Legal Luncheon

Meeting Agenda

I. Flood Legislation Status and REALTOR Disclosures:

II. Proposed Fracked Gas Pipeline | Windmills in Berkshire County

III. Medical Marijuana

IV. Escrow Accounts

V. Douglas v. Visser: Court Finds for "Reprehensible" Sellers

VI. Crumpton v. Grissom: Broker Accountable for Affiliate Broker Negligence

VII. Other Frequent Questions on the Legal Hotline

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NAR Issue Brief
Flood Insurance Comparison

Current Law (Biggert-Waters)	House Substitute (H.R. 3370)	Original Senate Bill (S. 1926)
Sec. 205-Sale/New Policy Trigger (premium increase triggered by property/new policy purchase)	Repeals Sec. 205-Sale/New Policy Trigger (including sale of second home/business) Returns to allowing the new owner to assume the old policy at the current rate (i.e. policy stays with property, not owner) Refunds to those who paid the increased premium, including those who were not warned prior to property purchase	Delays for 4 Years No refunds
Sec. 207-Remapping Trigger (5-yr phase-out of grandfathering triggered by new flood map)	Repeals Sec. 207-Remapping Trigger Restores grandfathering of properties in flood zone when built to code (including grandfathered second home/business) Restores rate phase-in for newly mapped	Delays for 4 Years
Annual premium increases	<u>GENERALLY IF BUILT BEFORE 1975…</u> Primary Home: Sets 5% floor and 18% ceiling per property (current law allows higher as long as the average per flood zone doesn't exceed 20%) Second Home/Business: 25% increases until reach full risk (same as current law) <u>GENERALLY IF BUILT AFTER 1975…</u> Primary Home, Second Home or Business: Sets 18% ceiling per property (down from the 20% average per flood zone)	Does not change current law
Offset	$25 assessment on all NFIP primary homes; $250 on the businesses and second homes in the NFIP	No offset

MASSACHUSETTS ASSOCIATION OF REALTORS®

FLOOD INSURANCE NOTICE

The mortgage lender for a buyer/owner may require that the buyer purchase and annually renew flood insurance in connection with the buyer's purchase and ownership of a property. Some buyers who purchase without mortgage financing may also wish to purchase flood insurance.

The National Flood Insurance Program (NFIP) provides for the availability of flood insurance, but also sets flood insurance policy premiums based on the risk of flooding in the area where a property is located. Due to amendments to federal law governing the NFIP and changes in flood maps, the premium may have increased over the premium previously charged for flood insurance for a particular property. As a result, a buyer should not rely on the premium paid previously for flood insurance on a particular property as an indication of the premium that will apply when the buyer purchases.

When considering a purchase, the Buyer should consult with one or more carriers of flood insurance for information about flood insurance availability and terms, the premium that is likely to be charged for such insurance and information about how those premiums may increase in the future. Additional information may also be available from a real estate attorney.

ACKNOWLEDGEMENT OF RECEIPT

(Original for Real Estate Broker; Copy for Consumer)

Date: _____, 20___ _____

Signature of Consumer [*Buyer or Seller*]

Date: _____, 20___ _____

Signature of Consumer [*Buyer or Seller*]

The Notice is not required pursuant to any Massachusetts statute, regulation or standard. Real estate brokers/salespersons do not have the duty to investigate the availability or cost of flood insurance on behalf of a buyer or seller. The Buyer has the duty to exercise due diligence for the Buyer's protection, including investigation of any information of importance to the Buyer.

Fracked Gas Pipeline:

While the actual process of gas fracking (pros and cons) are widely debated, for the purposes of our association, we are limiting our discussions to property right and disclosure issues related to a proposed multi-billion dollar pipeline that is anticipated to run through the Berkshire community. There is no proposal to frack gas here, only that the pipeline that will intersect the Berkshires will carry gas that was fracked in another state. Two issues raised immediately have been addressed by the MAR Legal Team: (1) Eminent Domain and how that would apply (2) what REALTORS must disclose to prospective purchasers and when they must disclose it:

- **Eminent domain issues exist**. The pipeline company must first obtain a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC) for "the construction or extension of any facilities…for the transportation in interstate commerce of natural gas." (15USC §717f(c)). A FERC certificate confers on the developer eminent domain authority. (15 USC §717f(h)). The FERC certificate provides a pipeline developer with the authority to secure property rights to lay the pipeline if the developer cannot secure the necessary rights-of-way from landowners through negotiation. I believe that this pipeline is intended to be underground so the company would be seeking easements from property owners. They may seek larger temporary easements for construction and then a smaller permanent easement (50' or so) once the construction is completed. The easements generally prohibit the erection of buildings and planting of trees so as not to hinder access to pipeline. Eminent domain would be a last resort for the company.

