

THE GIARDINELLI LAW GROUP, APC

Courtside Newsletter

Informing Real Estate Brokers, Association Members, and Local Businesses for Over Thirty Years.

RECENT DEVELOPMENTS

- *The Giardinelli Law Group, APC now handles Chapter 7 Bankruptcies. If you are considering filing, call today for your free, 30-minute consultation.*
- *T.G.L.G. recently settled a dispute between a home owner and contractor at mediation.*

CALENDAR

National Association of REALTORS® Conference and Expo

Dates: November 11-14, 2011
Location: Anaheim Convention Center

Go to www.realtor.org for more information!

Important Dates:

Memorial Day: May 30
Father's Day: June 19

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Of MARS and Short-Sales

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According to statistics compiled by the California Association of REALTORS® (C.A.R.), short sales comprised 23 percent of all California home sales in February 2011; that number was 20 percent in March 2011 (see www.car.org/marketdata/data/distressedsales/).

Because of the high percentage of short sales, almost every REALTOR® in California will participate in a short sale transaction at some point. This month's newsletter addresses what every REALTOR® should know about a new Federal Regulation applicable to REALTORS® involved with short sales.

Effective January 31, 2011, a new Federal Law (Title 16, Code of Federal Regulations, Part 322) imposes certain requirements on anyone who provides Mortgage Assistance Relief Services (MARS). Many REALTORS® may incorrectly assume from the title that this new regulation applies only to those who assist homeowners with loan modifications. As written, however, this regulation also applies to REALTORS® involved in short sales. This new law defines Mortgage Assistance Relief Service to include any service "to assist or attempt to assist" a person with "Negotiating, obtaining or arranging: (i) A short sale of a dwelling, (ii) A deed-in-lieu of foreclosure, or (iii) Any other disposition of a dwelling other than a sale to a third party who is not the dwelling loan holder."

By this definition, any REALTOR® who lists a short sale property is a provider of Mortgage Assistance Relief Services and must comply with the MARS rule. Further, under a strict reading of the MARS rule, even a REALTOR® who represents a buyer of a short sale property may be required to comply with the rule. For example, a REALTOR® who makes a phone call to the seller's lender in order to provide information to assist the lender in approving the short sale has arguably assisted the seller with obtaining the short sale. Thus, a buyer's agent who actively participates in the short sale approval process should be aware of and consider complying with the MARS rule. In general, REALTORS® need to be aware of three primary provisions of the MARS rule: 1) Prohibition Against Advance Payments; 2) Prohibited Representations; and, 3) Required Disclosures.

Prohibition Against Advance Payments

The MARS rule prohibits anyone who performs covered services from receiving any advance fee for the services. This does not usually apply to a REALTOR® who agrees to a commission, since commissions are generally not paid until escrow closes, when most services have already been performed. This may be a problem, however, for any REALTOR® who retains a short sale negotiator. Requiring the short sale negotiator's fee up front probably violates the MARS rule. Further, the MARS rule prohibits a person from assisting or facilitating someone who violates the rule. Thus, a REALTOR® could be held in violation of the MARS rule if he or she sends a client to a short sale negotiator who collects an up-front fee. Of course, as reported in our June 2010 and July 2010 Courtside

Newsletters, there are other potential serious issues related to the use of short sale negotiators (past issues of our Courtside Newsletter may be found on our website at www.glawgroupapc.com).

Prohibited Representations

Any REALTORS® who provide services covered by the MARS rule are prohibited from making certain representations. First, REALTORS® may not tell the sellers to avoid contact or communication with the lender or servicer. Second, REALTORS® may not represent to sellers any specific benefits or anticipated results of a short sale negotiation unless the REALTOR® is able to support the representations with reliable information. Finally, REALTORS® may not make any misrepresentations related to the short sale. The MARS rule lists 12 categories of misrepresentations, but makes it clear that misrepresentations which fall outside of these categories are also prohibited. Included in these categories are statements regarding the likelihood of success, time estimates for accomplishing results, affiliation or compliance with government programs, whether or not the seller should continue making payments, the possibility of refunds, the conditions that create the right to compensation for the service, and whether the seller is obligated to accept the relief offered.

