CORE 2023

STUDENT GUIDE

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Commission Core 2023

Course Approval #: C2023

Case Law Update

Learning Objectives:

- Explain the importance of clear and adequate written contracts in real property transfers
- Discuss how situations such as easements, water rights, and liens can affect a real estate transaction
- Identify when licensees are required to make disclosures to clients and customers to a real estate transaction and what must be disclosed

Aizpitarte v. Minear

Docket No. 48773, May 31, 2022

https://isc.idaho.gov/opinions/48773.pdf

Gem County

Easement Dispute

Summary

- In 1990, the Aizpitartes purchased a 17.67-acre parcel of land in Emmett, Idaho.
- In 1998, they partitioned it into four separate parcels and retained ownership of each of them.
- In 2000, the Aizpitartes built a house on Parcel 2, which included a north driveway as well as a south driveway on Parcel 3. The Aizpitartes' use of the South Driveway is the primary issue in this case.
- In 2005, the Aizpitartes sold Parcel 3 to the Gregorys.
  - At the time, the two parties made an oral agreement reserving the Aizpitartes' right to use the South Driveway.
  - This arrangement remained in place during the 13 years the Gregorys owned the property.
- In 2018, the Gregorys sold Parcel 3 to the Giles, who allowed the Aizpitartes to use the South Driveway.
- In 2019, the Gileses sold Parcel 3 to the Minears, who immediately obstructed the South Driveway and cut off the Aizpitartes' use of it.

- The Aizpitartes filed a complaint to quiet title to their claimed easement over the South Driveway and to enjoin the Minears from restricting their access. The Aizpitartes claimed they possessed an implied easement by prior use.
- The District Court ruled in favor of the Aizpitartes, and the Minears appealed.

Supreme Court Holding and Analysis
The Court stated that in order for the Aizpitartes to establish that they possessed an implied easement by prior use, they needed to prove the following three elements:

1. **Unity of title**. The two properties impacted by the easement were once unified or owned by the same person (common owner), who then severed or partitioned the property and sold it to another.
2. **Continuous Use Before Separation**. The common owner's use of the easement was visible or obvious and continued without interruption for a sufficient length of time before the severed property was conveyed to another owner.

The purpose of this requirement is to establish that the common owner's prior use of the easement was intended to be permanent, rather than temporary or occasional. The exact length of time required for continuous use may vary depending on the circumstances of the case, but it should be long enough to demonstrate that the use was intended to be permanent.

Notably, a property severance does not occur simply by partitioning or dividing land into separate parcels. Rather, it occurs when a common owner conveys the partitioned property to another, which creates a dominant estate (*i.e.,* the estate of the common owner who benefits from the easement) and a servient estate (*i.e.,* the estate of the new owner of the severed property where the easement is located).

3. **Reasonable necessity for proper enjoyment**. The owner seeking the easement (who previously owned both parcels of land) must demonstrate that the easement is reasonably necessary to utilize and enjoy their land. The Court makes this determination by focusing on whether the reasonable necessity existed at the time the properties were severed rather than whether the easement is presently necessary.

When deciding whether reasonable necessity exists, courts must balance the respective convenience, inconvenience, costs, and other pertinent facts. Once an implied easement is created by prior use, it is not subsequently extinguished if the easement is no longer reasonably necessary in the future.

In the present case, both parties acknowledged that the Aizpitartes once owned both parcels of land at issue and therefore had unity of title. However, the parties disagreed whether the Aizpitartes satisfied the other two elements required for an implied easement.

With respect to the second factor, the Minears asserted that the Aizpitartes had rarely used the South Driveway in the years preceding the lawsuit. The Court, however, stated that the Aizpitartes recent and present use of the driveway was irrelevant. Rather, Court determined that the Aizpitartes continuously used the driveway at the time they first conveyed the partitioned property to the Gregorys in 2005. As such, they satisfied the continuous use requirement.

With respect to the third factor, the Minears asserted that the easement was not necessary because the Aizpitartes could access their home through the north driveway. The Court, however, stated the Aizpitartes did not need to prove that their use of the South Driveway was strictly necessary. Rather, they merely needed to show it was reasonably necessary at the time the two properties were severed. The Court then determined that the Aizpitartes satisfied the necessity factor.

As a final matter, the Court distinguished an implied easement by prior use from an implied easement by necessity. For example, an implied easement by prior use arises from an individual's historical, reasonable use; whereas an implied easement by necessity arises when its creation is absolutely necessary based upon present circumstances. Additionally, the two easements are extinguished based on differing legal standards. On the one hand, an implied easement by prior use is permanent, and it is not extinguished when it is no longer reasonably necessary to use it. On the other hand, an implied easement by necessity is extinguished when the necessity abates.

Result of the Case

The Court affirmed the District Court's decision that the Aizpitartes possessed an implied easement by prior use.

Practical Application

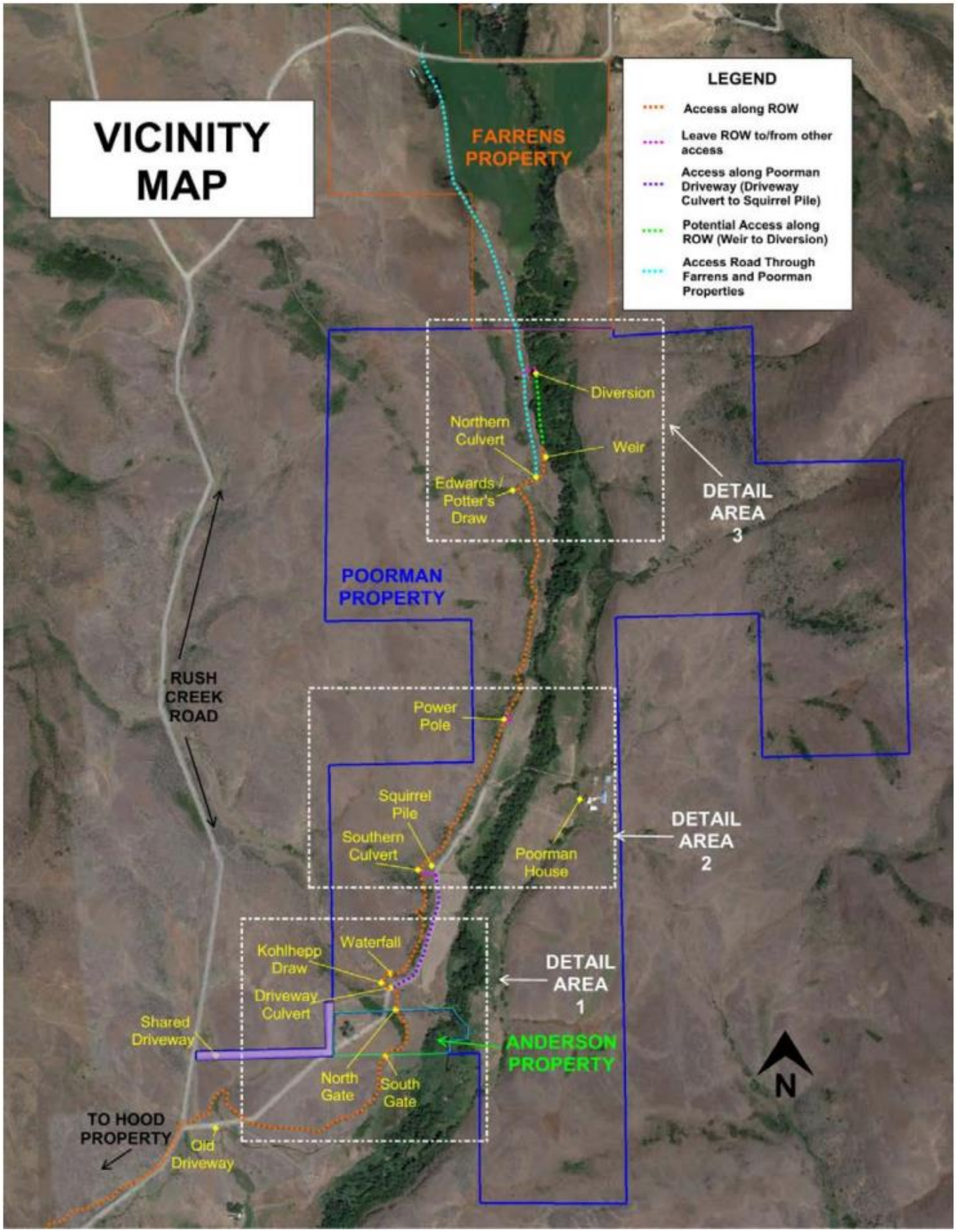
- Easements and related agreements **MUST** be disclosed in real estate transactions.
- Assist clients in identifying the existence, scope, and impact of an easement. Advise them to carefully consider any historical use of an easement when purchasing or selling a property.
- Easements based on prior use are permanently attached to the land. If an easement exists based solely on present necessity, help clients understand that it will exist until the necessity abates.