  One other note is that the federal Natural Gas Act preempts any state or local law that would obstruct the federal law (siting or zoning…).

- **The disclosure issues** will be different for each individual property. For a property that has already agreed to an easement, that easement would arguably serve as constructive notice and should be disclosed to any buyer. If the company has accessed the property or requested access to the property to survey it then it would likely be a good idea to disclose that to any buyer before an offer is made. Keep in mind the Attorney General's 93A regulation *". . . any person or other legal entity subject to this act, (specifically includes all real estate licensees) who fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction*." Finally, disclosure questions related to properties nearby, but not part of, the pipeline would need to be viewed in light of Massachusetts case law, specifically the *Urman v. South Boston Savings Bank* case dealing with "off site" defects. *Urman* held that a broker has a duty to disclose: (1) physical conditions; (2) which are known to a business person (seller or broker), but not known and not readily observable by the buyer; and (3) be sufficiently important that they affect the value or use of the property.

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Medical Marijuana Joint Testimony

MASSACHUSETTS ASSOCIATION OF REALTORS®

GBREB Est. 1889 GREATER BOSTON REAL ESTATE BOARD

April 19, 2013

Lauren A. Smith, MD, MPH
Interim Commissioner
Office of the General Counsel
Department of Public Health
250 Washington Street
Boston, MA 02108
VIA EMAIL: Reg.Testimony@state.ma.us

RE: PROPOSED AMENDMENT TO DPH DRAFT REGULATIONS 105 CMR 725.000

Dear Commissioner Smith:

On behalf of our 20,000 members, and the many homeowners, landlords and property owners they serve, the Massachusetts Association of REALTORS® ("MAR") & the Greater Boston Real Estate Board ("GBREB") wish to offer some suggestions and points of serious concern regarding the draft regulations issued by the DPH on April 8, 2013. It is our mission to promote the rights of property owners throughout the Commonwealth, and while we applaud the DPH for proposing regulations in a timely manner, we want to ensure that the regulations address some of the concerns of homeowners and landlords.

Possession of marijuana remains a crime under federal law, despite the recently enacted Massachusetts statute, Chapter 469 of the Acts of 2012 ("the Medical Marijuana Law"), that permits marijuana to be prescribed for medical purposes. The Medical Marijuana Law merely provides that possession and use of marijuana for medical purposes will not be penalized under state law. The Medical Marijuana Law does not abrogate Massachusetts law that makes possession of marijuana for non-medical purposes a crime nor does it supersede federal law which makes *any* possession of marijuana a crime.[1]

As a result, property owners, including residential landlords, condominium associations and real estate agents have a dilemma. If they permit use of marijuana, they will subject themselves to the risk of prosecution for aiding and abetting violation of federal law. The issue is heightened by the fact that a property owner who permits criminal activity to be conducted on a property may be subject to asset forfeiture of that property under federal law. Allowing use will also subject the property owner, condominium association or real estate agent to the risk of claims for bodily injuries and other harm

[1] See Memorandum of Deputy Attorney General David Ogden to Selected United States Attorneys, dated October 19, 2009.

caused to occupants of and visitors to their property. Alternatively, without a regulation that expressly allows a property owner, condominium association or real estate agent to restrict or prohibit marijuana use, if they restrict or prohibit use, they may be subject to claims for civil rights or fair housing violations by persons who were prescribed marijuana for medical purposes under the Medical Marijuana Act.

It is important to note that the Medical Marijuana Act merely eliminates *state criminal penalties* for patients prescribed marijuana for medical purposes and for health care providers who prescribe marijuana for medical purposes or assist in use for medical purposes. The Medical Marijuana Law does not confer a "right" or "privilege" on any person to possess marijuana, but merely permits prescribing or use *for medical purposes* without incurring a penalty under state law. In relevant part, that statute provides:

> Section 4. Protection From State Prosecution and Penalties for Qualifying Patients and Personal Caregivers
>
> Any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege for such actions.
> * * *

The Medical Marijuana Act recognizes that it does not supersede federal law:

> Section 7. Limitations of Law
> * * *
> (F) Nothing in this law requires the violation of federal law or purports to give immunity under federal law
> (G) Nothing in this law poses an obstacle to federal enforcement of federal law

In order to ensure that the regulations include protections for homeowners and landlords, we respectfully request that you take our specific comments regarding the current draft into consideration:

1. **<u>Use of Marijuana in Residential Property Where Landlords and Associations Have "No Smoking" Policies</u>**

Consideration must be given to the serious public health issue from exposure to second hand smoke. Studies have shown that such smoke is harmful.[2] Smoke from marijuana carries a pungent odor that many tenants or occupants of nearby dwellings will find offensive. If a person has inhaled second

