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2017 CASES OF INTEREST
IAR Legal Affairs

INDIANA CASES

COA Reaffirms Denial of Summary Judgment to Landowners in Failed Real Estate Deal

After granting a petition for rehearing to address – and ultimately reject – an argument over the contract in a real estate case, the Indiana Court of Appeals reaffirmed the denial of summary judgment to northern Indiana landowners who misrepresented property to a potential buyer.

In May, the appellate court affirmed the denial of summary judgment to Thomas and Theresa Iatarola, who had negotiated a deal to sell 16 acres of land to Cheng Song, yet failed to inform Song of the property's proper zoning. When Song learned the property in question was zoned for agricultural use, not industrial as he was told, he exercised his rights to terminate a purchase agreement with the Iatarolas in a 180-day due diligence period.

The Iatarolas petitioned the court for rehearing, and the court granted the petition to address just one argument: the designated evidence on summary judgment showed Song, not the Iatarolas, typed the due diligence addendum, so the addendum should be construed against him. Specifically, the couple cited to a portion of their designated materials that reads, "At Iatarola's insistence, Song drafted and the parties signed an Addendum and Strict Escrow Agreement which permitted Iatarola 180 days to vacate the property and for the deposit of $140,000 to cover any damages due to any breach of the agreement."

Further, the Iatarolas pointed to two pages of Song's deposition, in which he says he and Thomas Iatarola negotiated the addendum, but he physically typed it into a Word document. But in a Thursday opinion, Judge John Baker wrote such evidence does not change the outcome of the Iatarolas' appeal.

"During the summary judgment stage and in their appeal, the Iatarolas failed to establish that no genuine issue of material fact existed about whether Song independently drafted the addendum such that its interpretation should be construed against him," Baker wrote. "Rather, the evidence outlined above indicates that it was the Iatarolas who wanted the addendum drafted, and that both parties contributed to its preparation."

Thus, Baker said the Iatarolas argument was unpersuasive, and the court denied the petition for rehearing in *Cheng Song v. Thomas Iatarola and Theresa Iatarola*, 64A03-1609-PL-2094, in all other respects.

Landowner Must Have Notice of Easement in Order to Be Bound by It

***Beetz v. Bryant, et al., Ind. Ct. App.,* July 28, 2017**

The Gluff family owned property which had a small creek running through a portion of it with a small bridge that was used for road access. The property was divided into four parcels and sold over time. Three of the parcels (A, B, and C) are on the opposite side of the creek from parcel D and are landlocked. There was an easement granted in 1979 by the owner of parcel D to the owner of parcel C for ingress and egress purposes. A court case in 1982 resulted in an easement which applied to all three landlocked parcels. The easement was recorded in the chain of title for parcel C but the owner of parcel D failed to record it in their chain of title. Thirty years and a couple owners later, parcel D was purchased by the Beetzes. The Beetzes were made aware of the 1979 easement but not the subsequent easement of 1982 which was not recorded on their chain of title.

Over the years the Beetzes maintained the area of the easement by keeping it mowed, paid taxes on it and included it in their homeowner's insurance. However, after a fire truck struck and damaged the bridge disputes arose among the property owners about who had the authority to accept payment from the fire department for the damages, hire a contractor, and pay for the repairs. The court found that because the Beetzes were not aware of the 1982 easement they were not bound by it.

Landlord/Tenant Dispute

***Kulbieda v. Alford, Ind. Ct. App.,* May 25, 2017**

The parties entered into a one-year lease which was set to end on March 11, 2016. Tenants paid a $900 security deposit and agreed to pay $950 in monthly rent. In December 2015, tenants notified the landlord that they had purchased a home and would not be renewing the lease. However, they advised the landlord that they would be in the process of moving their items but that they understood the lease lasted until March 11 and they would continue to pay the rent and check on the property until that time. The tenants had moved their belongings in early January 2016.

On Jan. 14, 2016, landlord traveled from his home in Arizona to inspect the property. According to the landlord, he spent two weeks cleaning, demolishing a fire pit the tenants had built, and attempting to relet the property. Landlord signed a new lease with different tenants on Jan. 28, 2016. When tenants went to the property to check on it and get any mail, they found new tenants even though they had already paid rent for February. Tenants requested that the landlord return half of their rent for January, all of their rent for February, and their full security deposit. At some point the landlord refunded their rent for February rent but refused to return the security deposit claiming he had incurred unnecessary extra expenses by the tenants improperly moving out without notice.

The tenants filed a claim for the refund of their $900 security deposit, attorney fees, and court costs. The landlord filed a counterclaim alleging breach of contract and sought judgment of $3,191.59 for costs in securing, cleaning, and re-renting the property. The Small Claims Court entered judgment in favor of the tenants for $2,400 ($900 security deposit and $1,500 attorney fees). Landlord appealed the decision.

The Court of Appeals upheld the decision in favor of the tenants.

Real Estate Broker Receives 24-Year Sentence
***Garden v. State of Indiana, Ind. Ct. App.,* April 19, 2017**

Defendant Garden engaged in a series of fraudulent real estate transactions from approximately 2010 until 2014 for which he was charged with 27 felony counts in May of 2014. The counts included various forgery and theft charges. A jury trial on April 4, 2016 resulted with Garden being found guilty of 22 counts for which Garden was sentenced to an aggregate term of 24 years with 3 years executed in the Department of Correction, 3 years executed in community corrections, 18 years suspended, and 8 years served on probation.

Garden appealed and challenged the sufficiency of the evidence to sustain six of the convictions for Class C felony forgery. The Court of Appeals found the evidence to be sufficient and upheld the lower court's ruling.
Therefore, the Court of Appeals could not agree with the Seller's argument.

SEVENTH CIRCUIT COURT OF APPEALS:

Sexual Orientation Protected Category in Employment
***Kimberly Hively v. Ivy Tech Community College,* April 4, 2017**

Last April, in an unprecedented opinion, the Seventh Circuit Court of Appeals became the first federal appellate court in the country to rule that workplace discrimination based on sexual orientation violates the Civil Rights Act of 1964.

