MICHIGAN ASSOCIATION OF
REALTORS®

2013 Legal Update

TEN CONTRACT PRINCIPLES EVERY REALTOR® SHOULD KNOW

1. A seller who receives an offer can accept, reject, counter or do nothing. A seller with multiple offers is not required to consider them in any particular order, or treat all of the offers "fairly."

2. An offer to purchase real estate cannot be accepted orally. An acceptance requires a signature and delivery of the signed acceptance.

3. Delivery of acceptance can be to the buyer or to the buyer's agent. Whether delivery of the seller's acceptance to the cooperating agent is sufficient depends on who that cooperating agent represents.

4. While offers and acceptances relating to the purchase of real estate must be in writing, an offer can be revoked orally.

5. Generally, an offer or counteroffer can be revoked at any time before it is accepted. This is true even if the offer contains a stated expiration date. An exception to this rule is if consideration is given as with an option contract.

6. A buyer cannot simultaneously accept and materially change a seller's counteroffer. Any alteration which changes the obligations of a party in any respect is "material."

7. Once an offer is countered, it has been rejected. A seller who has countered a buyer's offer cannot go back and "accept" the buyer's offer as originally proposed.

8. The fact that the buyer proposes an amendment to a binding purchase contract does not free seller of his obligations under the existing contract.

9. In the case of a conflict between the preprinted provisions of a purchase agreement and the handwritten provisions, the handwritten provisions govern.

10. Almost all of these general contract principles can be changed by the agreement of the parties via the written terms of the contract itself.

Attached to this summary is a brochure explaining some of these contract principles that has been prepared especially for buyers who find themselves in a multiple offer situation.

A Primer On
MULTIPLE OFFERS

As the housing market recovers, more and more buyers are finding themselves in a situation where they are competing with one or more other buyers for the home of their dreams. Understandably, in this situation, the unsuccessful buyers are disappointed and often angry. Many times, the unsuccessful buyers' anger is directed at the REALTOR® who helped them try to buy the home, and their anger is misplaced.

The only law governing the presentation of offers is a rule that requires a real estate licensee to forward all offers he or she receives to the seller. R 339.22307. After the offers are delivered, there is no requirement that a seller consider them in any particular order or that the seller reject the "first" offer prior to considering a "second" offer. Additionally, there is no requirement that a seller reject an offer in writing or even acknowledge receipt of the offer. A seller who receives an offer can accept, reject or counter that offer. In addition, the seller can choose to do nothing. A seller can choose to "sit" on an offer while waiting for a second offer, or not. A buyer can request that a seller respond in writing, however, the seller has no legal obligation to do so. Further, a REALTOR® acting on behalf of the buyer is generally prohibited from contacting directly any seller who is represented by a REALTOR®.

When considering multiple offers, there is no requirement that a seller treat each potential buyer equally or even fairly. A seller can even discriminate, so long as the seller does not discriminate on the basis of religion, race, color, national origin, age, sex, disability or familial or marital status. A seller is not required to take the highest offer. A seller can decide to accept a lower offer because it is a cash offer or because that particular buyer has a preapproval letter from a lender. A seller could even accept a lower offer because she knew that the offer was from an avid gardener and believed that he would take good care of the garden she had put so much time into over the years.

That being said, it is certainly true that most sellers will in fact accept the highest price offer. In fact, REALTORS® and others in the real estate business often instruct buyers in this situation to present their "highest and best." To some buyers, this term suggests that this is in fact an auction-type situation in which the terms of the offers must be kept confidential and the highest offer must be accepted. This is simply not true. As stated above, the seller can accept any offer. The seller can disclose the amount of the other offers to none, some or all of the other potential buyers. A seller can offer one buyer an opportunity to submit another bid, without offering the other buyers a similar opportunity.

A Primer On
MULTIPLE OFFERS

Buyers in a multiple offer situation should certainly put forward their "highest and best." While there is no way for a buyer to guaranty that his offer will be the one selected, as a general rule, sellers prefer clean offers with few contingencies, short timeframes and evidence of ability to perform.

Finally, when competing with other potential offers, buyers should keep in mind the following rules of law relating to offers and acceptances:

1. An offer cannot be accepted orally. Even if you are advised via telephone that your offer is the one that has been accepted by the seller, you do not have a binding contract until the written acceptance is delivered to you (or to your real estate agent).

2. Generally, an offer or counteroffer can be revoked at any time before it is accepted. This is true even if the offer contains a stated expiration date.

3. While offers and acceptances relating to the purchase of real estate must be in writing, an offer can be revoked orally.

4. A buyer cannot simultaneously accept and materially change a seller's counteroffer. If, for example, you "accept" the seller's counteroffer, but add a provision whereby the sellers are required to throw in their pool table, you have in fact "countered" the seller's counteroffer.

5. Once an offer is countered, it has been rejected. So, in the above example, if the sellers do not agree to throw in their pool table, you cannot go back and "accept" the seller's original counteroffer.

6. A seller is not required to accept a full price and terms offer. A list price is not an "offer" that can be accepted by the buyer.

Buyers are cautioned not to get too caught up in the bidding process. For many of us, a home purchase is the biggest financial purchase we will make in our lifetime. While a waiver of an inspection contingency may make it more likely that you will be the successful "bidder," it is certainly a risky course of action. Remember that there are many other houses out there. You will fall in love again.

DEPARTING ASSOCIATE BROKERS AND SALESPERSONS: THE ISSUES

Unfortunately, when associate brokers and salespersons decide to change their affiliation with brokers, the situation can become ripe for contention and controversy. Part of the contention and controversy is a result of either a misunderstanding of the relationship between brokers, associate brokers and salespersons or a lack of preparation for a fairly common event, *i.e.*, associate brokers or salespersons affiliating with a new broker.

1. Who Owns What?

A. Unless the Independent Contractor Agreement between the broker and the salesperson provides otherwise, listings and commissions are the property of the broker.

B. There are no reported Michigan cases describing a departing salesperson's entitlement to compensation for a pending sale or for a listing under any circumstances.

C. Upon entering into the Independent Contractor Agreement, it is incumbent upon the broker and salesperson to decide their own fate (as opposed to a court deciding it) and providing contractually how these issues will be resolved upon the salesperson's departure. The MAR form of Independent Contractor Agreement provides a template for resolving these issues. Paragraph 12 of MAR's Independent Contractor Agreement provides:

> In the event this Agreement is terminated for any reason, Salesperson shall immediately deliver all files to Broker, including active files.
>
> a. **Pending Listings.** For listings procured by Salesperson which are pending at the time of termination **(select/modify as appropriate)**:
>
> ☐ *Salesperson shall not be entitled to a commission on any sales which close after termination, unless this Agreement is terminated by Broker, in which case*

Salesperson shall receive all commissions earned prior to termination which are actually received by Broker. For purposes hereof, "earned" shall refer to transactions with a binding purchase agreement in place at the time of termination.

☐ *As to commissions actually received by Broker* pursuant *to binding purchase agreements in place prior to termination of this Agreement, Salesperson shall receive _____ percent of the commission to which he/she would have otherwise been entitled if the Agreement was still in place.*

☐ *As to commissions actually received by Broker pursuant to purchase agreements signed after the termination of this Agreement, Salesperson shall receive _____ percent of the commission to which he/she would have otherwise been entitled if the Agreement was still in place. Salesperson shall not be entitled to any compensation in connection with purchase agreements signed during extensions to any such listings or on any re-listings.*

b. **Pending Cooperating Sales.** For cooperating sales procured by Salesperson which are pending at the time of termination **(select/modify as appropriate)**:

☐ *Salesperson shall not be entitled to a commission on any sales which close after termination, unless this Agreement is terminated by Broker, in which case Salesperson shall receive all commissions earned prior to termination which are actually received by Broker. For purposes hereof, "earned" shall refer to transactions with a binding purchase agreement in place at the time of termination.*

☐ *As to commissions actually received by Broker pursuant to binding purchase agreements in place prior to termination of this Agreement, Salesperson shall be entitled to _____ percent of the commission to which he/she would have otherwise been entitled if the Agreement was still in place.*

2. How Does a Departing Associate Broker or Salesperson Terminate and What Can They Do About Existing Listings?

A. There is no statute or rule which governs how salespersons terminate their affiliation with a broker or vice versa. The Independent Contractor Agreement between the broker and the salesperson should provide the procedure for termination of the Independent Contractor Agreement. Paragraph 10 of MAR's form of Independent Contractor Agreement provides as follows:

> This contract and the association created hereby may be terminated by either party, with or without cause, at any time, upon ___ days notice given to the other. The rights of the parties to any commission which accrued prior to notice of termination shall not be divested by the termination of this contract. Broker and Salesperson agree that the notice provided under this paragraph constitutes reasonable notice to the Salesperson to derive the potential economic benefit to the Salesperson of any listings or customers solicited for the Broker.

