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CAN BUYERS PHOTOGRAPH A SELLER'S PROPERTY?

A number of brokers and salespersons have asked whether it is legal for potential buyers to take photographs of a home they are viewing. Potential buyers may want to take pictures so they have a better recollection of the home at a later date when they are weighing their options and comparing that home with other homes they have viewed. After all, there are already 58 or so photographs of the home posted on the multiple listing service (“MLS”), so it seems as though the sellers have already consented to allowing their home to be photographed by potential buyers, right? Not necessarily. The sellers have a legal right to privacy and may believe that the photos published in the MLS should be sufficient. The sellers may also have concerns about the photos being taken for illegal purposes such as “casing” the home to later burglarize it or selling the photos for commercial purposes. So, naturally, given these competing concerns, the answer to whether it is permissible for potential buyers to photograph a seller’s home is . . . it depends!

Michigan law protects individuals from an invasion of their privacy. The immediate focus of any invasion of privacy claim is whether the complainant had a “*reasonable*” expectation of privacy. In Michigan, an unlawful invasion of privacy includes, among other things: (1) an intrusion into another’s solitude or private affairs; or (2) disclosure of private facts.¹

There are three necessary elements to establish a case of intrusion into private affairs: (1) the existence of private subject matter, (2) a right possessed by the complainant to keep that subject matter private, and (3) the acquisition of that subject matter through some method objectionable to a reasonable man.² This type of invasion of privacy claim focuses on the manner

¹ *Battaglieri v MacKinac Center for Public Policy*, 261 Mich App 296 (2004); *Dalley v Dykema Gossett PLLC*, 287 Mich App 296 (2010).

² *Dalley*, 287 Mich App at 306.

in which the information was obtained.³ The other type of invasion of privacy claim involves the disclosure of private information where it would be highly offensive to a reasonable person and the information is of no legitimate concern to the public.⁴ While there is no existing case law directly on point, there is a good argument that some types of photographs of another person's home could result in an invasion of privacy claim even if the home is listed for sale and generally accessible to members of the public.

The location from where the photo is taken is important. Generally speaking, authorities on the subject agree that if the photographer is on public property, such as a public street, he or she can photograph private property. So, a potential buyer, standing in the public street, can photograph sellers' homes.⁵ If, however, the potential buyer is standing on private property (*i.e.*, the inside of the house), then that person's right to take photos of that seller's home is limited.

When it comes to taking photographs of the inside of a seller's home, the line between what may be considered an invasion of privacy and what might be considered reasonable is not easily drawn. There is no bright-line legal formula or test. One way to look at the question from the potential buyer's perspective is "am I buying it?" That is, is the item or subject of the photograph something that would be included with the sale of the home? If the answer is yes, arguably, the buyer should be able to photograph the item or subject. Simply put, sellers should not have a reasonable expectation of privacy in something they are trying to sell and want potential buyers to see. Under this analysis, potential buyers can certainly take photographs of, for example, the kitchen cabinetry or the fireplace.

³ *Lewis v LeGrow*, 258 Mich App 175 (2003).

⁴ *Duran v Detroit News*, 200 Mich App 622 (1993).

⁵ *Jaubert v Crowley Post-Signal, Inc*, 376 So2d 1386 (1979).

What about personal possessions located within the home? Obviously, in the vast majority of cases, the potential buyer would not be purchasing the sellers' personal possessions. And, as a general proposition, most of us would consider our personal possessions to be private. If an item is not being purchased by the buyer, but the buyer finds the item novel or interesting, then it seems much more likely that his taking a photograph of the item would be viewed as an invasion of privacy. This is particularly true if the buyer shares the photograph with others – *e.g.*, “look what I saw at an open house!”

Again, however, location plays a key role in this analysis. For example, furniture is typically not included in the sale of a home, and ordinarily would be considered “private.” However, given the fact that furniture is typically located throughout the home, in plain sight, and in areas of the home which the seller knows will be viewed by potential buyers, it is highly unlikely that sellers would have a reasonable expectation of privacy in their furniture.

But, what about the family photos and other memorabilia sitting *on* the furniture – such as in a bookcase or on top of a desk? Here too, the items are personal possessions – and generally thought of as much more personal than furniture. Certainly, these are items that are not being purchased by the potential buyer. However, again, the items are in plain view and in areas of the home that a seller should not reasonably expect to be private to a potential buyer. In this instance, the answer may be determined not so much by location but by “what” is being photographed. Taking a picture of a room in a house in which personal family photographs are located may not constitute an invasion of privacy. In this situation, the appearance of the family photo in the background of a photograph of the room is merely incidental. However, this is different from taking a picture of the family photo all by itself. In this latter situation, the taking of the picture might be considered an invasion of privacy.

Taking it one step further, what about potential buyers photographing the contents of the sellers' furniture, such as their contents of their desk, nightstand or jewelry box. Again, it is likely that photographs taken of the pieces of furniture themselves would not cross the line of invading a seller's privacy. However, the contents of the furniture are not in plain sight and are not being purchased by the potential buyer. Rather, the contents of furniture are in a location in which the seller has a legitimate expectation of privacy and should not be photographed.

What about closets? Do sellers have a legitimate expectation of privacy in the contents of their closets? After all, the buyer *is* purchasing the closet itself. The buyer is not, however, purchasing its contents. And, the items in the closet are not in plain sight. Here, the answer may depend on "what" is being photographed. If the items in the closet are personal, but not typically considered "*private*," such as bath towels, coats and linens, then photographing them as incidental to taking a picture of the closet is probably not an invasion of privacy. However, photographs of more "private" items, such as a safe located in a closet could be a different story. A seller probably has a reasonable expectation of privacy in the location of his/her safe. Similarly, medications and other pharmaceutical products contained in closets or medicine cabinets or drawers should never be photographed. That could lead to the inadvertent disclosure of a seller's illness or disability and an invasion of privacy. The rule of thumb here is to use common sense and err on the side of caution. If the item to be photographed is questionable as to its "private" nature, a buyer should not take a picture!

Overall, buyers should conduct themselves in a reasonable manner when photographing the property they view. Potential buyers should not take, publish or disclose photos in such a manner that would reveal private and potentially embarrassing facts about the sellers. And, potential buyers should not use any photographs taken for any purpose other than to

determine if they want to buy the home. Once a home is eliminated from their consideration, the photos should be promptly deleted.

On the sellers' side, they may be counseled to remove from plain sight any personal items they do not want photographed like family memorabilia, a gun collection, antiques or expensive artwork. Such items can be taken off-site or stored in areas of the home in which the seller has a legitimate and reasonable expectation of privacy.

A Note on Realtor® Access

We occasionally get questions on whether it is permissible for a Realtor® without an actual buyer-client to schedule a showing for the purpose of taking photographs or videos of the interior of the home. Realtors® are strongly cautioned against doing so without the express authorization of the listing agent/seller. Sellers provide access through the MLS for the purpose of showing their home to potential buyers. Remember that under the law persons are entitled to a "reasonable" expectation of privacy. A person has a right to object if someone gains access to his or her private affairs through "some method objectionable to a reasonable man." It is not too difficult to imagine that a seller may claim that a real estate agent obtaining access to his or her home by pretending to have a buyer-client is "objectionable to a reasonable man." Such a practice could also be deemed a violation of SOP 1-16 and/or SOP 3-9.

Standard of Practice 1-16

Realtors® shall not use, or permit or enable others to use, listed or managed property on terms or conditions other than those authorized by the owner or seller.

Standard of Practice 3-9

Realtors® shall not provide access to listed property on terms other than those established by the owner or the listing broker.

FACEBOOK REQUIRED TO REFORM ITS ADVERTISING PLATFORM

In the Spring of 2018, a private nonprofit fair housing organization, the National Fair Housing Alliance (“NFHA”), filed a lawsuit against Facebook claiming that Facebook’s advertising system unlawfully allowed advertisers of homes for sale or lease to exclude people based upon race, gender and other protected classes.

By way of background, Facebook’s business model allows its advertisers to target specific groups of people. Facebook gathers huge amounts of information by tracking its users’ online activity – both on Facebook and elsewhere through the internet. The end result is a consumer profile that reflects each Facebook user’s demographic, location, behaviors and interests. This allows Facebook’s advertisers to focus their ad campaign with great specificity. For example, a company with a new high-end jogging stroller could advertise only to new parents who have an “affinity” for running and make over \$200,000 annually. The model also allows an advertiser to market to, or exclude, particular groups that are protected under federal and state anti-discrimination laws -- for example, women, young adults, or persons of a particular ethnic group or religious affiliation.

