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COMMERCIAL REAL ESTATE TRANSACTIONS GROUP: BROKERAGE HOT TOPICS – DUAL AGENCY, DEFENSE OF BROKERS AND CROSS-BORDER TRANSACTIONS

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Partly Cloudy or Partly Sunny:
The Forecast for Claims Against Real Estate Brokers and Their Defense
By Nelse T. Schreck

From 2002 until 2006, the real estate market seemed to be on a never ending upward trajectory, but in mid-2006, the market began to slow in many areas of the United States, particularly on the coasts. When the market was high, claims seemed to increase due to the increased number of transactions. Now that the market has slowed, we can expect to see not only the same old types of claims that have been around for years, but also a new breed of claims. While the potential for new types of claims seems to be worse for the appraising and financing players, as often happens in real estate cases, all of the individuals to the transaction are named as parties. This article will not focus on the traditional claims regarding agency and property condition disclosures. This article focuses on issues surrounding financing, valuation, the defense found in "as is" clauses, using codes of ethics as a defense, the limitation of broker's responsibilities in non-Agency transactions, and Errors and Omissions Insurance coverage issues.

1. Claims arising from appraisals.

As the value of real estate stagnates or even declines in certain markets, the role of the appraiser becomes more criticized. Brokers need to be wary of appraisers in lending arrangements beyond the bounds of traditional mortgages with banks and of certain types of appraisals. It is foreseeable that as industry-wide lending practices recalibrate after the demise of the subprime market, more and more lawsuits will arise from the valuation of homes. Typically the appraiser is selected by and responsible to the lender. The appraisal often has a clause restricting its use to the entity who ordered it. See Seit-Olsen v. Reliance Appraisals LLC, No. 264470, 2006 1113936 (Mich. Ct. App. April 27, 2006) (the appraisal stated the property at nearly twice the habitable space than actually existed). Often in these cases, the court will enforce the limitation of liability to only claims made by the lender. Id. at *7. When plaintiffs contemplate litigation, they scrutinize all aspects of the transaction for potential claims and bring claims against any and all players: the buyer or seller, the inspector, the real estate agents, the appraiser, the title company and the lender. Plaintiffs may allege breaches in duty regardless of whether the breach caused any damage.

For instance, in Seit-Olson, even though the claim centered around the purchase of property with an erroneous appraisal and misrepresentations regarding certain improvements that could not be made due to restrictions on the property, Buyer also brought claims against her former real estate brokers. The claims against the brokers were for breach of fiduciary duty, failing to market properly the Buyer's *existing residence*, failing to timely provide documents in advance of the closing, and self-dealing by failing to disclose that one of the real estate agents was a loan officer. The Seit-Olson court found that the brokers did not breach their fiduciary duty and that they were protected by a release provision in their agreement with the Buyer. Id. at *6. In the absence of fraud and overreaching, the release provision was enforced. Id. This is a case in which good facts made good law.

The release/waiver provisions are not always enforced when the facts are unfavorable, on the grounds that the contract is an adhesion contract or the economic loss rule is inapplicable.

Other courts have found that appraisers have an independent duty to the non-contracting party. The Utah Court of Appeals found that even though the Seller had contracted for the appraisal and

authorized the transfer of the appraisal to the lending institution, the Buyers had a right to state a claim in negligence for an error in the appraisal report. West v. Inter-Financial, Inc., 139 P.3d 1059 (Utah Ct. App. 2006). The Utah Court of Appeals held that the economic loss rule did not apply and that the appraiser had an independent duty, and the Buyer's claims in negligence and negligent misrepresentation were allowed despite the lack of contractual privity. Id. at 1065-66. The Court found that appraisers, like other real estate professionals, owed an independent duty to non-contracting Buyers which removed them from the limitations of the economic loss rule. Id. at 1064. That court likened the duties of real estate brokers and appraisers "to accountants, or surveyors," and distinguished them from "contractors and design professionals." Id.

