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ARELLO ACKNOWLEDGEMENT

Written and portions edited by John Henderson, broker, instructor, ARELLO member and CDEI certified.

If you have specific questions regarding license renewal, please contact:

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS BUREAU OF PROFESSIONAL LICENSING
REAL ESTATE BROKERS AND SALESPERSONS
PO BOX 30670
LANSING, MICHIGAN 48909
(517) 373-8068

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Chapter 1
MICHIGAN LAWS AND RULES UPDATE

Continuing Education and www.Michigan.gov/MiPlus

The Michigan Bureau of Professional Licensing (BPL) within the Department of Licensing and Regulatory Affairs (LARA) introduced a new online licensing system for real estate professionals in 2021. One feature of this new online process is agents will have differing license expiration dates. Prior to 2021, all licensees shared the same expiration date, Oct 31st. Now, each agent's license will expire on their license's anniversary date.

This change will create a need to adjust continuing education requirements. If you were issued a new license, relicense or renewal, you may need 6, 12 or 18 total credits depending on the license expiration date indicated on your pocket card.

If your existing license expires in 2022, you will need at least:
- 6 hours total of Continuing Education
- 2 of those hours in legal update, by the expiration date

If your existing license expires in 2023, you will need at least:
- 12 hours total of Continuing Education
- 4 of those hours in legal update, 2 hours completed annually, by the expiration date.

If your existing license expires in 2024, you will need at least:
- 18 hours total of Continuing Education
- 6 of those hours in legal update, 2 hours completed annually, by the expiration date.

***** IMPORTANT NOTE - Like your real estate license, Continuing Education classes will no longer expire on October 31st. Instead, your ConEd credit requirements will be calculated by your license's expiration date.**

Chapter 2
FEDERAL LAWS AND RULES UPDATE

Federal Eviction Moratorium

Last year, The Supreme Court ruled on August 26, 2021 to end the temporary stay on a lower court ruling seeking to overturn the federal eviction moratorium issued by the Centers for Disease Control and Prevention (CDC). In doing so, the Supreme Court's ruling invalidates the federal eviction moratorium, eliminating vital eviction protections that have kept millions of households in stable housing. However, the ended moratorium continues to impact communities as we move forward into 2022 and beyond.

More than 1,000 emergency rental assistance (ERA) programs have been created or expanded during the pandemic, and Congress has provided $46 billion to help renters remain stably housed. By the end of 2021, about $5 billion of the $46 billion in emergency rental assistance had been spent.

With the possibility of state and local courts processing and hearing a greater number of eviction cases in 2022, it is crucial that attorneys, judges, justices of the peace and court staff are active partners in connecting landlords and tenants to the assistance they need. Under the guidance of the CDC to improve access to ERA through state and local courts, ERA program administrators are being directed to:

- Reduce burdensome documentation requirements.
- Increase communication efforts in courts.
- Implement data sharing between courts and ERA.
- Be present in court.
- Fast track applications.
- Increase staffing.
- Contract with local community-based organizations.

Landlords and tenants who need ERA funds are encouraged to call 2-1-1 or visit www.211.org for more information.

CHAPTER 3
REAL ESTATE INDUSTRY UPDATE

There Are Now More Real Estate Agents Than Homes For Sale In The U.S.

If there has been one beneficiary of the Fed printing trillions of new dollars and bailing out the U.S. economy, it has been the housing market. The real estate market has continued to surge and this has resulted in an influx of new Realtors. In fact, as the Wall Street Journal reports, "there are more real estate agents than homes for sale in the U.S.". It marks only the second time in history The National Association of Realtors member count is above the number of homes on the market. The other time was in December of 2019. Recently, there were 1.04 million homes for sale (down 26% YOY and the lowest on record since 1982). The National Association of Realtors reported 1.45 million members, up 4.8% from the year prior.

Because of the glut of Realtors, many are finding it difficult to churn up business for themselves. Many new Realtors are defectors from the hospitality industry, where innumerable bartenders, waiters, hosts and cooks have all been laid off due to the government's response to the pandemic. But being a Realtor is often times easier said than done. There are very low barriers to entry, in terms of the ease of getting a real estate license. But the barriers to success are very high.

What's a Buyer's Agent to do?

Protecting your client's interest is the first priority for every principal/fiduciary relationship. However, that obligation is becoming increasingly difficult in the strong sellers market we are experiencing throughout the country. The conundrum agents feel is the pull between writing plenty of client protections into purchase agreements or removing protections in order for their client to get an accepted offer.

Here are common elements that help win an offer in today's competitive market:
Offered price often 20 - 50% OVER the listed asking price.
Waiving all home inspections.
Appraisal gap guarantee - buyers willing to bring additional cash to close if the appraisal falls short of the offered price - sometimes $10k, $20k or an unlimited amount.

It's becoming normal to warn clients of the added risk, saying if they really want a house, they may need to forego the safeguards many agents normally employ.

Brutally honest listing

“Bring your dumpster”: Listing a $25K home takes a brutally honest approach. A real estate agent in Iowa is marketing her new listing with a creative and unflinching description.

Listing agent Laura Bailey wrote up her marketing description. “If you like the outdoors, you will love the missing windows, allowing a cool breeze to flow through the home, saving on energy bills…the “creepy feel” of the creaky floorboards, broken siding and weeds growing inside the house, suggesting that fans of “horror flicks” would feel right at home…save time scraping off the lead- based paint, being half of it is missing!…“If you think someone else’s trash is another person’s treasure, then bring your dumpster, they left all of their trash behind for you,” the listing agent wrote.

Bailey, who works with Keller Williams Ankeny Metro, said the house’s owner gave full permission to market the property however she saw fit. “Please make viewing appts during the day as the owner lived in the home with no utilities hooked up!”

Neighbor likes his privacy

Wayne Lambarth of Lodi Township, MI claims that his neighbor who is a farmer, began using cow manure to construct the wall that divides their land. Apparently, there was a dispute between the neighbors about the property line. Prior to the dispute, Lambarth says the farmer would spread the manure over his fields. Now, the Michigan man says his neighbor has built a manure “wall” that extends 250 feet in length.

Unfortunately, local officials say as long as the manure remains on his neighbor’s property, Lambarth can’t do much about it. The farmer doesn’t seem to care what Lambarth thinks of his poop wall — he’d just prefer they stop calling it a “poop wall.” “It’s not a poop wall,” he said when asked about the manure. “It’s a compost fence.”

Agent Safety Awareness

NAR and many local real estate boards continue to address safety concerns for its members. Products such as Forewarn, Showingtime Safety Alert systems, etc. are available to Realtors to provide an additional layer to help keep agents safe. Many brokerages have developed safety protocols amongst fellow agents. Properly vetting people remains the best plan to remain safe. Statistically speaking, the real estate profession is very safe. However, there can be increased risk when showing homes to strangers or dealing with upset clients. It is always alarming when fellow agents are killed while performing their duties. As a reminder, here are a few victim agent’s stories:

October 8, 2021 - Soren Arn-Oelschlegel, 41 was fatally shot in Virginia by client Albert Baglione, 84. Baglione purchased a property sight-unseen through the agent and was disappointed with his purchase after seeing it for the first time after the transaction closed. He demanded that his money be returned to him. He shot Arn-Oelschlegel and then turned the gun on himself in this murder-suicide.

2016 - David Abbasi - Abbasi was shot to death inside an abandoned property in Woodstock, GA. His murder remains unsolved.
2014 - Beverly Carter. Carter was kidnapped from a rural, vacant home near Little Rock, Arkansas. Her body was found days later buried in a shallow grave. A couple posing as prospective buyers were convicted of her murder.

2011 - Ashley Okland. Okland was shot and killed while showing a new townhouse in West Des Moines, IA. Her murder remains unsolved.

2008 - Troy Vanderstelt, 33. Closer to home, Michigan agent Vanderstelt met with client Robert Johnson, aged 74 in the brokerage's conference room. After a purchase of a home in 2005, Johnson's property lost value during the housing crisis of 2008. Believing Vanderstelt had taken advantage of him, Johnson shot and killed his agent. Johnson was convicted of murder. No evidence exists that Vanderstelt was anything but honest throughout the real estate transaction.

Chapter 4
REAL ESTATE RELATED CASE LAW

ADMINISTRATIVE LAW

State ex rel. Figueroa v. Ohio DOC, Div. of Real Estate & Prof'l Licensing, 161 Ohio St. 3d 184 (2020) Supreme Court of Ohio

Facts: Mariner, a mortgage broker, filed a complaint with the Ohio Division of Real Estate and Professional Licensing against licensee Figueroa. Mariner alleged that Figueroa had falsified information on a mortgage application. The Division received Mariner's complaint on 9/29 and notified Figueroa of the complaint approx. one month later on 10/31. The Division also sent Mariner a letter on 10/31 acknowledging their receipt of his complaint. Each letter contained an offer to mediate the dispute, but only if the Division received a request "within ten days," without stating any actual date for the ten-day deadline. Both parties submitted mediation requests: the Division received Figueroa's on 11/14 and Mariner's on 11/17. However, the Division never scheduled a mediation hearing. In response, Figueroa filed a complaint with the court of appeals seeking a writ of mandamus to compel the Division to schedule the mediation. [A writ of mandamus is an order from a court to an inferior governmental official ordering the government official to properly fulfill their official duties.] Figueroa argued that the relevant statute, R.C. 4735.051, required the Division (1) to acknowledge receipt of the mediation requests and (2) to schedule the mediation and notify the parties. Nonetheless, the magistrate recommended denying the writ, reasoning that since both mediation requests were received more than ten days after the 10/31 letters, the Division had no clear legal duty to mediate and Figueroa had no clear legal right to mediation. Figueroa appealed.

Issue: Whether the licensee is entitled to a writ of mandamus compelling the Division to schedule mediation under R.C. 4735.051 even though the mediation request was received by the Division more than ten days after the licensee's notice of the complaint.

Held: NO: if the Division were required to schedule a mediation regardless of when a complainant or licensee filed a request, then the ten-day time limit expressed in each letter would serve no purpose. Accordingly, neither party has any clear legal right to a mediation meeting and the Division has no clear duty to schedule one, because the requests were incontestably late. The court reasoned that the relevant statute, R.C. 4735.051, states that the superintendent of the Division must “acknowledge receipt of the complaint and send a notice to the licensee describing the acts complained of" after a signed written complaint is filed against them. The acknowledgment and notice must notify the recipient of their option to request an informal mediation only if the complainant and licensee both file mediation requests within "ten business days thereafter.” The statute further provides that the Division's superintendent is required to schedule a mediation meeting only if both the complainant and licensee timely file requests for informal mediation, and if the complainant and licensee fail to agree to informal mediation, then the Division moves forward with its formal complaint handling process. According to the 10/31 letters offered to mediate the dispute if a request were received within ten days. The Division did not receive the licensee’s mediation request until 11/14 and did not receive the complainant’s request until 11/17. Therefore, no mediation needed to be scheduled.

AGENCY

Do the laws of agency for real estate brokers apply when no contract for agency was executed between the broker and the buyer or seller?

Wallace v. Heath, 479 P.3d 155 (2021) Supreme Court of Idaho

Facts: A dispute arose as to what duties a real estate licensee owes a buyer or a seller in a real estate transaction. After closing, the buyer discovered there had been a material change in an updated driveway agreement between the buyer and the neighboring property owner. The Seller and the Neighbor had an agreement for shared driveway access measuring 21 feet wide and 127 feet deep. Prior to closing, the title company discovered that the easement did not run with the land and notified the Licensee. The Licensee contacted the Neighbor and expressed the need for an updated agreement. The Neighbor measured the paved portion of the property and recorded “43 feet by 20 feet” and included that measurement in the “new” agreement. The Licensee forwarded the new agreement without reading the contents. The Buyer acknowledged receipt but also did not read the contents of the agreement. After the Buyer’s purchase, a dispute arose between the Buyer and Neighbor concerning use of the shared driveway. The Neighbor sued to quiet title. The Buyer brought claims for breach of contract and negligence against the Licensee and the Real Estate Brokerage in the quiet title action. Even though the Licensee and the Buyer exchanged text messages confirming the Buyer’s desire for the Licensee to represent Buyer, they did not enter into a written representation agreement and the RE-21 stated that the Licensee and their Brokerage were acting as “non-agents” for the Buyer. The district court determined that the Buyer had not raised a genuine issue of material fact with respect to the statutory duties owed to her by the Licensee and Brokerage under the Idaho Real Estate Brokerage Representation Act, primarily because the Buyer was not a “client” of the Licensee or their Brokerage. Based on this conclusion, the district court granted the Licensee and their Brokerage a summary judgment and dismissed the Buyer’s claims against them.

Issue: Is a real estate broker ("Licensee") liable to a customer for failing to independently verify the accuracy of a representation made by a party to a real estate transaction?

Held: YES: While an email exchange about the driveway access agreement did not establish a separate statutory agency relationship which would supplant their agreement, there were still explicit duties that the Licensee and the Brokerage owed to the Buyer as a customer. The Court determined that the Buyer had raised a genuine issue of material fact concerning whether the Licensee and the Brokerage breached one of the statutory duties owed to her as a customer. Because the Buyer's breach of contract claim relied upon the statutory duties owed to a client, the Court affirmed the district court's determination that the Buyer had not raised a genuine issue of material fact with respect to that claim. The Buyer's negligence claim, however, was premised upon the breach of those statutory duties owed to customers. The Court reversed the district court's decision with respect to her negligence claim and remanded the case for further proceedings. While there is no duty to independently verify the accuracy or completeness of any statement or representation made by a party to a real estate transaction, a material difference in two agreements is not a question of the accuracy or completeness. A real estate licensee could be liable to customers for failure to disclose all adverse material facts which they reasonably should have known—including a materially adverse fact due to a change in an agreement.