Hood v. Poorman

Docket No. 48636, October 27, 2022
https://isc.idaho.gov/opinions/48636.pdf
Washington County
Right-of-way Easement & Water Rights

Summary

- The Hoods purchased a property near Cambridge, Idaho, which included water rights enabling them to divert water from Rush Creek to their land through an irrigation ditch.
  - The ditch ran through two tracts of neighboring land owned by the Poormans and Rusty Anderson.
  - The Hoods had ownership of the ditch and also had an easement, referred to as a right-of-way, which allowed them to enter and travel across their neighbors' land to access the ditch.
  - The right-of-way extended laterally alongside the length of the ditch and included the ditch banks.
- The Hoods could have accessed their right-of-way by traveling along the ditch banks, but they typically did so by using a private access road on the Poorman's property.
  - The road, however, did not provide direct access to the right-of-way and resulted in the Hoods traveling long distances across the Poorman's property.
  - Nonetheless, it was the preferred and most convenient access point.
- The Hoods believed their right-of-way along the banks of their ditch was 200 feet wide, which gave them the right to do whatever they wanted with all land falling within the right-of-way.
  - As a result, the Hoods removed a small bridge over the ditch and two culverts, preventing Anderson and the Poormans from accessing significant portions of their property.
  - They also cut down 100 trees, including some located as far as 165-feet from the ditch, and removed two square miles of dirt and vegetation from the Poorman's property.
- After several years of altercations among the neighbors, the Hoods filed a complaint against the Poormans and Anderson and sought to have the District Court:
  - Enjoin their neighbors from interfering with the Hood's maintenance and use of their right-of-way.
  - Declare the Hood's rights with respect to the right-of-way.
  - Award damages against the Poormans and Anderson for damage done to the Hood ditch right-of-way.
- The Poormans and Anderson filed counterclaims.


VICINITY MAP
LEGEND
Access along ROW
Leave ROW to/from other access
Access along Poorman Driveway (Driveway Culvert to Squirrel Pile)
Potential Access along ROW (Weir to Diversion)
Access Road Through Farrens and Poorman Properties
FARRENS PROPERTY
Diversion
Northern Culvert
Weir
Edwards / Potter's Draw
DETAIL AREA 3
POORMAN PROPERTY
RUSH CREEK ROAD
Power Pole
Squirrel Pile
Southern Culvert
Poorman House
DETAIL AREA 2
Kohlhepp Draw
Waterfall
Driveway Culvert
DETAIL AREA 1
Shared Driveway
ANDERSON PROPERTY
North Gate
South Gate
N
TO HOOD PROPERTY
Old Driveway

Supreme Court Holding and Analysis

The Court began its analysis by addressing the scope of a ditch owner's rights as set forth in Idaho Code 42-1102. The Court noted that the existence of a visible ditch constitutes notice to the servient estate (*i.e.*, the landowner that has the ditch traveling through their property) that the dominant estate (*i.e.*, the ditch owner) has a right-of-way and incidental rights.

The Court stated that a right-of-way provides the ditch owner with the following rights:

- The right to enter the land over which the ditch runs.
- The right to inspect, operate, clean, maintain, and repair the ditch, and to do so with necessary equipment and personnel.
- The right to remove debris, soil, vegetation, and other materials from the ditch and, if desired, leave such debris on the right-of-way, such as on the ditch banks.
- The right to occupy the right-of-way at any time without prior notice to the landowner. [1]

Notably, the Court stated that all of the foregoing rights are limited by the rule of reasonableness, in that the ditch owners must act reasonably in exercising their rights. More specifically, ditch owners may enter another owner's property and utilize the right-of-way "only when necessary and in a reasonable manner" as to ensure they are not needlessly burdening the other landowner.

In order to limit a ditch user's easement rights, a court must conclude that:

1. The ditch user exercised their rights unreasonably and needlessly burdened the servient estate.
2. Threatened or actual harm would result if the ditch user continued to exercise their rights unreasonably.

After reviewing the foregoing rights and restrictions, the Court made the following determinations:

First, the Court found that the Hoods acted unreasonably in utilizing the private road on the Poorman's property to access their ditch when they could have reasonably done so by traveling along the ditch banks. The Court noted that the Hood's historic use of

[1] In addition to the delineated rights, the ditch owner has a duty to keep the ditch "in good repair," and is liable for all damages resulting from an overflow or from any neglect or accident (unless unavoidable) related to maintaining the ditch. Idaho Code 42-1102(3). Conversely, the landowner is prohibited from encroaching the right-of-way (*e.g.*, fences, gates, structures, landscaping, etc.).

the Poorman's road did not justify their continued use. Thus, the Court prohibited the Hoods from using the road and instructed them as to how they could access the ditch at other locations (even though the alternative locations were less convenient for the Hoods).

Second, the Court determined that the District Court made a procedural error by restricting the Hood's use of all access routes through the Poorman's property, except for the ones that were explicitly mentioned in the District Court's order. The Court instructed the District Court to reevaluate its decision and assess whether the Hood's continued use of such routes would result in irreparable harm to the Poorman's property.

Third, the Court both upheld and overturned portions of the District Court's decision limiting when the Hoods could utilize their right-of-way through the Poorman's property. For example, the Court upheld the decision to limit the Hoods from utilizing their right-of-way more than once per week and for purposes unrelated to maintaining it. However, the District Court abused its discretion in restricting the Hood's from conducting maintenance to one week in March and one week in September. The Court noted that each court-imposed restriction is fact-specific and based on the reasonableness of the ditch user's conduct.

Fourth, the Court determined that the Hoods improperly removed the culverts from the Poorman's property because:

1. The culverts did not interfere with the flow of water through the ditch.
2. The culverts did not increase maintenance costs.
3. There was no evidence that the Poormans installed the culvert without permission from the previous ditch owner.

Result of the Case
The Court upheld the district court's conclusion that the Hoods acted unreasonably in:

1. Utilizing the Poorman's road to access their ditch.
2. Removing the culverts on the Poorman's property.

The Court reversed and remanded the District Court's decision restricting the Hoods from using any access point to their ditch that was not specifically approved of the District Court's order. The Court both upheld and overturned portions of the District Court's decision limiting when the Hoods could utilize their right-of-way through the Poorman's property.

Practical Application

- Conduct due diligence to determine the use and access rights associated with all land transactions involving water rights. Be sure to consider the rights of the dominant estate (ditch owner) and the servient estate (property owner), and how these rights affect an individual's use and access to the property.
- By law, a right-of-way provides ditch owners with the right to:
  - Enter the land to access their ditch.
  - Clean, maintain, and repair the ditch.
  - Occupy the right-of-way at any time of the year without prior notice to the landowner.
- These rights may be modified or amended by contract or by property deeds.
- Do not assume that a ditch owner's preferred or historic use of a right-of-way is reasonable. Rather, the reasonableness of ditch owner's use and access of a right-of-way is fact-specific and based upon present circumstances, the necessity of the ditch owner's use, and the burdens imposed upon the underlying landowner.
- A landowner may prohibit a ditch owner from utilizing a right-of-way through their property by showing that threatened or actual harm will result if the ditch user continues to exercise their rights unreasonably.
- When possible and to avoid potential conflicts, use real estate contracts to define the scope and reasonableness of a ditch owner's use and access rights.

Berglund v. Dix

Docket No. 48276, June 6, 2022
https://isc.idaho.gov/opinions/48276xxx.pdf
Gem County
Permanent Structures & Easements

Summary

- Berglund owed a parcel on land located on Palomino Lane in Gem County, Idaho, which included a non-exclusive ingress, egress, and utility easement, which allowed them to, among other things, utilize a road through their neighbors' properties to access their property.
  - Dix, along with three other neighbors, owned property impacted by the easement.
- In 2017, Dix and his three neighbors installed a gate across the entrance to the easement located on Dix's property in response to concerns about trespassers and vandalism.
  - All of the neighbors in the area, including the Berglunds, received a combination to the lock on the gate.
  - The gate was typically locked at night and unlocked during the day.
- Over time, disputes arose among the property owners along Palomino Lane as to whether the gate should be locked.
  - Dix wanted to keep the gate locked.
  - The Berglunds, however, wanted to keep the gate unlocked and claimed that the locked gate prevented them from receiving trash, mail, and other services.
- In 2019, the Berglunds filed a complaint against Dix seeking to permanently enjoin him from closing and locking the gate.
- The District Court then ruled in favor of the Berglunds, and Dix appealed.

