Credit Repair Services Performed by Real Estate Brokers -- An Advisory to Licensees

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In the present California residential real estate environment, where current or potential homeowners and/or renters have debt and credit challenges, real estate brokers may and oftentimes do offer and provide credit repair services along with real estate-related work.

Advertisements for debt relief and credit repair are plentiful, and include solicitations such as "Want to Own Your Own Home? We Can Help", "Rent to Own Homes and Credit Repair", and "Rent an Apartment with Debt Consolidation".

While an in depth discussion of the California and Federal laws is beyond the scope of this article[1], it is important to note that California has a broad "Credit Services Act" (Civil Code section 1789.10 and those sections which follow) and there is also a comprehensive Federal law entitled "The Credit Repair Organization Act" (15 USCA section 1679 and the following sections). The Federal Act covers credit repair organization (as defined) services through the use of interstate commerce.

Both the California and Federal Acts contain requirements for consumer disclosures, written contracts, and numerous protections against false and misleading statements. They also *both contain prohibitions against charging or receiving any money or other consideration before fully performing the credit repair services the "repairer" has agreed to perform. Stated otherwise, both the California and Federal laws preclude the collection of "advance fees" for credit repair services*.

Significant sanctions and remedies are available under both of the Acts for violations.

While the Federal law does not have an exclusion or exemption for real estate brokers, the State law does. Section 1789.12 (b) (4) of the Civil Code

[1]The California Department of Consumer Affairs has an excellent and informative legal guide on the State and Federal laws pertaining to credit repair services. It can be accessed at http://www.dca.ca.gov/publications/legal_guides/cr-9.shtml

specifically provides that the following persons are excluded from the requirements set forth in the California Act:

"Any person licensed as a real estate broker performing an act for which a real estate license is required under the Real Estate Law…and who is acting within the course and scope of that license".

Since California law provides an exemption for real estate brokers and the Federal law does not expressly do so, the DRE wanted to provide some notes of warning to its licensees.

Cautionary Notes for Real Estate Licensees –

1. If the Federal Act applies (*e.g*., the person offering the credit repair services uses *any instrumentality of interstate commerce or the mails* to sell, provide, or perform – or represent that he, she or it can or will sell, provide or perform – any identified credit repair services, in return for the payment of money or other valuable consideration), the California law exemption for a real estate broker will not relieve a broker from the Federal law requirements and prohibitions. *That would include the prohibition against the charging or collection of fees in advance of services being performed.*

Licensees should carefully and closely review the case of Rannis v. Fair Credit Lawyers, Inc., 489 F.Supp.2d 1110 (2007), in which a U.S. District Court in California held that the "attorney" exemption under the California Credit Services Act did not exempt an attorney from the obligations under the Federal Credit Repair Organization Act where the attorney used interstate commerce and the U.S. mail regarding client advice and representation to correct his clients' credit reports.

The Federal court stated that the "Defendant's argument that the California statute controls the matters at issue and that the [Federal Act] must be read to include an exemption for attorneys must fail…Defendant provides no applicable authority for the proposition that a federal statute should be altered or affected by the California statute". Moreover, and importantly, the Court held that "to the extent that the California statute suggests that all attorneys are exempt from the behavior regulated by the [Federal Act], the statute is inconsistent with the [Federal Act] and must be disregarded".

2. The exclusion and exemption from the California Credit Services Act for real estate brokers is narrowly drawn. The language suggests that only where a real estate broker is performing an act or acts for which a real estate license is required (see sections 10131 of the California Business and Professions Code), and engaging in "related" credit repair services that are incidental to the real estate activities, the State law exemption would apply.

But if the credit repair services were not incidental to licensed real estate activities, or if the credit repair services are "isolated" from or "unrelated" to the real estate broker's real estate business (and licensed activities), the real estate broker would need to comply with the California "Credit Services Act". *That would include registering with the California Department of Justice and obtaining a surety bond.*

For that reason, if a real estate broker is performing "stand alone" credit repair services for a consumer which are unrelated to real estate work for that consumer, the broker must comply with the strict requirements of the California Act, as well as the Federal Act (unless the latter is not applicable – see the discussion above under Cautionary Note 1).

3. If a real estate broker is not covered by the terms of the Federal Act[2] (which may be questionable or very difficult to prove given breadth of its coverage, and the decision in the Rannis decision discussed above with respect to lawyers) and is exempt from the terms of the California Credit Services Act, the broker *may* be able to accept advance fees for such credit repair services *if, and only if,* he, she or it fully complies with the rules of the California Real Estate Law and regulations of the Real Estate Commissioner with respect to the collection of such fees in advance of services being performed.

Advance Fees – As noted above, if a real estate broker is not covered by the applicable terms of the Federal Act and exempt from the State Act, that broker *may* lawfully collect advance fees. But under the Real Estate Law and attendant regulations, such fees can be collected by a real estate broker (or salesperson working with the broker) *only where* (i) a written Advance Fee Agreement – with necessary supporting materials -- has been submitted to and reviewed by the Real Estate Commissioner/DRE, (ii) a No-Objection Letter is issued by the department to the broker, and (iii) the advance fees are properly handled as "Trust Funds" belonging to person who paid those fees. Any unearned fees must be repaid to that person.

A violation of the California Real Estate Law rules and regulations on advance fees constitutes grounds for disciplinary action against a real estate licensee, as well as grounds for criminal proceedings. Also, it should be noted that the issuance of a "no-objection" letter does not constitute the DRE's approval and/or endorsement of the advance fee agreement, supporting materials, or the services to be rendered. If a licensee were to suggest such approval and/or endorsement, that would be a misrepresentation.

In addition to considering the cautionary and advisory notes above, real estate licensees who perform credit repair services in connection with their real estate businesses would be wise to contact and consult with a qualified attorney

[2]Which conclusion should be based on a careful and competent legal determination after performing an "interstate commerce" and related "instrumentality" analysis based on all of the applicable facts.

or other subject matter professionals regarding their coverage under or release from the strict obligations of the Federal and/or State credit repair laws.

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