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M E M O R A N D U M

December 20th, 2019

To: **Florida Homestead Check, LLC**
Re: **Consideration of Potential for Consumer Claims Against Residential Property Brokers and Sale Closers Due To Lack of Timely and Sufficient Disclosure About Florida Homestead Law Matters**

The purpose of this Memorandum is to address two questions that you have presented – does the marketing program for your service described below comply with the Real Estate Settlement Procedures Act (RESPA)? And do real estate brokers and closing agents who do not advise, or inadequately advise, consumers about their homestead rights and requirements risk a claim for damages that would survive a motion to dismiss? We understand that you expect to provide copies of this Memorandum to brokers and closing agents. This is acceptable to us, subject to the following disclaimer:

This Memorandum is provided solely for the benefit of Florida Homestead Check, LLC, which is our client. Although this Memorandum may be displayed to other persons, such persons are not clients of Carlton Fields, P.A.

The information in this Memorandum is intended solely as educational and introductory to certain legal issues. ***No information in this Memorandum is legal advice applicable to any particular situation. No lawyer-client relationship is created by receiving a copy of this Memorandum and reviewing any material on it. No person is justified in relying on any article containing general information in making a decision about a specific situation; rather, anyone interested in these issues should consult competent counsel for legal advice or representation.***

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Background

"Homestead" is a natural person's primary residence. Florida has laws designed to protect a person's homestead from creditor claims and from ad valorem taxes, to a much greater extent than is true in many other states. There are actually quite a number of homestead-related laws in Florida, and they can be complex. They provide some protection from the claims of most creditors, limit ad valorem tax increases from year to year, provide valuation reductions, and provide to qualifying persons credits that reduce or even eliminate ad valorem taxes altogether. See for example Articles X(4) and VII(3), (4) and (6) of the Florida Constitution and Sections 222.01, 193.155 and 196.031-171 of the Florida Statutes.

Various homestead-related laws affect the amount of the assessed value (market value minus assessment reductions such as due to the annual cap on increases) and the taxable value (the assessed value minus exemptions such as the first and additional homestead exemptions- such as the exemption for deployed servicemembers) of homes. The amount that may be "ported" from one Florida homestead to another homestead relates to the difference between market value and the assessed value of the property as such values are listed for the year of the sale on the Property Record Card for the property, which is established by the county Property Appraiser's office each year. About the second week of August each year, each property owner receives a "Truth in Millage Rate" (TRIM) Notice (Notice of Proposed Property Taxes) annually from the County Property Appraiser which states the assessed value, taxable value and market value of the residence. A resident owner should carefully review and, if appropriate, challenge these values. The challenge, if any, must be filed in the form of a Value Adjustment Board Petition (Florida Form DR486) no later than 25 days from the date on which the TRIM notice is mailed. This normally puts the deadline for VAB challenges at around Sept. 10th-15th each year.

The effects on some of the homestead laws are not necessarily obvious, as for example the fact that a high market value increase is usually not a bad thing (because tax increases on homestead properties are capped by the Save-Our-Homes law at 3% annually) and can actually be beneficial (by resulting in higher portability savings). This may seem counterintuitive to many Florida homeowners, since when they receive a TRIM notice advising them of a market value that is far below what they know their home to actually be worth, they tend to think that is saving them money on their taxes and therefore they do not challenge the error. Actually, property owners pay taxes based on their property's assessed value, as opposed to their market value, and the assessed value for homestead property is capped by operation of the Florida Save Our Homes Act so taxes are not based on the market value.

To further add to the complexity- homestead status, portability, deductions and exemptions must all be claimed on proper forms and within certain time limits, or they may be temporarily or permanently lost. For an example of the complexities involved, if a homeowner has accrued "portability savings" on their home for them to "port" those savings to a subsequent Florida home they must file, in addition to the basic Homestead Filing (Florida Form DR501), an additional filing for the transfer of the portability (Florida Form DR501T). If this is forgotten, then the portability savings continue to reside in the prior home. They may be claimed and ported over to the subsequent home at any future time when the omission is discovered, up until the time at which the subsequent home is sold. At the time of sale of the subsequent home, the portability savings residing in the former home are permanently lost. If a homeowner neglects to file for portability when filing for homestead, and if, as is likely, a homeowner who has lived in the home for any significant period of time has accrued at least some portability savings, the sale of the home without filing for portability will result in a permanent loss of any accrued savings.