Supreme Court Holding and Analysis

In prior decisions, the Supreme Court held that all permanent structures obstructing an easement or reducing a user's access to, and enjoyment of the easement are considered "per se unreasonable." However, in the present case, the Court determined that Dix's gate did not permanently obstruct or reduce the size of the Berglund's easement. Rather, the gate only obstructed the roadway when it was closed and locked. However, when the gate was open, it did not block or diminish the Berglund's ability to access the road. Consequently, the Court determined that its per se unreasonable rule does not apply to Dix's gate.

After determining that Dix's gate was not per se unreasonable, the Court stated that the owner of a property impacted by an easement (the servient estate) could construct

a gate across an easement to limit use the easement to only those who have the right to use it. However, the Court emphasized that use of a gate, or any other method of regulating an easement, must be reasonable. Additionally, even when there are valid justifications for maintaining a gate across a roadway easement, these justifications may be outweighed by the inconvenience the gate may impose upon the easement holders (the dominant estate).

The Court then assessed whether Dix's use and operation of the gate was reasonable. The Court conducted this assessment by gauging the impact the gate had on the Berglund's right to access and utilize their easement along Palomino Lane.

Based upon Dix's operation of the gate and the burdens the gate imposed on the Berglunds, the Court determined that Dix used and operated the gate in an unreasonable manner. The Court noted that a continuously locked gate unreasonably interferes with, among other things, social visits, deliveries, housekeeping, maintenance contractors, and emergency visits. Additionally, in order for the Berglunds to use their roadway easement, they were required get out of their car, unlock the gate, drive through the gate, then get out of their car again to lock the gate before driving away. The Court determined that this posed an unreasonable burden upon the Berglunds. Consequently, the Court ordered Dix to remove the gate from the roadway easement.

Result of the Case
The Court reversed the District Court's judgment and ordered Dix to remove the gate across the Berglund's roadway.

Practical Application
- Permanent structures that obstruct an easement, reduce a user's access, or diminish the user's enjoyment of the easement are generally considered per se unreasonable.
- Gates or other methods of regulating an easement can be used by the property owner impacted by the easement to limit the use of the easement to only those who have the right to use it.
- However, the use of a gate or other regulation method must be reasonable.
- In determining whether a particular method of regulating an easement is reasonable, courts take into account the justification and utility of the regulation and the inconvenience imposed on the easement holders.

Hall v. Exler

Docket No. 48790, September 9, 2022
https://isc.idaho.gov/opinions/48790.pdf
Jefferson County
Lost Deed Doctrine

Summary

- The Halls and Exler jointly owned an investment property in Roberts, Idaho. The Halls asserted that in 2009, Exler deeded them his interest in the property in exchange for the Halls paying cleanup costs and overdue taxes associated with the property.
- Over the next 10 years, the Halls maintained sole possession of the property and paid all corresponding taxes.
    - Meanwhile, Exler did not list the property as one of his assets when he filed for bankruptcy in 2010, and he did not report any profit or loss related to the property on his personal taxes.
- In 2019, the Halls discovered that the deed had been lost and was never recorded.
    - As a result, Exler still held his interest in the property.
- The Halls attempted to acquire another deed showing that they were the sole property owners.
    - Exler, however, refused to sign a new deed and claimed he never deeded his property interest to the Halls.
- In 2020, Halls sued Exler to quiet title on the property and asserted that they could establish ownership under the lost deed doctrine.
- The District Court found in favor of the Halls, and Exler appealed.

Supreme Court Holding and Analysis

This case was the first time the Idaho Supreme Court considered the validity of the lost deed doctrine, which is a common law principal that allows a party to establish ownership in a property through circumstantial evidence when a deed has been lost or destroyed.

Exler argued that the lost deed doctrine violated the Statute of Frauds, which requires all agreements to sell or transfer ownership in real property to be in writing and signed by all parties. Exler argued that the Halls could not establish sole ownership in the property because they did not have a written contract or executed deed showing that he conveyed his ownership interest to them. The Court disagreed.

The Court stated that the lost deed doctrine does not supplant the Statute of Frauds, as all contracts for the sale of real estate must be in writing. Rather, in the event a written

contract or other essential document cannot be found, Idaho's Statute of Frauds law (Idaho Code 9-505(4)) allows parties to use secondary or circumstantial evidence to prove that the written contract or document once existed.

The Court stated that when an essential instrument such as a deed or contract has been lost or destroyed, a party may establish ownership through the lost deed doctrine by satisfying the following three elements by clear and convincing evidence:

1. **Execution**. the lost instrument (e.g., contract, deed, etc.) was in writing and properly executed by the parties.
2. **Delivery**. the grantor (or property owner) delivered the deed to the grantee (or new property owner) with the intent (via words, actions, or both) that the deed take effect.
3. **Contents**. the lost deed contained a property description and words of grant, which are words that clearly express the grantor's intent to convey or transfer the property.

The Court determined that the Halls satisfied the foregoing elements (e.g., a witness testified that he saw Exler's signature on the deed when he delivered it to the Halls; the Halls paid all taxes and maintained exclusive control of the property for 10 years; Exler failed to list the property in his bankruptcy petition, etc.). As a result, the Court determined that the Halls established that Exler deeded his share of the property to the Halls.

Result of the Case
The Court upheld the District Court's decision that the Halls owned the property. In so doing, the Court adopted the lost deed doctrine and held that circumstantial evidence can be used to establish the existence of a writing, such as a contract or deed, without violating the Statute of Frauds. Thus, the Court determined that:

1. A valid property deed once existed but was lost, and
2. Circumstantial evidence showed that Exler executed and delivered the deed transferring his interest in the property to the Halls.

Practical Application
- It is essential to properly execute, deliver, and retain copies of real estate sales contracts and property deeds.
- Sales contracts must be in writing and signed; deeds must be executed and delivered and contain required verbiage (i.e., property description and words of grant).

- Clients involved in an ownership dispute should seek legal advice and gather any circumstantial evidence that could support their ownership claim. This may include tax and financial records, witness testimony, and evidence of use and control of the property.
- Real estate licensees and their clients subject themselves to liability when they fail to properly handle essential real estate documents.
- Per Idaho Code 54-2049, real estate professionals are required to retain copies of the following for three years:
    - All accepted, countered, or rejected offers.
    - Listing or buyer representation agreements.
    - Transaction files and all required contents (e.g., proof of delivery of detailed closing statements).
    - Trust account ledger records.
    - All account reconciliation records.

National (Non-Idaho) Case Law

Disclaimer

The following cases are examples of the types of rulings made on current out of state real estate cases.

These non-Idaho cases have been included because there are important takeaways that can help Idaho licensees to develop appropriate risk reduction techniques.

Because the law is different in every state, Idaho courts reviewing a similar case may rule a different way on the same issue. Idaho courts are not bound to follow case precedent in other jurisdictions. But sometimes these cases are instructive.

Focus on the practical application of the cases that can help you in your daily real estate practice.

Soetaert v. Novani Flips, LLC

Docket No. WD82933 (Consolidated with WD82964), August 3, 2021

https://www.courts.mo.gov/file.jsp?id=179181

Missouri Court of Appeals

Property Disclosure & Adverse Material Facts

Summary

- Mechlin, a Missouri real estate licensee, represented a married couple who lived outside of the U.S. and owned Novani Flips, which purchased real estate investment properties.
- Mechlin frequently worked with a company owned by Reedy that flipped real estate properties.
  - In 2015, Reedy found a potential investment property that was in need of extensive repairs.
  - Reedy observed cracks in the foundation and evidence of water intrusion in the basement.
  - Reedy emailed Mechlin about the house, described it as one that needed a "full rehab," and asked whether she thought he could flip it for a profit.
  - Mechlin provided a general assessment indicating that he could likely do so.
- Reedy contacted Novani about the home, informed them of its issues, and presented it as an investment opportunity.
- Novani purchased the house, and Reedy was in charge of making the necessary repairs and upgrades before selling it.
  - Reedy subcontracted out the work done on the house.
  - Part of this work included epoxy injections in the foundation, shoring up the interior foundation wall, and creating a yard swale to channel water away from the home.
- Once work was completed, Mechlin listed the house for sale for Novani's owners.
- In 2015, Soetaert purchased the house.
- During the purchase process, Mechlin filled out the Seller Disclosure and Property Condition form on behalf of Novani's owners.
  - Rather than marking "yes" or "no," Mechlin put a slash mark through 12 sections of the form. She also wrote that the sellers lived out of the country, had never visited the property, and had limited knowledge about it.
  - Mechlin slashed through the section asking about water intrusion and repairs that had been made to the foundation.
  - She attached a scope of work document to the disclosure. That document referenced four piers being put in the foundation but did not address water intrusion or the epoxy injections.

