

# Report From Counsel

Background Report for Spring 2010 Issue

## CLIENT NEWSLETTER SERVICES NATIONAL LEGAL RESEARCH GROUP

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## REAL ESTATE ROUNDUP

### Condominium Buyers Cannot Revoke Contract

The Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701 et seq., is a consumer protection statute that is intended to curb abuses accompanying interstate land sales. Generally, the Act requires that the seller provide the buyer with a property report before the sales contract is signed, 15 U.S.C. § 1703(a)(1)(B), and failure to do so gives the buyer the right to revoke the contract. 15 U.S.C. § 1703(c).

When the purchase of the condominium unit to be built for the buyers in Stein v. Paradigm Mirasol, LLC, 586 F.3d 849 (11th Cir. 2009), became a bad deal for the buyers because of plummeting housing values in Florida, they tried to get out of the contract on the ground that the builder had failed to provide them with the property report contemplated under the Disclosure Act. There had been no property report for the buyers, but this was entirely lawful because of the provision in the Disclosure Act exempting sellers from the property report requirement for "the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years." See 15 U.S.C. § 1702(a)(2).

The contract at issue in Stein came within the exemption, as it required that the condominium unit be finished within two years,

as in fact it was. The buyers argued in vain that the exemption should not apply, because they had contracted away their right to certain types of damages for a breach, and because of a force majeure clause in the contract that would have excused performance not within the two-year period in the event of certain occurrences beyond the control of the seller. 586 F.3d at 855-57.

### **Lapsed Flood Insurance**

Federal law preempts state law tort claims arising from claims handled by a "write your own" carrier participating in the National Flood Insurance Program (NFIP) established under 42 U.S.C. § 4001. Referring to an insurance policy under the NFIP, 44 C.F.R. pt. 61, app. A(1), art. IX states, in pertinent part, that "[t]his policy and all disputes arising from the handling of any claim under the policy are governed exclusively by" FEMA regulations (emphasis added).

In Campo v. Allstate Ins. Co., 562 F.3d 751 (5th Cir. 2009), the court held that, for purposes of preemption analysis, an insured's state law claims against an insurer participating in the NFIP--alleging that the insurer and its representatives made negligent misrepresentations that prevented the insured from renewing his flood insurance policy--were not related to the "handling" of an insurance claim. Rather, the claims concerned a species of an "insurance procurement." The alleged

misrepresentations occurred when the insured's only relationship with the insurer, because of an expired policy, was that of both a former and a potential future policyholder. In addition, the insurer's representations were allegedly of a kind that could lull parties like the insured into believing that they would receive indemnity without having to submit any additional payments, thus affirmatively dissuading them from paying their delinquent premiums to reinstate their expired coverage.

The court in Campo also found that federal law did not preempt the state law procurement-based claims brought by the insured, because Congress, by its delegation of regulatory power to FEMA, had expressly preempted state law only as to handling-related claims. Unlike in handling-based cases, permitting the prosecution of procurement-related state law tort suits did not impede the full purposes and objectives of Congress. Id. at 758.

### **Misrepresentation About Water Damage Is Not "Property Damage"**

Insured parties brought an action against a liability insurer under a homeowner's insurance policy, seeking a declaratory judgment that the insurer had a duty to defend the insureds against a suit by third parties over the insureds' alleged misrepresentations in connection with the sale of a home. A state intermediate appellate court held that the third parties' complaint--alleging that the insureds misrepresented that there was

no water damage to the home--did not allege "property damage" within the meaning of the liability policy. Rock v. State Farm Fire & Cas. Co., 395 Ill. App. 3d 145, 917 N.E.2d 610 (3d Dist. 2009). Under the policy, only an "occurrence" triggered coverage, and an occurrence required that there be an "accident" resulting in "property damage." The court's reasoning in favor of the insurer was as follows:

In the underlying complaint, the Kosses [buyers] allege that the Rocks knowingly, recklessly or negligently misrepresented in a real estate disclosure form that there were no moisture or water problems in the home, no damage due to flood and no problems with the home's foundation. The Kosses also alleged that they relied upon these misrepresentations and were injured as a result of their reliance. Contrary to the Rocks' position on appeal, the underlying complaint does not make any allegation of post-sale water infiltration to the home. Indeed, the underlying complaint alleges that the Rocks misrepresented "past and/or existing material facts." Thus, the acts in the underlying complaint that are alleged to have caused injury, and the only possible "occurrence" for purposes of this appeal, were the misrepresentations made by the Rocks. The Rocks do not argue that the misrepresentations are an "occurrence" within the meaning of the policy. We need not determine whether the alleged misrepresentations meet the definition of "occurrence," however, because the underlying complaint does not allege that the misrepresentations caused property damage.