Based on your descriptions, you market an analytical report product, known as a Florida Homestead Check™, that identifies whether or not a customer has (1) forgotten to file for homestead, (2) forgotten to file to transfer portability savings, (3) has an error in the property's market or assessed value which would adversely affect them, and (4) forgotten to file for a property tax exemption for which they were eligible. Your report then advises the customer of the lost savings associated with any issues identified, and provides instructions on how to correct the situation. You offer a "Homestead Counselors™" service which is available to consumers who have received Homestead Checks™ where they may call and ask questions and receive non-attorney advice about the results of their report. You also offer a "Homestead Doctor™" service where clients may hire your company to handle the correction of issues identified by the Homestead Check™ product. We have not reviewed the substance of the Florida Homestead Check products and so no advice is given to you about whether or not they are adequate or accurate for their purposes. You are marketing Florida Homestead Check directly to potential consumers and through referrals from real estate brokers/salesmen and title company closing agents.

Currently, we believe that discussion between brokers and their customers about homestead rights in Florida is largely informal and, when it occurs at all, typically focuses only on some aspects of homestead, such as immediate saving from annual tax increases over 3% or the consumer price index, whichever is lower (the substantive provision of the Florida "Save Our Homes" Act). In the case of closing agents (some of whom are licensed attorneys or

licensed title insurance agents), it appears that some provide the consumer with no information about homestead rights, some mention homestead in a casual reference of the need to file a form with the County Property appraiser to claim homestead, and others deliver at the closing table a short written document that addresses some but not all of the potential homestead rights or how to claim them, even though in preparation for the closing the title agent's processing staff have property and consumer-specific information that gives them a unique opportunity to identify homestead law issues and lost-opportunities that the closing itself may trigger. Even if an attempt to convey helpful information is made by the closing agent, if that attempt is made at the time of the closing of the sale of the homestead property, it is too late to correct most of the substantial and permanent losses that will occur due to failure to file for portability or to correct market valuation errors.

Real Estate Settlement Procedures Act and Florida Department of Financial Services and Other State Regulations

Since your service is fact-specific for each customer, you need to collect and input certain data concerning the consumer and the homestead property. This includes, for example, dates of acquisition and disposition of Florida primary residence real property, and property appraiser statements of assessed value, taxable value and market value. To our knowledge this is data that the broker or closing agent does not normally need to collect.

You have advised us that your product includes several levels of services offered to consumers, including a "do it yourself" (DIY) program for which you currently charge $100, additional counselling for $50 for 30 minutes of your time, and the "doctoring" service for additional fees. In the DIY program, the consumer must research and provide certain property-specific information from sources the average consumer is not accustomed to working with. You offer to closing agents and brokers for them to make the DIY product available to their customers but with the closing agent or broker collecting the property-specific information (generally from the property appraiser's website). The combined charge to the consumer for that information collection service plus the DIY product is currently $125, with $25 being paid to the closing agent or broker for the information collection service. The consumer has the right to accept or reject these services. If the services are accepted, they would be appropriately disclosed in the required closing disclosure statements. You have asked us to advise you if the disclosed fee (i.e., the $25) paid to the closing agent or broker complies with the prohibition in RESPA against kickbacks and unearned fees. We believe that it does so comply.

RESPA includes anti-kickback, unearned fees and settlement services rules. The term "settlement services" is defined broadly in 12 U.S.C. §2602(3) and would be deemed to include your Florida Homestead Check DIY product. RESPA §2607(a) prohibits any person from receiving a fee or "thing of value" for referring a settlement service involving a federally related mortgage loan. RESPA §2607(a) prohibits any person from accepting a portion of any charge for rendering a settlement service in connection with such a loan other than for actual services. The CFPB has taken an expansive interpretation of these prohibitions, particularly in what constitutes an illegal fee or kickback (for example, in Consent Order with Prospect Mortgage LLC (which can be found on the internet at https://files.consumerfinance.gov/f/documents,201701_cfpb_PropsectMortgage-consent-order.pdf). Among the prohibitions is the splitting of settlement charges beyond a reasonable amount for services performed, payments merely for referrals to a person for a service, or the requirement for the consumer to use a particular provider. A referral agent may be compensated a reasonable amount for actual services they do not normally perform.

Since the collection of customer and property-specific information is essential to your provision of services to the consumer, since that collection is not a service normally provided by closing agents or brokers, and since the compensation for such collection of data is a modest amount commensurate with the service provided, in our judgment the compensation does not constitute an illegal payment or kickback.

