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Real Estate Brokers and Lawyers Beware!

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> *"The implosion of the subprime lending industry has given rise to a new wave of self-described consumer bailout 'experts' who hold themselves out as 'foreclosure consultants' or 'loan modifiers.'"*

In an article entitled "Welcome to the Hottest Trap for Unwary Real Estate Brokers & Lawyers!" which was published in the July 2009 issue of this newsletter, we alerted readers to a new loan modification scam in which struggling homeowners facing foreclosure or seeking loan modifications are targeted. In the August 2009 issue of the *California Bar Journal*, California Attorney General Edmund G. (Jerry) Brown, Jr. described the phenomenon as follows:

> "The loan modification industry is teaming with confidence men and charlatans who rip off desperate homeowners facing foreclosures by firm promises and money back guarantees. These scam artists pocketed thousands of dollars from each victim and didn't provide an ounce of relief."

The implosion of the subprime lending industry has given rise to a new wave of self-described consumer bailout "experts" who hold themselves out as "foreclosure consultants" or "loan modifiers." These individuals purport to offer distressed homeowners assistance in assessing their options or in negotiating loan modifications with their lenders. The Director of California's Department of Real Estate (DRE) indicated that as of the summer of 2008, officials had been inundated with complaints about loan modifiers. The DRE currently has more than 200 open investigations.

According to the DRE, loan modifications have traditionally been handled as real estate activities. One who performs loan modifications services must have a DRE license and follow state law. California's Foreclosure Consultant Statute (FCS), which addresses mortgage foreclosure consultants, is codified under California Civil Code Section 2945 *et seq*. The problem that has arisen is that lawyers, who are allowed to collect a fee before their services are fully rendered, and real estate agents are exempt from the FCS. The FCS provides that a consultant or loan modifier is prohibited from collecting any upfront advance fees in rendering foreclosure-related consultation services, such as helping a homeowner stop or postpone a foreclosure sale. Some foreclosure consultants have attempted to avoid this statutory prohibition by engaging a lawyer or a real estate agent to work with them in foreclosure consultations.

With hundreds of thousands of Californians in some stage of the foreclosure process, there exists a huge market opportunity for businesses that purport to serve the needs of these individuals. Consumers are being barraged with mailed offers and telephone calls from individuals referencing the availability of "new government programs" and soliciting payment of an upfront fee to help the consumer access the programs.

Another problem is that some lawyers are intruding on real estate brokers' turf by performing loan modification services. Many are doing so incompetently. The California State Bar has consequently filed a multitude of complaints. In April 2009, the state bar formed the Loan Modification Task Force (Task Force) to handle the growing number of bar complaints. The Task Force has received more than 1,250 complaints and is actively investigating over 250 lawyers.

The Task Force is considering not only the advanced fee issue, but also the improper partnering with real estate brokers or non-lawyers, fee-splitting, paying commissions to employees for sales, buying leads from non state bar referral services, and offering services out of the state under the guise of a law license in California, among others.

In many cases, attorneys have worked with untrained non-lawyers or non-legal staff engaged in the unlawful practice of law by offering legal advice to prospective clients.

The California Rules of Professional Conduct, which govern attorney's ethical obligations, specifically prohibit lawyers from:

- Paying a referral or marketing fee to a foreclosure consultant or other person for referring distressed homeowners to the lawyer;
- Directly or indirectly splitting fees earned from a distressed homeowner client with a foreclosure consultant or any other non-lawyer;
- Aiding a foreclosure consultant or anyone else in the unauthorized practice of law or forming a partnership or joint venture with a foreclosure consultant or other non-lawyer if any of its activities would involve providing legal services;
- Contacting a person or telephone a distressed homeowner referred by a foreclosure consultant or someone else unless the lawyer has a family or professional relationship with the homeowner;
- Filing a lawsuit without good cause or a motion in a lawsuit that is simply intended to delay or impede a foreclosure sale; and
- Failing to perform legal services with competence.

