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Newsletters

The Professional Line - May 2011

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To Disclose or Not Disclose?

By: Bradley M. Zamczyk

Real estate brokers and their agents (collectively, "agents") owe disclosure duties to prospective buyers of residential property. Buyers' agents must disclose all material information that might affect their clients' willingness to enter into or complete a real estate transaction. Conversely, sellers' agents only need to disclose information affecting the value or desirability of a property that a "reasonably competent and diligent visual inspection" would reveal. Cal. Civ. Code § 2079 (emphasis added). A discussion of agents' disclosure duties in California follows.

Recent Court Rulings — Case Summaries & Conclusions

Accountants: Accountants Owed Employees No Duty to Verify Information Provided by Employer in Preparing W-2 Forms
Giacometti v. Aulla, LLC, 187 Cal. App. 4th 1133 (2010)

The California Court of Appeal for the Second District held that plaintiff restaurant employees could not maintain a professional negligence action against defendant accountants hired by defendant, employer to prepare W-2 forms based on a lack of duty to the employees to verify the information provided by the employer. *Giacometti v. Aulla, LLC,* 187 Cal. App. 4th 1133 (2010).

For more information, please contact your regular Hinshaw attorney.

Architects & Engineers: Illinois Supreme Court Confirms That Engineer's Standard of Care Governed by Scope of Professional Services Contract
T*hompson v. Gordon,* 2011 WL 190290 (Ill. Jan. 21, 2011)

The Illinois Supreme Court earlier this year issued an opinion and ruling in favor of a highway engineer who was a named defendant in a wrongful death lawsuit. The case stemmed from a fatal auto accident that occurred when a car hit a low median separating traffic on a highway overpass bridge and vaulted over it into oncoming traffic. The engineer had been retained as part of a redevelopment

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project of the area surrounding and including the bridge. The engineer's contractually stated "scope of services" included "improvements" to the roadways and "replacement" of the structural design of the bridge deck. The bridge deck was at issue in the litigation. With the support of expert testimony, plaintiffs maintained that the bridge deck design prepared by the engineer should have included a Jersey barrier. The engineer countered that it was not contractually obligated to provide median barrier analysis or design; its scope of services was limited to replacement of the existing bridge deck design.

For more information, please contact Cassidy E. Chivers or your regular Hinshaw attorney.

Architects & Engineers: Insurer Must Defend Surveyor for Alleged Failure to Warn of Subsequently Discovered Error
Landmark American Insurance Company v. Soutex Surveyors, Inc., 2010 WL 5692073 (E.D. Tex. Dec. 22, 2010)

A land surveyor's professional liability (PL) insurer sought a declaratory judgment that it had no duty to defend and indemnify the insured surveyor. The insurer made the novel argument that the policy's coverage for "professional services rendered in the course of surveying and civil engineering" did not include the surveyor's "alleged failures to warn of dangers attributable to subsequently discovered surveying elevation errors." The carrier argued that a failure to warn of a later discovered error was really "an alleged breach of a clerical or ministerial duty." It further contended that regardless of professional education or training, a duty to disclose information that makes an earlier statement untrue or misleading is simply a nonprofessional (*i.e.,*general liability) theory of fault. The court concluded that "reason and common sense" will cause Texas courts to regard a failure to warn of a subsequently discovered error as a failure to render a professional service "when discovery of such errors is premised on knowledge obtained from surveying experience and when surveying expertise underlines the alleged liability for failure to warn."

For more information, please contact Cassidy E. Chivers or your regular Hinshaw attorney.

Accountants: Recovery Against Accountant for "Holder" Claims Requires Direct Communications With Accountant
Grant Thornton LLP v. Prospect High Income Fund, 314 S.W.3d 913 (2010)

The Texas Supreme Court issued an opinion setting forth the conditions under which an accountant can be held liable to a nonclient for an audit under Section 552 of the Restatement of Torts. The Court stated that for liability to attach, the accountant must have been aware of the non-client and intended it to rely on the audit. Such liability does not extend to all members of a limited class of potential investors and "holder" claims require direct communications between the plaintiff and the defendant accountant.

For more information, please contact your regular Hinshaw attorney.

Real Estate: California Court Clarifies Term "Prevailing Party" in Contractual Attorneys' Fee Provisions
de la Cuesta v. Benham, 2011 WL 1126585 (Cal. Ct. App. Mar. 29, 2011)

Many real estate-related contracts—including listing agreements, residential purchase agreements and lease agreements contain a provision whereby the prevailing party on a contract is entitled to its attorneys' fees and costs. See, *e.g.,* California Association of REALTORS®, Residential Listing Agreement ¶ 15 (RLA Rev. 4/06). Cal. Civ. Code § 1717 authorizes a trial court to determine the prevailing party on a contract, but defines "prevailing party" as the "party who recovered a greater relief in the action on the contract." Helpfully, *de la Cuesta v. Bon-ham* provides guidance on what circumstances justify a trial court's finding of "prevailing party" for the purposes of awarding attorneys' fees and costs pursuant to a contractual attorneys' fee provision.

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