Kimberly Hively sued her employer, Ivy Tech, under the Civil Rights Act of 1964, arguing that Ivy Tech violated her civil rights when it failed to offer her full-time employment or a promotion because of her sexual orientation.

The federal court in South Bend did not allow Hively's lawsuit to proceed, holding that Title VII – which prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion – does not protect employees from sexual orientation discrimination. Hively appealed the trial court's decision to the Seventh Circuit Court of Appeals.

In July 2016, a three-judge panel affirmed that the Civil Rights Act does not protect employees from discrimination based upon sexual orientation. As a result, Hively then requested the full panel of the Seventh Circuit rehear the case. In November 2016, all 11 judges of the circuit heard the parties' argument.

After this rare hearing, the court found 8-3 that the Civil Rights Act does protect employees from discrimination on the basis of sexual orientation.

Court Discussion:
"Any discomfort, disapproval, or job decision based on the fact that the complainant – woman or man – dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex," Chief Judge Diane Wood wrote for the court. "That means that it falls within Title VII's prohibition against sex discrimination, if it affects employment in one of the specified ways."

Ivy Tech has stated they will not appeal this decision to the United States Supreme Court.

Accordingly, LGBT employees in Indiana, Illinois, and Wisconsin now have the right to sue their employers over discriminatory practices based on sexual orientation.

Employers need to re-evaluate their practices and ensure they are not discriminating against employees on the basis of sexual orientation as a result of this court decision.

How does this affect REALTORS®?
REALTORS® added sexual orientation as a protected class years ago in the NAR Code of Ethics. This higher standard has been in place for our members in advance of this federal court's decision adding sexual orientation as a violation of federal law. REALTORS® obligations are set forth below.

Fair Housing-NAR Code of Ethics
It is professional misconduct for a REALTOR® to discriminate as follows:

Article 10
REALTORS® shall not deny equal professional services to any person for reasons of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.

REALTORS® shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.

REALTORS®, in their real estate employment practices, shall not discriminate against any person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.

CASES FROM THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB):

CFPB Orders Prospect Mortgage to Pay $3.5 Million Fine for Illegal Kickback Scheme

Real Estate Brokers and Mortgage Servicer That Took Kickbacks from Prospect Also Ordered to Pay $495,000

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) today took action against Prospect Mortgage, LLC, a major mortgage lender, for paying illegal kickbacks for mortgage business referrals. The CFPB also took action against two real estate brokers and a mortgage servicer that took illegal kickbacks from Prospect. Under the terms of the action announced today, Prospect will pay a $3.5 million civil penalty for its illegal conduct, and the real estate brokers and servicer will pay a combined $495,000 in consumer relief, repayment of ill-gotten gains, and penalties.

“Today’s action sends a clear message that it is illegal to make or accept payments for mortgage referrals,” said CFPB Director Richard Cordray. “We will hold both sides of these improper arrangements accountable for breaking the law, which skews the real estate market to the disadvantage of consumers and honest businesses.”

Prospect Mortgage, LLC, headquartered in Sherman Oaks, Calif., is one of the largest independent retail mortgage lenders in the United States, with nearly 100 branches nationwide. RGC Services, Inc., (doing business as ReMax Gold Coast), based in Ventura, Calif., and Willamette Legacy, LLC, (doing business as Keller Williams Mid-Willamette), based in Corvallis, Ore., are two of more than 100 real estate brokers with which Prospect had improper arrangements. Planet Home Lending, LLC is a mortgage servicer headquartered in Meriden, Conn., that referred consumers to Prospect Mortgage and accepted fees in return.

The CFPB is responsible for enforcing the Real Estate Settlement Procedures Act, which was enacted in 1974 as a response to abuses in the real estate settlement process. A primary purpose of the law is to eliminate kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services. The law covers any service provided in connection with a real estate settlement, such as title insurance, appraisals, inspections, and loan origination.

Prospect Mortgage

Prospect Mortgage offers a range of mortgages to consumers, including conventional, FHA, and VA loans. From at least 2011 through 2016, Prospect Mortgage used a variety of schemes to pay kickbacks for referrals of mortgage business in violation of the Real Estate Settlement Procedures Act. For example, Prospect established marketing services agreements with companies, which were framed as payments for advertising or promotional services, but in this case actually served to disguise payments for referrals. Specifically, the CFPB found that Prospect Mortgage:

- **Paid for referrals through agreements:** Prospect maintained various agreements with over 100 real estate brokers, including ReMax Gold Coast and Keller Williams Mid-Willamette, which served primarily as vehicles to deliver payments for referrals of mortgage business. Prospect tracked the number of referrals made by each broker and adjusted the amounts paid accordingly. Prospect also had other, more informal, co-marketing arrangements that operated as vehicles to make payments for referrals.
- **Paid brokers to require consumers – even those who had already prequalified with another lender– to prequalify with Prospect:** One particular method Prospect used to obtain referrals under their lead agreements was to have brokers engage in a practice of “writing in” Prospect into their real estate listings. “Writing in” meant that brokers and their agents required anyone seeking to purchase a listed property to obtain prequalification with Prospect, even consumers who had prequalified for a mortgage with another lender.
- **Split fees with a mortgage servicer to obtain consumer referrals:** Prospect and Planet Home Lending had an agreement under which Planet worked to identify and persuade eligible consumers to refinance with Prospect for their Home Affordable Refinance Program (HARP) mortgages. Prospect compensated Planet for the referrals by splitting the proceeds of the sale of such loans evenly with Planet. Prospect also sent the resulting mortgage servicing rights back to Planet.

Under the consent order issued today, Prospect will pay $3.5 million to the CFPB’s Civil Penalty Fund for its illegal kickback schemes. The company is prohibited from future violations of the Real Estate Settlement Procedures Act, will not pay for referrals, and will not enter into any agreements with settlement service providers to endorse the use of their services.

ReMax Gold Coast and Keller Williams Mid-Willamette

ReMax Gold Coast and Keller Williams Mid-Willamette are real estate brokers that work with consumers seeking to buy or sell real estate. Brokers or agents often make recommendations to their clients for various services, such as mortgage lending, title insurance, or home inspectors. Among other things, the Real Estate Settlement Procedures Act prohibits brokers and agents from exploiting consumers' reliance on these recommendations by accepting payments or kickbacks in return for referrals to particular service providers.