What is said to have caught the NFHA’s attention was an investigative news organization who claimed to have placed a Facebook advertisement that was targeted to people who were house hunting but excluded anyone who had an “affinity for” African-American, Asian-American or Hispanic people.⁶ NFHA then conducted its own investigation by creating a fictitious advertisement for an apartment to be run throughout the entire United States. NFHA used Facebook’s advertising options to customize its ad and its target audience.

⁶ Julia and Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*, Propublica.org (Oct. 28, 2016), <https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race>.

Specifically, Facebook’s “exclusions” feature allowed NFHA to exclude African-Americans and Hispanics from the ad’s potential audience by selecting Facebook’s demographic pre-set options.

According to NFHA, it then notified Facebook in writing that its advertising features violated the Fair Housing Act (“FHA”), which prohibits discrimination in housing transactions on the basis of race, color, national origin, religion, sex, disability or familial status (having children under 18 in a household; including pregnant women). NFHA met with Facebook representatives to explain that the FHA and other civil rights laws prohibited any system which exclude certain categories of people from viewing advertisements for housing, employment or credit. NFHA requested that Facebook cease and remedy its discriminatory behavior. In early 2017, Facebook published a statement on its website stating that it was ending the use of “ethnic affinity marketing” for ads offering housing, employment or credit and would require advertisers in these categories to self-certify that their ads complied with all anti-discrimination laws.

Despite Facebook’s promises, no real changes appear to have been made prior to the filing of the lawsuit. The same investigatory news organization that was responsible for the first inquiry published a second report in late 2017. This organization reported that it had published dozens of fictitious rental housing ads on Facebook in which it was allowed to block the ads from certain categories of users, such as African-Americans, mothers of high school kids, people interested in wheelchair ramps, Jews, expats from Argentina, and Spanish speakers.⁷ Based on Facebook’s prior announcement that it would end the use of “ethnic affinity marketing” for housing opportunities, Facebook should have rejected these ads. Other ads should have prompted a screen to pop up asking for self-certification of no discrimination. The news organization reported that

⁷ Julia Angwin, Ariana Tobin and Madeleine Varner, *Facebook (Still) Letting Housing Advertisers Exclude Users by Race*, Propublica.org (Nov. 21, 2017), <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin>.

Facebook had rejected none of its ads and that it never encountered a self-certification screen at any time.

In response to this second investigative news story, NFHA itself conducted another investigation. During this second investigation, NFHA was able to create ads and distribute those ads in a manner that excluded individuals based on race, disability, sex and familial status. As a result, NFHA filed its lawsuit in March of 2018.

Five months later, the U.S. Department of Housing and Urban Development (“HUD”) also took action against Facebook. In its Complaint, HUD claimed that Facebook’s advertising targeting tools enable advertisers of housing to discriminate as follows:

- Facebook enabled advertisers to discriminate based on sex by showing ads only to men or only to women.
- Facebook enabled advertisers to discriminate based on disability by not showing ads to users whom Facebook categorizes as interested in “assistance dog,” “mobility scooter,” “accessibility” or “deaf culture.”
- Facebook enabled advertisers to discriminate based on familial status by not showing ads to users whom Facebook categorizes as interested in “childcare” or “parenting,” or by showing ads only to users with children above a specified age.
- Facebook enabled advertisers to discriminate based on religion by showing ads only to users whom Facebook categorizes as interested in the “Christian Church,” “Jesus,” “Christ” or the “Bible.”
- Facebook enables advertisers to discriminate based on national origin by not showing ads to users whom Facebook categorizes as interested in “Latin America,” “Southeast Asia,” “China,” “Honduras,” “Somalia,” the “Hispanic National Bar Association” or “Mundo Hispánico.”
- Facebook enabled advertisers to discriminate based on race and color by drawing a red line around majority-minority zip codes and not showing ads to users who live in those zip codes.

In its Complaint, HUD also stated that Facebook promotes its advertising targeting platform for housing purposes with “success stories” for finding “the perfect homeowners.” HUD’s Complaint

was an internal complaint that triggered a factfinding investigation separate and apart from the NFHA lawsuit.

HUD's decision to target online housing discrimination was supported by the National Association of Realtors®. Immediately after HUD filed its complaint against Facebook, NAR's president issued a statement commending HUD for "taking decisive action to defend fair housing laws, and for working to ensure its intended consumer protections extended to wherever real estate is marketed."⁸

Meanwhile, in the NFHA lawsuit, Facebook asked the court to throw out the case on the basis that Facebook was merely an "interactive computer service" and therefore was immunized from FHA liability under federal law.⁹ This was an argument that had been successfully made by craigslist when it was sued years ago for housing advertisements on its website that said things like "no children" or "no minorities." Craigslist had argued, and the court had agreed, that craigslist was not responsible for these discriminatory advertisements because it did not have any involvement in the development or creation of the content at issue.¹⁰ As stated by that court:

Doubtless craigslist plays a causal role in the sense that no one could post a discriminatory ad if craigslist did not offer a forum. That is not, however, a useful definition of cause. One might as well say that people who save money "cause" bank robbery, because if there were no banks there could be no bank robberies. An interactive computer service "causes" postings only in the sense that of providing a place where people can post. * * * If craigslist "causes" the discriminatory notices, then so do phone companies and courier services (and, for that matter, the firms that make the computers and software that owners use to post their notices online),

⁸ <https://www.nar.realtor/newsroom/realtors-applaud-hud-decision-to-target-online-housing-discrimination>

⁹ The federal Communications Decency Act ("CDA") immunizes "interactive computer service providers" against liability arising for content created by third parties. The CDA does not immunize an "information content provider" defined as a website operator that is "responsible, in whole or in part, for the creation or development of" content. 47 USC § 230(f)(3).

¹⁰ *Chicago Lawyers' Committee for Civil Rights Under Law, Inc v craigslist, Inc*, 519 F3d 666 (2008).

yet no one could think that Microsoft and Dell are liable for “causing” discriminatory advertisements.

The U.S. Justice Department intervened in the NFHA lawsuit and argued that this situation was very different from the one in *Craigslist* because Facebook had actively collected the pre-populated list of demographics that its advertisers used to exclude specific types of people. In fact, the government argued, Facebook “actively marketed the availability, ease of use and effect of those classifications to potential advertisers without regard to the possible illegality of those classifications under federal fair housing laws.” In essence, the argument was made that Facebook was not immune from liability because, unlike *craigslist*, Facebook had actually participated in the making of the discriminatory advertisements.

The hearing on Facebook’s motion to have the case thrown out was adjourned three times, ultimately, allowing for the NFHA case to be settled before the motion could be heard and decided by the New York federal court. The settlement, announced on March 18, 2019, requires Facebook to pay \$1,950,000 in damages, attorneys fees and costs.¹¹ Facebook must also provide a \$500,000 credit to NFHA for advertising on Facebook that promotes fair housing rights. The settlement agreement also requires Facebook to implement comprehensive changes to its housing, employment and credit advertising which eliminates the targeting of ads based on, among other things, categories that describe or appear to relate to personal characteristics or classes protected under federal, state, and local fair housing laws, including, race, color, national origin, gender, age, religion, family status, disability, and sexual orientation. And, finally, Facebook must create and maintain a new page for all housing ads and provide fair housing training for its employees.

¹¹ According to the NFHA Complaint, in 2017, Facebook generated over \$40 billion in revenue (Facebook Investor Relations, <https://investor.fb.com/financials/sec-filings-details/default.aspx?FilingId=12512043> (Facebook, Inc. Annual Report for the Fiscal Year Ended December 31, 2017).

Despite the settlement of the NFHA lawsuit (and the changes that Facebook agreed to make as part of that settlement), HUD did not give up its pursuit of Facebook. In fact, two weeks after the NFHA settlement, HUD formally announced that it was pursuing its Complaint against Facebook seeking damages on behalf of “any aggrieved person” as well as the “maximum civil penalty” for each of its violations of the Fair Housing Act. This case, which could result in millions of dollars in penalties, remained pending at the time this article was written.

UPDATE: AFTER THE LEGALIZATION OF RECREATIONAL MARIJUANA

I. Introduction

With the legalization of marijuana for use by anyone over the age of 21, the issues raised by marijuana production, sale, and use in Michigan will be far more common. Medical marijuana remained a cottage industry. Broad legalization means a dramatic increase in scale, and marijuana shops could become as ordinary as many other retail uses.

Although the questions may arise more often, the nature of the problem for Realtors® has not really changed. It is the continued conflict with federal law. All the uses now permitted under Michigan law are strictly prohibited under federal law and are subject to criminal penalties¹² and civil forfeiture, even if the owner of the property seized is never even charged or convicted of a crime.

Consequently, the same cautions still apply: Realtors® should take great care offering advice or working on a transaction if the property's past, current, or intended use involves marijuana production or sale. Mere use of marijuana on the property may present less concern, though it still may present complications.