ANTITRUST

Can state boards, commissions, and their members be subject to antitrust litigation for decisions they make in furtherance of states' mandates?

Louisiana Real Estate Appraisers Board. v. United States Federal Trade Commission, 976 F.3d 597 (2020) United States Court of Appeals for the Fifth Circuit

Facts: In 2017, the FTC filed a complaint against the Board for alleged restraint of trade. The complaint stemmed from the Board imposing certain requirements on appraisal management companies (AMCs): the Board adopted a rule requiring licensees to compensate appraisers at a rate that is "customary and reasonable" for the appraisal services performed in the market area of the property being appraised and as prescribed by Louisiana law. Furthermore, the Board prescribed its own methods to establish whether a rate is customary and reasonable. This rule was different from the federal regulations, which required appraisal fees to be only "presumptively" customary and reasonable. The FTC filed an administrative complaint with the Commission, asserting that the Board's "customary and reasonable" rule exceeded the standards established by federal law.

According to the FTC's view, the rule adopted by the Board allowed for only three types of justified appraisal fees, unlawfully denying an AMC's opportunity to establish their fees based on free-market negotiations. The Board denied the FTC allegations and claimed antitrust immunity under the state action doctrine. Following the FTC's initiation of proceedings against the Board, the Governor issued an executive order increasing the state's oversight of the Board. The Board also revised the rule in accordance with the Governor's executive order. Based on those changes, the Board moved to dismiss the FTC's complaint in the administrative proceedings, since the executive order and revision of the rule mooted the FTC's claims. The FTC moved for summary judgment on the Board's state action immunity defense. The Commission denied the Board's motion and granted the FTC's, rejecting the Board's assertion of state action immunity. The Board then sued the FTC in the federal district court alleging that the Commission's decision constituted a violation of the Administrative Procedures Act and filed a motion to stay any further administrative proceedings, which the district court granted. The FTC appealed to the 5th Circuit, citing lack of jurisdiction.

Issue: (1) Whether the district court had jurisdiction to stay the administrative proceedings; (2) Whether state boards, commissions, and their members are immune from antitrust litigation.

Held: (1) NO: in order to properly have jurisdiction, the Federal District Court needed to meet the standard set out in 5 U.S.C.S. § 704: either the administrative proceedings are made reviewable by statute or the matter up for review was a final agency action for which there was no other adequate remedy. Because no language in any relevant statute makes the proceedings expressly reviewable, and since the matter brought to the district court was an interlocutory decision to stay further proceedings, the district motion. (2) MAYBE: under the state action doctrine, state regulatory programs are entitled to immunity from antitrust claims. However, to meet the state action standard, the state regulation in question must be clearly articulated and affirmatively expressed as state policy and “the anticompetitive conduct must be actively supervised by the state itself." On its face, the regulation established by the Board meets this standard: the regulation was clearly articulated as a state policy and then the Governor issued an executive order mandating closer supervision of the Board, just to clarify any misunderstanding by the FTC. But the US Supreme Court has previously distinguished specialized boards dominated by active market participants from prototypical state agencies, and the 5th Circuit held that the Board was more akin to the former than the latter and therefore could not receive immunity from antitrust litigation because it is not truly a "state agency."

BROKERAGE PRACTICES

Agent breach of duty or contract in failure to retain a structural engineer

Rosenthal v. JRHBW Realty, Inc., 1180718 (2020) Supreme Court of Alabama

Facts: In June 2013, Plaintiff retained RealtySouth through its agent, Valekis, (Defendants) to both sell his current home and buy a new home. Valekis told Plaintiff about an unlisted property, 4335 Cliff Road, and Plaintiff first visited on June 18, 2013, with his stepfather. In the basement, Plaintiff noticed a pile of rocks and multiple jacks, leading him to wonder about possible structural or foundation issues. Valekis assured him that the sellers had done work on the foundation and that there were no longer any issues. Nonetheless, Plaintiff said he would not purchase the property without an inspection by a structural engineer, which Valekis agreed to procure. Plaintiff's stepfather corroborated. Plaintiff visited the property again with Valekis and Annello, a building contractor. Annello also suggested an inspection by a structural engineer and again Valekis agreed to handle it. Annello corroborated. Valekis, however, asserted that the specification for a "structural engineer" was not made during any of their conversations. Valekis claimed that Plaintiff said a foundation-repair contractor would be sufficient, and so Valekis called Caudle to perform the inspection. On June 28, 2013, Caudle inspected the property with Valekis. Caudle noticed a problem with the rear foundation wall, prompting him to also suggest having a structural engineer make a full evaluation. Caudle, as a foundation-repair contractor, was not qualified to make such an evaluation. He advised Valekis of a reputable structural engineer. Once the engineer's evaluation was complete, Caudle told Valekis that he would be able to provide an estimate for the repairs.

Later on June 28, Valekis emailed Plaintiff about Caudle's inspection. Valekis wrote that Caudle had looked at the basement and around the periphery of the house's exterior. Valekis told Plaintiff that Caudle's only suggestion was to extend a concrete culvert and a gutter to help divert water. Valekis said that Caudle had given an estimate of $300 to $400 and would help Plaintiff find a contractor. According to Valekis' email, Caudle "did not seem to find anything that needed to be written-up," but that Plaintiff was welcome to call Caudle to discuss the inspection further. Valekis never told Plaintiff that Caudle was not a structural engineer, that Caudle noticed possible foundation problems in the house, or that Caudle suggested a structural engineer inspection.

Based on Valekis' representation that a structural engineer inspected the home and on Valekis' representation that Caudle found no structural issues, Plaintiff made an offer on the property. The sales contract was executed on June 29, 2013. The sales contract clearly stated that Plaintiff was purchasing the home "as is," and that, although it was Plaintiff's obligation to procure and analyze any inspections, the sale was not contingent on any inspection. The sales contract also expressly released RealtySouth and Valekis from any liability to both Plaintiff and the sellers, and contained a merger clause. The parties also executed a buyer's agency agreement. The agency agreement expressly placed all responsibility for determining the condition of the property on Plaintiff. In an addendum, the buyer's disclosure statement stated that Plaintiff was aware that although RealtySouth or Valekis may recommend or procure a contractor or inspector, neither would be liable for any condition on the property that is not detected by the contractor or inspector. Lastly, Valekis and Plaintiff signed a Real Estate Brokerage Services Disclosure, which stated Valekis was obligated to (1) provide services honestly and in good faith; (2) exercise reasonable care and skill; and (3) answer Plaintiff's questions completely and accurately.

The transaction closed on July 19, 2013. A few months later, Plaintiff decided to move and again engaged Valekis to sell the Cliff Road property. Plaintiff and prospective buyers began to notice signs of the foundation shifting: cracks in the walls, movement in a pillar on the front porch, and the front stairs separating from the main structure. Valekis told Plaintiff that multiple buyers were concerned about the home's condition.

Plaintiff procured a structural engineer to inspect the home. The structural engineer concluded that the home was under significant structural distress and estimated that fixing the problem would cost more than $100,000.

Issue: Whether the defendant broker's failure to procure a structural engineer to inspect the subject property constituted either (1) a breach of duty to the plaintiff buyer, or (2) a breach of contract with the plaintiff buyer.

Held: NEITHER: (1) Plaintiff argued that Valekis voluntarily agreed to procure a structural engineer to inspect the property, and therefore Valekis had a duty to exercise reasonable care in ensuring the property was inspected as he and Plaintiff agreed. Under Alabama law, a duty attaches when a person volunteers to act, even when no duty would exist otherwise. Therefore, Plaintiff argued, since Valekis said he would procure a structural engineer before they actually entered into the agency agreement, Valekis had voluntarily assumed the duty, breached that duty, and is now liable for negligence. However, Alabama law also states that though Valekis wasn't Plaintiff's "specific agent" at the time of their verbal agreement, he was acting as a "transaction broker." Accordingly, the court determined that Valekis' duties were limited to those duties listed in the statute and that Valekis could not have assumed any additional duties. Therefore, Defendants cannot be liable for negligence. (2) Plaintiff argued that Valekis' promise to find a structural engineer to inspect the home created an implied contract. However, Alabama law clearly prohibits any "implied contracts" for agency between a broker and a consumer. Moreover, the actual agency agreement between Plaintiff and Defendants expressly relieves Defendants of any responsibility to inspect the property or to procure inspectors and it includes a merger clause, rendering this agreement the only actionable one. Thus, the court held that Defendants were not liable for breach of contract.

BROKERAGE PRACTICES

Fiduciary duties and obligations of good faith and fair dealing members owe the LLC of which they are a member.

Klos Constr., Inc. v. Premier Homes & Props., LLC, 18 CVS 3078 (2020) North Carolina Superior Court, New Hanover County

Facts: Defendant Premier Homes and Properties (PHP) was a member-managed LLC formed in 2009. Plaintiff Klos Construction (represented by Klos), Defendant Key Marco (represented by Weinbach), and Defendant Alpat (represented by Cummings) served as its members under the operating agreement. PHP was formed for the purpose of building, marketing, and selling homes in Motts Landing, a development in Wilmington, NC. Motts Landing was owned by Defendant Aftew (represented by Sobol). Alpat provided funding, Plaintiff provided construction, and Key Marco provided marketing. Though not a member of PHP, Defendant T. Ando Construction, was made the sales manager. Its representative, Ando, a licensed real estate broker, was broker in charge.

Under the 2009 operating agreement, all members were shielded from liability to the fullest extent possible under the NC LLC Act, even as it was altered or amended. The operating agreement granted the members broad authority to engage in other business and investments, even when directly in conflict with PHP. The operating agreement expressly declined to place any time, geographic, or business-nature restraints on the LLC's members, agents, affiliates, or employees. The only limitations acknowledged by the operating agreement were those in the Act.

In June 2009, PHP entered into a sales and marketing contract with Aftew. PHP became the exclusive sales, marketing, and construction group for Motts Landing. The initial term was for thirty months, but the contract was extended multiple times. In July 2014, the contract was renewed with extended rights for PHP to build, market and sell. The term was to expire on December 31, 2015.

During the contract term, Weinbach and Ando formed two companies (one in 2011 and one in 2013) for the purpose of building and selling homes in communities similar to Motts Landing.

In both instances, Plaintiff wanted to join them, but Weinbach objected. He felt that Plaintiff was at capacity with the Motts Landing work and that Plaintiff increasingly had trouble meeting expectations for PHP. Plaintiff proffered several letters of recommendation from Motts Landing customers to dispute Weinbach's claims. Nonetheless, in April 2015, Weinbach and Ando formed Premier Homes and Communities LLC (PHC) for the purpose of building new communities and "potentially" continuing development at Motts Landing. Weinbach claimed that he informed Plaintiff of PHC prior to its formation. He claimed that he told Plaintiff that PHC was a "safety valve" in case Plaintiff could not meet expectations. However, less than one month later, PHC formed a working agreement with Aftew. The agreement identified properties that PHC would purchase from Aftew for construction and sale between July 1, 2015, and July 1, 2016. Multiple lots referenced in the agreement were already contracted for sale to PHP customers.

During negotiations, Sobol was not told that PHC was a different company than PHP. Instead, Sobol understood the new agreement as another extension of the original 2009 sales and marketing contract with PHP. On June 5, 2015, Ando emailed a document titled "Third Amendment to Village at Motts Landing Sales and Marketing Contract" to an attorney representing Aftew. In the signature block on the email, Ando represented himself as being affiliated with PHP. The Amendment was drafted as though it were between PHP and Aftew, as the original had been. It contained a signature block with Sobol's name printed as the representative for Aftew and Plaintiff's name as the representative for PHP. Sobol had already signed for Aftew and Ando had already signed for PHP. The Amendment contained three handwritten revisions: (1) each time PHP was referenced, "PHP" was crossed out and "PHC" was handwritten in its place; and (2) in the signature block, Sobol's middle initial is changed and (3) Plaintiff's printed name as "Member/Manger" is crossed out and replaced with "Ando—managing partner." The record does not reflect whether the revisions existed when Sobol signed the document. Aftew's attorney returned the Amendment with the requested revisions.

The Amendment was executed by Aftew and PHC on June 8, 2015. The Amendment specifically references the 2009 contract and states that it is an extension of the 2009 contract through June 30, 2016. However, it also expressly states that PHC, not PHP, has the exclusive right to purchase a certain number of lots in Motts Landing. On July 1, 2015, with Ando as broker in charge, PHC began construction operations at Motts Landing. Any construction initiated by PHP prior to July 1 was carried out under the PHP name and PHP had closings until the end of 2015, but the last home constructed by Plaintiff was completed in August 2015.

Ando conceded that Plaintiff was not expressly informed about the Amendment. Ando never provided Plaintiff with a copy of the agreement before it was executed. Though the record is unclear as to exactly when Plaintiff learned about PHC and the contract, Sobol did give him a copy of the Amendment in September 2015. Weinbach told Plaintiff that he wanted to begin discussions to dissolve PHP in the fall of 2015. Plaintiff "regretfully" agreed to the dissolution on September 22, 2015. Later in September, the members of PHP met to negotiate the dissolution and winding up. The record is unclear as to what the members (other than Weinbach) knew about PHC and the PHC contract at that point. They met again in early December 2015 and Weinbach subsequently executed and filed the articles of dissolution for PHP with the NC Secretary of State. Again, the record is unclear as to Plaintiff's understanding of the PHC contract at the time of the meeting. Whether Plaintiff actually agreed to dissolve PHP at the December meeting is also unclear.