On October 11, 2009, California Civil Code Section 2945 became effective. Section 2945 addresses how third parties can accept fees for loan modifications and makes it a crime for anyone to accept up front fees for performing a loan modification services. Attorneys, loan modification companies and real estate agents and brokers are covered under the law. In order to perform a loan modification service, a company or law firm must first perform all of its work and hope to get paid after the loan modification services have been rendered. Section 2945's purpose is to prohibit the charging of advance fees by a person offering his or her services to help negotiate a loan modification or other form of mortgage loan forebearance or forgiveness. The law is also intended to strengthen the California Finance Lenders Law by prohibiting false, deceptive and misleading statements, representations or admissions.

Section 2945 also requires those who wish to charge a fee for loan modification services (after performing them) to provide specific notice to borrowers regarding other options available to them where the law prohibits any service provider from imposing any interest or charge for performing services for borrowers in connection with loan modification or other forms of loan forebearance or forgiveness. Anyone found to have violated this statute will be subject to disciplinary action by the Real Estate

continued on back page

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Recent Court Rulings

Real Estate Broker Malpractice

Real Estate Broker Did Not Breach Fiduciary Duty When Buyer Failed to Investigate Zoning

Walker v. Berman, 2009 WL 1272395 (N.Y. Sup. Ct. May 4, 2009) (Unreported Disposition)

A buyer of investment property sued her real estate broker for breach of fiduciary duty of full disclosure because the broker did not inform the buyer that the property was not classified for apartment rentals.

As in most states, New York imposes a fiduciary duty on a real estate broker to disclose "all material information that it may possess or obtain concerning the real estate transaction involved." Nevertheless, the court chastised the buyer for failing to exercise due diligence, or as the court stated, "ordinary intelligence." The broker was found not to have breached her duty because she did not consciously withhold the property's classification from the buyer. Nor did she misrepresent the building's classification. In fact, the broker provided the buyer with all listing information from the owners, which indicated that the property was classified "Class B." The court concluded that it was the buyer's failure to investigate what a "Class B" classification meant, and not any alleged breach by her broker, that caused her to pay more than the property was worth.

Christina A. Lee
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Real Estate Broker Malpractice

No *Caveat Emptor* Where Misrepresentations Regarding Square Footage; Damages Depend on Bargained For Exchange

Bowman v. Presley, 212 P.3d 1210 (Okla. 2009)

Property buyers sought a home larger than their one-story, 1,398 square foot house. Their real estate agent and property sellers represented that the sellers' home was 2,890 square feet. A deal was struck for the buyers to purchase the sellers' home for $50 per square foot, or $144,500 (rounded up to $145,000). Shortly after the close of escrow, however, the buyers received an appraisal that stated that the home was only 2,187 square feet. They sued for fraud, breach of contract, and violation of Oklahoma real estate law.

As to the fraud claim, defendants moved for summary judgment, arguing that under the doctrine of *caveat emptor*, the buyers had a duty to investigate, measure or otherwise confirm the home's square footage prior to purchase. The court clarified that *caveat emptor* only barred recovery for misrepresentations about readily observable defects that could have been discovered by the buyers' inspection of the property, and self-serving misrepresentations about value that are merely opinions. Representations about a home's square footage are neither readily observable by an inspection nor opinions. Rather, they are statements of material fact. Therefore, the fraud claim was not barred by the doctrine of *caveat emptor*; and the buyers were not required to have independently verified the home's square footage. Accordingly, the court held that the buyers justifiably relied on the affirmative representations of square footage and could recover if their damages were established at trial.

Defendants also argued that the fraud claim was defeated because the buyers could not prove that they were damaged. A later appraisal of the home indicated that house was 2,468 square feet and that it was valued at $146,697. Defendants argued that the buyers were not damaged by the misrepresentation as to the square footage because the home was worth $1,697 more than the buyers had paid. Although the trial court and appellate court agreed, the Oklahoma Supreme Court ultimately did not.

