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Detective poses as buyer to gain access to suspect's house

A detective investigating a suspected drug dealer's residence found a way to get a peek inside: posing as a potential buyer for the house, which was listed for sale. The suspect was convicted of possession of meth and sentenced to prison, but the convict claimed the cop unlawfully posed as a bona fide prospective buyer to get the real estate agent to let him in the house.

Police officers in Porterville, Calif. arrested a man in August 2006 allegedly possessing methamphetamine. The suspect said he got the drugs from a residence on Larson Street and described the property to police. The house was vacant, but was being occupied by a man sleeping in the garage.

Police detective **Michael Benas** saw a "for sale" sign in the yard and contacted the listed real estate agent, acting interested in purchasing the home. While inside, the detective allegedly confirmed the presence of a particular vehicle and other items the informant described.

Benas acquired a search warrant and found defendant **Alberto Lucatero** at the house. Police allegedly found suspected drugs in the house and the vehicle, including a duffel bag containing Lucatero's ID card and meth.

Lucatero was charged with possession of methamphetamine for sale. He filed a motion to invalidate the search warrant, arguing that it lacked probable cause and that the evidence found was the "tainted product of a search conducted under the authority of an invalid warrant." The trial court denied the motion.

Lucatero pleaded no contest in April 2007 and was sentenced to five years and eight months in state prison. He appealed, claiming Benas' first entry to the property was unlawful since it was based on the false premise that he was interested in buying the house.

The Court of Appeal, Fifth District, California pointed out that the real estate agent didn't know Benas was a police officer, and he was not invited into the property for law enforcement purposes. He either misrepresented his identity or did not fully reveal it to the agent, the court said.

"We believe an investigating officer may pose as a potential buyer and enter a home under this misrepresentation, assuming the officer's actions do not exceed the scope of the consent. The officer must act as a potential buyer and do nothing that would violate the homeowner's legitimately held privacy expectations."

Finding that Benas' actions were reasonable under the Fourth Amendment, the appellate court on Sept. 15 affirmed the ruling against Lucatero.

For more on this story, visit www.reallawcentral.com

ON BOARD

Desecrated cemetery discovery stuns homebuyers

The American Dream turned into a nightmare for a Maryland couple who were shocked to learn that their property sat adjacent to a 1700s-era cemetery. The couple claimed the subdivision developer pulled up 20 headstones and adjusted property lines to ensure no one would see the burial grounds. Don't miss the next issue to see how the case unfolded.

Seller sidesteps broker's commission on \$1.25M sale

Did a misunderstanding or a blatant disregard of a listing agreement's terms cause a developer to bypass its listing broker and directly sell 40 lots to a buyer? The broker fought for commission from the \$1.25 million sale, but the seller insisted the brokerage wasn't entitled to it. See the upcoming story to find out whether the broker would get what he deemed as his fair share.

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In Memoriam
Founder & Publisher
Joe Casa

From the EDITOR'S DESK

Dear Readers,

With All Hallows Eve fast approaching, it's fun and a bit of a challenge to look for legal real estate stories that have a spooky angle. Although macabre cases can be creepy or downright disturbing, they are almost always intriguing.

As noted on the cover of this edition in the upcoming stories, we recently came across an eerie case, which just happened to come along just in time for Halloween. In a lawsuit, subdivision developer was accused of discovered a small, 18th century cemetery that appeared to be abandoned, and allegedly removed the headstones and adjusted the lot boundary lines so that construction could continue.

According to the lawsuit, the cemetery's existence wasn't discovered until about 20 years after the neighborhood was developed. Of course, claims like attracted the attention of several editors here at October Research. We wondered how a subdivision could be built without a single resident of the town remembering that a centuries-old graveyard existed there. Or how well-hidden the cemetery could be, considering that two families lived there and no one discovered it until someone allegedly involved in the neighborhood's construction mentioned it one day.

And, maybe this was just me, but I wanted to know what someone would do with 20 old headstones. Throw them out? As the court pointed out, desecration of a gravesite is a crime, so I imagine if someone did yank the headstones out of the ground, they wouldn't want to be found possessing them.

To be sure, the homeowners' discovery of a cemetery next to their property was devastating. Even putting aside the creepiness factor, there is the issue of the harm to their property values due to the potential stigma, and the fact that they can't do much development on their land with people buried nearby. It's difficult enough selling a house right now. It would take a listing agent who really loves a challenge to land a deal on that particular property.