Defense Tip: The economic loss rule.

Even though the Utah Court did not apply it, the economic loss rule is an important liability limiting legal theory that attorneys who represent brokers should be raising as a limiting defense. "The economic loss rule prevents a [contracting] party from claiming economic damages in negligence, absent physical property damage or bodily injury." Id. at 1061 (internal quotation marks & citation omitted). Economic damages are defined as "damages for inadequate value, costs of repair and replacement of the defective product[s]… without any claim of personal injury for damage to other property." Id. at n. 2 (internal quotation marks & citation omitted). Not all states have had the opportunity to apply the economic loss rule to real estate agents and brokers, i.e. New Mexico. Pursuant to the economic loss rule, when the parties enter into a contract, they have the ability to allocate risks and responsibility for losses between them. Therefore, the disputing parties may not bring negligence and negligent misrepresentation claims outside of the contract. In contrast, when there is no contract between the parties, there is an absence of opportunity to allocate risks and liabilities. Thus, the claims of negligence and negligent misrepresentation may still be brought even in the absence of privity. Id. at 1064.

Going one step deeper, the economic loss rule allows the contracting parties to protect against economic liability and override the tort principles enunciated in ¶ 552 of the Restatement (Second) of Torts. Restatement (Second) of Torts ¶ 552 (1977).[1] Section 552 addresses the liability of compensated professionals who supply false information for the guidance of others in their business transactions. Id. The economic loss rule usually applies to construction and

[1] Section 522 states:

(1) One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
   a. by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
   b. through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Restatement (Second) of Torts § 522 (1977).

design professionals. It has not been fully applied to other professionals at this point, which leaves a route for tort claims against professionals.

Utah has found an independent duty for brokers arising from the statutory licensee duties imposed by a state on brokers. The Utah Court found that the broker's independent duty to disclose under Utah law gave rise to a common law duty on the opposing broker to disclose facts materially affecting the value or desirability of the property which were known to the broker. Hermansen v. Tasulis, 48 P.3d 235 (Utah 2002). From this regulatory obligation arose an independent duty. Therefore, the economic loss rule did not bar the tort claim. Several states have held that appraisers have duties to individuals who are not in privity of contract with them;[2] typically, that duty only extends to a foreseeable class, i.e. buyers and investors. Courts will look at regulatory requirements, anti-indemnification statutes, and other risk limiting statutes to make this determination. Especially in cases where inadequate valuation is an element of damages, if the action causing the damage is not an independent duty already imposed on the broker, raising the economic loss rule as a defense against a contracting adversary is worth a try.

2. The effect of designating brokers as transaction / non-agency brokers.

Another important area of law which provides new opportunities for the defense of brokers is in non-agency or transactional broker relationships. Traditionally, the broker was the fiduciary of his client with all the duties and rights of recovery which come within the common law definition of fiduciary duty: obedience, loyalty, disclosure, confidentiality, accounting, reasonable care and no self-dealing. In the past 10 years at the urging and lobbying of brokers and local realtor boards, states have been passing legislation which allows for the creation of a non-agency broker or transaction broker.[3] The transaction broker designation allows brokers to be engaged by clients without the fiduciary duties. The basic philosophy for creating the transaction broker designation arose from two needs. First, with the advent of dual agency, which is a misnomer for dual transaction broker, the duties and obligations of real estate brokers needed to be redefined and limited to allow real estate brokers to act for both the buyer and the seller in the same transaction. Representing both sides of a deal violated the duty of loyalty. Second, there was a rarely voiced desire to relieve real estate brokers of the onerous nature of fiduciary duties. Real estate brokers are essentially high level sales persons who have specialized knowledge requiring their licensure by the individual states in which they practice. One must ask whether real estate brokers who arguably do not have the same depth of relationship with clients as attorneys or accountants should be burdened with the amorphous and burdensome scope of fiduciary duties.

