

7/27/11

Montana Board of Realty Regulation

POSITION STATEMENT RE MASS LISTINGS

Adopted by the Board of Realty Regulation October 7, 2011

The Board of Realty Regulation (Board) has become aware of a business model known as Mass Listings. Montana Licensees need to understand Mass Listing issues and the implications on a real estate licensee's ability to comply with Board requirements. In a Mass Listing, a "Service Provider" is allegedly authorized to sell real estate properties for a lender. Typically, the properties are repossessed properties but they need not be. The Mass Listing itself consists of a general Master Listing Agreement between a Montana licensee and the Service Provider. Once there is a general Master Listing Agreement, a separate *Addendum to Master Listing* is provided to the licensee with respect to each property to be sold for the lender. Because of the nature of the Mass Listing business model, the licensee knows very little about the property and the bank itself may know even less.

The Board has been informed that when a seller agent or a buyer agent becomes involved in a Mass Listing program, they are often unable to get documents required by the Board for inclusion in the Licensee's transaction file. This is a problem for the licensee because they find their transaction files lacking when they are audited. The missing documents may include signed lead base paint disclosures or agency relationships forms. In fact, often, the only documentation provided to the seller agent by the Service Provider is a letter of intent by the lender bank to sell a piece of property at a certain price. It has also been reported that the Service Provider's agents send unsigned electronic counteroffers that can't be printed by the licensee. When the licensee tries to print the counteroffer, the computer screen simply goes blank.

Of more concern is the question of who is actually conducting the real estate affairs for the lender/owner? Licensees are required to verify that the principal who is listing the property is the true owner or is authorized by the owner to list the property". ARM 24.210.641(5)(e). However, Montana licensees may find that the lender – who is the current property owner – is not actually acting as the principal. Rather, it is the agents of the Service Provider who are signing listing agreements, signing buy/sell agreements, and accepting offers. Conventional wisdom¹ notes that agents of the Service Provider sign the documents as themselves, and they do not even represent that they are doing it on behalf of the bank. The mass listing agreement itself indicates the licensee is listing and marketing the property for the servicing agent, not the bank. Remember, neither the Service Provider or its agents are the true owner of the property. It is true that the Service Provider alleges to be authorized to list the property but they usually will not provide the Licensee with proof of such authorization.

If the listing agreement is not signed by the owner or a true representative of the owner, the listing agreement is not valid. It is unlawful for a broker or salesperson to advertise property

¹ The Board has not investigated all of these claims and cannot state with any certainty that these practices are actually happening. This position statement is intended merely to help licensees avoid situations where they might find themselves in conflict with Board Law and Rule.

belonging to others unless the broker or salesperson has a signed listing agreement from the owner of the property. MCA 37-51-321(2)(a). Not realizing that they may have an invalid listing agreement, the parties may find themselves at closing without an enforceable transaction agreement. In one Montana case which was reported to the Board, the seller was able to cancel the buy/sell just before closing because the Service Provider's agent was the party that had signed the listing. That agent had no ownership in the property, so the listing wasn't valid. The buyer had no recourse for the lost purchase

Another area of concern is that Service Provider's agents often try to prohibit licensees from disclosing conditions of the property that should be disclosed. The Service Provider's agents claim the property is being sold "as is". Selling property 'as is' does not relieve a seller agent from the obligation to act in good faith with a buyer and the buyer agent. Real estate may be sold "as is" in Montana, but only after the seller agent makes full disclosure of any adverse material facts that concern the property and that are known to the seller agent. Also, the seller agent is obligated to disclose when the seller agent has no personal knowledge as to the veracity of information regarding adverse material facts. .

The Board has also heard tales of mass-listed properties which have undisclosed redemption periods wherein the previous owner still has a right to redeem the property for some period of time after the sale. Such redemption periods obviously can hinder the buyer's ability or proclivity to purchase the property.

The buyer and the licensee are usually unaware of these problems until they have spent a great deal of time and money on the transaction.

When pressed for more information, lender banks may be reticent. They contend that they have to follow the requirements of federal programs such as HUD. They handle the transaction the way the federal program wants it done and they are not obligated to follow state regulations. While that may be true for banks, it is not true for licensees.

Licensees have to follow Montana's laws and rules. That means they need to be sure that they have all required documentation in their files and they have to make all required disclosures.

The Auditor for the board has developed a checklist of documents that she expects to see in a transaction file when she conducts an audit. That checklist is a good start to know what should be in a licensee's file.²

At a minimum, a **SELLER AGENT** file must contain the following for each transaction:

- Listing Agreement
- Agency Disclosure
- Signed Buy/Sell Agreement
- Megan's Law Disclosure -
- Radon Disclosure (Inhabitable Prop.)

² The documents described herein are not the only records that an agent must keep. For example, if a Broker elects to use a trust account, the licensee must also keep trust account records in compliance with ARM 24.210.426.

Methamphetamine Disclosure (If Applicable)
Mold Disclosure (If Applicable)
Lead Based Paint Disclosure (If Applicable)
(Title X, Section 1018 of the United States Code) Regulated by EPA & HUD.

A **BUYER AGENT** file must contain the following for each transaction:

Buyer/Broker Agreement – ARM 24.210.641(5)(al); MCA 37.51.102(7)
Agency Disclosure MCA 37-51-314
Signed Buy/Sell Agreement ARM 24.210.641 (5)(l); ARM 24.210.641(5)(h)
Megan's Law Disclosure - MCA 37-51-105

CO-LISTING FILE

If you co-list a property, the Board of Realty Regulation requires that both listing licensees maintain complete files (as indicated above) for five years.

DUAL AGENT FILE

All documents as indicated under both the seller and buyer's file.

It appears that being involved in some of these Mass Listings may result in a Licensee choosing between getting much-needed business and violating the law. In these harsh economic times, Licensees are feeling pressure to accept these deals believing that, if they don't, someone else will.

Licensees need to know that their license is on the line if the banks and/or servicing agents don't have a true ownership interest and cannot lawfully list property or accept offers or sign buy/sells committing the property. Likewise, licensees are required to make various disclosures and cannot be made to hide material facts. Further, Licensees are required to maintain certain things in their files. Refusal of the 'client' to provide those things is not excuse for failing to comply with Board Law and Rule.

This statement is subject to change and is NOT a substitute for reading the regulations and understanding all the requirements as it applies to real estate licenses. Licensees are required to abide by ALL licensing laws and rules, and state and federal requirements that affect real estate licenses and real estate transactions. Failure to abide by laws and rules is considered unprofessional conduct as described in A.R.M. 24.210.641 and may result in disciplinary action.