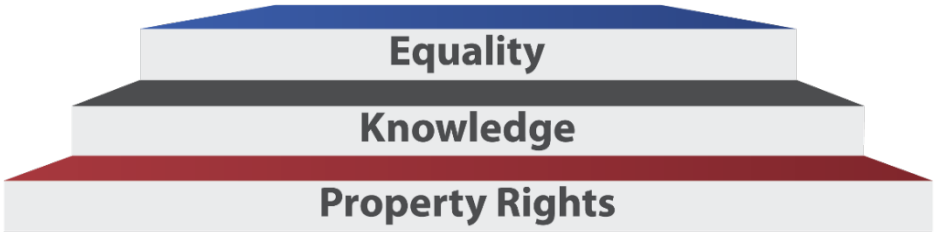
MICHIGAN REALTORS®

Within the Law



TEN COMMON LEGAL MISTAKES THAT REALTORS® MAKE

The following list of common legal mistakes made by Realtors® is not the product of a scientific or empirical survey. Instead, it is based on the observations and experience of attorneys who regularly deal with those mistakes.

1. When a Realtor® takes a new listing after the expiration of the prior listing with another agent, the Realtor® should not simply copy the information from the prior listing. Realtors® have found themselves in difficult situations when, for example, they have copied the square footage figure from a prior listing, and that square footage number has turned out to be incorrect. Realtors® should handle the input of re-listings in the same manner that they handle any new listing.

2. Realtors® should not mark up an offer and submit it as a counteroffer. There have been any number of disputes arising from a situation where, for example, the listing agent has the seller make various pen changes to the original offer and has the seller initial those changes. The situation becomes more complicated if the buyer then accepts some, but not all, of the seller's changes by initialing those changes and in addition makes her own pen changes. When this happens, it may be very difficult to determine the controlling terms of the contract. Realtors® should always use addendum forms (or start with a new purchaser agreement form) when preparing a counteroffer (or a counter to a counteroffer).

3. Realtors® sometimes fail to fill in all of the blanks in a purchase agreement form. If a Realtor® leaves a provision entirely blank, it is often not clear whether the intent was that the provision not apply at all. For example, suppose a purchase agreement form calls for the parties to select one of the following three possible tax proration methods: 1) due date in advance; 2) due date in arrears; and 3) calendar year in arrears. If a Realtor® does not select any

of these tax proration methods, does that mean that there will be no tax proration at all? When using a purchase agreement form, Realtors® shall fill in all of the blanks and cross out the inapplicable paragraphs.

4. When a transaction fails, a Realtor® cannot condition the release of the earnest money deposit upon the parties' execution of a mutual release. If there is no dispute over the earnest money deposit, the Realtor® cannot use his or her control over the earnest money deposit to force the parties to agree to release the Realtor® from any liability relating to the transaction. (The Realtor® can, but is not required to, require the parties to sign a release as it relates to the earnest money deposit only.)

5. An agent working with a buyer must deliver the earnest money deposit check to her broker upon receipt. A broker can wait to deposit the check until there is a binding purchase agreement in place, but a salesperson cannot wait to deliver the check to the broker.

6. A Realtor® representing a seller should be very careful to make sure that he or she does not take any steps that could result in a situation where more than one buyer claims to have a binding purchase agreement. Any number of disputes have arisen where, for example, after a seller has received multiple offers, the listing Realtor® prepares multiple counteroffers and delivers them simultaneously to all of the buyer's agents with the message that these are the terms the sellers will accept. A listing agent who does this runs the risk that more than one buyer will accept the sellers' counteroffer.

7. Realtors® working with buyers sometimes rely solely on the offer of compensation through the MLS. This can be risky. Realtors® working with buyers need to protect themselves by entering into buyer's agency contracts. If they do not do so, they may end up not being paid. Suppose, for example, Realtor® A has worked with Buyer Smith for many

months. Buyer Smith has narrowed his choice down to three homes. Then, out of the blue, Buyer Smith purchases an entirely different home through Realtor® B. Realtor® A will not be paid as he or she is not the procuring cause of the transaction that closed.

8. Realtors® must remember that the submission of a proposed amendment to a contract does not, in fact, enable the recipient to cancel the existing contract. Suppose, for example, Realtor® A lists 122 Elm Street, and an offer is submitted and accepted by the seller. During the time of the financing contingency, the buyer submits a proposed addendum to Realtor® A asking for an extension of the time to close. Realtor® A declares the addendum to be a counteroffer which the seller rejects and then accepts a better offer from another buyer waiting in the wings. The house has now been sold twice.

9. If a Realtor® represents that a property is serviced by public sewer and water, and that ends up not to be true, the buyers may be very unhappy. This is particularly the case if, for example, the septic drain field is saturated, and the nearest public sewer is $20,000 away. Realtors® who are not familiar with the area in which a home is located should confirm the existence of a public sewer by calling the municipality and/or asking for a copy of the sellers' water/sewer bill.

10. Finally, Realtors® should take great care to date all documents. Purchase agreements are typically full of terms that must be performed by a specific date, which is most often calculated from the date the contract becomes binding. For this reason, it is very important that all signatures are dated.

MARKETING OF PROPERTIES

Rules on marketing real property come from all directions – including the Occupational Code, MLS rules and the Code of Ethics. This article will summarize the requirements in the context of some of our most frequently asked questions.

I. MARKETING OF LISTINGS

A. Timing of Submission to MLS

Under NAR's mandatory clear cooperation policy, once a home is "publicly marketed," the listing broker has one business day to submit it to the MLS.[1] "Public marketing" includes public facing websites (*e.g.*, Facebook), brokerage website displays (including IDX and VOW) and multi-brokerage listing sharing networks.

Publication of a photograph of the home without the address is considered "marketing" if the home can be readily identified from the photograph. If, for example, the home is the only purple home in town – or the only one with a moat – the photograph alone qualifies as "marketing." Likewise, conversations or email exchanges with potential buyers during which the listing agent discloses identifying information about the home are considered "marketing."

The clear cooperation policy does apply to "coming soon" listings. So, for example, if an agent has a sign on a property advertising a home as "coming soon," it would also have to be advertised in the MLS as "coming soon."

The clear cooperation policy does not apply if the seller refuses to permit the listing to be placed in the MLS. An office exclusive can only be "advertised" to other members of the

[1] Within one (1) business day of marketing property to the public, the listing broker must submit the listing to the MLS for cooperation with other MLS participants. Model MLS Rules, Listing Procedures, Section 1.01.

listing firm. There can be no public advertising of an office exclusive. Office exclusives can be temporary or can run the entire duration of the listing. An MLS cannot regulate office exclusives, other than to require the listing broker to submit a disclosure form signed by the seller in which the seller acknowledges giving up the benefit of the MLS (the local MLS can dictate form to be used).

An MLS may have its own rules on the timing of the submission of a listing to the MLS. These rules would be in addition to the clear cooperation policy. For example, an MLS may require submission within one business day of the signing of the listing. Note that if the MLS rule refers to the signing of the listing contract, then the listing must be submitted after the contract is signed even if the listing calls for a later effective date. The post-dated listing can be designated as a coming soon listing (if allowed by MLS rules). If not, then it must qualify as an office exclusive/exempt listing, in which case the seller will need to sign any certification required by MLS rules.

