ANTITRUST LAWSUITS UPDATE

- March 6, 2019 – Moehrl v NAR et al. lawsuit filed
- Copycat lawsuits were subsequently filed
- May 17, 2019 – Motion to Dismiss filed
- June 2019 – Plaintiffs Amended Complaints
- Answers due in August
CYBERCRIME/WIREFRAUD

• Long Lost African Prince

• 4.4 Million Complaints Later (since FBI’s Internet Crime Complaint Center (IC3) inception in May 2000)

• From 2014-2018, IC3 reported:
  o 1,509,679 total complaints about internet scams since 2014
  o 7.45 Billion in total losses
2018 STATISTICS

2018 Overall Statistics

IC3 Complaints Last 5 Years

# of Complaints Reported Since Inception ('00)
4,415,870

Approximately 300,000 Complaints Received Per Year On Average

$2.71 Billion Victim Losses in 2018

Over 900 Complaints Received Per Day On Average

* 2018 IC3 Internet Crime Report
For victims over 40:

- Avg. loss of approximately $11,000
- Total loss of $1.5 Billion
TOP STATES

No. 24 Oregon - 4,511 victims
TOP STATES

No. 22 Oregon - $28,599,963
REAL ESTATE CYBERCRIME/WIREFRAUD

• Real Estate/Rental Cybercrime in 2018
  o 11,300 Victims*
  o $149,458,114 Total Loss*
  o 1100% increase in BEC/EAC victims **
  o 2200% of monetary loss **

• Per the FBI, real estate is now one of the top victims of malware attacks in the U.S.

*2018 IC3 Internet Crime Report
** Since 2015
TACTICS

• **Business E-Mail Compromise (BEC)** – Targets businesses working with foreign suppliers and/or businesses regularly performing wire transfer payments

• **E-Mail Account Compromise (EAC)** – Targets individuals. These sophisticated scams are carried out by fraudsters compromising email accounts through social engineering or computer intrusion techniques to conduct unauthorized transfer of funds

• **Phishing/Vishing/Smishing/Pharming** - Unsolicited email, text messages, and telephone calls purportedly from a legitimate company requesting personal, financial, and/or login credentials.

• **Spoofing** - Contact information (phone number, email, and website) is deliberately falsified to mislead and appear to be from a legitimate source.
THE PLAYBOOK

• Watch MLSs, syndication sites like REALTOR.com, Redfin and Zillow to identify pending home sales.

• Profile the parties in the transaction (real estate agents, title companies, law firms, sellers and buyers) using public websites.

• Hack an e-mail account, watch correspondence until they can step in and send false wiring instructions (e.g. last minute change).

• Steal down payment, closing costs or mortgage payoff funds.

• Rinse and repeat.
AGENT LIABILITY


- Fake wire instructions came from agent’s e-mail account
- Agent claims she never sent the fraudulent wire instructions
- However after fake wire instructions were sent, agent confirmed to buyer to wire money before closing
- Jury found real estate agent 85% liable
- Judgment of $167,129
NAR EFFORTS

• On March 12, 2019, NAR hosted representatives from American Bankers Association, American Land Title Association, Mortgage Bankers Association, RESPRO and the American Escrow Agents Association to meet with FBI.

• Working together to combat wire fraud, including educating members and developing common messaging to raise consumer awareness.
RECOMMENDED PRACTICES

1. Educate buyers about possible scams.
2. Make sure you send documents safely (transaction management system).
3. Never send wire instructions via e-mail.
4. Verify instructions with phone number independently obtained.
5. Double check e-mail addresses (call person if unsure).
6. Monitor e-mail for unrecognized activity.
7. Never click attachments.
8. Use strong passwords.
IF FRAUD OCCURS

1. Notify other parties in the transaction
2. Contact bank where funds were transferred immediately
3. File a complaint immediately at IC3.gov
   • Filing within 72 hours provides best chance for recovery
4. Report to local FBI office
E-MAIL NOTICE TEMPLATE

"IMPORTANT NOTICE: Never trust wiring instructions sent via email. Cyber criminals are hacking email accounts and sending emails with fake wiring instructions. These emails are convincing and sophisticated. Always independently confirm wiring instructions in person or via a telephone call to a trusted and verified phone number. Never wire money without double-checking that the wiring instructions are correct.

Email Notice Template available on nar.realtor:
Report is available on nar.realtor: https://www.nar.realtor/reports/cyber-and-fidelity-insurance-report
NAR RESOURCES

• Wire Fraud Landing Page: https://www.nar.realtor/topics/wire-fraud
• Sample Wire Fraud Notices: https://www.nar.realtor/data-privacy-security/wire-fraud-notices
• Legal Case Summary: https://www.nar.realtor/legal-case-summaries/licensee-liable-for-wire-fraud-losses
• Video Alerts and Education:
  • https://www.nar.realtor/videos/wire-fraud-alert-for-buyers
  • https://www.nar.realtor/videos/window-to-the-law/window-to-the-law-creating-a-cybersecurity-program
  • http://realtormag.realtor.org/daily-news/2016/04/22/video-arm-your-clients-against-wire-fraud
COMING SOON AND POCKET LISTINGS

• Coming Soon listing generally refers to when agent has a signed listing agreement but the property is not available for showing or sale until a later date.