Citing the "benefit of the bargain" doctrine, the Oklahoma Supreme Court explained that the buyers might have been damaged because they paid more than they bargained for. Specifically, they paid for what they thought was a 2,890 square foot house, but ended up with a significantly smaller home. This argument was enough to prevent summary judgment, which requires an absence of disputed facts. Summary judgment was improper because the appraisals' conflicting representations as to square footage (2,187 and 2,468) created a reasonable inference that the home's appraised value of $146,697 was incorrect. In short, "[t]he question of damages [could not] be resolved based upon the estimations of value contained in the mortgage appraisal alone."

In summary, the buyers could rely on the agent's and sellers' representations about the square footage of the house and were entitled recover their lost benefit of the bargain if they could establish damages at trial.

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Insurance Agents and Brokers

Triable Issue of Fact Exists Where Insurance Broker Fails to Inspect Previous Policy Prior to Placing Coverage

West Bend Mutual Insurance Company v. 1st Choice Insurance Services, 918 N.E.2d 684 (Ind. App. 2009)

A property seller entered into a conditional sale contract. The buyers were required to insure the property until the sale was finalized and to list the seller as the mortgagee on the insurance policy. The buyers purchased insurance from West Bend Mutual Insurance Company (West Bend). When the buyers failed to pay the premium, West End cancelled the policy.

One of the buyers then contacted 1st Choice Insurance Services (1st Choice) and purchased a policy from Auto-Owners Insurance Company (Auto-Owners). The buyer advised 1st Choice that she was the owner of the property, but 1st Choice did not inquire as to whether there were any other owners. Additionally, the buyer did not inform 1st choice that the seller held the mortgage on the property and should be named on the policy.

After the application was signed, but before it was submitted to Auto-Owners, 1st Choice obtained a copy of the West Bend policy. 1st Choice did not review the West Bend policy and submitted the application to Auto-Owners without requesting coverage for the seller.

1st Choice received the policy from Auto-Owners and cross-checked it against the application submitted to Auto-Owners. 1st Choice then cross-checked the Auto-Owners policy against the West Bend policy and noticed that the seller was listed on the West Bend policy. It then made several efforts to contact the buyer to determine whether the seller should be listed on the policy issued by Auto-Owners. A fire loss occurred before any contact was made. Because the seller was not listed on the Auto-Owners policy, Auto-Owners refused to make any payment to the buyer, asserting a lack of insurable interest.

The seller sued the buyer for damages. It also sued West Bend for negligence and breach of contract for canceling its policy, apparently for failing to properly notify the seller/mortgagee of the cancellation. The buyers sued 1st Choice and Auto-Owners for negligence in procuring the Auto-Owners policy and breach of contract for refusing to pay policy benefits. The seller then filed a third-party complaint against 1st Choice and Auto-Owners and moved to intervene in the buyers' lawsuit. All of the actions were ultimately consolidated.

1st Choice was granted summary judgment in its favor. Thereafter, the other parties mediated the case. West Bend paid the sellers $225,000 to settle the case and was assigned all rights that they had against all other parties. It was then substituted in as the real party in interest (replacing the sellers) and appealed the grant of summary judgment to 1st Choice.

Indiana law requires an insurance agent to use reasonable skill, care and diligence to obtain the requested insurance. The buyer did not request insurance for the seller and did not inform 1st Choice that the seller retained an interest in the property to be insured. The Indiana Court of Appeals

Case Summaries & Conclusions

determined, however, that triable issues of fact existed because the buyer had provided the West Bend policy to 1st Choice, thereby providing 1st Choice with all the information necessary to request the proper coverage. The appellate court therefore reversed, and remanded the case to the trial court.

The court noted that there might be comparative fault on the part of both the buyers and 1st Choice and that the trial court should address the proper allocation in accordance with the Comparative Fault Act as in any other negligence action.

