the payment of the rebate to all parties involved in the transaction, including but not limited to the listing agent, the sellers and the mortgage lender, if applicable. In addition, the broker must comply with all State and Federal requirements with respect to the disclosure of the payment of the rebate.

Q: Can I condition the payment of a rebate to buyers on the buyers using some other service or product that I offer?

A: Absolutely not. The rebate cannot be contingent upon the use of any other service or product that is offered by the broker who will be providing the rebate or any affiliate of the broker. The rebate also cannot be based upon the use of any lottery, contest or game.

Q: Are there any advertising issues that I should be aware of if I decide to offer rebates to buyers?

A: There are. First, the advertisement must have a disclosure concerning the buyers' obligation to pay any applicable taxes for receiving the rebate. Next, a notice that the purchaser should contact a tax professional concerning the tax implications of the rebate must be included. Finally, the required disclosure and notice must be conspicuously displayed in the advertisement and the size of the text must be equal to or larger than the size of the text used for the advertisement.

Q: Can I provide the buyer with a rebate for undertaking activities that real estate licensees might otherwise do?

A: You're prohibited from paying any unlicensed person, including the buyers, for any act that requires licensure. As a result, you cannot provide them with a credit or a check at the closing for providing any services that would require licensure.

FORM REBATE AGREEMENTS

Q: What agreements are available from NJAR® that will satisfy my obligation to have a writing or agreement concerning the payment of rebates to buyers?

A: NJAR® now has five different forms online that, at your option, you can use if you decide to provide rebates to buyers. The most basic Agreement merely provides the basic terms under which the rebate will be paid to the buyers.

Q: What other forms does NJAR® have concerning rebates to buyers?

A: NJAR® decided to have four other forms for the convenience of its members. These include two Non-Exclusive Buyer Agency Agreements, one that has a provision for rebates to buyers in it and one that does not. NJAR® also has two Exclusive Buyer Agency Agreements, one that has the rebate provision in it and one that does not.

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Q: Why would I bother entering into either an Exclusive or Non-Exclusive Buyer Agency Agreement rather than just keeping it simple by entering into an agreement that only deals with my providing a rebate to the buyers?

A: Each broker offering rebates has to make a business decision whether or not to enter into a Buyer Agency Agreement, but it is highly recommended that the decision be for his or her entire office. However, the advantage of a Buyer Agency Agreement, whether it is exclusive or non-exclusive, is that the agreement can protect the broker by providing, for example, how and what amount the buyers' agent will be paid, a protection period for property shown by the buyers' agent to the buyers, and a representation from the buyers that they do not have any Exclusive Buyer Agency Agreement with any other broker.

CONCLUSION

Q: Do you recommend that I start providing rebates to buyers?

A: That is a decision each broker will have to make for him or herself. However, there are already brokers who are providing such rebates in New Jersey as a result of this new law. As with all changes to the law that allow for new business models, competitive sources ultimately will decide how effective a business model offering such rebates to buyers will be. However, if you decide to provide rebates to buyers, you must ensure that you comply with all the requirements for providing such rebates.

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*Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith, & Davis LLP, focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders' and partnership disputes. He is the General Counsel for the New Jersey Association of REALTORS®.

What to Do if the Listing Broker Offers a Minimal Commission

by Barry S. Goodman, Esq., NJAR Counsel

What can you do? The listing broker only offers a "minimal" commission to you, as a buyer's agent. Can you negotiate the offer with the listing broker? How about negotiating with the seller? Should your buyer negotiate the offer? Can you offer a reciprocal minimal commission to that broker on your listings?

There are many legal, ethical and practical issues you, as a buyer's agent, must consider in such situations. Understanding your options and obligations for dealing with this situation will maximize the likelihood of your being paid the commission you expected and minimize the possibility of a lawsuit, an ethics complaint, or of the Real Estate Commission (REC) sanctioning you for improper conduct.

What Legal Standards Apply?