II. The News

Despite statewide legalization, local governments in Michigan have the choice of completely prohibiting or limiting the number of marijuana businesses in their communities. Over 600 local governments have prohibited marijuana businesses as of the date of this article,¹³ according to the [list](#) compiled by the new state Marijuana Regulatory Agency (MRA).¹⁴ Local

¹² 21 USC § 812.

¹³ That is a little more than a third of the 1,773 local governments in Michigan.

¹⁴ The MRA is responsible for implement both the new Michigan Regulation and Taxation of Marijuana Act (MRTMA), enacted by the November 2018 referendum, and the older Medical Marihuana Act (MMA)MCL 333.26424 et seq.

governments may not, however, prohibit personal cultivation, processing, or use by anyone over the age of 21. The MRA also keeps an unofficial [list](#) of those communities that have adopted regulations to allow them.

With two-thirds of the states permitting at least medical marijuana use and 10 allowing wider use, bipartisan legislation has been introduced again this year in Congress to create a broad exemption for anyone acting under those state laws. Other bills, also with bipartisan sponsors, would end civil asset forfeiture for marijuana offenses. None of these bills have advanced beyond committee hearings, however. Senate Majority Leader Mitch McConnell still opposes any exemption and has blocked legislation to change federal law to allow banking for marijuana businesses. Likewise, although new U.S. Attorney General William Barr initially indicated his preference for the Obama administration's policy of not enforcing federal law to interfere with state-regulated marijuana enterprises, he has also stated his support for a continued nationwide ban on marijuana use. In other words, relief is not on its way soon.

III. Representing Landlords

Occupancy: Many Realtors® have asked whether or not residential landlords are *required* to allow registered patients to use or grow marijuana in their apartments. The new law changes the answer somewhat. Under either marijuana law, a landlord is not required to lease residential property to a person who smokes or cultivates marijuana, so long as there is a specific written provision in the lease prohibiting that conduct.¹⁵ An example of a clause used is:

Drug-Free Housing: (a) Tenant, any member of the Tenant's household, or a guest or other person under the Tenant's control shall not engage in or facilitate criminal activity on or near the premises, including, but not limited to, violent criminal activity or drug-related criminal activity; (b) Tenant or members of the Tenant's household shall not permit the premises to be used for, or to facilitate,

¹⁵ MCL 333.26427(c)(3).

criminal activity; (c) “Violent criminal activity” means any felonious criminal activity that has as one of its elements the use, or threatened use, of physical force against the person or property of another; (d) “Drug-related criminal activity” means the illegal manufacture, sale, distribution, or use or possession with intent to manufacture, sell, distribute or use of a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802)). The possession, sale or use of any illegal drug in the premises or anywhere on the property is prohibited. **The smoking of marihuana and the growing of marihuana plants anywhere on the premises is prohibited even if the possessor is a registered patient or caregiver under the Michigan Medical Marihuana Act, MCL 333.26421, et seq.**

If a tenant’s use is permitted under the MMA, he or she may still be evicted for violating this provision, but the accelerated eviction process for drug use, with just 24-hour notice,¹⁶ would not apply as the use is not “unlawful.”

The MRTMA extends a property owner’s rights, but with a twist: it allows prohibiting any consumption, cultivation, distribution, processing, sale, or display of marijuana or marijuana accessories on the property, whether by lease or by any other rule. However, a lease may **not** prohibit “lawfully possessing and consuming marijuana *by means other than smoking*,”¹⁷ regardless of whether the use is for medical or recreational purposes. For residential leases, the lease clause suggested above can still be used, as it only prohibits smoking and growing marijuana. But landlords should understand that they cannot prohibit its use altogether. In a commercial lease, where a broader range of uses is possible, additional language can be added to prohibit distribution, processing, sale, or display of marijuana or marijuana accessories.

Risk of forfeiture: Both Michigan marijuana statutes include protection from property forfeiture under state law, but their protections for property owners and landlords differ. The differences matter because both state and federal forfeiture laws allow law enforcement agencies

¹⁶ MCL 600.5714(1)(b).

¹⁷ MCL 333.27954(5)(italics added).

to seize real and personal property linked to a crime – even if the actual owner of the seized property is never charged or convicted of the crime.

Before leasing to a marijuana business, the owner quite simply wants to know if it is putting its property at risk. The short answer is, “Yes.” Federal law prohibits marijuana production and use, and permits forfeiture of property used in connection with those criminal activities.¹⁸ The Michigan marijuana laws provide no protection from federal prosecution and civil forfeiture. Landlords who allow marijuana facilities to operate on their property could also be prosecuted for aiding and abetting the illegal activities. Unless or until Congress acts to change the law, landlords still run the risk of federal forfeiture proceedings, as does anyone who acts to facilitate transactions for the use, production, or sale of marijuana.

Forfeiture is also still possible under state law. If a tenant violates the limits of the new law in producing or selling marijuana, property involved may be subject to forfeiture. The new MRTMA did not carry over a protection for landlords from the Medical Marijuana Licensing Act. The owner of property used for a licensed medical “marijuana facility” and who has no knowledge that the licensee violated the Medical Marijuana Licensing Act is not subject to seizure of property based on the marijuana-related offense.¹⁹ The landlord is also protected from criminal or civil penalties under state or local laws regulating medical marijuana. The new law, however, only protects a property owner who leases or allows the use of property for *legal* activities. There is no protection if the tenant violates the law, even if the landlord does not know of the violation.²⁰ That will matter to property owners because the great bulk of marijuana production and sales will be under the new act, for the simple reason that it is easier. Under the

¹⁸ 21 USC § 801, *et seq.*

¹⁹ MCL 333.27201(3).

²⁰ MCL 333.27960(1)(g).

new law there is no need to obtain written certification from a physician – only proof of age is needed to buy.

Practical problems: As noted above, Congress has also done nothing to solve the banking problem for marijuana businesses. Federal law controls banking, and banks and credit unions will not knowingly accept deposits from marijuana businesses, creating practical issues for commercial landlords just in handling rent payments. The risk of forfeiture, as well as the concern with participation in facilitating activities that violate federal law, also means that leasing to a marijuana tenant will make refinancing extremely difficult, if not impossible.

IV. Representing Buyers and Sellers

After January 1, 2020, the question of whether to participate in sale or lease transactions involving marijuana businesses will be hard to avoid for commercial Realtors® with the dramatically increased number of marijuana businesses. With the likelihood of state prosecution or forfeiture greatly diminished, many professionals -- attorneys, accountants, architects, and engineers, as well as Realtors® -- must gauge the likelihood of federal prosecution or forfeiture. The greater difficulty for Realtors® lies in the absence of two of the mainstays of any current real estate transaction: title companies and traditional lenders. They are the ones who provide (some would say dictate) major terms, as well as the documentation and financial aspects, of ordinary real estate transactions, including even the basic transfer of funds.

Title companies have joined financial institutions in refusing to perform closings, insure title, or handle loans for property used or intended to be used to cultivate or sell marijuana. If the title company has no reason to know of the planned use of the property, however, it would be unlikely the federal government could establish it had knowingly “aided and abetted” a criminal drug enterprise, and most underwriters are still not including a regular question asking if

property will be used for producing or selling marijuana. If something suggests the property will be used in the marijuana business – the business entity’s name, for example -- title companies will refuse to participate in the transaction. Because of the state licensing and local approvals such as zoning and special use permits needed to operate marijuana businesses, it is increasingly common for purchase agreements to plainly state the use for which the buyer wants approvals before purchasing the property. Neither the parties nor the Realtor® should misrepresent the nature of the business if asked.

In a transaction involving a known marijuana business, there may be a title search, but there almost certainly will not be a title insurance or title company willing to escrow funds. The transaction is likely to be cash or some form of land contract. A range of zoning, licensing, and other regulatory questions for the business are also likely to be presented. For these reasons, not only should a Realtor® encourage clients to seek legal counsel, but a Realtor® should decline to represent any client who will not agree to use counsel for this type of transaction.

V. Environmental Concerns

The Michigan Department of Environment, Great Lakes, and Energy²¹ has a workgroup to review and consider the environmental issues of the marijuana industry. Those issues are still, for the most part, not a concern in a current real estate transaction, even if the property had been used for marijuana cultivation, processing, or sale. Unlike methamphetamines, growing and processing of marijuana for smoking does not include use of dangerous chemicals that create risks for future owners or occupants of the property.

²¹ Formerly the Department of Environmental Quality or DEQ.

The production of concentrated marijuana extracts, however, may pose problems. The extracts are needed to make an increasingly popular range of edible marijuana products, from gummies, chocolate bars, and mints to infused beer and other drinks. Producing the extracts often involves the use of solvents. If used or disposed of improperly, solvents may contaminate surface water or storm drains. The environmental issues are much the same as with any other industrial facility. The extensive licensing, testing, and labeling controls for legal marijuana products mean those issues are likely to be identified well before a real estate transaction. The possibility of illegal operations does raise new concerns.