Thus, for example, unless statements are true and can be supported by reliable documentation, REALTORS® should not tell sellers that they are likely to get an answer in three to four weeks, or that the lender is likely to approve a particular purchase offer from a buyer. REALTORS® should not tell sellers that a particular transaction complies with government regulations, or is part of any government program designed to help homeowners. REALTORS® should not tell sellers that they are required to pay for the services of a short-sale negotiator, or that the REALTOR® is entitled to a commission even if the sale does not close. This last issue is problematic for REALTORS® who use the standard C.A.R. Listing Agreement, which entitles the Broker to damages if the seller terminates the agreement early. The Federal Trade Commission (FTC) is currently reviewing this and other REALTOR® specific issues. According to the National Association of REALTORS® (N.A.R.), the FTC is not likely to strictly enforce some of these provisions against real estate practitioners until such conflicts are addressed and resolved. The MARS rule is essentially designed to protect homeowners from any sharp sales tactics.

Required Disclosures

Probably the biggest trap for the unwary REALTOR® arises from the disclosure requirements. A REALTOR® who advertises short sale services must make specific disclosures, as does a REALTOR® who assists a single client in a short sale transaction. The MARS rule sets forth what disclosures must be made, and under what circumstances.

1. General Commercial Communications.

Continued...

If a REALTOR® represents to the general public that he or she can help short sell a residential property, disclosures are required to be part of every communication. All written communications, such as advertisements, flyers, brochures, newsletters, and even business cards, (if they identify the REALTOR® as knowledgeable in short sales), must contain the following disclosures:

IMPORTANT NOTICE (in bold-face type that is two points larger than the font size of the disclosure) (Name of company) is not associated with the government, and our service is not approved by the government or your lender. Even if you accept this offer and use our service, your lender may not agree to change your loan.

If the REALTOR® orally communicates his or her ability to assist with short sales, these same disclosures must be made, and must be preceded by the statement "Before using this service, consider the following information." In any telephone communication, this wording must be used at the beginning of the call.

If the REALTOR® makes any statement regarding whether a seller should stop making mortgage payments, the following disclosure must be added:

If you stop paying your mortgage, you could lose your home and damage your credit rating.

2. Specific Commercial Communications.

REALTORS® who handle short sales without generally advertising this fact are also required to comply with the MARS rule disclosures. In such cases, the following disclosures must be made at the moment the REALTOR® becomes aware that the transaction will be a short sale:

IMPORTANT NOTICE (in bold-face type that is two points larger than the font size of the disclosure) You may stop doing business with us at any time. You may accept or reject the offer of mortgage assistance we obtain from your lender or servicer. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us (insert amount or method for calculating the amount) for our services. (Name of company) is not associated with the government, and our service is not approved by the government or your lender. Even if you accept this offer and use our service, your lender may not agree to change your loan.

If the REALTOR® makes any statement regarding whether a seller should stop making mortgage payments, the following disclosure must be added:

If you stop paying your mortgage, you could lose your home and damage your credit rating.

As noted above, the part of the required disclosure stating, "If you reject the offer you do not have to pay us," causes a conflict with the standard C.A.R. Listing Agreement. Both C.A.R. and N.A.R. are awaiting clarification from the FTC on this and other issues unique to REALTORS®.

3. Fee Disclosures.

As stated above, the MARS rule prohibits all up-front fees. It also requires that fees be disclosed

before the seller signs the listing agreement (if it is a known short sale at that time). More importantly, the fee must be disclosed once again before the seller completes a transaction. The MARS rule requires that the stated fees be the same on both disclosures.

