

Threats of lawsuits

Unfortunately, members occasionally become so upset with their local association that they threaten to sue that association. These types of threats typically arise when the member either believes he or she is being unfairly forced to participate in a professional standards proceeding or does not like the result of a professional standards proceeding. While the vast majority of threats never actually end up in litigation, a member did, in fact, initiate litigation against the West Michigan Lakeshore Association of REALTORS® (“WMLAR”). Fortunately, WMLAR obtained a result in the case that should significantly help to reduce risk to all local associations within Michigan.

As an aside, REALTORS® are well aware that the Code requires that associations treat all ethics proceedings confidentially. In this instance, however, the REALTOR® in question disclosed all the facts in the case in a public forum when he filed the litigation, and WMLAR was required to respond in order to defend itself. Everything disclosed in this article is now a matter of public record.

The facts that led up to this case against WMLAR are straightforward. REALTOR® Dean Borland (“Borland”) became a member of WMLAR in July 2002. In doing so, Borland, in his application for membership, expressly agreed to “abide by the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS® and the Constitution, Bylaws and Rules and Regulations of [WMLAR], the State Association, and the National Association of REALTORS®. As a result of his WMLAR membership, Borland was able to advertise properties both for sale and for rent using the copyrighted REALTOR® logo and WMLAR’s multiple listing service.

In September 2005, an ethics complaint was filed with WMLAR against Borland by Edward and Kathleen Butler (the “Butlers”). The Butlers are members of the public who had rented a vacation home through Borland. The Butlers’ complaint alleged that Borland had made various misrepresentations about the location of the vacation property that he rented to them and had otherwise mishandled their account. The Butlers claimed that Borland’s listing of the property they rented in the multiple listing service maintained by WMLAR contained deceptive terms.

WMLAR processed the Butlers’ ethics complaint against Borland through the procedures set forth in NAR’s Code of Ethics and Arbitration Manual, as amended to comply with

Michigan law (the “Manual”). A hearing was held, at which Borland was afforded a full opportunity to present evidence and cross-examine witnesses presented by the Butlers, as specified in the Manual. Upon completion of the hearing, the hearing panel found Borland to be in violation of Articles 1, 2, 11 and 12 of the Code of Ethics. The hearing panel imposed the following sanctions: (a) a letter of reprimand be placed in Borland’s file; and (b) Borland must complete a course entitled “Ethics for the Real Estate Property Manager.” Borland appealed the hearing panel’s decision to WMLAR’s Board of Directors. Borland retained legal counsel for his appeal to WMLAR’s Board of Directors. He claimed before WMLAR’s Board of Directors that WMLAR lacked jurisdiction to hear the Butlers’ complaint because Borland’s property management of rental and vacation property to the Butlers is not a real estate transaction covered by the Code of Ethics. This argument was considered and rejected by WMLAR’s Board of Directors, and the decision of the hearing panel was upheld.

Borland then commenced a lawsuit against WMLAR in the Ottawa County Circuit Court. In his litigation, Borland sought a declaration from the Ottawa County Circuit Court that WMLAR had no authority to process and hear the Butlers’ ethics complaint because “the rental and management of transient vacation accommodations does not constitute a transaction in real estate” and that the Code of Ethics “does not apply to Plaintiff’s [Borland] entire life, but rather his conduct as a REALTOR® while completing a transaction in real estate.”

WMLAR did not take the position in the litigation that the Code of Ethics applied to Borland’s entire life. WMLAR did take the position that the management and rental of transient vacation accommodations is in fact a “real estate transaction” under the Code. WMLAR further took the position that the Code of Ethics is much broader and covers far more than a REALTOR®’s conduct in a “real estate transaction.” WMLAR took the position that the Code of Ethics not only applies to a “real estate transaction,” but also to any “real estate-related activity.”

WMLAR also contended that the litigation initiated by Borland constituted nothing more than an internal matter involving membership in a fully voluntary trade association. By agreeing to be a member of the REALTOR® organiza-



tion and of WMLAR, Borland had agreed to be bound by the decision of WMLAR and to waive any cause of action arising from that decision.

The Ottawa County Circuit Court found that Borland had been engaged in a real estate-related activity which fell within the Code of Ethics; thus, it granted WMLAR's motion for summary disposition. Borland then appealed the decision by the Ottawa County Circuit Court to the Michigan Court of Appeals.

On appeal, WMLAR argued, among other things, that its conduct in this case was not subject to judicial review in light of the waiver provision contained in the Manual, which states:

Every member, for and in consideration of his right to invoke arbitration proceedings and to initiate complaints under the Code of Ethics as a member of the NATIONAL ASSOCIATION OF REALTORS®, hereby waives any right of action against the Board, any Board member, or any member of a Hearing Panel or tribunal arising out of any decisions, determinations, or other action taken or rendered under these procedures in the absence of willful or wanton misconduct. Further, as a condition of continued membership, every member expressly waives any cause of action for libel, slander, or defamation that might arise from the filing or consideration of any ethics complaint or arbitration request. (the "Waiver").

On December 11, 2007, the Michigan Court of Appeals issued its decision. A copy of the decision is attached to this article. In finding in favor of WMLAR, the Michigan Court of Appeals held:

The WMLAR hearing panel held a hearing with regard to the complaint about the rental property in question. After the hearing panel found grounds to sanction plaintiff [Borland], WMLAR's Board of Directors entertained plaintiff's appeal and ultimately denied it. Plaintiff then attempted to circumvent WMLAR's internal procedures by filing a complaint in the circuit court. However, by voluntarily joining WMLAR, plaintiff agreed to be bound by the Code of Ethics. The Code spe-

cifically provides that a member "hereby waives any right of action against the Board, any Board member, or any member of a hearing panel or tribunal arising out of any decisions, determinations, or other action taken or rendered under these procedures in the absence of willful or wanton misconduct."

The Court of Appeals analyzed the effect of the Waiver as part of the contract between WMLAR and Borland with respect to his membership in WMLAR. In construing this contract, the Michigan Court of Appeals held:

The waiver provision at issue here is unambiguous and clearly reflects an intent to bar a lawsuit such as the one initiated by plaintiff [Borland]. Indeed, there was no evidence of "willful or wanton misconduct" on the part of WMLAR, and plaintiff's complaint does not even allege such conduct. Under the circumstances, plaintiff simply cannot circumvent the Code of Ethics and the rulings of WMLAR by resorting to a lawsuit in the circuit court. WMLAR was entitled to summary disposition.

In obtaining this decision from the Court of Appeals, WMLAR achieved the broadest victory possible, i.e., a determination by the Court that the Waiver was effective and that a member may not circumvent the Code of Ethics by resorting to a lawsuit in the circuit court. In the absence of willful or wanton misconduct by a local association, the Waiver effectively protects against risk of lawsuits arising from a local association's handling of professional standards proceedings with respect to arbitration or ethics. Obviously, great care should be taken to adhere to the procedures set forth in the Manual so there can never be a claim that an association engaged in any "willful or wanton misconduct." In the absence of such conduct, a local association may respond firmly when threatened with litigation by a disgruntled member involved in a professional standards proceeding. **MAR**

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