Finally, MLS rules on submission of listings cannot contradict the clear cooperation policy but can work in tandem. For example, if an MLS requires submission within one day of signing, then the listing broker must submit a listing to the MLS within one day of signing the listing or one day of marketing, whichever comes first.

B. Photographs Submitted to MLS

Under copyright law, someone who publishes a photograph must have the permission of the photographer to do so. 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 them.

Under MLS policy, when a listing broker submits a photograph to the MLS, it is warranting to the MLS that it has the legal right to authorize the MLS to use the photograph (and other listing content).[2] 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 (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, 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.

If the seller changes listing brokers, they have no right to authorize the new broker to use the same listing photographs. Under copyright law, the photographs do not belong to the

[2] Model MLS Rules, Section 11.

seller/owner of the home, but to the person who took the photographs. Likewise, buyers obtain no rights in the listing photographs through the purchase of the home shown in the photographs. Buyers do not have the right to require an MLS to remove all photographs of the interior of the home that they have purchased.

As an aside, an MLS can have a rule which prohibits photographs that contain names, addresses, phone numbers or other identifying information. In other words, it is permissible for an MLS to prohibit photos that contain "branding" information.

C. Using Game Promotions to Market Property

A game promotion (where there is chance and a prize, but no consideration) is permissible, except if used to market a particular home.[3] A drawing which requires mailing a business card to an agent's office is permissible. A drawing which requires that participants submit comments on a particular home that the agent has listed is not permissible.

If a marketing program involves both "consideration" and "chance," it is not permissible under any circumstances.[4] So, for example, a listing agent may not offer a chance to win a getaway weekend to every seller who lists with them before a particular date. The question of whether there is "consideration" is typically determined by whether or not the promoter gained some type of financial benefit from the method of entry. For example, the Michigan Supreme Court has held that there was "consideration" where a theater gave all patrons a ticket to a drawing even though the theater patrons paid no additional consideration beyond the cost of the theater ticket.[5] The

[3] Occupational Code, MCL 339.2511.
[4] Michigan Lottery Statute, MCL 750.372.
[5] *Sproat-Temple Theatre Corp v Colonial Theatrical Enterprise, Inc*, 276 Mich 127 (1936).

Court pointed out that the drawing attracted theater patrons who would not otherwise attend and in that, the theater received a direct financial benefit (*i.e.*, "consideration").

D. Agents Marketing Their Our Property

Licensed salespersons can only market to sell their personal residence in their own name. Licensed associate brokers can market to sell any property they own in their own name. Both associate brokers and salespersons can advertise to lease any property they own in their own name.[6]

II. AGENTS MARKETING COMPETITORS' LISTINGS

Realtors® cannot advertise another broker's listings on their Facebook page (or other social media) without the listing broker's consent. This violates NAR MLS rules[7] and the Code of Ethics.[8] This is true even if the advertising clearly identifies the listing broker. On the other hand, linking to another broker's website does not require specific authority.

Of course, Realtors® who agree to an IDX feed do, in fact, authorize a display of their listings.[9] The authorization is limited, however, and does not permit a Realtor® to simply cut and paste another Realtor®'s listing and post it on their website. It does authorize a feed of participating brokers' listings so long as the IDX display complies with IDX rules.

The IDX rules are designed to make certain that listing information for a particular property is identified with, and controlled by, the listing broker. Participants must notify the MLS of their intention to display IDX information and give the MLS direct access for purposes of monitoring

[6] Occupational Code, MCL 339.2512(c)(2); (4).
[7] A listing shall not be advertised by any participant other than the listing broker without the prior consent of the listing broker. Model MLS Rules, Listing Procedures, Section 2.7.
[8] Realtors® shall not offer for sale/lease or advertising property without authority. Standard of Practice 12-4.
[9] NAR Handbook on Multiple Listing Policy, Statement 7.58.

compliance. MLS participants may not use IDX provided listings for any purpose other than IDX display. An MLS participant is allowed to withhold authority for IDX display of its listings either on a blanket basis or on a listing-by-listing basis as instructed by the seller.

III. CONCLUSION

Realtors® need to be aware of the various laws, MLS rules and code of ethics provisions governing the marketing of real property. The goal of these rules is to create an efficient pro-competitive and pro-consumer marketplace while at the same time protecting the interests of both property owners and real estate professionals. It is possible that no two people would draw the line in the exact same place.

TEAM ADVERTISING

When it comes to advertising as a Team, Michigan Realtors® should carefully comply with the Occupational Code requirements as to relative type size and content. In addition to the Occupational Code requirements, Michigan Realtors® should also make sure that the name of the Team and the content make clear that the Team is part of a real estate company and not a separate entity. This second "rule" is not a statutory requirement, but an important risk reduction technique. If an individual working through a company wants to avoid personal liability, it is very important that they maintain their corporate shield. This article will discuss the Occupational Code requirements as well as provide advice for maintaining your corporate shield.

Occupational Code Requirements

In any real estate advertising, the type size used for the broker's name must be at least as large as the type size used for the Team name. The names do not need to be in the same font or color, and it is not the case, for example, that if the Team name is in bold type then the broker's name must also be in bold type. The advertisement must include the broker's name as licensed or an assumed name on file with LARA. The advertisement must include the broker's phone number or address; however, the rules do not regulate the size of the type for the phone number/address.

When comparing the type size of the name of the Team with the type size of the name of the broker, either of the following tests may be used:

Test No. 1. Compare height of "blocks:" the height of the block containing the name of the Team may not exceed the height of the block containing the name of the broker.

Test No. 2. Compare type size of words: the point size of the majority of the letters in the name of the Team may not exceed the point size of the tallest word in the name of the broker.

An advertisement that satisfies EITHER of these tests is in compliance. It is not necessary to satisfy both tests. The purpose behind having two separate tests is to preserve the goal of the advertising rule – that is, to make sure that the advertising makes clear what company is doing the advertising – while at the same time, providing licensees with creative flexibility. Remember that these are minimum requirements. A broker can always adopt more stringent requirements than the law dictates.

Risk Reduction – Maintaining Your Corporate Shield

Teams should be aware of the corporate shield doctrine. Under this doctrine, as a general rule, a shareholder of a corporation or a member of a limited liability company is not personally liable for the obligations of the company. Michigan courts typically consider corporations legally distinct from their shareholders, even if a single shareholder owns all the stock. The same is true for limited liability companies. So, if a buyer with a leaky basement wants to sue their buyer's agent as well as the seller, ordinarily, the claim is against the company and not the individual agent.

However, in some instances, courts will permit someone like a disgruntled buyer to "pierce" the corporate veil – or in other words, ignore the entity and permit a lawsuit against the individual agents involved and/or the owners of the company. One situation in which a court may permit action against the individual agents and/or owners of the company is in the situation where the business was not conducted in the name of the company. Where it appears to the public that the business is being conducted by an individual or group of individuals, rather than a company, a court may decide that the individuals are personally responsible for any liability arising in

connection with the conduct of that business. For this reason, it is very important that an agent or Team of agents operate in such a manner as to make clear that they are not working for themselves but are working for an identified real estate company. The actual name of the Team should not muddle that distinction.