B. Departing associate brokers and salespersons are ethically prohibited from pursuing listings of the firm they are leaving. Standard of Practice 16-20 of NAR's Code of Ethics provides as follows:

> REALTORS®, prior to or after their relationship with their current firm is terminated, shall not induce clients of their current firm to cancel exclusive contractual agreements between the client and that firm. This does not preclude REALTORS® (principals) from establishing agreements with their associated licensees governing assignability of exclusive agreements.

Obviously, if the terms of an Independent Contractor Agreement grants an associate broker or salesperson the right to solicit "their" clients prior to or after termination of an affiliation with their current broker, it would not be a violation of Standard of Practice 16-20. The last sentence of the Standard of Practice specifically acknowledges that brokers, associate brokers and salespersons may agree contractually for the assignment of exclusive listing agreements.

C. Occasionally, there are "mass" transfers of listings from one firm to another firm which is many times required after one firm purchases the assets of the other brokerage firm. Since exclusive listing agreements are personal service contracts, in these instances sellers would need to at least acknowledge and approve of the assignment of their listing agreement to a new firm in order to ensure that the listing agreement remains enforceable against the seller at the time of closing on the sale of the seller's property.

3. Can the Departing Associate Broker or Salesperson be Stopped from "Damaging" the Business of Their Former Broker?

A. Many brokers invest a lot of time and resources in either initially training new licensees to be competent salespersons or, alternatively, training experienced licensees in more advanced sales techniques and processes. The brokers are understandably concerned when the product of their time and money ends up affiliated with a local competitor. Some brokers have inquired as to whether they could address this problem by requiring associate brokers and salespersons to sign covenants not to compete.

B. Until March 29, 1985, generally covenants not to compete in Michigan could only be enforced against persons who granted the covenant not to compete in the context of the sale of their business and so long as the covenant not to compete was reasonable in its scope and time. Although the enforceability of a covenant not to compete is based upon the specific facts of each case, it was generally assumed that a covenant not to compete that did not exceed three years and did not cover a geographic area larger than that covered by the former employer's business would be deemed reasonable. Prior to March 29, 1985, covenants not to compete, were not enforceable against individuals under any other circumstances.

C. The Michigan Antitrust Reform Act (MCL 445.771 *et seq.*) was amended in 1984 to permit enforceable covenants not to compete between an employer and an employee. MCL 445.774a(1) provides as follows:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

(the "Statute").

D. A covenant not to compete may be invalid pursuant to the Statute if it is unreasonably broad. Michigan courts are "circumspect" when considering non-compete clauses in employment contracts. *A Complete Home Care Agency, Inc v Gutierrez*, docket number 246280, 2004 WL 1459450 (June 2004).

E. A covenant not to compete is enforceable to "protect an employer's reasonable competitive business interests."

F. A covenant not to compete is enforceable if it expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the covenant is reasonable as to its duration, geographical area and the type of employment or line of business. A 6-month duration for a covenant not to compete is generally deemed reasonable. *A Complete Home Care Agency*, supra.

G. A covenant not to compete must be carefully crafted to make sure it actually permissibly limits competition. A covenant not to disclose confidential information is not

construed as a covenant not to compete. *Your Home Town USA, Inc v Creative Graphics, Inc*, docket number 273136, 2007 WL 778569 (March 2007).

H. A covenant not to compete is enforceable if it protects an employer's "reasonable business interests," but is not enforceable if it is simply intended to prevent competition. *Northern Michigan Title Co of Antrim-Charlevoix v Bartlett*, docket number 248751, 2005 WL 599867 (March 2005).

I. There is no Michigan case in which a broker has attempted to enforce a covenant not to compete against a departing associate broker or salesperson. Thus, it is not even clear that a court would find the Statute applicable to covenants not to compete between a broker and a salesperson, as the Statute contains no definition of the terms "employer" and "employee." A departing associate broker or salesperson could argue that the Statute does not cover an independent contractor relationship and thus the covenant not to compete was unenforceable.

J. Enforceability of a covenant not to compete turns very specifically on the facts of each case. A case which arguably includes facts which could apply between a broker and a departing associate broker or salesperson is *Northern Michigan Title Co of Antrim-Charlevoix v Bartlett*. A copy of this case is attached to this outline and will be explored in detail at the presentation.

4. Will a Covenant Not to Compete in an Independent Contractor Agreement Prevent a Competing Broker from Affiliating with a Departing Associate Broker or Salesperson?

A. It is fairly typical in cases where a former employer has sued a former employee for breaching a covenant not to compete to also sue the former employee's new employer alleging that the new employer has engaged in tortious interference with a contract.

B. While courts have described the claims necessary to establish tortious interference with a contract in various ways, generally the former employer must prove that the interference by the new employer was improper. The former employer shows the interference was proper by demonstrating that the new employer commenced an intentional act which lacked justification and purposely interfered with the former employer's contractual rights or business relationship. "Improper interference" can be established by either demonstrating the intentional doing of an act wrongful per se (*e.g.*, blackmailing the former employee to join the new employer), or the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading the former employer's contractual rights or business relationship.

C. Actions by a new employer motivated by legitimate business reasons do not constitute improper motive or interference. *A Complete Home Care Agency*, supra and *BPS Clinical Labs v Blue Cross Blue Shield of Michigan* (on remand) 217 Mich App 687, 699 (1996).

D. Typically, if a covenant not to compete is found to be unenforceable, the court will also find that there was no tortious interference with the contract, inasmuch as the breach portion of the contract (*i.e.*, the covenant not to compete) was unenforceable.

2005 WL 599867
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

NORTHERN MICHIGAN TITLE CO. OF ANTRIM-CHARLEVOIX, Plaintiff-Appellant,
v.
Debra BARTLETT, Donna Dohm, Maura Snabes, Corporate Title Agency-Charlevoix, LLC, Corporate Title Agency-Charlevoix, Inc., and Corporate Title & Escrow Company, Inc., Defendants-Appellees.

No. 248751. | March 15, 2005.

Before: MURPHY, P.J., and WHITE and KELLY, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

Charlevoix County Circuit Court LC No. 02-153319-CK [1]

*1 In this case arising from employment contracts, plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. We affirm.

I. Basic Facts

Debra Bartlett began working for plaintiff in the 1980s as a paralegal. She later became involved in the management of the company and ultimately held the position of president. Donna Dohm began working for plaintiff in 1990. Dohm eventually became vice president and, after Bartlett resigned, president of the company. Maura Snabes began working for plaintiff in 1994. She performed title examinations, issued commitments and policies and attended closings. She also functioned as plaintiff's legal counsel. At some point, each of these defendants signed an employment contract, which included a noncompete clause and a confidentiality agreement.

Bartlett resigned in March 2001. Dohm and Snabes resigned in April 2002. Soon after resigning, all three began working at Corporate Title Agency (CTA).[2] Plaintiff filed three complaints "for injunctive and other relief" alleging that Bartlett, Dohm, and Snabes breached the noncompete agreement because they began working for CTA within one year of resigning. Plaintiff also alleged that they breached their fiduciary duties by using plaintiff's "trade secret, confidential and/or proprietary information" for their own benefit. Plaintiff also alleged against CTA, Bartlett, Dohm and Snabes tortious interference with employment contracts, breach of duty under the Michigan Uniform Trade Secrets Act, MCL 445 .1901 *et seq.*, tortious interference with business relations and contract, and civil conspiracy.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Defendants argued that the noncompete clauses were unenforceable because MCL 445.774a only permits noncompete agreements that "protect an employer's reasonable competitive business interest." Defendants argued that the agreements do not protect a "reasonable competitive business interest," but rather, protect plaintiff from competition itself. Defendants also argued that the business of title insurance has no trade secrets. Bartlett also argued that her employment contract containing the noncompete clause was superceded by a subsequent employment contract without such a clause.

