

Buyers' Agents Have to Be Aware of Possible Consumer Fraud Act Liability

We've recently become aware of an important judicial decision that affects the Consumer Fraud Act. Please see below for an important update from NJ Realtors® General Counsel Barry Goodman on this issue. NJ Realtors® are currently working on a legislative fix to the problem, but anticipate it taking some time.

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

As a result of a recent unpublished Appellate Division decision in *McCarthy v. Prudential Fox & Roach*, buyers' agents need to be aware that there is potential Consumer Fraud Act ("CFA") liability for buyers' agents who obtain information on behalf of buyers that proves to be false or misleading. As explained below, buyers' agents therefore need to exercise caution whenever obtaining any information on behalf of their buyers.

By way of background, in 1997, the New Jersey Supreme Court held that a real estate broker can be liable under the CFA for innocently passing along misinformation from the seller to a buyer. This means that the broker would be liable even if neither the broker nor the seller knew that the information was false or misleading. Of course, under the CFA, a broker is liable automatically for treble damages and attorneys' fees.

In response, the New Jersey Realtors® lobbied for an exception to the CFA where the listing agent innocently passes along such information. Legislation then was enacted limiting the liability under the CFA for real estate licensees under certain circumstances. This provision, which has become known as the "Safe Harbor Provision," became effective in 1999. It provides that "there shall be no right of recovery of punitive damages, attorneys fees, or both" under the CFA if the real estate licensee communicates "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" as long as the real estate licensee satisfies two conditions.

First, the licensee must not have any "actual knowledge of the false, misleading or deceptive character of the information." Second, the licensee must have made "a reasonable and diligent inquiry to ascertain whether the information is of a false misleading or deceptive character." Such a reasonable and diligent inquiry can include but is not limited to information from (1) a person licensed or certified by New Jersey; (2) a government official or employee; or (3) a properly used seller property condition disclosure statement.

In the *McCarthy* case, the buyers' agent obtained information from a municipal zoning officer concerning the square footage of a house that the buyers could build on the property they were considering buying. However, the information provided by the zoning officer was wrong. After the closing, the buyers learned that they could not build the house as planned and sued the broker under the CFA for treble damages and attorneys' fees. The Appellate Division held that the Safe Harbor Provision was unavailable to the buyers' agent because that provision only protects information obtained by a real estate licensee "by or on behalf of the seller."

As a result, the New Jersey Realtors® already is actively engaged in seeking an amendment to the Safe Harbor Provision to clarify that it covers all brokers, whether or not they represent buyers and/or sellers. In the meantime, buyers' agents should be very careful about obtaining information on behalf of buyers and may want to suggest that buyers obtain information from the municipality or from other sources rather than obtaining that information for the buyers. For example, if a buyers' agent previously submitted requests to a municipality for a buyer under the Open Public Records Act for information about a property, the buyers' agent may want to have the buyers submit that

request. Similarly, if buyers want zoning information about a property, the buyers' agent may want to provide the buyers with contact information for the zoning officer rather than getting the information for the buyers. The bottom line is, if you obtain any information on behalf of a buyer, be very careful to ensure that it is accurate. ■

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.

**RPAC OF
NEW JERSEY**

\$920,000

[\$344,406.88]

raised as of April 16

NEW JERSEY LEGISLATIVE BILLS

A2804 – McKeon (D27), DeAngelo (D14)

Establishes financial incentives for certain energy providers to conduct energy audits.

New Jersey Realtors® Position:
SUPPORT

We support this bill as it provides incentives for homeowners to conduct energy audits on their homes as opposed to mandates for energy audits at the time of sale.

Bill History:

2/1/2018 – Introduced in Assembly and referred to Assembly Telecommunications and Utilities Committee

A2914 – McKeon (D27), DeAngelo (D14)

Requires installation of operational automatic rain sensor on lawn sprinklers as condition of sale and on lawn sprinklers on commercial, retail or industrial property and in common interest communities within specified timeframes.

New Jersey Realtors® Position:
OPPOSE

We oppose this bill that provides another mandate at time of sale and will make it more expensive and difficult to sell homes in New Jersey.

Bill History:

2/1/2018 – Introduced in Assembly and referred to Assembly Environment and Solid Waste Committee

S2364 – Bucco (R25)

Prohibits residential development fees on reconstruction after natural disasters.

New Jersey Realtors® Position:
SUPPORT

We support this bill to ensure homeowners do not have to pay additional fees to their town to rebuild their homes after a natural disaster occurs.

Bill History:

4/5/2018 – Introduced in Senate and referred to Senate Community and Urban Affairs Committee