

Mortgage Loan Procedures and Broker Liability

From time-to-time members contact the Minnesota Association of REALTORS® with questions about the ethical, legal and moral ramifications of business practices occurring in the marketplace. Although we cannot comment on “morality” we certainly can provide you with a framework for avoiding ethical and legal liability.

Most of the questions fall into four categories:

1. Illegal financing kickbacks to consumers
2. Transferring personal property without lender knowledge;
3. Subordinate financing listed as a cash downpayment in purchase agreement;
4. Broker to broker compensation within a buyer/seller purchase agreement

In this issue we'll discuss the first item. In subsequent editions we will address each of the subjects so that you have a better grasp on the issue before sharing the information with your sales associates.

FINANCIAL “KICKBACKS” AFTER CLOSING

One of the most egregious activities being committed in the marketplace is illegal kickbacks after closing. This occurs when a buyer receives a financial “kickback” from the seller after closing. These are funds transferred between the parties but not disclosed on the HUD 1 Statement. When this occurs the lending institution has no knowledge of the payment. These transactions generally have a few key elements your sales associates should be able to recognize.

- Properties often sell for more than the list price and include a side agreement that has the seller giving the buyer funds after closing. This is usually the difference between the true market price and the inflated amount paid by the buyer. We often see this with homes that have been on the market for extended periods of time. The buyer will present a PA for over list price, even though there is no competing offer or market indication that the property is incorrectly priced.

- Buyers unable to get financing within days of closing suddenly find this “creative financing solution” that will allow them to obtain a mortgage. In these scenarios the seller finds themselves in a difficult position because they generally are purchasing another property. Their judgment becomes clouded and will often do “whatever is necessary” to close the transaction.

Evidence of the “kickback” is kept from the lending institution, which is why it is not placed in the purchase agreement or on the HUD 1 Settlement Statement. Some Mortgage Originators/Loan Officers will say this type of financing is legal even though the secondary mortgage market is unaware of the activity. This is because they are selling the mortgage and not properly reporting all of the financial information to the secondary market.



The above scenarios and similar versions of them are illegal. All financial agreements related to the transaction should be included in the purchase agreement and placed on the HUD 1 Settlement Statement.

WHAT CAN A BROKER DO?

- Instruct your sales associates not to accept purchase agreements that include any type of “side” financing arrangements not disclosed on the HUD1 Statement.
- Have a conversation with your sellers at the time of listing informing them that in some situations a buyer or lender will suggest this is a legal financing arrangement.
- Ask the Buyer why if this is legal, they refuse to place the information on the HUD1 Settlement Statement.
- Recommend that your seller seek legal advice before proceeding.

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