

WHAT YOU NEED TO KNOW ABOUT BUYING AND SELLING A HOME

*This brochure will outline laws
and issues that affect consumers in
their purchase and sale of real property*

LOAN ISSUES

Predatory Lending

There are companies who are involved in what is known in the industry as “predatory lending.” Predatory lending involves usurious interest rates, very high pre-payment penalties, single-premium credit life insurance and similar high and unnecessary fees.

If you are involved in a mortgage process and fear that the company is charging too much interest or requiring you to pay unnecessary insurance premiums, you may contact the Department of Financial Institutions, your local Housing and Urban Development branch or your local county government office to file a grievance and launch an investigation.

In addition, you should never sign a closing (HUD-1) statement that does not accurately reflect the actual transaction that took place. This statement shows the federal government exactly how much money changed hands for tax and other purposes. It is a federal bank fraud violation to sign an inaccurate form. If a mortgage company asks you to re-write a contract using a different sales price or different terms than you agreed to, you should walk away from that deal. Moreover, it is a felony to file a deed that does not accurately state the actual purchase price of a piece of real property.

As a consumer, it is not in your best interest to purchase a piece of property that you cannot afford. Over 80% of properties that involve predatory lending result in foreclosure. The goal of home financing is to find a property that you can afford so that you can live there, build up equity and enjoy peace of mind. This is also the reason that finance companies have underwriting standards. Their accountants and actuaries have determined how much a particular consumer can afford based upon tried-and-true principles. To try to avoid these standards and purchase a home that is above your price range will certainly lead to problems.

Financing Options

There are numerous financing options available for consumers in this State. First-time homebuyers who meet certain income qualifications can apply for a loan through the Kentucky Housing Corporation (“KHC”). In addition, veterans of the United States armed services may be

eligible for a Veterans Administration (“VA”) loan. The federal government also subsidizes certain Federal Housing Administration (“FHA”) loans for which certain buyers may qualify.

There are also many zero down-payment programs and down-payment assistance programs that may be available to buyers within certain income criteria.

The wisest thing to do would be to obtain financial counseling regarding how much, and what type, of a loan you qualify for. In addition, shop around for the best rates. These rates also include the closing costs, the points that will be charged, the origination fees, etc. One company may have a lower interest rate, but higher fees, for example.

Financial institutions are required by law to provide you with a good-faith estimate of your charges. In addition, they are required to provide you with a closing statement at least 24 hours prior to closing that outlines exactly how much each party is required to pay and how much the total fees will be. If you find discrepancies in this statement, you can contact the closing attorney or closing agent.

As an aside, the closing attorney is generally present to represent the interest of the finance company. The closing attorney does not represent the buyer, per se, even though the buyer has chosen the finance company. If you want to be represented at the closing for whatever reason, you should hire your own attorney.

Real Estate Settlement Procedures Act (“RESPA”)

The Real Estate Settlement Procedures Act, commonly referred to as RESPA, was passed by Congress in 1974 to give consumers certain information and protections when financing a home. RESPA applies whenever a consumer obtains a conventional, FHA, VA or HUD loan. RESPA is administered by HUD. The Act prohibits those involved in the settlement of a real estate deal from receiving referral fees or kickbacks that would increase the cost of settlement charges. Lenders are required to provide consumers with an information bulletin within three (3) days of application, a good faith estimate of closing costs, and a closing statement 24 hours prior to the closing.

Truth in Lending Act (“TILA”)

The federal government also passed the Truth in Lending Act (“TILA”) to ensure that consumers receive disclosures relating to all fees and interest rates that will be charges for financing a piece of real property. There are certain “trigger terms,” such as down payment amount, payment amount, finance charges and payment period. If any of these “trigger terms” is used, then the ads must also disclose the annual percentage rate, down payment required, and/or the terms of repayment.

Title Insurance

When you finance a property, the mortgage company will usually obtain title insurance to secure the mortgage company's interest in the property. The mortgage company's title insurance does not protect you as the buyer. If you want to protect yourself and your interest, you must purchase a homeowner's title insurance policy.

Good Credit

It is important to maintain good credit in order to qualify for a mortgage to purchase real property. Once you have purchased a property, it is equally important to keep your mortgage payments current and to make sure that your property is at all times properly insured.