On April 22, 2016, Plaintiff filed articles of correction with the NC Secretary of State. Plaintiff asserted that Weinbach never secured unanimous consent from the PHP members and had improperly filed the articles of dissolution for PHP. Nearly a year later, on February 17, 2018, Plaintiff sent a demand letter to Key Marco, Alpat, and PHP. Based on PHC's alleged violation of PHP's rights in Motts Landing, Plaintiff demanded that PHP file suit against Key Marco, Alpat, and PHP. Plaintiff filed suit derivatively against Key Marco and Weinbach, Alpat, Aftew, PHC, and PHP on July 5, 2017, then voluntarily dismissed the suit without prejudice in March 2018. Plaintiff sent PHP two additional demand letters in February and March 2018, asking PHP to file claims against T. Ando Construction and Ando, Key Marco and Weinbach, and PHP.

In August 2018, Plaintiff filed a new complaint against PHC, Key Marco and Weinbach, and T. Ando Construction and Ando. The complaint was amended in April 2019. Plaintiff filed a motion for summary judgement on January 2, 2020, on, inter alia, claims for Breach of Fiduciary Duties and Constructive Fraud against Key Marco, Weinbach, and Ando; a claim for Breach of the Implied Covenant of Good Faith and Fair Dealing against Key Marco and Weinbach; and claims against Weinbach and Ando for Piercing the Corporate Veil; requests for an Accounting of PHP's financial records from 2015 to present and Judicial Dissolution of PHP; and the entry of an Order awarding Plaintiff $6,753,389.00 in compensatory damages.

Issue: Whether under the operating agreement, (1) all managers owed the LLC fiduciary duties and/or (2) there was a breach of the implied covenant of good faith and fair dealing.

Held: (1) NO: The court first determined that Weinbach was merely the representative for Key Marco. Accordingly, Weinbach can't personally be a party to the lawsuit; only Key Marco. The original 2009 operating agreement unambiguously stated that the LLC's managers were protected from liability to the furthest extent allowed by the Act. Moreover, the operating agreement clearly showed that the parties' intent was to lay the broadest limitation of liability allowed by the act, even as it was changed and amended over the course of the agreement. The plain language of the operating agreement says that all managers have a right to establish and engage in business ventures that may be directly in competition with PHP. Therefore, the court held that the duty of loyalty was properly waived by all managers: Key Marco, Alpat, and Klos. If there is no duty of loyalty to the LLC or its members, then there was no fiduciary duty for Key Marco to breach. If there was no duty and no breach, then there cannot be constructive fraud, either. Thus, Plaintiff's motion for summary judgment was denied as to those claims, and Defendants' motion for summary judgment was granted.

However, as a real estate broker, Ando did have a fiduciary duty to PHP to exercise reasonable care, skill, and diligence in all business entrusted to him. By law in North Carolina, real estate brokers are responsible to their principal for any loss resulting from their failure to carry out their fiduciary duty because the relationship is one of trust and confidence, not dissimilar to an attorney-client relationship. Brokers are explicitly prohibited from concealing material facts from their clients; they must fully and truthfully disclose all material facts that they know or should know after reasonable diligence. Because of this special relationship, clients aren't required to make their own investigations into the broker's statements—they can trust that what the broker has told them is true. Ando acted as the broker-in-charge for PHP on the Motts Landing development, but he was not a manager of the LLC. Ando was hired separately from the LLC's formation in 2009, and therefore he owed PHP and its members a fiduciary duty because they were his clients. So, the court held, when Ando intentionally concealed his participation in the PHC contract and then failed to inform Plaintiff of the PHC contract's existence, he very well may have breached his fiduciary duty to Plaintiff as his broker. The court determined that the question was best suited for the jury.

(2) MAYBE: Plaintiff alleged that Key Marco and Weinbach breached the implied contractual covenant of good faith and fair dealing by causing PHC to "step into PHP's contractual shoes," which made it impossible for the Defendants to properly perform their contractual obligations to PHP. The court determined earlier that Weinbach was not a party to the lawsuit, so only Key Marco's role was analyzed. Though the Defendants asserted that the same provisions of the PHP operating agreement that waived the duty of loyalty also waived the duty of good faith, the court held that the duty of good faith and fair dealing cannot be waived. Therefore, Key Marco was obligated to carry out the PHP operating agreement subject to the implied covenant of good faith and fair dealing. However, because the facts surrounding Key Marco's breach of the duty of good faith

are heavily disputed, the court held that the decision should be left to the jury.

BROKERAGE PRACTICES

Enforceability of commission obligation after seller's death.

Newton Ctr. Realty, Inc. v. Jaffe, No. 19-P- 1082 (2020) Appeals Court of Massachusetts

Facts: In 2017, Seller and the plaintiff Broker entered into exclusive right-to-sell agreements for each of three rental properties she owned. Each agreement, printed on standard forms from the Greater Boston Real Estate Board, entitled Broker to a 4% commission as the fee for their professional services in selling the property during the agreed exclusivity period. Under each agreement, Broker would be entitled to their commission only if (a) Broker procured a ready and willing buyer, (b) the subject property sold at all during the agreement's duration, or (c) the subject property was sold to anyone Broker introduced to the property during the agreement's duration within 90 days of the termination date. All three agreements were set to terminate on August 31, 2018.

Seller died on November 18, 2017. Her son, Defendant, was appointed personal representative of her estate. On June 26, 2018, Defendant sold two of the subject properties, one for $1.9 million and one for $2.5 million. On August 21, 2018, Defendant sold the last subject property for $1.2 million. When Broker learned of the sales, they sued Defendant in his capacity as personal representative of Seller's estate. Broker sought to recover their 4% commission for all three properties, totaling $227,400. Broker alleged a breach of contract and unjust enrichment. The trial court found there was no breach of contract because the agreements between Seller and Broker were agency agreements that terminated upon Seller's death. The trial court also found there was no unjust enrichment because Broker failed to show that they conferred any benefit to Defendant in connection with the sales. Broker appealed on the breach of contract claim only.

Issue: Whether the exclusive right-to-sell agreements survived Seller's death, entitling Broker to the 4% commission stated in the agreements.

Held: NO: Any agency relationship, which refers to a relationship where Party A (the agent) is authorized to act as a representative for Party B (the principal) to effect their legal rights and duties, generally terminates at the principal's death because there is no longer a party for the agent to act for. However, the law recognizes an exception when the agency agreement is coupled with an interest in the property on which the agency operates, such as maintaining a piece of real estate. Though this case was a question of first impression in Massachusetts, the court referred to other states' reasoning for guidance. The majority rule is that an exclusive right-to-sell agreement, like those between Seller and Broker, creates an agency relationship between the parties. Due to the fiduciary character of that relationship, the death of the seller terminates the agency. Moreover, just because a contract pertains to real estate does not mean it creates an interest in property. Therefore, the property-interest exception does not apply and the agency terminates completely. Broker argued that under the 1899 Massachusetts case Brown v. Cushman, two separate classes of agency contracts exist: those based on personal services by the agent and those based on something else, such as sales. Under Brown, contracts based on personal services by the agent necessarily terminate at death because the services can no longer be performed. Other contracts, however, can survive because they aren't dependent on any particular skill or judgment. The court reasoned that Broker's argument would go to a situation where the agent had died, but not the principal. Accordingly, the court held that the exclusive right-to-sell contracts had created an agency relationship which necessarily terminated when the principal died. Since there was no one for the agent to act for, the relationship ended. Therefore, Broker is not entitled to any commission or contract damages from Defendant's sale of the three subject properties.

BROKERAGE PRACTICES

Seller's liability for negotiating directly with buyer when seller was a party to a listing

George Clift Enters. v. Oshkosh Feedyard Corp., No. S-19-700 (2020) Supreme Court of Nebraska

Facts: On July 15, 2013, Jessen, president of Oshkosh Feedyard Corp. (Defendant Owner), entered into an exclusive listing agreement with GCE (Plaintiff Broker) through their agent, Bretz, to sell the feedyard. According to the agreement, the feedyard was listed at $4.5 million and Broker was entitled to both a listing fee and a brokerage fee. The listing fee was $4,000 payable immediately upon execution of the agreement. Owner paid the listing fee in full. The brokerage fee was 4.5% of the sales price payable when either (a) the sale of the property closed; (b) Owner defaulted after Broker produced a buyer agreeable to Owner's price and terms; or (c) Buyer defaulted and Owner retained any earnest money. Additionally, the agreement included a protection period clause that obligated Owner to pay the brokerage fee under the same conditions if the feedyard was sold to either (a) a buyer that Broker introduced to the property and Owner had actual knowledge of; (b) a buyer that Broker introduced to the property and whose name is included on Broker's list delivered to Owner within 30 days of the agreement's termination; or (c) a buyer that Owner introduced to the property without referring them to Broker during the agreement's term. The listing agreement's term lasted twelve months from the date of execution, and the protection period lasted two months after the termination date.

In April 2014, Betley, Braun, and Matzke (Defendant Buyers), three Wisconsin-based purchasers, contacted Bretz to inquire about purchasing a feedyard for dairy cows. Bretz mentioned several feedyards that were for sale, including the Oshkosh Feedyard, but he didn't recommend any specific feedyard to Buyers. Around the same time, Owner was getting frustrated with Broker's efforts in selling the Oshkosh Feedyard. A mutual friend of Owner and Buyers put them in touch and Owner gave Buyers a tour of his feedyard in May 2014. However, Buyers clearly communicated to Owner that they weren't ready to purchase anything at that point. Owner informed Broker of his communications with Buyers and Broker raised no objection. In June 2014, Bretz emailed Buyers to recommend a different feedyard. In the email, Bretz encouraged Buyers to continue discussions with Owner about the Oshkosh Feedyard. The exclusive listing agreement between Broker and Owner terminated on July 15, 2014, and the protection period expired two months later on September 15, 2014.

At some point during the summer of 2014, Buyers decided to purchase the Oshkosh Feedyard. In accordance with the email they received from Bretz in June 2014, Buyers contacted Owner to negotiate the purchase. Together, Buyers and Owner formed Oshkosh Heifer Development LLC on August 12, 2014. The purchase agreement was finalized on December 12, 2014.

On August 18, 2014, Broker filed a complaint against Owner alleging they had breached the listing agreement. Broker sought damages for their lost opportunity in the amount of \$202,500—the commission they would have received from the deal, plus \$20,000 that Broker allegedly spent on marketing the Oshkosh Feedyard. However, on July 17, 2017, the court dismissed the action without prejudice, citing lack of prosecution. Nothing had been filed with the court since December 2014, responses to discover had been delayed for an extended amount of time, and there were no other indications that the action was being actively pursued by the Plaintiff Broker. Broker filed the present action, practically identical to the first action, on September 7, 2017.

Issue: Whether Owner breached the exclusive listing agreement by engaging in a civil conspiracy to tortiously interfere with Broker's expected commission by negotiating with Buyers and failing to refer them to Broker.

Held: NO: there was never a dispute that Broker was not entitled to a commission under the exclusive listing agreement. Broker failed to produce a ready, willing, and able buyer during the listing period, which ended on July 15, 2014. Typically, unless the agreement states otherwise, a broker doesn't earn a commission until an agreement is reached between the buyer and seller. However, even if a sale is made after the agreement expires, a broker may be entitled to a commission only if they introduced the buyer to the seller and the sale is made on substantially the same terms previously offered through the broker. Here, Broker never alleged that an offer was made during the agreement's term, so no "previously offered" terms existed. Accordingly, there could not be an agreement between Owner and Buyers that was "substantially the same terms" as anything produced by Broker for the sale of Oshkosh Feedyard. The market for Owner's sale of their property after the agreement's term expired is not circumscribed by the fact that some or all available buyers have had been approached by Broker. Because Broker failed to perform their end of the listing agreement, all Owner's obligations to Broker for payment were terminated on July 15, 2014.

The protection period described in the listing agreement lasted two months after the agreement terminated—until September 15, 2014. The purpose of the protection period is to protect the broker when, though they didn't complete the sale themselves, their actions put the prospective buyer on notice of the available property and the seller would not have been able to conclude the sale without that notice from the broker. The protection period is a safeguard against a defrauding vendor who waits until just after the expiration of the listing agreement period before selling to a buyer introduced to them by the broker. Here, Broker alleges that Owner, in bad faith, purposefully delayed a sale during the listing period. However, the feedyard sale wasn't finalized until after the protection period had expired. Therefore, even if Owner had purposefully delayed a sale, there was no contractual safeguard in place to prevent a sale that long after the listing agreement expired.

Broker asserts that a sale would have occurred during the protection period but for the Owner and Buyers' allegedly tortious conduct. Broker claimed Defendants breached the last sentence of the protection period clause: "Owner agrees to refer all prospective buyers to Broker and agrees not to negotiate with such prospective buyers." Broker alleges that they are owed the 4.5% commission since, because of the breach, they were deprived of an opportunity to contact and negotiate with prospective buyers known to Owner. However, Broker did know about Buyers. Buyers had been in communication with Broker throughout the last half of the listing agreement's term. In May and June 2014, Bretz expressly recommended that Buyers continue their discussions with Owner, and assured them that Broker and Owner would work things out themselves. Therefore, the court held that Broker had effectively waived the referral obligation in hopes that putting Owner and Buyers in direct contact would expedite the sale. When that strategy failed, Broker sued Owner and Buyers for breaching the very provision they had waived to gain an advantage. Accordingly, the court held that any failure to refer buyers to Broker could not be the proximate cause of any damages because Broker was actually aware of Buyers during the listing period and had direct contact with them on several occasions.

