

HOT TOPICS IN BROKER RISK REDUCTION

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COPYRIGHT INFRINGEMENT

<http://www.realtor.org/topics/copyright>

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I. Background: Recent litigation has raised concerns regarding the ownership and rights surrounding photographs used in property listings. It's imperative that brokers actually obtain the rights in the photographs that they assert to have when sharing the photos in the MLS, public portals, and other venues. Brokers should also be able to document that chain of title. In addition, compliance with the DMCA Safe Harbor on IDX displays should greatly reduce brokers' and agents' risk of liability regarding third party photos.

II. Litigation

- a. *Boatman v. Coldwell Banker Honig-Bell*, No. 1-16-cv-08397 (N.D. Ill. 2016) (amended complaint filed Oct. 14, 2016)
- b. *Alan J. Goldstein v. Metropolitan Regional Information Systems, Inc.*, No. 8:15-cv-02400-TDC (Dist. MD, complaint filed Aug. 13, 2015)
- c. *VHT, Inc. v. Zillow Group, Inc.*, No. 2-15-cv-1096 (W.D. Wash. 2015)
 - i. Zillow's Motion for Judgment on the Pleadings for Failure to Join Indispensable Parties [real estate brokers and agents] (filed Aug. 18, 2016)
- d. *Alexander Stross v. Redfin Corp.*, No. 1:15-cv-00223 (W.D. Tex. 2015)
 - i. NAR's Amicus Curiae Brief in Support of Redfin's Motion for Summary Judgment on the DMCA Issue (filed Jul. 29, 2016)
 - ii. Order Granting Summary Judgment for Redfin (filed Sept. 1, 2016)
- e. *Stevens v. CoreLogic, Inc.*, 2016 WL 4371549 (S.D. Cal., Jul. 1, 2016)
 - i. Order Granting Summary Judgment for CoreLogic (filed Jul. 1, 2016)

III. Risk Reduction Tips:

- a. Use written agreements to obtain ownership or requisite exclusive licensing rights in listing photographs.
- b. Comply with the safe harbor provisions of the Digital Millennium Copyright Act.

IV. NAR Resources:

- a. *Sample Photography Agreements* at: <http://www.realtor.org/law-and-ethics/who-owns-your-property-photos>
- b. *Window to the Law: Listing Photo Copyright Issues* at: <http://www.realtor.org/videos/window-to-the-law-listing-video-copyright-issues>
- c. *Window to the Law: Copyright Infringement Safe Harbor* at: <http://www.realtor.org/videos/window-to-the-law-copyright-infringement-safe-harbor>

WIRE FRAUD

<http://www.realtor.org/topics/wire-fraud>

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- I. **Background:** Criminals are currently hacking into email accounts and using information in those accounts to dupe homebuyers into a fraudulent wire transfer. These hackers send homebuyers an email that is spoofed to look like it comes from the real estate agent, title representative, or attorney involved in the transaction. The email is sent right before closing and claims that there has been a last minute change to the wiring instructions. Following these new instructions, the homebuyer will wire funds directly to the hacker's account.

- II. **Risk Reduction Tips**
 - a. Alert homebuyers of this fraudulent scheme at the outset of the transaction. Many brokers are requiring signed disclosure statements to that effect.
 - b. Avoid sending wire instructions (and any sensitive financial information) via email.
 - c. Instruct homebuyers to call wire recipient immediately prior to sending, using an independently-verified phone number.
 - d. Contact law enforcement immediately if fraud is suspected.
 - e. Use strong email passwords and change them regularly.
 - f. Use secure email and transaction management platforms.

- III. **NAR Resources**
 - a. *Wire Fraud Alert Video:* <http://www.realtor.org/videos/wire-fraud-alert-for-buyers>
 - b. *NAR Window to the Law on Cyberscams:* <http://www.realtor.org/videos/window-to-the-law-cyberscams-and-the-real-estate-professional>
 - c. *Cybercrime Hitting Real Estate* by NAR Associate Counsel Jessica Edgerton: <http://rismedia.com/2016/02/01/cybercrime-hitting-real-estate/>
 - d. *Protecting Your Business and Your Clients from Cyberfraud:* <http://www.realtor.org/law-and-ethics/protecting-your-business-and-your-clients-from-cyberfraud>
 - e. *FTC – NAR Warning:* <https://www.consumer.ftc.gov/blog/scammers-phish-mortgage-closing-costs>