[2] According to Reference.com (http://www.reference.com/motif/health/breathing-second-hand-marijuana-smoke): "Breathing second hand marijuana smoke can be just as dangerous, and toxic, as smoking the actual joint. This is due to the chemicals and tar within the marijuana. Also, some marijuana has been coated with unknown substances by the supplier. . . . There is no filter on a joint, unlike a cigarette. Second hand smoke should be considered harmful to anyone who is exposed to it. Not only can you catch a second-hand buzz, or high, but you are exposing your lungs to chemicals that will coat the delicate tissues within your airway. Small exposure, such as catching a whiff of second hand marijuana smoke while outdoors, probably will not cause problems. Repeated exposure to the drug or spending lots of time around others who smoke pot can harm you. Breathing second hand marijuana smoke should be considered just as dangerous and harmful as breathing second hand cigarette smoke, and with the same long term consequences."

hand smoke from marijuana, the person's driving may be impaired. If tested by an employer, that person may fail an employment-related drug test. Additionally, a no-smoking policy can help prevent fire, and can also allow landlords to obtain a discount on their property insurance premiums.

However, under the current statute, it is unclear whether or not a landlord may refuse to allow a tenant or prospective tenant to smoke marijuana in their property. Certain prospective tenants who may lawfully possess and smoke marijuana due to a medical condition may in fact have a disability as defined under Massachusetts anti-discrimination laws, which prohibit a landlord from refusing to rent to a tenant due to a disability. Restricting or prohibiting the possession, cultivation, smoking or other use of marijuana, including use for medical purposes at rental property, should not be deemed to be discrimination on the basis of disability under the laws of the Commonwealth. This should also be the case for residential and commercial rental property as well as condominium associations. Therefore, the Massachusetts Association of REALTORS® and the Greater Boston Real Estate Board respectfully request that the following regulation be added to 105 CMR 725.000:

725.650

Notwithstanding any provision of 105 CMR 725.000 to the contrary, a residential or commercial landlord, condominium association or other property owner is not required to permit the possession, use or cultivation of marijuana in or at the premises owned, operated or controlled by such person as an accommodation to a person prescribed marijuana for medical purposes. A residential or commercial landlord, condominium association or other property owner may restrict or prohibit the possession, use or cultivation of marijuana at such premises. It shall be permitted for any person who advertises or offers a property for sale or rent to state that possession, use or cultivation of marijuana for medical purposes is restricted or prohibited or that the property will not be shown, rented or sold to a person who intends to possess, use or cultivate marijuana.

2. Disclosures Regarding Whether or not Tenants Smoke Marijuana in a Building

As proposed, the regulations do not address any disclosure duties or prohibitions of a landlord or condominium association where there is a person or persons smoking medical marijuana on the premises. Must a landlord or condominium association disclose the location of a tenant or occupant who uses medical marijuana to other tenants, buyers or prospective tenants or buyers? May the owner disclose the existence of an occupant who uses medical marijuana to current tenants, prospective tenants and prospective buyers? The Department of Public Health should recognize that landlords, property owners, condominium associations and real estate agents should not be placed at risk for compliance with federal law or for protecting the health of other occupants of property. Therefore, the Massachusetts Association of REALTORS® and the Greater Boston Real Estate Board respectfully request that the following regulation be added to 105 CMR 725.000:

725.660

If a tenant or other person who has been prescribed medical marijuana, pursuant to Massachusetts law, possesses, uses or cultivates marijuana at premises owned or controlled by a landlord, condominium association or property owner, it shall be permitted, but not required, for

the landlord, condominium association, property owner or their agents to disclose the possession or use or cultivation to tenants, visitors and unit owners as well as to prospective tenants and prospective buyers. Identifying the dwelling or other location where such activity occurs is expressly permitted.

3. Advertising Property for Rent Could be Problematic

Without clarification, real estate licensees as well as landlords and condominium associations who advertise and show property as "no-smoking" may be at risk for discriminatory advertisement. For example, a licensee may advertise a property for sale or rent and state in the advertisement that possession or use of medical marijuana is prohibited. A disgruntled prospective tenant or buyer could argue that the advertisement was discriminatory, and should have been shown the property and that an offer to rent or buy should have been presented to the seller or landlord. Therefore, the Massachusetts Association of REALTORS® and the Greater Boston Real Estate Board respectfully request that the following regulation be added to 105 CMR 725.000:

725.670

It shall not be unlawful for any person who advertises or offers a property for sale or rent to state that the use of marijuana for medical purposes is restricted or prohibited or that the property will not be shown, rented or sold to a person who intends to use, cultivate or possess marijuana, for medical or other purposes.

MAR and GBREB urge the Board to consider these proposals and comments. We appreciate the opportunity to submit comment.