• Pocket Listing (Office Exclusive Listing, Off-MLS Listing) generally refers to a listing in which an agent has a signed listing agreement and the seller opts-out of placing the listing on the MLS.

• Neither are new, but have become more popular due to current market conditions.
ARE THEY THE SAME?

• NO – A Coming Soon is different if it is used appropriately and fairly.

• A Coming Soon becomes a Pocket Listing when the listed property is never made available to the general public.

• Coming Soon when used appropriately is completely legitimate.

• Pocket Listing is more risky and raises many questions.
COMING SOON – PROPER USES

• Coming Soon is appropriate when it helps the seller
  o Market generation
  o Provides seller extra time
• Presents a true and accurate picture
• All buyers are treated equally and fairly
• Complies with state laws, regulations and MLS rules
COMING SOON – IMPROPER USES

- Never lists on the MLS
- Shown only to a select few
- Without seller permission or consent
- No signed listing contract
- Accept bids or offers before advertised time
- No logical or reasonable reason
- Only appropriate if it’s not misused
POCKET LISTINGS

- Most experts agree that sellers (majority) are best served by MLS listing.
- MLSs facilitate transactions by creating a consolidated source of accurate property information, and function best when information is complete.
  - Pocket Listings can compromise information accuracy and undermine cooperation.
- MLSs ensure max exposure and provides the best chance for highest offer.
- General perception that Pocket Listings only benefit the listing firm.
POCKET LISTINGS – PROPER USES

• Rarely in the best interest of the seller.
• Seller wants privacy (e.g. celebrity, divorce).
• Seller wants a quick transaction.
• Seller wants control and to limit the number of strangers walking through seller’s property.
• Seller wants to test price.
LEGAL RISKS

• Breach of Agent’s Duties
• State Laws and Regulations
• Fair Housing
• Antitrust
BREACH OF DUTIES

• Loyalty – Act solely in the principal’s best interests at the exclusion of all others including broker’s self interest.
  o Dual Agency (*NYC Lawsuit - Houlihan*)
  o Conflict of Interest: Self Interest (*Double Commission*) vs. Seller’s Interest (*Highest Price*)
    – *Sweetwater v. Umansky*

• Reasonable Care and Diligence
  o Competent
  o Superior skill and expertise
  o Same duty as doctor or lawyer

• Cooperation – Duty to cooperate when in the client’s best interest. Rooted in the premise that broad exposure and cooperative marketing produce best result.
STATE LAWS AND REGULATIONS

• Colorado
  o Advise client during listing contract negotiation the risks and benefits risks of “coming soon.”
  o Motivation must be only for seller’s benefit.

• South Carolina
  o Cannot advertise as “Coming Soon” before entering into a listing agreement.

• Idaho
  o “Coming Soon” that markets to only a select group is misleading advertisement.
  o No safe haven for claims that a seller is content just because of accepted offer.
  o Could violate Idaho’s Consumer Protection Act.
STATE LAWS AND REGULATIONS

- Nebraska
  - Must have an active listing agreement.
  - Must be in the name in which broker does business and under the broker’s supervision.
  - Must be with the property owner’s knowledge and written consent.
  - Must actually be “Coming Soon” and not shown or marketed before indicated time.
CODE OF ETHICS

• Protect and promote client’s interest while treating all parties honestly. (Article 1)

• Advise seller of policies regarding cooperation and any compensation amounts to be offered. (SOP 1-12)

• Cooperate and make property available for showing when in the seller’s best interest. (Article 3 & SOP 3-10)

• Do not misrepresent availability to show or inspect property (SOP 3-8)

• Be honest and truthful in communications and present true picture in advertising, marketing and other representations. (Article 12)
DYNAMICS

SELLER

- Agency
- Best Interest
- Reasonable Care
- Diligence

BROKER

- Must harmonize these relationships and duties

MLS Association Law

- MLS Policy
- MLS Rules
- Code of Ethics
- Professional Standards
- Applicable Laws

Must harmonize these relationships and duties
BEST PRACTICES

• Don’t advertise a property without written consent of the seller.
• Get a listing agreement that is legally compliant and fully executed.
• Know and follow your state laws, regulations and MLS submission rules.
• Make sure the seller understands the pros and cons of an exclusion (EXPLAIN, EXPLAIN and EXPLAIN).
RESOURCES

• Articles:
  o The Latest on Coming Soon: https://www.nar.realtor/realtor-ae-magazine/the-latest-on-coming-soon-listings

• Window to the Law Videos:
**WINDOW TO THE LAW**

A monthly video series focusing on legal topics of interest to the real estate industry.