VI. Marijuana Business in the Courts

At the risk of stating the obvious, it should be noted that Michigan law offers protection only for *legal* marijuana operations. Participants in transactions operating outside the law cannot expect help from the judicial system when something goes wrong. In a recent Michigan Court of Appeals case, Zachary Varela claimed that his landlords, Brad and Catherine Spanski, had wrongfully locked him out and kept his property, a not uncommon commercial dispute. The property they kept included growing equipment and 70 marijuana plants.²² Varela explained that he and the Spanskis had entered into a lease and partnership to equip and operate a medical marijuana growing enterprise. Varela qualified to grow legal medical marijuana, but, the Spanskis pointed out in their response, the agreements between Varela and the Spanskis required Varela to grow a lot more marijuana than the law allowed. The parties were also going to be partners in illegal distribution of the marijuana. Why would the Spanskis admit to their own illegal conduct? The answer is a common law rule – the wrongful conduct rule -- that bars any

²² *Varela v Spanski*, ___ Mich App ___, Docket No. 343137 (2019).

claim if a plaintiff (here, Valera) must rely on his own illegal conduct to recover in his lawsuit. The courts refused to help Valera recover, even though the Spanskis admitted they were as guilty of the wrongful partnership as Valera. The rationale is that courts should not help a party whose illegal actions are directly related to his claim. If the other party's guilty conduct is no worse, the court will leave the parties as they are.

For transactions related to marijuana, this rule raises a greater problem in federal courts. While a number of states, like Michigan, have created a marijuana economy that is legal under state law, it is often the case that the usual business disputes arise and land in federal court. Federal courts are of course bound by federal law.

The problem can turn up even in mundane matters like insurance claims. In a case in federal court in Michigan, *Nationwide Mutual Fire Ins Co v McDermott*, 2013 WL 3732874, Docket No. 12-11863 (July 15, 2013), McDermott's husband, in the course of testing a batch of marijuana resin called "honey oil," produced in their basement using cans of butane, had burned their house to the ground. Nationwide denied the claim under the homeowner's policy on various grounds, including the wrongful conduct rule, saying the fire was caused "by operating an illegal marijuana, butane honey oil, and THC manufacturing facility" in the Bay City home. As it happened, the court ruled in Nationwide's favor, saying the fire was not the result of an accident, and did not need to rule on the wrongful conduct defense.

What is notable about the case is that Nationwide sued first, bringing its case in a federal court, bound by federal law. If McDermott filed first in state court, the same wrongful conduct rule would not apply, so long as the basement operation was legal under Michigan law. The conflict between state and federal law creates a real incentive for "forum shopping," as it is called. Who files in court first may well decide the outcome of the case. In a real estate

transaction involving a marijuana use, whether a case is filed in state court or federal court may decide whether the purchase agreement or commission agreement is enforced. When dealing with an out-of-state party, the contract can specify not only that it will be governed by Michigan law, but also that any claim will be filed in a Michigan court, naming the circuit court for the county where the property is located.²³

Bankruptcy is always in federal court, and bankruptcy courts have rejected relief for failing businesses engaged in activities directly or indirectly related to marijuana, including grow operations or the sale of equipment for hydroponic gardening. A bankruptcy court dismissed a proposed reorganization for a real estate business because it derived 25% of its income from a warehouse lease for a marijuana grow operation. In a bankruptcy reorganization, the court appoints a trustee – who is an officer of the court – to oversee the operation of the business temporarily. Here the court said it would not require a trustee to deal in the proceeds of illegal drug sales.

In another bankruptcy case, an attorney attempted to use federal law to protect him from a theft claim brought by his marijuana dispensary client.²⁴ In that case, Northbay Wellness Group operated a California medical marijuana dispensary; Michael Beyries served on its board and received \$5,000 per month as its attorney. Northbay also entrusted Beyries with a \$25,000 cash legal defense trust fund to be used in the event a Northbay employee, board member, or patient were arrested on marijuana-related charges. A year later, Beyries quit and kept the \$25,000 trust fund. To avoid Northbay's claims (among others), Beyries filed bankruptcy, presumably thinking that the fact that Northbay had engaged in illegal activity would protect

²³ It should be noted that such a provision is not conclusive; some cases may still be removed to federal court.

²⁴ *Northbay Wellness Group, Inc v Beyries*, 789 F3d 956 (9th Cir, 2015).

him. The trial court agreed: Although ordinarily claims of fraud and breach of fiduciary duty cannot be discharged in bankruptcy, the court concluded that Northbay's illegal actions barred its claim against its attorney. The Court of Appeals for the Ninth Circuit disagreed, holding that while it was true that both Northbay and Beyries had engaged in illegal activity, as an attorney, Beyries was held to a much higher standard.

VII. Conclusion

So long as federal law is in direct conflict with Michigan's and other state's marijuana laws, participation in transactions involving marijuana businesses will carry risks. Those risks include the possibility of prosecution as well as property forfeiture. Since the 1980's, state and federal law enforcement used forfeiture widely to discourage drug trafficking, and the direction that federal enforcement will take is still not clear. Landlords can protect themselves through clear lease language and rules, although they cannot prohibit marijuana use altogether. If they choose to participate in a marijuana-related transaction, Realtors® should be sure that the parties are represented by attorneys and are not looking to the Realtor® for advice or counsel on issues related to the use. How the courts, particularly federal courts, handle ordinary business disputes involving marijuana-related businesses will be skewed by the continuing conflict between state and federal law. Parties involved in such transactions, including Realtors®, should keep that in mind when writing contracts and deciding when and in what court to file a claim.

DUAL AGENCY ON THE HOT SEAT

A computer search of the term “dual agency” will uncover any number of articles that are highly critical of the practice. The titles to these articles do not leave any room for interpretation. Some recent examples:

*Dual Agency Doesn't Benefit Consumers*²⁵

*Don't Fall Into This Real Estate Trap*²⁶

*Dual Agency Can Cost You: Beware of “Double Agents” When Buying a Home*²⁷

*What is Dual Agency? The Dark Side of Real Estate*²⁸

*Dual Agency is a Terrible Idea for Buyers & Sellers*²⁹

The National Association of Realtors® does not have a stance on dual agency, but it does caution Realtors® that they must thoroughly explain the pros and cons of dual agency to consumers. Critics of the dual agency model scoff at the idea that agents adequately explain the downside. These commentators argue that if buyers and sellers actually understood dual agency, they would never agree to it. Some go so far as to proclaim that an agent's sole motivating factor for practicing dual agency is greed.

Many commentators point out that buyers and sellers typically need more assistance than a dual agent can provide. As one commentator put it:

A seller wants to squeeze every last nickel out of a house, and a buyer wants to pay not a penny more than necessary. Those are competing interests.

²⁵ Bill Gassett, National Association of Realtors® Realtor® Magazine, June 24, 2019, <https://magazine.realtor/news-and-commentary/commentary/article/2019/03/dual-agency-doesn-t-benefit-consumers>.

²⁶ Ann Brenoff, HuffPost, July 27, 2018, https://www.huffpost.com/entry/dual-agency-real-estate-trap_n_5b58fc17e4b0de86f4931357.

²⁷ Pete Gerardo, The Mortgage Reports, May 10, 2018, <https://themortgagereports.com/37910/dual-agency-can-cost-you-beware-of-double-agents-when-buying-a-home>.

²⁸ Kevin Vitali, <https://merimackvalleymarealestate.com/dual-agency-massachusetts-real-estate/>.

²⁹ Hank Miller Team, <https://hankmillerteam.com/2015/01/dual-agency-is-a-terrible-idea-for-buyers-sellers/>.

Real estate agents are supposed to be in their client's corner. They are being hired to provide sound advice. In the case of first-time home buyers, an agent may be relied on to guide the process.

With dual agency, a real estate agent can't really give proper guidance to either the buyer or the seller. If a buyer likes a home and asks a dual agent how much to offer, the agent can't give advice exclusively in the buyer's best interests.

And if the seller asks how much to counteroffer, the agent cannot be impartial. Nobody wins because neither buyer nor seller has real representation. The agent can't ethically serve both sides simultaneously. There is no real upside to sharing an agent because the agent can't share confidential information from either side. Plus the agent, looking at that fatter check when the deal closes, could be overincentivized to seal the deal at all costs.³⁰

Another commentator posed the following hypothetical:

I list a home on Main Street for \$500,000. I go about marketing the property. Someone calls me from seeing it online and asks me to show it to them. I show the buyer the property the home and they absolutely love it. The buyer says "Bill I want to make an offer". I say that's great. The buyer says "so what should I offer?" I say sorry I can't help you with that, remember I am a dual agent.