A number of states have specific laws designed to prevent an individual or Team from advertising in a way that suggests that the Team is an independent real estate brokerage. For example, a number of states specifically prohibit Team names that include words like "realty," "real estate brokerage," "company," "associates" or "group." Some states prohibit a Team from using any insignia or trade name that suggests company ownership or management. Other states require that all Team names include the name of at least one of the Team members.

Michigan does not have any such laws. Nonetheless, for liability reasons, Michigan licensees should make certain that their advertising makes clear that the Team is part of the real estate company and not a separate entity. Although Michigan Teams are not required by license law to follow the "naming" rules from other states, they are very good suggestions. Remember, even if your advertisement complies with the Michigan Occupational Code's relative type size requirements, a Michigan court could still find that based on the Team name or other advertising content, the Team members are not protected by their brokerage firm's corporate shield.

In order to preserve your corporate shield, it is also important that you do not enter into contracts in your Team name. Listing contracts and buyer broker contracts should not list the Team as a party or be signed by an agent as a representative of a Team. Agency contracts should be signed by individual licensees as representatives of the broker. Again, you want to avoid the impression that the Team is a separate legal entity.

Finally, agency disclosure forms should not be filled out in the name of the Team. The names of individual licensees should be inserted. If more than one Team member will be working with a particular client, each licensee should be listed by name in both the designated agency agreement and the agency disclosure form.

Conclusion

Assume, based on advertising signs and signature blocks on forms, that a buyer thought it was working with a business known as "Smith Realty Group." Assume further that the basement leaks and the buyer sues both the seller and "Smith Realty Group." When it is discovered that "Smith Realty Group" is the name of a Team that is part of the Jones Real Estate brokerage company and not an actual entity, a court may hold the "Smith Realty Group" agents personally responsible to the extent there is liability. Moreover, in this instance, the broker's insurance carrier may decide that there is no coverage because the business was not being conducted in the name of the broker.

The advertising rules in the Occupational Code and the corporate shield doctrine are designed to make certain that consumers know who they are dealing with. In order for someone to be forced to look only to the brokerage company for money damages, it must be shown that at the time they were contracting for services, they were aware – or should have been aware – of the fact that they were dealing with the brokerage company.

LEGAL ACTION COMMITTEE

Michigan Realtors® maintains a special fund known as the Legal Action Fund. One of the primary purposes of that fund is to assist in the development of case law necessary to protect real property rights in Michigan. In choosing cases, the Legal Action Committee, appointed by the Board of Directors, must decide which cases will have the most significant impact on Realtor® members and the organization as a whole. This article will discuss several of the significant cases that the Legal Action Committee has been involved with in recent years.

Statute of Frauds

As Realtors® are well aware, there is a statute in Michigan which states that any agreement by a seller to pay a commission in connection with the sale of real estate must be in writing. It is one of the few rules that are written in stone. Or so we thought. Several years ago, Michigan Realtors® was involved in a case that challenged this most basic rule.[10]

The case involved a broker that had seen a for-sale-by-owner sign on real property. The sign said that the property was for sale and was "broker protected." The broker notified a potential buyer of the available property. Despite the broker's repeated attempts, neither the buyer nor the seller agreed to work with the broker. When the buyer purchased the property, the seller paid a commission to another company who had worked with the buyer. The first broker sued the seller claiming that it was entitled to a commission based upon the doctrine of promissory estoppel. The broker alleged that the "broker protected" language on the sign was a promise that they were entitled to rely on.

[10] *North American Brokers, LLC v Howell Public Schools*, 2017 WL 535555 (February 9, 2017), *lv den*, 502 Mich 882 (2018).

The trial court threw out the case holding that the broker's claim was barred by the statute of frauds. The broker appealed and the Court of Appeals ruled in favor of the broker. The Court of Appeals found that the Michigan Supreme Court had held that promissory estoppel is an exception to a different section of the statute of frauds. It was the opinion of the Court of Appeals that it had no choice but to allow the doctrine in this case.

The seller asked the Michigan Supreme Court to review (and overturn) the Court of Appeals' decision. Michigan Realtors® filed a brief in support of the position of the seller. In its brief, Michigan Realtors® pointed out that the Michigan Supreme Court had strictly enforced the requirement for a written commission agreement as far back as 1916. Unfortunately, the Michigan Supreme Court refused to hear the case. The Court of Appeals' decision was allowed to stand.

Michigan Realtors® was very disappointed in the outcome and quite concerned that this new rule, whereby a licensee could claim a commission based upon an alleged "promise," would wreak havoc in the industry. Accordingly, Michigan Realtors® turned to the Legislature. At Michigan Realtors®' urging, the statute of frauds was amended to make absolutely clear that without a writing, there may be no claim to a commission against a seller under any legal theory. As stated by the sponsors of the bill, this revision to the statute of frauds "makes it easier to know what is owed to whom without fear of noncontractual parties claiming that different compensation is owed."

This section of the statue of frauds does not apply to claims between brokers. And, of course for Realtors®, there is a mechanism in place to resolve commission disputes between brokers.

Independent Contractor Status

A few years ago, an associate broker filed a lawsuit against his former broker alleging that he had been wrongfully terminated.[11] Under Michigan common law, even if an employee is "at will," they cannot be terminated if doing so would violate "public policy." One of those public policy exceptions to an "at will" employment relationship is where the employee is discharged for refusing to violate the law. Here, the associate broker alleged that he had been terminated because his broker had required him to violate RESPA and he had refused.

The case never got to the issue as to whether the broker had, in fact, directed the associate broker to violate RESPA. Instead, at the broker's request, the trial court threw out the case on the basis that the associate broker was an independent contractor, not an employee. The trial court found that the public policy exception to the "at will" employment doctrine applies to employees only and that the associate broker was clearly an independent contractor under the following provision of the Occupational Code:

> (h) "Independent contractor relationship" means a relationship between a real estate broker and an associate real estate broker or real estate salesperson that satisfies both of the following conditions:
>
> (i) A written agreement exists in which the real estate broker does not consider the associate real estate broker or real estate salesperson as an employee for federal and state income tax purposes.

[11] *Smith v Town & Country*, 338 Mich App 462 (2021).

(ii) At least 75% of the annual compensation paid by the real estate broker to the associate real estate broker or real estate salesperson is from commissions from the sale of real estate.

The associate broker had argued that this definition sets forth only the minimum qualifications for an independent contractor and that it does not mean that if those criteria are satisfied, a person is necessarily an independent contractor. The associate broker argued:

By way of analogy, the Constitution sets forth three qualifications for service in the United States Senate: (1) that the individual be at least 30 years of age, (2) that the individual be a United States citizen for at least nine years, and (3) that the individual reside in the state he/she seeks to represent at the time of election. U.S. Constitution, Article I, section 3, clause 3. However, simply because an individual is able to meet these criteria does not mean that the individual is, in fact, a U.S. Senator.

The proper test for determining whether the associate broker was an employee or an independent contractor, the associate broker argued, is the "control test," which involves the weighing of numerous factors to determine whether the worker has control over the method of their work. The trial court rejected these arguments and held that the associate broker was an independent contractor.