Have you had to handle a property transaction with a dark past? How do you provide full disclosures without frightening prospective buyers right out the door? I'd love to hear some of your first-hand experiences.

Be sure to read the next edition to see how the homeowners living next to the desecrated cemetery fared in their case against their homebuilder. Also, if you haven't seen the special report on Death and Disclosure on RealLawCentral.com, stop by the site and take a peek at how some agents wound up in front of the courts after selling stigmatized properties.

In the meantime, enjoy this issue of *Real Law Central*.

Sarah Thuerk

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Sexual harassment allegations shake up Georgia RE/MAX office

A former RE/MAX of Georgia executive quit the company and sued the establishment, claiming it retaliated against her for voicing complaints of possible sexual harassment and discrimination that her co-workers had experienced.

Plaintiff **Kathleen Teare** worked at RE/MAX of Atlanta as its senior vice president of growth and co-regional director of Georgia, Southern Ohio and Tennessee/Kentucky. She allegedly heard complaints from female employees regarding inappropriate behavior by defendant **Ken Moe**, controller at RE/MAX. Teare allegedly saw Moe looking down women's blouses.

Defendant **Darko Kapelina**, executive vice president and manager of operations, also was the subject of complaints from some female co-workers who allegedly told Teare he inquired about their marital and familial statuses.

In the spring and summer of 2004, Kapelina allegedly rearranged the

office structure, placing Teare only in charge of Southern Ohio, where she would spend about half of her time.

In early July 2004, Teare contacted the CEO of the realty firm — **Howard McPherson** — after a co-worker told Teare that some female employees planned to sue RE/MAX due to Moe's and Kapelina's conduct.

Moe was terminated due to "unacceptable behavior," but RE/MAX found the actions were not sexual in nature. Kapelina later met with Teare and allegedly ordered her never to contact McPherson again. He also told Teare to focus all of her time on the Southern Ohio region and asked her to remove all her belongings from the Atlanta office, but without arousing suspicion from co-workers.

Teare resigned in September 2004 and sued RE/MAX with claims that fell under the opposition clause of Title VII of the Civil Rights Act of 1964, which prohibits discrimination against an employee by an employer for opposing an unlawful employment practice.

The U.S. District Court for the Northern District of Georgia, Atlanta Division found that based on Teare's alleged observations, she had a "good faith belief that this behavior was an unlawful employment practice."

That didn't mean the realignment of RE/MAX organizational structure was a retaliatory act. The court said the company had legitimate business reasons to restructure, although other actions by Kapelina could be construed as materially adverse activities designed to dissuade a reasonable employee from reporting discrimination or harassment.

She thus established a *prima facie* case of retaliation against her former employer.

Teare did not provide evidence to demonstrate the working conditions were intolerable, however.

The district court on Sept. 30 determined RE/MAX had caused Teare emotional distress, and awarded her \$10,000 in compensatory damages.

Can agent collect commission following million-dollar FSBO deal?

After the \$1 million sale of an apartment complex in Louisville, Ky., a real estate agent sued the seller, arguing she had found the buyers and thus was the procuring cause for the sale.

Defendant **Lafayette G. Owen** had entered into a contract with plaintiff **Mary Eitel** to sell his Oxford Hill Apartment complex in Jefferson County, Ky., in 1993. The parties signed a listing agreement which was set to expire Oct. 31, 1993.

Eitel received an offer of \$1 million in September 1993 from **Robert Emig** and **Robert Rogers**. Owen made a counteroffer of \$1,060,000, but it was rejected. At the end of the listing agreement deadline, the property had

not sold. After the contract expired, Owen started advertising the apartments on his own.

Emig and Rogers contacted Owen, who was unaware they had previously made an offer. They bought the property in August 1994 for \$1,050,000. Eitel claimed Owen received \$50,000 more from the sale because he didn't have to pay her a commission.

Eitel sued Owen, claiming she was the procuring cause for the sale. Owen sought summary judgment, which was granted by the circuit court. Eitel filed a motion to vacate, which the court overruled. She appealed.

The Court of Appeals of Kentucky

explained that when a specific deadline is provided in a listing agreement, the broker is entitled to recover a fee only if the sale happened prior to the contract's expiration, or if there was evidence the seller delayed the sale until after the expiration date to avoid paying commission.

