

HOT TOPICS FOR RISK MANAGEMENT COMMITTEE

Presented by:

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Introduction

- 50,000 → 32,000 Licensed R.E. Brokers
- 9,000 → 4,400 Mortgage Brokers
- Arbitrations and ethics complaints-steady

- But increase in real estate litigation
- Economic challenges prompt missteps by Brokers

Broker as Principal

- *Seibel v. Colorado Real Estate Commission*
- CP-35 (new)
- Only serve as agent for self and treat other side as customer (no brokerage relationship)
- Do not serve as TB

Short Sales

- Full disclosure
- Avoid multiple hats
- Misrepresentations to Lender

Criminal Convictions

- Must report to Division even if not felony
- List that constitutes a license law violation has grown (2008)

Aggressive Marketing

- Staging without owner's permission
- Living in house without owner's permission
- Marketing at prices less than approved by Seller
- Misdeshribing the property

Property Management

- Lack of appropriate accounting
- Misuse of client's funds to pay brokerage operating expenses, fund vacations, and pay other personal and brokerage firm expenses

Administrative Charges and Other Fees:

Recent years, settlement service providers including real estate brokers have been charging consumers certain “fees” in addition to commissions, such as:

- Administrative fee
- Processing fee
- Overhead charges

Administrative Charges and RESPA:

Section 8(b) prohibits charging for “real estate settlement services” unless the fee is for “services actually performed”.

Busby v. JRHBW Realty, Inc., 2008 11th Circuit Court of Appeals, attacked \$149 “administrative brokerage fee”.

Administrative Charges and RESPA: (Cont.)

- (1) Cannot charge a fee unless perform services for it.
- (2) Compensation for overhead may not be legal.
- (3) Question of characterizing the compensation.

For example, charge a percentage and a flat rate for brokerage services.

- (a) but disclose both as compensation for the services; and
- (b) don't create impression the flat fee is for a separate service unless you actually provide the service.

Administrative Charges and RESPA: (Cont.)

Mark up on Third Party Fees

For example: title company collecting a recording fee that exceeds the fee paid to the recording office.

Echevarria v. Chicago Title and Trust

7th Circuit Court of Appeals

- Said mark up violates Section 8(b) of RESPA
- But other Circuits say mark up is okay
- 10th Circuit (Colorado) has not addressed the issue

RESPA

Section 8(a)

No person shall give or accept any fee, kickback, or thing of value

- pursuant to any agreement or understanding
- that business incident to or a part of a real estate settlement service involving a federally related mortgage loan
- shall be referred to any person

RESPA

Section 8(c)

- Exceptions:
 - Co-brokerage agreements
 - Payments for services rendered
 - Payments to employees
 - Profit sharing pursuant to a properly established, operated and disclosed affiliated business arrangement

In Colorado:

Each real estate licensee must give written disclosures to the Colorado Division Real Estate on the form available at the Division's Website:

- When a licensee enters into an AfBA
- When an AfBA is changed
- When a person files an application for a real estate license
- When a licensee changes status from inactive to active
- Employing Brokers are required to file annually

Colorado Division of Real Estate Estimates That At Least 60% of Brokers Have Not Made The AFBA Disclosure to the Division

- **Enforcement begins**
- **Joint marketing agreements**

Future Developments

- Division of Insurance is revising Regulation 351 which regulates title companies
- Changes what Real Estate Brokers can get from title companies

Revised Regulation 351

- No free O&E's
- No free TBD commitments
- Public hearing on March 5

Questions

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