The buyer is on their own. After a few blank stares the buyer says I want to offer \$490,000. I then take the offer to the seller and they say to me "Bill what do you think?" "Should I give them a counter offer and if so what should it be?" My legal response should be "I can't help you with that as I am a dual agent."

Legally no party has any proper representation when practicing dual agency. It is a LOSE-LOSE situation for both buyer and seller. At \$490,000 the buyer could be significantly overpaying for the property. They might also be underpaying as well. Nobody has any guidance. One of these parties could be making a big mistake. In this situation, the only person making out is the real estate agent.³¹

³⁰ Pete Gerardo, The Mortgage Reports, May 10, 2018, <https://themortgagereports.com/37910/dual-agency-can-cost-you-beware-of-double-agents-when-buying-a-home>.

³¹ *What is Dual Agency: Why Buyers & Sellers Should Avoid it*, Bill Gassett, April 10, 2017, <https://www.maxrealestateexposure.com/dual-agency-why-avoid-it/>.

The point that is being made by these commentators is that the typical buyer and seller need guidance on price (and other matters) that a dual agent cannot provide.

Many commentators point out that a number of states have banned dual agency.³² Others cite a recent report of the Consumer Federation of America (“CFA”) that calls for a ban on dual agency.³³ What must be emphasized, however, is that neither the CFA, nor any state legislature, has declared that real estate agents should only be permitted to act in a single agency capacity for either the seller or the buyer.

In the CFA’s report, for example, it opines that the system in Great Britain is preferable to the one in this country. According to the CFA, the British system is preferable because there “agents work not as a fiduciary with significant responsibility to a buyer or seller, but as a facilitator with much less responsibility to both a buyer and seller.” This system, the CFA opines, is more economically efficient, resulting in lower commissions. Here, in the United States, the CFA explains further, “when the seller and buyer have separate fiduciary agents in a home sale, it is easier to justify much higher commissions than in a system in which [a single] agent facilitates a sale.” Clearly, the CFA is not promoting single agency over dual agency and, in fact, is questioning the need for agency relationships at all. It is apparently the CFA’s position that for buyers and sellers, fiduciary representation is an unneeded expense and that all that these parties need is a “facilitator.”

It is also true that most, if not all, of the states that have banned dual agency nonetheless permit one agent to represent both parties to a transaction as a neutral “facilitator.” In Florida, for example, a single “transaction broker” may provide a “limited form of nonfiduciary

³² Alaska, Colorado, Florida, Kansas, Maryland, Oklahoma, Texas and Vermont.

³³ *The Agency Mess*, Stephen Brobeck, Consumer Federation of America, January 14, 2019.

representation” to both the buyer and seller. The duties and responsibilities of a Florida “transaction broker” are spelled out in the statute:

- (a) Dealing honestly and fairly;
- (b) Accounting for all funds;
- (c) Using skill, care, and diligence in the transaction;
- (d) Disclosing all known facts that materially affect the value of residential real property and are not readily observable to the buyer;
- (e) Presenting all offers and counteroffers in a timely manner, unless a party has previously directed the licensee otherwise in writing;
- (f) Limited confidentiality, unless waived in writing by a party. This limited confidentiality will prevent disclosure that the seller will accept a price less than the asking or listed price, that the buyer will pay a price greater than the price submitted in a written offer, of the motivation of any party for selling or buying property, that a seller or buyer will agree to financing terms other than those offered, or of any other information requested by a party to remain confidential; and
- (g) Any additional duties that are mutually agreed to with a party.³⁴

Another state that has banned dual agency, Colorado, also permits a broker to act as a neutral “transaction broker” with a similar list of statutory duties and responsibilities.³⁵

Likewise, while a Kansas broker may not act as a dual agent, he or she may act as a “transaction broker” who “assists one or more parties with a real estate transaction without being an agent or advocate for the interests of any party to such transaction.”³⁶ The Kansas statute imposes certain disclosure requirements on transaction brokers but expressly provides that the transaction broker may not disclose the fact that the seller will take less or that the buyer may pay more.

³⁴ FSA § 475.278.

³⁵ CO ST § 12-61-806.

³⁶ KS ST § 58-30, 102.

As stated above, commentators often mention the fact that buyers and sellers need advice from their agents as to price and other issues that dual agents cannot provide. However, the laws that have been enacted to address these concerns do not provide that a buyer or seller is entitled to an agent who is looking out for its sole interests. A transaction broker, like a dual agent, is not going to be able to advise a buyer as to how much he should offer or the seller as to the price she should counter at. The point that is being made by consumer groups and others seems to be that if a licensee enters into a full service contract (where he or she is to be paid accordingly), then the licensee should not be able to unilaterally reduce the level of service being provided. In other words, if the licensee is being paid a “full service” commission, then in exchange for that amount, the licensee needs to be in a position to fully represent the interests of his or her clients. If the licensee is going to act as a dual agent (similar to a neutral “facilitator”), so the argument goes, then the price for such limited service should be significantly less.

In summary, Realtors® need to be aware of the “dual agency” discussion that is going on online and be prepared to answer the questions raised directly and honestly. While real estate practitioners may disagree on the question of whether or not Realtors® should ever serve in this capacity, it is beyond dispute that a licensee can never serve as a dual agent unless there has been informed, written consent.

COPYRIGHT LAW – PHOTOGRAPHS AND OTHER CREATIVE LISTING COMPONENTS

As a general rule, copyright law protects the creative portion of a listing, such as a photograph or a virtual tour of the home. (Copyright law does not protect “facts,” but may, such as in the case of an MLS, protect the creativity involved in selecting, coordinating and arranging the facts.) In the case of creative works, the copyright belongs to the person who did the creating, for example, the person who took the photograph. The copyright protection is automatic from the moment the work is created. Copyright registration is not necessary for copyright protection.³⁷

A photographer can give someone a license to use a photograph for a particular purpose for a particular period of time. Alternatively, a photographer can assign all of his rights in the photograph to the person who hired him. If the person who paid for the photograph receives only a license, then she must take great care to make certain that her use of the photograph does not exceed the rights granted in the license. For example, if the photographer grants a Realtor® a non-exclusive license to use photographs in connection with marketing active listings, it would be a copyright violation if the photographs were used in connection with a home design website.

The Handbook on Multiple Listing Policy provides that by submitting listing content to the MLS, the broker is granting the MLS a license to use the listing content in its MLS compilation and also in any statistical reports on comparables. MLS Policy provides further that

³⁷ Copyright registration, however, does have some benefits. First, it allows the copyright owner to sue in federal court for infringement. Second, the registration is reliable evidence of copyright validity and creates a public record of the copyright. Third, registration, if done prior to when the infringement begins, renders a copyright owner eligible for statutory damages (\$30,000) and attorney fees. If there is no registration, then the copyright owner is only entitled to actual damages – typically lost profits.

prior to submitting to the MLS, the listing broker should own or have authority to license all listing content (*e.g.*, photographs, virtual tours, descriptive narratives, etc.).

In 2019, changes to the MLS Model Rules added language whereby by submitting a listing, an MLS participant is deemed to have warranted to the MLS that it has the legal right to authorize the MLS to use the photograph and other listing content. The rule changes also added language whereby the MLS participant who submits the listing to the MLS is deemed to have agreed to indemnify both the MLS and any other participant of the MLS against any liability as a result of “any inadequacy of ownership” of the submitted listing content.

Obviously, the MLS is relying on the broker to obtain all necessary rights to use the photograph and other copyrightable listing content. Brokers, in turn, rely on the party who obtained the photograph, typically the listing agent, both for authorization to use the photograph and for assurance that the listing agent has the authority to grant the broker the right to use the photograph. This is typically done through the independent contractor agreement between the broker and the salesperson.

Many, if not most, independent contractor agreements provide that all photos, virtual tours, written descriptions and other copyrightable elements of a listing submitted by the agent are “works for hire” and the property of the broker. A “work for hire” is a contractual exception to the general rule that the person who creates the work holds all rights to the work produced. Under this doctrine, even if the agent took the photograph and created the written description, the terms of the independent contractor agreement assign all rights in that creative work to the agent’s broker. If the independent contractor agreement states that the photograph provided by the salesperson is a “work for hire,” then the photograph belongs to the broker even if the salesperson terminates his relationship with the broker.