- Coming Soon Listings
- Teams
- RESPA
- Wire Fraud
- Independent Contractor Classification
- Antitrust
- Social Media
- Interactions with an Appraiser
- Campaign Finance Law
- ADA: Basics & Website Accessibility
- Copyright Infringement
- Patent Trolls
- Drones
- Elder Abuse
- And many more.

LEGAL PULSE
Quarterly newsletter analyzing recent legal trends, as well as emerging issues, impacting real estate professionals.

Current Issue: 4Q 2018: Agency, PCD, RESPA, and Fair Housing

Download or print this quarter's Legal Pulse newsletter. (PDF: 402.62 KB)

This edition of the quarterly report analyzes legal trends in risk management areas that affect real estate professionals: Agency, Property Condition Disclosure, RESPA, and Fair Housing.

- Read the 4Q 2018 Executive Summary

https://www.nar.realtor/publications/legal-pulse
STATE ISSUES TRACKER

Interactive, searchable database of real estate-related state regulations, as well comparisons of various state approaches to core real estate issues.

https://www.nar.realtor/political-advocacy/state-issues-tracker
LEGAL CASE SUMMARY

Legal summaries of recent cases of interest to the real estate industry.

https://www.nar.realtor/legal-case-summaries
Hot Topics in Broker Risk Reduction

Katie Johnson, General Counsel & Chief Member Experience Officer
May 2019

WIRE FRAUD (https://www.nar.realtor/topics/wire-fraud)

a. Follow these tips to reduce risk of wire fraud:
   i. Alert homebuyers at the outset of the transaction. Many brokers are requiring signed disclosures. [http://www.realtor.org/videos/wire-fraud-alert-for-buyers]
   ii. Instruct homebuyers to call wire recipient using an independently-verified phone number.
   iii. Avoid sending wire instructions (and any sensitive financial information) via email.
   iv. Use a secure transaction management platform to share documents and information.
   v. Use good email security practices – never open unsolicited links or attachments, keep operating system and anti-virus updated, use strong passwords and two-factor authentication, purge regularly, and avoid using unsecured wifi.
   vi. Create an e-mail rule to flag email communications where the “reply” email address is different from the “from” email address shown.
   vii. Immediately report suspected fraud to the bank from which the funds were transferred.
   viii. Get to know your local FBI field office and contact them immediately if fraud is suspected.

b. Resources:

https://www.nar.realtor/legal/hot-topics-for-brokers
SAMPLE PHOTOGRAPHY AGREEMENTS

Real Estate Brokerage Essentials®

Real Estate Brokerage Essentials®: Navigating Legal Risks and Managing a Successful Brokerage, Fourth Edition is the most comprehensive business tool for brokers to run their offices efficiently and minimize their risk for legal liability. This is a must have for all Brokers!

Watch Katie Johnson and the Legal team share why this is the one resource you need to succeed!

This product covers everything from hiring and training employees, licensing issues, dealing with consumers, key intellectual property concepts and how to understand and deal with tough business issues. The product was created by NAR’s Legal Team and includes a foreword by NAR General Counsel Katie Johnson.

This comprehensive guide includes training modules on some of the most relevant topics to provide an easy source for assisting brokers with creating effective training programs on risk management issues. The guide offers current case law, checklists, training worksheets, and does so in a way that anyone can relate to. It offers quick tips and helpful summaries and checklists on many of the topics to assure Brokers and able to successfully manage their businesses.

The product features 15 updated chapters with 30% of the content being new, including one completely new chapter called Emerging Risk Management Issues.

TRADEMARK PROTECTION PROGRAM
Logos and Trademark Rules

It is important to use NAR’s membership marks—including the REALTOR® logo and the terms REALTOR®, REALTOR-ASSOCIATE®, REALTORS®—correctly and according to the rules outlined in the Membership Marks Manual.

Download REALTOR® Logos and get information on how to use the logos correctly:

REALTOR® logo  Commercial logo  Opportunity logo  MLS logo

Read the top 5 things you need to know about using the REALTOR® trademarks correctly, then take this quiz to test your knowledge.

Get tips for using the terms REALTOR®, REALTOR-ASSOCIATE®, and REALTORS®:

• With a member’s name

http://www.nar.realtor/logos-and-trademark-rules

Trademark Tips for Associations Video: https://www.nar.realtor/videos/maintaining-the-realtor-brand-for-the-next-100-years
REALTOR® TRADEMARK VIDEOS


LITIGATION SUPPORT
LEGAL ACTION PROGRAM

NAR’s Legal Action Committee provides financial assistance in connection with litigation affecting NAR, state and local REALTOR® associations, members, and real estate owners where the cases may have a direct or indirect impact on the real estate industry.

https://www.nar.realtor/programs/legal-action-program
THANK YOU

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