Broker also alleged Defendants engaged in a conspiracy to tortiously interfere with their contract, business relationship, or expectation. Specifically, Broker alleged Buyers had conspired with Owner in order to deprive them of the brokerage fee stated in the listing agreement. The court reasoned that the apparent underlying breach at issue here is the implied covenant of good faith. All contracts contain an implied covenant of good faith. In an exclusive listing agreement, the seller implied that they will refrain from doing anything that would destroy or injure the right of the broker to earn a commission. Broker asserts that, by engaging in a civil conspiracy, Defendants breached the implied covenant of good faith under the listing agreement. A civil conspiracy is an agreement between two or more people to gain, by concerted action, either an unlawful or oppressive object or a lawful object by unlawful or oppressive means. The plaintiff must establish that the defendants had an expressed or implied agreement to commit an unlawful or oppressive act that constitutes a tort against the plaintiff. The issue in a civil conspiracy action is not the conspiracy charged, but the damages the plaintiff claims to have suffered as a result of the defendants' wrongful acts. A civil conspiracy is actionable only if the conspirators actually committed some underlying misconduct. It cannot stand as an independent tort—it requires the existence of a separate underlying tort. Without an underlying tort, there can be no cause of action for a civil conspiracy to commit the tort. In their affidavits, all Defendants denied ever having a conversation about delaying the sale or trying to deprive Broker of any commission. Buyers weren't even aware of any exclusive listing agreement until June 2014, after Bretz's email encouraging them to negotiate with Owner directly. Moreover, because there was no underlying tort committed, no action for civil conspiracy can stand.

CONTRACTS

Was the earnest money paid refundable?

River Range, LLC v. Citadel Storage, LLC, 166 Idaho 592 (2020) Supreme Court of Idaho

Facts: A dispute arose over the return of earnest money following termination of an agreement to purchase a storage facility. Following a termination of the Purchase and Sale Agreement, the Buyer demanded return of the previously submitted earnest money. The Seller refused and argued that the deadline for the return of earnest money had passed. The Buyer filed a lawsuit and sought the return of its earnest money. The Seller filed a motion for summary judgment and argued that under the plain language of the agreement, it had no duty to return the money to the Buyer. A section of the Purchase and Sale Agreement provided that the Buyer had 15 business days from receipt of a preliminary title commitment to object to any conditions of title. If the Seller was not able or willing to cure any title conditions that rendered the title to the property unmarketable within 10 business days of the Buyer's title objections, then the earnest money would be fully refunded to the Buyer and the agreement would be terminated. The parties later signed an addendum that stated, in part, that the earnest money would become nonrefundable if the Buyer failed to terminate the agreement within a defined due diligence deadline. This addendum also stated that if there was any conflict between the provisions of the addendum and the Purchase and Sale Agreement, the provisions of the addendum would apply. The preliminary title commitment was not received by the Buyer until less than 15 business days before the end of the due diligence deadline. The Buyer objected to certain title defects within 15 business days of receipt of the preliminary title commitment, but after the due diligence deadline had passed. The Buyer argued that the Seller had to resolve the title issues pursuant to the Purchase and Sale Agreement, otherwise the earnest money should have been refunded. The Seller argued that the Purchase and Sale Agreement only gave the Buyer the right to terminate the agreement and not to the return of earnest money. The Seller pointed to the Addendum which established a date by which all earnest money became non-refundable. The district court granted summary judgment in favor of the Seller.

Issue: Whether the addendum superseded the form language, making the earnest money nonrefundable.

Held: YES: When a conflict arises between pre-printed or form language in the body of a contract and an addendum written for a specific purpose, the portion that is created for the specific purpose of the agreement supersedes the pre-printed or form language. The Idaho Supreme Court held that the agreement unambiguously provided that the earnest money became nonrefundable after the due diligence deadline. Further, the Court held that the Buyer waived the right to have the earnest money returned and the Seller did not breach the duty of good faith and fair dealing. The Court affirmed the order granting summary judgment and the Seller was awarded its attorney fees on appeal.

CONTRACTS

Whether a commission payable from a salesperson's broker pursuant to an oral personal services contract is earned by a salesperson when the salesperson dies before closing.

Alma Logan and Logan Real Estate Associates, LLC v. Raynette Randall, as Executor of the Estate of Ray Ellis, No. 05-19-00043-CV (2020) Court of Appeals of Texas, Fifth District, Dallas

Facts: Logan was a self-employed, licensed real estate broker with Logan Real Estate Associates, LLC (doing business as RE/MAX). Ellis was the founder and president of Kwik Industries, the parent company of Kwik Kar automotive oil change and lube shops. Ellis was also a licensed real estate broker. He facilitated the sale of existing shops to new owners. Ellis operated as a broker at Logan's firm. Years before his death, Ellis and Logan entered into an oral agreement regarding Ellis's role within Logan's firm. The undisputed terms of the agreement were that, in exchange for working under Logan's brokerage, Ellis would pay a percentage of the commissions earned on his real estate transactions. At the time of Ellis's death, the agreement was that she would receive 1% of the broker's fee commission up to $2,000.

In early 2015, Privett informed Ellis that he was considering selling his Kwik Kar shop on Inwood Road in Dallas. Privett and Ellis discussed pricing and Privett agreed to pay a $150,000 broker's fee commission with the understanding that the money would go to Ellis. Privett had previously completed five other transactions with Ellis and Ellis always received the commission. In March 2015, Ellis procured a buyer, Piracha. Ellis and Privett signed a "Registration Agreement between Broker and Owner" listing Piracha as the prospective buyer. Ultimately the deal fell through. In July 2015, Ellis found Goff. Ellis, Goff, and Privett met later that month, and Goff and Privett came to an agreement for the sale of the Inwood shop.

Ellis died on October 20, 2015. Following his death, Dunham, a licensed real estate broker with Keller Williams and a Kwik Industries employee, handled all communications between Goff, Privett, and their attorneys and processed the transaction file. Dunham had worked with Ellis on many deals while at Kwik Industries, and Logan confirmed that Ellis employed Dunham to work on his transactions. Dunham testified she never worked for Logan and, though Logan was the sponsoring broker on the Inwood deal, Dunham had processed the file as an employee of Kwik, not for Logan. Logan admitted she had no formal employment relationship with Dunham, but she felt that Dunham was performing the processing work for her as an independent contractor.

On October 23, Dunham sent an email to other Kwik employees about the Inwood deal. The original Registration Agreement executed by Ellis and Privett named the first prospective buyer, Piracha. Dunham had spoken with Logan and said they could write in Goff's name. She stated that Logan would initial and authorize the change as Ellis's broker. Dunham's email also said that any commission paid would have the 1% broker's fee deducted as well as a $75 E&O charge.

Several weeks later, Logan informed Dunham via email that she spoke to the Texas Real Estate Commission about the Inwood deal. Logan reaffirmed that the Registration was completed by Ellis and he brought the two parties together. However, Logan said that since Ellis's license was no longer active, the contract could not have his name on it. Instead, Logan's brokerage was entitled to the transaction since the Broker owns any listings and clients.

Logan testified that she sent the email in an attempt to pay Ellis's Estate for the deal. Logan further confirmed that, when she authorized the changed buyer on Registration Agreement, she had not planned to keep the broker fee commission. She did not decide to keep the fee until later.

According to Dunham, Logan handled approximately 5%-10% of the transaction. Privett had only one short conversation with Logan to give her his contact information. Goff said he'd never heard of Logan before The Estate brought this suit.

Dunham drafted the original sales contract, but Logan revised it to show RE/MAX as the broker instead of Keller Williams. Dunham stated this was the only change that Logan made. The principal broker listed on the contract was RE/MAX Real Estate Associates and Logan was listed as the agent. The broker license number on the agreement was Logan's personal license, not the separate corporate license for her firm. The final contract was executed in January 2016 and the deal closed five months later.

In June 2016, Dunham informed Randall, Ellis's daughter and the executor of his Estate, that Logan would be sending Randall the checks by Fed Ex or mail. By June, Logan had decided she would not pay Ellis's Estate the 99% of the broker's fee because she did not feel it should receive the full amount. At some point after the June email, Logan decided she would not disburse any of the broker's fee commission to the Estate. Instead, Logan offered to pay Dunham 10% of the commission for her processing work and asked Dunham to send her an invoice. Until that point, Dunham was unaware that Logan intended to keep more of the commission than the 1% allocated to her under the oral agreement with Ellis. Privett had assumed Ellis would receive the entire commission, as he had in all their transactions, and Logan never informed him that this case would be different. Privett testified that he “would have reevaluated the situation” if he had known Logan’s intentions because, based on how little work she did, he did not feel she was entitled to a commission of that size.

Nonetheless, Logan deposited the entire broker’s fee into her firm’s account. Logan testified that most of the money from her transactions and her commissions go into the firm and she would withdraw money for personal expenses as needed. She said the firm had been operating at a loss every month since May 2016. Between May 2016 when the deal closed and September 2017, Logan paid herself $115,000. She admitted that some of that money would have been from the transaction. The Estate sued for breach of contract, promissory estoppel, [promissory estoppel refers to the doctrine that a party may recover on the basis of a promise made when the party’s reliance on that promise was reasonable], and quantum meruit [a reasonable sum of money for services rendered when the amount due is not stipulated in a legally enforceable contract]. The Estate also claimed a breach of fiduciary duty as assignee of the interests of Privett’s company. In a bench trial, the court concluded that Logan was liable for breach of contract and awarded $135,000 in actual damages along with attorney's fees and post-judgment interest. All other relief was denied.

Issue: (1) Whether Logan’s decision to retain the entire commission for the Inwood deal constituted a breach of contract or (2) a breach of fiduciary duty.

Held: YES and NO: (1) Logan did breach her contract with Ellis. Ellis’s involvement in selling Privett’s shop to Goff was a real estate transaction and therefore, as the licensed broker, Ellis earned a commission because he procured a ready, willing, and able buyer. While parties to a contract may expressly agree to different terms for the commission, there is no evidence that Logan and Ellis altered the terms of their oral agreement for the Inwood deal. The agreement terms were that, in exchange for Logan acting as Ellis’s sponsoring broker, Logan would receive a monthly desk fee, payment for Ellis’s E&O insurance, and 1% of the commissions paid on Ellis’s transactions. For the Inwood deal specifically, neither Privett nor Goff ever dealt with Logan. Privett said the transaction would not have happened without Ellis bringing the parties together. Logan would have never been involved with the sale, but for her agreement with Ellis. Accordingly, the transaction was Ellis’s. He earned his commission in accordance with the terms of the original agreement with Logan.

Logan argued that the oral agreement terminated upon Ellis’s death because it was for “personal services.” Contractual obligations generally survive the death of one party, with the only exception being a contract for “personal services.” If performance of a contractual obligation depends on the existence of a particular person, one party relies on the skill or character of the other party, or the contract is based on a personal confidence between the parties, then the contract may be for “personal services.” However, the only service that was personal to Ellis was bringing together a buyer and seller for the purchase of Privett’s shop. Thus, Ellis fully performed his obligations under the contract before he died and Logan must honor the oral agreement.

Logan argued that her obligations to Ellis and his Estate ended upon his own breach: After his death, no one paid Ellis's desk fee, which Logan argued was a prior breach of their agreement and therefore her own breach isn't actionable. However, because Ellis's obligations on the Inwood deal were already complete when he died, the failure to continue paying his desk fee cannot be considered a breach that would deprive his Estate from his commission payments. Ellis had already earned the commission before he died and before the desk fee payments stopped.

(2) The trial court did not err in finding no breach of fiduciary duty. The Estate already recovered damages against Logan for breach of contract, and thus would not recover any more damages for a breach of fiduciary duty. First, the Estate didn't prove or allege separate tort damages from breach of fiduciary duty; and second, the breach of contract theory provided the most substantial recovery based on the availability of attorney's fees under Texas law.

CONTRACTS

Whether an enforceable contract was created entitling an agent to a commission.

Mabery v. Morani River Ranch Holdings LP , No. 04-19-00798-CV (2021) Court of Appeals of Texas, Fourth District, San Antonio

Facts: Morani River Ranch was an exotic game ranch owned by the Respondent, Morani River Ranch Holdings and Reid. Respondent ran a successful business breeding exotic game and selling exotic game hunts on the Ranch. Reid hired Appellants, Mabery and Thorpe, as consultants. Appellants were both licensed brokers in Texas. Reid expressed an interest in selling the Ranch and he agreed to pay Appellants 5% commission if they procured a buyer, though he did not sign any listing agreement. In late 2013, Appellants introduced Reid to Bisbee, who was interested in buying the entire Ranch through his nonprofit, BWFC. Bisbee expressed that he would need to obtain a charitable contribution from the MPT Trust in order to purchase the property. Bisbee then contacted Staack, the trustee, to solicit the contribution. Staack said the Trust may make the contribution and contacted Reid to work on the purchase price. In Spring 2014, Appellants drafted a purchase contract for $15 million with a 5% commission. In Summer 2014, BFWC and Reid executed a purchase contract for $11 million with the brokerage fee agreement attached. They also executed a $5 million asset purchase agreement for the hunting and breeding business. However, a satisfactory closing on the purchase contract was a condition precedent for the asset purchase agreement. Both documents set the closing deadline for 30 days later. The Trust never made the contributions to BFWC and the purchase fell through.

In 2017, the Respondent sold an undivided 84% interest of the Ranch for $8 million to Stewards Real Estate Holdings, Inc., an entity owned by Staack. Respondent then donated the remaining 16% of the Ranch to Stewards of Wildlife Conservation, Inc., a non-profit founded by Reid. Appellants learned of the transaction and sued seeking their

5% commission. The trial court granted summary judgment for the Respondent, reasoning that the brokerage commission agreed to in the 2014 purchase contract was limited to a sale between the Respondent and BFWC.

Issue: (1) Whether emails exchanged between Respondent and Appellants could constitute an enforceable agreement regarding Appellant's right to commission; (2) Whether the 2014 contract entitled Appellants to commission upon the closing of the 2017 deal; (3) Whether Appellants could recover commission under the doctrine of partial performance.