A home is usually the largest investment that an individual will make in his or her lifetime. There are many steps that you can take to protect that interest. If you fall behind on your payments, the bank can foreclose on their mortgage note. This means that the bank would take over and potentially sell your property at the courthouse steps. A foreclosure would be very detrimental to your credit.

If you should ever get into financial difficulties, contact your bank immediately and try to set up a meeting to discuss alternative payment schedules, etc. There may be government assistance or other credit counseling programs that could help you get back on your feet without drastic results.

PROPERTY ISSUES

Home Inspections

Perhaps one of the most important protections a buyer and a seller can have in a home sale or purchase is a whole-house home inspection. In addition, you should have a termite or other wood-destroying insect inspection and any other type of inspection that your particular property may require.

Many buyers want to save a little money by waiving their right to a home inspection. The Commission advises against such a decision. There are numerous aspects of a property that may need to be repaired or replaced. The seller may not even know of some defects and may not, therefore, be able to disclose them to you.

Likewise, your real estate agent cannot guarantee that a property is free from defects. A listing agent only knows as much about the property as the seller has disclosed and as much as he or she can see with his or her own eyes. Most real estate agents are not certified home inspectors. Most sellers do not even know all of the potential problems with their homes.

Finding and hiring a qualified home inspector is the best way to protect yourself and your investment.

Surveys

An additional way to protect yourself is to ensure that your property lines are where they should be and that there are no encroachments on your property. The only way to verify acreage and encroachments is through a survey. The Commission strongly recommends that buyers obtain a staked survey prior to purchase. If you do not obtain a staked survey, you should, at the very least, obtain a mortgage survey.

Lead-Based Paint Disclosure

The federal government requires all owners, agents and landlords to disclose the presence of lead-based paint in any property built prior to 1978. The government has developed a disclosure form that shows consumers what, if any, knowledge the owner or agent has about lead-based paint in a property.

CONTRACT ISSUES

Oral Negotiations

In Kentucky, a contract for the sale of real property must be in writing to satisfy the Statute of Frauds. Verbal negotiations or verbal contracts are not binding on either party. If you and the other party have agreed upon a price, etc., over the phone and one party changes his or her mind, there is no deal.

Make sure that you have each and every negotiation reduced to writing and signed, dated and timed by all parties. Until you have that accomplished, you do not have a binding contract.

Likewise, once the agreement has been signed by both parties and communicated back to the last offeror that it is accepted without any changes, the agreement is binding. There is no 3-day right of rescission for a purchase or a listing contract. If the parties want to void the contract after acceptance, then it will require a mutual release signed by both parties.

“Time is of the Essence”

In general, the dates and times outlined in a purchase contract are not set in stone. Since the purchase of real estate is a long-term proposition, the law favors allowing the contract to go through, rather than holding the parties to strict dates and times. So, if the closing date in your contract states that the closing must occur by a certain date, the contract is not automatically void on that date. To the contrary, both parties still have a “reasonable amount of time” to pursue and close the deal. The reasonableness of the time depends upon each circumstance and cannot be determined by anyone other than a judge, jury or arbitrator.

If you want to ensure that each time and date in your contract is set in stone, the legal term of art is that “time is of the essence.” If “time is of the essence” as to the closing date, for example, then the contract will become null and void once that day passes if the closing has not yet occurred. A word of caution: Do not use the phrase “time is of the essence” unless you are certain that you want the contract to be voided on the closing date. If the bank is delayed in processing your paperwork, or if the seller finds a new buyer (or the buyer finds a new home), the contract will be voided. This may not be the result you are looking for.

Binding Contract

Once both parties have agreed to the terms of a sales and purchase contract, have signed that contract, and the acceptance is communicated back to the offeror, it is binding on both parties. There is no right of rescission. Therefore, it is advisable to think very seriously about your offer and the terms of that offer prior to signing a binding contract.

Earnest Money

Most sellers will want an earnest money deposit from the buyer to show the buyer’s good faith in entering into the contract. This money is generally placed into a broker’s escrow account and held in trust for the protection of both parties. Under KRS 324.111(4), that money can only be removed upon performance on the contract, a mutual release signed by both parties or a court order.

Arbitration and Mediation

Many real estate purchase and listing contracts have provisions for arbitration and/or mediation of any disputes that may arise under that contract. Arbitration and mediation are not synonymous. They are both alternative dispute resolution methods. They serve as an alternative to civil court.