Sincerely,

Michael McDonagh

General Counsel & Director of Government Affairs
Massachusetts Association of REALTORS®

Patricia Baumer

Patricia Baumer
Director of Government Affairs
Greater Boston Real Estate Board

Escrow Accounts - The Law:

254 CMR 3.00: Professional Standards of Practice - violation of any of the provisions of 254 CMR 3.00 may result in the suspension, revocation or discipline of a license. (10) **Client Funds**:

(a) **Escrow Accounts**. Unless otherwise agreed to in writing by the parties in transactions involving the sale, purchase, renting or exchange of real property, all money of whatever kind and nature paid over to a real estate broker to be held during the pendency of a transaction shall be immediately deposited in a bank escrow account and such broker shall be responsible for such money until the transaction is either consummated or terminated, at which time a proper account and distribution of such money shall be made. An escrow account is an account where the broker deposits and maintains the money of other parties in a real estate transaction and such broker has no claim to such money. An escrow account may be interest or non-interest bearing but where it is interest bearing the broker must make a proper account of such interest at either the consummation or termination of the transaction.

(b) **Record Keeping**. Every broker shall keep a record of funds deposited in his/her escrow accounts, which records shall clearly indicate the date and from whom the broker received the money, date deposited along with the source of the money and check number, date of withdrawal with the name of the person receiving such withdrawal, and other pertinent information concerning the transaction and shall clearly show for whose account the money is deposited and to whom the money belongs. Every broker shall also keep a copy of each check deposited into and withdrawn from the escrow account for a period of three years from the date of issuance. All such funds and records shall be subject to inspection by the Board or its agents.

(c) **Salespersons Prohibited from Holding Funds**. A real estate salesperson or broker engaged by another broker shall immediately turn over all deposit money or other money received to such employing broker. No salesperson shall at any time hold client funds.

Escrow Accounts – Why Diligence is Important

Escrow mishandling is among the most common violations of real estate regulations…and brokers are more likely to violate escrow laws than salespeople. Mishandling of escrow funds include;

- commingling escrow money with company funds;
- not being licensed or bonded to accept escrow funds;
- shoddy bookkeeping;
- failing to collect deposits from buyers or renters;
- "borrowing" from escrow accounts to fund business operations; and
- brokers playing judge and jury by deciding who gets what when disputes arise.

Escrow account administration is an urgent business issue. Brokers can find themselves in regulatory hot water not only for blatant mishandling of escrow funds, but also for shoddy accounting and record keeping. Requirements are rigorous, and penalties are severe.

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10 Tips for Safer Escrow Accounts

Loretta Dehay, general counsel of the Texas Real Estate Commission, offers this advice on keeping out of trouble with escrow accounts.

1. Never commingle funds. Money held in escrow must be kept in a separate account.

2. Keep separate transaction journals for sales escrow, rental escrow, and advance-fee escrow accounts. Then, with your journals as supporting data, prepare reconciliation statements for each account.

3. Disclose interest. Escrow funds may be placed in an interest-bearing account, but you must notify, in writing, all parties who will receive interest. (Note: not all states permit brokers to put escrow funds in interest-bearing accounts).

4. Don't borrow from escrow funds. No matter how quickly you replace the money, it's illegal to use escrow accounts to fund your business operations.

5. Don't attempt to resolve disputes. It's not a broker's place to decide who gets what in escrow account disputes. Many states have procedures in place for settling these matters, including referral to a third-party mediator.

6. Consider contracting with a title company or law firm to handle escrow accounts. More and more brokers are using these expert services to cut down on paperwork and errors. But make sure the company knows how to address a broker's unique requirements.

7. Get written releases. If a contract fails to close, you must obtain written releases from the principals before disbursing any escrow funds.

8. Don't take commissions out early. Licensees aren't entitled to any part of a commission until the sale is closed, unless the principals to the transaction stipulate otherwise in writing.

9. Deposit escrow funds within a reasonable time after the contract is executed. In some states, you must make this deposit within two business days. Check your individual state requirements.

10. Retain records of all deposits and withdrawals from escrow accounts as mandated by your individual state laws. In some states that period is four years.

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Real Estate Broker Enforcement Actions from 2013 involving Escrow Funds

- **Gregory Fiore, Lynnfield:** The Board entered into a consent agreement with Fiore, resolving allegations that he failed to supervise a real estate salesperson affiliated with him which led to funds being deposited into the escrow account that were not related to a real estate transaction. Under the terms of the agreement, Fiore agreed to a 45- day suspension of his license.

- **Barbara Buchmann, Lexington:** The Board entered into a consent agreement with Buchmann, resolving allegations that she failed to properly account for money belonging to others within a reasonable time in connection with the sale of a property in Lexington, and that she failed to provide to the Board documents that it had requested within a reasonable time. Under the terms of the agreement, Buchmann agreed to a 60-day suspension of her license.