The CFPB's investigation found that ReMax Gold Coast and Keller Williams Mid-Willamette accepted illegal payment for referrals. Both companies were among more than 100 brokers who had marketing services agreements, lead agreements, and desk-license agreements with Prospect, which were, in whole or in part, vehicles to obtain illegal payments for referrals.

Under the consent orders filed today, both companies are prohibited from violating the Real Estate Settlement Procedures Act, will not pay or accept payment for referrals, and will not enter into any agreements with settlement service providers to endorse the use of their services. ReMax Gold Coast will pay $50,000 in civil money penalties, and Keller Williams Mid-Willamette will pay $145,000 in disgorgement and $35,000 in penalties.

Planet Home Lending

In 2012, Planet Home Lending signed a contract with Prospect Mortgage that facilitated the payment of illegal referral fees. The company's practices violated the Real Estate Settlement Procedures Act and the Fair Credit Reporting Act. Specifically, the CFPB found that Planet Home Lending:

- **Accepted fees from Prospect for referring consumers seeking to refinance:** Under their arrangement, Planet Home Lending took half the proceeds earned by Prospect for the sale of each mortgage loan originated as a result of a referral from Planet. Planet also accepted the return of the mortgage servicing rights of that consumer's new mortgage loan.
- **Unlawfully used "trigger leads" to market to Prospect to consumers:** Planet ordered "trigger leads" from one of the major consumer reporting agencies to identify which of its consumers were seeking to refinance so it could market Prospect to them. This was a prohibited use of credit reports under the Fair Credit Reporting Act because Planet was not a lender and could not make a firm offer of credit to those consumers.

Under the consent order filed against Planet Home Lending, the company will directly pay harmed consumers a total of $265,000 in redress. The company is also prohibited from violating the Fair Credit Reporting Act and the

Real Estate Settlement Procedures Act, will not pay or accept payment for referrals, and will not enter into any agreements with settlement service providers to endorse the use of their services.

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The Consumer Financial Protection Bureau is a 21st century agency that helps consumer finance markets work by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers to take more control over their economic lives. For more information, visit consumerfinance.gov.

CASES FROM OTHER STATES:

(SUMMARIES PROVIDED BY NAR)

Broker Liable for Altering Commission

Campbell v. Luong , No. 04-16-00460-CV, 2017 WL 3044591 (Tex. App. July 19, 2017), review denied (Oct. 27, 2017). **[This is a citation to a Westlaw document. Westlaw is a subscription, online legal research service.]**

Texas court rules that listing broker breached his fiduciary duty and engaged in fraud when he increased the amount of his commission without receiving the seller's consent.

A property owner ("Owner") asked a real estate professional ("Listing Broker") to list two properties that he owned for sale after the Listing Broker had helped locate a tenant for another property that he owned. The Owner wanted to quickly sell the properties because he was in a dispute with another real estate licensee and she had threatened to place liens on the properties.

The Owner and the Listing Broker negotiated a commission arrangement for the properties which set forth a specified commission for the Listing Broker and another for all cooperating brokers. However, the listing agreement that the Listing Broker sent to the Owner only contained the Listing Broker's commission amount and did not include the commission amount to be paid to cooperative licensees.

The Owner returned the agreements to the Listing Broker signed, after which the Listing Broker noticed the mistake in the total commission amount. The Listing Broker changed the total commission amount to the originally agreed upon amount and signed the agreement. While the Listing Broker claimed he sent the amended agreement to the Owner, there was no record of the Owner receiving the amended agreement.

The Listing Broker located a buyer for one of the properties. The purchase agreement listed the originally agreed upon commission for the cooperating broker, but the Listing Broker had crossed off that amount and reduced that

amount by .5%, essentially increasing his commission by .5%. The Listing Broker testified that the Owner had agreed to this change because of the extra work involved in the sale, but the Owner testified he had not agreed to increase the Listing Broker's commission and simply thought he would pay less in total commissions. The cooperative licensee testified that the Listing Broker had contacted him and told him that the Owner would only pay him the reduced commission amount.

The Owner became aware of the altered commission amounts when he received the HUD-1 for the sale setting forth each real estate professional's commission. The Owner later filed suit against the Listing Broker for breach of contract, violations of the state's deceptive trade practices law, fraud, and breach of fiduciary duty. The trial court found that the Listing Broker had violated the state's consumer fraud law, breached his fiduciary duty, and committed fraud. The court awarded the Owner $1,175 in damages, $3,525 in treble damages, and attorney's fees. The Listing Broker appealed.

The Court of Appeals of Texas, San Antonio, affirmed the trial court. The court first examined the Listing Broker's argument that the Owner had ratified the agreement by proceeding with closing. Ratification occurs when a party later validates an action either through words or actions. The Owner testified that a provision in one of the closing agreements required all parties to comply with all applicable agreements and he believed that this provision would allow him to later collect the excess commission from the Listing Broker following the closing. Since the trial court had evaluated and accepted the Owner's testimony, the court rejected the Listing Broker's ratification argument and affirmed the damage awards to the Owner.

Next, the Listing Broker argued that the dispute over the increased commission amount was a contract dispute and therefore the state's consumer fraud statute was inapplicable. The consumer fraud statute allows for the award of attorney fees if an individual engages in a deceptive trade practice while in commerce with consumers in the state. The court found that the Listing Broker had agreed to accept the lower commission amount but then actively worked to receive an increased commission without fully disclosing the higher commission to the Owner. Because these actions were more than a breach of contract, the court affirmed the award of attorney's fees under the state's consumer fraud statute.

Ruling Upheld over Sewer Access

Hall v. Eagle Rock Dev., LLC, No. E201501487COAR3CV, 2017 WL 3233496 (Tenn. Ct. App. July 31, 2017)
[This is a citation to a Westlaw document. Westlaw is a subscription, online legal research service.]

Tennessee appellate court affirms lower court ruling that buyers could rescind purchase contract and receive an award of attorney's fees because the seller and the listing broker had failed to properly disclose to the buyers that the property had limited sewer access.