But, what if, as is often the case, the agent does not take the photo or create the video tour himself, but instead hires a professional photographer or videographer? Many Realtors® are under the assumption that if they hire a professional photographer to take a photograph, then the photograph belongs to them. Technically, this is not the case. Other than in an employer/employee situation, in order for the “work for hire” doctrine to apply, the parties must agree via a written contract that the work shall be considered a “work for hire.” If the agent hires a professional photographer then the agent needs the photographer to agree in writing that the photograph that the agent paid for is a “work for hire” and belongs to the agent. Alternatively, the photographer could license the agent to use the photograph for marketing purposes. In the absence of a written agreement, legally all rights in the photograph belongs to the photographer. (If an employee of a listing agent takes the photograph, then under the “work for hire doctrine,” the photograph belongs to the employer-listing agent. The “work for hire” doctrine applies automatically in an employer/employee relationship, and there is no need to assign those rights pursuant to a written agreement.)

Most brokers’ independent contractor agreements provide that it is the responsibility of the agent to make sure that he/she not only obtains the right to use the photograph, but also the right to assign those rights to his/her broker. Many independent contractor agreements also include a provision whereby if the agent fails to obtain all necessary authorization to use any photographs or other copyrightable listing content, the agent will indemnify the broker for the costs involved defending any copyright infringement claim.

If the seller relists the property with a new broker, that new listing broker cannot use the prior broker’s photographs. In 2019, the MLS Rules and Regulations were amended to include procedures to be followed in the event any MLS participant believes that another participant has

engaged in the unauthorized use of his or her photographs or other listing content. Under the new MLS Rules and Regulations, a participant may not file a lawsuit or pursue any action against another MLS participant based on the unauthorized use of his or her photographs until he/she first follows these new procedures:

1. Claimant must send notice of alleged unauthorized use to the MLS not more than 60 days after the alleged misuse is first identified.
2. MLS then sends notice to the participant who is accused of unauthorized use.
3. Within ten days, the respondent must either 1) remove the alleged unauthorized content or 2) provide proof that the use is authorized.
4. If the respondent submits evidence that the use is authorized, MLS must make a decision as to whether the use was in fact unauthorized within 30 days.
5. If MLS determines that use is unauthorized, MLS may issue sanctions including a request that the respondent stop the unauthorized use within ten days. (MLS itself may remove the content only “where a clear violation exists” – if the question is debatable, the MLS should leave the parties to work this out in the courts.)
6. If the respondent does not remove the content within ten days, then the complainant may pursue legal remedies.

Finally, agents and brokers should also keep in mind that photographs they find online of a local landmark, park, school or tourist attraction may also be subject to copyright protection. Realtors® should not rely on the presence or absence of a copyright notice (“©”) because such a notice is not required for works published after March 1, 1989. If the copyright for these photographs is registered, then an agent who uses these photographs without the permission of the copyright owner may be liable for statutory damages as high as \$30,000 (\$150,000 if the infringement is “willful”).

COMING SOON AND OTHER OFF-MLS LISTINGS

A “coming soon” listing generally refers to a property that is not available for showing or sale until a later date. A “pocket listing” generally refers to a listing where the seller has opted out of placing the listing on the MLS. An off-MLS listing, whether a “pocket listing” or a “coming soon” listing, is not illegal in the sense that there is a statutory provision against such a listing. However, depending on the circumstances, using an off-MLS listing could violate Michigan licensing law, MLS rules and/or result in a breach of fiduciary duty or a violation of antitrust laws and/or fair housing laws.

Realtor® proponents of these models typically focus on MLS policies and potential challenges from their local associations. Most MLSs have adopted policies aimed at trying to make sure that these marketing strategies are not misused. These rules typically limit the coming soon period and prohibit showings and the presentation of offers during the coming soon period. It is certainly true that listing brokers must be careful not to run afoul of their own MLS rules and regulations. From a legal standpoint, however, the bigger risk for listing agents who use these strategies may be a challenge from sellers who later decide that this marketing strategy was not in their best interest and that they did not receive as much for their home as they otherwise would have.

How would these challenges come about? A disappointed buyer could contact the sellers and tell them that they would have paid “much more” than the sale price “if they had only known.” We have also heard stories about tax assessors opining that a home sold off MLS was not an arms-length sale. Remember that tax assessors are not required to set the taxable value equal to the sale price. Imagine the reaction of a seller who discovers that the tax assessor refuses to use the sale price for tax purposes because he or she believes the property was sold for

much less than it was worth. And there are a number of real estate attorneys around the country who are very suspicious of these types of marketing strategies and may be looking for an opportunity to challenge them.

Most people in the real estate industry believe that MLSs ensure maximum exposure and provide the best chance for the highest offer. As explained by NAR’s General Counsel, Katie Johnson: “As a general practice, actively discouraging the submission of listings to MLSs is inconsistent with the fundamental cooperative nature of the MLS and the obligations of the Code of Ethics.”³⁸ A listing Realtor® who encourages particular sellers to use an “off-MLS” marketing strategy should be prepared to explain why in this particular instance, maximum exposure was not in the best interest of the seller. Specifically, the Realtor® will need to be able to show that the marketing strategy was not chosen simply to give the listing broker a competitive advantage in finding a buyer for the property. Such Realtor® will also need to be able to show that the sellers provided informed consent.

Sellers who believe that they have been misled as to the benefits of a “coming soon” marketing strategy have a number of potential claims. First, such sellers could argue that the Realtor® breached his fiduciary duty of loyalty – in other words, the listing broker breached his duty to act in the sellers’ best interest and instead acted in his own self-interest. In addition, sellers could argue that the listing broker violated the Occupational Code provision that requires a listing broker to market the seller’s property in the manner agreed upon in the listing agreement.³⁹ (If a listing broker is going to use the “coming soon” marketing method, the listing contract should clearly spell this out.)

³⁸ Managing the Disruption From Pocket Listings by Melissa Dittmann Tracey, National Association of Realtors® Realtor® Magazine, September-October 2018.

³⁹ MCL 339.2517(3)(2)(a).

An aggrieved seller could also bring an ethics claim. Under Article 3 of the Code of Ethics, for example, listing brokers have a duty to cooperate with other Realtors® except when it is not in their clients' best interest. Standard of Practice 3-10 provides that this duty to cooperate "relates to the obligation to share information on listed property and to make the property available to other brokers for showing to prospective purchasers when it is in the best interest of the seller." Article 1 requires a Realtor® to promote and protect the interests of their clients, and Article 12 requires Realtors® to present a true picture in their advertising and marketing.

There are a number of legitimate reasons for a "coming soon" listing. Sellers may want to premarket their home while the home is being renovated, repaired or staged. Sellers may want to test the market for pricing. Sellers may demand greater privacy and/or want to avoid lots of showings. On the other hand, there are instances when the decision to use a "coming soon" marketing strategy appears to have been made to give a competitive advantage to the listing agent. A listing agent may have a difficult time convincing a court (or ethics hearing panel) that the decision to use a "coming soon" marketing strategy was for the sellers' benefit if, for example, one or more of the following facts are true:

- (1) The home was not renovated, repaired or staged during the "coming soon" period;
- (2) The home was shown to a select few agents/buyers during the coming soon period;
- (3) The home was sold during the "coming soon" period before the home was ever actually listed on the MLS;
- (4) The home was sold to a buyer who was represented by the listing agent;
- (5) The listing agent uses off-MLS methods exclusively or almost exclusively for most of his/her listings.

Listing agents who choose to market their listings off-MLS to only a select group of potential buyers may also face Fair Housing Act claims. If the listing agent limits exposure to a select group of buyers, this marketing strategy may have a discriminatory effect. Remember that a discriminatory effect, even in the absence of a discriminatory intent, may constitute a violation of the Fair Housing Act.

LAND DIVISIONS FROM THE SELLER'S PERSPECTIVE

Situations such as the following are not unusual: when the Jacksons built their house twenty-some years ago, they bought extra property to give themselves a little extra room. While the Jacksons only needed an acre for their house, the price for four acres was reasonable. The extra property certainly would not go down in value. Now that the Jacksons are ready to retire, they will be spending much of the year traveling, and it seems like a good time to sell two of their four acres. The township is a reasonable commuting distance for many jobs, the school district is good, and the Jacksons find a buyer within a month who offers a good price. In order to build a house and a pole barn, the buyers want more than the two acres offered for sale, but the Jacksons decide that the remaining one and a half acres will suit them just fine. The township quickly approves the land division, the closing occurs and the Jacksons take off for the winter. When the Jacksons come back from their travels in late spring, the buyers' new home is well underway.

That summer, the Jacksons decide to add a deck, but when their contractor goes in to get a building permit, they discover they do not have enough land. Unbeknownst to the Jacksons, the township zoning ordinance was amended 10 years ago, and the minimum lot size for a single-family house is now two acres. Not only can't the Jacksons add a new deck, their existing house is now illegal, and the township is threatening to take enforcement action. How could this have happened?