- **Timothy V. O'Brien, Somerville:** By Final Decision and Order by Default, the Board revoked O'Brien's right to renew his real estate salesperson license. A review by the Board found that O'Brien failed to remit the full amount of client funds provided to him as a deposit for an apartment rental agreement that was ultimately rejected. The Board also found that O'Brien was operating a real estate business, BRW-Rentals, Inc., without holding a real estate broker license in violation of board regulations.

- **Sorn C. Richardson, Framingham:** The Board entered into a consent agreement with Richardson, resolving allegations he failed to account for or remit money belonging to others which came into his possession as a real estate broker. Under the terms of the agreement, Richardson agreed to a 60-day suspension of his license.

- **Richard P. Murphy, Springvale, ME**: The Board entered into a consent agreement with Murphy resolving allegations related to his mishandling of client funds. The allegations stemmed from a 2008 incident in which Murphy deposited $2,400 derived from a rental property in Readville into his personal bank account instead of an escrow account as required by state regulations. As part of his agreement with the Board, Murphy accepted a twenty-one day suspension of his license, including seven days of outright suspension and a fourteen day probationary period.

STANDARD BERKSHIRE COUNTY MULTIPLE LISTING SERVICE PURCHASE AND SALE AGREEMENT / BUYER AND SELLER ASSENT TO RELEASE DEPOSITS FROM ESCROW

► 1. **PARTIES**: **SELLER(S)** **BUYER(S)**

Name(s) _____ _____

_____ _____

Address _____ _____

_____ _____

► 2. **INSTRUCTIONS AND ASSENT TO RELEASE DEPOSITS FROM ESCROW**: Pursuant to Section 32 'Release Of Deposits' in the Standard Berkshire County Multiple Listing Service Purchase And Sale Agreement, the SELLER(S) and BUYER(S) who are parties to a Purchase and Sale Agreement, dated _____ for _____ ("PROPERTY"), hereby authorize, assent and instruct the Escrow Agent _____ to release all deposits and funds held pursuant to the Purchase and Sale Agreement, including accrued interest, if any, to the **BUYER(s) / SELLER(s) (strike one)**.

3. **THIS IS A LEGALLY BINDING CONTRACT**. IF NOT UNDERSTOOD, SEEK LEGAL COUNSEL: Executed under seal by the Parties hereto as of the latter of all dates set forth below, together with referenced additions, if any.

► _____ _____

SELLER: **DATE** **BUYER:** **DATE**

_____ _____

SELLER: **DATE** **BUYER:** **DATE**

Last Revision: 6/2005

Court Finds for "Reprehensible" Sellers: Douglas v. Visser

In Douglas v. Visser, the Court of Appeals of the State of Washington found in favor of property sellers Terry and Diane Visser ("Sellers"), despite evidence that they had concealed pervasive rot that was destroying the house from the inside out. In reaching its decision, the court determined that the inquiries made by homebuyers Nigel and Kathleen Douglas ("Buyers") into the condition of the house prior to purchase were not sufficient to satisfy their duties to "beware, inspect and question."

In 2005, Sellers bought the property as a "fixer-upper," and initially undertook a number of repairs and renovations. However, they quickly realized that existing damage to the house went well beyond their original expectations. They decided to sell, and one of the Sellers, a licensed real estate broker, listed the property for sale.

Two years later, Buyers made an offer. Upon receiving Sellers' disclosure statement, they discovered that Sellers had answered "don't know" to a number of questions. Seeking clarification, Buyers sent follow-up questions and requested a copy of the inspection report prepared prior to Sellers' 2005 purchase of the property ("2005 Report"). Sellers replied to the follow-up questions, but Buyers remained unsatisfied that their concerns were being properly addressed. Sellers never provided the 2005 Report to the Buyers.

The inspection ordered by Buyers ("2007 Report") revealed small areas of rot in the house, as well as multiple repairs made by the Sellers adjacent to the rot. Buyers did not discuss the report with either the inspector or Sellers prior to their purchase of the property in April 2007. Buyers bought the house for a purchase price of $189,000, executing a promissory note with the Sellers for $149,000.

After purchase, Buyers began to notice rot and pest problems throughout the house. Subsequent inspections uncovered damage so extreme that the house was deemed uninhabitable. In addition, the inspections revealed significant evidence that the rot damage had been intentionally concealed. Buyers defaulted on the promissory note and sued Sellers, claiming fraudulent concealment, negligent misrepresentation, violation of the Consumer Protection Act, breach of contract, and violation of one of the Sellers' statutory duties as a real estate agent.