ADA WEBSITE ACCESSIBILITY

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I. Background: Plaintiffs' law firms are sending demand letters or initiating litigation against businesses in a variety of industries, including real estate, which operate websites that are not accessible to individuals with disabilities. These demand letters seek injunctive relief – i.e., website accessibility – and attorneys' fees purportedly based on the law firms' continued monitoring of the sites for compliance over the next several years. The law is not clear on whether or not the Americans with Disabilities Act (ADA) applies to websites generally, but the Department of Justice's position is that it does. The DOJ recently issued a Supplemental Advance Notice of Proposed Rulemaking, to which NAR filed a detailed comment addressing each of the concerns affecting the real estate industry.

II. Risk Reduction Tips

- a. Ask your website provider about your site's accessibility and about indemnification in the event of a challenge.
- b. Speak with a website accessibility consultant to create a plan for becoming accessible. The following list of consultants was provided to NAR as examples:
 - i. SSB Bart Group: <http://www.ssbbartgroup.com>
 - ii. The Paciello Group: <https://www.paciellogroup.com/>
 - iii. AudioEye: <https://www.audioeye.com/company/>
 - iv. Siteimprove: <http://siteimprove.com/>
 - v. Bender Consulting Services: <http://www.benderconsult.com>
- c. Include contact info on your site for individuals with disabilities to contact you for accommodation. For example, see (and feel free to copy) <http://www.realtor.org/accessibility>.

III. NAR Resources

- a. *Accessible Websites and the ADA* video, at: <http://www.realtor.org/videos/window-to-the-law-accessible-websites-and-the-ada>
- b. REALTOR® Magazine article, *Is Your Website ADA Compliant?*, at: <http://realtormag.realtor.org/technology/feature/article/2016/04/your-website-ada-compliant>.
- c. NAR Comment in Response to DOJ's Supplemental Advanced Notice of Proposed Rulemaking, at: <http://www.narfocus.com/billdatabase/clientfiles/172/3/2752.pdf>
- d. *Six Ways to Help Everyone Access your Website*, at: <http://realtormag.realtor.org/for-brokers/network/article/2016/07/6-ways-help-everyone-access-your-website>

HUD GUIDANCE ON USE OF CRIMINAL RECORDS

<http://www.realtor.org/programs/fair-housing-program>

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I. Background: While persons with criminal records are not a protected class under the Act, recent HUD guidance stresses that criminal history-based barriers to housing have a statistically disproportionate impact on minorities and, therefore, arbitrary or blanket criminal-based policies or restrictions could violate the Fair Housing Act. HUD's guidance does not preclude criminal history-based policies or practices, but HUD states that such policies should be tailored to serve a substantial, legitimate, and nondiscriminatory interest of the housing provider, such as resident safety or the protection of property.

II. Risk Reduction Tips

- a. Clearly articulate specific rationale for any policy based on criminal history.
- b. Do not have any blanket prohibitions; evaluate on case-by-case basis.
- c. Only exclude individuals based on criminal convictions that present a demonstrable risk to resident safety or property.
- d. Consider the nature and severity of the crime as well as the time that has passed since it was committed.

III. NAR Resources

- a. *Analysis of HUD Guidance on Criminal History*, at: <http://www.realtor.org/articles/fair-housing-act-criminal-history-based-practices-and-policies>
- b. *Disparate-Impact Liability Explained* video, at: <http://www.realtor.org/videos/window-to-the-law-disparate-impact-liability-and-fair-housing>
- c. *FHA Disparate-Impact Liability Upheld*: <http://www.realtor.org/legal-case-summaries/fha-disparate-impact-theory-upheld>
- d. HUD Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, at: <http://bit.ly/1T81FSu>

RESPA and MSAs

<http://www.realtor.org/topics/real-estate-settlement-procedures-act-respa>

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I. Background: Section 8(a) of RESPA prohibits payment in exchange for referral of business for settlement service. Section 8(c)(2) provides that payment for goods and services actually furnished or performed is not prohibited. CFPB enforcement actions over the past several years and CFPB's failure to provide clear guidance on marketing service agreements has caused settlement service providers to terminate and avoid entering into MSAs.