In Colorado and New Mexico, in the absence of a written agreement, the real estate professional is assumed to be a transaction broker and not an agent. See Colo. Rev. Stat. § 12-61-803(2) (West 2000); NMSA 1978, § 61-29-10.1 (2003). According to the Colorado statutes, a transaction broker "assists one or more parties throughout a contemplated real estate transaction

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[2] Fisher v. Comer Plantation, Inc., 772 So.2d 455, 462 (Ala. 2000); Soderberg v. McKinney, 52 Cal. Rptr.2d 635, 640-41 (Cal. Ct. App. 1996); Larsen v. United Fed. Sav. & Loan Assoc., 300 N.W. 2d 281, 287 (Iowa 1981); Stotlar v. Hester, 92 N.M. 26, 28-29, 582 P.2d 403, 406-07 (Ct. App. 1978); Alva v. Cloninger, 277 S.E.2d 535, 540 (N.C. Ct. App. 1981); Costa v. Niemon, 366 N.W.2d 896, 899 (Wis. Ct. App.1985).

[3] The states now permitting transactional agency or non-agency include Colorado, Delaware, Florida, Indiana, Kansas, Main, Massachusetts, Missouri, New Hampshire, New Mexico, Oklahoma, Oregon, South Dakota, Texas, Virginia and Wisconsin.

with communication, interpostion, advisement, negotiation, contract terms, and the closing of such real estate transaction without being an agent or advocate for the interests of any party to such transaction." Colo. Rev. Stat. § 12-61-802(6) (West 2002). From a damages perspective, the significant difference between an agent and a transaction broker is that an agent who breaches his fiduciary duties is liable for the full amount of any actual loss suffered and disgorgement of his commission. The transaction broker designation is a statutory construct which is now being supported by affirming case law. A Colorado court has held that in the absence of a written agency agreement, the broker serves as a transaction broker and is not an agent in a fiduciary relationship with either party to a real estate transaction. See Hoff & Leigh, Inc. v. Byler, 62 P.3d 1077, 1078 (Colo. Ct. App. 2002).

The Tenth Circuit endorsed Colorado's transaction broker statute and held that a seller's broker was only acting as a transaction broker. Stearns v. McGuire, 154 Fed. Appx. 70, 71 (10th Cir. Nov. 14, 2005). In this unusual – even refreshing - case, the plaintiff broker sued his client when the client backed out of a purchase. The plaintiff broker sued the defendant for his commission and alleged breach of contract, misrepresentation, and unjust enrichment. Id. at 73. The defendant buyer responded with the contention that the plaintiff breached his fiduciary duty. Id. This type of retaliatory counterclaim is anticipated in a commission dispute. The court held that that a transaction broker assists with real estate transactions, "without being an agent or advocate for the interests of any party to such transaction" and that a transaction broker "is not in a fiduciary relationship with either party to a real estate transaction." Id. at 74 (internal quotation marks & citation omitted). The court further stated that "[a] real estate broker is presumed to be a transaction broker and not a seller's agent unless there is a written agreement between the broker and the party to be represented establishing a single agency relationship with the seller." Id. at 75. "[The buyer] argued that the real estate contract established an agency relationship with [the plaintiff]" and "[pointed] to the [ ] section, in which the 'Seller Agent/Subagent' check box [was] checked." Id. at 75. The court concluded that the contract was "not a written agreement sufficient to transform [broker] from a transaction broker into a seller's agent" and noted that the buyer's own testimony, which stated that he did not authorize the broker to act on his behalf, reinforced the conclusion. Id. The court ruled in favor of the broker. Id. What does this result achieve? The disgorgement penalty for fiduciaries is avoided and the duties of the broker are quantified by statute.

3. Potential financing related claims.

A trend which attorneys should be on the alert for will be how real estate brokers factor into dubious financing and subprime mortgage fallouts. Brokers should be counseled to refer clients only to well-established banks and mortgage brokers. In the event a buyer is in need of special assistance with financing, a broker may want to suggest VA and FHA financing instead of a non-traditional mortgage offered by an unestablished financer.

