

Hot Off The Hotline

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Governor Linda Lingle signed Act 137: Mortgage Rescue Fraud Prevention Act into law effective June 3, 2008. The purpose of Act 137 is to protect Hawai'i consumers from persons who prey on home owners who face property foreclosure, liens, and encumbrances. In light of the downturn in the economy, many consumers are facing this predicament. In these cases, consumers may own residential real property deemed to be "distressed property" or property in foreclosure or at risk of foreclosure, subject to a lien or risk of a lien due to nonpayment of any taxes or other assessments, or subject to a loan for which notice of default has been issued or which has been accelerated.

A "distressed property consultant" is a person who, among other things, solicits, represents, or offers to (1) stop or postpone the foreclosure sale, (2) stop or postpone the charging of any liens or encumbrances against any distressed property, (3) obtain any forbearance from any mortgagee or relief with respect to any tax lien sale, (4) assist in curing a default under Hawai'i law, (5) obtain any extensions of period within

which to reinstate the consumer's rights with respect to the distressed property, (6) obtain any waiver of any acceleration clause contained in a promissory note, (7) assist the distressed property owner in foreclosure or loan default, (8) avoid or ameliorate the impairment of an owner's credit, or (9) save the owner's property from foreclosure or loss of home due to nonpayment of taxes. REALTORS® are not exempt from Act 137.

So does Act 137 apply to REALTORS®? The short answer is "yes" if you are engaged in the practices of a distressed property consultant. Needless to say, more information, education and awareness regarding the requirements and the impacts of Act 137 on the REALTOR® will be necessary in the ensuing months.

In these cases, the distressed property consultant must enter into a written contract with the consumer or owner of a distressed property. The contract must fully disclose the services to be performed by the distressed property consultant, a description of the property, a clear identification of the distressed property consultant, notice details in case the owner wishes to cancel the contract, bold-

including a cancellation form, the total consideration to be paid to the distressed property consultant, and terms of payment. Additionally, the contract must be signed by all owners of the distressed property.

Finally, the distressed property consultant must not, among other things, misrepresent or conceal any material fact; induce the distressed property owner from waiving any rights under Act 137 or engaging in any act not covered by the written

terms of the contract; take or claim any compensation (i) for which services under the contract have not been fully performed, or (ii) that exceeds two most recent monthly mortgage installments of principal and interest; take or ask for a security interest to cover any compensation due; acquire any interest in the distressed property; or take any power of attorney from the distressed property owner. This list is not exhaustive of all prohibitions,

but I think you get the message.

Any person who violates Act 137 shall be deemed to have engaged in an unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of Section 480-2, Hawai'i Revised Statutes. Therefore, treble damages may apply.

So does Act 137 apply to REALTORS®? The short answer is "yes" if you are engaged in the practices of a distressed property consultant. Needless to say, more information, education and awareness regarding the requirements and the impacts of Act 137 on the REALTOR® will be necessary in the ensuing months. In the meantime, it would behoove the REALTOR® to continue to conduct oneself in a manner consistent with company policies and procedures, independent contract agreements, and ethical standards.

If you have any real estate related questions, and are enrolled in the LEGAL ASSISTANCE HOTLINE, give us a call. If you are not a HOTLINE subscriber, call us at 1-800-782-0195, and we will be happy to send you information and an enrollment form. You may also want to inquire about our Brokers Protection Program, the General Counsel Holomua Program, and our conveyancing packages. ☐

You Be The Judge

Case #1-10

Obligations Under Exclusive Listing

(Originally Case #7-12. Reaffirmed May, 1988. Transferred to Article 1 November, 1994. Revised November, 2001.)

At the time Client A signed an exclusive listing agreement with REALTOR® B, they discussed market conditions and prevailing prices, and agreed on listing at \$156,900. After six weeks with no apparent interest in the house, Client A called REALTOR® B to learn why his property was receiving scant attention from prospective buyers. REALTOR® B said, "It's not hard to diagnose the trouble. Your property is overpriced. That was clear to me by the time we had it listed for ten days. In this market, it would take a really interested buyer to go as high as \$149,000 for it. That's why it hasn't been possible for us to push it." "When you reached that conclusion, why didn't you tell me?" asked Client A. "Because," said REALTOR® B, "it wouldn't have done any good. I know from experience that sellers can't be convinced that they are overpricing their property until they get

tired of waiting for an offer that will never come. Now that the market has taught you something that you would not take as advice, let's reduce the price to \$148,900 and push it."

Client A complained about REALTOR® B to the Board of REALTORS®, detailing these circumstances, strongly insisting that REALTOR® B had fully agreed with him on the price at which the property was originally listed.

Client A reiterated this point strongly at the hearing of his complaint which was held before a Hearing Panel of the Board's Professional Standards Committee. REALTOR® B did not contest this, taking the position that at the time of the listing it was his judgment that a price of \$156,900 was fair and obtainable in the market. He stated that a strong immediate sales effort had convinced him that the listed price was excessive, and he defended his action of reducing his sales effort as he had done in his discussion with the client. He said that many years of experience as a broker had convinced him that once a seller decides on a definite price for his property, no argument or analysis will shake his insistence on getting that price; that only inaction in the market is convincing to the sellers.

(See answer on page 11)

The Code of Ethics of the National Association of REALTORS® establishes a public and professional consensus against which the practice and conduct of REALTORS® and REALTOR-ASSOCIATES® may be judged. In joining a Board of REALTORS®, REALTORS® and REALTOR-ASSOCIATES® signify their intention to abide by the Code and thereby enhance the public and professional image of themselves and all other REALTORS®. The "You Be The Judge" column is based on the Interpretations of the Code of Ethics available in the NAR Code of Ethics and Arbitration Manual. It was developed and formatted to help REALTORS® and REALTOR-ASSOCIATES® understand the ethical obligations created by the Code of Ethics. For more on the Code of Ethics, please visit www.Realtors.org.

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