In response, plaintiff argued that defendants had access to and were using "trade secrets" and "confidential information." Plaintiff argued that defendants could use their knowledge about how plaintiff's tract system was superior to CTA's to improve CTA's system. Plaintiff also argued that defendants' knowledge of "clients" habits, preferences, and personal matters, enabled them to take business from plaintiff. Plaintiff also argued that defendants knew of the strengths and weaknesses of plaintiff's finances and employees. Plaintiff argued that these things gave CTA an unfair competitive advantage. Plaintiff also requested that the trial court order Bartlett, Dohm, and Snabes to return the bonuses they received pursuant to their contracts if the contracts were determined to be void.

*2 The trial court granted defendants' motion for summary disposition. The trial court determined that the noncompete clauses were unenforceable under MCL 445.774a because "general knowledge, skill or facility acquired through training or experience while working for an employer appertain

exclusively to the employee" and a legitimate business interest must be something greater than mere competition. The trial court determined that there were no trade secrets, customer lists, or pricing information that the defendants used to unfairly compete and defendants were not using plaintiff's tract system. The trial court granted summary disposition on all of plaintiff's claims "because they depend entirely upon the enforceability of th[e] noncompetition agreement[s]."

II. Standard of Review

This Court reviews de novo a trial court's grant of summary disposition. *Spiek v. Dep't of Transportation,* 456 Mich. 331, 337; 572 NW2d 201 (1998). Defendants filed their motion pursuant to MCR 2 .116(C)(8) and (C)(10). Because the trial court looked beyond the pleadings in deciding the motion, this Court reviews the motion as having been granted pursuant to MCR 2.116(C)(10). *Kefgen v. Davidson,* 241 Mich.App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm'rs,* 227 Mich.App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *Downey, supra* 626. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court considers the documentary evidence presented to the trial court in the light most favorable to the nonmoving party. *DeBrow v Century 21 Great Lakes, Inc, (After Remand),* 463 Mich. 534, 538-539; 620 NW2d 836 (2001).

III. Noncompete Clauses

A. Bartlett

Although the 1990 employment agreement between plaintiff and Bartlett contained a noncompete clause, plaintiff admits that Bartlett entered into a new agreement in October 16, 1998 that does not include a noncompete clause. "When two agreements cover the same subject matter and include inconsistent terms, the latter agreement supercedes the earlier agreement." *CMI Intern Inc v. Intermet,* 251 Mich.App 125, 130; 649 NW2d 808 (2002). Because both agreements address the terms of Bartlett's employment by plaintiff, we conclude that the latter agreement, without the noncompete clause, supercedes the earlier agreement. Plaintiff argues that whether the latter agreement "was intended to replace the prior agreement is a disputed issue of fact." But courts may look to extrinsic evidence only to clarify a contractual ambiguity. *Stine v. Continental Casualty Co,* 419 Mich. 89, 112; 349 NW2d 127 (1984). Plaintiff does not present any argument that there is contractual ambiguity. Therefore, we conclude that the trial court properly granted summary disposition of plaintiff's claim that Bartlett breached the noncompete clause even though it granted the motion for the wrong reason. "A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Mich. Dep't of Transportation,* 256 Mich.App 1, 3; 662 NW2d 822 (2003).

B. Dohm and Snabes

***3** Dohm's and Snabes' employment agreements each include a noncompete clause, which provides:

> 2. That upon termination of the Employee's employment voluntary or involuntary, with or without cause, the employee agrees and promises not to engage in the title insurance business in Charlevoix County, Michigan for a period of five (5) years directly or indirectly, either individually, as a partner, as a stockholder in a corporation, as any other type of investor, or as an agent, employee, representative or consultant or through a relative.

It is undisputed that soon after resigning, Dohm and Snabes began working for CTA, thereby breaching their noncompete agreements.

But defendants argue that the noncompete clause is unenforceable pursuant to MCL 445.774a, which provides:

> (1) An employer may obtain from an employee an agreement or covenant which protects an employer's *reasonable competitive business interests* and expressly prohibits an employee from engaging

> in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited. [Emphasis added.]

The parties do not differ with respect to the meaning of the statute, rather, they differ regarding the result of applying the plain language of this statute to the noncompete clause. Because the statute requires inherently fact specific and circumstantial determinations, we must determine whether the noncompete clause protects plaintiff's "reasonable business interest" considering plaintiff's particular business.

Under the circumstances of this case, plaintiff's noncompete agreement is unenforceable because it does not protect plaintiff's "reasonable business interest." Because the agreement completely prohibits Dohm and Snabes from engaging in title insurance business (within a specified time and place), it serves to protect plaintiff from competition itself. The noncompete agreement would be enforceable if it served to protect plaintiff from an unfair competitive advantage in the title insurance business. But an unfair advantage cannot arise from the employee's use of general knowledge or skill gained in working for the employer.

This application of MCL 445.774a is in keeping with the Michigan Antitrust Reform Act (MARA), MCL 445.771 *et seq.* as a whole. As stated in *Bristol Window v. Hoogenstyn,* 250 Mich.App 478, 485 (2002),

> Section 2 of the MARA, MCL 445.772, which was derived from the Uniform State Antitrust Act, sets forth the following general proposition: "A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful."

***4** MCL 445.774a, specifically addresses covenants not to compete between employers and employees. Thus, reading these two section is pari materia, we conclude that a noncompete agreement that protects an employer's "reasonable competitive business interest" must not restrain or monopolize trade or commerce.

This application is also in keeping with Michigan common law. MCL 445.774a is not a derogation, but rather, a codification of the common law on noncompete agreements. As noted in *Bristol,* "Long ago, before any statutory scheme of business regulation existed in Michigan, a common-law rule of reason governed what constituted a permissible restraint of trade." *Bristol, supra* at 486, citing *Hubbard v. Miller,* 27 Mich. 15, 16-17 (1873). *Bristol* made clear that 445.774a was merely a codification of the common law "that the enforceability of noncompetition agreements depends on their reasonableness." *Id.* at 495.

In *Follmer Rudzewicz & Co v. Kosco,* 420 Mich. 394; 362 NW2d 676 (1984), our Supreme Court further explained that the reasonableness of noncompetition agreements depends upon the type of information that the employee is restricted from using. The Court held:

> While an employee is entitled to the unrestricted use of general information acquired during the course of his employment or information generally known in the trade or readily ascertainable, confidential information, including information regarding customers constitutes property of the employer and may be protected by contract. [*Id.* at 402 (footnotes omitted).]

In so holding, the Court noted:

> "It has been uniformly held that general knowledge, skill, or facility acquired through training or experience while working for an employer appertain exclusively to the employee. The fact that they were acquired or developed during the employment does not, but itself, give the employer a sufficient interest to support a restraining covenant, even though the on-the-job training has been extensive and costly." [*Id.* at 402, n 4, quoting Blake, *Employment Agreements Not to Compete,* 73 Harv L Rev 625, 652 (1960).]

In this case, the noncompete clause completely prohibits Dohm and Snabes from engaging in the title insurance business. It does not narrow the focus of the prohibition to prevent unfair competition. Under these circumstances,

Dohm and Snabes would not be permitted to obtain referrals from sources that had never had a relationship with plaintiff. Nor would they be permitted to offer title insurance services to clients who never had or never would have given business to plaintiff in the first place. In any event, according to the record, there are seldom repeat clients in the title insurance business. The business itself in mainly developed through referral sources, of which there are many and which are readily identified in any given community. But any referral source should be free to choose a title insurance company. Even if the noncompete agreement specifically prohibited Dohm and Snabes from soliciting business from referral sources with which plaintiff had developed relationships, the agreement between plaintiff and Dohm and Snabes could not prevent the referral sources from contacting Dohm and Snabes.

*5 Thus, aside from using plaintiff's confidential information while conducting title insurance business, there is nothing about defendants' employment in the title insurance business generally that gives them an "unfair advantage" over plaintiff. Although the parties appear to have blended plaintiff's claims, the claims that Dohm and Snabes breached their confidentiality agreements are distinct from the claims that they breached their noncompete agreements. Therefore, we address the latter below.