A couple ("Buyers") sought to purchase an investment property. The Buyers learned about an empty lot available in a development from the developer's ("Developer") exclusive listing firm ("Listing Broker"). While there was a dispute over whether the Buyers discussed sewer access with the Listing Broker while visiting the property, the MLS listing for the property stated that utilities were available near each property but it was the owner's responsibility to connect the property to the utilities. There were also sewer grates on the street in front of the property.

Local health officials issued a certificate on June 8, 2006 that stated the maximum building size that could be built on the property for sewage purposes was a two-bedroom house ("Certificate"). The Buyers signed a contract to purchase the property on June 16, 2006 but never received the Certificate. In the seller's disclosures, the Developer checked "no" to indicate there was no public sewer. The agency disclosure form identified the Listing Broker as the Buyers' representative, but the Listing Broker also signed the purchase agreement on behalf of the Developer. The transaction closed on June 30, 2006.

The Buyers immediately listed the property for sale and found a buyer in 2009. However, the transaction fell apart when the buyer discovered the Certificate and its limitations on building. The Buyers then filed a lawsuit against the Listing Broker and Developer claiming breach of contract and seeking attorney's fees pursuant to the state's consumer fraud act.

The trial court ruled the Buyers could rescind the purchase agreement because of a material misrepresentation about the property's sewer access. The court also awarded the Buyers their attorney's fees because the Listing Broker had failed to disclose to the Buyers that he was a member of the entity selling the property. The Listing Broker and the Developer appealed.

The Court of Appeals of Tennessee, Knoxville, affirmed the trial court. The court agreed with the trial court's conclusion that the evidence showed that the Buyers were led to believe that the property would have public sewer access. Both the Developer's website and the MLS listing stated that the sewer would be available, and there were sewer grates in front of the property. Additionally, the seller disclosure form stating that there would not be sewer access for the property was signed on March 15, 2006, or three months prior to sharing with the Buyers. The court found that sewer access was a material factor in the Buyers' decision to purchase the property and the access was misrepresented to them. Therefore, the court affirmed the rescission of the contract and ordered the return of the Buyers' purchase price.

Next, the Listing Broker argued that it should not be liable for attorney's fees because the Listing Broker was not a party to the purchase contract. Tennessee's consumer fraud act allows for the award of attorney fees if an individual engages in a deceptive trade practice while in commerce with consumers in the state.

The court rejected the Listing Broker's argument, finding that the trial court had properly found that the Listing Broker had engaged in a deceptive trade practice when it misrepresented the sewer access and therefore the Buyers could collect attorney's fees pursuant to the statute. The court also found that the Listing Broker's failure to disclose his affiliation with the developer also constituted a misrepresentation in violation of the consumer fraud act. Thus, the court affirmed the trial court's award of attorney's fees to the Buyers.

Broker Not Liable for Injuries

Jacobs v. Coldwell Banker Residential Brokerage Co., 14 Cal. App. 5th 438 (Cal. Ct. App. 2017).

California appellate court rules listing broker did not have a duty to warn potential purchaser that standing over an empty pool on a diving board posed a risk of injury because the danger was open and obvious.

A real estate brokerage ("Brokerage") marketed for sale a bank-owned, vacant property. In the multiple listing service entry, the salesperson handling the listing had placed the following note: "[P]lease use CAUTION around the empty pool."

A contractor ("Contractor") and his wife visited the property with their representative, as they were considering purchasing an investment property. The Contractor testified that he regularly worked around pools and knew that falling into an empty pool "would hurt." After touring the house, the couple went outside and the representative opened the latched gate to the pool area. The Contractor examined the pool, and then walked out onto the diving board over the pool to see how accessible the pool was from a nearby road. Within 30 seconds of walking out onto the diving board, the diving board collapsed and the Contractor fell into the empty pool, suffering serious injuries.

The Contractor brought a lawsuit against the Brokerage, alleging that the Brokerage was negligent because it failed to warn him that the diving board posed a danger to visitors. The Brokerage filed a motion for judgment in its favor, arguing that the Brokerage did not owe a duty to the Contractor and had no knowledge that the diving board posed a danger. The trial court found there was no evidence that the Brokerage had knowledge that the diving board was defective and entered judgment in favor of the Brokerage. The Contractor appealed.

The California Court of Appeal, Second District, affirmed the judgment of the trial court. On appeal, the Contractor argued that the trial court had improperly barred his argument that the Brokerage had a duty to warn him about the danger of the empty pool. The court had barred these arguments because the Contractor had failed to make this allegation in his initial pleadings, as he had only claimed the Brokerage had a duty to warn him about the diving board.

The court ruled that the trial court had properly barred the arguments about the empty pool but, even if the arguments had been allowed, it would not have changed the result. First, the court stated that a party cannot make an unpled, undisclosed theory in the middle of a case and so the Contractor was limited to his argument in his complaint that the Brokerage had a duty to warn the Contractor about the diving board.

However, even if the Contractor could make the argument about the empty pool, the court stated that the Brokerage would still be entitled to judgment because there was no duty to warn the Contractor about an open and obvious danger like an empty pool. The danger of the empty pool would be obvious to any visitor of the property and so the Brokerage would have no reason to expect visitors to not realize the danger of the empty pool. Additionally, the Brokerage did not invite the Contractor to approach the empty pool; in fact, the Brokerage had placed a warning in the MLS about the empty pool. Thus, the court affirmed judgment in favor of the Brokerage.

Listing Photos Infringe Copyright

Adams v. Agrusa, 693 F. App'x 563 (9th Cir. 2017)

California federal court rules that salesperson infringed another firm's copyright by using photographs of property in the MLS that the other firm had copyrighted when it had previously listed the property for sale.

A real estate brokerage firm ("Copyright Holder") received a U.S. Copyright for photos of a property entitled "Staged Photos." The Copyright Holder entered into an agreement with the owner of the property ("Owner") to list the property for sale. The Copyright Holder entered the property into the MLS with 20 of the copyrighted photos ("Photos") with a copyright registration symbol affixed to each of the Photos. The Owner later canceled the listing agreement and entered into a listing agreement with a new brokerage ("Brokerage").