As more and more buyers find themselves unable to obtain financing because of tighter marketing restrictions on subprime mortgages, more buyers may resort to seller financed real estate contracts. These contracts tend to be particularly dangerous for the buyer with financial problems who may be unable to make all of his payments in a timely manner. After all, a buyer who can't qualify for a traditional mortgage did not get in that predicament by paying his bills in a timely fashion. With a real estate contract, a foreclosure action is not required, the buyer is entitled to get any of his investment back, and the warranty deed is forfeited by the buyer as an

operation of law. Brokers need appropriate risk management regarding these financing issues which are likely to become more dangerous as they advise buyers with financing difficulties.

4. Dangerous clients.

Another area of concern for brokers is representing the "investment dabbler." This is an individual who has seen promotional videos or attended promotional seminars where he is taught how to invest in real estate for the purposes of flipping or renting. Many of these individuals lack the experience, the knowledge, and the actual financial ability to engage in real estate investment. Now that we have entered a period where property values are not steadily and dramatically increasing, the dabblers' expectations may not be met. As they seek a way to recover their loss of anticipated gain or investment, they may look to the real estate brokers for inaccurate investment advice, the inspectors for missed defects, and the appraisers for errors in valuation. Not only should brokers have a contract with their clients that specifies that they are not providing financial and investment advice, but the brokers need to *actually refrain* from giving that advice. Brokers need to be particularly careful about comparative market analysis and information regarding leasing in the area. They also need to be careful not to get involved in home improvement suggestions for flipping a property at a profit. As tempting as it is and as helpful as brokers like to be to their clients, as financing tightens up and prices drop, the dabbling investors may seek the return on their investments from their brokers' errors and omissions insurance policies.

A Nevada District Court held that a broker was liable for his employee's representation to a buyer that the tenant in an investment property was a good paying tenant, when it was not. Muhlenberg v. Omni Elec., No. A461498, 2005 WL 3749854 (Nev. Dist. Ct. Oct. 4, 2005). The plaintiff purchased the property from Thompson (the Broker) through a brokerage firm that acted as the sales agent for both parties. Id. Before entering into the sale, the plaintiff claimed that he discussed the tenants' status with an employee of the brokerage firm and was told that the tenants were in "good standing" and had only occasionally been late on rent. Id. After the sale, the plaintiff discovered that the brokerage firm employee's representations of the tenant were incorrect and told the employee to evict the tenants. Id. The employee did not follow the plaintiff's orders and allowed the tenants to stay without paying rent. Id. The tenants were eventually evicted after allegedly being late with two month's rent and failing to pay a tax bill. Id. Plaintiff filed a suit against the tenants, Thompson and the brokerage firm, alleging misrepresentation. Id. At trial, the district court held that the brokerage firm, through its employee, "negligently or intentionally misrepresented to the plaintiff that [the tenant] was a 'good tenant'" while knowing that the tenant was behind on payments. Id. The court also held that Thompson was responsible for the sales agent's actions, even though there was no proof that he knew about the misrepresentations. Id. The employee's allowing the tenant to stay after not paying rent probably weighed against the broker in the court's analysis.

5. Sometimes the "as is" provision actually works.

Many brokers believe that an "as is" clause will act as a silver bullet and save them from erroneous representations regarding the condition of the property. "As is" is often included as boilerplate language in purchase agreements. An "as is" clause does not always absolve the seller or brokers of liability for non-disclosed conditions of the property. In cases of fraud and

negligent omission of material information, the "as is" release is less likely to be enforced. Yet when the disclosure facts are strong, a court is likely to enforce it.[4]

In Loomis v. Troknya, the Ohio Court of Appeals affirmed that an "as is" clause did protect the selling parties and real estate agents when the buyer alleged that disclosures had not been made regarding condition of the septic field. 846 N.E. 2d 101 (Ohio Ct. App. 2006). Loomis was told about problems with the septic tank prior to purchasing the home. She purchased it anyway and then learned that the old septic tank needed to be replaced. The Court of Appeals affirmed the trial court's holding that she had been given plenty of notice of the potential condition, such that she could perform her own due diligence and inspection. In the absence of undisclosed superior knowledge and because the buyer failed to have the septic tank inspected, the "as is" clause controlled. Id. at 105.