Plaintiff also argues that if this Court determines that the noncompete clause of the employment agreements is unenforceable, it must order defendants to return their bonuses, which they obtained pursuant to the agreements. But we have not determined that the employment agreements are unenforceable, only that the noncompete clause is unenforceable. Generally, the failure of a distinct part of a contract does not void valid, severable provisions. *Samuel D Begola Services, Inc, v Wild Bros,* 210 Mich.App 636, 641; 534 NW2d 217 (1995). The primary consideration in determining whether a contractual provision is severable is the intent of the parties. *Id.* Our Supreme Court has explained as follows:

> Two principal factors are considered: first, "whether the two or more promises or parts of the contract are so interdependent or interwoven that the parties must be deemed to have contracted only with a view to the performance of both, and would not have entered into one without the other"; and second, whether the consideration for the several promises can be apportioned among them without doing violence to the contract or making a new contract for the parties. 3 Williston, Contracts (3d ed), § 532, p 764. However, "even though the consideration for each agreement is distinct, if the agreements are interdependent and the parties would not have entered into one in the absence of the other, the contract will be regarded ... as entire and not divisible." *Id.,* p 765. [*Dumas v. Auto Club Ins Assoc,* 437 Mich. 521, 616-617, n 87; 473 NW2d 652 (1991).]

In this case, the noncompete clause in each employment contract is severable from the rest of the contract. The contracts establish the terms of the employment relationships. Despite the unenforceability of the noncompete clause, the parties still had employment relationships that were governed by the employment contracts. With respect to the bonuses, the contracts provide: "The Employer has heretofore voluntarily established a 'bonus' policy with distributions to employees based on merit and Employer profitability." Because the bonuses were based on performance, we cannot conclude that the bonuses were tied in such a significant way to the noncompete clause that the bonus provision must be rendered unenforceable as well. Therefore, it does not follow from our determination that the noncompete clause is unenforceable that Dohm and Snabes must return the bonuses they received from plaintiff during the course of their employment.

IV. Confidentiality Agreements

*6 Plaintiff also alleged that Bartlett, Dohm, and Snabes breached their agreements to keep confidential all of plaintiff's "trade secrets, confidential and/or proprietary information." Specifically, plaintiff alleged that defendants breached this agreement by "using and/or disclosing to [CTA] [plaintiff's] trade secrets, confidential and/or proprietary information." The trial court did not err in dismissing this claim because, beyond mere conjecture, plaintiff has produced no evidence whatsoever that defendants have used or disclosed this information to CTA or anyone. In *Smith v. Globe Life Insurance Co,* 460 Mich. 446, 455 n 2; 597 NW2d 28 (1999), our Supreme Court clarified the proper standard under 2.116(C)(10):

> Under 2.116(C)(10), it is no longer sufficient for plaintiff's to promise to offer factual support for their claims at trial.... [A] party faced with a motion for summary disposition brought under 2.116(C)(1) is, in responding to the motion, required

> to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted.

Plaintiff's argument simply assumes that because Bartlett, Dohm and Snabes had access to confidential information that they must necessarily be using or disclosing it if they are working for CTA. But the mere fact that defendants have or at one time had this information in their minds is not sufficient evidence to support plaintiff's claims.

Plaintiff argues that defendants' knowledge of plaintiff's tract system, its strengths and weaknesses, will allow CTA to gain an unfair advantage. Plaintiff cites Bartlett's deposition testimony that CTA's tract system is inferior to plaintiff's and that she has discussed improving CTA's system. But even without knowledge of plaintiff's tract system, CTA could develop an improved system. Thus, upgrades and improvements to tract systems are elements of normal competition that do not depend on the knowledge of competitors' tract systems. The mere fact that Bartlett testified that she discussed improving CTA's tract system is not sufficient evidence to support plaintiff's claim that defendants misused or disclosed plaintiff's confidential information.

Plaintiff also argues that defendants used knowledge of closing agents', title examiners', realtors', bankers', and lawyers' "habits, preferences, and personal matters, such as the identities of their spouse, family members and hobbies (i.e., whether they like to golf, fish, hunt, etc.)" to "take business from" plaintiff. Plaintiff has failed to present any evidence that defendants used or disclosed this information in working for CTA. But even if there was evidence that they did, Berlage acknowledged that referral sources (Plaintiff refers to them as "clients.") are easily identified by joining local clubs or a telephone directory. Furthermore, the habits and likes of referral sources could also be obtained by anyone, in the title insurance business or without, and is surely known by more people than plaintiff's employees or defendants. To the extent that the habits and likes of referral sources were particular to the way business was conducted, any competitor could be exposed to this information through general inquiry or through a single business transaction.

*7 Plaintiff also argues that defendants' knowledge of "employee salaries, bonuses, and benefits," plaintiff's "revenues and expenses," business plans, capital investments, and hiring policies would allow them to "evaluate the strengths and weaknesses of [CTA's] system." But, again, there is no evidence that defendants used this information in working for CTA.

Because plaintiff failed to produce any evidence indicating that Bartlett, Dohm, and Snabes have used or disclosed plaintiff's confidential information in working for CTA, the trial court did not err in granting summary disposition of these claims.

V. Plaintiff's Other Claims

Plaintiff also argues that the trial court erred in granting summary disposition of its claims of breach of fiduciary duty, civil conspiracy, tortious interference, and violation of Uniform Trade Secrets Act, MCL 445.1901 *et seq.* because none of them depended on the noncompete clauses. But plaintiff has failed, in responding to defendants' motion, to present any evidence that defendants used or disclosed plaintiff's confidential information or intentionally interfered with plaintiff's business or contractual relationships. Therefore, the trial court properly granted summary disposition of these claims.

VI. Summary Disposition Premature

Plaintiff also argues that summary disposition was premature because discovery was incomplete on may disputed issues. We disagree.

Pursuant to MCR 2.116(G)(4), plaintiff was required to submit proofs in response to defendants' motion for summary disposition. Discovery cutoff was March 24, 2003. Defendants' motion for summary disposition was first scheduled to be heard on March 6, 2003, at which time the trial court adjourned the motion to give plaintiff the required time to respond. The hearing was rescheduled for April 25, 2003. Plaintiff filed its motion to compel discovery on April 17, 2003. Therefore, even if plaintiff's failure to support its response to summary disposition was due to defendants' objections to discovery requests, plaintiff contributed to this failure by filing its motion to compel several weeks after the discovery cutoff and one week before the rescheduled hearing date for the summary disposition motion. "An appellant cannot contribute to error by plan or design and then argue error on appeal." *Munson Med Center v. Auto Club Ins Ass'n,* 218 Mich.App 375, 388; 554 NW2d 49 (1996).

Affirmed.

Footnotes

1 The trial court entered an order consolidating Docket Nos. 02-153419-CK and 02-153519-CK with this case.

2 We refer to Corporate Title Agency-Charlevoix, LLC, Corporate Title Agency-Charlevoix, Inc., and Corporate Title & Escrow Company, Inc. collectively as "Corporate Title Agency" (CTA).

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EARNEST MONEY DEPOSITS

1. Neither the law nor the Code of Ethics dictates whether the listing office or the selling office holds the earnest money deposit ("EMD").

A. Regardless of which office holds the EMD, the role of the escrow agent is a neutral role. Even if it is a buyer's agent that acts as the escrow agent, he would have a duty to disclose to the seller if the EMD check bounced or if there was another problem with the EMD funds.

2. A seller and buyer can agree that any third party will hold the EMD. If a third party (*i.e.,* a non-real estate licensee) holds the EMD, the third party is not subject to the Occupational Code/rules on handling EMDs. If a third party is to hold the EMD, a REALTOR's® responsibility is to deliver the check to the named escrow agent within 2 banking days of receiving notice of acceptance by all parties. MCL 339.2512(i)(vi).

3. If a REALTOR® holds the EMD, then the REALTOR® must comply with Occupational Code/rules governing EMDs.

A. A salesperson cannot hold the EMD until there is a binding contract, but instead must turn over the EMD check to his broker "upon receipt." MCL 339.2512(i)(ii).

B. The broker, on the other hand, is not required to deposit the check into its trust account immediately, but may hold the check until the purchase agreement is accepted.

C. A broker must deposit the EMD in its trust account within 2 banking days after the broker has received notice that there is a binding purchase agreement. MCL 339.2512(i)(iv).