The short answer is that approval of a land division is a very limited approval, and the Jacksons are not the first to have left themselves with a parcel that is too small or otherwise no longer "legal" in any number of ways. The only contingency in the buy-sell agreement was for

land division approval, and this obviously did not adequately protect the interests of the sellers. In this case, while the Jacksons' township has grown, it still does not have more than a part-time staff. By default, land divisions are reviewed and approved by the assessor. This assessor, as is common, works on contract for several townships. She pays close attention to the legal descriptions, the number of divisions that are permitted, and the drawing or survey showing the old and new parcel lines. She does not check to see where a house might be built on the new parcel, if there is an approval from the county health department for a new septic system or well, whether there is an area where a driveway can be built that will be approved by the county road commission, or whether there might be regulated wetlands that may not leave room for the house, the pole barn, or the driveway. She does not look at zoning details. Although she knows from the assessing record that the Jacksons have a house, she does not check to see if they will still have the minimum lot size needed or if their house meets the setback from the new property line.

As many townships do, the Jacksons' township has a land division ordinance, but it just repeats the standards from the Land Division Act. It does not set any minimum area or lot width. The zoning ordinance sets minimum standards that vary by zoning district, but they are not incorporated into the land division ordinance.

Land Division Approval Standards and Limits

For approval under the Land Division Act, each parcel must have a sufficient legal description, with a tentative parcel map showing the area, parcel lines, public utility easements, and the number of divisions being used. The depth of each parcel must be no more than four times its width. Each parcel must be accessible, but accessibility simply means that each parcel

has access to a road directly or by easement. A parcel that will be developed must also have adequate easements for utilities, but in most cases the public road right-of-way or the driveway easement will provide those easements. If all these requirements are met, the Land Division Act says that the “proposed division shall be approved.”⁴⁰

The Land Division Act is also quite clear in stating, “Approval of a division is not a determination that the resulting parcels comply with other ordinances or regulations.”⁴¹ It is not an all-purpose review. Common errors include not only the Jacksons’ undersized parcel, but also wells or septic fields too close to new lot line, a new lot line too close to the house to meet the required setback, and often, more than one of these mistakes.

The Jacksons protest that when their house was built they only needed an acre, and it should be protected as nonconforming use. The problem with this argument is that when the Jacksons built their home, they had 4 acres, more than enough under the old or the new ordinance. The lot and house were not nonconforming until the Jacksons sold the “extra” land, and when that happened, the law required two acres. To be protected, the nonconforming use and parcel must have been *legal* when they were created; the Jacksons’ new remainder parcel and house were illegal when created by the division.

The Land Division Act clearly protects the township and its assessor, who provided only a limited approval. The Jacksons have no claim against township and likewise no apparent claim against the buyers.

⁴⁰ MCL 560.109(1).

⁴¹ MCL 560.109(6).

Protecting the Buyer and Seller in the Purchase Agreement

With a division, the focus is most often on the *new* parcel, the one that will have a new house or an addition. Care is taken by the buyers to make sure they will be able to build what they want, and the buy-sell agreement typically contains provisions – at the least, an inspection period – for the buyers to verify those things. The buy-sell agreement should account for the buyers' need to determine whether the new parcel is large enough for minimum area and setbacks from the house and other structures under the zoning ordinance, the availability of public water and sewer or enough area and the right conditions needed for a well and septic system, buildable area outside of wetlands, and driveway and utility access.

Of course the buyers should be paying attention, but protecting the sellers means addressing many of the same issues. Although the sellers are often responsible for the land division approval, the proposed parcel map or survey prepared for the land division application may leave the existing house, its well, septic field, and other features entirely out of the picture. A survey or accurate drawing should include the location of those features. The sellers should also make sure that their house and lot will still meet the requirements of local zoning and other ordinances. Will the location of the buyers' house and other improvements have any effect on the sellers' well, septic field (including any area reserved for a backup field when the septic system was approved), or drainage? Will the driveway location approved by the road commission for the new house or barn affect the old house or its driveway? Most of these issues can and should be addressed before a buy-sell agreement is even signed. Where they are not pre-approved or verified, as when the Jacksons' buyers asked for more land, there should be a provision in the buy-sell agreement for the sellers to approve setbacks and the location of such things as

driveways, well, and septic fields, and to verify that they meet all governmental requirements, not just land division approval.⁴²

Platted Lots

Suppose the Jacksons had originally bought two lots in a platted subdivision. Suppose further that they had built their house on one of the two lots. Years later, they sell their extra lot to their neighbors who wants to build an addition (or to new buyers who knocked down the neighbors' old house and wants to build a bigger house). The lot is already platted, so there is no need even for division approval. The result for the Jacksons will be the same, however: if the lot they kept is not large enough to meet the current zoning requirements for lot size or lot width, it violates the zoning ordinance. If their house was built too close to the line that now separates their lot from what is now someone else's property, their existing house violates the zoning ordinance.

Over the years, zoning ordinances have been amended to require larger and larger lots. The fact that a lot was platted and met minimum zoning requirements at the time the plat was recorded does not guarantee that it is "buildable" for a new house under the current zoning ordinance. The result is the same for an old house on a parcel that is now reduced in size. It is true that a house built on a lot large enough to satisfy all the standards that applied when it was built can always be maintained as a legal nonconforming use, even if those standards have changed. That is not true if half the land is now sold to someone else. If the Jacksons only ever

⁴² Tax allocation: When pro-rating taxes, keep in mind that in many communities, a new tax parcel i.d. for the new parcel may not be assigned the same year the property is sold. If the sale closes in May, for example, the July and December tax bills will be pro-rated, but the July and December bills for the entire parent parcel may still be sent to the seller.

owned one lot, the fact that it is too small to meet current standards would be no issue. When, by selling one of their lots, they have created a parcel that is now too small, that protection no longer applies. If these matters are not settled and verified before the buy-sell agreement is signed, the same types of provisions are needed in the agreement to protect both buyers and sellers.

Condominium Developments

A number of years ago, the Condominium Act was amended to provide that if the condominium project was not completed within a specific period of time, the undeveloped portion of the project could be “taken” from the developer by the condominium association and converted to general common elements.⁴³ The statute also provides that a developer can prevent this from happening by withdrawing the undeveloped land before the deadline expires. Developers who intend to sell (or develop) the withdrawn undeveloped land typically want to maximize their profits by withdrawing as much land as possible. Again here, however, the developer/seller should make sure that after the “extra” land is withdrawn from the condominium project, the reconfigured condominium project will still meet setback requirements and comply with all other zoning and local ordinances.

Conclusion

Most real estate practitioners are accustomed to looking at development plans from the buyers’ point of view. When vacant property is purchased for construction/development, the purchase agreement typically contains appropriate contingencies whereby prior to closing, the

⁴³ MCL 559.167.

buyers can confirm their ability to use the property for its intended use. Realtors® should also keep in mind that if their sellers are selling only a portion of the land they own, they should take similar steps to enable the seller to make certain that the sellers' remaining land will be in conformance with all zoning and other ordinances.

CRIMINAL BACKGROUND CHECKS

In 2012, the federal government published a study that showed that there had been a major increase in the number of Americans with criminal records.⁴⁴ Between 1974 and 2001, the number of former prisoners living in the United States had more than doubled from 1,603,000 to 4,299,000. The study concluded that if incarcerations do not increase, approximately 6.6% of all persons born in the United States in 2001 will serve time in prison during their lifetime.

When individuals are released from prisons and jail, their ability to find a job and a place to live is critical to their successful reentry into society. The use of criminal background checks has become more and more common among both employers and landlords. While the use is certainly lawful, as will be discussed below, both employers and landlords are prohibited from adopting a policy whereby an applicant with a criminal history is automatically disqualified.

Employment

Federal law prohibits employment discrimination based on race, religion, sex or national origin. We all understand that the law prohibits an employer from letting these factors enter into their hiring or firing decisions. What employers may not understand, however, is that this law also prohibits an employer from basing its decision on a factor that appears to be neutral on its fact, but which disproportionately impacts on a protected class of persons. This rule of law can be perhaps easiest understood by examining the facts of a U.S. Supreme Court case decided back in 1971. The case involved a North Carolina power company that had adopted a requirement that job applicants have a high school diploma. A much higher percentage of the white job seekers in the area at this time had a high school degree and thus the requirement had a

⁴⁴ Bureau of Justice Statistics, U.S. Dep't of Justice, *Prevalence of Imprisonment in the U.S. Population* (2003).

disproportionate impact on minority job applicants.⁴⁵ Since the diploma requirement operated to disqualify minority applicants, it was only permissible if the Company could show that the diploma requirement was significantly related to job performance. The power company could not do that so the policy requirement was held to be unlawful. In its decision the United States Supreme Court made clear that it did not matter if the power company had adopted the diploma requirement with the intent to discriminate against minorities:

. . . good intent or absence of discriminatory intent does not redeem employer procedures or testing mechanisms that operate as “built in headwinds for minority groups and are unrelated to measuring job capability.