Held: (1) The emails exchanged in 2014 did not satisfy the statute of frauds because they did not include a promise that a commission would be paid. The emails were merely communications contemplating a contract to be made in the future. The emails also did not describe the real property subject to the transaction. (2) The 2014 contract describing how the commission was conditioned on completion of closing between the seller and buyer, which never actually occurred, did not apply to the 2017 sale. (3) The doctrine of partial performance did not apply. A broker cannot recover a commission in the complete absence of any agreement with the seller explicitly entitling the broker to the commission. Here, the broker cannot recover commission from the 2017 sale based on performance alone.

CONTRACTS

Reformation of the commission provision of a buyer agency agreement.

Franklin Real Estate Grp., Inc. v. Spero Dei Church , No. M2019-01691-COA-R3-CV (2021) Court of Appeals of Tennessee, At Nashville

Facts: In 2016, Broker entered into a seller’s agreement with the Church regarding property in Bellevue, TN. Broker procured a buyer and the property sold for $10.2 million. In accordance with their agreement, Broker was paid a commission. The Church then asked Broker to find properties to purchase. The Church requested that Broker include properties not listed for sale and Broker decided a separate commission provision in the new buyer’s agreement was necessary. Broker's president, Boozer, drafted the agreement in early 2017 using the 2016 seller’s agreement as a template. He replaced Seller with Buyer where appropriate. Paragraph 5 was intended to state the terms for Broker’s commission: the Church would pay a 4% commission if, within the one-year term of the agreement or during the six-month carryover period, the Church contracted to purchase or lease from a seller whose property was introduced to them by Broker. However, since he used language from the seller’s agreement, Boozer made a mistake and Paragraph 5 actually said the Church was required to pay a 4% commission if they contracted to purchase or lease to a seller whose property was introduced by Broker.

But, on March 17, 2017, Boozer’s intended meaning was validated by an email sent to Perez, the Church’s pastor. After Boozer emailed him the buyer’s agreement, Perez asked specific questions about Broker's commission. Boozer responded within the hour, clarifying that if the Church completed a sale or lease agreement during the contract term, then Broker must be paid a 4% commission. Boozer further explained that, though everyone hoped the seller would cover commission, if the seller refused to pay at least 4% then the Church would need to pay Broker the difference. On March 20, Perez told Boozer that the Church decided to execute the agreement and they would return the signed contract to Boozer.

On March 17, the same day Boozer sent the buyer's agreement, Perez saw a church building on Park Avenue in Nashville, TN. The building was not for sale at the time, but Perez stopped and photographed the property. On May 2, Broker emailed information about four properties they thought would meet the Church's requirements. Coincidentally, one was the Park property. Boozer emailed Perez on June 2, encouraging him to consider the Park property. The next week, Broker went to the Park property with Perez for an on-site inspection.

Perez never told Broker that the Church was familiar with the Park property during the contract term or the carryover period, never asked Broker to pursue negotiations with the seller when it was listed for sale in March 2018, and never disclosed that, because Perez "introduced" himself to the Park property in March 2017, the Church expected to avoid paying Broker's commission if they purchased it.

Broker provided services to the Church in accordance with the buyer's agreement for the remainder of the contract term, including delivering information about over 100 properties and negotiating multiple written offers with various sellers, although none ended in a sale. In March 2018, the buyer's agreement terminated and the six-month carryover period began. During the carryover, the Church entered into negotiations to buy the Park property using Holland, a real estate broker and parishioner. The Church closed on the Park property on August 2, 2018, and paid Holland a commission on the $2 million purchase price. The Church did not pay Broker any commission.

Broker sued the Church for breach of contract in October 2018. The Church responded by moving for summary judgment, arguing that the buyer's agreement was unenforceable because Paragraph 5 was poorly drafted and the terms were indefinite. The Church also asserted that there was no obligation to pay Broker a commission because Perez had "introduced" the Church to the Park property, not Broker. In response, Broker argued that the court should reform the agreement under the doctrine of mutual mistake, not render it void. Broker also asserted that they had "introduced" the Church to the Park property within the meaning of the buyer's agreement. In July 2019, the court agreed with Broker and denied the Church's motion for summary judgment. The court, sua sponte [Latin for "of one's own accord, voluntarily] , granted summary judgment for Broker and awarded them the 4% commission, plus interest.

Issue: (1) Whether the court erred in denying the Church's motion for summary judgment and deciding to reform the buyer's agreement provision regarding Broker's commission; (2) Whether Broker or the Church "introduced" the Park property.

Held: (1) NO: The court did not err in deciding to reform the 2017 buyer's agreement to conform to the parties' intentions instead of declaring the agreement void. Generally, courts must interpret and enforce contracts as written and may not make up a new contract between the parties. However, the general rule is not universal, and courts do have power to reform a written contract if, at the time it was executed, both parties were operating under a mutual mistake of fact or law regarding a basic assumption underlying the deal. The purpose of reformation is to make the contract conform to both parties' intentions, as shown by clear and convincing evidence. Broker needed to prove (1) that parties reached a prior agreement regarding Broker's commission; (2) the parties intended their prior agreement to be included in the final version of the buyer's agreement; (3) that the commission provision in the final buyer's agreement materially differs from the terms they agreed to before; and (4) that the variation was not the result of gross negligence. Here, Broker presented overwhelming proof that the agreement should be reformed. The mistake in Paragraph 5, which altered the meaning of the commission provision, happened in the course of Boozer's efforts to transpose the 2016 seller's agreement into the 2017 buyer's agreement for the same client. As shown by the email exchanges and Broker's continued services to the Church, the parties had agreed to certain terms for commission in the past and intended for the buyer's agreement to follow the same course: the client would pay Broker's commission if Broker introduced the client to the property that they ultimately purchased. The evidence proved that the error resulted from an oversight, not gross negligence, and thus reformation was proper.

(2) BROKER: Neither Perez nor Holland "introduced" the Park property to the Church—Broker did, within the meaning of the agreement. Courts must interpret individual terms within the context of the entire contract, so while the buyer's agreement doesn't expressly define "introduce," the contract as a whole informs the court that "introduce" in Paragraph 5 means "to put forward for consideration." The Church asked Broker to find property to purchase after they sold the Bellevue property. The subsequent buyer's agreement was drafted to ensure Broker received a commission if the Church purchased a property "put forward for consideration" by Broker during the contract term or the carryover period. In Paragraph 5, "introduce" requires only that Broker (1) presented the property to the Church and (2) the Church bought that property. If the court were to adopt the Church's interpretation, it would create a loophole that would defeat the right to a commission in every case. Perez discovered the Park property by driving around Nashville and taking photographs, which cannot be held as sufficient to deny brokers their right to a commission. Therefore, the court did not err in denying summary judgment for the Church.

CONTRACTS

Enforceability of commission obligation in twenty-year-old agency agreements.

Reserve Realty, LLC v. Windemere Reserve, LLC, AC 38167, AC 38440, AC 38442 (2021) Appellate Court of Connecticut

Facts: In 2002, a real estate development group, Woodland LLC, hired Haddad and Scalzo Realty to negotiate the purchase of a 546-acre parcel of undeveloped land. Haddad and Scalzo entered into a listing agreement with Woodland that gave them the exclusive right to sell or lease any property developed on the land. Under the agreement, Woodland was required to inform any subsequent purchaser of the exclusivity provision as it applied to them. Woodland purchased the land in June 2002 and named it “the Reserve.” Haddad and Scalzo Realty formed Reserve Realty LLC.

BLT purchased Parcel 13 and Windemere purchased Parcel 15 in July 2003. Pursuant to their respective purchase contracts, both entities were obligated to also execute buyer's and listing agreements with Reserve for any future sales or leases of property contained in their respective parcels. Under Paragraph 8 of their agreement, BLT owed Reserve a 3% commission on any subsequent sale or lease of Parcel 13, either as a whole or as individual lots. Windemere intended to develop commercial office space on Parcel 15, and Paragraph 8 of their purchase agreement stated that Reserve would receive a $1 million commission for their services in leasing out the office space. The parties also executed an agreement requiring the purchase and sale agreements to be held in escrow by Woodland’s counsel until several conditions were met, including the execution of listing agreements. The parties executed all the agreements on September 10, 2003.

In 2006, Haddad and Scalzo began marketing the Reserve and procuring prospective buyers and lessees for BLT and Windemere. However, eventually neither entity wanted to retain Reserve as their listing agent. Both entities executed listing agreements only to satisfy Paragraph 8 of their purchase agreements. They argued that the only reason Paragraph 8 was included in the agreements was to enable Woodland to honor its own contractual obligations. In January, 2007, representatives from Reserve, BLT, and Windemere met to discuss terminating the broker/client relationship. BLT and Windemere offered a buyout figure to Haddad and Scalzo, but both refused.

Haddad and Scalzo continued to make a good faith effort to procure buyers and lessees for Parcels 13 and 15 until the real estate market deteriorated in mid-2007. Accordingly, BLT and Windemere explored other options, including the development of Parcel 13 into a luxury apartment rental complex. In 2011, the zoning commission approved BLT’s plan for the Abbey Woods apartments on Parcel 13 and construction started soon after. BLT started leasing units through its own on-site agent in March 2013. BLT did not notify Reserve of the project on Parcel 13. Haddad died just before Reserve discovered the project. Reserve contacted BLT, but BLT refused to discuss the project. BLT claimed that the listing agreements for Parcel 13 were actually “personal service agreements” between BLT and Haddad, and since Haddad had died the agreements had terminated.

Reserve and Haddad's estate sued BLT and Windemere in July 2013, alleging a breach of contract and an anticipatory breach of the buyer's agreement and the listing agreements for Parcels 13 and 15. Plaintiffs argued that (1) they were entitled to commission for the gross rents collected from the Abbey Woods apartments already leased, plus the estimated gross rents over the next ten years; (2) they were entitled to the $1 million commission for office space due and payable when Windemere constructs and begins leasing office space on Parcel 15; and (3) a declaratory judgment recognizing their right to be the listing agent going forward for any sale or lease of Parcel 13 or 15 was proper. Defendants raised five defenses: (1) the listing agreements were executed pursuant to an illegal tying arrangement; (2) there was no consideration because Plaintiffs failed to perform brokerage services entitling them to compensation; (3) the listing agreements were personal service contracts; (4) the listing agreements expressly expired on September 10, 2010; and (5) the listing agreements were unenforceable because the necessary conditions precedent had not been satisfied. The trial court found for Defendants, holding that the purchase and sale agreements created an illegal tying arrangement in violation of the Connecticut Antitrust Act. The court also held that Plaintiffs failed to prove Defendants' breach of the listing agreements or liability for anticipatory breach because the listing agreements (a) failed to satisfy the requirements in Connecticut law because they were ambiguous and incomplete regarding the duration of the authorization, which is required in any agreement for commissions in a commercial real estate transaction; and (b) were personal service contracts with Haddad. Lastly, the trial court agreed that the agreements expressly expired on September 10, 2010. However, even without an explicit expiration date, the contract made the term of the agreements start on the day of the first sale or lease of a unit and then continue for ten years. Thus, the agreements had no fixed expiration date and were invalid for failure to comply with Connecticut law.

Issue: Whether the plaintiff brokers are entitled to recover commissions from the defendants pursuant to nearly twenty-year-old buyer's agreements and listing agreements.

Held: NO: under Connecticut Statute § 20- 325a(b), a broker cannot recover commissions unless their brokerage services were "rendered pursuant to a contract or authorization from the person for whom the [services were rendered]:" the client, or the defendants in this case. The contract or authorization must (1) be in writing, (2) contain the names and addresses of the real estate broker and the name of the client, (3) show the contract or authorization's date of execution, and (4) contain the conditions of such contract or authorization. The next section, § 20-325a(c), specifically addresses commercial transactions. § 20-325a(c) requires (1) a contract or authorization that meets the requirements in § 20-325a(b), and (2) some writing that identifies the client and is signed by the client, states the duration of the authorization or contract, and states the amount of any compensation payable to the broker. The buyer's agreements did comply with § 20-325a(b) and (c): those contracts gave the plaintiffs the exclusive right to represent the defendants in purchasing parcels 13 and 15 at any time between the date of execution, September 10, 2003, until September 10, 2010. Therefore, the agreement was valid as written, but had expired years prior. Therefore, the court determined that the plaintiffs could not recover commission.

The listing agreements, however, did not strictly comply with § 20-325a(b) or (c). While the trial court held that the listing agreements were invalid under § 20-325a because they lacked an "expiration date," the proper inquiry would be whether the agreements properly specified the duration of the plaintiff brokers' authorization from the defendant clients. Per the agreements, the "term" was to begin when the developer (the defendants) became the owner and end "120 months from the date of the first conveyance...or executed lease to an unrelated party." The court determined that to be valid, a duration stated in a contract must be measurable and predictable. The listing agreements made the amount of time the defendants would be bound completely undeterminable, possibly binding them indefinitely. The term of the contract could be calculated only by reference to an uncertain future event, making it impossible to state the duration as required by § 20-325a(c). Moreover, the duration condition required by § 20-325a(c) exists to promote public policy: a defined duration is required for a listing agreement because the broker is entitled to their commission during that time, regardless of whether or not they actually procure the buyer themselves. This puts brokers at an advantage and could entitle them to payment for services while they didn't protect the public from abuse. Therefore, the court determined that the plaintiffs could not recover commission.