- After purchasing the home, Soetaert experienced water intrusion in the basement necessitating extensive repairs.
- Soetaert sued Mechlin's brokerage for violating a Missouri consumer protection law.
    - A jury returned a verdict in Soetaert's favor, and Mechlin was ordered to pay her compensatory and punitive damages as well as Soetaert's attorney fees.
- Mechlin appealed to the Missouri Court of Appeals.

Missouri Appellate Court Holding and Analysis

Missouri law states that real estate brokers do not owe any duties to a customer except to disclose all "adverse material facts actually known or that should have been known by the broker," including the physical condition of the property and any material defects. Additionally, Missouri law states that brokers may not be held liable for any information contained in a seller's disclosure form unless they know the statement is false or "acted in reckless disregard as to whether the statement was true or false." The court stated that reckless disregard exists when there is a "high degree of awareness" that the statement is false, or there are "serious doubts as to its truth."

The Court noted that Mechlin's exclusive right to sell contract with Novani's owners obligated the owners (as sellers) to complete the seller's disclosure form. The disclosure stated that non-occupant sellers are not relieved of the obligation to fill out the disclosure form. It also stated that licensees, like Mechlin, would rely on the disclosures made by sellers in the form. Mechlin, however, took on the duty of filling out the disclosure form as opposed to relying on disclosures made by Novani's owners. In so doing, she slashed through four questions directly addressing foundation problems, cracks in walls or foundation, corrective action (including bracing), and water leaking in the basement.

The Court concluded that there was sufficient evidence that Mechlin filled out the disclosure form with a reckless disregard as to whether the statements were true or false. In support of this conclusion, the Court relied on Mechlin's testimony about her knowledge of the some of the problems with the foundation as well as her decision not to answer questions in the disclosure form and instead attaching scope of work document to the form.

The Court stated that the scope of work document Mechlin attached was "extremely limited and did not provide the same depth of knowledge that answering the questions in the disclosure would have provided." The scope of work also failed to mention any water intrusion. Moreover, the Court noted that the disclosure form requested invoices, repair estimates and other documentation for significant repairs,

improvements, and alterations. In failing to provide any, the Court stated that Mechlin "effectively represented to [Soetaert] that no such documents existed."

Result of the Case
The Court affirmed the jury verdict finding that Mechlin filled out the disclosure form with a reckless disregard as to whether the statements were true or false.

Practical Application
- Licensees owe a duty to customers and clients to disclose all adverse material facts actually known or that reasonably should have been known.
- Clients, rather than licensees, should complete the property condition disclosure form.
- Licensees should not knowingly allow clients to make false statements or representations in disclosure forms.
- Although Idaho's Property Condition Disclosure form states that it "is **NOT** a statement of any agent representing the seller and no agent is authorized" to make or verify representations about the property, filling out the disclosure form with reckless disregard as to whether the statements are true or false may result in liability.
- Licensees should prioritize honesty and transparency when representing clients in real estate transactions and work to provide accurate and complete information about the properties they sell.

Nau v. Vogel

Docket No. 82544-5-1 (Unpublished), October 4, 2021
https://www.courts.wa.gov/opinions/pdf/825445.pdf
Washington Court of Appeals
Negligent Misrepresentation & Adverse Material Facts

Summary

- Nau purchased two parcels of property from Vogel in Washington state.
  - A portion of a historic Native American cemetery was located on the property.
  - Nau hired a real estate licensee, Lewallen, to assist him with the transaction.
- Prior to the purchasing the property, Nau visited it twice.
  - During the initial visit, Vogel informed him of the existence of a historic cemetery and pointed to a small cluster of headstones located roughly 40 to 50 feet away from the house.
  - During the second visit, Nau explored the property with his real estate agent and Vogel. Vogel identified the general location of the cemetery and what she believed to be its boundaries.
- Prior to closing, Nau reviewed plat maps of the property that showed the cemetery on a neighboring lot.
- Vogel also disclosed the cemetery's existence in a Seller's Disclosure Statement, which estimated how much of the cemetery was located on the property.
- Nau signed a contingency addendum that allowed him to investigate the cemetery before purchase.
- After closing, Nau learned of additional graves on the property that were not disclosed in Vogel's disclosure statement.
- He sued Vogel for fraud and negligent misrepresentation and his real estate agent for negligent misrepresentation.

Washington Appellate Court Holding and Analysis

The first legal issue concerned Nau's claim against Vogel for Negligent Misrepresentation. The Court held that buyers are entitled to rely on the information provided by the seller, but once a potential title or property defect is discovered, it becomes the responsibility of the buyer to investigate it further. Although Nau acknowledged that he was aware of the defect (*i.e.*, the existence of a cemetery on the property), and that Vogel did not directly make any false statements about the cemetery. However, he argued that the impact of the defect was far greater than what Vogel disclosed to him. The Court dismissed Nau's claim, ruling that it was his responsibility to investigate the full scope, impact, and magnitude of the defect once he was made aware of it.

Second, Nau claimed his real estate agent gave him incorrect information about the location of a cemetery, however, he did not provide any supporting evidence. Regardless, the Court stated that even if the real estate licensee gave Nau wrong information, he could not justifiably rely on it as he had many sources of information and was on notice of the cemetery's existence. Thus, the Court dismissed Nau's Negligent Misrepresentation claim against his real estate agent.

Result of the Case

The Washington Appellate Court affirmed the District Court's decision and dismissed all of Nau's claims against his real estate agent and Vogel.

Practical Application

- Full and accurate disclosure and diligent investigation in real estate transactions is essential.
- Licensees must ensure all known material defects with a property are disclosed to potential buyers, and that buyer clients are made aware of their responsibility to investigate and verify any information provided to them.
- Buyers should thoroughly investigate properties, obtain inspections, conduct their own research, and ensure they are fully aware of any issues or defects that may impact their decision to purchase.
- Licensees should be aware of potential issues such as historic sites, cemeteries, or other sensitive locations that may be located on or near a property and should provide accurate and complete information to potential buyers.
- Failing to disclose adverse material facts may result in civil liability (particularly when relied upon) and Commission discipline (regardless of reliance).
- Licensees can protect themselves by disclosing all adverse material facts in writing (even though not required to do so); and properly filling out paperwork.
- Buyer and seller representation agreements provide waivers and disclosures that help protect licensees. However, licensees can waive these protections by making false representations of fact, overpromising, and misrepresenting the condition of the property.

Hinson v. Forehead

Docket No. A-20-370, July 20, 2021
https://www.nebraska.gov/apps-courts-epub/public/viewOpinion?docId=N00007978PUB
Nebraska Court of Appeals
Property Disclosure & Adverse Material Facts

Summary

- In 2017, the Beans hired Forehead, a licensed real estate broker in Nebraska, as their listing agent.
  - After listing the home for sale, at least four agents for prospective buyers contacted Forehead with concerns about the home's foundation, which included the existence of settling, tilting, or slanting.
  - They told Forehead that these concerns were dissuading their clients from making offers on the home.
- The Beans allowed one potential buyer, Starkel, to obtain an inspection before submitting an offer.
  - The inspection report identified signs of water intrusion, mold, and problems with the home's foundation.
  - Starkel's agent emailed the report to Forehead.
  - During subsequent litigation, Forehead confirmed that she received the email but claimed she did not open it or review the attached inspection report.
  - As a result of the inspection, Starkel submitted an offer of $300,000, which was substantially lower that the $470,000 asking price.
- Less than a month later, the Hinsons entered into a contract to purchase the Beans' property, and the Beans provided them with a Property Condition Disclosure Statement stating there were no structural problems with their home.
- Prior to closing, the Hinsons obtained a property inspection, which revealed evidence of cracking on right exterior foundation of the home.
  - As a result, the Hinsons hired an engineer to assess the foundation. The engineer identified several issues but concluded that there were no significant structural defects or damage.
- Shortly after the transaction closed, Starkel provided the Hinsons with the inspection report he had obtained a month earlier, which revealed structural defects in the home's foundation.
- The Hinsons filed a lawsuit against the Beans and Forehead, alleging Forehead breached her duties as a licensed broker by failing to disclose adverse material facts about the condition of the home.
- The District Court granted summary judgment in Forehead's favor and dismissed all of the Hinsons' claims against her.

