Michigan Realtors®
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VALUATION OF PROPERTY

I. INTRODUCTION

REALTORS® are often asked for their opinion on the value of a particular piece of property. REALTORS® need to keep in mind first, that the Occupational Code limits what types of opinions a REALTOR® can provide without an appraiser's license. REALTORS® also need to be cautious about their valuation representations, keeping in mind that in recent years, both buyers and sellers have sued brokers claiming that the broker's valuation analysis was faulty and either caused the buyer to pay too much or the seller to take too little. This article will first discuss the rules contained in the Occupational Code and then discuss some of the cases that have been brought against REALTORS® for an allegedly incorrect value analysis.

II. DISCUSSION

A. License Law

As REALTORS® are well aware, appraisers are separately licensed under Article 26 of the Occupational Code. Accordingly, a real estate licensee who does not have an appraiser's license cannot provide an appraisal. However, either a salesperson or an associate broker can prepare a market analysis at no cost (*i.e.,* cannot be paid a fee or other consideration) for the purposes of assisting a customer or potential customer in determining the potential sale, purchase or listing price of real property. MCL 339.2601.

A broker or associate broker can charge a fee for a market analysis (other than for federally related transactions) as long as the market analysis is in writing and states in boldface print:

> **This is a market analysis, not an appraisal and was prepared by a licensed real estate broker or associate broker, not a licensed appraiser.**

A licensed salesperson cannot provide a market analysis for a fee.

B. Providing Valuation Information to Buyers

Back in the early 1990's, when buyer representation in Michigan was just beginning, a series of seminars was held to discuss potential liability issues. One of the issues that drew a few chuckles was a potential claim by a buyer against a buyer's agent, based upon an alleged failure to keep the buyer from paying too much for a parcel of property. The chuckles were justified in a real estate environment where market values increased incrementally from year to year. However, in a market of declining values, unfortunately this potential claim is now a real possibility.

A few years ago, there was a California case which was widely reported in the media involving buyers that had sued their buyers' agent, claiming that the buyers' agent had caused them to pay too much for their home. The buyers contended that the buyers' agent did not show them two comparables, which would have demonstrated that they were paying in excess of $100,000 over the fair market value of the home. The buyers contended that the buyers' agent had breached his fiduciary duty owed to them by concealing these comparables from them. In addition, the buyers contended that the buyers' agent had a duty to determine the appropriate purchase price for the home. Fortunately, at trial, the

REALTOR® and his lawyer proved that the REALTOR® had not concealed any meaningful comparables from the buyers and that the buyers had paid the approximate fair market value at the time they purchased their home.

There have been a number of similar threats of litigation in Michigan and there is at least one actual case pending. These threats arise in part from the fact that buyers' agents in Michigan typically gather comparables and provide an analysis to buyers to help the buyers reach their own conclusion as to what they are willing to pay for a specific piece of property. While REALTORS® need not stop this practice all together, they should take care to make certain that they are not held to the valuation standards of an appraiser.

The pending Michigan case involves a buyer who entered into an exclusive buyer agency agreement with a Michigan REALTOR® firm. The firm prepared an offer to purchase a home on behalf of the buyer with a purchase price of $168,000. The firm also prepared an addendum which called for the buyer to obtain an appraisal from a licensed appraiser within ten days from the date of the acceptance of the offer. The offer had no financing contingency as the buyer was paying cash.

The sellers accepted the offer. Thereafter, the buyer proceeded to close on the property ten days later without obtaining an appraisal. Due to a change in personal circumstances, the buyer almost immediately began to consider selling her recently purchased property. In the process of arranging for the possible sale of her newly acquired home, the buyer received information that convinced her that the price she had paid was $30,000 over the actual value of the property as of the date of closing.

The buyer has asserted two different claims against the REALTOR® firm and agent. First, the buyer contends that her exclusive buyer agency agreement contained contractual terms which required the firm and its agent to determine the approximate value of the property by researching comparable sales within a reasonable period of time prior to the closing date. It is also alleged that the firm and its agent led the buyer to believe that a "home inspection" was the same as an "appraisal report." Thus, the buyer claims that there was a breach of contract.

Second, the buyer contends that the REALTOR® firm and its agent owed it a duty to determine the "estimated market value of the property" by "researching of comparable home sales of comparable homes within a reasonable period." The buyer contends that the firm and its agent "carelessly, recklessly and negligently" breached this duty, among other duties, in failing to obtain comparable sales which would have prevented her from allegedly paying $30,000 more than the property was worth.

It is anticipated that the firm and its agent will ultimately prevail in this case. However, it will be a time-consuming and expensive process to flush out the facts and present the truth to a court.

In an effort to protect against these types of claims, REALTORS® should include a disclaimer in their written buyer's agency agreements, indicating that the REALTOR® will not be acting as an appraiser. Typical disclaimer language in a buyer agency agreement would be as follows:

> Broker's services shall include, but not be limited to, consulting with Client regarding the desirability of particular properties and the availability of financing; formulating acquisition strategies; and negotiating purchase agreements. Client acknowledges

> that Broker is not acting as an attorney, tax advisor, surveyor, appraiser, environmental expert or structural or mechanical engineer, and that Client should contact professionals on these matters.

