

3 MINUTE READ

Buyers' Agents May Have Liability For Responses To OPRA Requests



from February 2021 Designated Realtor®
by New Jersey Realtor®



BY BARRY S. GOODMAN, ESQ., NEW JERSEY REALTORS® GENERAL COUNSEL

Buyers' agents must be aware 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. This includes responses to property document requests under the New Jersey Open Public Records Act (OPRA) that a buyers' agent provides to buyers that turns out to include incorrect information.

Buyers' agents need to exercise caution when obtaining any information on behalf of their buyers.

Background

In 1997, the New Jersey Supreme Court held that, under the CFA, a real estate broker can be liable for innocently passing along misinformation from the seller to a buyer. This means a broker would be liable even if the broker or the seller did not know the information was false or misleading. If there is a violation of the CFA, a broker is liable automatically for treble damages and attorneys' fees.

The Safe Harbor Provision

In response to the 1997 decision, New Jersey Realtors® worked for an exception to the CFA where the listing agent innocently passes along such information. Legislation was enacted limiting the liability under the CFA for real estate licensees under certain circumstances. The provision, known as the Safe Harbor Provision, became effective in 1999 and provides "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,

Next Story →
from 'February 2021 Designated Realtor®'



**Introducing
New Jersey Realtors**

brokersalesperson or salesperson, by or on behalf of the seller of real estate located in New Jersey,” as long as the real estate licensee satisfies the following 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.

A More Recent Example

In a recent unpublished case, a buyer was interested in building on a property they were considering for purchase. The buyers’ agent obtained information from a municipal zoning officer concerning the square footage of a house that the buyer could build. However, the information provided by the zoning officer was wrong.

After the closing, the buyers learned 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.”

In response to this decision, New Jersey Realtors® is seeking an amendment to the Safe Harbor Provision to clarify that it covers all brokers, whether 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 buyers obtain information from the municipality or from other sources themselves rather than the agent obtaining that information for the buyers.

A New OPRA Form for Members

As a result of this issue, New Jersey Realtors® has prepared and posted a new form in the Forms Library, Open Public Records Act Notice To Buyers, which explains to buyers that they can obtain documents relating to a property under OPRA. It also includes examples of documents a buyer may want to request, such as open and closed permits, documents about variances, code citations, inspections, certificate of occupancy, a list of off-site conditions that may affect the value of the property and ordinances indicating if the property is in an air safety zone. The bottom line is that it is best to have the buyer obtain such documents but, if you obtain any information on behalf of a buyer, be very careful to ensure that it is accurate.

Visit New Jersey Realtors® Forms Library at njrealtor.com/zipform.

Currently there is legislation introduced in Senate and Assembly that will address this issue. If you have questions please contact Vice President of Government Affairs Douglas Tomson.