Joseph J. De Hope, Jr.
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Insurance Agents and Brokers

When Right to Subrogation is Contractual, Insurer Need Not Establish Settlement With Insured is Covered Loss or that Actual Loss Exists

Bay Rock Operating Company v. St. Paul Surplus Lines Insurance Co., 298 S.W.3d 216 (Tex. 2009)

Where an insurer has a contractual right to subrogation and seeks to assert a subrogation claim for negligence against an insured, it need not establish that its settlement with the insured was a covered loss and that the insured suffered actual loss.

Hollimon Oil Corporation (Hollimon) operated and managed an oil well interest. As part of the agreement between it and the working interest owners, Hollimon obtained a blowout insurance policy with St. Paul Surplus Lines Insurance Company (St. Paul). The policy contained a subrogation clause which provided, in relevant part,

[t]he Company shall upon reimbursement hereunder to the Insured of *any* loss, damage or expense be subrogated to *all* the Insured's rights of recovery against any other person, firm or corporation who may be... liable for such loss, damage, or expense so reimbursed by the Company. [italics added]

Hollimon hired Bay Rock Operating Company (Bay Rock) to design, plan and supervise the drilling of the oil well. Bay Rock recommended Unison Drilling, Inc. (Unison) to Hollimon to physically drill the well. Hollimon ultimately followed that advice, hiring Unison. Bay Rock's engineer prepared a drilling program, which included the hiring of an on-site company representative to work with Unison on a day-to-day basis during the drilling operation and to maintain lines of communication between Unison and Bay Rock.

The drilling program included a test to measure whether the formation being drilled into could withstand the pressures created by gas flowing into the hole formed from the deep drilling process. Bay Rock instructed its on-site representative to conduct the test, as was the standard drilling practice. However, the on-site representative decided that the test was not necessary. Bay Rock agreed and instructed Unison to continue drilling deeper into the formation. During the drilling, gas flowed into the hole, creating extreme pressures within the formation, exceeding the equipment's ability to contain the gas, and ultimately causing a blowout underground and at the surface. As a result, the drilling rig was destroyed, and there was a loss of the anticipated valuable gas produced from the well.

Hollimon filed a claim under the St. Paul policy for the loss caused by the blowout and fire. St Paul initially issued a reservation of rights letter contending that the claim was not covered under the policy. Subsequently, St. Paul settled with Hollimon, advancing $2 million to cover payments to third-party vendors and then another $857,788 as full and final settlement of all claims. St. Paul then filed a subrogation suit against Bay Rock. The jury found Bay Rock negligent and that it was the cause in fact of the blowout, loss of the oil rig, and loss of the valuable gas.

Bay Rock appealed, asserting that St. Paul failed to prove that it was entitled to recover as subrogee to Hollimon. Bay Rock conceded that St. Paul had a right to bring a subrogation action in the name of its insured, Hollimon. However, it argued that St. Paul failed to prove that the settlement was a "covered loss" under the policy and that Hollimon did not have a right to recover a loss sustained by it.

While recognizing that under both equitable and contractual subrogation, an insurer stands in the shoes of its insured and may assert only those rights held by the insured against a third party, the court concluded that the two types of subrogation are not the same. Equitable doctrines must conform to contractual agreements; not the other way around. The court found that St. Paul's contractual subrogation right arose directly from its agreement with Hollimon, rather than from any principals of equity. Accordingly, St. Paul was not required to prove that the settlement to Hollimon was a covered loss or that it had a right to recover a loss sustained by Hollimon.

Examining the plain language of the subrogation clause in St. Paul's policy, the court determined that St. Paul's right to subrogation arose upon payment of *any* loss to Hollimon, and that St. Paul was subrogated to *all* of Hollimon's rights of recovery against Bay Rock. Thus, based on its contractual subrogation right, St. Paul stepped into Hollimon's shoes and obtained Hollimon's right to sue Bay Rock for negligently causing the blowout. Once St. Paul showed that it had a contractual subrogation right as a matter of law, it had only to prove to the jury that Bay Rock was negligent.