The associate broker appealed to the Court of Appeals. Michigan Realtors® filed a brief in support of the broker. The Court of Appeals found that the Occupational Code was definitive on the issue of whether the associate broker was an independent contractor.

Warranty of Title and Building Code Violations

In the spring of 2022, the Michigan Court of Appeals issued an opinion which made sellers strictly responsible for any and all building code violations, even if they were wholly unaware.[12] In this case, a prior owner had divided one condominium unit into three separate units. This prior owner failed to install any fire walls between the newly-created units. The current seller, who had purchased one of the new units, was unaware of this building code violation. The buyers, who discovered the problem after closing and were required to install a fire wall, sued their seller even though there was no evidence that their seller had known of the problem.

The trial court threw out the case against the apparently innocent seller, but the Court of Appeals reversed. The Court of Appeals held that when the seller gave the buyers a warranty deed, among other things, the seller was "warranting" that the property complied with all building codes. Because it was a warranty, it did not matter if the seller had been unaware of the problem.

The Court of Appeals' decision had no basis in Michigan law and was contrary to the law in other states. The seller appealed to the Michigan Supreme Court. Michigan Realtors® filed a brief in support of the seller's position. The Supreme Court unanimously reversed the decision of the Court of Appeals, correctly holding that a "warranty" in a warranty deed is a warranty of title, not a warranty as to the condition of the property.

Consumer Protection Act

There is a Michigan Consumer Protection Act ("MCPA") issue that Michigan Realtors® have been following since the early 1980's. Briefly, the MCPA prohibits "unfair, unconscionable and deceptive" practices. Consumers, as well as the Michigan Attorney General and county

[12] *Galvan v Poon*, 2021 WL 3700299 (August 19, 2021), *rev'd* 2023 WL 4496998 (July 12, 2023).

prosecutors, can bring enforcement actions under the MCPA. Violators may be required to pay actual damages, fines of up to $25,000 and reasonable attorney fees.

The issue that has been the subject of litigation for decades has to do with the interpretation of the following exemption from the MCPA:

A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.[13]

Real estate licensees and other regulated industries have argued that this exemption applies if the general activity involved is regulated. Under this analysis, if, for example, the alleged deceptive activity occurred in connection with a real estate listing, the claimant must pursue the licensee under the Occupational Code and not the MCPA. The opposing argument is that this MCPA exemption applies much more narrowly. Under this view, the activity complained about must be specifically authorized by another statute.

Suppose, for example, that sellers bring an action against their listing agent claiming that the listing agent disclosed confidential information about the seller-clients to the buyer. Under the broad interpretation of the MCPA exemption, the sellers could not pursue this claim under the MCPA because the overall conduct – the listing of property – is regulated under the Occupational Code. Under the narrow interpretation of the exemption, the sellers would have a claim under the MCPA because the Occupational Code (obviously) does not authorize the listing agents to disclose confidential information about their seller-clients.

This issue appeared to have been pretty well-settled by 2008. By then, the Michigan Supreme Court had ruled in a number of different cases that the MCPA does not apply if the overall

[13] MCL 445.904.

activity is regulated and that it is not necessary that the alleged misconduct be specifically authorized. Michigan Realtors® filed amicus briefs in a number of these cases.

In recent years, there have been a couple of Michigan Court of Appeals' decisions in which members of the Court have expressed disagreement with the broad view of the MCPA exemption. In these cases, the Court of Appeals has followed earlier rulings of the Michigan Supreme Court, but openly encouraged it to reconsider.[14] There is currently a case pending in which the Michigan Attorney General has asked the Michigan Supreme Court to do just that. While the case does not involve real estate licensees, but instead pharmacists, the larger issue at hand – *i.e.*, whether regulated industries are exempt under the MCPA – is of major importance to Michigan Realtors®.

[14] *Cyr v Ford Motor Company*, 2019 WL 7206100 (December 26, 2019), *lv den*, 506 Mich 950 (2020); *Atty General v Eli Lilly and Company*, 2023 WL 4141169 (June 22, 2023).

BROKER LIABILITY FOR SAFETY OF POTENTIAL BUYERS

I. Introduction

As Realtors® may recall, just over a decade ago, the Michigan Court of Appeals ruled that prior to showing a home, a buyer's agent does not have a duty to pre-inspect the home in order to warn the buyer about any dangerous conditions.[15] On July 28th of this year, the Michigan Supreme Court overruled existing Michigan law on premises liability.[16] What impact, if any, does this ruling have on Realtors® showing homes?

II. Discussion

A. The Supreme Court Case

Previously under Michigan law, a property owner was not responsible for an injury that occurred on that owner's property if the dangerous condition that caused the injury (*e.g.*, water on the floor) was "open and obvious." The only exception to this rule was where the injured party could not have avoided the dangerous condition (*e.g.*, the only available entry was via the slippery floor).

A recent Michigan Supreme Court case changed this rule. Now, a property owner may be liable even if the dangerous condition is "open and obvious." Under Michigan's new premises liability law, property owners (and possessors) owe a duty to exercise reasonable care to protect visitors from an unreasonable risk of injury due to hazardous conditions, even if those hazardous conditions are "open and obvious." A jury can still consider the "open and obvious" nature of the hazardous conditions but that fact alone will not bar the lawsuit. Rather, a jury must consider

[15] *Davies v Johnson,* 2012 WL 2947903 (2012).
[16] *Kandil-Eslayed v F&E Oil, Inc,* _____ Mich _____ (2023).

whether the "open and obvious" nature of the hazardous condition means that the plaintiff is also at fault and, if so, reduce the plaintiff's damages accordingly.

B. Buyer's Agent Liability

This change in Michigan premises liability law should not affect the earlier decision holding that buyer's agents have no duty to inspect a home before showing it to their client.

The earlier decision involved a buyer, Davies, who, along with his buyer's broker, viewed a home that had no heat or electricity. While touring the home, Davies opened a door to a dark room. No one knew what was inside the room. Davies walked into the room and tried to light the room using a cell phone and a cigarette lighter. Davies could not see what he was walking on and, a few steps in, walked off a 3 to 4-foot ledge into a boat dock well. Davies was subsequently treated for a sprained right ankle and a fracture to his left elbow.

Davies sued the property owner, the listing broker and its agent, as well as the buyer's broker and its agent. The circuit court threw out the case against the buyer's broker and its agent, holding that they had no duty to pre-inspect the home or to warn about a condition they did not know about. Davies appealed and the Court of Appeals upheld the trial court's decision, finding that the buyer's agent generally has no control of the premises and has no greater access or ability to discover and avoid damages than his/her client.

Courts in other states have also refused to hold buyer's agents liable for injuries sustained by their clients during a showing. For example, in a Delaware case, the Johnsons were purchasing an undeveloped 1.3-acre parcel of land.[17] The property was unkempt and overgrown and had a dilapidated structure on it. The Johnsons' buyer's agent was walking the property with the

[17] *Johnson v Chupp,* 2003 WL 292168 (2003).