The Brokerage assigned the listing to a salesperson ("Salesperson"). A member of the Brokerage downloaded the Photos from the MLS and removed the copyright symbol. The Brokerage then gave the photos to the Salesperson and told her to use the Photos in the MLS listing for the property. The Salesperson entered the property into the MLS with the Photos. In addition, the Owner posted five of the Photos on its website.

The Copyright Holder filed a lawsuit against the Salesperson, Brokerage and the Owner, alleging copyright infringement for its unauthorized use of the Photos. In order to establish a claim for copyright infringement, a party must show ownership of a valid copyright and that the other party violated one of the copyright holder's exclusive rights. A court has wide discretion in awarding damages for infringement, with statutory damages ranging from $750 to $30,000 per work. However, if the infringement was innocent, the court may award damages as low as $200.

There was no dispute that the copyrights were valid and the Copyright Holder's copyrights had been infringed. The trial court ruled that the Salesperson was an innocent infringer because the copyright symbol had been removed from the Photos and there was no other evidence that the Salesperson knew about the copyright. The court awarded the Copyright Holder $250, finding that $250 was the approximate cost for having a property photographed and the Salesperson's use of the Photos constituted a single infringement by the Salesperson because the photos were all part of the same marketing campaign. The Owner never entered an appearance and so the court entered a default judgment of $2,000 against the Owner. The Copyright Holder appealed.

The United States Court of Appeal for the Ninth Circuit affirmed the trial court. The court affirmed the trial court's ruling that the Salesperson was an innocent infringer, as the Copyright Holder had failed to produce any evidence that the Salesperson knew her use of the Photos constituted copyright infringement. The court also affirmed the trial court's ruling that the Salesperson's acts constituted a single act of infringement, since the Photos were part of the same marketing compilation for the property. Therefore, the trial court's rulings were affirmed.

No Right to Sign-Language Interpreter
Tauscher v. Phoenix Bd. of Realtors, Inc., No. CV-15-00125-PHX-SPL, 2017 WL 4357489 (D. Ariz. Sept. 30, 2017). [This is a citation to a Westlaw document. Westlaw is a subscription, online legal research service.]

Arizona federal court rules that a REALTOR® association did not discriminate against deaf individual when it refused to honor his demand for a sign language interpreter at an association education session.

A real estate licensee who was also deaf ("Licensee") sought to take an education class at a local REALTOR® association ("Association"). The Licensee contacted the Association and requested the Association to provide him an accommodation by having a sign language interpreter attend the class to translate for him. The Association offered alternative accommodations to the Licensee, such as having captioning or a FM loop system, because it was expensive to provide an interpreter.

A few months later, the Licensee signed up for a course at the Association and checked the box that he had a disability and required an accommodation, writing "sign language interpreter." The Association responded to him through its attorney, who told the Licensee that the Association denied the accommodation request for an interpreter but was willing to discuss other alternatives. The Licensee did not attend the class and received a refund of the registration costs.

The Licensee brought a lawsuit against the Association alleging violations of Title III of the American with Disabilities Act ("ADA") and the state's disabilities act. To allege discrimination under the ADA, an individual must allege that he

is disabled under the ADA; that he is a qualified individual with a disability; and that he was discriminated against. Because the Licensee met the first two prongs, the only question was whether the Association's refusal to provide him with an interpreter constituted discrimination.

Enacted in 1990, Title III of the ADA specifically aims to end discrimination by private entities that operate a "place of public accommodation," and requires that any existing architectural and communication barriers be removed (where such removal is readily achievable and would not cause undue hardship to the entity) so that disabled persons are provided equal participation and benefits. While the type of accommodation offered is specific to each request, the implementing regulations for the ADA state that "the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication."

The court ruled that the Licensee had failed to demonstrate that the Association had discriminated against him by refusing to provide an interpreter. The parties disputed whether the Association qualified as a place of public accommodation, and the court did not decide this issue. The court found that the Association met the ADA requirements when it engaged in discussions with the Licensee on providing an accommodation. The ADA does not require the public accommodation to provide the individual with his/her requested auxiliary aid; the only requirement is that the auxiliary aid selected facilitates effective communication. Because the Licensee refused to discuss any other alternatives with the Association, he prevented the Association from providing an accommodation to him. Thus, the Licensee could not allege discrimination under the ADA and so the court entered judgment in favor of the Association.

Verdict Against Brokerage Affirmed

Hensley v. Duvall, No. 2911 EDA 2015, 2017 WL 1372759 (Pa. Super. Ct. April 13, 2017). **[This is a citation to a Westlaw document. Westlaw is a subscription, online legal research service.]**

A Pennsylvania appellate court has affirmed a jury verdict ruling that buyers suffered damages from an improperly prepared contingency clause by their real estate professional.

The owners of a dog day care business ("Buyers") decided to offer overnight kennel services and so began searching for a property to accommodate the kennels. The Buyers entered into a buyer representation agreement with a real estate brokerage ("Buyer's Representative") and explained to the Buyer's Representative that they were searching for a property that could accommodate their kennels.

The Buyer's Representative located a property that had a barn on it, and the Buyers found that the barn would accommodate their kennels. The Buyers negotiated a purchase price with the sellers and then measured the property to ascertain whether the kennels would meet the town's zoning ordinances. After discovering the barn did not meet

the 200-foot setback requirement for the kennels, the Buyers expressed concern. One of the sellers was a township supervisor and he told the Buyers that he would help them obtain a zoning variance for the barn. Additionally, he told them the barn did meet the zoning requirements because the steps that extended into the barn brought the barn within the setback requirement.

Before entering into the purchase agreement, the Buyers asked the Buyer's Representative to draft a contingency clause allowing the Buyers to void the agreement if the barn could not be used as a kennel. The Buyer's Representative drafted a contingency that allowed the Buyers to cancel the agreement if the property could not be used as a kennel without specifying the barn, and the language was approved by the firm's managing broker. The Buyers expressed concern that the contingency was not specific enough, but the Buyer's Representative assured them that the language was sufficient. The Buyers received a zoning variance from the town and completed their purchase of the property.