Lastly, under § 20-325a(d), a broker may still be entitled to commission even if the listing agreement doesn't strictly comply with § 20- 325a(b) and (c). Under § 20-325a(d), the broker may still recover their commission if (1) the contract substantially complies with § 20-325a(b) and (c), and (2) the facts and circumstances of the case would make it inequitable to deny the broker their recovery. When a contract "substantially complies" with the statutory requirements, the nonconforming provisions at issue are immaterial to the performance of the contract. In other words, even though there are errors, the contract can still be completed to fulfill the intent of both parties. Here, however, the court held that the missing duration condition was imperative to both parties' understanding of their rights and duties under the contract. The court explained that those fundamental components were absolutely material to the contract's completion, and therefore, the listing agreements did not substantially comply with § 20-325a. Though that was enough to deny their recovery, the court also held that the plaintiffs could not recover under § 20-325a(d) because, given the facts and circumstances of the case, it would not be equitable to grant them their commission. The plaintiffs argued that they worked to market the defendants' empty parcels over the years and that the defendants wrongfully prevented them from marketing they Abbey Woods apartments after they were finally completed. However, the court determined that the plaintiffs only met their duty as the defendants' broker for parcels 13 and 15 from 2006-2007. The Abbey Woods apartments weren't constructed until 2011 and the plaintiffs didn't learn of their existence until 2013. The parties had very little communication between 2007 and 2013, such that one plaintiff stated he was "shocked" to discover the apartments in 2013. Therefore, the court held that the plaintiffs had not upheld their part of the contract to the extent that it would be inequitable to deny their recovery.

GOVERNMENT

Without violating the First Amendment of the U.S. Constitution, can an occupational licensing agency deny an application for licensure due to certain statements an applicant makes on social media that give rise to professional concerns?

Gray v. Dept. of Public Safety, Ken-20-168 (2021) Supreme Judicial Court of Maine

Facts: On January 26, 2018, Gray applied to the Department of Public Safety (hereinafter "DPS") for a professional investigator (PI) license. The Chief of the Maine State Police issued the decision to deny Gray's application on August 31, 2018. DPS determined that Gray had made “materially false” statements on social media, including on the Facebook page for his private investigation business, which raised concerns for Gray’s ability to competently investigate and report. DPS determined that Gray lacked the requisite competency and fitness of character to act as a professional investigator. Gray appealed to the Superior Court, which held that DPS could not deny a license for statements made on social media, unless the statements fell outside the protection of the First Amendment of the U.S. Constitution. The court remanded for DPS to determine whether Gray made the statements on social media with “actual malice:” with knowledge that the statements were false or with reckless disregard of their falsity. On remand, DPS questioned Gray about certain statements he made that a Maine State Police lieutenant was "possibly drunk” during a police incident that resulted in a woman's death. Gray stated that the lieutenant had “murdered” the woman. During DPS questioning, he claimed that the statements were opinions, not facts, and that when he learned that another officer had actually shot the woman, he provided that information on social media. He also admitted that he stated that the lieutenant had been the subject of multiple internal affairs investigations, but again claimed that his statement was an opinion.

During its examination of Gray's responses, DPS reviewed affidavits from the lieutenant in question and the commander of the DPS Office of Professional Standards (formerly the Office of Internal Affairs). The commander reported that only one complaint had been made against the lieutenant that had resulted in an investigation, and it was initiated by Gray. DPS issued a second decision denying the application, finding that Gray had made certain statements with actual malice. However, the decision also stated that the actual malice standard did not apply because, even if Gray had the right to make those statements, he was not entitled to a license if he did not meet the competency and character standards.

On October 28, 2019, Gray again appealed to the Superior Court by filing a petition for review of the Department's denial of his application for a license. The court affirmed the DPS decision on June 1, 2020, concluding that the finding of actual malice was supported by the administrative record.

Issue: (1) Whether intermediate scrutiny is the proper standard for determining whether the speech is protected by First Amendment and (2) Whether DPS violated Gray's First Amendment rights in applying to standards to deny his application for a license.

Held: YES and NO: (1) Intermediate scrutiny is the proper test to apply. The regulation of conduct did not explicitly target speech, but incidentally burdened it. In NIFLA, the Supreme Court explained that lower-level scrutiny should be applied in analyzing two kinds of content-neutral restrictions: (1) licensure laws governing commercial speech; and (2) regulations of professional conduct that incidentally burden speech. The Fourth Circuit determined that, even though licensing laws inevitably have some effect on the speech of those who are not (or cannot be) licensed, the effect is merely incidental to their primary objective: regulating the conduct of the profession. Therefore, the issue here falls into the second category from NIFLA and intermediate scrutiny should be applied. (2) Gray argued that DPS's denial is analogous to Pickering, where a teacher was terminated after criticizing the school board in a letter to the local newspaper. However, Gray was not terminated because he exercised his right to speak as a private citizen on a matter of public concern. Instead, he was subject to regulations governing professional licensure and was denied based on his conduct as a member of the profession for which he seeks a license. Accordingly, DPS's decision to deny the license did not violate Gray's First Amendment rights because substantial evidence showed that the applicant used his business's social media to repeatedly publicize uninvestigated and false statements, behavior demonstrating that he lacked the necessary good character and competency to serve as an investigator under Maine licensing regulations. The purpose of the regulations is to determine who is capable of serving as a private investigator in Maine, not to control the speech of prospective licensees. Gray's application was denied because he chose to publish uninvestigated speculation as fact using his job title and the name of his business. DPS determined that his conduct showed an inability to distinguish between fact and opinion, to investigate facts, and to honestly report facts, giving rise to professional responsibility concerns. The DPS decision doesn't operate to suppress any of Gray's rights aside from speech that would, for a professional investigator, violate standards of conduct in a profession that is focused on the investigation and accurate communication of facts.

HOMEOWNER ASSOCIATIONS

Was there an agreement to dedicate an easement to the City for public parking

City of Eagle v. Two Rivers Subdivision HOA, 167 Idaho 70 (2020) Supreme Court of Idaho

Facts: A dispute arose between a homeowners' association and the City of Eagle over the public's right to use a parking lot located on land owned by the homeowners' association. During the development of Two Rivers Subdivision, the City of Eagle held a public hearing at the Developer's request for certain concessions from the City associated with the subdivision. The City argued that the Developer offered to dedicate an easement for public parking on Lot 35 at that hearing. The City further argued that the offer was accepted a few months later when the City approved the Developer’s design review application showing the specific location and design of the parking lot. Two Rivers Subdivision Homeowners Association, Inc. argued that no dedication occurred because the Developer’s intent to dedicate was not clear and unequivocal. The district court granted summary judgment in favor of the Association.

Issue: Whether the HOA effectively accepted the Developer's offer to dedicate an easement for the City to use for public parking when the HOA approved the Developer's design plan.

Held: YES: The Idaho Supreme Court concluded that the Developer made a present offer of dedication and that the City accepted this offer. The Court vacated the district court’s judgment, reversed the district court’s summary judgment decision, and remanded with instructions to enter judgment in favor of the City and to consider whether the City was entitled to any injunctive relief. If an offer to dedicate is made and accepted, a common law dedication of easement can be found even in the absence of a writing memorializing the dedication. (Don’t do business this way!) You’re better off to get everything in writing and not rely upon the whims of the court.

LANDLORD AND TENANT

What are a landlord's duties in regards to keeping tenants safe?

Estate of Campagna v. Pleasant Point Properties, LLC , A-2989-18T1 (2020) Superior Court of New Jersey, Appellate Division

Facts: Campagna was a resident in a licensed rooming house owned by the defendant, an LLC with Dalton as its only member. On October 7, 2015, Campagna was stabbed to death by Strong, another resident in the rooming house. After the murder, the rooming house management discovered that Strong had just been released from prison after an armed robbery conviction and was still in a parole supervision program. Strong moved into the rooming house in September 2015. Dalton testified that she had never met or interviewed him, and she never inquired about his rental, employment, or criminal history. Dalton stated that she had never been required to perform background checks and it was not her practice to do so. She was unaware of any prior complaints of confrontations or crimes at the rooming house, however she admitted that there were no procedures in place to record and address any such complaints.

Campagna’s Estate filed a five-count complaint against the LLC and later amended the complaint to include Dalton personally. The Estate alleged gross negligence, statutory and related regulation violations, and wrongful death. The Estate contended that as a rooming house operator, the LLC and Dalton were under a duty of care to protect tenants’ safety by conducting criminal background checks on prospective tenants.

Issue: Whether a rooming house operator has a legal duty to conduct criminal background checks for prospective tenants in order to promote the safety of other tenants

Held: NO: no NJ statute or administrative code regulation imposed a legal duty to protect tenants beyond what has been determined by the common law: (1) keeping the premises in reasonably safe condition; (2) taking reasonable security measures; and (3) imposing reasonable restrictions on tenants' dangerous activities (posing a hazard to the life and property of other tenants). The court focused narrowly on the duty to conduct criminal background checks, not the general safety duty laid out in the common law. The landlord's duties arise only when (1) the harm is reasonably foreseeable and (2) the landlord has sufficient control over the area and situation to prevent the harm. Because a background check was not required, Dalton could not have known about the existence or nature of Strong's prior conviction or propensity for violence. Therefore, the murder was not reasonably foreseeable. Additionally, the murder took place inside Campagna's private room in the rooming house, not in a common area. Dalton could not have exercised sufficient control to prevent the harm over Campagna's private room. Campagna was free to invite anyone he wished into his room and Dalton could not object. Campagna's decision to invite Strong into his room on the night of the murder was out of Dalton's control. Therefore, Dalton did not have a duty to prevent the harm and was not liable for Campagna's death. Furthermore, the court held that permitting landlords and rooming house operators to run background checks on prospective tenants was and always had been lawful: landlords and rooming house operators were allowing third parties into their private property to live, and choosing to conduct a background check for a prospective tenant is reasonable. However, requiring landlords and rooming house operators to run background checks (creating the duty) would have significant public policy ramifications, most notably authorizing otherwise unlawful discrimination against people with a criminal past. The court held that mandating background checks would likely cause more harm than good from a public policy standpoint and accordingly declined to create a new duty for landlords and rooming house operators.

MISREPRESENTATION

When a broker engages in deceptive trade practice, what judgment is appropriate?

State of Arkansas v. Real Travel, LLC, 04CV- 19-1838 (2020) Circuit Court of Benton County, Arkansas; Civil Division

Facts: Real Travel, LLC (owned and operated by Bowe and Scruggs) sold time share exit services to consumers nationwide. the LLC utilized deception and high-pressure sales tactics to convince customers that they could help them liquidate, cancel, or transfer their unwanted time share ownership in exchange for a fee ranging from $5000 to $18,000. The LLC advertised a "100% guarantee." However, the LLC was not 100% successful and left customers with not only continued ownership of their time share, but also the exorbitant fees paid to the LLC. The LLC also failed to honor a contractual three-day cancellation period by refusing to refund monies. Bowe was a "controlling person" for the LLC. Bowe personally formulated, directed, controlled, supervised, managed, participated in, had knowledge of, and acquiesced in the business practices of the LLC.

Issue: Whether monetary judgment is appropriate

Held: YES: in addition to injunctive relief, a substantial monetary judgment is appropriate against a firm or broker charging exorbitant fees to time share owners attempting to transfer or cancel their property interests. In a consent order, the Benton County Court permanently enjoined Bowe from conducting any business related to time shares and time share exits in Arkansas. The court also held that Bowe, as the controlling person for the LLC, was required to pay $50,000 restitution to the state of Arkansas. The court determined that Bowe will make one $5000 payment each year for ten years. The Arkansas Attorney General will then distribute the restitution to the affected customers. The court also held that Bowe had violated the Arkansas Deceptive Trade Practices Act and accordingly assessed $450,000 in civil penalties against him. His civil penalties are suspended pursuant to his abiding by the terms of the consent order. The Arkansas Attorney General is still pursuing a judgment against Bowe's colleague Scruggs and the LLC itself.

PROPERTY RIGHTS

What is sufficient to establish a boundary by agreement?

Owen v. Smith, 485 P.3d 129; 167 Idaho 758 (2020/21) Supreme Court of Idaho

Facts: A dispute arose between neighbors over the location of the boundary between their properties. In 2018, the Smiths bought property next to the Owens. As part of the Smiths' purchase agreement, a survey of the property was completed. The survey was completed in 2018. The Smiths then erected a fence along the boundary defined in the 2018 survey. The Owens disputed the boundary established by the 2018 survey and filed a complaint seeking damages for trespass, deprivation of real and personal property that was in the disputed area, loss in property value, and inability to inhabit and enjoy the property. The Smiths counterclaimed for quiet title and an easement guaranteeing them access to a buried irrigation pipeline that crossed the Owens' property. The parties each filed a motion for summary judgment. The Owens argued that the 2018 survey was inaccurate and referenced an earlier survey completed in 1978. However, the Owens did not proffer any admissible evidence to support their claim that the 2018 survey was incorrect. The surveyor engaged by the Smiths pointed out an improper location of a corner pin from the 1978 survey and the Owens did not provide any evidence to dispute this finding. Though the Owens did not explicitly claim a "boundary by agreement" they argued that the existence of a "decades old" grape patch fence, a riding lawnmower, garden tools, fencing supplies, and other equipment located on the area of the property in dispute, and the existence of a gardening spot defined the true boundary of the property. The district court granted the Smiths motion for summary judgment, holding the Owens had no right, title, or interest in the disputed property, that a boundary by agreement did not exist as the actual prior owners of the Smith property (who were leasing the property to a third party) were not aware of conditions alleged to have established a boundary by agreement, and that the Smiths were bona fide purchasers with superior claim to any land described in their deed.

Issue: Whether the presence of the Owens' fence, gardening tools, and other equipment can properly define the "true boundary" of the disputed property?

Held: NO: The Owens did not adequately establish a boundary by agreement by showing (1) an uncertain or disputed boundary or (2) a subsequent agreement fixing the boundary (with the actual owner) expressly or by acquiescence. Further, the Supreme Court held that, since the Smiths recorded their deed in good faith for valuable consideration, they had priority over any subsequent claims to the property. A boundary by agreement may only be established by showing that such agreement was established directly between the owners of the subject properties (by express agreement or through acquiescence) and the actions of a tenant do not necessarily establish a boundary change if the underlying owner is not aware. The Idaho Supreme Court affirmed a district court's decision granting summary judgment to the Smiths arising from a boundary dispute.