It is important for buyer's agents and listing agents to know what duties they have regarding commission splits under REC regulations. The starting point for any discussion is to keep in mind that you, as a buyer's agent, have a fiduciary duty to the buyer. Of course, the listing agent also has the same fiduciary duty to the seller. In fact, REC regulations require that each licensee "protect and promote, as he would his own, the interests of the client or principal he has undertaken to represent."[1]

In addition, the REC requires that, "[u]nless directed not to do so in writing by an owner..., every licensee shall fully cooperate with all other New Jersey licensees, utilizing cooperation arrangements which shall protect and promote the interests of the licensee's client or principal."[2] An exception is, if the seller, "with full knowledge of all relevant facts, expressly relieves the listing broker from one or more of those requirements in writing."[3] Thus, absent such a written waiver by the seller, the listing broker has a duty to fully cooperate with you as a buyer's agent under REC regulations.

Listing agents also are required to include in the written listing agreement the precise commission splits that will be offered to other brokers so that the seller will know what commission is being offered to buyer's agents.[4] However, a listing broker is not prohibited "from varying his commission split policy with respect to any one or more selling brokers in order to achieve equality of commission splits with such other selling broker or brokers in connection with their commission split policy with such listing broker."[5]

Is NAR'S Code of Ethics Applicable?

The Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS® (NAR) also significantly affects what can and cannot be done by you as a buyer's agent and by the listing broker. For example, REALTORS®. must advise sellers when they enter into a listing agreement about the REALTOR®'s policy regarding cooperation and the amount of any compensation that will be offered to buyer's agents or transaction brokers.[6]

The Code's Standard of Practice 16-16 is of particular importance with regard to this issue. It specifically prohibits a REALTOR® from using the terms of an offer to try to modify the listing broker's offer of compensation. It also prohibits a REALTOR® from making the submission of an executed offer contingent on the listing broker modifying his/her offer of compensation.[7]

However, keep in mind that the Code of Ethics only applies to the activities of

continued on page 16

What to Do if the Listing Broker Offers a Minimal Commission

continued from page 14

REALTORS® and not to the conduct of buyers (or sellers).

What Are Your Options?

Based upon New Jersey law and the Code of Ethics, there are at least six options for dealing with a listing broker who only is offering a minimal commission. The key to choosing which of these options is in the best interest of your buyer is to have an agreement, preferably in writing, with the buyer at the beginning of your relationship after you have fully explained the ramifications of each option. In this way, the issue of a minimal commission split to you will not come as a surprise to the buyer or be a problem if it arises.

Your options when faced with a minimal commission offer include at least the following:

1. The buyer can include in a written offer to the seller that the seller will pay your full commission. Note that only the buyer, not you, can decide to include this in the offer. It only should be included in the offer where the buyer has provided informed consent, which would include your explaining to the buyer how such a term will affect the offer.

A quick example will show how the offer will be affected. Let's say that your buyer is submitting a $400,000 offer and that you and the buyer have agreed that you will be paid a 3% commission. However, the listing broker only is offering a 1% commission to buyer's agents. As a result, if the $400,000 offer includes the seller paying your 3% commission, the offer in effect will be $8,000 less ($400,000 x 2% = $8,000) than another offer for $400,000 that does not include that the seller will pay an "extra" 2% to the buyer's agent.

2. The buyer can agree to pay your commission or any part of it that the seller does not pay. This preferably would have been agreed upon in writing at the inception of your relationship with the buyer.

3. You can negotiate directly with the listing broker to be paid the commission you expected. However, you cannot place your interest in receiving the commission you expected above the interest of your client, the buyer. As a result, if your buyer wants to place an offer on the house, you must do so regardless of whether or not you are going to be paid your full commission at that point. This is why it is so important for you and the buyer to have agreed early in your relationship how this compensation issue will be handled.

4. You can negotiate directly with the seller if the listing agent agrees or the buyer can negotiate directly with the seller. However, you should be careful about encouraging the buyer to directly negotiate with the seller since you are subject to ethical standards. It should be the buyer's decision to enter into such negotiations.

5. You can agree with the buyer that you will not show the buyer any listings where the listing broker is not offering the full commission that you and the buyer have agreed you will be paid. However, such an agreement should be in writing after the buyer has given his or her informed consent with full knowledge that this will limit the number of properties the buyer will be shown.