Similarly, the Ohio Court of Appeals affirmed the enforceability of the "as is" clause in a termite case in which a previous problem with termites had been disclosed and the buyers failed to perform additional due diligence. Niermeyer v. Cooks Termite & Pest Control, Inc., No. 05AP-21 2006 WL 330099 (Ohio Ct. App. Feb. 14, 2006). Although the buyers alleged fraud, the trial court granted summary judgment in favor of the sellers because there was no showing of justifiable reliance on the part of the buyers that the termite problem had been resolved. Id. at *4. In Niermeyer, the brokers prevailed on summary judgment on counts of negligence and fraud because they provided the information they had regarding termites to the purchaser, and those statements by the brokers were not relied upon by the purchasers. With a factual twist a defense attorney could only dream of, this lack of reliance was proven by the fact that the first purchase agreement fell through when the termite issue was not resolved and a later purchase agreement accepted the home "as is" and at a reduced price. Id. at * 4, 5. Caveat emptor still governs Ohio law, but the vendor must also disclose known imperfections. Id. at *3

An "as is" clause is not likely to protect a seller or real estate agent from a sale in which a material fact known to them is not disclosed. The "as is" clause is particularly useful in the defense of the selling side of the transaction when a problematic feature of a property is disclosed and the purchaser is given the opportunity to perform his own due diligence. When the purchaser chooses not to undertake due diligence, the facts align in such a way that the court is inclined to apply the "as is" clause even if the language is simply boilerplate.

6. Uses of the National Association of Realtors® Code of Ethics and other industry standards.

Most lawyers who do not practice in broker law misuse the Code of Ethics and Standards of National Association of Realtors® ("Code"). The license to sell property is issued by the appropriate state authority. The Realtor® designation is an additional designation issued by the professional association. States regulate the legal duties of brokers. The Code governs the ethics required of Realtors.® The ethics themselves are not "wimpy", and they can be used as a sword

[4] See, Jumonville v. Fed. Home Mortgage Corp., No. Civ. A. 04-2295, 2005 WL 1431505 (E.D. La. June 10, 2005), CADCO, LLC v. Barry, No. M200401315COAR3CV, 2006 WL 140412 (Tenn. Ct. App. Jan. 8, 2006), Sims v. Century 21 Capital Team, Inc., No. 03-05-004612006-CV, WL 2589358 (Tex. App. Sept. 8, 2006).

or a shield for brokers with the Realtor® designation. Often brokers' legal duties are defined by statute, regulation, and common law. The Code of Ethics can be used to flesh out the duty of care where the law is otherwise lacking. The Code will not be authoritative in a legal action, but it is very useful for establishing an industry standard.

The Code can be used to fill in gaps in law that is patchy and create a standard of care or industry standard. The Code can guide the finder of fact to the proper and reasonable standard of care. It can also be used to explain why a Realtor® did what he did. On the other hand, in a difficult case, i.e. the broker's action fell beneath the standard of care, the Code can highlight the shortcoming. The following two cases demonstrate how the rules of professional organizations can be used to bring a claim, and to support expert testimony:

The Rules of Professional Conduct of the American Industrial Real Estate Association were used to define the standard of care in a dispute between two brokers in a tortious interference case. Vision Entertainment (Vision) asked the plaintiff real estate brokers to represent it in finding property to lease. Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc., 42 Cal.Rptr.3d 235, 238 (Cal. Ct. App. 2006). The plaintiffs expended hundreds of hours looking for property, conducting cost analysis, and providing Vision with information. Id. When the plaintiffs started negotiations for the actual lease, Vision informed the plaintiffs that the defendants (the parent corporation of the company acquiring Vision) demanded that any negotiations on behalf of Vision had to be conducted by another company, Insignia. Id. The plaintiffs "objected to 'Insignia's insertion into the relationship . . .'" and claimed that the defendants violated the Rules of Professional Conduct (Rules) of the American Industrial Real Estate Association (Association)." Id.. The plaintiffs brought suit on a claim of interference with prospective economic advantage. Id.