PROPERTY TAXES

Oakland County Michigan man loses house due to $8.41 in unpaid taxes

Rafaeli, LLC v. Oakland County, Michigan Supreme Court

Rafaeli is a retired engineer who lost his Oakland County rental home back in November of 2020 for not paying his property taxes in full. He owed $8.41. Oakland County foreclosed and seized his home, auctioning his property off, and kept the $24,500 in excess from the sales.

Rafaeli's home which was in Southfield was purchased in August of 2011 for $60,000. A three-bed, 1500 square-foot home that was at the time an investment rental property. Later in June of 2012, he was told by the Oakland County Register of Deeds he was behind in property taxes by $496. He made payment, on time and in full. According to court records he attempted to settle his unpaid tax debt but made an error with interest, resulting in owing $8.41. A year later Rafaeli's home along with other properties in Oakland County was put up for sale.

Not only did he lose his property over a pittance in tax money owed, but the county also sold it for far less than the $82,000 the property was valued at. Over $20,000 in equity was lost from the $60,000 original purchase price.

ISSUE: Was the county reasonable in taking Rafaeli's property.

HELD: NO. In a majority opinion by the Michigan Supreme Court, six out of seven justices agreed that the seizure was a taking of private property that required just compensation.

The reasons the Court noted was early in Michigan's statehood it was commonly understood that the government could not take more taxes than what was owed, nor could it sell more land than what's necessary for unpaid taxes. They also noted it was axiomatic (unquestionable) that in terms of eminent domain, the government shall take no more property that is necessary for the particular public use in which the taking was done. They concluded that these fundamental principles protect taxpayers and property owners from governmental overreach.

The opinion of the justices goes back to limitations on the government's power to take property from delinquent taxes from the Magna Carta and English Common Law. The court's opinion found a property owner's right to the residual value of a property is protected by the takings clause of the Michigan State Constitution and the Fifth Amendment of the U.S. Constitution. Further concluding, "We must keep in mind that Michigan's Takings Clause has been interpreted to afford property owners greater protection than its federal counterpart when it comes to the state's ability to take private property for a public use under the power of eminent domain."

In civil asset forfeiture, part of what it is meant to do is punish the owner of the property, the court said, such as if someone is convicted of a crime, and the property from that criminal operation is seized. However, the state General Property Tax Act is not "punitive" in nature. The act they said was to have people pay their taxes in a timely manner and to return those delinquent properties back to where they can further generate taxes.

The Michigan Supreme Court found the "plaintiffs did not use their properties for illicit purposes. They simply failed to pay their property taxes, which is not a criminal offense."

Justice David Viviano wrote in his opinion, (Because) "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it" under the majority's theory, no constitutional issues occur until the surplus proceeds are retained. It does not matter that once title has vested in the government without chance of redemption, the taxpayer's property—his or her equity—has been taken. Consequently, the majority's view of the case would seemingly be that if the property does not sell at auction and is simply transferred to a governmental unit, the taxpayer is out of luck: no proceeds, let alone a surplus, have been produced or retained by the government…. Perhaps worse still, governmental units have numerous opportunities to purchase the property for the minimum bid, i.e., for the debt (and costs), and thus obtain it for an amount that will usually be much less than fair market value."

According to Viviano, the property owner is not just entitled to the proceeds from the sale, minus fees and what he owed in back taxes, but also the “equity” he holds in the property as a whole. Meaning the owner is owed fair market value compensation. The concern is that when the county sells a property, they usually only care about getting only what they’re due, and not the full value a property owner would seek when selling property.

In Detroit, 150,000 properties in Detroit have gone through foreclosure. In many cases what were once grand old homes being sold for less than $1,000. This is according to data collected by Jerry Paffendorf of Loveland Technologies. Finding that in many cases the homes auctioned off were not even vacant.

In Wayne County, delinquent tax surpluses have given an extra $382 million into the general fund since 2012 according to Bridge Michigan. In Oakland County, $196.8 million has come from net assets. The problem is also in other Michigan Counties as well.

In Detroit, from 2017 to 2018 volunteers for the non-profit Quicken Loan Community Fund polled 60,000 property owners who owed taxes in Detroit. Many said they were aware that they owed, they just didn’t know about the process or the consequences.

What makes this case noteworthy is that Rafaeli and others are now due money they are owed, and others who have been foreclosed on could seek compensation. Forcing counties all over the state to refund people, when many counties are struggling already.

RESTRICTIVE COVENANTS

Was there an easement for use of the driveway

Lorenzen v. Pearson, 167 Idaho 385 (2020) Supreme Court of Idaho

Facts: A dispute arose between neighbors over a shared driveway on residential property near Hayden Lake in Kootenai County, Idaho. The properties at issue were originally one 1,400 acre estate. Over the years, parts of the property were sold off and the property was frequently re-platted. An oval asphalt driveway accessing these properties dates back to at least 1946. This oval driveway was used continuously as a shared driveway without known dispute. The Lorenzen family’s interest in the land dates back to a 1968 purchase of a cabin with surrounding property. In 1976, the Lorenzens were granted a quitclaim deed to a tract of land that expanded their Hayden Lake property interest. Inclusive in that quitclaim deed was a reservation by the grantor giving “their heirs and assigns, the right to use the oval roadway ... and the Grantees [the Lorenzens] the right to use for ingress and egress the existing roadway . . . .” The Pearsons purchased their property in 2013 and disputes over the driveway began. The disputes culminated in 2016 when the Pearsons installed an electric fence that controlled access to the shared driveway. The Lorenzens filed a complaint seeking an injunction and a declaratory judgment. At trial, the district court found the easement language in the 1976 deed to be ambiguous. Further, the court construed the subsequent deeds to grant both parties express easements to the shared driveway.

Issue: Whether the quitclaim deed created an easement for use of the driveway.

Held: YES: A grantor cannot claim a reversionary interest in the property after forever conveying his full interest to the grantee via a quitclaim deed. Additional restrictive language would be needed to create a reversionary interest. Quitclaim deeds are limited in their utility and should not be used in every situation. Consult with an attorney when making material changes to real property rights. The Court affirmed the trial court's decision agreeing that the quitclaim deed was ambiguous. Further, the Court agreed the quitclaim deed created an easement that extended to the parties as well as to their heirs, successors, and assigns. By using a quitclaim deed, the grantor in 1976 covenanted to "convey, release, remise, and forever quitclaim" the granted interest. Thus, the Court found that the 1976 grantor gave up the interest they once held "forevermore." Further, the Court found that the easement was appurtenant.

RESTRICTIVE COVENANTS

Who can grant an easement? Who can they grant an easement for?

Fitzpatrick v. Kent, 166 Idaho 365 (2020) Supreme Court of Idaho

Facts: A dispute arose between neighbors over the validity of an easement. In 1997, the Fitzpatricks bought two adjacent lots in Ada County. In 2016, while still owning both lots, the Fitzpatricks recorded a document that granted an easement to the owners of the first lot (themselves). The easement provided the right to maintain, repair, and improve a portion of the second lot. After recording the easement, the Fitzpatricks then sold the second lot to the Kents. In 2018, the Kents allegedly made certain modifications to the easement area that the Fitzpatricks opposed. The Fitzpatricks claimed that the easement precluded the Kents from making the modifications. The Kents asserted that the easement was unenforceable. The Fitzpatricks and Kents filed cross-complaints seeking to quiet title to the easement area. The district court granted the Kents' motion for summary judgment after concluding that "one cannot have an easement in his own lands." The Fitzpatricks appealed the district court's summary judgment decision.

Issue: Whether a property owner can grant an enforceable easement to themselves.

Held: NO: A person cannot grant an easement to himself. Therefore, no easement was ever created for the Fitzpatricks. The lower court's judgment is affirmed.

RESTRICTIVE COVENANTS

The easement deduction requirements under 26 USC 170 and whether a deed of easement met the technical requirements to protect the conservation purposes in perpetuity.

Glade Creek Partners, LLC v. Commissioner, 22272-17 (2020) United State Tax Court

Facts: In 2006, ILC purchased 2000 acres of undeveloped forest in Bledsoe, TN. ILC planned to divide the land into three “tracts” (Tracts, I, II, and III) and then further divide the tracts into lots for private homes. There was virtually no existing infrastructure on the property. ILC involved Vincent, a local real estate investor who had served on the planning commission in the past. Vincent assisted in building the necessary infrastructure by procuring permits, utilities contracts, and financing for the project. Vincent invested a substantial amount of his own funds and he personally guaranteed ILC’s loans for the project. In 2007, ILC recorded the planned division of Tract I. ILC also recorded easements along the creeks and waterfalls and restrictions on cutting and clearing timber. ILC did not, however, record any division for Tracts II and III. Tract I was divided into 415 lots. It sold 75 lots in 2007 and 46 lots in 2008. In 2009, however, only nine lots were sold. ILC quickly ran out of funds and had to stop marketing the remaining Tract I lots. ILC eventually transferred the property to Hawks Bluff Investment Group, which consisted of Vincent and one other ILC investor. Sales were still slow, and in 2011 Hawks Bluff was forced to refinance the property. Hawks Bluff still owed $3.3 million. In an effort to pay off the remaining debts, Vincent (who had personally guaranteed much of the debts) determined to donate a "conservation easement" on Tracts II and III, which had never been divided or developed. A donation that size would translate into a sizeable tax deduction and would help raise funds to pay off the debts.

Issue: Whether Glade Creek is entitled to a charitable contribution deduction for donating a conservation easement.

Held: The Court held that Glad Creek was not entitled to a charitable contribution deduction because the easement did not meet the technical requirements of the law.

UNLICENSED ACTIVITY

Whether Defendant violated the Tennessee Real Estate Broker License Act, when he negotiated acquisition and disposition contracts with Plaintiffs and Co-Defendants.

Soto, et al v. Presidential Properties, LLC, et al., No. E2020-00375-COA-R3-CV (2021) Court of Appeals of Tennessee, at Knoxville

Facts: Defendants first acquired a leasehold interest in a property known as “Michael Ridge” from its owners, but represented to Plaintiffs that Defendants were the owner, and then entered in to a lease agreement with the Plaintiffs. The Defendants also obtained a deed to Plaintiffs’ property known as “Bays View” and received an assignment of rents Plaintiffs were receiving from Bays View tenants. Last, Defendant entered into a purchase agreement with the owners of Michael Ridge, but at closing proposed an unsecured promissory note in exchange for a warranty deed and that the owners would remain liable for the underlying mortgage on Michael Ridge. The Plaintiffs sued for fraud, breach of contract, violations of the Tennessee Consumer Protection Act and violations of the Tennessee Real Estate Broker License Act. The Plaintiffs sought treble damages under Tennessee Code 62-13-105 for Defendants' alleged violations. The Defendants counterclaimed against Plaintiffs for breach of contract and fraud, claiming that they rightfully leased, purchased, sublet, and sold properties to individuals who could not obtain traditional financing. After a trial the Court awarded Plaintiffs $77,418 in damages, divested title to the Bays View property out of Defendants' names and vested in Plaintiffs names, awarded Plaintiffs $26,732.55 in attorney's fees and $2,893.92 in litigation expenses.

Issue: Whether the Defendants acted like a broker when they expected to receive some form of consideration from another for its efforts in soliciting or negotiating the purchase of the Michael Ridge property.

Held: The Court held that Defendants did violate the Tennessee Real Estate Broker License Act when it attempted to sell the Michael Ridge property to the Plaintiffs. It was not disputed that Defendants did not have a broker's license and that it never owned the Michael Ridge Property and thus were not exempt from the Act. The Court specifically found Defendants were not absolved from liability because of a disclaimer in contractual documents indicating it was not a real estate broker. Lastly, the Court rejected Defendants' argument that it was not expecting to receive a commission, noting that Defendants expected to receive valuable consideration in the form of a cash payment and monthly rent payments. The Court affirmed the trial court's conclusion that Defendants violated the Act by acting as a broker without a real estate broker's license, thereby barring Defendants from asserting any claim for damages or other compensation from Plaintiffs.

Chapter 5
PROPERTY MANAGEMENT

Property Management is a growing and an increasingly profitable business segment in the real estate industry. What started as a “mom & pop” small business of buying property and renting out single units, has become a $88.4 billion industry in our country. It is estimated to increase 7.78% annually and there are more than 300,000 property management companies registered in the United States.

Here are State of Michigan laws that deal with rental property

Michigan Compiled Laws (MCL) that guide property management

MCL 37.2101 - 37.2804 - Elliott-Larsen Civil Rights Act 453 of 1976. The Act prohibits discrimination on the basis of race, color, religion, national origin, age, sex, marital status or familial status. There are a few exceptions regarding age specific (50 or older), religious and private clubs.

MCL 566.132 - Statue of Frauds. All real estate contracts (including leases) must be in writing to be enforceable. They must be signed with an authorized signature of the party who will be charged. The only exception are leases less than 1 year in length.

MCL 554.1 - 554.46 - In 1846, the Michigan Legislature revised it’s statutes dealing with freehold and leasehold estates. There are 4 recognized leasehold estates:

Estate for Years - A lease that has a specific beginning and end date. After expiring, the tenant is expected to vacate the property or convert tenancy to an estate at will.
Estate From Year To Year - Also known as periodic tenancy. A lease that has a definite period of time and automatically renews itself for the same period of time.
Estate At Will - A lease that can be ended at any time. The tenant has a right to possession until the estate is terminated by either party.
Estate At Sufferance - This estate occurs when a tenant has lawful possession of a property but continues to possess it after expiration of a lease and without the owner’s consent.

Landlord And Tenant Relationships. Act 348 of 1972 - MCL 554.601a - 554.616

This Act regulates relationships between landlords and tenants. It includes the regulation of payments, repayments; the use and investment of security deposits; provides for commencement and termination inventories of rental units; provides for termination arrangements relative to rental units; and provides for legal remedies and penalties.