1) A seller/buyer cannot agree, for example, that the EMD check will not be cashed until the inspection contingency is waived or until the short sale lender signs off. (In this situation, someone other than a real estate licenses would need to hold the EMD.)

D. Trust account must be a non-interest bearing demand account. Checks must be signed by a broker or associate broker. R 339.22313(1).

E. Broker may not commingle its own funds in the trust account (except for up to $500 to avoid service charges). R 339.22313(3).

F. Broker must maintain duplicate records for its trust account: (i) a chronological record of all receipts/distributions from that account; and (ii) a transaction specific record. R 339.22313(4).

4. If funds are in a real estate licensee's trust account and if there is a dispute over the EMD, the EMD must remain in the trust account until buyer and seller have agreed in writing or there is a court order directing the disbursement of the EMD. The real estate licensee can also interplead the funds with the court. R 339.22313(6).

A. This rule only applies where there is a dispute over the EMD.

B. A REALTOR® cannot condition the release of an EMD on the sellers/buyers releasing the REALTOR® from any liability in connection with the transaction.

1) While it is a good practice to ask for a release, the rule does not authorize a REALTOR® to refuse to release the EMD because the parties will not release each other, let alone the REALTOR®. A written release is only required by the Rule if there has been a dispute.

2) If one party has made a demand for the EMD and the other party will not sign a release or otherwise respond, it is recommended that a letter be sent indicating that the EMD will be released to the party making the demand unless an objection is received within a specified timeframe.

C. A purchase agreement may be considered terminated even if there is still a dispute over the EMD. The fact that there is a dispute over the EMD does not prevent the sellers from re-listing or the buyers from looking for a new home.

D. REALTORS® are not entitled to keep abandoned EMDs; rather, the funds escheat to the State of Michigan.

5. It is not always the case that a purchaser can walk away from a transaction with no adverse consequences other than the forfeiture of the EMD. Many purchase agreements provide that in the event of the buyer's default, the sellers can keep the EMD and sue the buyer for damages.

THE SECURE FAIR ENFORCEMENT FOR MORTGAGE LICENSING ACT OF 2008 (THE "SAFE ACT") AND THE MORTGAGE LOAN ORIGINATOR LICENSING ACT (THE "MLOLA") – CAN WE STILL DO LAND CONTRACTS?

The question of the impact of the SAFE Act and MLOLA on Michigan purchase money mortgages and land contracts was first discussed in a white paper prepared for the MAR Convention held in 2009. At that time, it was concluded that both purchase money mortgages (*i.e.*, a mortgage given by a seller to secure financing extended by the seller to a buyer) and land contracts were subject to the regulations of the SAFE Act and MLOLA. The Michigan Department of Financial Insurance Services ("DIFS") gave a reprieve on land contracts when it published a FAQ which indicated that DIFS would not consider land contracts subject to the SAFE Act or MLOLA until HUD said otherwise. Unfortunately, HUD promulgated a SAFE Act Final Rule that became effective on August 29, 2011 (the "Rule"). The Rule makes it clear that the SAFE Act and thus MLOLA govern Michigan land contracts.

At the time this article was being prepared, DIFS was in the process of finalizing FAQs for the SAFE Act and MLOLA which should help guide REALTORS® working with clients who sell properties on land contract. If DIFS' anticipated FAQs are published after the preparation of this article but before its presentation, the presentation will be supplemented as necessary to reflect the position of DIFS.

This article highlights those portions of the SAFE Act, MLOLA and the Rule which directly impact REALTORS® working with sellers. A complete discussion of the technical requirements of the SAFE Act, MLOLA and the Rule are beyond the scope of this presentation.

1. Introduction – Brief History of the Promulgation of The SAFE Act, MLOLA and The Rule.

A. REALTORS® providing brokerage services to the public are not required to comply with MLOLA. The definition of "mortgage loan originator" specifically excludes: ". . . a person who only performs real estate brokerage activities and is licensed or registered under the laws of this state, unless the person is compensated by a lender, a mortgage broker, or other mortgage loan originator or by any agent of a lender, mortgage broker, or other mortgage loan originator."

B. MLOLA defines "real estate brokerage activity" as providing real estate brokerage services to the public including, but not limited to, the following listed activities:

> (i) Acting as a real estate agent or real estate broker for a buyer, seller, lessor, or lessee of real property.
>
> (ii) Bringing together parties interested in the sale, purchase, lease, rental, or exchange of real property.
>
> (iii) On behalf of any party, negotiating any portion of a contract relating to the sale, purchase, lease, rental, or exchange of real property, other than in connection with providing financing with respect to that contract.
>
> (iv) Engaging in any activity for which a person engaged in the activity is required to be registered or licensed as a real estate agent or real estate broker under any applicable law.
>
> (v) Offering to engage in any activity, or act in any capacity, described in subparagraph (i), (ii), (iii), or (iv).

In sum, if a REALTOR® is simply engaged in the sale of property which involves a sale on land contract, a purchase money mortgage or other form of seller financing, the REALTOR® is not subject to MLOLA. Obviously, this exemption would not apply if the REALTOR® was providing financing for the sale or the REALTOR® was being compensated by a lender,

mortgage broker or other mortgage loan originator or by any agent of a lender, mortgage broker or other mortgage loan originator.

C. Section 5 of MLOLA sets forth various activities that are exempt. These exemptions include an individual who offers and negotiates terms of a residential mortgage loan secured by a dwelling that served as his or her residence. Thus, sellers need not comply with MLOLA if they are financing the sale of their residence by way of a land contract or purchase money mortgage. Section 5 also contains an exemption for an individual who offers and negotiates terms of a "residential mortgage loan" with or on behalf of an immediate family member.

D. The SAFE Act and MLOLA only apply to seller financing involving a "residential mortgage loan." A "residential mortgage loan" is defined as a loan primarily for personal, family or household use that is secured by a mortgage or other equivalent, consensual security interest on a dwelling or on land in which a person intends to construct a dwelling. In turn, a "dwelling" is defined as a residential structure or mobile home which contains one to four family housing units or individual units of a condominium or cooperative.

E. A purchase money mortgage is a residential loan covered by MLOLA.

F. A land contract is a residential mortgage loan covered by MLOLA.

G. Seller financing which involves vacant land not intended for construction of a residence or involves property other than a residential dwelling is not covered by MLOLA.

H. Under the Rule, not every person who acts a "loan originator" must be licensed. Instead, under the Rule, a license with MLOLA is required only for those persons who "engage in the business of loan origination." The Rule states that persons are engaged in the business of a loan originator if they habitually or repeatedly in a commercial context take residential mortgage

loan applications; offer or negotiate terms of a residential mortgage loan for compensation or gain or otherwise hold themselves out to the public to be in the business of a mortgage loan originator.

I. Under the Rule, a person must be licensed if he or she "offers or negotiates terms of a residential mortgage loan for compensation" or gain. In turn, the Rule provides that an individual "offers or negotiates terms of a residential mortgage loan for compensation or gain" if the individual: (i) presents for consideration by a borrower (*i.e.*, land contract vendee or purchase money mortgage purchaser) particular mortgage loan terms; (ii) communicates directly or indirectly with a borrower for purposes of reaching an understanding about residential mortgage terms; or (iii) recommends, refers or steers a borrower to a specific lender or particular residential mortgage terms pursuant to a duty or incentive (*e.g.*, payment) from any person other than the borrower; AND such individual receives or expects to receive payment in connection with the above-described activities.

J. MLOLA does not contain a minimum number of residential mortgage loan transactions (*i.e.*, land contracts or purchase money mortgages) before an individual is required to be licensed as a mortgage loan originator under MLOLA.

K. MLOLA specifically provides the following exemptions from the licensing requirements under MLOLA:

1) A registered mortgage loan originator, when acting for a depository institution, a subsidiary of a depository institution that is owned and controlled by that depository institution and is regulated by a federal banking agency, or an institution regulated by the farm credit administration; and

2) A licensed attorney who negotiates the terms of a residential mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client, unless the attorney is compensated by a lender, mortgage broker, or other mortgage loan originator or by any agent of a lender, mortgage broker, or other mortgage loan originator.