The EEOC looks at an employer’s use of an individual’s criminal history in making employment decisions the same way. It is true that, of course, an employer cannot treat criminal history information different for different applicants based on their race or national origin. But the EEOC also says that national data shows that fairly neutral criminal records exclusions have a disproportionate impact based on race and national origin. African Americans and Hispanics are arrested at a rate that is 2 to 3 times the proportion of the general population. One in seventeen white men are expected to serve time in prison during their lifetime. The rate climbs to 1 in 6 for Hispanic men and to 1 in 3 for African American men.^{46 47} Such requirements will be deemed to violate the law if not job related.

- An employer cannot simply adopt a policy that disqualifies any job applicant with a conviction for any crime.

⁴⁵ 42 USC §2000e.

⁴⁶ *Griggs v Duke Pair Co*, 401 US 424 (1971).

⁴⁷

- An exclusion based upon a conviction must be job related for the position in question.
Employers must consider the following factors:
 1. The nature and gravity of the offense;
 2. The time that has passed since the offense and/or completion of the sentence;
 3. The nature of the job sought.
- An exclusion based on an arrest (rather than a conviction) is never permissible.
- Employers are encouraged to provide for “individualized assessments” where the individual is given notice that he/she has been screened out because of a criminal conviction. The individual is then given an opportunity to demonstrate that the exclusion should not be applied due to his/her particular circumstances, such as:
 - Extenuating circumstances about the offense;
 - Post-conviction conduct/employment history;
 - Rehabilitation;
 - Character references.
- Employers may be able to justify excluding individuals from particular positions for specified criminal conduct.
- Employers are encouraged to limit inquiries to records for which exclusions would be job related for the position in question.

Housing

Like the EEOC, HUD has also published guidelines in which it has indicated that a criminal history policy can have a disproportionate impact on racial and ethnic minorities.⁴⁸

⁴⁸ Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate Related Transactions (2016).

While HUD left open the door for a particular landlord to offer evidence to refute that claim in the context of a particular market, it is quite clear that this would be an uphill battle.

If a policy does have a disproportional impact on minorities, then the landlord must show that the policy is nonetheless justified. Presumably, the landlord or property manager would assert that the policy is necessary for the protection of other residents on their property.

- A landlord cannot exclude individuals because of one or more prior arrests (without any conviction).
- A landlord cannot impose a blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the alleged conduct entailed or what the convicted person has done since then.
- Landlord's policy must be distinguished between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.
- Law allows blanket rule exclusion of individuals that have been convicted for drug manufacture or distribution (not possession) so long as the rule was applied to all applicants regardless of race.

Conclusion

Policies that exclude persons based on criminal histories must be narrowly tailored. For example, it may be reasonable to disqualify a person with an embezzlement conviction from being considered for a bookkeeping position, but not to deny this same person the right to rent an apartment. And a person with a 30-year-old assault charge should not be treated the same as a person with a multiple recent assault convictions. This is particularly true if the person has had a clear record for the 30 years since his conviction, during which time he has been a productive member of society.

ANATOMY OF A PURCHASE AGREEMENT – CONTINGENCY CLAUSES

Like any other profession, those of us in the real estate industry have our own jargon. We often use jargon and shortcuts when we discuss real estate concepts with one another. A recent Court of Appeals case provides a good illustration of what can go wrong if someone uses those same shortcuts when drafting a purchase contract.

The case involved a purchase agreement for commercial property.⁴⁹ The purchase price was to be \$730,000 with a \$10,000 earnest money deposit. According to the Court of Appeals, the “meager two-page purchase agreement” included the following two paragraphs:

1. This offer is subject to Buyer obtaining a real estate mortgage for no less than SIX HUNDRED THOUSAND DOLLARS (\$600,000.00) payable over 20 years with interest not to exceed six percent (6%) at customary terms with a firm commitment thereto 60 days from the date hereof.

* * *

9. This offer shall remain open until 12 o'clock a.m., on October 19, 2015, and if not accepted by said time, this offer shall be deemed rescinded and all deposits shall be refunded.

The buyer was not able to get financing. The parties discussed the possibility of seller financing but were never able to reach an agreement. The seller ended up selling the property to someone else, and the buyer sued the seller arguing that the buyer had some right in the property. For our purposes, the most interesting part of the case is the fight over the \$10,000 earnest money deposit.

The trial court determined that the seller was entitled to the earnest money deposit, ruling that paragraph 9 of the purchase agreement (cited above) contained the only condition under

⁴⁹ *Livonia Gateway Investments LLC v Block Property Holdings, LLC*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2019 (Docket No. 340439).

which the earnest money would be returned to the buyer – *i.e.*, if the seller failed to accept the purchaser’s offer. Since that condition did not come to pass, the seller was entitled to the earnest money deposit. The trial court stated:

* * *

the offer was accepted and so there doesn’t seem to be any basis upon which [the buyer] could ask for the earnest money back. [In order to return the earnest money to the buyer] I would have to infer something into this agreement and I don’t know on what basis I would infer a contractual provision between the parties.

The Court of Appeals disagreed with the trial court. The Court of Appeals held that paragraph 9 of the purchase agreement simply said what would happen if the seller did not accept the purchase offer by a particular date. The Court of Appeals declined to interpret the language in paragraph 9 as the only way in which the buyer could get its earnest money deposit back.

The Court of Appeals went on to decide against the buyer under a different analysis. The Court of Appeals focused on paragraph 1 of the purchase agreement (cited above). The court did not read paragraph 1 as a financing contingency under which the buyer was able to walk away from the transaction if it could not obtain financing. Instead, the Court of Appeals looked at paragraph 1 as a contractual obligation on the part of the buyer. The Court of Appeals determined that the buyer had breached the purchase agreement by “failing to fulfill its obligation to obtain financing which prevented the parties from closing on the real estate transaction.” Since the purchase agreement was silent as to what was to happen to the earnest money deposit in the event the contract was breached, the Court of Appeals sent the case back to the trial court for a determination as to the parties’ intent.

This case provides an excellent illustration of the Court of Appeals' current view on the role of Michigan courts in interpreting contracts. It has always been the case that Michigan courts would say that the "main goal in the interpretation of contracts is to honor the intent of the parties." At one time, courts would try and determine "intent" by looking at the language of the entire contract, the practice in the industry and the parties' course of dealing. Michigan courts have moved away from that approach and now frequently recite the maxim that "the words used in the contract are the best evidence of the parties' intent." The difficulty with this approach to contract interpretation is it assumes that everyone uses exact precision whenever they write a contract clause. This is not the case.

For example, when someone in the real estate industry writes "this offer is subject to the buyer obtaining a real estate mortgage for \$600,000 within 60 days," what they really mean is:

This Agreement is contingent on Buyer's ability to obtain a mortgage loan in the amount of \$600,000. If Buyer does not obtain loan approval within 60 days of the date of this Agreement, this Agreement will terminate, the earnest money deposit will be returned to Buyer and neither party will have any further rights or obligations under this Agreement.

Most Realtors® and real estate attorneys would say that this additional language is superfluous and that "everyone knows" how a financing contingency works. But obviously, at least in this case, the Court of Appeals did not see it that way.

A lesson to be learned from this case is that all of us need to make every effort to spell out exactly what we mean when we draft a contingency. The court's analysis suggests that each contingency should spell out exactly what will happen if that particular contingency is not satisfied or waived. This would be true for contingencies found in the standard purchase agreement form such as the inspection contingency and the title examination contingency. It

would also be true for any transaction-specific clause the Realtor® drafts in an addendum. So, for example, it might not be sufficient to simply say: “This Agreement is subject to Buyers’ sale of their home at 123 Main Street within sixty (60) days.” Instead, the addendum would say something like:

This Agreement is subject to Buyers’ sale of their home at 123 Main Street within sixty (60) days of the date hereof. If Buyers do not waive this contingency in writing within said timeframe, this Agreement shall automatically terminate, the earnest money shall be returned to Buyers and neither party shall have any further rights or obligations hereunder.

An alternative method for handling contingencies would be to include a general statement along the lines of:

If this offer is not accepted or title is not marketable, or insurable or if the terms of the purchase are contingent upon ability to obtain a new mortgage or any other contingencies as specified, which cannot be met, the Agreement shall terminate, the earnest money deposit shall be refunded to Buyer and neither party shall have any further rights or obligations hereunder.

The larger lesson to be learned from this case is that transaction-specific addendums need to be carefully drafted and complete on their face. A Realtor® should never assume that “everyone knows what this means.” Whenever drafting an addendum, a Realtor® should assume that the reader has no real estate experience. Transactions rarely end up in court, but if an agent does end up in a contractual dispute, he or she probably will not get a chance to explain what the clause was intended to mean. The court is likely to want to enforce the provision exactly as written.