Your proposed plan of operation does not violate any Florida statutes or regulations regarding the activities of title insurance agents, including Part 5 of Chapter 626, Florida Statutes (Title Insurance Agents), Part 13 of Chapter 627, Florida Statutes (Title Insurance Contracts), Chapter 69B-186, Florida Administrative Code (Title Insurance), Chapter 69B-215, Florida Administrative Code (Agents), Chapter 69O-186, Florida Administrative Code (Title Insurance Rates), and Chapter 69O-215, Florida Administrative Code (Agents).

Your proposed plan of operation does not violate the prohibition against referral fees because it does not involve a referral to an insurance agent. It does not violate premium rebate or abatement prohibitions because the plan is unrelated to the title insurance premium since the program does not involve an inducement to enter into the title insurance contract, as the program is offered by a different entity from the insurer offering the contract, it is offered separate and apart from the title insurance contract, and it requires the payment of an additional fee.

Florida law contains certain authority for title insurance agents to provide specified services, such as acting as escrow agent. However, nowhere do the Florida Statutes or

Administrative Code is there a restriction on other activities of an agent, which is in stark contrast to the explicit statutory restriction imposed on the activities of title insurance companies. In addition, the services the title insurance agent is to provide to you may be considered to be the production and provision of a "property information report," which section 627.7843, Florida Statutes, specifically authorizes.

Potential for Consumer Claims Against Residential Property Brokers and Closing Agents

An eligible consumer who fails to file for homestead or fails to file for portability rights may be damaged to the extent of tens of thousands of dollars through the loss of judgment protection and/or unnecessary liability for ad valorem taxes. Available tax exemptions might be lost, a judgment might be executed against the primary residence, ad valorem taxes might increase more than 3% per year, or accumulated homestead ("portability") savings might be lost when the consumer purchases a new homestead property. Faced with the realization that he suffered such losses, and given that the losses will occur each year for the remainder of the years that the consumer continues to reside in the property, it is predictable that a consumer would try to hold someone accountable. In the typical residential transaction in Florida, where buyers and seller rarely employ attorneys, the potential targets are the real estate brokers and the closing agent.

We cannot predict all of the theories that a plaintiff's attorney might advance in an attempt to hold a broker or closing agent liable for the damage suffered by a buyer or seller. New theories of liability evolve all the time. For example, an attorney might assert that such a claim arises under the Florida Deceptive and Unfair Trade Practices Act, §501.201, Florida Statutes, in lulling the consumer into a false sense of security that the real estate professionals involved have given the consumer the information needed to take full advantage of homestead rights. It might be particularly tempting to bring such a claim because there is a provision for the recovery of attorney's fees. Or an attorney might bring a claim based on a theory that the circumstances created an implied contract whereby the consumer had a reasonable expectation that the broker and/or closing agent would use the available information about the property or the consumer to direct the consumer's attention to anything, including for example the difference between the assessed value and the market value of the residence being sold (which is readily apparent from the property record card), that worked to the consumer's disadvantage that could easily be remedied.

Without attempting to predict whether such a suit would be successful, we believe that a claim against a Florida real estate broker for failure to properly and timely advise the buyer

and/or seller about the need to look into all of the various aspects of homestead laws in Florida would have a reasonable chance of surviving a motion to dismiss for failure to state a claim, and could result in liability. In the case of closing agents, there is less supporting law than exists with respected to licensed brokers to support a theory that there is a duty to warn or render advice, but if the closing agent volunteers information about Florida's homestead laws, allegations that the closing agent assumed a duty to fully and correctly inform the consumer, or point him to the need for expert advice, could survive a motion to dismiss because of the need for findings of fact relating to the duties assumed by the agent under the circumstances of the case.

There are a number of potential theories of liability that a plaintiff's lawyer could raise, including among others simple negligence, negligent misrepresentation, breach of fiduciary duty, breach of express or implied contract and professional malpractice. Whatever label is attached to the claim, there are certain allegations likely to be made for such a case. This is not to say that defenses are not available, or even that such theories of liability cannot be rebutted, but that there is sufficient uncertainty that one cannot rule out with a reasonable degree of certainty that such claims or theories will survive a motion to dismiss and might be presented to a jury.