L. Generally, an employee of a bona fide nonprofit organization or a volunteer for such an organization who engages in the business of a mortgage loan originator is not required to be licensed under the Rule. At least preliminarily, DIFS takes the position that the same persons are not required for licensure under MLOLA.

M. Under the Rule and HUD's commentary to the Rule, the following specific seller financing transactions do not require a mortgage loan originator's license:

1) An individual who sells his or her own residence in a seller financed transaction, and pursuant to the transaction, offers or negotiates the terms of a residential mortgage loan;

2) An individual who sells his or her vacation home in a seller financed transaction and, pursuant to the transaction, offers or negotiates the terms of a residential mortgage loan;

3) An individual who sells an inherited property in a seller financed transaction, and, pursuant to the transaction, offers or negotiates the terms of a residential mortgage loan;

4) An individual who sells his or her dwelling to an immediate family member (spouse, child, sibling, parent, grandparent, grandchild, step parent, stepchildren, stepsiblings, and adopted relationships) in a seller

financed transaction and, pursuant to the transaction, offers or negotiates the terms of a residential mortgage loan.

A mortgage loan originator license is not required for the above-described transactions provided that such activity is not "habitual."

N. DIFS, in a preliminary draft of FAQs, has indicated that an activity will be deemed "habitual" under the following standard:

> Unless other evidence to the contrary indicates that an individual is 'engaged in the business' of loan origination, during a 12-month period from January 1 to December 31, an individual will not be considered to be engaged in the business of mortgage loan origination if the individual is not engaged in any activity under the MLOLA except seller financing transactions AND the individual, together with any affiliates, originates three or fewer mortgage loan transactions. If four or more transactions are originated within such 12-month period, DIFS will presume the individual is 'engaged in the business' and licensure as a mortgage loan originator is therefore required.

In other words, a seller can engage in seller financing 3 times per calendar year without being "habitual," *e.g.* licensed with MLOLA.

O. A seller who regularly sells residential properties on land contract or through purchase money mortgages cannot avoid licensure under MLOLA by working through a real estate broker or salesperson who is licensed under MLOLA. Unfortunately, provisions of the Mortgage Brokers, Lenders, and Servicers Licensing Act prohibit this activity unless the real estate broker or salesperson is licensed under the MBLSLA.

Again, DIFS will or may already have published its FAQs for MLOLA by the time this article is presented. If the publication of those FAQs does not occur prior to the presentation of this article, any inconsistencies between this article and the DIFS FAQs will be described in a follow-up article in the Michigan REALTOR®.

PROCURING CAUSE AND COMMISSION DISPUTES

1. Cooperating commissions are a matter of contract.

A. Under the Michigan law, cooperating commission contracts between licensees may be in writing or may be oral.

B. If both REALTORS® are members of the same MLS, then the initial cooperating commission contract is through the MLS.

1) The MLS listing is the "offer," which is "accepted" by the cooperating broker by producing a ready, willing and able buyer.

2) Listing broker may change the amount of the offer of compensation in the MLS at any time until it is accepted by the cooperating broker.

3) Even after the offer of compensation is accepted, the cooperating commission contract may be changed by agreement between the listing broker and the cooperating broker.

4) If the cooperating broker agrees to reduce his commission in order to facilitate the transaction, this becomes a new (binding) cooperating commission contract.

2. For offers of compensation through a REALTOR® MLS, the listing broker must specify the amount of compensation being offered to other MLS participants. The compensation offer in listings must be:

A. A percentage of the gross selling price;

B. A definite dollar amount;

C. Or, but only if the MLS specifically allows it, a percentage of the net sales price defined as the gross sales price minus seller concessions (and the MLS must come up with its definition of "seller concessions").

3. An offer of compensation through a REALTOR® MLS must be unconditional except that the cooperating broker must have been the "procuring cause" of the sale.

4. A listing broker is not precluded from offering any particular MLS participant compensation other than the amount that is published in MLS, provided that:

A. The MLS participant must be notified in writing in advance of submitting an offer; and

B. Modification cannot be the result of any agreement with other MLS participants.

5. A MLS may provide for commission adjustments under limited circumstances.

A. MLSs, at their discretion, may adopt rules enabling listing brokers to communicate to cooperating brokers that the commission established in the listing contract is subject to court approval, and that compensation payable to cooperating brokers may be reduced if the commission established in the listing contract is reduced by a court. In such instances, the fact that the commission is subject to court approval and either the potential reduction in compensation payable to the cooperating broker or the method by which the potential reduction in compensation will be calculated must be communicated to the cooperating broker in advance of submitting the offer.

B. In any instance where a listing broker discloses a potential short sale, an MLS, at its discretion, may adopt rules enabling listing brokers to communicate to cooperating brokers how any reduction in the commission established in the listing

contract required by the lender as a condition of approving the sale will be apportioned between the listing and cooperating broker.

6. In order for a cooperating broker to be entitled to a commission as the "procuring cause," it is not necessary that the listing broker have been paid a commission. It is necessary that there have been a "successful transaction," meaning the cooperating broker's buyer actually closed on the purchase.

7. The listing broker's obligation to compensate the cooperating broker who was the procuring cause may be excused if, through no fault of the listing broker, it was impossible or financially unfeasible for the listing broker to collect some or all of the commission from the seller.

A. Matter for resolution through arbitration.

B. Listing broker must have exercised "good faith and reasonable care."

C. Listing broker must have promptly communicated to cooperating broker when he became aware of the fact that some or all of the commission might not be paid.

8. Hypotheticals

A. An offer is presented through cooperating REALTOR® Smith. REALTOR® Jones thinks that he, not REALTOR® Smith, was the procuring cause. REALTOR® Jones may remain silent until after the sale closes and then attempt to establish that he was in fact the procuring cause of the sale. REALTOR® Jones is entitled to the cooperating commission offered through the MLS if he can establish that he, not REALTOR® Smith, was the procuring cause.

B. An offer is presented through cooperating REALTOR® Smith. REALTOR® Jones calls REALTOR® Smith and claims that he, not REALTOR Smith, is

the procuring cause for the sale. REALTOR® Smith and REALTOR® Jones agree that REALTOR® Jones will receive a 1% referral fee. This is a binding amendment to the original cooperating commission contract.

C. In a short sale, REALTOR® Jones submits an offer to the listing REALTOR®, which is accepted, but the seller's lender will only consent if both REALTOR® Jones and listing REALTOR® agree to reduce their commission. If REALTOR® Jones agrees to a reduced commission, this is a binding amendment to the original cooperating commission contract.

D. Listing REALTOR® lists his mother's home in the MLS and offers a cooperating commission of 3%. REALTOR® Jones presents an offer which is accepted. The seller changes her mind and refuses to proceed with the sale. REALTOR® Jones cannot proceed to arbitration against listing REALTOR® because there was not a "successful transaction." If, on the other hand, the listing REALTOR®'s mother closes on the sale, but the listing REALTOR® waives the entire commission, REALTOR® Jones can proceed with arbitration against the listing REALTOR® even though no commission was collected at closing.

E. Listing REALTOR® lists a short sale property, offers a 3% cooperating commission but adds a notification stating that any reduction in the commission required by the lender will be shared equally between listing REALTOR® and the cooperating REALTOR®. The original cooperating commission contract through the MLS is not for a 3% commission, but is for a 3% commission or such lesser amount as may be approved by the lender.

F. Listing REALTOR® places a listing in the MLS and offers a cooperating commission of 2%. REALTOR® Brown, not a participant in the MLS, calls to arrange an appointment to show the property to a prospective purchaser. There is no discussion of compensation. REALTOR® Brown presents listing REALTOR® with a signed purchase agreement, which is accepted by the seller. Subsequently, REALTOR® Brown requests arbitration with listing REALTOR®, claiming to be the procuring cause of the sale. Because REALTOR® Brown is not a participant in the MLS, there is no cooperating commission contract between them, and therefore no issue to arbitrate.

SELLER'S DISCLOSURE AND AGENCY DISCLOSURE AFTER 20 YEARS

The Michigan Seller Disclosure Act ("SDA") originally took effect on January 1, 1994. As we approach the 20th anniversary of the enactment of the SDA, the courts have gone a long way in interpreting and applying the SDA. REALTORS® who were in the business on January 1, 1994 will recollect that MAR pursued enactment of the SDA on the assumption that if sellers made full disclosure of what they knew about the physical condition of their properties to buyers, and could prove they made such disclosure, the incidents of litigation between sellers and buyers for alleged misrepresentations about defects in a home would decline. As a side benefit, REALTORS® would find themselves less involved in litigation between sellers and buyers as to the physical condition of the property at the time of sale. It would appear that the SDA has had that effect as long as the sellers have properly filled out the Seller's Disclosure Statement.