Johnsons. Unfortunately, while they were walking the property, Mrs. Johnson fell partly into an open unmarked well which was hidden by the underbrush. In addition, Mr. Johnson contended that he was holding hands with Mrs. Johnson at the time of the fall; thus, he was also injured. The Johnsons sought damages for physical injuries, pain and suffering, loss of enjoyment of life and medical and travel expenses. The Johnsons sued the owners, the listing agent and the buyer's agent.

The Delaware court summarily dismissed the Johnsons' claims against the buyer's agent. The Delaware court acknowledged that the property was overgrown with weeds and generally unkempt. However, the Delaware court refused to find that a buyer's agent has a duty to inspect the property. Just like the Michigan court in the *Davies* case, the Delaware court found that the buyer's agent had no more control over the property and its condition than the buyers themselves. Importantly, the Delaware court noted that it could not locate a single state in the United States which required a buyer's agent to inspect property for safety, or to warn buyers of any dangers.

Since buyer's agents are not liable for injuries sustained by a buyer when viewing a property, the new Michigan rule of law as it relates to "open and obvious" dangers is irrelevant as it relates to buyer's agents.

C. Listing Agent Liability

We are aware of only one Michigan case discussing a listing agent's responsibility for injuries as a result of a dangerous condition at a home the agent had listed.[18] In that case, the listing agent planned to hold an open house on a Sunday. It snowed on Friday night. On Saturday morning, the sellers cleared the snow from the sidewalk and driveway, and then, acting under

[18] *Anderson v Wiegand*, 223 Mich App 549 (1997).

instructions from the agent, left town. On the morning of the open house, it was warm and there was a slight thaw. As the day progressed, it became colder. The thawed areas that were in the shade turned to ice. A person attending the Sunday morning open house was walking up the drive and slipped and fell on the ice.

The injured person sued both the homeowners and the listing agent. The trial court threw out the case against the listing agent, holding that the agent was not required to do snow shoveling or "anything of that nature." The injured party appealed and the Court of Appeals ruled that the case against the listing agent should not have been thrown out.

The Court of Appeals found that the sellers/property owners had surrendered exclusive possession and control of the property to the listing agent, as a consequence of which, the listing agent assumed the duty of the sellers/property owners to "take reasonable steps within a reasonable time to diminish the hazard of injury after an accumulation of ice and snow." Whether the listing agent's lack of action immediately before the open house was reasonable was left for the jury to determine.

A number of other states have imposed similar liability upon listing brokers but, like the Michigan case, have done so only in the context of an open house. These cases have generally made clear that while a listing agent has some responsibility with respect to dangerous conditions, this responsibility is not the same as the owner's.

Some courts have held that the duty of listing agents hosting open houses is to disclose dangerous conditions that they know about.[19] Other courts have held that the duty extends beyond known defects and extends to defects that are "reasonably discoverable through an ordinary

[19] *Coughlin v Harland L Waver, Inc*, 103 Cal App 2d 602 (1951).

inspection of the home undertaken for the purposes of its potential sale."[20] Finally, there may be a duty to take actual steps to diminish the hazard where the listing agent has control of the home – for example, if the home is vacant, the sellers currently live out of town and the listing agent has agreed to monitor the home in the sellers' absence.

As one court explained:

Based on the nature and circumstances surrounding an open house, we conclude that implicit in the broker's invitation to customers is some commensurate degree of responsibility for their safety while visiting the premises.

Michigan law as it relates to the responsibility of listing agents holding open houses is not yet settled. Michigan courts have not said that every listing agent holding an open house has a duty to discover and disclose any dangerous conditions. What the Michigan Court of Appeals has said is, at least where sellers have surrendered control and possession of the home for a period of time prior to the open house, the listing agent has a duty to take reasonable steps to protect attendees from foreseeable harm. In this context, Michigan courts have not yet fleshed out either "reasonable steps" or "foreseeable harm." The recent Michigan Supreme Court case on "open and obvious" dangers did not shed any light on these standards.

III. Conclusion

Under existing Michigan law, buyer's agents owe no duty to discover and disclose dangerous conditions in properties they are showing. Under existing Michigan law, listing agents have no duty to take steps to protect potential buyers from dangerous conditions other than in

[20] *Hopkins v Fox & Lazo Realtors*, 132 NJ 426 (1993).

connection with an open house and even then, maybe only where the sellers have surrendered control and possession of the home for a period of time leading up to the open house.

The recent Michigan Supreme Court case did not change these rules. However, it is now the case that in situations where listing agents may be responsible for an injury caused by dangerous conditions in a listed property, they cannot get the case thrown out on the basis that such dangerous condition was "open and obvious."

Because of the potential for liability, many listing forms used around the state contain a provision whereby the sellers expressly agree to indemnify and hold the listing broker/listing agent harmless from any and all liability as a result of any injuries to any person arising during a showing.

SALESPERSONS WITH INTERESTS IN TITLE COMPANIES

As Realtors® are well aware, a title company cannot reward real estate agents for referring them business. A title company cannot, for example, provide agents who refer business with a getaway vacation. A title company cannot even host a reception for these agents. A title company certainly cannot reward these agents by giving them an ownership interest in the title company.

So, while it is true that a real estate agent can own an interest in a title company, that ownership interest must be based on the agent's actual investment in the business. It cannot be a gift in exchange for past referrals or expected future referrals.

Even if the agent's interest in the title company is legitimately established, the agent must make certain that when they refer a client to such title company, they follow RESPA's requirements for an "affiliated business relationship."

Brokers do have a legitimate interest in making certain that their agents' relationships with a title company are RESPA compliant. First, the Occupational Code requires brokers to supervise their salespersons. Second, it is quite possible that a court could hold a broker vicariously liable for their agent's RESPA violation.

A Review of RESPA Basics

Section 8(a) of RESPA provides:

> No person shall **give** and no person shall **accept** any **fee, kickback, or thing of value** pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

Remember that RESPA does not prohibit referrals, only payments for referrals. There is an exception for this rule that would allow a real estate salesperson to refer a client to a title company in which they hold an ownership interest (and therefore will benefit from that referral).

This Section 8 exception is known as an "affiliated business arrangement." In order to qualify for the "affiliated business arrangement" exception, the salesperson must follow several rules.

First and foremost, the only money that the salesperson can receive from the affiliated title company is a share in the overall profits of the company based upon the salesperson's percentage interest in the company. The salesperson's compensation cannot be tied to their referrals in any way.

Second, the salesperson must provide clients with the statutory affiliated business disclosure form that discloses the nature of the relationship and makes clear that the client may obtain title insurance elsewhere. This disclosure must be made prior to making the referral.

Third and finally, the affiliated title company must be a legitimate company, with sufficient capital, employees and separate office space. The title company must perform core services associated with the industry. It would not be permissible for a salesperson to set up a wholly owned "title company" that did nothing more than pass on their clients' title insurance orders to another title company that does the actual work.

Vicarious Liability

It is ordinarily the case that principals (*e.g.*, brokers) can be held vicariously liable for their agents' (*e.g.*, salespersons') violations of federal law. A RESPA violation is a violation of federal law. The broker's liability will depend on whether the actions of the salesperson are viewed as being within the scope of their authority. This does not require that the broker have authorized the salesperson to violate the law. The question is whether the salesperson's actions were in connection with the broker's real estate business or were wholly separate and apart from that business.