1. Complexity. In some states, homestead laws may be simple or the claiming or not of homestead rights may be relatively inconsequential. That is not the case in Florida. Here, homestead rights are a significant element of owning one's primary residence – if they are properly and timely claimed.
    a. They protect the full value of a homestead from judgment liens.
    b. The taxable value of a homestead is reduced by a "standard" exemption of $50,000, and potentially much further by one or more of dozens of additional exemptions which may reduce the taxable value by as little as $5,000, or as much as a complete exemption from the payment of all ad-valorem tax.
    c. Annual assessed value increases of a homestead are limited to three percent (3%) (or the Consumer Price Index increase, if lower).
    d. The accumulated savings can be "ported" forward from one homestead to its replacement up to a maximum amount of $500,000, which equates to an approximately reduction in the tax bill of $10,000 per year.
    e. There are constitutional and statutory benefits of a homestead for surviving spouses, veterans, first responders, active-duty servicemen, certain senior citizens, and a number of other constituencies.

Homestead benefits can be lost, and in some cases lost permanently, if they are not properly and timely claimed. Accrued portability savings will be lost if they are not filed for and claimed prior to the sale of the home to which they would have been transferred, and may be optimized by checking and correcting inaccurate market valuations prior to the sale of a property. All this is to say that one would not expect the average consumer to be aware of either the benefits or the requirements to obtain the benefits of the homestead laws in Florida, which may be even more true for the person newly moving into Florida, the first-time homebuyer, or the first-time home seller. Expertise is needed even to know of the need to seek out expertise. In other words, the residential home buyer or seller in Florida is, when it comes to homestead rights, a vulnerable class of consumers. Those real estate experts in the purchase and sale process, which would include brokers, closing agents and attorneys (to the extent they are employed) are in a position to protect that vulnerable class by providing information of the right type and at the right time. The responsibility of those with expertise when dealing with a vulnerable class has eroded the old concept of *caveat emptor*, let the buyer beware. See for example, Tennant v. Lawton, 615 P.2d 1305 (Wash. App. 1980); Strawn v. Caruso, 638 A.2d 141 (N.J.App. 1994); Mallet v. Maggio, 503 So.2d 37 (La. 1987).

2. Expertise. The buying and selling of real estate is a complicated transaction requiring specialized knowledge (professionalism) for which the average consumer is uneducated and inexperienced, and the real estate professional is (or should be) specially trained. The duty to inform the consumer therefore arises simply from a justifiable perception by the consumer that the broker or closing agent, being a professional having specialized expertise, is in a position to protect the consumer and undertakes that responsibility merely by participation in the real estate transaction process. This is particularly true to the extent that those experts invite the consumer to rely on them rather than, in any meaningful way, steering the consumer to consult with others whose expertise would be predictably useful, such a attorneys. The Supreme Court of New Jersey points out that virtually all of the activities in a real estate transaction involve to some degree the practice of law – creating and explaining the obligations of contract, reviewing and evaluating the quality of title, deciding on the form of deed, and drafting the deed and other closing documents, among other things (In Re Option No. 26 of the Committee on Unauthorized Practice of Law, 654 A.2d 1344 (N.J. 1995), but that – as in Florida – real

estate professionals often handle the transaction without any involvement by legal counsel. When a person acts as a legal adviser, he is held to the standards of a lawyer whether or not he actually is one. See for example Bowers v. Transamerica Title Ins. Co., 675 P.2d 193 (Wash. 1983).

3. Professional Malpractice. A "professional" owes a duty beyond that of any express or implied contract, a breach of which presents a claim for malpractice. Florida law recognizes a certain class of experts to be professionals for purposes of a malpractice action's statute of limitations is applicable (§95.11(4)), Florida Statutes. A professional owes duties to his customers beyond the duties set forth in any contract between the professional and the customer (Randolph v. Mitchell, 677 So.2d 976 (5th DCA 1996), quoting with approval a case from Illinois which said that the duty of a professional "existed independently of the … contract"). Similarly holding a professional has a duty independent of the terms of the contract are Rushing v. Wells Fargo Bank, N.A., 752 F. Supp. 2d 1254 (M.D.Fla. 2010) and First Equity Corp. v. Watkins, 1999 WL 542639 (3rd DCA Fla. 1999).