II. PHH v. CFPB, No. 15-1177, (D.C. Ct., decided October 11, 2016).

- a. The CFPB imposed a \$109 million fine against PHH for a captive reinsurance program that was deemed to be in violation of RESPA because there was a direct referral arrangement between PHH and preferred mortgage insurers to use PHH's subsidiary for captive reinsurance. The CFPB denied PHH's argument that such arrangement was proper under RESPA section 8(c)(2) because the mortgage insurance companies paid fair market value for the reinsurance product. PHH appealed to the D.C. Circuit Court and NAR filed an *amicus curiae* brief in support of PHH on the RESPA issue.
- b. On appeal, the District Court held:
 - i. The CFPB interpreted section 8(c)(2) of RESPA incorrectly. It is not a RESPA violation to pay fair market value for actual services delivered to those making referrals.
 - ii. The CFPB improperly disregarded the clear and well-recognized interpretation of section 8(c) that has been historically issued by HUD and relied upon by the industry.
 - iii. The CFPB is bound by RESPA's 3-year statute of limitations for enforcement actions.
 - iv. The composition of the CFPB with a single head is unconstitutional, so the Court ordered that the President must have total ability to remove the head of the CFPB for any reason (not just for cause).

III. Risk Reduction Tips

- a. Proceed with caution. Consult with attorney when structuring an MSA.
- b. Determine the fair market value for the services to be performed and document that analysis. Analysis cannot be based on referrals of business.
- c. Service provider should be monitored to ensure that it is performing the services set forth in the MSA and should be able to demonstrate such performance.

IV. NAR Resources:

- a. *FAQs*: <http://www.realtor.org/topics/real-estate-settlement-procedures-act-respa/respa-faq>
- b. *MSA "Dos and Don'ts"* at the REALTOR® Store on REALTOR.org.

INDEPENDENT CONTRACTOR STATUS

<http://www.realtor.org/topics/independent-contractor>

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I. Background: There is an inherent conflict between common law independent contractor status and the traditional classification of real estate salespeople as independent contractors. However, some state real estate statutes expressly address the unique status of real estate agents, permitting classification as independent contractors despite the required control and supervision the broker has over the licensees. In recent years, attempted class action lawsuits by salespeople against brokers have challenged this inherent conflict.

II. Litigation

- a. *Patterson vs. Boston Pads LLC*, (a.k.a. *Monell II*) Docket No. 1684CV00351 (Mass. Super. Ct. Feb. 1, 2016) (Class/collective action)
- b. *Lee v. WWW.Urban, Inc*, Docket No. 4:16-cv-01841 (S.D. Tex. Jun 27, 2016) (Class/collective action)
- c. *Stratulat v. Nationwide Real Estate Executives, Inc*, Docket No. BC625180 (Cal. Super. Ct. June 27, 2016)
- d. *Alonzo v. Bellmarc Administrative Corporation et al*, Docket No. 156326/2016 (N.Y. Sup. Ct. July 29, 2016) (class action)

III. Risk Reduction Tips

- a. Know your state law regarding independent contractor classification of real estate licensees. Statutes protecting this classification are the strongest defense to a legal challenge.
- b. Always have a written independent contractor agreement.
- c. Don't mandate meetings, administrative office duties, or use of certain tools.
- d. Allow salespeople to work where, when, and how they deem best.

IV. NAR Resources

- a. White Paper Report: *Independent Contractor Classification in Real Estate*, at: <http://www.realtor.org/sites/default/files/reports/2016/independent-contractor-white-paper-2016.07.14.pdf>
- b. State Statutory Approaches to Worker Classification, at: <http://www.realtor.org/law-and-ethics/state-statutory-approaches-to-worker-classification>
- c. *Key Provisions for Independent Contractor Agreements*, at: <http://www.realtor.org/law-and-ethics/key-provisions-for-independent-contractor-agreements>
- d. *Ten Ways to Manage the IC Relationship*: <http://www.realtor.org/articles/ten-ways-to-successfully-manage-your-independent-contractor-relationships>
- e. *FAQs*: <http://www.realtor.org/law-and-ethics/independent-contractor-status-frequently-asked-questions>

DEPARTMENT OF LABOR

NEW OVERTIME RULE

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- I. **Background:** Beginning December 1, 2016, the minimum salary levels will increase significantly in order to claim the Executive, Administrative and Professional Exemption and Highly Compensated Employee Exemptions. Employers will need to meet this increase in order to continue to claim the exemptions from the Fair Labor Standards Act's minimum wage and overtime pay obligations. The new rule does not change the duties test for these exemptions, however the rule does effectuate three major changes that all employers should be aware of: (i) increased minimum salary levels; (ii) automatic updates to the increased salary levels; and (iii) use of nondiscretionary bonuses, payments, and commissions to satisfy minimum salary levels.

