

# focus on: Legal Affairs

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## Broker Liability for Failure to Include Contingency

**The Nevada Supreme Court upheld a jury verdict against a real estate professional over allegations that she failed to make a subsequent purchase contingent on the sale of a residence. Davis v. Beling, 278 P.3<sup>rd</sup> 501 (Nev.2012). The facts in that case were as follows:**

In 2005, the Doughertys decided to sell their home located on Augusta Drive in Henderson (the Augusta Property) and build a custom home in the MacDonald Highlands development in Henderson. The Doughertys entered into a listing agreement with Davis and Platinum, whereby Davis would serve as the agent for the listing and sale of the Augusta Property and Platinum would act as the broker. The Doughertys explained to Davis that they wished to use the proceeds from the sale of the Augusta Property in order to finance the acquisition of the lot for their custom home.

Thereafter, the Doughertys agreed to sell the Augusta Property to the Byrds and were set to close in a few months. The Doughertys then located a lot in the MacDonald Highlands development to build their custom home. Davis assured the Doughertys that the Byrds would go through with the purchase of the Augusta Property and, relying on these assurances, the Doughertys closed on the MacDonald Highlands Property, despite the fact that the Byrds had not yet closed on the Augusta Property.

The Doughertys needed a place to live during the interim period between the anticipated sale of the Augusta Property and the estimated two year construction of the MacDonald Highlands Property. Davis convinced the Doughertys that purchasing a property and then selling it at a profit after they moved into the MacDonald Highlands Property would be preferable to renting a residence. Thus, Davis showed the Doughertys a residence located on Ping Drive (the Ping Property). The Doughertys then entered into an agreement to purchase the Ping Property for \$825,000. The Doughertys explained to Davis, however, that it was imperative that the closing of the Ping Property be contingent on the closing of the Augusta Property because they needed to use the funds from the sale of the Augusta Property in order to close on the Ping Property.

Contrary to these instructions, Davis did not make the Doughertys' offer on the Ping Property contingent on the closing of the Augusta property. The planned series of transactions started to unravel when problems began to threaten the closing of the Augusta Property due to the Byrds' difficulty in selling their home. Davis, however, repeatedly represented to the Doughertys that the sale of the Augusta Property would close.

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Despite these initial representations, Davis had to explain to the Doughertys that the Byrds were unable to sell their home, and, as a result, they could not purchase the Augusta Property. The following day, however, the Doughertys spoke with the Byrds' lender, who informed the Doughertys that the Byrds still wished to purchase the Augusta Property, but that they needed three days to obtain the necessary funds to do so.

Immediately thereafter, Davis called the Doughertys and told them that they needed to close on the Ping Property or they would lose their earnest money deposit. By this time, the Doughertys no longer trusted Davis, and they told her that they did not wish to close on the Ping Property because the Augusta Property had not closed.

Then, purporting to be acting on behalf of the Byrds, Davis offered to advance the Doughertys the \$150,000 needed to close on the Ping Property. Davis told the Doughertys that the Byrds would close on the Augusta Property in a few more days. She then represented that she was placing the money into escrow on behalf of the Byrds for the Augusta Property. Relying on Davis's assurances that she had worked out an arrangement for the Byrds to close on the Augusta Property, the Doughertys accepted the \$150,000 advance and closed on the Ping Property. Ultimately, the Byrds were unable to successfully close on the Augusta Property.

Afterward, Davis verbally offered to purchase the Ping Property from the Doughertys, but the Doughertys refused. Davis sued the Doughertys under various theories of liability, including breach of contract and unjust enrichment seeking to recover the \$150,000 that she had advanced to the Doughertys. Of course, the Doughertys then countersued Davis for, among other things, negligent misrepresentation and breach of fiduciary duty. In addition, the Doughertys brought a claim against Platinum based on a respondeat superior theory. The court affirmed the liability findings against Davis and the Brokerage, but vacated the damages awarded and sent the case back to the trial court for a recalculation of damages.

**In Indiana, there would also be liability against the agent and brokerage in similar circumstances. If you fail to follow your client's instructions, i.e., fail to make a subsequent purchase contingent on the sale of a residence, and damages result therefrom, a court will find a breach of fiduciary duty. The damages are still undetermined at this point in the Davis case as the trial court will rehear the damage issue. It will be interesting to see the actual dollar amount assessed against the parties by the lower court. Will the real estate agent recover the money she advanced to the Doughertys to close on the Ping Property even though she violated her fiduciary duties? Stay tuned for an update down the road.**

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