6. You simply can remove yourself from the transaction and let the buyer negotiate the offer directly with the listing broker or seller. If the commission split that is being offered to you is extremely low and you have not worked out with the buyer ahead of time how you will be paid in such a situation, this may be the most realistic choice. However, if you have come to an agreement with the buyer about your compensation in a timely manner, this option should never have to come into play.

Can You Offer the Same Minimal Commission to the Listing Broker on Your Listings?

Do you have to offer the same commission to all buyer's agents? If you want to vary the commission for a specific broker on your listings, what steps must you take?

A broker has the right to unilaterally decide the terms on which he/she will deal with other brokers, consistent with the REC regulations and NAR Code of Ethics cited above and with the full knowledge of his/her client (preferably in writing). The key is that it must be a unilateral decision and not be a part of any agreement, conspiracy or other joint decision that could be considered to be a boycott or restraint of trade under the antitrust laws. You, therefore, should not make this decision in conjunction with any other broker.

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What to Do if the Listing Broker Offers a Minimal Commission

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If you decide to vary the commission you will be offering in the MLS for a specific broker, you should advise that broker by sending him/her a letter. The letter should be sent by certified mail, overnight express or some other means that will provide you with evidence it was received. Do not copy the MLS or any other broker, person or association on the letter. The letter solely should be between you and the other broker so as to avoid any implication that you are encouraging others to make the same decision (remember, no group boycotts).

The letter should state the specific dollar amount or percentage you will be paying as a commission to the other broker, rather than simply saying that the commission will be "reciprocal" or the same as the other broker has in his/her listings. It also specifically should state that this amount is in lieu of the amount set forth in the MLS for all of your listings.

Finally, you must inform the seller for each listing you take that your policy is to provide a lower commission to that broker and that this policy may limit the number of potential buyers who will submit an offer for the property. This preferably should be in writing, which can include having the seller sign the letter that you have sent to that broker.

Conclusion

The key to avoiding any problems is to remember that you have a fiduciary duty to your buyer (as the listing agent must remember that he/she has a fiduciary duty to the seller) to place the buyer's interest over your financial interest. Problems with minimal commission splits will not arise if you have fully discussed this issue with your buyer before the issue arises. Whether you have an exclusive agency or not, it always is preferable to have your agreement with the buyer in writing in order to avoid any last minute problems when you finally locate your buyer's dream house. If you've earned your commission, and if you have taken the time to reach an agreement with the buyer at the beginning of your relationship, there is no reason why you should not be paid the full commission you were expecting.

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis LLP, is General Counsel for NJAR. He is a trial attorney who focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders and partnership disputes.

1 N.J.A.C. 11:5-6.4(a).

2 N.J.A.C. 11:5-6.4(f).

3 N.J.A.C. 11:5-6.4(f)2.

4 N.J.A.C. 11:5-6.4(f)3.

5 N.J.A.C. 11:5-7.6. However, such a varying commission split policy cannot be directly or indirectly undertaken based upon "any punitive or retaliatory action against any other licensee(s) or such actions based upon the failure or refusal to adhere or to adopt any commission." id.

6 NAR Standard of Practice 1-12.

7 NAR Standard of Practice 16-16 provides as follows: "REALTORS®, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation to subagents or buyer/tenant representatives or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker's agreement to modify the offer of compensation."

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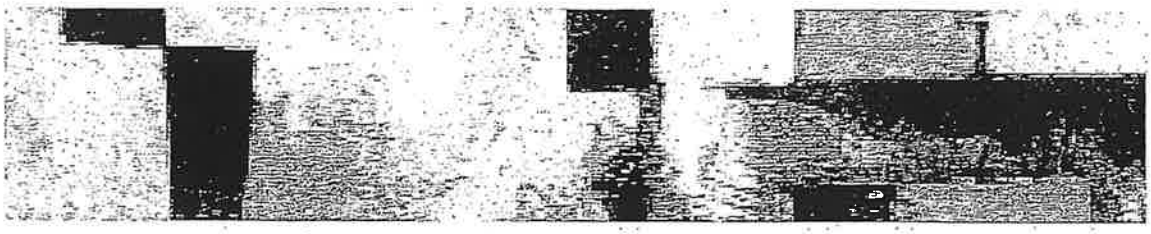

DOES A VIOLATION OF THE LICENSING LAW VOID A LISTING AGREEMENT?