On appeal, one of the defendants' arguments was that a "violation of the Association's Rules would not suffice to constitute wrongful conduct" as was required by case law concerning such interference claims. Id. at 239-40. The court distinguished the case from the one in which the defendants relied and stated that "[u]nlike the opinion testimony. . ., the Association's Rules are written and presumably made available to all Association members. . . . [and] cannot be deemed nebulous." Id. at 241. The court concluded that "a violation of well-defined, established rules or standards of a trade, association or profession may constitute . . . wrongful conduct" sufficient for an intentional interference claim. Id. at 242. The court also noted that in an intentional interference claim, the defendant's conduct must amount to "independently actionable conduct and held that because of the Association's internal remedies, the defendant's conduct should suffice. Id. (internal quotation marks & citation omitted). Thus, the court granted the plaintiff an "opportunity to amend its pleading to allege . . . that [defendants'] violation of the Rules is independently actionable." Id.

In another use of the Code, an expert's opinion was found to be supported by his testimony that he adhered to the ethical standard in forming his opinion. Smolnik v. Van Dyke, No. 8:04CV401, 2006 WL 2990357, at *2 (D. Neb. Oct. 18, 2006). The expert was expected to testify about the fair rental value of the defendants' house during the relevant time period. Id. at *1. The trial court determined that the even though the testimony was relevant, the expert failed to articulate a methodology that met the requirement established by Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993). Smolnik, 2006 WL 2990357, at *1. The trial court granted the plaintiffs' motion in limine, which precluded the expert testimony of the defendant's expert. Defendants filed a motion to reconsider the ruling on the motion in limine. Id. The expert

attested in his affidavit that "he complied with all applicable standards, including the 'Code of Ethics and Standards of Practice of the National Association of Realtors®'" in rendering his opinion. Id. at *2. The trial court stated that "[g]iven this standard and [the expert's] assurance that he complied with industry standards, the court can identify [his] methodology." Id. The court further stated that although "[the expert's] methodology relies heavily on his experience in the real estate industry and his own personal ownership interest . . . . the Code of Ethics demonstrates an industry code of conduct legitimizing [the expert's] opinion." Id. The court granted the defendants' motion to reconsider. Id. at *3.

7. Common coverage exclusions in Errors and Omissions ("E&O") policies for brokers.

Many brokers voluntarily protect themselves with E & O coverage and some state licensing authorities require them to have it. Like most consumers, most brokers do not read their policies and lack an understanding of types of claims that are excluded from coverage. While different insurers provide different coverage, a list of commonly excluded claims follows:

- Claims arising from other real estate activities, i.e. appraising, developing, acting as a lawyer, title officer or mortgage broker;

- Claims regarding property which the broker or his spouse sold or purchased, owns entirely or in part, or developed;

- Intentional, fraudulent, illegal and culpable claims;

- Punitive damages;

- Conversion of funds, commingling of funds, and misappropriation of funds;

- Defamation, discrimination, wrongful entry and wrongful eviction; and

- Environmental pollution and mold claims.

Brokers can also purchase an endorsement for ethical and regulatory claims. In the event a complaint is filed with the state licensing authority or the local Board of Realtors, the regulatory endorsement provides them with limited defense coverage for responding to the written complaint and appearing at hearings. This endorsement is inexpensive and worth every penny in this consumer complaint oriented market.