Following their purchase, the town informed the Buyers that the town would not issue the permit allowing the Buyers to use the barn as a kennel. The Buyers filed a lawsuit against the Buyer's Representative, claiming that the Buyer's Representative was negligent in drafting the contract contingency because it did not allow them to cancel the agreement when they couldn't use the barn as a kennel. A jury found that the Buyer's Representative was negligent in drafting the contingency clause and awarded the Buyer damages of approximately $200,000. The Buyer's Representative appealed.

The Superior Court of Pennsylvania affirmed the verdict against the Buyer's Representative and remanded the matter back to the trial court for an award of attorney fees and interest to the Buyers. The court first considered the Buyers' argument that they should have been awarded attorney fees because they were the prevailing party in the litigation and the buyer's representation agreement contained a clause that awarded the prevailing party in any litigation "reasonable attorney fees."

The Buyers argued that they were the prevailing party at trial and so should receive attorney fees. The jury found that the Buyer's Representative was negligent in drafting the contingency clause because it did not allow them to void the contract when the barn could not be used as a kennel. Since the jury had found that the Buyer's Representative was negligent in drafting the contingency clause, the court agreed that the Buyers should receive attorney fees and so sent the case back to the trial court for a determination on the amount of attorney fees to be awarded to the Buyers.

Next, the court considered the Buyer's Representative's argument that the court should have granted its motion for judgment after the verdict because the evidence did not support the jury's determination. The Buyer's Representative argued that it did not owe a duty to the Buyers to draft a contingency clause. The Buyer's

Representative knew that the Buyers would not buy the property if they could not use the barn as a kennel. When the Buyer's Representative authored the contingency clause, they assumed the duty to properly craft the clause to protect the Buyers. Because they negligently drafted the clause, the court rejected the Buyer's Representative's argument and affirmed the jury award.

Editor's Note: The Pennsylvania Association of REALTORS® has filed an amicus curiae brief in support of the Buyer's Representative's appeal. In its brief, PAR argues that the court had improperly held the Buyer's Representative responsible for the town's refusal to issue a permit allowing the Buyers to use the barn as a kennel.

Large Verdict Entered Against Brokerage

Douglas Elliman of Westchester, LLC, v. Thiess, No. 58059/2015, 2017 WL 3159223 (N.Y. Sup. Ct. Westchester Cty. June 20, 2017). **[Note: This opinion was not published in an official reporter and therefore should not be cited as authority. Please consult counsel before relying on this opinion.]**

New York jury awards $4.75 million in damages and punitive damages in a case where a firm hired a manager of another brokerage and allegedly encouraged the manager to secretly recruit salespeople as well as steal listings and other information from the brokerage before she left to work at the new firm.

A branch manager ("Manager") who worked for a real estate brokerage ("Employer") was allegedly recruited by a competing firm ("Competitor"). The Competitor had reportedly tried to recruit salespeople from the Employer at an earlier time. Allegedly, the Competitor asked the Manager to remain with the Employer for a period before moving to the Competitor so that she could recruit salespeople and also bring listings to the Competitor.

Eventually, the Manager and eleven of the Employer's salespeople moved to the Competitor's firm, with the Manager becoming a vice president at the new firm. The Manager allegedly copied other confidential information from the Employer prior to leaving the firm. The Manager also allegedly received a recruitment bonus from the Competitor.

The Employer filed a lawsuit against the Manager and the Competitor alleging that the Manager had a fiduciary duty to the Employer to recruit/maintain the firm's relationship with its salespeople and she breached that duty when she recruited the salespeople to work for the Competitor. In addition, she allegedly breached her duty to her employer by stealing confidential information. The Manager also breached her duty by allegedly encouraging the salespeople to delay the execution of listing agreements so that the listings could be transferred to the Competitor.

The Manager claimed she had not received a raise in four years nor had she received a promotion, causing her to leave the firm. The Competitor denied the allegations as well. A jury considered the allegations.

The Supreme Court of New York, Ninth Judicial District, Westchester County, entered an award by the jury of $4.75 million in favor of the Employer. After a four-week trial, the jury determined the Employer had suffered damages of $2,250,000 and jury also awarded the Employer $2,500,000 in punitive damages. The Competitor has stated that it intends to appeal the jury verdict.

Court Rules FHA Protects LGBT Couple

Smith v. Avanti, No. CV16CV00091RMMJW, 2017 WL 1284723 (D. Colo. April 5, 2017). **[This is a citation to a Westlaw document. Westlaw is a subscription, online legal research service.]**

A Colorado federal court has ruled that the federal Fair Housing Act ("FHA") prohibits discrimination against LGBT individuals based on gender-nonconformity, as that constitutes sex discrimination under the FHA.

A couple with children sought to rent a townhouse. One member of the couple is transgender. The owner of the property asked the couple for a picture of the family, and the couple sent a picture and then met with the owner at the property. Following the visit to the property, the owner emailed the couple and stated that he did not want to rent to the couple for two reasons: first, the couple had children; and second, the owner had "kept a low profile" in the community and wanted to keep it that way. The owner later clarified that the couple's "unique relationship" might bring unwanted attention to the owner.

The couple filed a lawsuit alleging violations of the FHA and state fair housing laws. The FHA makes it illegal to discriminate in the sale or rental of housing based on a person's "sex, familial status, or national origin." The FHA also makes it illegal to refuse to negotiate the sale or rental of housing because a person falls within one of the protected categories. The couple alleged that the owner's refusal to rent them their property constituted both sex and familial status discrimination under the FHA, and made similar allegations under the state's fair housing law. The couple filed a motion for judgment and the owner did not oppose the couple's motion.

The United States District Court for the District of Colorado ruled that the owner's conduct violated the FHA as well as the state's fair housing laws. The court first examined the sex discrimination claims. The FHA does not prohibit discrimination based on LGBT status; the couple claimed that they suffered sex discrimination because one member of the couple was being stereotyped because of her gender nonconformity.