The court reviewed the various expert and percipient witness testimonies and found that Bay Rock was negligent for not performing the pressure test, which the court found was an industry standard of practice. It concluded that the failure to perform this test was the proximate cause of the loss of the oil rig and the valuable gas. The evidence was both legally and factually sufficient to support the jury's finding against Bay Rock.

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Insurance Agents and Brokers

Professional Negligence Claim Against Insurance Agent and Broker Considered Assignable

Associated Insurance Service, Inc. v. Garcia, 2010 WL 246065 (Ky. 2010)

The city of Louisville operated a ship for dinner cruises called the Star of Louisville (the Star). The city sought marine insurance for these operations from Associated Insurance Services, Inc. (Associated), which in turn contacted AON Risk Services of Ohio (AON) to obtain a quote. AON provided a quote from an Australian insurer, HIH Casualty and General Insurance, Inc. (HIH). The city purchased a policy from HIH with limits of $1 million.

Two passengers were seriously injured while on a dinner cruise on the Star. HIH provided a defense to the resulting personal injury action but became insolvent while it was pending. Thereafter, the Star admitted liability and agreed to arbitrate damages pursuant to a high-low agreement. The passengers agreed not to collect on the award from the Star in return for an assignment of all rights the Star had against Associated and AON. The arbitrator ruled in favor of the passengers in the sum of $742,193.10.

Associated and AON moved for summary judgment, asserting that tort actions are generally not assignable and that public policy disfavors the assignment of claims for professional negligence. The secondary basis for the motion was that as Associated and AON were not parties to the arbitration, the result was not binding against them. The trial court agreed and granted the motion for summary judgment.

The court of appeals reversed and remanded, concluding that a tort claim arising from a contractual relationship is assignable and that the professional negligence claim against the insurance professionals could therefore be assigned. The court distinguished a claim against an insurance professional from one against an attorney because the former type of claim does not involve the "role reversal" present in the latter. The court concluded, however, that the arbitration award was not binding upon Associated or AON because they were not parties to the action.

The Kentucky Supreme Court affirmed the appellate court's conclusion that the professional negligence claim was assignable because it was essentially a negligence claim resulting in pecuniary loss rather than a bodily injury claim. It then distinguished this claim from a legal malpractice claim, holding that attorneys owe a fiduciary duty to their clients but

continued on back page

Real Estate Brokers and Lawyers Beware!

continued from front cover

Commission. A violation of any of the above by an attorney may subject him or her to disciplinary action.

Previously, California Civil Code Section 2945 regulated the activity of foreclosure consultants. But that law contained numerous exemptions from its requirements, including exemptions of legal professionals, real estate brokers and several types of lenders. California Civil Code Section 2944.7 closes the loopholes in the existing law which have allowed the unscrupulous loan modification industry to exist. The prohibition of charging up front fees was intended to prevent individuals from providing limited services that fail to help borrowers and instead leave them worse off than before they engaged the services of the loan modification consultant.

Section 2944.7 is effective immediately and expires on January 2, 2012. California Civil Code Section 2944.7(a)(1) makes it unlawful to "[seek] claim, demand, charge, collect or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represent that he or she would perform," even if that compensation is called a "retainer." Under California New Business and Professions Code Section 6106.3(a), it constitutes a cause for the imposition of discipline against an attorney to engage in any conduct in violation of California Civil Code Section 2944.6.

One of the more confusing points of Sections 2944 and 2945 is whether an attorney may collect money into his or her trust account and hold the money until the end of the process. The client is still protected because the trust account is strictly regulated by the state bar, and any funds that are not earned must be returned to the client. Here, however, the state bar makes it clear that accepting funds into a trust account is a violation of California Civil Code Section 2945. Yet the state bar looked at the plain meaning of "received" in the statute and determined that "the term is broad enough to encompass a lawyer's receipt of advanced fees into a trust account." Thus, according to the state bar, if any money is taken from a client for any reason and is held in any way, a "receipt" will be considered to have occurred and the statute will be deemed to have been violated.