The trial court found that Sellers had intentionally concealed the damage, and that "the defects were unknown to [Buyers] and were not discoverable by a careful and reasonable inspection." It ruled in favor of Buyers on all claims and, after offsetting the awarded damages against the amount still owed on the promissory note, entered judgment for Buyers in the amount of $24,245.

The appellate court reversed on all counts, stating in its opinion that while "the Visser's efforts in concealing the defects of the house they were selling are reprehensible, even more so because Visser is a licensed real estate agent…the law retains a duty on a buyer to beware, to inspect, and to question."

The crux of the appellate court's ruling rests on the fact that the 2007 Report revealed areas of rot, and therefore put Buyers on notice of the defects. Buyers' argument that they attempted to make inquiries about the conditions of the house through their follow-up to the pre-purchase questionnaire and their request for Sellers' 2005 Report was to no avail. The appellate court found that inquiries made prior to

the rot-revealing 2007 Report "cannot be construed as inquiries regarding the rot discovered during the inspection."

The appellate court also noted that "further inquiry is not necessary where it would have been fruitless." Nonetheless, because the trial court failed to enter findings that Sellers' "overt attempts to cover up the defects prior to listing the property, and their pre-inspection evasiveness" demonstrated the fruitlessness of further inquiries, an essential element of each of the Sellers' claims was not satisfied.

Concluding that Buyers "were on notice of the defect and had a duty to make further inquiry," the court awarded Sellers the principal on the Promissory note plus 18% interest and, attorney's fees, as set forth in the promissory note.

Buyer, beware.

Douglas v. Visser, 295 P.3d 800 (Wash. Ct. App. 2013)
Full Text: http://www.mrsc.org/mc/courts/appellate/slip%20opinions/672428.pdf

Broker Accountable for Agent Negligence: Crumpton v. Grissom

In Crumpton v. Grissom, a Tennessee appellate court found that a managing broker ("Managing Broker") could be held accountable for the misrepresentations and negligence of an affiliate broker ("Affiliate Broker"), even though the Managing Broker was not personally involved in the transaction.

After closing on a mixed-use property, plaintiff Reid Crumpton ("Buyer") discovered that a five year non-compete clause in an addendum to the real estate sales contract had been excluded from some signed copies of the contract. The non-compete clause affected Buyer's ability to conduct his business on the premises. Buyer sued Affiliate Broker and Managing Broker, alleging that Affiliate Broker had made misrepresentations and been otherwise negligent in regard to the sales contract, and that Managing Broker had breached her duty to supervise the Affiliate Broker in the transaction.

The trial court entered summary judgment in favor of Managing Broker, holding that she had no knowledge of the substance or details of the transaction, and that "neither Tennessee statutes nor Tennessee case law suggests that managing brokers' duty to supervise their affiliates can create liability on the part of the managing broker where the managing broker has no direct involvement with or knowledge of the transaction."

Buyer appealed the trial court's ruling, and the appellate court reversed and assessed the costs of the appeal against the Managing Broker. In its opinion, the appellate court stated that under the Tennessee Real Estate Broker License Act, it is the unambiguous duty of a managing broker to ensure that her subordinate licensees "conduct their business in accordance with appropriate laws, rules, and regulations." In this case, held the appellate court, Managing Broker had clearly owed such a duty to Buyer, and had failed to produce any evidence that she had satisfied this duty.

In short, stated the appellate court, the trial court's erroneous ruling would, if put into practice, allow managing brokers to avoid their statutory duties "by simply and purposefully remaining ignorant of the substance and details" of a subordinate licensee's transactions.

Read the full text of decision: http://www.tncourts.gov/sites/default/files/crumptonrropn.pdf

Notes from the MAR Legal Hotline: Pocket Listings

Michael McDonagh, MAR General Counsel
Ashley Stolba, MAR Associate Counsel
Justin Davidson, MAR Staff Attorney

December 2013

Q: I have heard a lot of buzz about "pocket listings" and "coming soon" arrangements between brokers and their seller-clients. I remember this being popular many years ago. What is the difference between a "pocket listing" and "coming soon?"

A. The terms "Pocket-Listing," and "Non-MLS listing" generally refer to those listings that are never listed in a Multiple Listing Service. They are different than FSBOs in that the seller engages a broker to sell their property, but the home is not advertised through MLS.

Properties that are advertised as "coming soon" usually refer to those listings that may be listed in the Multiple Listing Service at an upcoming date, but are not currently listed, either because: 1) a listing agreement has been executed and the client has agreed that the property will not be marketed through the MLS until a specified date; or 2) the Broker has engaged an owner in some form of an unwritten or limited marketing arrangement to "pre-market" or sell the owner's property prior to executing a listing agreement with the owner.

Q: My seller-client asked me if he should keep his listing off of the MLS. Why would he want to do this? Are there any ethical or legal obligations that I should consider?