When Owen sold the property, it was well after the contract with Eitel had expired. Eitel also failed to prove Owen intentionally delayed the sale to avoid paying her a commission.

The appellate court found no reason to stray from the trial court's findings, and on Sept. 19, it affirmed the decision to grant summary judgment to Owen.

For the full stories, see RealLawCentral.com.



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What are the obligations of a buyer's agent when two of their buyers decide to put purchase offers on the same property? What duties does an agent owe to each party in a real estate transaction if they are simultaneously representing both the buyer and seller in a single sale? What happens when an agent is both operating in a dual capacity AND either acting as the buyer or seller of the property? What if they take a dual role as both real estate agent and loan officer for the buyer in the same transaction?

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Coldwell Banker admits error after buyer trashes seller's stuff

Coldwell Banker allegedly admitted to failing to adequately warn a property buyer that the dwelling's occupants needed 60 days to collect their belongings after escrow closed.

In early 2004, plaintiff **William Lott** entered into an exclusive listing agreement with Coldwell Banker Residential Brokerage to sell a three-unit residential property in San Diego.

Lott allegedly told Coldwell Banker that two of the units were being occupied: unit 1 by **Elizabeth Altamerano** and her family, and unit 3 by his daughter, **Adjekai Kuma** and her fiancé, **Barron Taylor**.

Any contract for sale had to include a provision allowing Lott 30 days after close of escrow to remove personal property and the property of Kuma and Taylor, who were military personnel stationed overseas.

Coldwell Banker found a buyer, **Jo Ann Jaffe**, in May 2004. Coldwell Banker allegedly told Jaffe unit 1 was occupied, but failed to mention unit 3 was occupied also. Escrow closed in June 2004. A week later, Jaffe threw out personal property at the site.

Lott sued Jaffe in September 2004 on multiple causes of action, including breach of contract and forcible entry. Jaffe responded with a cross-complaint alleging misrepresentation and emotional distress.

Coldwell Banker allegedly offered Lott \$83,200 to resolve his lawsuit with Jaffe. He accepted, and the brokerage submitted a declaration to the court noting the in the property listing on the multiple listing service, Coldwell Banker had mistakenly identified two of the units as vacant.

The court denied the settlement and Lott filed a cross-complaint against Coldwell Banker, claiming the listing agreement created an implied duty by the brokerage to inform the buyer that unit 3 was occupied. The court sustained a demurrer by Coldwell Banker and approved a settlement agreement between the brokerage and Jaffe for \$100,000.

Lott appealed. On Sept. 17, the Court of Appeal, Fourth District, Division 1, California rejected Coldwell Banker's assertion that it fully performed its obligations under the oral modification of the listing agreement, reversing the lower court's ruling.

Broker-attorney's determination gets him disbarred

An attorney in Maryland likely had his client's best interests in mind when he fought to save his house from a partition action, but he only got himself in legal trouble. The issues began when **Barbara Johnson** filed a partition action against **Gustav Hamilton** in July 2003 to sell their jointly-owned real property.

The court entered an order of default in November 2003 and entered judgment against Hamilton. The property was ordered to be sold, and **Ade Awojobi** was appointed as trustee to sell the property. Hamilton's prior counsel filed an unsuccessful motion to vacate.

Charles E. McClain Sr., a lawyer and a licensed real estate broker, was retained by Hamilton in September 2004 to serve as his attorney. They also entered into an agreement for McClain to act as the broker to purchase the property in question. McClain was to collect half of the commission from the sale, allegedly to substitute attorney fees.

McClain filed a motion to vacate the

judgment. In September 2004, Awojobi filed a motion to compel sale of the property. McClain asked the judge to recuse himself, noting that he had sanctioned McClain in the "recent past." All of McClain's requests were denied. The judge determined the motion to vacate was a stall tactic, and he and Hamilton were jointly and severally sanctioned.

McClain continued to negotiate with Awojobi and entered into a contract to close on the house by late November 2004. The trustee eventually canceled the contract when Hamilton was unable to secure financing.

McClain allegedly arranged a "sham" settlement on the property with a mortgage company while Awojobi was out of town.