Coverage for leasing and management activities may also require an endorsement depending on the coverage offered by a particular company. This is an important endorsement for brokers who lease or manage apartments, commercial buildings, short-term rentals and homes. If this endorsement is not available, then the broker needs to allocate indemnification and defense obligations in the leasing/management contract with his client.

One last coverage tip: especially for brokers working in commercial or expensive residential markets, brokers should buy a policy with adequate limits of liability. A typical policy limit of $100,000.00 may not be sufficient coverage for a property damage or economic loss claim to a business.

Real Estate Regulation in the Province of British Columbia
Presented by Larry Buttress, Manager, Industry Practice
Real Estate Council of British Columbia
By Larry Buttress

1. The Governance Model

The *Real Estate Services Act* (RESA) came into effect January 1, 2005. One of the significant changes brought about by the introduction of this legislation, which replaced the former *Real Estate Act*, was that the Real Estate Council of British Columbia (the "Council") became a self-regulatory body. In that respect, the Council acts much as the Law Society does in British Columbia. It is responsible for the licensing, education, and discipline of real estate licensees. The Council is comprised of 16 members, 13 elected from across the province representing two licence levels (brokers and representatives) and 3 public members appointed by government.

There are four components of the legislation:

- RESA itself, which establishes the overall structure for regulation and the authority of the Council, and creates affiliated organizations such as the Real Estate Errors and Omissions Insurance Corporation, the Real Estate Compensation Fund Corporation, and the Real Estate Foundation.
- The *Real Estate Services Regulation*, which deals primarily with transitional issues, sets fees where they are beyond the jurisdiction of the Council, and establishes exemptions from the requirement to be licensed.
- The Council Bylaws, which essentially deal with administrative and governance matters.
- The Council Rules, which establish professional conduct requirements.

The Council has authority to make and change its bylaws and rules, providing it with substantial flexibility to deal with changing professional practice.

2. Providing Real Estate Services in British Columbia

Real estate services are comprised of three distinct groups of activities: trading services (related to acquisitions and dispositions), rental property management services, and strata management services. The definition of each of these terms found in section 1 of RESA establishes the scope of activities that require licensing in British Columbia. Persons are able to become licensed to provide any combination of these services. Separate licensing courses are available with each containing a core of information related to real estate services generally, and a supplemental component which focuses on the particular category of service. Once the person is licensed to provide one category of service, they are able to become licensed to provide another category of service by completing the supplemental information for the applicable category. All individual licensees must be engaged by a licensed real estate brokerage.

It is the provision of real estate services within the physical jurisdiction which triggers the licensing requirement; it is not the fact that the real estate is located in British Columbia. This means that so long as a person does not enter the province, he or she may provide real estate services without having a BC licence to do so. Also, a BC licensee is able to share remuneration with a person licensed or similarly authorized to provide real estate services in another jurisdiction. Furthermore, a person who is able to act under an exemption from licencing is able

to provide real estate services in BC without being subject to certain aspects, if not all, of the legislation.

There are approximately 20,000 real estate licensees currently in BC.

3. Licensing Reciprocity with Other Jurisdictions

American jurisdictions tend to be more amenable to licence reciprocity than Canadian jurisdictions. Alberta is the notable exception in Canada; Alberta has entered into reciprocity agreements with a number of American jurisdictions, and has offered such agreements to all Canadian jurisdictions. Of the remaining provinces, five plus Alberta have entered into a licence recognition agreement. Essentially this allows a person who is licensed in any of those jurisdictions to become licensed in any of the other jurisdictions by passing an examination which is based on material specific to that jurisdiction. Effectively this reduces the education requirement in BC by approximately one half.

In BC the Council also considers exemption requests based on experience and/or equivalent education obtained in any other Canadian or American jurisdiction.

4. The Discipline Process

The Council is for the most part autonomous in its authority to deal with professional conduct. In addition to the expected natural justice based disciplinary procedures, it has also been given extensive authority to search, seize, and freeze documents, accounts, and personal assets, as well as to issue orders in urgent circumstances where it is believed the time necessary to hold a hearing would be detrimental to the public interest.