- II. **Current legal challenges to enjoin implementation of the Rule**
 - a. *Plano Chamber of Commerce, et. al. v. Perez*, U.S. District Court E.D. of Texas, Civil Action No. 16-cv-00732.
 - b. *Nevada, et. al. v. U.S. Department of Labor*, U.S. District Court E.D. of Texas, Civil Action No. 16-cv-00407.

- III. **NAR Resources**
 - a. NAR Guidance on DOL's New Overtime Rule, at: <http://www.realtor.org/sites/default/files/policies/2016/7-27-16-dol-guidance-new-overtime-rule.pdf>
 - b. *Window to the Law Video*, at: <http://www.realtor.org/videos/window-to-the-law-video-new-dol-overtime-rules>

- IV. **DOL Resources**
 - a. Overtime for White Collar Workers: Overview and Summary of Final Rule, at: <http://bit.ly/1XmUYvA>
 - b. Small Entity Compliance Guide to the Fair Labor Standards Act's "White Collar" Exemptions, at: <http://bit.ly/2bgAfsa>
 - c. Questions and Answers from the General Information Overtime Webinars, at: <http://bit.ly/2bGaoLm>

PATENT TROLLS

<http://www.realtor.org/topics/patent-litigation-reform>

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- I. **Background:** In recent years, patent trolls have sued more non-tech companies than tech companies, including real estate brokerages, associations, and MLSs; costing the U.S. economy billions in litigation costs. Businesses that adopt emerging technologies are facing more patent-infringement claims and the litigation that goes along with them. This includes common technologies like scanner-copiers, website maps, and website alert technologies.
- II. **National Association of REALTORS® v. Digital Distribution Technologies, LLC** (USPTO PTAB; IPR2016-01075) and **National Association of REALTORS® v. Digital Distribution Technologies, LLC** (W.D. Wash. 2016, Case No. 2:16-cv-00851)
 - a. Digital Distribution Technologies (DDT) owns a patent for an online searchable database where users can save favorite properties and search criteria and receive an email alert when new properties matching their criteria come on the market. DDT does not invent or produce anything but instead acquired the patent rights for the purposing of enforcing those patent rights on third parties, including real estate firms. In 2012 and 2013, DDT made demands upon and settled with RE/Max, Weichert, REALTORS®, Kayak, ZooAlert and Price Grabber. They continued to send numerous demand letters for licensing fees to real estate firms and MLSs in the years following those settlements.
 - b. On behalf of those members and MLSs who received such demands, NAR filed an “Inter Partes Review” proceeding in the U.S. Patent and Trademark Office (USPTO) challenging the validity of the DDT patent and also filed a petition for a Declaratory Judgment in Federal District Court seeking a declaration that the patent is invalid.
 - c. In lieu of defending the UPSTO and declaratory judgement actions, DDT agreed to forever refrain from enforcing – by demand letter, litigation, or otherwise – this patent against anyone in the real estate industry. That means that NAR’s members, local and state associations, and MLSs no longer face the risk of being targeted by this patent troll.
- III. **NAR Resources**
 - a. *Patent Troll Stops Pursuit of Real Estate Industry* at: <http://realtormag.realtor.org/daily-news/2016/09/16/patent-troll-stop-seeking-fees-from-real-estate-companies>
 - b. *Patent Troll Demand Letter video* at: <http://www.realtor.org/videos/window-to-the-law-patent-troll-demand-letters>
 - c. *Patent Litigation Reform Resources* at: <http://www.realtor.org/topics/patent-litigation-reform>
 - d. *NAR Congressional Testimony* at: <http://www.realtor.org/articles/nar-testifies-on-patent-demand-letter-reform>