"Property damage" is defined in the policy as "physical damage to or destruction of tangible property, including loss of use of this property." In this case, the underlying complaint does not allege that the purportedly false statements made by the Rocks caused any physical damage to or destruction of tangible property. The Kosses alleged that the Rocks made misrepresentations about past and/or existing facts related to moisture or water problems in the home, including damage due to flood and problems with the foundation. The underlying complaint makes no reference to any physical damage to

the house incurred after these statements were made. Any physical damage to the house predated the statements made by the Rocks. Logically, misrepresentations concerning past or existing damage could not have caused past or existing damage.

917 N.E.2d at 614-15.

#### **BUSINESS LOANS CANNOT REDUCE ESTATE TAXES**

In Estate of Farnam v. Comm'r, 583 F.3d 581 (8th Cir. 2009), the single issue was whether certain unsecured loans made by the decedents, who were husband and wife, to a family-owned corporation constituted "interests" in the corporation, as that term is used to determine the estates' eligibility for "qualified family-owned business interest" (QFOBI) deductions under I.R.C. § 2057(a). The court held that the decedents' debt interests in a family-owned corporation did not qualify for QFOBI deductions.

The decedents' debt interests as creditors holding promissory notes for unsecured shareholder loans to the family-owned corporation did not qualify as an "interest in an entity carrying on a trade or business," within the meaning of the estate tax provision governing the liquidity test for QFOBI deductions. I.R.C. § 2057(e)(1)(B). An ownership or equity interest, rather than merely a debt interest, was required for the deductions. The court relied on the familiar principles of statutory construction, that if the statute's language has a plain and unambiguous meaning with regard to the particular dispute in the case, the analysis

ends and the court applies the statute's plain meaning; in determining whether the statutory language is plain and unambiguous, the court must read all parts of the statute together and give full effect to each part. Id. at 584.

In accord with Estate of Farnam is Estate of Artall v. Comm'r, T.C. Memo. 2008-67, 2008 WL 724018 (T.C. 2008).

### **AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT**

The Americans with Disabilities Act Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, Sept. 25, 2008, 122 Stat. 3553, went into effect on January 1, 2009.

The Equal Employment Opportunity Commission's (EEOC) Notice of Proposed Rulemaking relating to the ADAAA summarized the new Rule, as follows:

The Equal Employment Opportunity Commission (the Commission or EEOC) proposes to revise its Americans with Disabilities Act (ADA) regulations and accompanying interpretive guidance in order to implement the ADA Amendments Act of 2008. The Commission is responsible for enforcement of title I of the ADA, as amended, which prohibits employment discrimination on the basis of disability. . . .

Pursuant to the 2008 amendments, the definition of disability under the ADA, 42 U.S.C. 12101, et seq., shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the ADA as amended, and the determination of whether an individual has a disability should not demand extensive analysis. The Amendments Act makes important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of EEOC's ADA regulations. The effect of these changes is to make it easier for an individual seeking protection under the

ADA to establish that he or she has a disability within the meaning of the ADA. Statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008 (hereinafter 2008 Senate Managers' Statement); Committee on Education and Labor Report together with Minority Views (to accompany H.R. 3195), H.R. Rep. No. 110-730 part 1, 110th Cong., 2d Sess. (June 23, 2008) (hereinafter 2008 House Comm. on Educ. and Labor Report); Committee on the Judiciary Report together with Additional Views (to accompany H.R. 3195), H.R. Rep. No. 110-730 part 2, 110th Cong., 2d Sess. (June 23, 2008) (hereinafter 2008 House Judiciary Committee Report).

The Amendments Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways, therefore necessitating revision of the existing regulations and interpretive guidance contained in the accompanying "Appendix to Part 1630--Interpretive Guidance on Title I of the Americans with Disabilities Act," which are published at 29 CFR part 1630.

The two U.S. Supreme Court decisions which Congress found to be too restrictive in determining who is disabled within the meaning of the ADA, thus prompting the ADAAA, are Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (under plain meaning of ADA, corrective and mitigating measures should be considered in determining whether individual is substantially limited in major life activity, and thus disabled, given that ADA requires that person be presently, not potentially or hypothetically, substantially limited in order to demonstrate disability, that determination of disability is individualized inquiry, with consideration of positive and negative effects of mitigating measures, and that Congress's estimate, at time of ADA's enactment,

that 43 million Americans had disabilities showed intent not to include all those with uncorrected conditions, which would have included more than 160 million people), and Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002) (to be substantially limited in performing manual tasks, so as to be disabled under the ADA, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives).