The court found McClain's efforts were pursued in bad faith, and ordered sanctions against him and Hamilton for \$12,230. The property was later sold, and McClain challenged the deal. The court found no abuse of discretion.

The Court of Appeals of Maryland was asked to review the matter. It determined that based on the record, Hamilton did not have a defense to the sale of the property when McClain was retained.

The appellate court found evidence the attorney was purposefully dishonest to the courts, and that he orchestrated a phony settlement when he was aware the trustee was out of the country. Therefore, on Sept. 8, the Court of Appeals of Maryland ruled that McClain be disbarred.

Agent snags buyer, but can't collect referral fee

A real estate agent in California expected a 5 percent referral fee after helping a Missouri couple sell their

home. Instead, he was greeted with a lawsuit when the sellers argued the fee was illegal.

Missouri residents **William and Robin Childers** contacted California real estate agent **Gary Schwartz**, seeking help to find a buyer for their home. The Childerses allegedly orally agreed to pay Schwartz 5 percent of the purchase price if any of his referrals led to a sale. Schwartz drafted a referral fee agreement that allegedly memorialized the oral agreement.

The agreement indicated the sellers were to pay Schwartz 5 percent of the purchase price. Both parties signed the contract.

The home was later sold, allegedly to buyers from California referred by Schwartz, but he never received his fee. The Childerses' attorney had advised the couple that the referral deal wasn't legal in Missouri, so they filed a petition against Schwartz seeking declaratory judgment and damages for negligent misrepresentation, unjust enrichment and tortious interference with a contract.

The sellers claimed Schwartz wrongfully acted as a real estate professional and was not entitled to referral fees for real estate sales in Missouri. Schwartz claimed all of the actions in the agreement occurred in California and that when he executed the deal, he assumed it would be governed by California law. He said the sellers never notified him that Missouri law was to apply.

All of the prospective buyers referred by Schwartz were California residents, the agent claimed. The circuit court granted Schwartz's motion to dismiss for lack of personal jurisdiction, which the Childerses appealed. They claimed the agent had engaged in acts included in Missouri's "long-arm statute" and that he had sufficient minimum contacts in their state to satisfy due process requirements.

The long-arm statute provides that any

person or company that conducts the acts included in the section would submit that person or entity to the jurisdiction of the Missouri courts for a cause of action arising from those acts. The court determined that even if Schwartz's activities were considered a business transaction in Missouri or constituted commission of a tortious act there, his contacts in the state were insufficient under the due process clause.

That clause limits the power of courts to exercise personal jurisdiction over non-resident defendants. The fact that Schwartz had entered into a contract with a pair of Missouri residents wasn't sufficient to satisfy the jurisdiction question, the appellate court found. If Schwartz were subjected to personal jurisdiction in Missouri, his due process would be violated. Thus, on Sept. 16 the appellate court affirmed the lower court's decision to dismiss the suit.

Despite inspections, buyer takes seller to task over defects

Disclosure forms and two separate termite inspection reports weren't enough for a homebuyer in California. She waited almost two years after buying a property before suing the seller for alleged negligence and failure to disclose material facts affecting the property's value.

Defendant **Patsy J. Anderson** listed her Corona, Calif. home for sale with F.M. Tarbell Co., doing business as Tarbell Realtors, in September 2002. **Ralph A. Hernandez** was Anderson's real estate agent. Plaintiff **Minerva Fiscal** made an through her agent, **Edith Risso** with Century 21 Superstars, in November 2002. She allegedly signed a buyer's inspection advisory and Risso told Fiscal to have a licensed contractor conduct an inspection.

Before escrow closed, Fiscal visited the property three times. She hired an

inspector and tagged along as he worked. The inspector provided a written report, and Hernandez also conducted a visual inspection and noted his findings on the real estate transfer disclosure form. He noted a sagging ceiling in the living room, inoperable windows and cracks in the driveway.

Fiscal submitted a list of repairs she wanted the sellers to make based on Brown's inspection. The sellers agreed to complete some of the repairs. Fiscal allegedly visited the property as many as 10 times. She received two termite inspection reports, and Anderson hired an exterminator to conduct termite eradication. Escrow closed in February 2003.

Fiscal sued the Anderson in October 2004, claiming she found termite damage, roof leaks, plumbing defects and other problems. The court granted summary judgment to Anderson in May 2007, finding that Fiscal had been represented by a real estate agent, hired inspectors and visited the property several times, and thus found no triable issues of fact.