4. Brokers and Closing Agents as Professionals. A licensed broker is a "professional" (§475.01(1)(a), Florida Statutes). Whether a broker is acting in a transaction capacity (§475.01(1)(l), Florida Statutes) or as a single agent (§475.01(1)(k), Florida Statutes)), the buyer or seller of real property is his customer (§475.01(1)(d), Florida Statutes). In either capacity the broker has a "duty to use skill, care, and diligence" (§475.278(2) and (3), Florida Statutes, respectively). In the case of single agency, which many brokers begin as when they are listing agents, that professional duty arises to the higher standards of a fiduciary duty (§475.01(1)(k) , Florida Statutes). For purposes of applying a standard of care, a closing agent might be subject to the high standards of a professional. Although Florida cases state that a professional for purposes of the statute of limitations includes a minimum requirement of a four-year college degree (see for example, Garden v. Frier, 602 So. 2d 1273 (Fla. 1992) and Moransais v. Heathman, 744 So. 2d 973 (Fla. 1999)), one not satisfying the education or traditional test might be a "professional" for purposes of the standard of care required "[i]f the act is one which involves giving advice, using superior knowledge and training of a technical nature, or imparting instruction and recommendations in the learned arts" (Pierce v. AALL Ins. Inc., 513 So.2d 160 (5th DCA Fla. 1987)).

5. The Buyer and the Seller are Both Owed a Duty. As stated above, in the case of a licensed broker, the person to whom a duty is owed is the buyer and/or seller. Although a broker may argue that he is not liable to a buyer without a specific buyer agency agreement, or that duty to a seller is limited when acting as a transactional broker, courts have tended not to adhere to such technicalities in the consumer real estate context. Due to the complexity of any real estate transaction, the relative inexperience of the consumer, and the relative expertise of the broker, the absence of a formal agency relationship has not prevented claims being brought successfully against brokers. See for example, Stortroen v. Beneficial Fin. Co., 736 P.2d 391 (Colo. 1987); Munjal v. Baird & Wagner, Inc., 485 N.E.2d 855 (Ill.App. 1985); Gerard v. Peterson, 448 N.W.2d 699 (Ia.App. 1989); Dugan v. Jones, 615 P.2d 1239 (Ut. 1980). Regardless of who actually retains them, closing agents are clearly the agents for the buyer and the seller in the transaction. See for example Mizrahi v. Valdes-Fauli, Cobb & Petrey, P.A., 671 So. 2d 805 (3rd DCA FDC. 1996) and Fla. So. Abstract & Title Co. v. Bjellos, 346 So. 2d 635 (2nd DCA Fla. 1977). "Where the title insurance company is acting as closing agent, this court has stated in dicta that the agent also has a duty, as noted above, to both the buyer and the seller to properly supervise the closing. … In this regard, the title agent has a fiduciary duty to both the buyer and the seller… ." (Askew v. Allstate Title & Abstract Co., 603 So. 2d 29 (Fla. 2nd DCA 1992), emphasis added).

6. The Standard of Care, Generally. The standard of care required of a professional is ordinarily the standard of care used by similar professionals in the community under similar circumstances (Moransais v. Heathman, 744 So. 2d 973 (Fla. 1999)). This is a factual determination typically resolved by the testimony of expert witnesses for each side. As such, the allegation that a broker or closing agent breached a professional standard of care should survive a motion to dismiss and require the case proceed at least to some extent of discovery. It has been successfully argued that certain standards are minimal and require no inquiry into what other professionals do, based on public's reasonable expectations of the degree of knowledge the professional should possess. For example, in Bates v. Gambino, 72 N.J. 219 (N.J. 1977), an insurance broker who failed to advise a client about the availability of a certain coverage option because he had not been informed about its adoption a year previously, was held to have committed professional malpractice because the broker had "a duty to know." In

the case of residential transactions, both brokers and closing agents are in a position to know if the homestead laws are relevant to the buyer and/or seller, based on conversations, the nature of the financing applied for and the manner in which title is held or to be acquired, among other indications. A broker can be held responsible to know information from the consumer that is relevant to the transaction (see for example, Tennant v. Lawton, 615 P.2d 1305 (Wa.App. 1980)). It may not be necessary that the consumer expressed his reliance or specific concern – the professional has been held to have a duty to investigate matters relevant to the customer based on a reasonable reliance of the inexperienced customer on the superior knowledge and experience of the professional, and the failure to do so may result in a claim of negligence. See for example, Easton v. Strassburger, 152 Cal.App.3d 90 (Ca.App. 1993).