    - The court stated that Forehead did not breach any duty to the Hinsons because she did not have actual knowledge of a material defect in the home.
- The Hinsons appealed.

Supreme Court Holding and Analysis
This case dealt with the Nebraska Court of Appeals' interpretation of two statutes related to the disclosure of adverse material facts. The first statute defined the phrase "adverse material fact." The second statute stated when a seller's agent must disclose adverse material facts to a buyer or potential buyer.

Definition Statute: The first statute defines "adverse material fact" as a fact that:

1. Significantly affects the desirability or value of the property to a party, and
2. Is not reasonably ascertainable or known to a party.

Disclosure Statute: The second statute states that a seller's agent has a duty to disclose in writing to the buyer all adverse material facts "actually known" by the agent. These facts include, among other things, the physical condition of the property and any material defects in the property.

The District Court determined that Forehead did not have actual knowledge of a material defect about the home and therefore had no duty to disclose any concerns about the foundation to the Hinsons. The appellate court disagreed and determined that the District Court's interpretation of the disclosure statute failed to take into account the definition of adverse material facts as set forth in the foregoing definition statute.

Specifically, the Court determined that the statutes did not limit Forehead's obligation to disclose information only when she had actual knowledge of a material defect or when she knew that the home required extensive repairs. Rather, the statutes contemplate whether Forehead knew of any facts that significantly affected the desirability or value of the property, which were not reasonably ascertainable or known by the Hinsons, pertaining to the physical condition of the property or any material defects in the property.

In other words, the District Court essentially determined that Forehead only needed to disclose adverse material facts based on the way the phrase is used in the disclosure statute, whereas the appellate court determined that Forehead needed to disclose adverse materials facts as the phrase is used in both the definition and disclosure

statute. Based on that interpretation, the Court determined that the District Court should not have dismissed the Hinsons' claims against Forehead.

Although the Court disagreed with the District Court's decision, it did not conclude that Forehead had knowledge of the foundation defects. Rather, it found that there was enough evidence to suggest that:

1. Forehead was aware of adverse facts that significantly impacted the value of the Bean's home.
2. These facts were not reasonably ascertainable to the Hinsons.
3. Forehead failed to disclose these adverse facts.

Consequently, the Court determined that the District Court erred in dismissing the Hinsons' case and should have let it go to trial to be considered by a jury.

Result of the Case

The Appellate Court reversed the District Court's decision to dismiss the Hinsons' claims against Forehead and remanded the case to the District Court for further proceedings.

Practical Application

- Licensees must understand and comply with their duties and obligations to both clients and customers.
- Nebraska and Idaho's statutes defining adverse material facts; and outlining a licensee's obligation to disclose adverse material facts are substantially similar.
- Licensees have a duty to disclose any adverse material facts about a property that significantly affect its value or desirability, which are not reasonably ascertainable or known by the buyer. This includes physical conditions and material defects.
- Idaho law requires licensees to disclose adverse material facts to all parties to a real estate transaction, including their clients and their customers.
- Unlike Nebraska, Idaho licensees are not required to disclose adverse material facts in writing, however, licensees can protect themselves by doing so.
- Licensees should carefully review any inspection reports or other documents related to a property and disclose any adverse material facts to potential buyers.
- When there is a question whether information constitutes an adverse material fact, it is better to over disclose than under disclose.
- Failure to disclose adverse material facts can result in liability and administrative discipline.

Nelson v. Chandra

Docket No. 81019-COA (Unpublished), November 15, 2021
https://casetext.com/case/nelson-v-chandra
Nevada Court of Appeals
Failure to Comply with Real Estate License Law

Summary

- The Nevada Real Estate Commission initiated disciplinary proceedings against Nelson, who was licensed as a real estate broker in the state and charged her with multiple violations of the state's real estate laws.
- Following a disciplinary hearing, the Commission determined that Nelson engaged in grossly negligent or incompetent conduct on 21 occasions when she carried out a scheme to earn higher sales commissions. Additionally, the Commission found that Nelson failed to exercise reasonable skill and care when she failed to:
  - Ensure buyers' earnest monies were timely deposited on 18 occasions, and
  - Properly account for and remit buyers' earnest money within a reasonable time on three occasions.
- The Commission revoked Nelson's real estate license and ordered her to pay $222,489 fines, costs, and attorney fees.
- Nelson appealed the Commission's decision; however, the District Court denied her petition for judicial review.
- Nelson then appealed to the Nevada Supreme Court.

Nevada Supreme Court Holding and Analysis

The Nevada Supreme Court reviewed the Commission's decision for clear error or an abuse of discretion. It stated it would only overturn the Commission's decision if it was not supported by substantial evidence, which is evidence that "a reasonable mind might accept as adequate to support a conclusion."

First, the Court upheld the Commission's finding that Nelson engaged in gross negligence or incompetence on 21 occasions in carrying out a scheme to increase her commissions. As a listing agent, Nelson entered into exclusive right to sell agreements with her clients but failed to disclose the commission she would earn upon finding a buyer for the property. After securing a listing, Nelson often lowered the commission offered to the buyer's broker in her property listings, particularly if she thought a potential buyer was interested in making an offer.

Nelson employed this tactic to deter other brokers from presenting offers and to provide her husband, who was also a licensed real estate professional, with ample time to locate a buyer for her property listings. Once her husband found a buyer, Nelson

would increase the sales commission associated with her listing, and she and her husband would then split the entire commission upon completion of the transaction.

The Court found that Nelson's actions went beyond failing to disclose her commission to potential buyers. She also breached her "duty of absolute fidelity" to her clients. By limiting the market exposure of her clients' properties and discouraging other buyer's brokers from making offers on her listings, she obstructed the fair market value of her clients' homes and limited the pool of potential buyers.

Second, the Court upheld the Commission's finding that Nelson failed to exercise reasonable skill and care on 18 occasions when she failed to ensure buyers' earnest monies were timely deposited. In Nevada, brokers are obligated to "deposit any check or cash *received* as earnest money before the end of the next banking day." Nelson acknowledged that earnest monies were not always deposited within one banking day. However, she argued that she was not responsible for depositing the funds because she never received them. As such, she argued that it was the buyers' responsibility to deposit their own earnest moneys with the title companies.

The Court acknowledged that the Commission's earnest money provision did not explicitly address situations where the buyer, rather than the broker, chooses to deposit the funds. As such, the Court needed to interpret the meaning of the statue. The Court noted that it typically reviews and interprets statutory language independently. However, in administrative agency appeals, the Court defers to an agency's interpretation of its own governing statutes and regulations so long as the interpretation is consistent with the language of the statute.

The Court noted that the Commission interpreted its earnest money statute in the context of a broker's duty to exercise reasonable skill and care. As such, the Commission concluded that the statute implicitly requires brokers to ensure that earnest monies are timely deposited. The Court stated that the Commission's interpretation was reasonable and therefore upheld its decision that Nelson failed to exercise reasonable skill and care.

Third, the Court affirmed the Commission's determination that Nelson failed to exercise reasonable care and skill in three instances when she neglected to properly account for and remit buyers' earnest money within a reasonable time. Nelson contended that she could not have violated this responsibility because she did not physically receive any funds. However, the three earnest money checks at issue were made payable to Nelson's brokerage. Additionally, Nelson endorsed at least one of the checks, indicating that she had possession of the check at some point. Consequently,

the Court upheld the Commission's decision that Nelson failed to exercise reasonable care and skill.

Result of the Case
The Court affirmed the Commission's decision and upheld the disciplinary sanctions.

Practical Application
- Licensees **MUST**:
  - Understand and comply with the laws and rules governing real estate. Failure to do so may result in disciplinary action.
  - Promote their clients' best interests and may not engage in practices that limit market exposure.
  - Account for and remit buyers' earnest money within a reasonable time.
  - Keep accurate records of all funds in your possession, including earnest money.
- The Commission's Guidance Documents on the IREC website may help licensees interpret governing statutes and regulations.