Fiscal appealed, questioning whether Anderson knew of several defects in the house and failed to disclose them.

Based on what was included in the disclosure form, evidence that Fiscal had been given inspection reports, and the fact that Anderson hired an extermination service, the appellate court said the seller proved she fulfilled her contractual duties, and did not negligently conceal any defects.

"Anderson did what the contract required her to do," the appellate court said. "She disclosed what she knew, recommended that plaintiff have the property inspected and addressed the termite issue."

Fiscal had a duty to exercise reasonable care in order to protect herself, the court noted. Therefore, the Court of Appeal, Fourth District, Division 2, California on Sept. 5 affirmed the lower court's ruling against Fiscal.

Agent's alleged forgery infuriates realty firm

A real estate agent accused of forgery and failing to disclose defects in a California apartment she helped sell to an elderly woman wasn't free from litigation after her agency settled the matter with the buyer.

Plaintiff **Helen Lynch**, a real estate saleswoman with Brenlar Investments, doing business as Frank Howard Allen Realtors, agreed to represent 70-year-old **Barbara Crane** in the purchase of an apartment unit adjacent to her own in Sausalito, Calif.

Lynch had allegedly previously sold several units in the apartment and was aware of "significant defects" such as dry rot. Lynch was accused of concealing several defects from Crane.

Brenlar accused Lynch of forging Crane's name on documents to make it appear the buyer knew of the defects. Barbara Crane's son determined the undisclosed defects would cost more than \$250,000 to repair.

Crane sued Lynch and Brenlar, and the matter was settled in October 2004 for \$150,000 at Brenlar's expense, with no contribution from Lynch. Brenlar sued Lynch on charges of equitable indemnity, comparative negligence, contribution and breach of contract.

Lynch filed a cross-complaint against the law firm Murphy, Pearson, Bradley & Feeney (MPBF) and one of its partners, **Mark Perelman**. Lynch claimed MPBF and Perelman advised her to execute the settlement agreement, allowing the agency to sue her and thus breaching their fiduciary duty. MPBF and Perelman filed a motion for summary judgment, which the trial court granted in August 2007. The court noted when the parties settled, Brenlar paid \$75,000 and its insurance company covered the other half. Brenlar reserved its indemnity

rights against Lynch as part of the settlement. Lynch appealed, claiming Perelman failed to tell her that Brenlar was reserving its right to indemnification, and that before signing the agreement, she told Perelman she would pay the \$75,000 deductible to end the litigation, and he replied it wouldn't be necessary.

The Court of Appeal, First District, Division 3, California said Lynch failed to submit evidence to prove that if Perelman and the law firm had notified Brenlar of Lynch's willingness to pay \$75,000 for the settlement, the agency wouldn't have reserved its rights against her in the settlement.

The appellate court therefore affirmed the lower court's decision on Sept. 18.

Buyer's lack of oversight blamed on dual agent, sellers

An experienced buyer overlooked an important contingency affecting the desirability of an apartment building in Southern California he intended to buy. He discovered the issue after escrow closed, but pinned the blame on the sellers and the dual agent in the deal.

Plaintiff **Alan P. Wurtzel**, interested in buying a six-unit apartment building in Northridge, Calif. from defendants **Jason Rodin, Les Rodin, Malkie Rodin, Ruchama Rodin** and The Rodin Company, retained real estate agent **Tony Azzi** of broker Marcus & Millichap. Wurtzel agreed to pay \$490,000. Azzi signed the agreement as the agent for both parties.

The agreement indicated it was Wurtzel's responsibility to investigate issues potentially affecting the desirability of the building. The Rodins were required to provide a preliminary title report to Wurtzel. Jason Rodin delivered documents to Azzi in January 2004. Wurtzel signed an acknowledgement of receipt of the

forms, including the preliminary title report. The form stated it was Wurtzel's duty to review all documents.

The preliminary title report noted a regulatory agreement from the Los Angeles County Recorder's Office indicating the owner of the building had to provide 40 percent of the units to low-income tenants for 30 years.

Wurtzel discovered the agreement after escrow closed and sued the sellers and Azzi, who filed a motion for summary judgment, which the court granted in May 2006. Wurtzel appealed. He claimed he had asked the escrow officer for a copy of the preliminary title report, and that she said she didn't have one. But Wurtzel had allegedly initialed a document releasing all contingencies for the sale. He acknowledged he didn't review the title report before escrow closed.

