



# Alerts

## Professional Lines Alert

August 10, 2010

- [Real Estate Agent/Broker](#)
  - [Pest Inspection](#)
  - [Accountant](#)
  - [Architect/Engineer](#)
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### Real Estate Agent/Broker

*Barfield v. Hal Realty, Inc.*, 232 P.3d 286 (2010)

Colorado law distinguishes between a "transaction broker" and a "real estate broker." A transaction broker facilitates communication and negotiation but is not an agent of a buyer or a seller and owes no fiduciary obligation to either. In contrast, a real estate broker owes a fiduciary duty to his or her principal. In this case, the transaction broker represented the subject property as a "turn-key business" but the property lacked the appropriate permits for both the water supply and sewage. The buyer sued the transaction broker for negligent misrepresentation, concealment and fraud. The transaction broker prevailed by summary judgment and on appeal because the broker had no actual knowledge of the permit issues. Further, by statutory limitation, the transaction broker had no duty to investigate.

*Greenlake Capital, LLC v. Bingo Investments, LLC*, 185 Cal. App. 4th 731 (2010)

Greenlake Capital was retained to assist in identifying and raising financing. It was to be paid two percent of the financing upon the closing of any deal. In accordance with the agreement, Greenlake sought \$3 million. Bingo paid \$300,000. Greenlake sought to enforce the agreement. Bingo obtained summary judgment on the ground that Greenlake was not a licensed real estate broker. Summary judgment was reversed because the trial court failed to determine which services fell within the scope of the licensing statute, Cal. Bus. & Prof. Code § 10131. Those engaging in activity that requires a real estate license in California, should be sure to be licensed.

### Pest Inspection

*Formet v. The Lloyd Termite Control, Co.*, 185 Cal. App. 4th 595 (2010)

The pest inspection company inspected the residence and provided a "Wood

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[Accountants Liability](#)

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[Real Estate Agents & Brokers Liability](#)

[Securities Brokers' Liability](#)

[Technology Errors & Omissions](#)



Destroying Pests and Organisms Report" which disclosed certain areas of dry rot. It recommended remediation, which was not performed. The property was sold, and a guest of the new owners was injured when a balcony railing failed, allegedly due to dry rot. The inspection report did not identify any damage in the specific area where the railing failed. The pest inspection company prevailed by summary judgment and on appeal because under California law, in the commercial context, a provider of information is not liable to third parties who are neither the beneficiaries of, nor parties to, a contract.

### **Accountant**

*Duncan v. State Board of Accountancy*, 232 P.3d 322 (2010)

An accountant provided tax services for a married couple for several years. The wife asked the accountant for a referral for a divorce attorney. Thereafter, a personal relationship developed between the accountant and the wife. Minimal tax services were provided after that date and there was no contention that the services were below the standard of care. The husband, however, filed a complaint with the Idaho State Board of Accountancy (Board) alleging that the personal relationship was not disclosed. The accountant admitted that there was no formal disclosure but presented evidence that the husband was aware of the relationship when the supplemental work was performed. The husband did not formally consent to the continued representation. The Board fined the accountant for a conflict of interest. The Idaho Supreme Court found the accounting board's decision reasonable as the rule required disclosure of any personal relationship. The Court stated that professional standards should not be dependent upon the accountant's subjective understanding of the client's thoughts and concerns. Professionals should note that potential conflicts of interest should always be disclosed.

### **Architect/Engineer**

*Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722 (2010)

The Indiana Supreme Court affirmed the application of the "economic loss rule" to architect and design professionals. The Court explained that contract law governs damage to the product or service itself and purely economic loss arising from the failure of the product or service to perform as expected. Damage to other property generally permits a tort recovery. In this case, a library purchased a complete refurbishing of the library facility from multiple suppliers, including engineers and design professionals. Therefore, the "other damage" was not distinct from the project as a whole. Further, the Court held that "there is no liability in tort to the owner of a major construction project for pure economic loss caused unintentionally by contractors, subcontractors, engineers, design professionals, or others engaged in the project with whom the project owner, whether or not technically in privity of contract, is connected through a network or chain of contracts."

*JNY, L.P. v. Raba-Kistner Consultants, Inc.*, 311 S.W.3d 584 (2010)

The Texas Court of Appeals resolved a statutory conflict by determining that affidavits of merit are only required when a complaint is filed against an individual who is a registered architect or licensed professional engineer. Corporate entities are not "design professionals" as that term is statutorily defined, and therefore a certificate of merit was not required.

*Northview Christian Church, Inc. v. Monolithic Constructors, Inc. d/b/a Monolithic Dome Institute*, 2010 WL 2812849 (N.D. Tex, 2010)

Architects entered into a contract with an Alabama church to build two church buildings in Alabama. The contract required all disputes to be resolved in Utah. The U.S. District Court for the Northern District of Texas enforced the clause, severed the claim against the architects from the remainder of the action and transferred that cause of action to the federal court in Utah.

*Trikon Sunrise Associates, LLC v. Brice Building Company, Inc. a/k/a Brice Construction Company*, 2010 WL 2882434 (Fla. 4th DCA 2010)

An architect contracted with a tenant to design a fitness center, but was not a party to the contract for the construction of the building. During construction, a hurricane damaged the building. The owner of the building, which was not a party to



the design contract, sued the architect alleging that he had assumed certain engineering duties relating to review and inspection of the failed bracing. The court denied summary judgment because the design contract included site visits during construction. A Florida statute defines the duty of an architect to include job-site inspection. Thus, a question of fact existed regarding the scope of the duties assumed by the architect.

For further information, please contact [Cassidy E. Chivers](#), [Marissa I. Delinks](#) or your regular [Hinshaw attorney](#).

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