7. A Professional's Duty to Know and Therefore to Advise. In Menzel v. Morse, 362 NW2d 465 (Ia. 1985), the court applied as a standard of required conduct for a licensed broker Article 2 of the National Association of Realtors Code of Ethics, that he "should endeavor always to be informed regarding laws, proposed legislation, [and] governmental regulations … in order to be in a position to advise his clients properly." While many cases have extended the broker's responsibilities with respect to investigating and informing the consumer about a property's physical characteristics such as the risk of radon gas levels, or the direct legal qualities of the property such as the status of title, they can go further to matters of transactional importance. In Morley v. J. Pagel Realty & Ins., 550 P.2d 1104 (Ariz.App. 1976), for example, the court held it was common knowledge in the broker community that a note should be secured by a mortgage, and this knowledge was "imputed" to the broker, making it his duty to so advise his client. The duty to advise the consumer arises out of this duty to be knowledgeable. Florida homestead law is the subject of the Florida Real Estate Commission Course I requirements (Section 8) while education about market values and assessed values are part of the Florida Real Estate Commission Course II requirements (Chapter 6). These professional educational requirements could be asserted to be evidence that providing adequate advice about such subjects to applicable customers is a part of the duty owed by a broker to the customer. In other words, a broker's ignorance about the homestead laws may itself be a neglect of duty. Likewise, when the closing agent is himself a licensed professional or working under such professional's supervision, whether for title insurance (where knowledge of homestead is necessary to evaluate titles) or as an

attorney, it is foreseeable that a court might apply a duty to know and to inform the consumer concerning homestead laws. In Bates v. Gambino, 370 A.2d 10 (N.J. 1977), an insurance broker who failed to advise a client about the availability of a certain coverage because he was uninformed about its adoption a year earlier was held to be liable because the broker had "a duty to know." Real estate brokers have been held liable for giving no, inadequate or incorrect advice on a number of transactional subject matters, such as usury (Mallet v. Maggio, 503 So. 2d 37 (La. 1987)), non-recourse liability (Crutchley v. First Trust & Sav. Bank, 450 NW2d 877 (Ia 1990)), the effect of a restrictive covenant (Monty v. Peterson, 540 P.2d 1377 (Wa. 1975)) and building codes and zoning ordinances (Amato v. Rathbun Realty, Inc., 647 .2d 433 (NM 1982), holding "a broker has a duty to exercise reasonable care or competence in obtaining or communicating information" especially since brokers are "a licensed group"). In Florida, the case of Seascape of Hickory Pt. v. Associated Insurance Services, Inc., 443 So. 2d 488 (2nd DCA 1984) cited the Bates case with approval and held an insurance broker liable when it failed to advice a customer of the availability of seawall insurance. In Woodham v. Moore, 428 So. 2d 280, the court held an insurance broker liable for professional negligence when it failed to advise a client that higher coverage limits of the sort it once enjoyed were newly available again "notwithstanding the absence of any instructions to that effect from the [customer]."

8. Liability When an Agent Assumes a Duty. Even if a broker or closing agent does not have an inherent duty to provide advice about homestead laws to the consumer, it may be alleged that, under the facts and circumstances, the broker or agent assumed that duty and established reasonable reliance by the consumer that he was being fully informed when he actually was being incompletely or inadequately advised. There are any number of conversations that occur between brokers and consumers where the subject of the purchase or sale involving a primary residence arises and a broker may advise that the consumer "file for homestead" and nothing more. A similar conversation may arise at the closing table with a closing agent. Many closing agents actually present the consumer with written information about filing for homestead, creating the incorrect impression that this is all that needs to be done for the consumer to obtain all of the homestead benefits. We are advised that many brokers and their licensed real estate sales agents mail a "reminder to file for homestead" card to purchasers before the March 1 filing date after the purchase of the homestead property. Such information presented

