

# SIMKIN LAW UPDATE

## Real Estate and Business Law

**Inside this issue:**

REAL ESTATE	1-2
LANDLORD-TENANT	3
BUSINESS	3
ESTATE PLANNING	4
LIFESTYLE	4

### NEW LAWS FOR 2010

*Dear Clients,*

*We wish you a happy and prosperous 2010. This newsletter discusses some new laws related to business and real estate. For a more complete explanation of any the new laws or regulations you read about here or any other matters, please contact us. We offer free telephone consultations on legal matters including real estate, HOA's, estate planning, asset protection, probate, conservatorships, corporate formation, business, franchises, entertainment law, copyright and trust litigation.*

Truly,



### *About Our Firm*

At Simkin & Associates, our attorneys handle every case with individualized attention, creative approaches and honest answers. Mr. Simkin is AV-rated by Martindale-Hubbell, an indicator of the highest ethical standards and professional ability.

### REO BUYER'S CHOICE

**Civil Code Sections 1103.20 - 1103.23**

The Buyer's Choice Act prohibits a REO lender from directly or indirectly requiring the buyer to purchase title insurance or escrow services in connection with the sale from a particular title insurer or escrow agent as a condition of selling the property. If the REO lender provides the buyer with written notice of the right to make an independent selection, the buyer can accept a title insurer or an escrow agent recommendation. An REO lender that violates this law can be held liable for three times the charges the buyer incurred, whereas a violation by the seller's agent may be subject to license disciplinary action.

**REAL ESTATE**



### MORTGAGE FRAUD PUNISHABLE BY PRISON SENTENCE

**Penal Code Section 532(f)**

California is one of the leading states in the incidence of mortgage fraud. As of January 1, 2010, anyone deliberately making any misstatement, misrepresentation, or omission during the mortgage lending process will be guilty of mortgage fraud. Violation of this law is punishable by up to one year in state prison. Under existing federal law, loan fraud against a federally-insured lender is a crime punishable by a \$1 million fine, plus one-year imprisonment (18 U.S.C. § 1014).

## ADVANCE FEES CHARGED FOR LOAN MODIFICATIONS DEEMED ILLEGAL

### **Business and Professions Code Section 10147.6 and Civil Code Sections 2944.6 -2944.7**

In October 2009 the State Bar published a list of 16 attorneys who were under investigation for misconduct related to loan modification. That same month, new laws were enacted prohibiting anyone from claiming compensation for negotiating or arranging a loan modification until after that person fully performs each and every service they were contracted to perform or represented that they would perform. In other words, no real estate agent or attorney may collect upfront fees for loan modification services. Moreover, they must provide the borrower with a specified notice that paying a third-party for loan modification services is unnecessary as borrowers may negotiate directly with lenders and many non-profit housing counseling agencies offer the same services free of charge. Violators of the new laws may be liable for a \$10,000 fine plus one-year imprisonment for individuals or a \$50,000 fine for businesses. As of October 11, 2009, real estate brokers with existing Advance Fee Loan Modification Agreements reviewed by the Department of Real Estate can no longer enter into these agreements or collect advance fees. Agreements entered into and advance fees collected before October 11, 2009 are not affected.

**“In other words, no real estate agent or attorney may collect upfront fees for loan modification services.”**



## NEW REGULATION Z RULES PROHIBIT DECEPTIVE MORTGAGE LOAN ADVERTISEMENTS

### **Truth in Lending Act Section 129(l)(2).**

The Federal Reserve Board has adopted rules to prohibit the following seven deceptive practices in advertisements for mortgage loans. The following practices are prohibited in advertisements for credit secured by a dwelling:

1. Misleading use of the word “fixed” for loans whose rates or payments can vary without adequately disclosing that the rates or payments are “fixed” only for a limited period of time, not the full term of the loan;
2. Comparison of an actual or hypothetical rate or payment obligation to the rates or payments that would apply if the consumer obtains the advertised product, unless the advertisement states the rates or payments that will apply over the full term of the loan;
3. Characterizing the products offered as “government loan programs,” “government-supported loans,” or otherwise endorsed or sponsored by a federal or state government entity even though the advertised products are not government supported or sponsored loans;
4. Solicitation letters that display the name of the consumer’s current mortgage lender, unless the advertisement also discloses that the advertisement is from a mortgage lender **not** affiliated with the consumer’s current lender;
5. Making claims of debt *elimination* or a waiver or *forgiveness* if the product advertised would merely *replace* one debt obligation with another;
6. Advertising the false impression that the mortgage broker or lender is a “counselor” for the consumer;
7. Foreign-language advertisements in which certain enticing information, such as a low introductory “teaser” rate, is provided in a foreign language, while required disclosures are provided only in English.

## LANDLORD - TENANT

### Counterfeiting on Property Business and Professions Code

Sections 17800 - 17802 and Penal Code Section 11226. Commercial properties used for certain counterfeiting activities are deemed "nuisances" and are subject to public and private remedies, including abatement.

**60 Day Notice** Civil Code Section 1946.1. Makes permanent that an owner of a residential dwelling give at least 60 days' notice prior to termination to end a tenancy that has lasted for longer than one year and at least 30 days' notice prior to termination if any tenant has resided in the dwelling for less than one year. Tenants are still required to give 30 days' notice in writing before vacating.

**Pool Standards** In 2002, seven-year-old Virginia Graeme Baker died in a tragic accident when the suction from a spa drain entrapped her underwater. In 2008, the **Federal Virginia Graeme Baker Act** was enacted to promote safety in public pools and spas. By July 1, 2010, all pools in apartment buildings must be equipped with an anti-entrapment device or other systems that meet ASME/ANSI or ASTM performance standards. Pools that have a single main drain that is not an unblockable drain must equip it with certain approved devices designed to prevent physical entrapment..

## SERVICE CONTRACTS

### Civil Code Section 1794.45

New requirements for retailers that sell service contracts! During the period that the service contract is in effect, the retailer must:

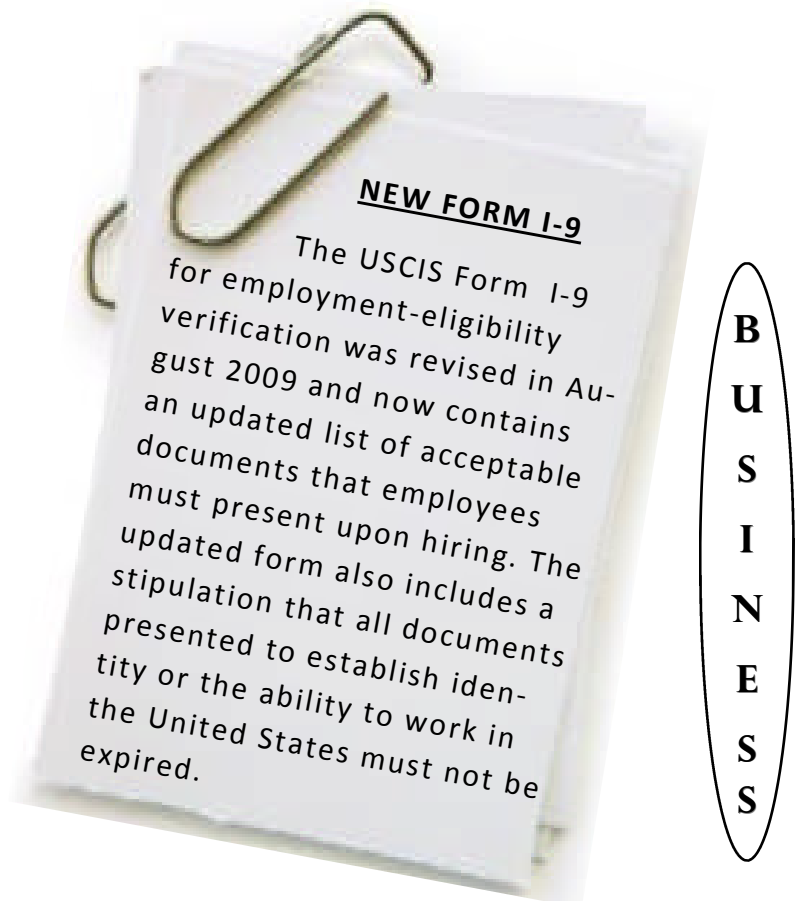
1. Maintain contract information that includes the terms and conditions of the service contract and provide this information to the purchaser of the service contract upon request or;
2. Obtain a copy of the service contract upon request from the purchaser of the service contract and provide that copy to the requester within 10 business days after receiving the request.