The Council received 550 written complaints in fiscal 2006. Approximately 60% of these were closed administratively either for lack of jurisdiction, lack of evidence, or because they were informally resolved by Council staff. The remaining 40% were reviewed by a Complaints Committee which may dismiss the complaint, issue a letter of warning, or order that a hearing be held. Hearings were ordered in approximately 25% of the files which were reviewed by the committee. Once a hearing has been ordered, the licensee is able to enter into an Agreed Statement of Facts, as well as a Consent Order. In a majority of 'hearing files' Consent Orders were issued.

The Council has a wide range of 'penalties' it may order, whether through Consent Order or as the result of a hearing. Where there is a finding of professional misconduct, it may

- reprimand the licensee,
- suspend or cancel the licence,
- impose restrictions or conditions,
- require the licensee to cease or to carry out specific activities,
- require education,
- prohibit the licensee from applying for a licence for a specific period of time,
- order the payment of enforcement expenses and discipline penalties (maximum $20,000 for a brokerage and $10,000 for an individual licensee).

The Superintendent of Real Estate has the authority to appeal certain disciplinary decisions of the Council. The appeal body is the Financial Services Tribunal. The Superintendent also has the authority to exercise the powers of the Council if the public interest is seriously at risk and the Council is not taking any action.

5. Marketing Strata Title Projects

The *Real Estate Development Marketing Act* (REDMA) establishes requirements for the marketing of 'development units'. This act is administered by the Superintendent of Real Estate.

Development units include a variety of shared interests in land. Where the development unit is a part of development property including 5 or more units, the filing of a disclosure may be required under REDMA may be required. Where REDMA applies it also establishes

- when marketing may commence,
- how and by whom deposit monies are to be held,
- when funds may be released to the developer,
- rights of rescission, and
- the enforcement powers of the Superintendent.

The *Homeowner Protection Act*, administered by the Homeowner Protection Office, also applies to strata developments in that it requires that

- all new homes be covered by either third party home warranty insurance or an owner builder personal guarantee, and
- residential builders be licensed.

6. Related Web Sites

Real Estate Council of British Columbia www.recbc.ca

Superintendent of Real Estate www.fic.gov.bc.ca

Homeowner Protection Office www.hpo.bc.ca

Representing Brokers who Act as Dual Agents

prepared to supplement a presentation regarding
Dual agency - from a practical viewpoint at the
American Bar Association Real Property, Probate and Trust Symposium

Oliver E. Frascona, Esq.

I. The Players

A. Buyers agents
   1. Fact: _____
   2. Fiction: _____

B. Transaction Broker (non-agent)
   1. Fact: _____
   2. Fiction: _____

C. Seller agents
   1. Fact: _____
   2. Fiction: _____

D. Customers
   1. Fact: _____
   2. Fiction: _____

E. Designated/Split Agency
   1. Fact: _____
   2. Fiction: _____

F. Dual Agent
   1. Fact: _____
   2. Fiction: _____

II. Issues

A. Seller objectives
   1. S_____
   2. P_____
   3. Ex_____

B. Broker or Seller objectives
   1. S_____
   2. P_____
   3. Get the next leg
   4. Personal Issues

C. Buyer objectives
   1. B_____

2. Saw the S_____ / A _____

3. N_____

D. Broker Buyer objectives

1. S_____

2. Get P_____

3. List Buyer's existing property

4. S_____

E. Buyer wants to buy Seller's Property
1. Property vs. People
2. Agency vs. Brokerage

3. Seller wants _____

4. Buyer wants _____

5. Broker wants _____

6. Attorney wants _____

III. Dual Agency vs. Transaction Broker

A. The Difference is _____
B. Disclosure
1. Where
2. What
3. Really
C. Firm
1. Seller is Principal
2. Buyer is Principal
3. Family Members
4. Nature of Real Estate

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