

Steer Clear of HOA Risks

Distressed sales hurt communities; they don't have to hurt you.



Barbara Nichols

Author, REALTOR®, general contractor, expert witness, consultant, and national expert in risk management. She is the author of *The No-Lawsuit Guide to Real Estate Transactions* (McGraw-Hill: 2007). She is based in Los Angeles and can be reached at 310-273-6369 and via her Web site, www.BarbaraNichols.net.

It's not uncommon for homeowner associations to sue builders for property defects such as improper drainage that can lead to mold and other debilitating issues. In some cases, builders agree to pay funds to the HOA for repairs. The HOA might then distribute funds to home owners to make the repairs or might handle the work itself. The problem is that some HOAs may make only a portion of the repairs, if any, and funds distributed to home owners might be spent on something else.

Salespeople selling units that were never repaired can be sued if they fail to disclose past lawsuits to clients who later discover mold or other defects.

These lawsuits are an eye-opening example of the risks that can arise when you're helping clients buy and sell in a condominium or other development that's governed by an HOA. In every state, HOAs have specific requirements regarding disclosures and delivery of documents, including those related to past lawsuits. Unless you're aware of these requirements, you can expose yourself to liability. Here's what you need to know.

TYPICAL DISCLOSURES

HOAs are usually required to disclose the most basic information about their organization: whether they're incorporated, what assessments they require of owners, whether units are age-restricted, and so on. They're also required to disclose certain documents: the HOA bylaws, the pro forma operating budget, and any pending litigation, among others.

Past litigation must typically be disclosed as well: what the lawsuit was about, which units or houses were involved, and whether funds were received by the HOA to make repairs. The HOA should also track what repairs were made and maintain these records. However, the HOA won't always have information on owners' repairs within their homes.

REQUESTING THE INFORMATION

In some states, where attorneys handle the escrow functions, they may have the responsibility to request and obtain this information for the buyer. In others, salespeople have this responsibility, and they

can seek this information directly or through an escrow or title company. For example, the CALIFORNIA ASSOCIATION OF REALTORS® has a form available for making these HOA requests.

Don't assume that requests for HOA disclosures fall to an attorney or escrow officer. If you're the buyer's agent, you have a fiduciary duty to your client not only to look for official notifications that the documents have been sent to your client but also to review what was received to be sure that all required information was delivered.

Still, you're not expected to analyze the HOA financial statements or any other document beyond your scope of knowledge as a real estate licensee. Rather, buyers should be referred to their accountant or attorney. There are also companies that specialize in reviewing HOA documents. Search Google for "community association document review."

Having a knowledgeable entity look at the documents is particularly important today, given the large number of short sales and foreclosures. Distressed sales can have a severe impact on HOAs: Dues aren't paid, reserve funds are depleted, and maintenance is sometimes neglected. In some cases, HOAs cease to function as a formal entity, with no elected officers and no one to assume responsibility for providing documents in response to requests—in violation of state laws.

In *Calemine v. Samuelson*, a California appellate court found last year that a condo seller who disclosed a defect in the property should also have disclosed a previous lawsuit regarding that defect. The court said that the failure to disclose past litigation related to flooding and drainage issues was material information that could impact the desirability and value of the property to a potential buyer and thus could be litigated. Further, the court said the seller's disclosure of the HOA repairs without talking about past litigation could be characterized as a partial disclosure, likewise creating an issue that could be litigated.

To protect yourself and your clients, be aware of what HOAs must disclose in your state and make sure those disclosures are made. ■