This requirement would not apply to a vehicle service contract.

## UNLICENSED CONTRACTORS FACE HARSHER CONSEQUENCES

### Business and Professions Code Sections 7028 - 7028.16

In addition to jail, a first conviction for unlicensed contracting is punishable by a fine not exceeding \$5,000. The fine for a second conviction is the greater of 20% of the contract price, 20% of the aggregate payments made to, or at the direction of, the unlicensed contractor, or \$5,000. A third or subsequent conviction requires that the fine be no less than \$5,000 and no more than the greater of \$10,000, 20% of the contract price, or 20% of the aggregate payments made to, or at the direction of the unlicensed contractor.



## ESTATE PLANNING

### ATTORNEY-CLIENT PRIVILEGE

**Evidence Code Sections 953 & 957 and  
Probate Code Section 12252**

Clarifies that the personal representative of a decedent, who is appointed for purposes of estate administration, is a holder of the attorney-client privilege.



### ESTATE TAX AND FULL TAX BASIS ADJUSTMENT ELIMINATED FOR 2010 ONLY

Due to a one-time congressional loophole, 2010 will be a "limbo year" for estate planners and legislation. For 2010 only the federal estate tax is repealed, meaning if an individual dies this year, their estate will completely avoid federal estate tax liability. Unless Congress acts, the 2001 federal estate tax levels (excluding \$1 million from taxation with the rest taxed at 55%) will be restored in 2011. Also, the full tax cost adjustment for assets owned at death is eliminated for 2010. The basis adjustment at death is limited to an increase of \$1.3 million plus another \$3 million if property is left to spouse or qualifying trust. For many couples, the new basis rules mean more tax being paid when the surviving spouse tries to sell appreciated assets.

### PAPARAZZI PUNISHMENT!

**Civil Code Section 1708.8**

According to the new law aimed at punishing invasive paparazzi, taking photographs, video or audio of individuals engaging in "familial or personal" activities constitutes constructive invasion of privacy. Paparazzi are liable for up to three times the amount of damages caused by the violation, punitive damages and a civil fine between \$5,000 and \$50,000. If the plaintiff proves the invasion of privacy was committed for a commercial purpose, the defendant also must yield any proceeds to the plaintiff. The media outlets who buy and sell the illegally obtained photographs face similar consequences.



### SAME-SEX COUPLES GRANTED LEGAL LOOPHOLE TO EQUAL RIGHTS

While Prop 8 passed in November 2008, banning same-sex marriage in California, **Family Code Section 308** enables same-sex couples to receive the same benefits heterosexual married couples do so long as they get married *somewhere else!* First, couples who married outside of California before November 5, 2008, are entitled to full recognition as married couples in the state. Second, couples who get married *outside of California* on or after November 5, 2008, will receive all of the rights, benefits and responsibilities of marriage except for the name "marriage." Thus, same-sex California couples merely need to hop on a plane to Vermont, Massachusetts, New Hampshire, Connecticut or Iowa, where same-sex marriages are legally performed to obtain benefits in California reserved for married couples, such as family insurance plans and community property rights. Now same-sex couples must be cognizant of laws involving community property and assets.