to the buyer does nothing to inform the seller about homestead portability, and does not inform the buyer of the many aspects of the homestead laws that are or will be of great importance to the buyer. In Lindstrand v. Transamerica Title Ins. Co., 874 P.2d 82 (Or. App. 1994), the court held that a trier of facts could determine that a closing agent providing advice about height limits in a restrictive covenant was liable for inaccuracy because it volunteered the advice "as an adjunct to the performance of its other duties." As the court stated in Mallet v. Maggio, 503 So. 2d 37 (La. 1987), "Given the complexity of real estate financing, a client naturally looks to his broker for advice in this area. … While a broker is not required to be a complete financial expert, he should have at least a familiarity with the basics of real estate financing, especially if he undertakes to give advice in this area" (emphasis added). By creating certain expectations on the part of the customer, or by failing to correct a customer's misimpressions about the services the broker offers, the broker could create a gratuitous agency imposing on itself a duty the broker might otherwise not have had (see for example Lee Hawkins Realty, Inc. v. Moss, 724 So. 2d 1116 (C.A. Miss. 1998)). If the broker for the individual selling one home in Florida and buying another in Florida volunteers to advise a customer that he or she needs to file form DR501 with the county assessor for homestead protection, but fails to advise the customer to also file form DR501T for portability of the homestead savings accrued under the homestead being sold, or fails to identify a significant market valuation error which acts to reduce the amount of portability that can be transferred when they may have had that information at their fingertips throughout the transaction, a claim can be made that the broker created a gratuitous agency with a duty to advise the customer about all relevant aspects of homestead rights preservation and that the broker failed in that duty. As the court observed in Mayflower Mortg. Co. v. Brown, 530 P.2d 1298 (Colo. App. 1975), citing 2 Restatement (Second) of Agency s 378, "where the broker gratuitously undertakes by promise or conduct to perform acts of service and thereby causes another to refrain from performing such acts, he has an obligation to use care in the performance of the services or to give notice that he will not perform." See also Hardt v. Brink, 192 F. Supp. 879 (M.D. Wash. 1961), in which the court stated that a person can, by his conduct, permit a reasonable inference to be drawn by his customers that he is highly skilled in the matter under discussion, causing them to rely on him and thereby assuming a duty to them. See also Fennell Realty Co. v. Martin, 529 So.2d 1003 (Ala. 1988) and Lewis v. Long & Foster, Inc., 584 A.2d 1325 (Md.App. 1991). Closing agents owe a duty of reasonable care and prudence to the buyer and seller who

retain them. See Fla. So. Abstract & Title Co. v. Bjellos, 346 So. 2d 635 (2nd DCA Fla. 1977). This is because the closing agent assumes responsibility of properly supervising the closing, especially in the absence of attorneys. Fla. So. Abstract & Title Co. held that the closing agent had an implied "legal obligation" to examine non-title instruments and to at least raise the question whether they satisfied the conditions to closing. That duty arises out of the nature of the closing services that occasions reliance by the parties to the closing.

9. Potential Damages. The damages suffered by the consumer for a failure to properly and timely file for homestead, portability and exemptions depends on the individual circumstances. The potential damage from missing an exemption filing can range from $10.00 a year to the full property tax bill for each year that the exemption is not claimed. In the case of a too low market valuation for portability, the amount of damage depends on how high the market value should have been. If, for example, the property appraiser schedules the market value at $575,000 when it should have been $800,000, then with the example of a $400,000 assessed value the consumer is able to port $175,000 ($575,000 - $400,000) instead of $400,000 ($800,000 - $400,000). The damage is roughly 2% per year for the amount lost in portability, $275,000 ($400,000 - $175,000) or $5,500 per year so long as the consumer owns a homestead property in Florida. Since the maximum amount of portability is $500,000 per year, damages could be as high as $10,000 per year. A complete failure to file for portability will damage the consumer per year about 2% of the market value of the house up to $500,000, reduced proportionately to the extent that the replacement home has a market value lower than the home that was sold.

10. Properly Alerting the Consumer Can Provide Defense Against Liability. The argument for liability if a broker or closing agent fails to advise the customer about homestead is not that the agent must be an expert about homestead rights and details but that he has a duty to advise the customer that homestead rights exist, that they are complex, and that they must be claimed properly and in a timely manner. The duty of the agent would allegedly be to inform the customer that homestead is an area of special concern in Florida and the customer should make due inquiry of an appropriate expert. A company credibly claiming the expertise and having the systems in place such as your company's

Homestead Check™, would be a referral that substantially reduces or eliminates the risk of the types of claims being brought that are discussed above.

Certainly, not every buyer of homestead property in Florida who is misinformed or fails to take advantage of the homestead laws will bring suit, and the amount of damages in every case of a misadvised buyer may not be significant enough to justify such a suit. Not every claim recognized in other states has yet been ruled on by the Florida appellate courts. The above discussion we believe does answer the question what risks are assumed by brokers and closing agents in failing to advise customers at least to get advice about how to handle this important right unique to Florida law, and to have a written record of that advice.

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