Azzi said he didn't review the documents Jason Rodin delivered before Wurtzel picked them up; he allegedly presumed they contained the necessary forms. He also didn't review the papers with the buyer.

According to the escrow officer, she had the preliminary title report at all times during escrow and did not recall Wurtzel asking for a copy until after escrow closed.

The jury found that the Rodins were negligent and caused harm to Wurtzel. He was awarded \$130,000 in damages. The defendants appealed when their motions to vacate were denied.

The Rodins claimed they had no duty to disclose the regulatory agreement because Wurtzel's means to discover its existence were readily available.

The appellate court said buyers who receive a contract and sign it without noting any of its conditions do so "at their own peril." Thus, on Sept. 23 the Court of Appeal, Second District, Division 4, California reversed the judgment and vacated the award.

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Burnet revived: New suit targets alleged conflict of interest

In December 2007, a Minnesota judge ruled to deny class certification in the fiduciary duty suit pending against Coldwell Banker Burnet. Now, a new class action lawsuit has been filed in Minnesota once again accusing Burnet Realty of directing business to its affiliate, Burnet Title, in exchange for “valuable consideration.” The lawsuit was filed Sept. 25 in Hennepin County by plaintiff **Nancy Larpenteur**.

First time around

In the February 2007 lawsuit, plaintiffs **Kenneth and Dylet Grady** claimed Burnet Realty agents violated their fiduciary duties by steering them to Burnet Title, allegedly knowing its prices were higher than those charged by comparable title companies. Although the complaint alleged that the proper RESPA affiliated business disclosures were provided, the plaintiffs argued that this disclosure wasn't enough, and that the information was “deceptive, ambiguous and incomplete.”

The suit was denied class certification by Judge **Francis J. Connolly** of the Hennepin County District Court in the Fourth Judicial District of Minnesota. He agreed with Burnet that it would be nearly impossible to identify who fits the plaintiffs' proposed class definition without conducting a file-by-file review of 160,000 to 170,000 closing files.

At the time, plaintiff's attorney **Hart Robinovitch** of Zimmerman Reed PLLP called the judge's ruling and reliance on cited case law “dead wrong” and said the case had many more chapters to be written. His foreshadowing has come to fruition, this time in a lawsuit citing specific incentives for Burnet Realty agents to direct business. The lawsuit contends a conflict of interest exists when a fiduciary stands to receive incentives or other consideration to steer business in order to receive profit.

“It breaches the fiduciary duties that it owes its principles unless it first obtains the principal's informed consent to the conflicts,” the suit states. “When such a breach occurs, the principal has an absolute right to recover from the fiduciary without further proof of any actual out of pocket loss. The fiduciary forfeits its right to retain any commissions, fees and profits received in the scope of the relationship.”

Ronnie Semlak, president of Burnet Title, said he believes his company acted lawfully and in the best interest of clients.

“We disagree with the allegation that there is anything improper about the business relationship between Burnet Title and Burnet Realty, and look forward to a court reviewing and rejecting the claims made against our company,” he said. “Similar claims were made in a prior lawsuit, which was brought by the same parties in interest, and in which Burnet Realty successfully challenged class certification.”

The lawsuit contends Burnet Realty, doing business as Coldwell Banker Burnet, owed fiduciary duties to all of its clients in that it “received valuable consideration from Burnet Title ... for steering business to Burnet Title.” The lawsuit also accuses Burnet Title's underwriter, Lawyer's Title, of providing kickbacks for the referral of business.

Robinovitch said Burnet Realty never obtained the plaintiff's informed consent to the conflicts of interest. It couldn't do this, he said, because Burnet Realty denied receiving referral fees in written disclosures given to the purported class members. However, according to the lawsuit, Burnet Realty “was being credited with income and/or from title insurance orders generated through its agents' referred business and/or other consideration.” Because of the absence of full disclosure, according to Robinovitch, Burnet Realty breached its fiduciary duty.