A. Celebrities, public figures, and other individuals who wish to maintain privacy may request that you list their property without entering it into the MLS. Although legal, there are certain considerations that should be discussed thoroughly with your client prior to entering into either a "pocket" listing or a "coming soon" arrangement:

1) MLS Rules and Regulations:
Upon the execution of the listing agreement, most Multiple Listing Services require that the listing be entered into the MLS within a certain amount of time. If you and your client have agreed to keep the listing out of the MLS, most require an opt-out form be signed by the broker, agent, and the seller, acknowledging that the choice to not market the property in the MLS is the sole discretion of the seller. In the circumstance of a "coming soon" listing, where a listing agreement has been signed, but the seller chooses to not market the property for a specified period of time, most MLSs require an opt-out form for that specified time frame. If the broker and client verbally agree to "pre-market" the sale, with no written listing agreement yet in place, the MLS mandatory submission requirement typically does not kick in. To avoid any confusion, be sure to check with your MLS Rules to be sure you are properly handling the listing.

2) REALTOR® Code of Ethics:
All REALTORS® are bound by the REALTOR ® Code of Ethics. For purposes of this discussion, close attention should be paid to Articles 1 and 3. Article 1 states that, "REALTORS ® pledge themselves to

protect and promote the interests of their client." Further, Standard of Practice 1-12 specifically requires REALTORS® to discuss with the sellers his or her "company policies regarding cooperation and the amount(s) of any compensation that will be offered...". When a property is listed with the MLS, the amount of compensation to be paid to cooperating agents is specified on the listing, and is generally offered to any MLS participant who is the procuring cause of the sale. If the property is sold while not in the MLS, how will compensation be handled with cooperating agents? It is important to have a conversation with your seller to determine how cooperating agents will be paid if the listing is sold outside of the MLS.

Article 3 of the Code of Ethics places on a REALTOR® a duty to cooperate. Further, Standard of Practice 3-10 states that the "duty to cooperate… relates to the obligation to share information on listed property, and to make property available to other brokers for showing to prospective purchasers… when it is in the best interests of sellers..." If your seller is not fully educated on the ramifications of keeping the listing out of the MLS, it could be perceived that by opting out of the MLS, you are not operating in the best interests of your seller because you are restricting the availability of information and showings to outside brokerages.

3) Massachusetts Law: Under Massachusetts license law, agents owe their clients a number of fiduciary duties, including the duties of loyalty and obedience to lawful instruction. As an agent, you work for your client, and it is important that you always work in his or her best interest. Be sure that the decision to opt-out of the MLS is at the sole discretion, and to the sole benefit, of your client – not the other way around.

4) Listing Agreement: Included in the "Broker's Duties" section of the Massachusetts Association of REALTORS® Listing Agreement is the requirement that the Broker "use reasonable efforts in marketing the Property and agrees to list the Property with…a multiple listing service." As part of your discussions with your client, be sure to point out this clause and allow the seller to decide if he would like it stricken.

In order to both protect yourself and act in the best interest of your client, it is important that the items above are considered. It is recommended that prior to opting out of the MLS, either temporarily or entirely, you make sure that a seller truly understands the advantages and disadvantages of opting out of the MLS, including any options available within the MLS to address their concerns (such as declining Internet display if apprehensive about privacy or non- placement of a lockbox if concerned about security). After full disclosure, make sure the seller voluntarily decides to keep the listing off the MLS. Specifically, you may want to explain to your client that listing a property in the MLS maximizes exposure of for-sale homes to potential buyers and the participating brokers who work with them, advertising the property to a wide range of people generally helps sellers obtain the highest possible price for their home, and when seller's property is in the MLSs, it is included in its download to various real estate Internet sites that are used by the public to search for properties.

MAR Legal Hotline Program Operation

Program Purpose

The Hot Line is designed for members to have direct, toll-free access to a qualified staff attorney who can provide information on real estate law and related matters. Further, the program is intended to provide legal preventative maintenance to all MAR members and, through them, the public they serve.

How does the Hot Line benefit MAR members?

- Access to information will help prevent REALTORS® from making mistakes. REALTORS® will increase professionalism, and consequently, the image of Massachusetts REALTORS® will be enhanced.
- Emerging legal issues affecting all Massachusetts REALTORS® will be identified. Early warning will allow MAR time to properly address the issues, through legislation, education programs or otherwise. The Baystate REALTOR® will also be used as a vehicle to keep the membership informed.
- The free access to the Hot Line will encourage office principals and branch managers and their designees to ask questions that may not normally be considered serious enough to call a private attorney. Unasked questions create the potential for future problems. Possible legal entanglements and costly lawsuits may be avoided.
- The public will be better served by having access to more informed and professional REALTORS® who protect the public's interest more completely by being adequately prepared to avoid potential problems in real estate transactions.