This creates a problem when, as commonly occurs, lenders reduce the amount of commissions that will be paid to listing agents before closing. In such a situation, it may be impossible for REALTORS® to comply with the requirement that the fee disclosed to consumers be the same on the two required disclosures. This is another of the issues that N.A.R. has addressed with the FTC, and for which a resolution is expected.

C.A.R. Forms

The California Association of REALTORS® has created two forms to help REALTORS® comply with the MARS rule. If the REALTOR® knows at the time the listing is taken that the transaction will be a short sale, the REALTOR® should use form MARSSN. This form should be part of the Listing Agreement. If the REALTOR® later learns that the sale proceeds will not cover the amount owed on the property, the REALTOR® should immediately present form MARSMRN to the seller. These forms contain the required language set forth above.

It is important to be aware of two potential pit falls. First, these forms are specifically drafted for listing agents. As stated above, circumstances may arise where the buyer's agent contacts the seller's lender in an effort to facilitate negotiation of the short sale. Under a strict reading of the MARS rule, the buyer's agent in such a situation would also be providing Mortgage Assistance Relief Services, and therefore would be required to make disclosures to the seller. If that occurs, it is recommended that the buyer's agent modify form MARSMRN and provide it to the seller's agent for the seller's signature. This matter has been discussed with the C.A.R. legal department, which is likely to review it further depending on how the FTC clarifies the MARS rule as it applies to REALTORS®.

The second and more important pit fall arises for REALTORS® who think that using the standard C.A.R. forms will assure that they have complied with all of the requirements of the MARS rule. This is not true for any REALTOR® who publicizes the fact that he or she can handle short sales. If the words "short sale" occur in any communication to the general public (such as advertisements, flyers, brochures, newsletters, business cards, or even conversations), that communication must contain the required disclosures for General Commercial Communications (above). Simply using the standard C.A.R. forms does not fulfill the disclosure requirements for commercial communications.

This article has discussed the MARS rule only in the context of short sale services. There are many other provisions of the MARS rule that could create exposure for a REALTOR®. For example, if a REALTOR® gives any general advice about loan modifications or foreclosures, or advises clients regarding whether or not to continue making mortgage payments, that REALTOR® could be found to violate the MARS rule. As with any legal issue, it is important to receive guidance from qualified legal professionals.

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BUSINESS CORNER

"We want to help."



BUSINESS TIPS

C.A.R. NEW & REVISED STANDARD FORMS

- Denial of Rental Application (DRA)
- Mortgage Assistance Relief Services Offer of Mortgage Relief Notice (MARSMRN)
- Mortgage Assistance Relief Services Short Sale Negotiation Notice (MARSSN)
- Additional Information Regarding Termination of Tenancy Within One Year After Foreclosure (NAF)
- Notice of Termination of Tenancy Within One Year After Foreclosure (Giving Tenant At Least 90 Days to Vacate) (NTAF)
- Agent Visual Inspection Disclosure (AVID)
- Cancellation of Listing (COL)
- Notice of Change in Terms of Tenancy (CTT)
- 48-Hour Notice of Inspection Prior to Termination of Tenancy (FEHN)
- Lease Listing Agreement (LL)
- Residential Lease or Month-to-Month Rental Agreement (LR)
- Application to Rent/Screening Fee (LRA)
- Notice of Entry (NOE)
- Notice of Obligation to Pay Rental or Lease Payments in Cash, Money Order, Cashiers Check (NPC)
- Notice of Right to Inspection Prior to Termination of Tenancy (NRI)
- Notice of Sale and Entry (NSE)
- Purchase Agreement Addendum (PAA)
- Probate Advisory (PAK and PAL)
- Notice to Perform Covenant (Cure) or Quit (PCQ)
- Property Management Agreement (PMA)
- Notice to Pay Rent or Quit (PRQ)
- REO Advisory (REO)
- REO Advisory (Listing) (REOL)
- Trust Advisory (TA)
- Trust Advisory (Listing) (TAL)
- Tenant Estoppel Certificate (TEC)

For further information please refer to the C.A.R. web page at www.car.org/legal/standard-forms/

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