Earlier this year, a court was asked whether an employer could be vicariously liable for an employee's violation of the RESPA Section 8 anti-kickback rule.[21] The case involved bank employees who had accepted kickbacks for referrals to a title company. A class action against the bank was brought on behalf of borrower-customers. The bank argued that it could not be liable because the kickbacks were for the benefit of the bank employees, not the bank. Specifically, the bank argued that it could not be liable because:

1. The checks were made payable to the employees and not the bank;
2. The employees did not disclose the kickback arrangement to the bank; and
3. The mortgage loans were already approved and would have closed regardless of which title company was used.

The Court refused the bank's request that it throw out the case. The Court first noted that the United States Supreme Court has said that:

> Traditional vicarious liability rules ordinarily make principals or employers vicariously liable for their agents' or employees' violations of federal law.

The Court went on to say that in each case, the question is whether the act of the employee/agent was within the scope of their authority or employment. Here, the ordering of title insurance was within the employees' job description, and the bank benefited to the extent that the performance of title insurance services was essential to the loan closings. The Court went on to say that an employer may be vicariously liable even if it can be shown that the employee had disregarded the employer's instructions.

Admittedly, this was a case involving an employee rather than an independent contractor. However, there are other cases involving different sections of RESPA where courts have applied

[21] *Bezek v First Nat'l Bank of Pennsylvania*, unpublished opinion per curiam of the United States District Court, D. Maryland, issued January 20, 2023 (Docket No. SAG-17-2902); 2023 WL 348967.

the same analysis in the case of a principal/agent relationship. For example, banks have been held liable for the actions of their servicers which were wholly separate companies.

It is quite possible that under this type of analysis, a court could hold a real estate brokerage firm vicariously liable if the agent's relationship with a title company is not RESPA compliant. This is true even if the broker has nothing to do with that relationship and receives no financial benefit.

An Aside on Affiliated Business Disclosure Forms

Providing an affiliated business disclosure form is a critical step in the process which should not be taken lightly. The disclosure must be made before the referral is made and Realtors® should not modify the disclosure language in the form. In addition to RESPA, there is another federal statute that prohibits taking unreasonable advantage of a consumer's lack of knowledge about selecting a financial product or service. The concern is that buyers are being asked to make quick decisions about products they know nothing about based upon advice from professionals with their own self-interest. The verdict is still out as to if and how this law applies in the case of affiliated business arrangements expressly permitted under RESPA. Nonetheless, Realtors® are encouraged to take the AfBA disclosure requirement very seriously. The affiliated business disclosure form should be presented to the client separately (as opposed to including it as part of a package of forms that need signatures). Moreover, Realtors® should not simply email the form to the client for signature, but should take the time to explain the contents of the form in detail before asking for a signature. The goal is to obtain not just consent, but informed consent.

TEN THINGS REALTORS® SHOULD KNOW ABOUT THE SELLER DISCLOSURE ACT

1. The fact that sellers have never lived in a home does not mean that they are exempt from filling out the SDA form. Sellers who have not lived in the home cannot state that they "know nothing about the condition of the home" unless that is, in fact, true. Most sellers know something about the condition of the home even if they have never lived there.

    a. If, for example, the sellers know that the basement leaks:

        - It is fraudulent to say it does not.
        - It is fraudulent to say that the sellers "know nothing about the condition of the home because they have never lived there."
        - It is fraudulent to "accidentally" skip the question that asks about water in the basement.

2. A listing agent should never advise a seller against making a disclosure on the SDA form. Disclosure is always the safest course of action, and Realtors® do not want to put themselves in the position of having their sellers testify that the sellers wanted to disclose a particular defect but that their Realtor® talked them out of it.

3. Most of the questions on the SDA form relate to the present condition of the property only.

    a. One notable exception is the question on whether there has (ever) been water in the basement/crawl space.

        - It has been held that sellers were required to disclose the fact that the basement leaked 26 years ago.

    b. Other examples of historical questions include "major damage to the property from fire, wind, floods or landslides" and any "structural modifications, alterations or repairs made without necessary permits or licensed contractors."

4. A seller is not responsible for an innocent misrepresentation in an SDA form.

    a. Form says:

        - "This statement is not a warranty of any kind by the seller or any agent representing the seller in this transaction, and is not a substitute for any inspections or warranties the buyer may wish to obtain."

    b. Seller's protection against liability for an innocent misrepresentation is limited to questions on the seller's disclosure form. Under Michigan law generally, sellers are not required to volunteer information, but if they do, they are responsible for false statements even if innocently false.

- When the SDA passed, it was decided that, for the first time, sellers were going to be required to volunteer certain information, but in exchange, the law would protect them if they were simply mistaken.

5. Sellers are not obligated to conduct any research as to the condition of their home. Form says:

    - Unless otherwise advised, the Seller does not possess any expertise related to the construction or condition of the home.

    - Unless otherwise advised, the Seller has not conducted any inspections of generally inaccessible areas to determine the condition of the home.

6. There is no private cause of action under the SDA. Under the SDA, if the seller fails to provide the buyer with a seller's disclosure statement, the buyer can exercise his/her right to terminate the purchase agreement at any time up to the date of closing.

    a. A seller could decide that they are willing to risk the fact that the buyer may walk from the transaction at any time and simply refuse to provide an SDA form. There may be a reasonable basis for this choice – for example, a home being sold by someone who has a power of attorney for an incompetent seller.

    b. A buyer who has been provided with a partially completed form could argue that the seller has not actually complied with the SDA and therefore the buyer can still terminate the agreement.

7. A buyer may have a common law fraud claim based on a knowingly false statement made by the seller in the SDA form.

    a. If a seller does disclose the existence of a problem in the SDA form, courts have generally held that the burden shifts to the buyer to investigate the nature and extent of the problem. As a general rule, Michigan courts don't seem to be open to the argument that the seller was required to provide more detail than they did – particularly if the buyer made no follow-up inquiry.

8. The SDA has been amended to make clear that any representation as to the condition of an appliance in the SDA form does not mean that such appliance will necessarily be included in the sale. The purchase agreement will be controlling.

    a. Buyer's agents should make certain that the buyers understand this limitation.

    b. Same is true with items mentioned in the MLS.

    c. Avoid disputes by specifically listing all personal property the buyer wants included in the offer to purchase.

9. An SDA form is only required for sales of not less than four residential dwelling units. An SDA is not required for commercial transactions or for sales of vacant land.

a. There are vacant land disclosure forms out there. Unlike with SDA, a seller will be liable for an innocent misrepresentation in a vacant land disclosure form (because there is no statutory protection like there is with the SDA).

10. A seller is statutorily obligated to update his/her SDA form if something occurs after the form is completed but before closing that makes the statement inaccurate only IF such inaccuracy relates to the structural/mechanical/appliance systems.

a. Statute also says:

- If information disclosed … becomes inaccurate as a result of any action, occurrence or agreement after the delivery of the required disclosure, the resulting inaccuracy does not constitute a violation of this act.