When can a tenant break their lease?

1. A rental agreement shall provide that a tenant who has occupied a rental unit for more than 13 months may terminate a lease by a 60-day written notice to the landlord if 1 of the following occurs: (a) The tenant becomes eligible during the lease term to take possession of a subsidized rental unit in senior citizen housing and provides the landlord with written proof of that eligibility. (b) The tenant becomes incapable during the lease term of living independently, as certified by a physician in a notarized statement.

2. A tenant who has a reasonable apprehension of present danger to themselves or their child from domestic violence, sexual assault, or stalking while that person is a tenant shall be released from his or her rental payment obligation after submittal of written notice of his or her intent to seek a release and written documentation. Submittal of written notice shall be made by certified mail. A rental agreement may contain a provision stating "A tenant who has a reasonable apprehension of present danger to him or her or his or her child from domestic violence, sexual assault, or stalking may have special statutory rights to seek a release of rental obligation under MCL 554.601b.". If the rental agreement does not contain such a provision, the landlord shall post written notice visible to a reasonable person in the landlord's property management office or deliver written notice to the tenant when the lease agreement is signed. The content of the written notice shall be identical to the provision in this section.

The tenant shall include in the submittal a written statement that the tenant or a child of the tenant has a reasonable apprehension of present danger from domestic violence, sexual assault, or stalking. For purposes of releasing a tenant from their obligation to pay rent, the tenant is released from an obligation to pay rent no later than the first day of the second month that rent is due after notice is given. A release of a rental obligation does not apply to prepaid amounts, including, but not limited to, prepayment of first and last months' rent. A release of rental obligation does not take effect before the tenant vacates the premises. Nothing in this section shall prevent a landlord from withholding security deposits. Tenants must provide 1 or more proofs verifying their concern. Here are 5 types of acceptable documents a tenant may provide:

(a) A valid personal protection order, foreign protection order or an order removing an abusive person from a home under MCL 712A.13a(4), issued by a court of competent jurisdiction that remains in effect on the date of submittal.

(b) A valid probation order, conditional release order, or parole order that is still in effect on the date of submittal if the probation order, conditional release order, or parole order indicates that the individual subject to the order is subject to conditions reasonably necessary to protect the tenant or child of the tenant, including a condition that the individual is to have no contact with the tenant or child of the tenant.

(c) A written police report that has resulted in the filing of charges by the prosecuting attorney that has jurisdiction over the matter if the charges were filed not more than 14 days before submittal of the written notice.

(d) A written police report that has resulted in the filing of charges by the prosecuting attorney that has jurisdiction over the matter if the charges were filed more than 14 days before submittal of the written notice. A tenant who uses a police report under this subdivision shall demonstrate a verifiable threat of present danger from domestic violence, sexual assault, or stalking.

(e) Submittal to the landlord of a report that is verified by a qualified third party. A qualified third party would include: A sexual assault or domestic violence counselor, a licensed health professional, a mental health professional or a member of the clergy, if the clergy member is affiliated with a tax-exempt religious institution.

The landlord shall reveal forwarding address information submitted by the tenant to other individuals only as reasonably necessary to accomplish the landlord's regular and ordinary business purpose. The landlord shall not intentionally reveal forwarding address information or documentation submitted by the tenant to the person that the tenant has identified as the source of the reasonable apprehension of domestic violence, sexual assault, or stalking.

If a rental agreement obligates multiple tenants to be liable for rental obligations and a tenant is released from his or her rental obligations, all other tenants who are parties to the rental agreement remain subject to the rental agreement.

Security Deposits

A landlord may require a security deposit for each rental unit. A security deposit shall not exceed 1 1/2 months' rent.

A request for a security deposit must be in writing, sent to the tenant no later than 14 days from the date a tenant assumes possession, include the landlord's name and address for receipt of communications, and request tenant’s forwarding mailing address to the landlord within 4 days after termination of occupancy. That notice shall include the following statement in 12 point boldface type which is at least 4 points larger than the body of the notice or lease agreement: "You must notify your landlord in writing within 4 days after you move of a forwarding address where you can be reached and where you will receive mail; otherwise your landlord shall be relieved of sending you an itemized list of damages and the penalties adherent to that failure."

The security deposit shall be deposited in a regulated financial institution. A landlord may use the monies so deposited for any purposes he desires if he deposits with the secretary of state a cash bond or surety bond written by a surety company licensed to do business in this state and acceptable to the attorney general to secure the entire deposits up to $50,000.00 and 25% of any amount exceeding $50,000.00

For the purposes of the Act and any litigation arising thereunder, the security deposit is considered the lawful property of the tenant until the landlord establishes a right to the deposit.

A security deposit may be used only for the following purposes:
1. Pay for actual damages to the rental unit or any ancillary facility that are the direct result of conduct not reasonably expected in the normal course of habitation of a dwelling.
2. Pay for all rent in arrearage under the rental agreement.
3. Pay rent due for premature termination of the rental agreement by the tenant.
4. Pay for utility bills not paid by the tenant.

Inventory Checklist

(1) The landlord shall make use of inventory checklists both at the commencement and termination of occupancy for each rental unit which detail the condition of the rental unit for which a security deposit is required.

At the commencement of the lease, the landlord shall furnish the tenant 2 blank copies of a commencement inventory checklist, which form shall be identical to the form used for the termination inventory checklist. The checklist shall include all items in the rental unit owned by the landlord including, but not limited to, carpeting, draperies, appliances, windows, furniture, walls, closets, shelves, paint, doors, plumbing fixtures and electrical fixtures. Unless the landlord and tenant agree to complete their inventory checklist within a shorter period, the tenant shall review the checklist, note the condition of the property and return 1 copy of the checklist to the landlord within 7 days after receiving possession of the premises.

The checklist shall contain the following notice in 12 point boldface type at the top of the first page: "You should complete this checklist, noting the condition of the rental property, and return it to the landlord within 7 days after obtaining possession of the rental unit. You are also entitled to request and receive a copy of the last termination inventory checklist which shows what claims were chargeable to the last prior tenants.".

At the termination of the occupancy, the landlord shall complete a termination inventory checklist listing all the damages he claims were caused by the tenant. In case of damage to the rental unit or other obligation against the security deposit, the landlord shall mail to the tenant, within 30 days after the termination of occupancy, an itemized list of damages claimed for which the security deposit may be used including the estimated cost of repair of each property damaged item and the amounts and bases on which he intends to assess the tenant. The list shall be accompanied by a check or money order for the difference between the damages claimed and the amount of the security deposit held by the landlord and shall not include any damages that were claimed on a previous termination inventory checklist prior to the tenant's occupancy of the rental unit. The notice of damages shall include the following statement in 12 point boldface type which shall be at least 4 points larger than the body of the notice: "You must respond to this notice by mail within 7 days after receipt of same, otherwise you will forfeit the amount claimed for damages.".

Failure by the landlord to comply with the notice of damages requirement within the 30 days after the termination of occupancy, constitutes agreement by the landlord that no damages are due and he shall remit to the tenant immediately the full security deposit.

The tenant shall notify the landlord in writing, within 4 days of their forwarding address. Failure to comply with this requirement relieves the landlord of the requirement of notice of damages but does not prejudice a tenant's subsequent claim for the security deposit.

If a landlord claims damages to a rental unit and gives notice of damages as required, the tenant upon receipt of the list of damages shall respond by ordinary mail to the address provided by the landlord indicating in detail his agreement or disagreement to the damage charges listed. For the purposes of this section the date of mailing shall be considered the date of the tenant's response.

Within 45 days after termination of the occupancy and not thereafter the landlord may commence an action in a court of competent jurisdiction for a money judgment for damages which he has claimed or in lieu thereof return the balance of the security deposit held by him to the tenant or any amount mutually agreed upon in writing by the parties. A landlord shall not be entitled to retain any portion of a security deposit for damages claimed unless he has first obtained a money judgment for the disputed amount or filed with the court satisfactory proof of an inability to obtain service on the tenant or unless:

(a) The tenant has failed to provide a forwarding address as required.
(b) The tenant has failed to respond to the notice of damages as required.
(c) The parties have agreed in writing to the disposition of the balance of the deposit claimed by the landlord.
(d) The amount claimed is entirely based upon accrued and unpaid rent equal to the actual rent for any full rental period or portion thereof.

Upon termination of a landlord's interest in a rental unit whether by sale, assignment, death, appointment of receiver or otherwise, the landlord or his agent is liable with respect to the security deposit, until the occurrence of either of the following:
(a) Transfer of the deposit to the landlord's successor in interest and written notification to the tenant by ordinary mail of the transfer and of the successor's name and address.
(b) Return of the security deposit to the tenant.

TRUTH IN RENTING ACT Act 454 of 1978

AN ACT to regulate rental agreements for residential premises; to prohibit the inclusion by lessors of certain clauses or provisions in residential rental agreements; to require the disclosure by lessors of certain information; to require the inclusion of certain provisions in residential rental agreements; to regulate the commercial sale of printed rental agreement forms; and to prescribe penalties.

Prohibited Statements

A rental agreement shall not include any provision that does 1 or more of the following:

(a) Waives or alters a remedy available to the parties when the premises are in a condition that violates the covenants of fitness and habitability.
(b) Provides that the parties waive a right established by the Landlord and Tenants Act.
(c) Excludes or discriminates against a person in violation of the Elliott-Larsen civil rights act, or the persons with disabilities civil rights act,
(d) Provides for a confession of judgment by a party [a written agreement that accepts the liability and amount of damages] outside the prescribed rules.
(e) Exculpates the lessor from liability for the lessor's failure to perform, or negligent performance of, a duty imposed by law.
(f) Waives or alters a party's right to demand a trial by jury or any other right of notice or procedure required by law in a judicial proceeding arising under the rental agreement.
(g) Provides that a party is liable for legal costs or attorney's fees incurred by another party, in connection with a dispute arising under the rental agreement, in excess of costs or fees specifically permitted by statute.
(h) Provides for the acquisition by the lessor of a security interest in any personal property of the tenant to assure payment of rent or other charges arising under the rental agreement, except as specifically allowed by law.
(i) Provides that rental payments may be accelerated if the rental agreement is breached by the tenant.
(j) Waives or alters a party's rights with respect to possession or eviction proceedings.
(k) Releases a party from a duty to mitigate damages.
(l) Provides that a lessor may alter a provision of the rental agreement after its commencement without the written consent of the tenant. Exceptions to this include an agreement which may provide for the following types of adjustments to be made upon written notice of not less than 30 days:

> (i) Changes required by federal, state, or local law or rule or regulation.
> (ii) Changes in rules relating to the property that are required to protect the physical health, safety, or peaceful enjoyment of tenants and guests.
> (iii) Changes in the amount of rental payments to cover additional costs in operating the rental premises incurred by the lessor because of increases in ad valorem property taxes, charges for the electricity, heating fuel, water, or sanitary sewer services consumed at the property, or increases in premiums paid for liability, fire, or worker compensation insurance.

(m) Violates the Michigan consumer protection act.
(n) Requires the tenant to give the lessor a power of attorney.

A rental agreement shall not include a clause or provision that, not less than 90 days before the execution of the rental agreement, has been prohibited by statute or declared unenforceable by a published decision of the supreme court of this state or the United States supreme court relating to the law of this state.

Mandatory Statements

A rental agreement shall state the name and address at which notice required under this act shall be given to the lessor.

A rental agreement shall state in a prominent place in type not smaller than the size of 12-point type, or in legible print with letters not smaller than 1/8 inch, a notice in substantially the following form: "NOTICE: Michigan law establishes rights and obligations for parties to rental agreements. This agreement is required to comply with the Truth in Renting Act. If you have a question about the interpretation or legality of a provision of this agreement, you may want to seek assistance from a lawyer or other qualified person."

Notices

A lessor may cure a violation by giving written notice to all tenants who are currently parties, with the lessor, to a rental agreement which contains a prohibited provision. The notice shall state that the provision is void and unenforceable or alter the provision to bring it into compliance with this act.

A lessor may cure a violation giving written notice to all tenants who are currently parties, with the lessor, to a rental agreement which does not include a required statement.

A notice may be given personally or sent by first class or certified mail to the tenants at the address of the leased property.

Court Actions and Attorney Fees

If a rental agreement contains a provision which violates the law and if the landlord fails to cure the violation by exercising the notice provisions within 20 days after the tenant gives written notice to the landlord of the provision believed to be in violation and the reason therefor, a tenant may bring an action for any of the following relief:

(a) To void the rental agreement and terminate the tenancy.
(b) To request the lessor complete the notice.
(c) To recover damages in the amount of $250.00 per action, or actual damages, whichever is greater.

A party who prevails in an action under this section is entitled to recover court costs plus statutory attorney fees.

Printed rental agreement forms.

A printed rental agreement form which violates this act shall not be offered for sale in this state by a commercial seller. A commercial seller who violates this shall be liable for damages suffered by a purchaser.

Best Practices

While the Legislature covers many aspects of property management, there are several other topics that all property managers should concern themselves with. These include:

Setting up a rental office
File compliance
Policies
Developing house rules
Maintenance issues
Showing available properties
Interviewing / screening applicants
Application processes
Reasonable accommodations & modifications
Disability awareness
Service animals & unauthorized pets
Resident retention
Damage to property
Unauthorized occupants
Resident harassment
Hoarding
Evictions

HOLLOWAY'S REAL ESTATE INSTITUTE, INC

2022 CONTINUING EDUCATION EVALUATION

CITY: ___________________________ DATE: ___________________ INSTRUCTOR: _____________________

Circle your rating	POOR	<--------------------->			BETTER
Instructor	1	2	3	4	5
Location	1	2	3	4	5
Materials	1	2	3	4	5
Presentation	1	2	3	4	5

Comments:

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