Barry S. Goodman*

Although the New Jersey Real Estate Licensing Act[1] (the "Act") requires you, as a listing agent, to leave a copy of the fully executed listing agreement with the seller when it is executed and to specify the termination date in the listing agreement, you inadvertently forgot to do so. As a result, you could be subject to sanctions by the Real Estate Commission for violating the Act.

However, does such a violation of the Act also automatically void the listing agreement? Under a 1979 case, the answer to this question has been "yes." However, based on a recent Appellate Division decision, the listing agreement no longer automatically would be void but, depending upon the circumstances, might be voidable.

Section 17 of The Act

Under Section 17[2] of the Act, real estate licensees are prohibited from engaging in certain conduct. One of these prohibitions specifically deals with listing agreements. Section 17(f) specifically provides that a real estate licensee will be guilty of violating the Act for the following conduct regarding a listing agreement:

> f. Failure to provide his client with a fully executed copy of any sale or exclusive sales or rental listing contract at the time of execution thereof, or failure to specify therein a definite terminal date which terminal date shall not be subject to any qualifying terms or conditions.

In 1979, a trial court held that, if Section 17(f) is violated, the listing broker would not be permitted to enforce the listing agreement because the agreement was void as a matter of public policy[3]. No cases in New Jersey had been decided on this issue since then until a September 2007 Appellate Division decision.

The Appellate Division Considers If Violations Of The Act Void Listing Agreements

In a case known as *Exit A Plus Realty v. Zuniga*[4], the Appellate Division reviewed the issue of whether or not a violation of the Act should automatically void a listing agreement and bar a broker's right to recovery a commission under the agreement.

By way of background, Exit A Plus Realty ("Exit Realty") was the buyer's agent and Coldwell Banker Jablonski Real Estate ("Coldwell Banker") was the listing agent with regard to the sale of property in Bayonne, New Jersey by Edison and Teresita Zuniga to Sharon Rockett ("Rockett"). The Zunigas executed a multiple listing agreement granting to Coldwell Banker the exclusive right to sell the Zunigas' home during the period from April 14, 2005 to June 14, 2005. The offering price for the home was $474,900. The listing agreement provided that Coldwell Banker was offering to cooperating brokers a commission of two percent (2%) minus two hundred dollar ($200).

There is a dispute whether or not the listing agreement was left with the Zunigas when they signed it. They testified that it was not but the Coldwell Banker agent said that he left a copy of it with them. The trial court accepted the Zunigas' testimony that the listing agreement was not left with them when they signed it.

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In addition, the trial court found that the listing agreement was not completed when it was signed because the space providing for the extended protection period was left blank and later was filled in by the Coldwell Banker agent and mailed to the Zunigas. Mr. Zuniga testified that, when he received the listing agreement in the mail, the blank space for the extended protection period was filled in with "90 days." He therefore immediately called the Coldwell Banker agent. Mr. Zuniga testified that the agent told him that he should not worry about it and did not explain what the 90 days meant. Mr. Zuniga further testified that, since he had agreed to list the property with Coldwell Banker for "60 days," he put a line through the handwritten "90 days" and wrote "60" above it.

In mid-May 2005, Exit Realty then produced Rockett as a buyer for the property. The contract included a price of $465,000, subject to the property being appraised at that price or above. However, the appraisal came back at $450,000 and the Zunigas refused to lower the price. Instead, one day after the expiration of the exclusive listing agreement with Coldwell Banker, the Zunigas advised the buyer that they were declaring the contract void unless she agreed to purchase it for $465,000, which she refused to do.

Several days later, the Zunigas agreed to lower the price to $450,000 and the buyer agreed to purchase the property. Title closed on July 19, 2005 and, upon learning of the sale, the brokers demanded to be paid their commission, which the Zunigas refused to pay.