1. The Basics.

A. The SDA applies to transfers of any interest in real estate consisting of not less than one or more than four residential dwelling units. MCL 565.952. The SDA applies to the following transactions:

1) Sales of an interest in residential real estate.

2) Exchanges of interests in residential real estate.

3) Options to purchase residential real estate.

4) A ground lease coupled with proposed improvements by the purchaser or tenant.

5) A transfer of stock or an interest in a residential cooperative.

B. The following are exempt from compliance with the SDA (MCL 565.953):

1) Transfers made pursuant to a court order, including orders by a probate court in administration of estate; transfers by any foreclosure sale; transfers by a trustee in bankruptcy; transfers through condemnation; and transfers resulting from an order for specific performance.

2) Deeds in lieu of foreclosure or quit claim deeds from a mortgagor to a mortgagee.

3) Transfers by a fiduciary who does not occupy the residential real estate in the course of administration of a decedent's estate, guardianship, conservatorship or trust.

4) Transfers from one co-tenant to one or more other co-tenants.

5) Transfers made to a spouse, parent, grandparent, child or grandchild.

6) Transfers resulting from a judgment of divorce.

7) Transfers to or from any governmental entity.

8) Transfers made by a licensed home builder of newly constructed residential property that has not been inhabited.

C. A completed Seller's Disclosure Statement must be delivered to a buyer or other transferee within the following time limits (MCL 565.954):

1) Prior to a buyer executing a binding purchase agreement.

2) Prior to a vendee executing a land contract or a lessee executed a lease coupled with improvements by the lessee.

3) If the form is delivered after the purchase agreement is signed, the buyer may terminate the purchase agreement not later than 72 hours after receipt

of the form in the case of a hand delivery (or 120 hours in the case of registered mail).

D. Delivery to the buyer's, vendee's/lessee's agent is deemed delivery to the buyer/vendee/lessee.

E. An amendment of a previously delivered Seller's Disclosure Statement must only be made if any changes occur in the structural/mechanical/appliance systems of the property from the date the form is completed to the date of closing. MCL 565.954 (3) and MCL 565.956. Upon personal delivery of an amended Seller's Disclosure Statement to a buyer, the buyer has 72 hours to terminate the transaction after delivery to the buyer or the buyer's agent in person or 120 hours after delivery of the amended Seller's Disclosure Statement to the buyer or buyer's agent if the amended Seller's Disclosure Statement was delivered by registered mail.

F. A buyer's right to terminate the purchase agreement ends upon the transfer of the property by deed or land contract.

G. The following are limitations on the liability of a seller for the information contained in the Seller's Disclosure Statement:

1) A seller or his or her agent is not liable for any error, inaccuracy or omission in information provided in the Seller's Disclosure Statement if the error, inaccuracy or omission was not within the personal knowledge of the seller. MCL 565.955(1).

2) The seller does not violate the SDA by failing to disclose information that could only be obtained through inspection or observation of inaccessible portions of the property or could only be discovered by a person with

expertise beyond the knowledge of the seller (*e.g.*, an inspector, contractor, builder or engineer). MCL 565.955(1).

3) A seller must fill out the Seller's Disclosure Statement in "good faith," meaning honesty in fact in the conduct of the transaction. MCL 565.960.

4) A transfer that is subject to the SDA cannot be invalidated solely because of a seller's failure to comply with the SDA. MCL 565.964.

2. The Courts' Application of The SDA.

A. The SDA did not create any new causes of actions or claims against sellers or REALTORS®. *Vettese v Zehr*, docket number 255919; 2005 WL 3439788 (Dec 2005); *Pena v Ellis*, docket number 257840, 2006 WL 1006444 (April 2006). The only remedy permitted by the SDA for a buyer is to terminate a binding purchase agreement where a Seller's Disclosure Statement is not timely delivered or the seller has not otherwise complied with the SDA. The right to terminate expires upon the conveyance of the property.

B. The courts have not found a violation of the SDA when sellers who have not lived in the residence for sale indicate they generally have no knowledge of its condition. *Vettese*, supra. However, sellers who have been landlords of the property for sale should be very careful if they claim they have no knowledge of the condition of the residential property for sale.

C. Omitting information from a Seller's Disclosure Statement or providing false information in a Seller's Disclosure Statement may be used as evidence of common law fraud. *Smith v Cristoforo*, docket number 266942, 2007 WL 866229 (March 2007); *Elliott v Therrien*, docket number 288235, 2010 WL 293071 (Jan. 2010).

D. A seller cannot be found liable for an innocent misrepresentation in a Seller's Disclosure Statement because the SDA provides that a seller is "not liable for any error,

inaccuracy or omission in any information delivered pursuant to this Act if the error, inaccuracy or omission was not within the personal knowledge of the transferor . . ." MCL 565.955(1). *Roberts v Saffell*, 483 Mich 1089 (2009); *Bergen v Baker*, 264 Mich App 376 (2004).

E. In claims for fraud alleged against sellers by reason of a misrepresentation in the Seller's Disclosure Statement, buyers are still required to demonstrate that they reasonably relied upon the misrepresentation. *Timmons v DeVoll*, docket number 241507 and 249015, 2004 WL 345495 (Feb. 2004).

F. It has been consistently recognized that it is not a violation of the SDA if after the Seller's Disclosure Statement is completed and provided to a buyer, something changes before the closing to render the statement inaccurate. MCL 565.956. However, if the change causing the inaccuracy relates to "structural/mechanical/appliance systems," then the seller has a duty to update the Seller's Disclosure Statement. Once the Seller's Disclosure Statement is amended, the purchase agreement once again becomes subject to revocation by the buyer. A failure to amend, when required, will give rise to a cause of action for silent fraud. *Pena*, supra. The Court of Appeals has held that the duty to amend does not apply to all questions in the Seller's Disclosure Statement, but only "structural/mechanical/appliance system" changes. *Huhtasaari v Stockemer*, docket number 256926, 2005 WL 3481429 (Dec 2005).

G. The issue of whether a property subject to the SDA is in the "proximity" to a shooting range is a question of fact which may be decided by a jury. *Pena*, supra.

H. Question (1) under the heading "Property Conditions" in the Seller's Disclosure Statement requires sellers to disclose if there "has . . . been evidence of water" in the basement or crawlspace. This inquiry has been interpreted by the Court of Appeals as requiring disclosure if there has been evidence of water in the basement at any time while the sellers have occupied the

residence. *Pena*, supra. The wording of this question in the Seller's Disclosure Statement should be compared with the disclosure required for a roof, *i.e.*, "does it presently leak?"

I. Sellers were found not to have violated the SDA in a situation where they did not disclose certain defects known by them at the time they purchased the property for which they had been provided with a credit against the purchase price; received a report indicating defects in the structure of the residence; and obtained a bid from a contractor to correct the defects. *Westrick v Jeglic*, docket number 291470, 2010 WL 2793556 (July 2010). The jury believed the sellers' testimony that the sellers had not attached great significance to the earlier report of structural defects; had lived in the home for a couple of years with no problems; and, when filling out the Seller's Disclosure Statement, had attached no significance to the earlier report and bid. The Court of Appeals affirmed. This case is relevant to the issue of whether a seller should amend a Seller's Disclosure Statement when an inspection report is received in connection with a prior offer and the inspection report reveals changes to the "structural/mechanical/appliance systems" of the property. A seller in good faith may believe that the conditions detected by the inspector are not as described by the inspector. Remember, however, that the case will turn on whether the jury finds the sellers' testimony to be credible.

J. A Seller's Disclosure Statement should always be filled out by the seller and not the REALTOR®. An obvious exception is where a seller requires physical assistance in filling out the Seller's Disclosure Statement. In that situation, it is still preferable for the seller to receive the assistance of a family member or trusted friend in filling out the form.