Arbitration is a process in which a neutral person or persons, the arbitrator, presides over a formal hearing to determine whether a contract has been breached, whether there has been fraud, etc. The decision of this arbitrator is usually binding, meaning there is no appeal to a higher court and the decision is final once issued.

Mediation is a process in which the parties come together with a neutral facilitator to try to fashion their own resolution to a dispute. The mediator is there to assist the parties in reaching a compromise, but is not there to be the ultimate decision-maker in the case.

It is important to understand these distinctions, and to understand what you have agreed to, before signing any contract. If a dispute arises under your contract, you are bound by the terms of that contract, including using the alternative dispute resolution method agreed upon in the contract.

LEGAL ISSUES

Megan's Law

Kentucky has adopted a sex-offender registry law, commonly known as Megan's Law. Under this law, all sex-offenders are required to register with the local sheriff's office upon moving into a particular neighborhood. These offenders are ranked according to their dangerousness to society.

If you are moving into a neighborhood and are interested in whether a sex-offender has registered there, you can go to the local sheriff's office to inquire or plug in the address of the property on the Kentucky State Police website. Be sure to verify that the information is accurate with the sheriff, as these individuals may have moved since registration.

Stigmatized Properties

There is no specific stigmatized property law in the State of Kentucky. If you want to know whether there has been a murder, suicide, violent crime or ghost in a particular home, you must ask the question. Once asked, the seller or the seller's agent must disclose the information. However, without being asked, there may be instances where the seller has not disclosed such information, and by law is not bound to disclose.

Likewise, as a seller, you must determine whether a murder, suicide, violent crime or ghost in your property has created a stigma and therefore a defect. If it is the reason that you are moving, you may want to disclose it, as that has become a stigma to you. My advice would be to disclose it anyway, as it is always better to have a knowledgeable buyer rather than one who feels duped after the closing. Buyers will find out the details of the property from neighbors or others once they move in, so it seems wise to disclose all known facts about the property.

Federal Fair Housing

The federal government has passed several laws to ensure that all consumers are given the opportunity to purchase or sell their real property. The law states that a consumer seeking housing cannot be discriminated against based upon race, color, gender, national origin, religion, familial status or disability. In addition, sellers and real estate agents or brokers are prohibited from: 1) steering consumers to, or away from, a certain area; or 2) blockbusting certain areas by trying to encourage sellers to move based upon certain buyers moving into the neighborhood. In addition, lending institutions cannot "redline" certain areas and refuse to make loans in those areas.

REPRESENTATION ISSUES

Agency

An agent is someone who represents your interest. If a real estate licensee represents you as an agent, then certain fiduciary duties attach to that representation. The fiduciary duties owed to a client are disclosure, loyalty, accounting, confidentiality, reasonable care and diligence, and obedience to lawful instructions.

An agent could also represent another party in a deal and you may be unrepresented. In this case, you would be treated as a customer. A customer is to be treated with honesty and fair dealing; however, the other fiduciary duties mentioned above do not apply.

The types of agency available in Kentucky are as follows: seller's agent, buyer's agent, limited dual agent, designated agent or transaction broker. The Commission requires licensees to disclose these relationships through Agency Disclosure Statements for Buyers and Sellers.

Limited Dual Agency

Oftentimes, a buyer will work with the agent who has listed a piece of property for sale. If the agent represents only the seller, the agent will disclose this agency relationship to you in writing through a Commission-approved Agency Disclosure Form. In this instance, the buyer would be a customer, not a client. Customer status means that the buyer will be treated with honesty and fair dealing by the agent, but you will not be represented by the agent. You have the right to seek your own representation.

If the agent has the consent of both parties to act in a limited-dual-agency capacity, then the agent will be representing both the buyer and the seller in a limited way. Once the agent represents both sides of a deal, the agent cannot perform as many of the actions or duties as he or she could when representing only one party. For instance, the agent cannot try to get the highest price for the seller while also getting the lowest price for the buyer.

Remember: An agency relationship requires both knowledge and consent. You have the right to be represented by whomever you wish.

Listing Agreement

In order to publicly promote real property for sale, a Kentucky licensee will need a valid, written listing agreement. This agreement, once signed and agreed upon, is binding upon both parties.

Buyer Brokerage Agreement

Many buyers will enter into a buyer brokerage agreement with their agent. This agreement, like a listing contract, binds the two parties in an agent-principal relationship for a set period of time.