Starks v. Carver

Docket No. A21A0572, June 29, 2021

https://efast.gaappeals.us/download?filingId=7b39d961-b106-4dd4-af68-d6080d510730

Georgia Court of Appeals

Duties to Customers & Clients

Summary

- In 2013, Carver hired Starks, a commercial real estate broker, to sell eight acres of unimproved land in Georgia under an exclusive listing agreement.
- Two years later, Carver sent Starks a letter terminating their agreement, and the parties did not enter into another written agreement.
- Shortly after the termination, Starks received an offer for the property, which included a provision stating that Starks and his brokerage would receive an eight-percent commission upon the sale of her property.
    - Starks emailed the offer to Carver and answered her questions about several terms in the proposed contract. Carver eventually accepted the offer.
- During their email exchange, Starks and Carver did not discuss a key provision detailing how the sales price would be calculated.
    - Specifically, the sales price was based on the exact acreage of the property but excluded land within any public road right-of-way, setback lines, buffers or easements, flood plains, or wetlands.
    - As a result of this provision, the purchase price ended up being much lower than what Carver had anticipated.
- Carver sued Starks for negligence claiming he was negligent in failing to warn her of the impact the contract provision would have on the ultimate purchase price.
- Starks attempted to have the case dismissed, however, the Trial Court refused.
- Starks then appealed to the Georgia Court of Appeals.

Georgia Appellate Court Holding and Analysis

Just as in Idaho, Georgia's real estate licensing act makes a distinction between clients and customers. The distinction is important because brokers owe higher legal duties to clients that they do not owe to customers. For instance, brokers must promote a client's best interests but do not owe that same duty to a customer.

Under Georgia law, a "client" is someone represented by a real estate broker in an agency capacity pursuant to a written brokerage agreement. In contrast, a "customer" is not represented by a broker through a written brokerage agreement but may have a verbal or written agreement with a broker to perform basic tasks in a real estate transaction.

On appeal, Starks argued that Carver was not his client, rather, she was merely a customer. As such, Starks asserted that he did not owe her any special duties and was not negligent in failing to discuss the price provision in the purchase contract. Carver, however, argued that she was Starks' client because he answered her questions about some of the terms of the purchase contract shortly before she accepted it. Additionally, Carver argued that Starks received a commission on the sale of her property, which essentially renewed their listing agreement.

The Court rejected Carver's arguments and ruled in favor of Starks. The Court noted that a month before she received the purchase, Carver terminated her listing agreement with Starks, and they did not enter into another written agreement after that point. Without a written agreement in place, the Court stated that Carver could not have been a client and was instead a customer.

Result of the Case
The Court reversed the Trial Court's judgement.

Practical Application
- Client listing and representation agreements must be in writing.
- Idaho's real estate laws are substantially similar to the laws discussed in this case. All buyers and sellers fall in one of two categories:
    - Customer **OR** Client.
    - There is no third category where a buyer or seller is neither a customer nor a client and owed no legal duties.
- Clients are entitled to greater legal duties than customers; it is crucial to understand the duties that apply to both.
- Licensees can agree to greater duties than required by law but not to lesser duties.
- Ensure clients understand all key terms of a contract, particularly those related to the sales price.
- Ensure all contractual modifications are in writing and signed.
- Help clients understand the impact of terminating a representation agreement.
- Keep accurate records of all communication with clients and customers, including emails and phone calls, to avoid any misunderstandings or disputes.
- When there is uncertainty about whether a party is a client or a customer, ask for advice; failing to provide required duties has serious legal consequences.

Idaho 54-2083 (Definitions)

- **Client:** means a buyer or seller, or a prospective buyer or seller, or both who have entered into an express written contract or agreement with a brokerage for agency representation in a regulated real estate transaction.

- **Customer:** means a buyer or seller, or prospective buyer or seller, who is not represented in an agency relationship in a regulated real estate transaction.

Idaho Code 54-2086 (Duties to a Customer)

1. Ministerial or routine acts

2. Honesty, good faith, reasonable skill and care

3. Account for money or property

4. Disclose all adverse material facts

If you enter into a compensation agreement or customer services agreement with a customer, you must be available to receive and timely present all offers and counteroffers.

Idaho Code § 2087 (Duties to a Client)

1. Perform terms of the written agreement

2. Reasonable skill and care

3. Available to receive and present offers and counteroffers

4. Promote best interests in good faith, honesty and fair dealing including

5. Account for money or property

6. Maintain confidentiality

7. Disclose all adverse material facts

Commission Core 2023

Course Approval #: C2023

Legislative Update

Learning Objectives:

- Review 2023 law and rule changes impacting Idaho real estate practices

1. 2023 Legislative Session Recap:

The First Regular Session of the 67th Idaho Legislature began on January 9, 2023, and adjourned Sine Die on April 6, 2023. During the session, there were:

- **861** legislative ideas
- **595** ideas introduced to the House and Senate
- **317** bills passed by the House and Senate
- **312** bills signed by the Governor and became law

2. Unfair Service Agreements Act – H0238 (effective 07.01.2023)

This legislation aims to protect homeowners and to provide a remedy for existing Unfair Service Agreements, while discouraging future unfair and deceptive trade practices in real estate transactions.

A service agreement is considered unfair if any part of the agreement provides an exclusive right to a service provider for a term in excess of 1 year after the time it is entered into, and has any of the following characteristics:

(a) The service agreement purports to run with the land or to be binding on future owners of interests in the real property;

(b) The service agreement allows for assignment of the right to provide service without notice to and consent of the owner of residential real property; or

(c) The service agreement is recorded or purports to create a lien, encumbrance, or other real property security interest.

A consumer who is party to an unfair service agreement related to residential real property may bring district court action to obtain a declaratory judgment that the agreement is unenforceable and to recover any damages, costs, and attorney's fees.

(See Idaho Code 48-2001-48-2008)

3. Property Valuation Notices – H0051 & H0135 (effective 01.01.2024)

House Bill 0051 requires the Idaho State Tax Commission to prepare a standard valuation assessment notice form to be used by all counties. The notice must include:

- A clear description of assessed value
- The property taxes collected
- The property tax budget growth
- The services supported by the property tax collection

These disclosures will be included on the existing property tax assessment notice.

House Bill 0051's effective date is 03.16.2023; however, House Bill 0135 modifies the effective date of H0051 to be **01.01.2024.**

(See Idaho Code 63-308)

4. Property Tax Relief, Schools, Homes – H0292 (effective 01.01.2023 & 03.29.2023)

This legislation incorporates various complex ideas. To start, it establishes a School District Facilities Fund in the State Treasury, to be funded by sales tax revenue, the Idaho Tax Rebate Fund, and any excess balance in the General Fund, rather than receiving funding via a school levy funded by property taxes.

Furthermore, this legislation creates the Homeowner Property Tax Relief Account, to be funded by sales tax revenue, the Idaho Tax Rebate Fund, and any excess balance in the General Fund. County assessors will prepare a Homeowner Property Tax Relief roll, which must include:

(i) The current year's levy for the tax code area in which the property is situated,

(ii) The amount of eligible property taxes levied on each qualifying homestead, and

(iii) The total amount of eligible property taxes levied on all properties within the county that are receiving the homestead property tax exemption.

The State Tax Commission will then determine the:

- Total number of homeowner property tax relief homesteads to be allowed in each county
- Dollar amount of eligible property taxes for each homeowner property tax relief homestead allowed
- Total dollar amount of eligible property taxes for all homeowner property tax relief homesteads within each county

This bill also increases both the income and home value thresholds for the Circuit Breaker Program. The income threshold is increased from $31,900 to $37,000. The home value threshold is increased from $300,000, or 150% of the median assessed valuation for all homes in the county receiving the homestead exemption to $400,000 or 200% of this valuation.

(See Idaho Code 33-911, 57-810, 57-811, 57-827, and 63-705)

5. Veterans, Permanently Disabled, Tax Relief – H0258 (effective 03.24.2023)

This legislation amends existing law to revise provisions regarding property tax reduction for certain permanently disabled veterans.

A veteran, with a 100% service-connected permanent and total disability, who has applied for and been granted property or occupancy tax reduction, will continuing receiving the benefit in subsequent years **without needing to apply annually**, unless the veteran changes homesteads.

(See Idaho Code 63-705A)

6. Legal Notices, Publication – H0090 (effective 07.01.2023)

Legal notices provide information to consumers about government activities that may affect them. Certain legal notices are required by law to be published in a newspaper that meets certain distribution and circulation criteria. Some examples of required public legal notices include:

- A notice of trustee's sale
- Foreclosure notices
- Probate notices
- Unclaimed property notices

This legislation amends the existing requirements for publishing legal notices.