- Seller makes these disclosures based on the seller's knowledge at the signing of the document.

- Seller certifies that the information in the statement is true and correct to the best of seller's knowledge as of the date of the seller's signature.

b. Just because the seller is not statutorily obligated to update the SDA doesn't mean it isn't a good idea.

- Suppose at the time the seller fills out the SDA form, there has never been any evidence of water in the basement. Three weeks later, the basement leaks. Does the seller really want to get involved in a factual dispute over what they knew when?

- Again, the listing agent should not advise the seller against updating the form. If the listing agent does advise the seller not to update the form, and a dispute arises after closing, the seller is likely to point to the listing agent.

THE CONTINUED EVOLUTION OF DRONE LAW

Federal Law

The Federal Aviation Administration ("FAA") regulates the conditions under which drones may be flown in the United States.[22] Drones must be registered and drone pilots must be licensed. Drones cannot weigh more than 55 pounds, including all attachments. They cannot be flown higher than 400 feet. Also, there are "No Drone Zones," such as airports and military bases over which drone flight by private operators is prohibited.[23] A drone must remain in the drone pilot's line of sight at all times.

Commercial pilots must obtain a Remote Pilot Certificate, sometimes referred to as a Part 107 License, from the FAA. Recreational pilots, on the other hand, need only pass The Recreational UAS Safety Test, and carry proof of having passed that test with them when flying. A use is "commercial" if you receive direct compensation from the drone use. A use is also "commercial" if you use the drone to enhance the day-to-day operations of your business. A listing agent who uses a drone to photograph their own listings is using photographs to enhance their business and, therefore, such use is "commercial."

Commercial drone pilots are required to follow a few rules that do not apply to recreational pilots, including conducting a pre-flight inspection and maintaining a flight log. Recreational pilots may not fly over people unless the people are involved in the operation of the drone or located within a structure. Commercial pilots may fly over people in certain circumstances.

---

[22] Small Unmanned Aircraft System (UAS) Regulation, 14 CFR Part 107.

[23] You can find out if there are airspace restrictions where you are planning to fly by using the B4UFLY mobile app.

Recently, the FAA reported that there are currently over 850,000 drones registered in the United States. In order to accommodate the increase in drone usage, the FAA issued a new rule this year (the "Remote ID Rule") which requires drones to broadcast identification information about the drone and its operation while in flight. The Remote ID Rule becomes effective on September 16, 2023. By that date, drone pilots across the United States will be required to equip their drones with a remote ID that law enforcement can cross-reference with the drone's registration number. The drone's location, speed and altitude must also be broadcast. This requirement applies equally to new and existing drones. There is no grandfathering of older drones and it doesn't matter if you are flying for recreation or business. The only exception to the Remote ID Rule is if you *only* fly your drone in a designated drone flying zone, specifically, an "FAA-Recognized Identification Area." The FAA will publish locations of these areas.

Obviously, the Remote ID Rule is intended to enhance drone accountability, safety and security. In turn, this leads to a greater potential for liability in the form of fines that can be levied by the FAA. The FAA can also suspend or revoke a drone pilot's certification to fly.

Many enforcement actions have involved situations where the drone pilot lost control of the drone and put people at risk. For example, one action involved a drone that crashed into a residential apartment and shattered a window. Another enforcement action involved a mid-air collision between a drone and a Los Angeles police helicopter.

In 2015, the FAA attempted to impose a $1,900,000 fine on a large aerial photography company that worked primarily for real estate developers and others in the real estate business. The FAA claimed that on numerous occasions, the photography company had operated in a careless and reckless manner in "highly restricted air space" (*i.e.*, New York City and Chicago).

The photography company denied the allegations and the parties eventually settled on a $200,000 fine.

And, of course, the FAA will fine pilots who are not licensed or are using a drone that is not registered. The FAA can also fine a person who knowingly hires an unlicensed drone pilot.

Michigan Law

Unfortunately, even if you do everything required by the FAA regulations, you still have a few more laws to contend with. Each state, including Michigan, has its own set of drone laws.

Michigan law prohibits the operation of a drone for the purpose of capturing photographs or video recordings that invade an individual's reasonable expectation of privacy. Michigan law also prohibits the use of drones for the purpose of harassing others. A drone cannot be used in a way that interferes with law enforcement, firefighters, or search and rescue personnel. A drone cannot be used to hunt or fish.[24] Conversely, a drone cannot be used to hinder someone who is lawfully hunting or fishing.[25] Drone pilots may not operate drones over certain locations in state parks, including occupied beach areas, campgrounds and restroom facilities.[26] Similarly, drones cannot be operated in Michigan in a manner that interferes with the operations of a correctional facility/jail or other "key facilities," including utilities, chemical manufacturers, transportation facilities and telecommunication facilities.[27] And, finally, one Michigan statute says if it is illegal to do it without the aid of a drone, it is illegal to do it with a drone.[28]

[24] MCL 324.40111c.
[25] MCL 324.40112(2)(c).
[26] Order 5.1, State Parks & Recreation Areas (2019).
[27] MCL 750.552c(1).
[28] MCL 259.320(1).

Local Laws

Michigan law prohibits counties, cities, villages and townships from enacting or enforcing ordinances that regulate the ownership or operation of drones[29] by anyone other than the county, city, village or township itself.[30] This law, however, has not stopped local units of government from trying. The Michigan Court of Appeals recently decided a case in which the Michigan Coalition of Drone Operators sought to invalidate certain county ordinances which restricted the use of a drone in county parks without written permission from the county Park Commission and banned drone usage near jails and courthouses. The trial court found that the county ordinances conflicted with Michigan's prohibition of local government regulation of drones. The Court of Appeals agreed and affirmed the trial court order invalidating the ordinances and enjoining the county from enforcing them.[31]

This does not mean that drone operators, or those employing drone operators, should ignore local ordinances that purport to regulate drone usage. It does mean, however, that the validity of those ordinances may be questioned through proper legal channels.

Michigan Supreme Court

There is currently a case pending in the Michigan Supreme Court addressing whether a Township can use a drone to take aerial photographs of a particular property to use in enforcing a zoning ordinance.[32] The property owners in this case have argued that this activity violated their Constitutional protection against unreasonable searches.

---

[29] MCL 259.305(1)

[30] MCL 259.305(2).

[31] *Michigan Coalition of Drone Operators, Inc v Ottawa County*, unpublished per curiam opinion of the Court of Appeals, issued November 17, 2022 (Docket No. 359831); 2022 WL 17073493.

[32] *Long Lake Twp v Maxon,* unpublished order of the Supreme Court, entered May 24, 2023 (Docket No. 164948).

The decision of the Supreme Court in this case may have broader implications than the right of law enforcement to use drones to investigate. At the heart of this analysis is whether law enforcement surveillance of this nature intrudes into someone's reasonable expectation of privacy.

