

Buyer Agency, Dual Agency, Property Condition Disclosure and Short Sales are Focus of Legal Scan

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Every two years, the National Association of Realtors conducts a survey of its member boards to determine what issues Realtors face. The 2011 Legal Scan was recently published and indicates that Realtors nationally continue to be concerned about (1) the lack of education of Realtors regarding agency issues; (2) the nuances of buyer brokerage; (3) the nuances of dual agency; (4) fiduciary duties; and (5) disclosure of short sale issues.

Agency Law

The focus of responses to NAR's Legal Scan related primarily to basic Agency Law issues. Agency issues consistently appeared as one of the top three current issues and focused on breach of fiduciary duty, dual agency, agency relationship disclosure and buyer representation. There was a general perception that Realtors need better education tools to deal with Agency Law issues. Surprisingly, the Legal Scan reviewed 108 new statutes and regulations specifically addressing agency issues. Just as New York State has moved to designated agency, it was noted that designated agency and transactional brokerage are now the focus of many legislative initiatives nationally. Transactional brokerage is becoming more prevalent with the elimination of traditional fiduciary duties mandated by Agency Law.

"Teams"

The Legal Scan indicated that only three states have addressed brokerage "teams" during the past two years. Those states are Maryland, Maine and Washington. Proposed advertising regulations under Section 175.25 of the Rules and Regulations of the New York State Department of State have been proposed for over a year but action regarding same has been stalled. The New York State Board of Real Estate continues to examine input from brokers, agents, teams, the New York State Association of Realtors and others to try to bring about a specific set of rules. In Maryland, a new licensing statute was enacted which requires that a team designate a qualified leader. It defines the duty of the leader, the duties of the team members, the role of the real estate broker and the role of the branch office manager. It also provides for a designated agency format by "intracompany agents".

Dual Agency

83% of the people responding to the NAR survey placed "dual agency" among the top three current issues. Nearly 45% of the respondents believe there is a significant need for training on dual agency. Many object to dual agency because of the difficulty in representing two people on opposite sides of a transaction. Confidentiality is also a

significant issue and agents report that many of the agents they deal with do not understand dual agency, are unable to explain it to their clients and fail to make required disclosures.

The Legal Scan identified twenty cases around the country involving dual agency, three of which produced verdicts against Realtors.

Buyer Representation

Survey respondents indicated that buyer representation was not a source of significant current disputes although 81% of the respondents ranked the issue among the top three current issues.

Just as in the dual agency relationship, respondents believe that buyer agents do not always understand their responsibilities and fail to explain their role adequately. The Legal Scan identified twenty-four cases involving buyer representation disputes and only one ended with a judgment in favor of a plaintiff against a real estate broker.

Agency Relationship Disclosure

The NAR Legal Scan produced responses from several responding agents indicating that many agents still cannot articulate the scope of the agency relationship or the nuances of buyer agency and dual agency. A respondent from Minnesota stated "Disclosure is done poorly on a routine basis". In summary, the respondents believe that greater levels of education are necessary for most licensees, licensees must have impressed upon them why disclosure is important and what the consequences are of not making the disclosures.

Breach of Fiduciary Duty

71% of the respondents to the NAR Legal Scan ranked breach of fiduciary duty as one of the top three current issues. Respondents to the survey indicated that many licensees "lack understanding of what it means to be a fiduciary". The survey found seventy-three cases involving breach of fiduciary duty and several large verdicts against real estate licensees were reported, one for over \$2,000,000, one for \$744,789.58, one for \$713,000 and another for \$1,030,427.

Short Sales

The Legal Scan reported that short sales are the most significant individual issue facing Realtors. In particular, it was the failure of Realtors to disclose the potential for a short sale that resulted in a significant number of current disputes. Over 74% of the respondents to the survey ranked short sale disclosure issues among their three top current issues. Short sales generate both property condition disclosure issues as well as transactional issues. The increasing number of short sale transactions results in

anticipation that these issues will not disappear for some time. Many survey respondents believe that there is no benefit to disclosing anything about the property's condition particularly because the condition of the property can change dramatically while the transaction is pending. Moreover, lenders and sellers insist on "as is" sales.

As to whether there will or will not be a short sale, many agents believe that licensees do not feel it necessary to disclose the potential for a short sale particularly if a seller does not want them to. As a result, all sorts of "misrepresentations" arise. Many of the respondents directed the primary problem at the banks because banks are reportedly in chaos, tend to be unresponsive, do not approve transactions in a timely manner and bank employees "don't know what they're doing". Many of the respondents report that the complexity of short sale transactions result in issues that most real estate agents are not trained to address. Some respondents reported that it almost becomes necessary for real estate agents to engage in the "unauthorized practice of law".

REOs

Just as short sales have become a major issue for respondents to the Legal Scan, REOs have produced numerous complications. REOs refer to bank owned property which banks have received via foreclosure or by deeds in lieu of foreclosure. Comments similar to those made about short sales apply equally to REOs. Banks consistently refuse to make any representations about the actual condition of the property, refuse to make disclosures and "hide behind exemptions in the law" that allow them to make no disclosures despite the fact that buyers believe that the bank should be bound to address any threats to health and safety that exist in the property. Banks consistently refuse to address these issues and often "ugly battles ensue". In some instances, brokers have been targeted as the persons to blame for "undisclosed defects". The respondents report that banks are inflexible in their negotiations, that there are no guidelines for the banks to follow and that listing agents are often placed in the position of acting as property managers when they have no skills to do so.

Broad Range of Issues

The 2011 NAR Legal Scan addressed numerous other issues which agents face throughout the nation. It is no surprise that agency relationship and buyer brokerage, dual agency and property condition disclosure remain high on the problem list. Real estate education remains a key to competency by real estate licensees. The difficulties, however, of survival in a difficult real estate economic climate, tend to lessen the focus on education and instead place the emphasis on "getting the deal done". Realtors are encouraged to ensure that their education and continuing education efforts provide them with the ability to make appropriate disclosures and ensure their continued competency.

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