1. Legal notices may now be published on "a public legal notice website" rather than on a newspaper's own website or app
2. The date of electronic publication for legal notices may be used to satisfy commencement of publication requirements
3. If the legal notice is properly submitted for publishing and it is not correctly published by the newspaper, the notice is still considered valid

(See Idaho Code 60-106A)

7. Notices, Websites – H0065 (effective 07.01.2023)

Idaho Code 45-1602 requires certain notices to be provided to the owner(s) of record during the foreclosure process. This bill removes direct URL links in Idaho Code and replaces them with general directions for consumers to find more information via HUD's website or the Idaho Attorney General's Website.

This bill also modernizes the language defining the requirement for providing written notice.

(See Idaho Code 45-1506C & 45-1602)

8. Accessory Dwelling Units, Regulation – H0166a (effective 04.03.2023)

This bill allows private property owners the right to have internal accessory dwelling units (ADUs) on owner-occupied residential property. Furthermore, **NO** covenant, condition, or restriction (CC&Rs) that prohibits an ADU may be added, amended, or enforced on or after July 1, 2023.

It should be noted that an internal ADU does **NOT** include an alternative detached structure, camper, motorhome, recreational vehicle, tiny home on wheels, or other such similar dwellings on wheels.

(See Idaho Code 55-3212 & 55-618)

9. Homeowner's Associations, Condos, Fees – H0157 (effective 07.01.2023)

This legislation clarifies that a homeowner's association (HOA), or their management company, may **NOT** charge a fee for providing an account statement to a property owner; any such fee would be considered a violation of the Idaho Consumer Protection Act.

(See Idaho Code 55-1528 & 55-3205)

10. Property Valuation, Assessors – H0230 (effective 07.01.2023)

This legislation adds a provision to existing law in relation to how county assessors establish the market value of income-producing property for assessment purposes. Furthermore, upon request by the property owner, the assessor shall provide the calculations used by the assessor to derive the income-producing property owner's market value, including any value exempted by statute.

(See Idaho Code 63-208)

11. Property, Reasonable Fees – S1039a (effective 07.01.2023)

This legislation requires that any fees imposed on a residential tenant must be reasonable. Furthermore, an owner may not charge to the tenant of a rental property a fee, fine, assessment, interest, or other cost:

(a) In an amount greater than that agreed upon in the rental agreement; or

(b) That is not included in the rental agreement, unless:

(i) The rental agreement is an oral agreement; or

(ii) The rental agreement is written, and the owner provides the tenant a written thirty (30) day notice of the change

(See Idaho Code 55-314)

12. Other Legislation of Interest

Land, Water, Foreign Ownership – H0173a (effective 04.03.2023)

This legislation prohibits a foreign government or foreign government-controlled entity from purchasing, acquiring or holding a controlling interest in agricultural land, water rights, mining claims or mineral rights in the State of Idaho. (See Idaho Code 55-103).

Endowment Land, Notice, Restriction – S1049 (effective 07.01.2023)

This legislation requires the State Board of Land Commissioners to provide notice of closure, restriction, regulation, or prohibition of specified activities on state endowment lands. Notices will be posted on the Idaho Department of Lands website and offices, as well as at gates, roads, or trail entry points onto the endowment land to which the notice applies. (See Idaho Code 58-156).

Commission Core 2023

Course Approval #: C2023

Antitrust Awareness

Learning Objectives:

- List the 3 *Per Se* violations of the Sherman Act
- Explain best practices to proactively prepare yourself for potential antitrust violations

I. Regulators, Mount Up

A. Sherman Act 15 U.S.C. §§1 (1890)

B. Clayton Act 15 U.S.C. §§12 (1914)

C. Federal Trade Commission Act 15 U.S.C. §§41 (1914)

D. Executive Order 14036 – Promoting Competition in the American Economy (2021)

II. The Sherman Act

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

Case Study: "Party Antics"

THE PLAYERS

- Loretta is the broker/owner of the 2nd largest real estate brokerage in Idaho
- Krista is the broker/owner of the largest real estate brokerage in Idaho
- Josh owns a boutique brokerage that only represents sellers of potato farms, with a fair market value of 7 million dollars. He also has a daughter who wants to expand the brokerage.
- Barb is the broker/owner of the 3rd largest real estate brokerage in Idaho

THE FACTS:

- Krista invites Loretta, Josh, Barb, and a some of their associates to a holiday party at her country club. After dinner, Krista stands up and announces that she is raising her commission rate to 10% and that she "does not care what the others do."
- Loretta stays for the entirety of the party. After leaving, Loretta informs her associates that the brokerage is raising the commission rate to 10%.
- Josh stays for the entirety of the party. After leaving, Josh tells his daughter that he wants to change the boutique brokerage to a full-service brokerage.
- Barb leaves the party as soon as Krista sits down. Later, she tells her associates that in 6 months, they will be raising their commission rates slowly and will continue to raise them every 6 months until they reach their goal.

**Scenario is loosely based on U.S. v Foley 598 F.2d 1323 (1979)*

A. Elements of a Violation

1. The charged conspiracy was knowingly formed and was in existence at or about the time alleged

2. The defendant knowingly joined the charged conspiracy, or intended to agree

3. The charged conspiracy either substantially affected interstate or foreign commerce or occurred within the flow of commerce

4. Statute of Limitations is generally 5 years

B. With *Per Se* violations, the Department of Justice (DOJ) does **NOT** have to prove:

1. That the agreement was successful
2. Loss or harm as a result of the agreement
3. That conduct was unreasonable or lacked economic justification

C. *Per Se* violations

1. Price fixing
2. Bid rigging
3. Market allocation

III. Price Fixing

A. Charging the same price; raising prices together

B. Adding fees or surcharges

C. Eliminating discounts or having uniform discounts

D. Establishing minimum prices

E. Establishing a standard pricing formula

F. Coordinating and not competing on other commercial terms

Discussion Questions: "Party Antics"

DISCUSSION QUESTIONS:

- Which of the players have committed an antitrust violation?
- Was there some form of mutual understanding in "Party Antics"?
- Does just knowing about a conspiracy make you a party to a conspiracy?
- Does real estate impact interstate commerce?

The Analysis: "Party Antics"

Conspiracy:

- A conspiracy is an agreement, understanding, or meeting of the minds between at least two competitors, for the purpose of restraining trade
- An **AGREEMENT** is what constitutes the offense—overt acts in the furtherance of the conspiracy are **NOT** needed

Knowingly Join:

- Mere knowledge of a conspiracy without participation does not make the defendant a party to the conspiracy
- However, the defendant will need to demonstrate that any actions taken weren't made based on that knowledge

Interstate Commerce/Flow of Commerce:

- Do you:
  - Advertise across state lines?
  - Work with relocation services?
  - Have clients selling and moving out of state or buyers moving in-state?
  - Have funds coming from out-of-state or federal programs?

**Scenario is loosely based on U.S. v Foley 598 F.2d 1323 (1979)*

PRO TIP

What's your "Miss America"? Most of us are familiar with the 'interview' portion of pageants where contestants are asked a random question and then answer. Many of the contestants seem to have memorized stock answers that may not actually answer the question.

When handling antitrust situations, having a "Miss America" response ready to go can save you from a lot of uncomfortable, and potentially illegal, interactions. A few examples include:

- *I'm not comfortable continuing this conversation, I'm concerned it may be an antitrust violation.*
- *I am leaving before this discussion goes further.*
- *I have sensitive skin and the prison uses cheap soap—I will not be participating in any conspiracy to restrain trade.*

IV. Boycott/Refusal to Deal

A. As explained by the Federal Trade Commission:

"Any company may, on its own, refuse to do business with another firm, but an agreement among competitors not to do business with targeted individuals or businesses may be an illegal boycott, especially if the group of competitors working together has market power."