Burnet Realty did not immediately provide comment regarding the new lawsuit. When asked about the 2007 lawsuit, Burnet Realty maintained it “does not improperly ‘steer’ clients to Burnet Title,” and noted, “To the extent that Burnet Title has advantages in getting business, they have a proven track record as a trustworthy and reliable company, and the quality of its products and services.” Further, Burnet said, “Although the complaint implies or suggests that the obligations Burnet has under state law are higher than the obligations imposed by [RESPA], the opposite is true.”

Under state law, “a fiduciary may be compensated for the referral of business with the principal's knowledge and consent. RESPA prohibits the payment of referral fees regardless of the principal's knowledge and consent,” Burnet claimed.

“Under state law, a real estate broker or agent has a duty to disclose to buyers those material facts that could adversely and significantly affect the buyers' use and enjoyment of the property, or any intended use of the property of which the broker or agent is aware. Under RESPA, a real estate broker or agent has a duty to disclose facts about affiliated business relationships to buyers, regardless of whether those facts would affect the buyers' use or enjoyment of the property.” Burnet added, “There is absolutely no basis in state law to claim that a fiduciary has a duty to its principal to priceshop before making a referral.”

Robinovitch has maintained that profits from Burnet Realty and Burnet Title flow up to their common parent, Realogy Corp., which follows a business model that incentivizes employees for maximizing the profits of Burnet Title.

“Because referral fees between the entities help maximize capture rates for cross-sales to Burnet Title and in turn, maximize Burnet Title's revenues, defendants' common

parent allows Burnet Realty and Burnet Title to filter money and other valuable consideration aimed at encouraging referrals ... using unconventional accounting techniques,” according to the lawsuit. The lawsuit contends that since 2002, Burnet Title has contracted to act as an agent for Lawyer’s Title. According to the suit, Lawyer’s Title filed insurance rates in Minnesota are among the highest. Tigor Title’s rates, the suit alleges, have been 30 percent lower than Lawyer’s Title at any given policy amount throughout the relevant period.

‘Value Circle’ business strategy

The suit cites Realogy’s “Value Circle,” that states “internally, our various real estate related companies provide many cross-selling opportunities. Employees of Realogy and its business units are responsible for driving growth both within their segment — franchising, relocation, brokerage, or settlement — and throughout the circle.”

Robinovitch said numerous incentive programs and practices have been implemented by the defendants to encourage referrals. He said Burnet Realty receives referral fees from Burnet Title to fund its manager compensation and bonus program and other incentive programs. Separately, Robinovitch said, Burnet Realty and its affiliates arranged for referral fees to be paid by Lawyer’s Title in exchange for an agreement to promote referrals and “develop and implement specific performance incentives.”

The lawsuit contends Burnet Realty branch managers are paid a substantial portion of their annual compensation based on referred title insurance orders.

The lawsuit cites an annual 10K filing on March 31, 1998 with the SEC by Burnet Realty’s parent, Cendant Corp. (now known as Realogy), that states the Preferred Alliance Program was established where third-party vendors pay

consideration in order to be referred business. The filing said Coldwell Banker, Century 21 and ERA agents provide a valuable access point for services attempting to reach homebuyers and sellers. It said preferred alliance marketers include title insurance. The lawsuit alleges Lawyer’s Title, at all relevant times, was a participant of the preferred alliance program. Competing underwriters with lower rates who refused to pay the fees in the “preferred alliance,” Robinovitch alleges, were rejected.

What’s new this time?

Robinovitch said the new case focuses on legal claims that were not resolved in the class certification order in *Grady*.

“The claim challenging Burnet Realty’s conflicts of interest from self-dealing and its failure to obtain its clients’ informed consent to those conflicts was not fully addressed in the order denying class certification,” he said. “Instead the court’s order focused on the failure to disclose material facts claims which involve application of a different legal standard. The conflict of interest claim in *Grady* was pending before the court on cross motions for summary judgment when the case settled. As a result, the matter was never finally adjudicated by the *Grady* court.”

Robinovitch also said the facts and arguments regarding the Preferred Alliance Program were not presented to the court at the class certification phase in *Grady* and were never ruled on by the court. He also said Burnet Title’s conduct of “enticing Burnet Realty to breach its fiduciary duties by self-dealing” was not brought before the court in *Grady*.

“As described in the Larpenteur complaint, Burnet Title promoted and facilitated Burnet Realty’s self-dealing,” Robinovitch said. “Those claims are new and therefore, were never adjudicated in *Grady* on the merits or with regard to class certification.”



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