A Note of Caution: Information received via the Hot Line is NOT to be used to counsel other licensees or the public. It is intended to keep REALTORS® informed and to obtain answers to your questions ONLY.

- Access
- Advertising - Truth in Lending
- Agency (Buyer, Seller, Dual, Sub-Agency)
- Anti-Trust
- Auction
- Bankruptcy (as it relates to real property)
- Broker/Salesperson
- Civil Rights laws (Fair housing, accommodation of the disabled)
- Closing (Costs, Proceeds, Prorations)
- Commissions (Adjustment, Policy letters)
- Condominium law
- Consumer Protection Act (M.G. L. 93A)
- Disclosure (Agency, Broker status, Continuing duty, Fee/commissions, Investigation, Lead Paint, Material/adverse factors, Parties, Property, Radon, Stigmatized properties, UFFI)
- Easements
- Environmental Law (Title V, Wetlands)
- Execution of documents
- Financing (Anti-trust, Conditions, Discrimination, Equity participation, Interest on escrow accounts, Real Estate contracts, Notes & mortgages)
- Employment law and related issues
- Home warranties
- Homeowners associations
- Incentives (Listing, Sales)
- Landlord-Tenant
- Lead Paint
- License law (Appraiser, Broker/Salesperson, Dealing, Negotiating, Corporate, Discipline)
- Listing (Exclusion/exception, Ownership, Performance, Protection, Requirements, Solicitation, Termination, Transfer)
- Marital Property (Credit, Divorce, Domicile, Title)
- Misrepresentation
- Mobile home - sales
- Negotiation - out of state property
- Offer (Acceptance, Addendum, Allocations, Amendment, Back-up offers, Contingencies, Execution, Multiple offers, Occupancy charge, Personal property, Presentation, Representation/warranties, Counter offers, Secondary advancement, Disclosure of terms, Termination, Earnest money return, Timing)
- Probates
- Records
- Referral/finder's fee
- Remedies (Earnest money, Foreclosure, Land contract, Mitigation of damages, Notes & mortgages, Real estate contracts, Specific performance)
- Salesperson's relationship (Agency relationships, Commissions, Independent contractor, Covenants-noncompete, Securities, Separation, Solicitation, Supervision)
- Title-interests in property (Concurrent interests, description, encumbrances, methods of taking, water rights)
- Title insurance
- Trust accounts

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MAR Legal Hotline Program Operation

Q. How do I get access to the Hot Line?
A. Simply by calling the MAR office at 1-800-370-LEGAL during the Hot Line hours (Monday-Friday, 9 a.m. to 1 p.m., or by faxing (781) 890-4919 or by mailing your questions to MAR Legal Hot Line, Massachusetts Association of REALTORS®, 60 Hickory Drive, 4th Floor, Waltham, MA 02154-1139.

Q. What happens when my call is answered?
A. You will be asked for your name and your membership number (Normally your social security number). MAR will also check to see if you have signed a memorandum of understanding and agreement. Once your access to the Hot Line has been verified, you may ask your question. It will be restated for accuracy. (MAR suggests you write down your question before you call.) If the attorney is unavailable you will receive a return call as soon as prior calls are answered.

Q. Will the attorney answer my question right away?
A. Most of the time, yes. If for some reason your question cannot be answered immediately, the Hot Line attorney will call you back within 24 hours.

Q. May I ask more than one question?
A. Only one question per call is allowed. The Hot Line's intention is to provide a complete answer to you while at the same time, keeping the line open for others to access the service.

Q. If I get a verbal answer, will I get it in writing later:
A. MAR will be tracking the material and topic areas of calls made to the Hot Line in order to help identify "hot" issues and concerns that should be addressed through education, publication, legislatively or otherwise.

Q. Who will have access to the Hot Line?
A. Principals, one other designee from the firm, plus branch managers, Board Executive Officers and Board Presidents. All Hot Line users must sign a memorandum of understanding and agreement before they contact the Hot Line.

Q. Is my call confidential?
A. Any calls handled through the Hot Line **DO NOT RESULT IN AN ATTORNEY-CLIENT RELATIONSHIP.** The Hot Line is a source of legal information and no such attorney-client relationship is intended or implied. This means that any information conveyed to the caller may be subject to discovery by another person under certain circumstances if a lawsuit is filed.

Q. What if I want to use the Legal Hot Line attorney as my own attorney?
A. MAR policy prohibits the Legal Hot Line attorney from accepting employment with respect to any matter arising from or relating to a Hot Line call.

Q. Are there specific topics the Hot Line will not handle?
A. The Hot Line is not intended to provide legal advice with respect to any particular factual situation, nor an actual dispute between members of MAR