As a result, Coldwell Banker and Exit Realty filed suit. After a trial, the trial court dismissed the lawsuit, holding that Section 17(f) had been violated and, as a result, the listing agreement automatically was void and unenforceable. Coldwell Banker appealed.

The Appellate Division Adopts NJAR®'s Position Concerning A Violation of Section 17(f)

The New Jersey Association of REALTORS® ("NJAR®") filed an application to appear as an amicus curiae before the Appellate Division concerning this important issue. The Appellate Division not only granted NJAR®'s application but then adopted NJAR®'s position with regard to the issue and reversed the longstanding policy in New Jersey that listing agreements automatically are void when there is a violation of the Act.

NJAR® argued that the listing agreement in question is enforceable even assuming, after its execution, there may not have been strict compliance with Section 17(f). NJAR® contended that Section 17 does not provide that listing agreements will be void if this section is violated. Instead, it provides that the agent may be subject to sanctions by the Real Estate Commission. The Appellate Division agreed with NJAR®'s position.

The Appellate Division specifically rejected the 1979 trial court decision and stated as follows: "[W]e are of the view that a violation of any of the enumerated provisions of N.J.S.A. 45:15-17 would render the agreement voidable, but not automatically void. Indeed, as pointed out in the amicus curiae brief submitted by NJAR®, if the Legislature had wanted to invalidate agreements entered in contravention of N.J.S.A. 45:15-17, it could have done so explicitly, as it has done in numerous other instances."

The Court also noted that the Zunigas did not suffer any prejudice as a result of the failure to have a copy of the listing agreement with them on the date it was signed since it was mailed to them the next day. Similarly, they were not prejudiced by the insertion of the 90-day provision in the agreement since Mr. Zuniga saw that the "90 days" had been inserted and therefore could have objected to the insertion and refused to go forward with the listing agreement. Instead, he changed "90 days" to "60 days," which was accepted by Coldwell Banker. The Appellate Division also found that Mr. Zuniga's testimony that he understood the 60-day period to be the term of the agreement, not an extended protection period, to be at odds with the actual wording of the listing agreement.

Finally, the Court noted that Zunigas' cancellation of the contract of sale with the buyer one day after the expiration of the exclusive listing agreement and their subsequent acceptance of the offer of purchase at the appraised value of the property gave rise to significant questions of good faith and fair dealing by the buyer and sellers. The Court held that "technical violations that resulted in no prejudice" to the buyer and sellers should not be the basis for denying a broker's claim to a commission.

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Conclusion

As a result of this significant Appellate Division decision, listing agreements no longer automatically are void if a real estate licensee violates Section 17 of the Act. However, listing agreements are voidable depending upon all of the facts and circumstances involved in the transaction. In addition, real estate licensees still may be subject to sanctions by the Real Estate Commission for violating Section 17. Real estate licensees therefore still should carefully adhere to the requirements of Section 17 in order to ensure that their commissions are protected.

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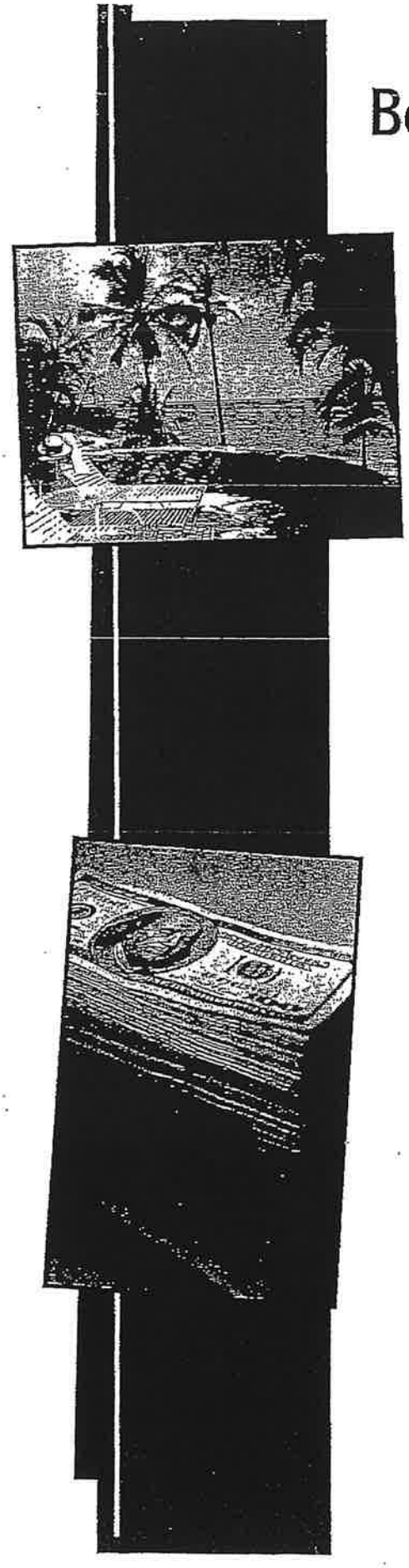
* Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis LLP, is General Counsel for NJAR®. He is a trial attorney who focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders and partnership disputes.