The right to privacy extends beyond law enforcement. Michigan law also protects individuals from an invasion of privacy by third parties. The immediate focus of any invasion of privacy claim is whether the complainant had a reasonable expectation of privacy. If a person who is in their own back yard is visible to adjoining property owners, does that property owner still have a right to privacy that protects them from drone surveillance in this same location? And at what point, if ever, does the operation of a drone over someone's property constitute a trespass? When the Court of Appeals considered the law enforcement question now before the Supreme Court, it said:

> Drones fly below what is usually considered public or navigable airspace. Consequently, flying them at legal altitudes over another person's property without permission or a warrant would reasonably be expected to constitute a trespass. We do not decide whether nonpermissive drone overflights necessarily *are* trespassory, because we need not decide that issue.[33]

Although the non-governmental interference questions will not be decided by the Supreme Court in the case currently before it, the decision will likely provide a good indication as to the Court's views on the matter.

Conclusion

A real estate agent's use of drones in connection with its business is a commercial use. If you are going to use a drone, visit the FAA website, get the drone registered, get the appropriate certification and abide by the rules of flight. If, on the other hand, you are going to employ a drone

[33] *Long Lake Twp v Maxon*, 336 Mich App 521 (2021).

pilot to obtain photographs, make sure that the pilot is properly certified with the FAA as a commercial pilot and operates the drone in accordance with federal and Michigan law.

RESIDENTIAL PROPERTY MANAGEMENT – NOT FOR EVERYONE

We are aware of a number of salespersons around the state who have been asked to act as property managers for their investor clients. An out-of-town client may own 3 or 4 single-family homes and be looking for someone who can "keep an eye on things." These salespersons and their brokers need to be aware that: (1) residential leasing is highly regulated; (2) even an innocent mistake about the law can result in significant cost to the landlord; and (3) the broker's errors and omissions policy may not cover this activity.

At the outset, keep in mind that only a broker can enter into a property management contract. So, if salespersons want to manage property, they need to do so on behalf of their broker. It is also the case that residential landlords and their property managers are heavily regulated under federal, state and local laws. This article will not explain all relevant landlord/tenant law in detail. Instead, we will provide examples of the nature and extent of the regulation.

1. There is a statute in Michigan that contains a list of about 15 provisions that cannot be included in a residential lease form.[34] By way of example, a lease form cannot state that the landlord may accelerate the entire balance owed in the event of a tenant default without also explaining the landlord's obligation to try and re-lease the rental unit. If a lease contains one or more of the offending provisions, the tenant may take steps to have the lease declared void. In addition, the landlord using an improper lease form may be fined and/or required to pay damages.

2. Security deposits are also heavily regulated.[35] Landlords must use lease forms and inventory checklists containing specific notice language (in specific type size), and if they wish to apply the security deposit toward amounts owed, they are required to take a number of steps within

[34] Michigan Truth in Renting Act, MCL 554.632, et seq.
[35] Residential Landlord Tenant Act, MCL 554.601, et seq.

specified timeframes or forfeit their right to the security deposit. Security deposits must be kept in a separate account or bonded over.

3. Many Realtors® are aware that Michigan's anti-lockout statute prohibits a landlord from changing the locks to keep a nonpaying tenant out of the property. Realtors® may not be aware that the statute also prohibits any unlawful interference with the tenant's possessory interest. For example, a landlord cannot cut off utilities or "introduce noise, odor or other nuisances" in an effort to encourage the tenant to vacate. It may also be a violation if the landlord does not follow the eviction process correctly – for example, where the landlord obtains a judgment for possession but does not follow through and get a writ of restitution.[36]

4. Property managers are responsible for explaining the lead-based paint rules to both landlords and tenants. Again, the laws are enforced strictly. One property manager was found in violation of the law because, while the lead-based disclosure form she had provided to the tenants had been completed by the landlord, she had neglected to get the landlord to sign it before providing it to the tenant.[37]

5. While Realtors® are aware that the Fair Housing Act prohibits unlawful discrimination, they may not, for example, be up to speed on current interpretations dealing with questions as to appropriate occupancy restrictions. A restriction on the number of people per bedroom may be deemed to improperly discriminate against families. Fines and penalties in Fair Housing Act cases are typically significant.

[36] *Andrews v Maloy*, No. 200252, Michigan Court of Appeals, July 17, 1998.
[37] *Keegan v Kivitz*, 2005 WL 2036919 (United States District Court, N.D. California, August 22, 2005).

6. Domestic violence victims, qualified senior citizens and people in the armed services must be allowed to breach their lease under certain circumstances.[38] Michigan lease forms are required to include language explaining these rights.

7. Landlords must make reasonable accommodations in rules, policies, procedures and services when necessary to afford a person with a disability full enjoyment of the premises.[39] When considering these types of requests, a property manager must make a number of judgment calls; an error in any one may result in liability. Is the accommodation request "reasonable?" Is the disability obvious or is the property manager entitled to ask for proof of the disability? Can the request be denied on the basis that the accommodation will result in "undue hardship" on the part of the landlord?

8. Local ordinances may require licensure and, in addition, contain their own rules about lease content. East Lansing, for example, has its own lease addendum that all landlords are required to use, which regulates such things as "party litter" and parking on lawns.

We are only scratching the surface. Suffice to say, landlord/tenant laws and regulations are numerous. Landlords typically look to their property managers to keep them in compliance. Landlords who are not in compliance may be subject to significant fines and/or damages. Landlords who incur these costs as a result of mistakes made by the property managers are likely to look to their property managers for reimbursement. These types of claims may not be covered by the broker's insurance policy.

And if that isn't enough to scare you …

[38] MCL 554.601a; 554.601b.
[39] Persons with Disabilities Civil Rights Act, MCL 37.1101, et seq.

In April of this year, the Michigan Court of Appeals heard a case involving a tenant who fell off the front porch of the house she was renting.[40] The tenant sued both the owner and the property manager for negligence and breach of the landlord's duty to ensure the premises were fit for their intended use.

The property manager argued that it should not be part of the case because it had no legal relationship with the tenant and "merely collected rents and coordinated contractors" on behalf of the owner. The trial court held, and the Court of Appeals agreed, that the property manager did have liability. First, it had entered its name as landlord under the lease: "Property Management Co. in its capacity as Agent." Second, the lease had provided that Property Management Co. was the "landlord" to whom the plaintiff was to pay rent. Finally, the lease provided that Property Management Co. "reserved the right, as landlord, to enter the premises in an emergency or to perform repairs. . . ." Accordingly, the Court of Appeals held that Property Management Co. was the tenant's landlord under the lease and, as such, owed a legal duty of care to the tenant with respect to the condition of the leased premises.

Conclusion

No one should dabble in residential property management. It is a complicated area of the law whether you are talking about managing one duplex or a 500-unit apartment building. If Realtors® are not wholly familiar with the details of the various laws and regulations, they should not be in the property management business. The risks are too great.

If a broker does decide to get into the property management business, it should consult with an attorney, not only to develop a legally compliant lease form, but also to create a

[40] *McCarty v Bepro, LLC*, unpublished opinion per curiam of the Court of Appeals, issued April 13, 2023 (Docket No. 361250); 2023 WL 2938768.

property management agreement which will govern the relationship between the property manager and its landlord-client.

Finally, under the Occupational Code, the signatory on a property management account can be either the broker or someone who works for the broker.[41] That being said, it is the broker who is ultimately responsible for the funds in the account and for making sure that all appropriate records are kept.

[41] MCL 339.2512c.