Even with this disclaimer in place, however, REALTORS® should be careful about the any representations they make about the value of a home. A REALTOR® who, after obtaining a buyer's signature on such a disclaimer, may, through subsequent words or actions, be deemed to have given the buyer a reason to rely on the REALTOR®'s valuation opinion. This in fact occurred in *Holguin v Coleman*, 2002 WL 31854851, where a buyer's agent faced liability for making false representations to a buyer about the value of an interest in an apartment complex the buyer had purchased. The buyer's agent argued that regardless of what he had said about the value of the property, the case should be thrown out because the agent had recommended that the buyer get an appraisal, which had the buyer obtained, would have disclosed the true value of the apartment complex. The California court rejected this argument, holding that "the mere fact that a buyer does not exercise the right . . . to have an appraisal conducted is not sufficient to put the buyer on notice that the value of the property is not as represented by their real estate agent."

As shown by the decision in *Holguin*, courts may be reluctant to enforce a clause in a contract whereby the buyer acknowledges that the REALTOR® is not a valuation expert if the REALTOR® later provides his buyer client with what in fact purports to be the opinion of a valuation expert. Thus, in addition to including a disclaimer in the buyer agency agreement, a REALTOR® is well-advised to include a similarly written disclaimer with any valuation information later provided to his buyer-client.

C. Providing Valuation Information to Sellers

Another California case involved a seller who alleged that the listing broker had undervalued a commercial building and that in doing so, the listing broker had breached its fiduciary duties. *Pacific Millennium Training Corp v Form,* 2002 WL 1150747. This lawsuit arose out of a transaction that had failed because certain title problems had prevented the seller from deeding the property. The buyer then sued the seller for breach of contract and specific performance and the seller, in turn, filed a cross-claim against the listing broker. The seller's claim against the listing broker was that the listing broker's undervaluation of the property made it more likely that the buyer would bring suit.

The seller argued that based on the listing broker's valuation opinion, the seller had entered into an agreement to sell the property for $2.175 million, even though the property had been actually worth $2.5 million. The seller pointed out that after all, the measure of damages for breach of contract is the difference between the price agreed to be paid and the actual value of the property. It was only because of this below market purchase price, the seller argued, that the buyer had any real damages.

The trial court had accepted this theory holding:

> . . . the [broker's] misconduct permitted [the buyer] to enter into a binding contract with [the seller] to purchase property hundreds of thousands of dollars below market value and the litigation brought by [the buyer] against [the seller] seeking specific performance of the sale at a price approaching half a million dollars under market would not be unexpected.

On appeal, the California appellate court found that while the broker's valuation method had been negligent and, as a result, the property had been undervalued, the argument that this conduct had been the cause of the seller's damage was simply too

speculative. The court was unable to definitively conclude that had the valuation figure been correct, then the agreed-upon purchase price would have been higher and, thus, when the seller defaulted under the purchase contract, the buyer would not have sued the sellers.

A similar suit was brought by the sellers of property in Connecticut in *Noyes v Godiksen,* 2008 WL 3306658. In that case, the listing broker had prepared a comparative market analysis ("CMA") for her seller clients which valued the property at approximately $551,000. Based on this CMA and the advice of the listing broker, the sellers listed the property at $549,000. The sellers received several offers and ended up accepting an offer for $565,000. One of the sellers became concerned that she had received bad valuation information for the listing broker, so she obtained two appraisals which suggested that the property was worth far more than the CMA. The sellers then attempted to terminate the purchase contract, the buyers sued and the sellers eventually sold the property to the buyers for $568,000. The sellers then sued the listing broker claiming that they had relied on the broker's CMA in determining the sale price for the property and that the CMA was inaccurate.

After considering all the evidence, including the appraisals obtained by one of the sellers, the court concluded that the true value of the property at the time the CMA was prepared was actually $600,000 (as opposed to the $551,000 provided for in the CMA). The court concluded, however, that the mere fact there was this difference between the CMA and the actual market value and that the listing broker had used this CMA as the basis of her recommendation of a listing price, did not necessarily mean that the listing broker had been negligent. The court noted that the listing broker had actually recommended an appraisal

and, moreover, that one of the sellers had indicated that she needed money and wanted to sell the property right away. In finding in favor of the listing broker, the court opined:

> A CMA is not an appraisal. Real estate agents prepare CMAs but only a licensed appraiser may prepare an appraisal. A CMA usually indicates a range of values, whereas an appraisal usually will indicate the appraiser's opinion as to the specific market value of the subject property. An appraisal will use as comparable sales only properties in which actual sales have occurred. A CMA will include as comparables properties that have been sold, and the asking price of properties which have not yet been sold. There is much more detail in an appraisal concerning adjustments to comparable sales than there is in a CMA. A CMA is a realtor's opinion of value or a range of values.

III. CONCLUSION

As REALTORS® are well aware, valuing properties is not an exact science. An opinion of value is after all, just that, an opinion. This is particularly true in today's volatile real estate market. Perhaps the best way for REALTORS® to protect themselves is to make certain that any written or oral opinion as to value makes very clear that the value is simply an opinion based on the REALTOR®'s review of what he or she believes to be comparable sales. Stating a range of value in the CMA say, for example, $190,000 to $210,000, rather than a definitive price, say $194,600, may help convey to your client the fact that the opinion as to value is not in fact precise. Finally, including a statement in the CMA that encourages the client to obtain an appraisal could be extremely helpful in the event of a subsequent challenge.