1) N.J.S.A. 45:15-1, et seq.

2) N.J.S.A. 45:15-17.

3) See Winding Brook Realty v. Platzer, 166 N.J. Super. 575 (Law Div. 1979), aff'd on other grounds, 173 N.J. Super. 472 (App. Div.), certif. denied, 85 N.J. 119 (1980).

4) _____ N.J. Super. _____ (App. Div., decided and approved for publication on September 5, 2007).



Beware the Sellers' Bonus!

By Barry S. Goodman, Esq.

You have just listed a new home and have very motivated sellers who already are under contract to buy another home. The sellers suggest a "bonus" to the selling agent above the commission that normally would be offered and decide to offer a $5,000 bonus plus a seven-day trip to Bermuda as an incentive for selling agents to sell their home. The sellers also offer you a bonus of a $5,000 American Express Gift Card if you can sell their home within 30 days.

Can the sellers offer such bonuses to the selling agent and you? Is there any problem with the selling agent or you accepting such bonuses? In a slow market in which sellers are seeking ways to gain an edge to sell their house, it is important that you understand what you can and cannot do regarding such bonuses.

Legal Considerations Regarding Bonuses

The real estate licensing law provides some clear parameters for any such bonuses. First and foremost, the licensing law specifically provides that "[n]o real estate salesperson or broker-salesperson shall accept a commission or valuable consideration for the performance of any of the acts herein specified [as a licensee], from any person except his employer, who must be a licensed real estate broker."[i] Thus, not only must the broker pay all commissions to an agent, but any "valuable consideration" provided to an agent for any activities as a real estate licensee also must be paid through the broker to the agent.

This requirement that such compensation only be paid to the agent by the broker is reinforced in a provision in the licensing law that provides that a salesperson can be sanctioned for accepting such a payment from someone other than the broker. The licensing law specifically provides that a real estate licensee can be sanctioned by the Real Estate Commission for "[a]ccepting a commission or valuable consideration as a real estate broker-salesperson or salesperson for the performance of any of the acts specified in this act from any person, except his employing broker, who must be a licensed broker."[ii]

Sanctions for violating this rule may include the Commission placing the real estate licensee on probation, or suspending or revoking the agent's license, as well as fining the agent not more than $5,000 for the first violation and not more than $10,000 for any subsequent violation. If the licensee is guilty of a third offense, the Commission may direct that no license as a real estate broker, broker-salesperson or salesperson shall ever be issued to that person again. Under the licensing law, each transaction shall be construed as a separate offense.[iii]

In addition, only a real estate broker, not a salesperson or broker-salesperson, has the right to sue to be paid a commission or any other consideration if the seller failed to pay the bonus.[iv] Thus, the agent would not have any right to sue the seller for the bonus since only the broker can file a lawsuit to recover the bonus.

Finally, it should be noted that, under Real Estate Commission regulations, all salespersons must have a written agreement with the broker specifying the rate of compensation to be paid to the salesperson during his or her affiliation with the broker.[v] The terms of this written agreement presumably would be binding with regard to any split of compensation to be paid to the salesperson, including a bonus.