Recent Court Rulings — Case Summaries & Conclusions

continued from page 3

that insurance professionals only owe a duty of reasonable care. Further, whereas the attorney's duty flows only to the client, the insurance agent has a duty to both the insured and the insurer. The court found the attorney-client relationship to be "uniquely personal in nature" and that the confidentiality owed by an attorney exceeded the confidence owed by an insurance agent or broker. Thus, unlike a claim for legal malpractice, a claim for professional negligence against an insurance agent or broker can be assigned.

The Kentucky Supreme Court discussed the split of authority in different jurisdictions relating to the right to proceed under an assignment when the assignor had no damages due to the covenant not to execute. Aligning itself with the majority, the Court affirmed the validity of the assignment. It also stated that the majority rule had the practical value of aiding the injured party and the tortfeasor who has negligently been denied insurance coverage.

The court then found that a stipulated judgment, prejudgment settlement or arbitration award obtained without consent and participation of the insurance professionals would be subject to review for reasonableness, but that it would not be automatically invalidated. Therefore, the case was remanded to the trial court for it to determine whether the arbitration award reasonably reflected the damages. The trial court was instructed to hold a trial to determine the liability, if any, of Associated and / or AON and whether the arbitration award was reasonable.

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Architects & Engineers

Failure to Comply with OSHA Specifications Did Not Automatically Constitute Negligence in Employees' Death

Rogers v. Barlow Eddy Jenkins, P.A., 22 So. 3d 1219 (Miss. July 28, 2009)

A roofing subcontractor's employee, Robert Rogers (Rogers), sustained injuries while climbing a ladder to inspect a leak in the roof of a building where he had previously worked. He ultimately died due to the injuries. The Occupational Safety and Health Administration (OSHA) later inspected the ladder from which Rogers fell and determined that it failed to meet the specified dimensions. Based on that determination, Rogers' widow filed a wrongful death action against the architects, Barlow Eddy Jenkins, P.A. (Barlow Eddy) and the project representative Hugh Blair (Blair). The widow's experts claimed that the ladder's design and construction did not meet OSHA's standards because the spacing between the vertical bars on the ladder was too narrow and there was not enough space between the ladder and the wall to which it was secured.

Barlow Eddy moved for summary judgment. Finding the widow's proffered experts' opinions to be insufficient on the issue of causation, and that there was no genuine issue of material fact with respect to Barlow Eddy's alleged negligence, the circuit court granted summary judgment in Barlow Eddy's favor.

Rogers' widow appealed, arguing that the circuit court erred in placing a higher burden on her than was required. The court of appeals considered the evidence concerning causation. First, it recognized that the trial court had the discretion to admit evidence of OSHA's regulations for a limited purpose—meaning that while the regulations are not always admissible and may not be used to show negligence or establish causation, they may be used "as a measure of reasonable care consistent with industry standards." After reviewing the evidence, the court held that the fact that the ladder might not have been constructed pursuant to OSHA regulations did not, alone, establish negligence.

Second, the court examined the widow's experts' testimony concerning the ladder. It found the experts' opinions to be mere guesses, speculation or conjecture. No one could testify as to how it was that Rogers actually fell, i.e., whether he slipped, missed a step or fell due to some other reason not related to the ladder's dimensions. The fact that Rogers was on the ladder when he fell was not enough, alone, to establish that the non-OSHA-compliant ladder was, in fact, the cause. Because there was no eyewitness testimony, and the experts could only provide speculative conclusions, the court agreed with the trial court in finding a lack of causation. Absent proximate cause, the widow was unable to establish that the architect was responsible for her husband's death. The court consequently affirmed the ruling of summary judgment in favor of Barlow Eddy.

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