AGENCY DISCLOSURE

REALTORS® have been required to comply with Michigan's Agency Disclosure Law for almost 20 years. The purpose of the Agency Disclosure Law was, in part, to address complaints by consumer advocates that members of the public had no idea who was representing them when they were selling or purchasing a home. MAR obtained enactment of the agency disclosure law to both address the concerns of consumer advocates and to protect REALTORS® from complaints from buyers after the fact that they had been misled as to whom the selling REALTOR® represented in the transaction.

The Agency Disclosure Law has spawned very little litigation. Upon its enactment almost 20 years ago, there was grave concern expressed by real estate commentators that the time of delivery of the Notice of Agency Disclosure (the "Notice") would be a major problem. The statute provides that the Notice must be delivered ". . . before the disclosure by the potential buyer or seller to the licensee of any confidential information specific to that potential buyer or seller." The commentators came up with numerous hypothetical scenarios whereby it would not be possible for a REALTOR® to physically deliver the Notice prior to a buyer or seller disclosing confidential information. Fortunately, to date none of these hypothetical scenarios have panned out. We are unaware of any case in which the time of delivery of the Notice has been an issue.

While there has been very little case law involving the agency disclosure law, it appears to have proven beneficial to REALTORS® in at least three different situations.

First, REALTORS® continue to engage in buyer representation without the benefit of a buyer's agency agreement. Claims have been asserted by sellers that a cooperating REALTOR® has failed to disclose material facts about the buyers to the sellers or to the listing REALTOR®. For example, sellers have claimed that the cooperating REALTOR® had a duty to tell the sellers

that the buyers had indicated they may not be able to obtain financing for the transaction. In almost all instances, the cooperating REALTOR® has made appropriate agency disclosure indicating he or she represents the buyer (despite the absence of a buyer agency agreement), and can demonstrate that all parties were aware that he or she was representing the buyers, as set forth in the Notice.

Second, courts have found that agency disclosure by a listing REALTOR® protects the listing REALTOR® from claims asserted by buyers in certain situations. In the typical case, a listing REALTOR® receives offers from more than one unrepresented buyer (*i.e.*, the listing REALTOR® is working with several buyers as customers). The offers are then submitted by the listing REALTOR® to the seller with a recommendation by the listing REALTOR® that the seller accept one of the offers for reasons specific to the seller.

When the second, losing buyer, finds out that the seller accepted the offer based upon the listing REALTOR®'s recommendation, the losing buyer has tried to sue the listing REALTOR® contending that he or she breached a fiduciary duty owed to that buyer. In these instances, the listing REALTOR® prevailed based upon the fact that he or she made the appropriate agency disclosure to all buyers indicating that he or she was representing the seller. This same type of scenario has occurred with respect to the order in which the listing REALTOR® submits offers to the seller and similar scenarios.

Finally, the use of the Notice has proven extremely effective when buyers have contended that they did not consent to a dual agency arrangement. The Court of Appeals in *Clancy Realtors v Rubick*, docket number 276309 and 276310, 2008 WL 4958793 (Nov. 2008) and *Vanhellemont v Gleason*, docket number 286350, 2009 WL 3049582 (Sept. 2009) found that the delivery of a Notice to the buyers from the listing REALTOR® indicating that the listing

REALTOR® was acting as a dual agent was effective to limit the duties owed by the listing REALTOR® to both the seller and the buyer. If REALTORS® find themselves in the situation where they are in the middle of a transaction and have become dual agents, they are advised to make certain they provide agency disclosure to both the seller and can demonstrate that there was informed consent.

UPDATED MAR REAL ESTATE FORMS

MAR has updated a number of its real estate forms. We have attempted to make the formatting more consistent from one form to the other. We have also attempted to eliminate "legalese" and make the forms both easier to understand and easier to complete. We have eliminated the "plain English" versions that we had for a couple of the forms on the assumption that by now all of our forms should in fact be in "plain English." We have also created separate "designated agency" and "traditional agency" versions of the listing contracts and buyers agency forms. We have attached the new forms to this article and included a discussion of the substantive changes below.

1. Exclusive Listing Contract (Traditional Agency) FORM B

A. Clarified that compensation can be stated as a dollar amount, a percentage, or a combination.

B. Cooperating compensation offers now reference an actual specific percentage amount rather than "not more than" a specific percentage amount.

C. Eliminated requirement that sellers list their title encumbrances at the time the listing contract is signed.

D. Added release language in paragraph 10 regarding the security of the property and damage/loss during showings.

E. Puts sellers on notice that in addition to the state anti-discrimination laws, there may be local ordinances covering additional protected classes.

F. Clarified that where buyer is represented by same firm, there are choices other than dual agency (as has been done for years on the buyer's agency forms).

G. Reworded the seller's disclosure paragraph to eliminate the discussion of a seller's obligation to notify the listing broker of any defects and have simply stated that the seller must comply with the Seller's Disclosure Act and will hold the broker harmless for any violations of the seller's disclosure obligations.

2. Exclusive Listing Contract (Designated Agency) FORM BB

A. This is a completely new form. Previously, we only had a designated agency addendum to attach to a traditional exclusive listing contract.

B. Unlike the traditional exclusive listing contract, this form establishes agency relationships with the designated agent and the supervisory broker only.

C. A conflict in paragraph 10 only arises if the same designated agent represents both the buyer and the seller. (If the same supervisory broker is on both sides of the transaction, the law imposes consensual dual agency automatically.)

3. Exclusive Buyer Agency (Traditional Agency) FORM J

A. Formatted similarly to the listing contract with the seller.

B. Set up to more readily provide for electronic signatures and delivery.

C. Put buyers on notice that in addition to the state anti-discrimination laws, there may be local ordinances covering additional protected classes.

D. Provided for a waiver of a duty to disclose confidential information learned in both prior and pending transactions.

4. Exclusive Buyer Agency (Designated Agency) FORM JJ

A. Previously, we only had an addendum to attach to a traditional exclusive buyer agency contract.

B. Unlike the traditional exclusive buyer agency contract, this form establishes agency relationships with the designated agent and the supervisory broker only.

C. A conflict in paragraphs 8 and 9 arises only if the same designated agent represents both parties. (If the same supervisory broker represents both parties, the law imposes consensual dual agency automatically.)

5. Exclusive Buyer Agency Contract (Short Form – Traditional Agency) FORM U

A. Provided for electronic signature and delivery.

B. Included express statement that the buyer is not responsible for compensating buyer's agent.

C. Added language protecting confidential information learned in prior or pending transactions (not just in agency relationships).

6. Exclusive Buyer Agency Contract (Short Form – Designated Agency) FORM UU

A. New form; no longer use an addendum to the traditional agency version.

7. Dual Agency (Traditional Agency) FORM P

A. Streamlined form

B. Eliminated compensation discussion because unnecessary.

8. Dual Agency (Designated Agency) FORM PP

A. If designated agency firm, a dual agency agreement is only needed if same designated agent represents both seller and buyer.

9. Buy and Sell Agreement FORM A

A. Combined Form A and Form I (former "plain English" version)

B. Set up to facilitate email signatures and delivery. Note the agreement provides that delivery to the listing REALTOR® shall constitute delivery to the seller and the delivery to

the selling REALTOR® shall constitute delivery to the buyer (whether or not the selling REALTOR® is a buyer's agent).

C. Eliminated language that suggests that the buyer is required to accept the property subject to whatever easements and restrictions exist of record. This provision conflicted with the title insurance paragraph elsewhere. (Form I)

D. Required buyer to produce evidence of mortgage application and appraisal ordered by a particular date.

E. In title insurance paragraph, limited the buyer's right to object to the "special exceptions."

F. Eliminated requirement that buyers disclose name and contact information for its attorney.

G. Provided that the buyer shall be responsible for any fees imposed by the buyer's lender or the lender's title insurance company.

H. Separated the discussion of real estate taxes and special assessments and included choices for handling special assessments.

I. Modified the property inspection paragraph to cover <u>any</u> inspections desired by the buyer rather than just a contractor's inspection.

J. Revised the earnest money deposit paragraph to facilitate the option of having a title company or other third party hold the earnest money deposit.

K. Provide buyer with the right of walk through within 48 hours prior to closing.

L. Clarified that the offer will expire on the particular date stated or upon seller's receipt of revocation from the buyer, whichever comes earlier.

M. Eliminated the witness requirement.

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