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REPORT FROM LEGAL AFFAIRS FORUM

May 5, 2021

Below is a summary of the information provided at the Spring Legal Affairs Forum, usually provided at the Friday Caucus Meeting. As I often caution, the Legal Affairs Forum consists of attorneys who practice real estate law, some of whom are attorneys with CAR, but most are not. Often there is a difference of opinion between the CAR attorneys who create the forms and manage the association and the attorneys who advise on actual transactions in the field and litigate disputes. I'm just communicating what was discussed; don't shoot the messenger if you disagree. I am happy to discuss in more detail if you have any questions.

Tenant in Common Projects

There are tenant in common agreements where two or more people agree to purchase a property to rent or develop. These can be unrelated people or parents purchasing with their children. I highly recommend that when a group of people decide to purchase property together, they should put their agreement in writing. Especially when dealing with siblings. Three of my last five partition actions involved siblings jointly owning property.

What was discussed at the Forum today was a form of ownership which is similar, but different from, condominiums. While condominiums and other forms of common interest developments are governed by the Davis Stirling Act, Tenant in Common developments are only governed by general contract law. They have been popular in San Francisco for about 10 years as a vehicle for landlords to get out of the rental business, and are now also popular in southern California. I expect we will be seeing some of these developments here as well.

The most important part of a Tenant in Common development is the Tenant in Common Agreement. Agents and brokers should not be giving advice on the sufficiency of these agreements, but it is a document that should definitely be part of the purchase agreement, similar to approval of the CC&Rs for a common interest development.

Issues in the Present Market

A. Multiple Offers. Buyers get caught up in the negotiations and then regret their decision. (For

example, one buyer ended up in a contract for property \$900K over the listing price.)

- Use the Market Condition Advisory form - ***before the offer is written!***
- Have the clients sign and date comparable sales data
- Don't rely on solely electronic communication - have a conversation with the buyers about the condition of the market and the risks...before getting into the frenzy of the negotiation process

Agents tend to think they need to write risky offers in this market and that their duties are therefore less than they normally are.

NO! Just the opposite. Clients need more direction and advice from the professionals when making risky offers.

B. Elder Abuse claims. The biggest risk discussed was the combination of older clients and off-market listings. It is tempting to want to make it easy if the agent already has a buyer. But, off-market listings inherently contain risks to the seller which should be fully explained and documented to the clients.

C. Non-Contingent Offers. When clients make no contingency offers, they risk the loss of the deposit. Not surprisingly, if the purchase is not completed and the seller retains the buyer's deposit, the buyer looks to the agent to reimburse them for the deposit lost to the seller. A written advisory regarding the risk of non-contingent offers should be signed by the buyer.

D. Escalation Clause. (For example: \$X over the highest bona fide offer.) An obvious problem is defining what is the highest bona fide offer. These are apparently successful means of getting an offer accepted, but there are risks. If you use this approach, do NOT waive the cancellation, appraisal and investigation contingencies, or cancellation based on buyer's personal preferences.

E. Title reports. These new preliminary title reports with hyperlinks to the pertinent documents are very useful for the buyers. Judges have decided that these do increase the fiduciary duties of the agents.

- Do not give legal advice, but do review the report
- Have the client contact the title officer with any questions
- Recommend consultation with a real estate attorney for any further questions
- Be aware of any limits on the use of the property
- Be aware of liens for solar, etc.

F. Inspections. Get it right, slow down, pay attention.

You can NOT delegate your duty to inspect. It is a statutory duty. Use all your senses when you

do an inspection. If additional inspections are needed, put it in writing to your client. Impress upon your sellers to disclose; remember that a Gladys Kravitz (for you Bewitched fans) lives in every neighborhood and will tell the new buyer everything when they move in!

Build a relationship with your clients so they will feel comfortable disclosing all the relevant information. Finally, remember your value as the broker/agent is as a professional guiding individuals through a very expensive transaction. You have a fiduciary duty to guide them in the best direction for their situation.

Sincerely,

WILSON & WILSON

Ann Bell Wilson

ABW/dd