#### **E-MAILED DOCUMENTS ALLOWED**

The Computer Fraud and Abuse Act (CFAA) prohibits a number of different computer crimes, the majority of which involve accessing computers without authorization or in excess of authorization, and then taking specified forbidden actions, ranging from obtaining information to damaging a computer or computer data. See 18 U.S.C. § 1030(a)(1)-(7).

To prove a claim under the civil remedy provision of the CFAA, for losses of at least \$5,000 in value, the plaintiff must show that the defendant (1) intentionally accessed a computer, (2) without authorization or exceeding authorized access, and that he or she (3) thereby obtained information (4) from any protected computer, if the conduct involved an interstate or foreign communication, and that (5) there was loss to one or more persons during any one-year period aggregating at least \$5,000 in value.

LVRC Holdings, LLC v. Brekka, 581 F.3d 1127 (9th Cir. 2009). In Brekka, an employee did not access a computer "without authorization," nor "exceed authorized access," in violation of the CFAA, when he e-mailed documents from his work computer to himself and to his wife while he was still employed by the employer. The employer had given the employee permission to use his work computer while he was employed, and the employee was entitled to obtain the documents at the time he sent them to his and his wife's personal e-mail accounts.

Regarding a separate claim under the CFAA, the court found that the former employee did not log onto the former employer's website after he was no longer employed, as would constitute access of a protected computer without authorization; although an unauthorized log-in was done using the employee's former password, at least two other individuals had access to that password after the employee left the employer, and there was no evidence definitively showing the location or identity of the person logging onto the website. Id. at 1136.

#### **CREDIT CARD ACT**

The Credit Card Accountability, Responsibility, and Disclosure Act of 2009 (the Credit CARD Act), Pub. L. No. 111-24, May 22, 2009, 123 Stat. 1734, was effective for some provisions on August

20, 2009, but, for most of its provisions, it will be effective on February 22, 2010.

The table of contents for the most substantive parts of the Act reads as follows:

TITLE I--CONSUMER PROTECTION

Sec. 101. Protection of credit cardholders.

Sec. 102. Limits on fees and interest charges.

Sec. 103. Use of terms clarified.

Sec. 104. Application of card payments.

Sec. 105. Standards applicable to initial issuance of subprime or "fee harvester" cards.

Sec. 106. Rules regarding periodic statements.

Sec. 107. Enhanced penalties.

Sec. 108. Clerical amendments.

Sec. 109. Consideration of Ability to repay.

TITLE II--ENHANCED CONSUMER DISCLOSURES

Sec. 201. Payoff timing disclosures.

Sec. 202. Requirements relating to late payment deadlines and penalties.

Sec. 203. Renewal disclosures.

Sec. 204. Internet posting of credit card agreements.

Sec. 205. Prevention of deceptive marketing of credit reports.

TITLE III--PROTECTION OF YOUNG CONSUMERS

Sec. 301. Extensions of credit to underage consumers.

Sec. 302. Protection of young consumers from prescreened credit offers.

Sec. 303. Issuance of credit cards to certain college students.

Sec. 304. Privacy Protections for college students.

Sec. 305. College Credit Card Agreements.

#### TITLE IV--GIFT CARDS

Sec. 401. General-use prepaid cards, gift certificates, and store gift cards.

Sec. 402. Relation to State laws.

Sec. 403. Effective date.

#### **CAR DEALERS CLASH WITH WEBSITE**

The provision in the federal Communications Decency Act which effectively immunized the website provider in Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 564 F. Supp. 2d 544 (E.D. Va. 2008), from tort liability was 47 U.S.C. § 230(c)(1):

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

In this context, "[t]he term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or

services offered by libraries or educational institutions." 47  
U.S.C. § 230(f)(2).

Regarding a separate claim by the car dealers against the website provider in Nemet Chevrolet, Ltd., the dealers lacked standing to bring unfair competition and false advertising claims under the Lanham Act. The claims were also based on the allegedly disparaging reviews of the car dealers posted on the website by third parties; the parties were not competitors with each other, and the claim was not within the type of injury that the Lanham Act, 15 U.S.C. §§ 1051 et seq., sought to prevent. 564 F. Supp. 2d at 551-52.