Monetary v. Other Consideration

There are two types of bonuses that a seller can offer, a cash bonus or some item of value. Under New Jersey law, each of these bonuses has to be analyzed in a different way.

With regard to a cash bonus, since all payments for work done as a real estate licensee must be paid through the broker, the bonus can be paid to the broker, who then can compensate the agent. Of course, such a payment would be subject to the provisions of the written agreement between the salesperson and the broker.

More problematic is a bonus that is offered in the form of a trip, gift card, plasma television, or some other item. Unless the agent and broker have agreed, or at least can agree, how such a bonus will be paid through the broker to the agent, it is unclear how the agent could be paid this bonus.[vi] This would be true whether the seller was offering this bonus to the listing agent or the selling agent.

Conclusion

As a result, it is clear that sellers may offer bonuses to selling agents, as well as listing agents, in New Jersey. However, agents must understand that they cannot accept any such bonus directly from the seller. All such bonuses must be paid through the agent's broker. Otherwise, there could be serious consequences for the agent.

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis LLP, is General Counsel for NJAR.

Barry S. Goodman, Esq.

i *N.J.S.A. 45:15-16.*
ii *N.J.S.A. 45:15-17(m).*
iii *N.J.S.A. 45:15-17.*
iv *N.J.S.A. 45:15-3.*
v *N.J.A.C. 11:5-4.1(a).*
vi *This agreement should be included in the written agreement between the broker and salesperson that is required to set forth the rate of compensation to be paid to the salesperson*

Promotions in New Jersey: Be Careful What You Offer!

By Barry S. Goodman, Esq., NJAR General Counsel

The expectations of buyers and sellers are changing. Of course, you have to provide personal and professional services to help buyers locate their dream homes and to market homes for sellers. However, many of them now also expect you to provide free or discounted promotions from other businesses that will make their move easier and less expensive. In New Jersey, what can you offer? To whom do you have to offer such promotions? Can you offer promotions that are being marketed around the rest of the country by other REALTORS®? It is important to understand laws that are unique to New Jersey to avoid any pitfalls when you offer such promotions.

Background

The New Jersey Real Estate Licensing Act (the Act) historically prohibited any real estate licensee from "[u]sing any plan, scheme or method for the sale or promotion of the sale of real estate which involves a lottery, a contest, a game, a prize, a drawing, or the offering of a lot or parcel or lots or parcels for advertising purposes."[1] Similarly, the Act prohibited licensees from "[p]aying any rebate, profit, compensation or commission to anyone not possessed of a real estate license."[2] The Real Estate Commission (the Commission) broadly interpreted these provisions in the Act to prohibit a broker from offering any free or discounted services or products, including coupons, from any other business.

In the mid-1980s, Coldwell Banker, which then was owned by Sears Roebuck, initiated a promotion under which it offered Sears merchandise coupons providing discounts for buyers and sellers. The Commission concluded that the coupon program was prohibited as a "prize" and as a "rebate, profit, compensation or commission" in violation of the Act.

Coldwell Banker appealed this decision. However, the Appellate Division issued an opinion in 1990 affirming the Commission's decision.[3] Such promotions therefore were prohibited in New Jersey.

Amendments to the Licensing Act

After a significant majority of other states began to allow such promotions, in April 2001 the Legislature amended the relevant sections of the Act to permit real estate brokers to offer "free, discounted or other services or products" under certain conditions.[4]

First, the promotion cannot be tied to the consumer entering into "a sale, listing or other real estate contract as a condition of the promotion or offer." As a result, receipt of the offer can be conditioned, for example, on the person attending a sales presentation. However, it should be available to all consumers and not limited to actual buyers or sellers entering into a buyer agency, listing or other real estate agreement.[5]

Next, the promotion still cannot involve a lottery, contest, game, prize, drawing or offering of lots or parcels. Finally, if the broker is receiving "any compensation" for such a promotion or offer, the broker must disclose the compensation in writing to the consumer in the form and substance required by the federal Real Estate Settlement Procedures Act (RESPA) no later than when the promotion or offer is extended to the consumer.[6]