The court agreed that discriminating against a person for not conforming to gender stereotype norms, such as the gender of the person they should marry or be attracted to, constituted discrimination under the FHA. The court also agreed that discrimination against a transgender person because they aren't conforming to their birth gender (here, a male not acting like a male) constituted sex discrimination. The court declined to extend the FHA protections to gender identity claims or sexual orientation claims, as those allegations were not plead by the couple.

The court also agreed that the owner had violated the FHA's prohibition on familial status discrimination. The FHA defines "familial status" as "one or more individuals (who have not attained the age of 18 years) being domiciled with…a parent or another person having legal custody of such individual or individuals." Here, the owner had stated that she was not renting to the couple because they had children and so this constituted familial status discrimination in violation of the FHA.

The court also found that the owner had violated the state fair housing law, including the state law prohibitions on discrimination based on sexual orientation. Therefore, the court entered judgment in favor of the couple.

Commission Recovered from Failed Deal

Wing v. Still Standing Stable LLC, 387 P.3d 605, cert. denied sub nom. Wing v. Still Standing, No. 20161053, 2017 WL 825549 (Utah Feb. 22, 2017)

Elite Legacy Corp. v. Schvaneveldt, 2016 UT App 228, cert. denied sub nom. Elite Legacy Corp v. Schvaneveldt, No. 20161057, 2017 WL 825552 (Utah Feb. 22, 2017). **[This is a citation to a Westlaw document. Westlaw is a subscription, online legal research service.]**

Still Standing LLC ("Seller") purchased 170 acres of property in 1998. The property did not have access from any public roads. The Sellers attempted to gain access by suing adjoining landowners but those efforts failed to secure road access to the property.
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n 2006, the property was advertised as a for-sale-by-owner property. A real estate broker ("Broker") contacted the Seller on behalf of a client, and the Broker visited the property with his client ("Buyer"). Following the visit, the parties exchanged offers to purchase the property. The parties eventually reached an agreement, and the final purchase agreement ("Contract") contained a brokerage fee clause and required the Seller to convey marketable title by general warranty deed.

Initially, the transaction proceeded as planned, with the Buyer making the required deposits and the Seller making the required disclosures, including disclosing that the property did not have direct access to a public road. As closing approached, the Seller informed the Buyer that the Seller would convey the property by special warranty deed. The Buyer's attorney said that might be ok if the Buyer could obtain title insurance, but the Buyer could not obtain title insurance and so did not appear at the closing.

Following the collapse of the transaction, the Broker brought an interpleader action to claim the earnest money held in escrow as a commission payment. The Broker also filed a complaint against the Seller for payment of its commission based on the Contract, arguing that the Seller had breached the agreement by failing to deliver a

general warranty deed to the Buyer as specified in the Contract. The Seller filed a counterclaim against the Broker with various allegations, including misrepresentation and breach of fiduciary duty.

The trial court ruled that the Broker had earned the commission because the Seller had breached the Contract, and a jury awarded the Broker $30,000. Following the award, the Broker moved for a new trial because the commission award was not the full amount. Rather than order a new trial, the trial court increased the commission award by $100,000. The court also awarded the Broker attorneys' fees and interest. The Seller appealed these rulings.

In a series of rulings, the Court of Appeals of Utah affirmed the trial court's rulings. First, the court examined whether the trial court properly ruled that the Broker had earned the commission. The trial court had determined that the Contract required the Seller to pay the Broker a commission and the only reason that the transaction failed was because the Seller failed to provide insurable access to the property.

In Utah, a real estate professional is entitled to a commission when he/she procures a buyer who is ready, willing, able, and who is accepted by the seller. The parties can also establish by contract when a commission is payable, and the Contract's "Brokerage Fee" language stated that if the closing was prevented by the Seller's default, then the Broker could collect the commission. The court agreed that the Seller had defaulted by failing to provide a general warranty deed or insurable access to the property and so the court affirmed the trial court rulings.

Next, the court considered the breach of fiduciary duty and misrepresentation allegations made by the Seller. The trial court had ruled that the Seller's own breach of the Contract had caused its damages and so the Seller could not prove causation for either cause of action and so the court had dismissed these allegations. The Seller failed to address the causation issue on appeal, and so the court affirmed the trial court rulings in favor of the Broker.

Misrepresentation Lawsuit Dismissed

Beckman v. Wells Fargo Bank, N.A., No. A15-1819, 2016 WL 5640664 (Minn. Ct. App. Oct. 3, 2016). **[This is a citation to a Westlaw document. Westlaw is a subscription, online legal research service.]**

Minnesota appellate court rules that real estate professional did not make a misrepresentation when he based his statements about the property on information obtained from the county's website.

Wells Fargo ("Bank") foreclosed on a property in 2010. Following the foreclosure, the Bank had the property appraised, and the appraiser estimated that the property needed approximately $22,000 in repairs. A real estate broker ("Broker") hired by the Bank to list the property for sale told the Bank that the property had "potential but boy what a mess." The Bank spent $75,000 on property repairs.

The Broker listed the property for sale in the MLS "as-is" with a "lake view." The Broker later reduced the price and added "1,500 feet of lakeshore located across the road" to the property description.

An Ohio couple ("Buyers") were interested in Minnesota properties and saw the Broker's listing. The Buyers retained a local licensee to represent them ("Buyer's Representative") and they visited the property twice. The Buyers did question the Buyer's Representative about the 1,500 feet of lakeshore property. The Buyer's Representative contacted the Broker and the Broker forwarded her a link to the county's website, which showed the property as having 900 feet of lakeshore access and 600 feet on a flowage.

The Buyers made an offer for the property in its "as-is" state. The Buyers did not have the property surveyed or inspected, and they did not conduct a final walk-through. Following their purchase, the Buyers discovered a number of issues including mold, urine-stained walls, and dead animals in the walls. These issues were not discovered until they began pulling up the carpeting and moving appliances. A neighbor also told the Buyers that they only owned half of the 900 feet of lakeshore.

The Buyers brought a lawsuit against the Bank and the Broker alleging fraudulent misrepresentation over the failure to accurately disclose the condition of the property and the size of the property's waterfront access. The court entered judgment in favor of the Broker and Bank, and the Buyers appealed.