B. If done with intent to harm the boycotted party, it is a *Per Se* violation

If you run into antitrust violations online, know how to protect yourself! Some online "Miss America" responses may include:

- Commenting on the inappropriateness of the discussion and voicing your unwillingness to participate
- Leaving the group, unfriending, reporting Terms of Use violations to platform
- Documenting that while you might have been aware of the conspiracy, you did not knowingly enter into it or change your behavior

V. Tying Agreements

A. Not a *Per Se* violation, as this requires a "full market analysis"

B. Elements:

1. Two distinct products or services
2. A conditional sale (you can't have one without the other)
3. Market power in the tying product
4. A substantial impact in terms of sales in the market for the tied product
5. The 9th circuit (includes Idaho) requires plaintiffs to prove the tying seller has some direct economic interest in the sales of the tied product

Case Study: "It All Ties Together"

THE FACTS:

- Tess Tory wants to buy a property in the Echo Estates subdivision
- Properties don't come on the market in that subdivision very often, so when Tess sees a listing show up, she calls the listing agent immediately
- Tess tours one of the properties with listing agent, Ella Echo of Echo Realty
- Ella explains that a requirement of purchasing a home in the subdivision is to agree that if the property is ever sold, it will be listed with Echo Realty
- When Tess comments that she would probably paint the exterior of the property, Ella points out that all colors must be approved by the Homeowners Association and the work is to be completed by Echo Painting

APPLYING THE ELEMENTS:

- Are there 2 distinct products or services? If so, what are they?
- Is the sale conditional on something else? If so, what?
- Does the tying condition have market power? If so, how?
- Does the tying condition have a substantial impact in terms of the sale? Explain.
- Does the tying seller have some direct economic interest with the tying condition? If yes, how so?

C. Executive Order 14036 – Promoting Competition in the American Economy:

Section 5(h): To address persistent and recurrent practices that inhibit competition, the Chair of the Federal Trade Commission, in the Chair's discretion, is also encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority, as appropriate and consistent with applicable law, in areas such as:

(vi) unfair tying practices or exclusionary practices in the brokerage or listing of real estate

Group Discussion:

- Based on what you learned today, how does antitrust regulation affect your real estate practice?
- Take a moment to share your best Miss American response!

Commission Core 2023

Course Approval #: C2023

Guideline Review

Learning Objectives:

- Explain how the covered guideline will impact your real estate practice

I. Guideline 14 – Disputed Earnest Money

The topic of earnest money continues to be one of confusion and frustration, both for consumers and licensees. Understanding your responsibilities as a licensee when dealing with earnest money is essential to your business practice and to remaining compliant with Idaho license law—especially if there is a dispute.

Important to Note: This information in this section focuses on some examples that various brokerages handle earnest money. **This is not necessarily how it will be handled at your brokerage!**

Be sure to check with your broker if you have any questions about how your brokerage would address these issues or examples.

CLASS ACTIVITY: The Complexities of Earnest Money

Answer the following discussion questions, as directed or assigned by your instructor. Following class discussion, watch the associated short video clip, featuring industry voices who participated as a panelist at IREC's 2023 Instructor Conference.

THE PANELISTS:

- **Josh Harbst** is the Designated Broker for Genesis Real Estate. He has been actively licensed in Idaho since 2004. He loves all things outdoors such as snowboarding, mountain biking, and playing in Idaho's lakes and rivers. He is also an avid tennis player. Josh has a lovely wife, son, and daughter. He is excited about the future both professionally and personally.

- **Darrin Jaszkowiak** has been a REALTOR® since 1984. Fulfilling the role of designated broker/owner/certified mentor with RE/MAX Advisors allows him to fulfill his personal mission: "Make things happen and impact people in a positive way." Darrin has personally handled over 2,000 real estate transactions; he has appeared in court as an expert witness on real estate valuations in various cases; he has been a presenter for attorney CE classes; and he has earned The RE/MAX Hall of Fame and Lifetime Achievement awards.

- **Catharine Quinn** serves as the Designated Broker and President for 5 Idaho brokerages, including Keller Williams Realty Boise; she is also the Principal Broker in Oregon for Keller Williams Four Rivers. With 18 years in the real estate industry, she thrives in supporting agents by marrying her skills and passion to drive transaction and business success. She advises and educates both new and experienced agents in the nuances of client representation, transaction process, and oversees thousands of transactions annually. She is passionate about leading herself and others to higher levels of growth.

- **Elizabeth Hume** is currently the Real Estate Commissioner for Idaho's Southwestern District; she is also the President Elect for Boise Regional REALTORS®. Elizabeth serves on the professional development committee for Idaho REALTORS®, and she is the NAR Major Investor Council representative for the State of Idaho. She was awarded the opportunity to study in the Idaho REALTORS® Leadership Academy in 2019/2020 and enjoyed learning more about our industry. Elizabeth has been honored to receive the Boise Regional REALTORS® Leadership in Ethics award, REALTOR® of the Year for Boise Regional REALTORS®, and Boise Business Review Residential Power List 25, where she ranked number 9. Elizabeth works hard selling and teaching real estate so she can enjoy travel, skiing, golf, camping, and boating.

1. What happens when there is an earnest money dispute?

2. During an earnest money dispute, what are the main differences when the earnest money is held by a responsible broker vs. a third party?

3. What can be held in a trust account? What do you do if you get something other than money?

4. What happens when there is an earnest money dispute?

5. Identify some "best practices" for <u>ALL</u> licensees when handling earnest money.

IDAHO REAL ESTATE COMMISSION
Guideline #14
Revised December 2022

DISPUTED EARNEST MONEY

Many brokerages are requiring their clients to place earnest money at title companies in order to forgo the requirement of keeping a real estate trust account. In these cases, the monies are not considered "entrusted," and the responsibility falls to the title company, which has its own requirements to follow. In these cases, during an earnest money dispute, the brokerage is to inform all parties, in writing, that the title company will handle the dispute according to their procedures; brokerages must also retain proper receipting and ledger card records.

This Guideline will explore the procedures for brokerages when an earnest money dispute occurs with "entrusted" consideration. As a reminder, any and all funds received by the broker are considered "entrusted" **UNLESS**:

- The parties have directed the broker, in writing, to transfer those funds to control of a third party, such as a title, escrow or trust company; **and**

- Neither the broker nor his licensees have any right to exercise control over the safekeeping or disposition of the funds

While the Commission regularly receives complaints concerning earnest money disputes, these disputes are considered a civil manner. Therefore, the Commission is not empowered to decide earnest money disputes or order to release of earnest money. However, Idaho Code 54-2047 provides brokers with three options for settling earnest money disputes involving "entrusted" consideration.

It should be noted that the law does not give weight to any of these options over the others. Furthermore, license law does not require that these options be utilized in any particular order. However, the Commission has presented these options below, in what it considers the most logical succession.

Option 1:

If an earnest money dispute occurs during a transaction, a broker may attempt to resolve the issue via a written agreement, signed by both the buyer and the seller. This agreement may release the broker as the custodian of the disputed earnest money, and provide directions as to the proper disbursement of the consideration.

While this option appears to be the simplest solution for everyone, depending on the level of disagreement between the buyer and the seller, it may not be the most realistic choice for resolution. Often, brokers may find the relationship between the buyer and seller has turned contentious, and either one or both parties are unwilling to concede to an agreement. Should this be the case, the broker should employ an alternative option.

This guideline is not a new law but is an agency interpretation of existing law.
For more information on this guideline, please contact:
MiChell Bird, Executive Officer at michell.bird@dopl.idaho.gov.

Option 2:

Idaho Code 54-2051(4)(e) requires that all offers to purchase real property contain "A provision for division of earnest money retained by any person as forfeited payment should the transaction not close." As such, a broker involved in an earnest money dispute may rely on the wording of the purchase and sale agreement as directions for the division of the funds in the event that the transaction fails or terminates.

Should a broker choose this route and disburse the earnest money in accordance with the terms of the purchase and sale agreement, the broker must first notify all parties involved in the transition, in writing, of the broker's intention. Furthermore, a broker in this situation should maintain accurate documentation within their files as to how and why the consideration was disbursed.

However, while this option may also appear to be as simple as the previous, brokers may be found civilly liable to the party not receiving the funds if the broker disburses the funds in a manner found to be inconsistent with the terms of the purchase and sale agreement.

Option 3:

Brokers also have the option of holding the disputed, entrusted funds in their trust account until they are ordered to disburse the funds by a court of competent jurisdiction. Prior to utilizing this option, brokers must notify all parties involved in the transaction, in writing, of the decision. This option should only be utilized if the broker does not believe it is reasonably possible for the funds to be disbursed in accordance with the written instructions of the offer to purchase.

Ultimately, it is a broker's responsibility to use their best efforts to get the dispute resolved between a buyer and a seller.

Unless a broker has acted in a reckless manner by improperly holding or disbursing earnest money, the Commission will not get involved in this type of problem. Rather, it is up to the buyer and seller to reach agreement concerning the dispute. If the buyer and seller are unable to come to an agreement on their own, they may choose to resolve the dispute through a broker-initiated interpleader action or in civil court. In many cases, if the dispute involves $5,000.00 or less, it may be handled in Small Claims Court.

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