The Commission then promulgated regulations providing additional conditions and clarifications. First, the Commission explained that the amendment to the Act covers all "offerings which confer monetary benefit upon consumers." Examples of covered promotions provided in the regulation include the following: free or subsidized homeowner's warranties; property, radon and pest inspections; surveys; mortgage fees; offers to pay other costs typically incurred by parties to real estate transactions; and coupons offering discounts on commissions charged by brokerage firms.[7]

The Commission also provided that, whenever the promotion has a value of more than $5.00 retail, the licensee must provide a written disclosure to the recipient stating in a clear and conspicuous manner that (1) the consumer is not required to enter into any sale, listing or other real estate contract as a condition of receiving the promotion, (2) whether the consumer has to perform any action to qualify for the promotion, and (3) if the offered services or products are not delivered when the disclosure is provided to the consumer, the date they will be delivered.[8]

In addition, the Commission specified that this disclosure must be provided to the consumer no later than when the promotion or offer is extended to the consumer. Finally, the broker is prohibited from requiring the consumer to take any action prior to delivery of the disclosure "other than an action necessary to accomplish the delivery of the disclosure to the consumer."[9]

Permitted Promotions

Real estate licensees, therefore, now are permitted to provide certain promotions and offers for free or discounted services or products as long as they comply with these requirements. For example, licensees can provide free or discounted services or products from other companies that could be for home improvement services, warranty programs, landscaping, furniture and appliance coupon books, interior decorating consulting and American flags, as well as products and services unrelated to the home.

A recently announced promotion that is a joint offering of the NATIONAL ASSOCIATION OF REALTORS® (NAR) and

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Promotions in New Jersey: Be Careful What You Offer!

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Lowe's provides a good example of the parameters for offering promotions in New Jersey. Under this program, Lowe's will provide customized mailings for REALTORS® that Lowe's will send to a REALTOR®'s sellers, buyers and prospective buyers with discount coupons and rebates. These marketing services will be free for REALTORS®. In addition, REALTORS® will be entitled to five percent discount gift cards and rebates from Lowe's.

Any REALTOR® in New Jersey offering the Lowe's program will have to ensure its compliance with the Act and the Commission's regulations. For example, when a REALTOR® provides Lowe's with names, addresses, etc., for consumers who should be sent the marketing material, the REALTOR® should not limit the names to consumers who entered a sale, listing or other real estate contract. In addition, written disclosures will have to be provided to consumers since REALTORS® will be receiving compensation in the form of free marketing, discount gift cards and rebates.[10]

Conclusion

The amendments to the Act have provided real estate brokers with a tremendous opportunity to offer promotions that they previously could not offer. However, brokers must carefully analyze any promotion that they decide to offer to consumers to ensure that it fully complies with the Act and the Commission's regulations. As long as the promotion complies, there is no reason that brokers cannot offer, and consumers cannot receive, the benefits of such promotions.

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis LLP, is general counsel for NJAR. He is a trial attorney who focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders and partnership disputes.

1 N.J.S.A. 45:15-17(g). 2 N.J.S.A. 45:15-17(k). 3 Coldwell Banker v. Real Estate Commission, 242 N.J. Super. 354 (App. Div. 1990). 4 See N.J.S.A. 45:15-17(g) and (k). 5 N.J.S.A. 45:15-17(g). It should be noted that NAR Standard of Practice 12-3, which provides that promotions are not "unethical even if receipt of the benefit is contingent on listing, selling, purchasing or leasing through the REALTOR® making the offer," is subject to the limitations and restrictions of New Jersey law. 6 N.J.A.C. 45:15-7(g). 7 N.J.A.C. 11:5-6.1(m)2. 8 N.J.A.C. 11:5-6.1(m)4. 9 N.J.A.C. 11:5-6.1(m)7. 10 If the Lowe's (or any other) rebate is a payment to a salesperson, it must be made through the broker pursuant to N.J.S.A. 45:15-16. In addition, brokers and salespersons should consider including a provision in the salesperson's independent contractor agreement permitting the salesperson to receive the other "compensation" from Lowe's.

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