The Court of Appeals of Minnesota affirmed the trial court's ruling. The Buyers argued that there were fact issues that precluded judgment on the fraudulent misrepresentation claims. In order to plead a fraudulent misrepresentation claim, a party must allege a false statement of a material fact that was made with knowledge of the statement's falsity, an intention to cause the other party to rely upon the statement, the other party relied upon the statement, and this reliance caused the other party harm.

The court determined that there was no false statement made about the property's lakeshore access size. The Buyers argued that the property's legal description showed that the access was less than 900 feet and the Broker had served as the listing broker in a previous transaction. However, the Buyers failed to show that the Broker had knowledge that the access was less than 900 feet. The Broker had obtained the information about the lakeshore access size from the county's website, and the property taxes for the property were based on 900 feet of lakeshore access and the appraisal also stated that the property had 900 feet of lakeshore access. The court affirmed the trial court's judgment.

Next, the court considered the allegations concerning the condition of the property. The purchase contract stated that the property was being sold "as-is." The Buyers claimed that the Broker misrepresented the property's condition, but

did not present any evidence that the Broker knew of the defects nor that the Broker even made any representations to the Buyers about the property's condition. Therefore, the court affirmed the trial court's rulings.

Commercial Broker Keeps Commission

Berardine v. Weiner, No. CV 16-864, 2016 WL 3997244 (E.D. Pa. July 26, 2016). **[This is a citation to a Westlaw document. Westlaw is a subscription, online legal research service.]**

Pennsylvania federal court rules that the broker's alleged agreement to reduce his commission was never incorporated into the purchase agreement and so the buyer could not claim a portion of the broker's commission.

In 2015, a mother and her son ("Buyers") began looking to purchase a commercial property in Center City, Philadelphia. The Buyers retained a commercial broker ("Broker") to assist in their search, and he located an office building that interested the Buyers which was listed for $5.5 million. After the Buyers made an offer below the list price, the seller countered with a $6 million offer and said the offer would expire in 24 hours.

Angered by the seller's price increase, the Buyers accused the Broker of not representing them properly during negotiations and asked the Broker to reduce his commission by half. The Broker negotiated a slightly higher commission, and the Buyers and the Broker agreed that the Broker would give nearly half of his commission to the Buyers at closing. The commission agreement was never reduced to a writing. The Buyers then accepted the Sellers offer to purchase the property at $6 million.

As the closing neared, the transaction settlement sheet was circulated amongst the parties. The Buyers noticed that the Broker's commission sharing arrangement was not noted on the settlement sheet and so told the Broker that the sheet needed to be revised. The Broker ignored this request as well as subsequent requests. Three days before closing, the Broker told the Buyer that he was not going to honor the commission reduction agreement. The closing occurred as scheduled and the Broker received the full commission amount.

Following the closing, the Buyers filed a lawsuit against the Broker seeking the portion of the commission that the Broker had agreed to rebate to them. The Broker moved to dismiss the lawsuit.

The United States District Court for the Eastern District of Pennsylvania dismissed the Buyer's lawsuit. Among other things, the Broker argued that the parol evidence rule barred the Buyer's claims. The parol evidence rule bars pre-contractual agreements when these agreements are not incorporated into the final agreement, unless one of the exceptions to the rule is successfully demonstrated.

The court agreed that the parol evidence rule barred the Buyers' lawsuit. The Broker argued that the sale agreement barred the oral agreement to split the commission with the Buyers, as the sale agreement directed payment of the entire commission to the Broker. The Buyers argued that the commission rebate was a separate agreement and so not barred by the parol evidence rule. The court determined that since the Broker's agreement to reduce the commission was integral to their decision to enter the transaction, the Buyers should have insisted the commission rebate be included in the purchase agreement. Since the agreement was not included, the parol evidence rule barred the Buyers from raising this argument and so the court dismissed the Buyers' lawsuit.

Photo Infringement Lawsuit Dismissed

Bell v. Taylor, 827 F.3d 699 (7th Cir. 2016).

Federal appellate court dismisses photographer's lawsuit against a real estate professional over her use of the photographer's copyrighted photograph on her website without permission because the photographer did not demonstrate actual damages.

A photographer ("Photographer") took a picture of the Indianapolis skyline during the daytime in 2000 ("Daytime Photo"). The photo was posted on his website in 2000. In 2011, he registered a copyright for the Daytime Photo with the U.S. Copyright Office.

Shortly after registering the copyright, the Photographer filed a lawsuit against three businesses who allegedly had posted the Daytime Photo on their websites, including a real estate professional ("REP"). The REP immediately removed the photograph in 2011 after she was contacted by the Photographer. One of the other businesses had shut down his website after the website failed create business for his company and the other website did not use the Daytime Photo (instead, that website was using another photo from the Photographer that showed the skyline at night).

The trial court entered judgment in favor of the website owners. Even though the court agreed that the Photographer owned the rights to the Daytime Photo and the website owners had used the photo without permission, the court ruled that the Photographer had failed to establish damages. The Photographer appealed the trial court's ruling.

The United States Court of Appeals for the Seventh Circuit affirmed the trial court. To establish a claim for copyright infringement, a party must show ownership of a copyright and an unauthorized copying of the constitutional elements of the work which causes the copyright holder damage. Damages for copyright infringement arise from any harm caused by the infringing activity as well as proving lost profits. Lost profits are calculated by determining the fair market value of the copyright and then showing the profits lost by the unauthorized use of the copyrighted work.

The court found that the Photographer had failed to establish the fair market value of the Daytime Photo and thus could not show damages. The Photographer claimed that the fair market value of the Daytime Photo was $200, as that was the charge that he listed on his website for licensing the photo. However, there was no evidence that anyone had ever paid $200 to license the photo and the only other evidence offered by the Photographer was his own belief that $200 was the fair market value.

Since the Photographer's only evidence for the fair market value was his own subjective opinion about the value of the Daytime Photo, the court ruled that the Photographer had failed to establish the fair market value of the Daytime Photo and so could not allege any damages arising from the unauthorized use of the Daytime Photo. Because damages are a necessary element for a copyright infringement claim, the court affirmed the lower court entry of judgment in favor of the REP and the other two website owners.