



Legal Affairs Update

Washington REALTORS® Take Action on Cases Involving:

- Real Estate Broker Liability
- Growth Management
- B&O Taxes
- Procuring Cause for Real Estate Commissions

Jackowski v. Hawkins Poe Realty – Duties and Liabilities of Real Estate Brokers

In this case, the Court of Appeals determined that real estate brokers may have common law duties beyond the statutory duties established in Chapter 18.86 RCW, the real estate agency law, and that a cause of action may exist for violation of those duties. These two conclusions are contrary to the intent of the real estate agency law to establish clear statutory duties and create significant liability risks for the real estate industry.

REALTORS® submitted an amicus brief in support of a Motion for Reconsideration of the Court of Appeals decision, which the Court of Appeals denied. REALTORS® also approved funding to support an appeal to the Washington Supreme Court, and filed an amicus brief in support of the Petition for Review. The Washington Supreme Court accepted the REALTORS® amicus brief and granted the Petition for Review, meaning that the case will be heard on appeal.

The additional funds approved by Legal Affairs will be used to file an amicus brief on the merits of the appeal, which should occur in the Winter Term of 2010-2011.

Jackowski v. Borchelt et al. – Duties and Liabilities of Real Estate Brokers

On September 16, 2010, the Washington Supreme Court will hear oral argument in an appeal of a Court of Appeal decision concerning the liability of real estate brokers. The appeal in Jackowski v. Borchelt et al. concerns whether a cause of action exists for violation of RCW Chapter 18.86, the real estate agency law, and whether there are common law duties under RCW Chapter 18.86 in addition to the specific statutory duties.

Washington REALTORS® filed on amicus brief in the case in support of Coldwell Banker Hawkins Poe Realtors, arguing that the decision by the Court of Appeals is inconsistent with RCW Chapter 18.86, and treats real estate professionals differently than architects, engineers, or other licensed professionals in the building industry by failing to apply the economic loss rule to protect real estate brokers from tort lawsuits.

Windermere Camano v. Department of Revenue – B&O Tax on Referral Fees

Washington state Department of Revenue concluded in a business and occupation tax (B&O) tax audit that a real estate office must pay B&O tax on referral fee amounts paid to 3rd party real estate offices, even though the 3rd party office must also pay the B&O tax on the same referral fee commission income. WDOR also concluded that commission amounts credited to buyers and sellers are subject to B&O, even though real estate brokers never actually receive those amounts.

Washington REALTORS® Legal Affairs Committee has supported this appeal through the WDOR's administrative appeal process. Thus far, WDOR's Administrative Law Judge issued a decision affirming the audit finding, and so a Motion for Reconsideration has been filed. After the Motion for Reconsideration is determined, Legal Affairs will determine the next step in this case.

Real estate companies have never before been required to pay the B&O tax on referral fee income paid to other firms. If your office has been audited by WDOR and told that it is required to do so please contact the Washington REALTORS® Government Affairs staff who have been monitoring the situation. You can call us at: 1-800-562-6024.

Prudential Almon Realty v. Young – Procuring Cause of Real Estate Commission

In this case, Prudential Almon Realty was the listing office of a house in Yakima and posted signs and flyers at the property. A person who saw the signage took a flyer, and passed it on to his sister, who was in the process of moving to Yakima. While seeing homes in Yakima, the sister asked about the house from the flyer, and drove by the house but the "for sale" sign was down because the listing had ended. They then inquired of the neighbor, who ultimately put the sister in contact with the owner, and a successful sale closed.

The Superior Court determined that the real estate office was not the procuring cause of the sale under the terms of the listing agreement.

Washington REALTORS® Legal Affairs approved funding and an amicus brief in the appeal by Prudential Almon Realty, supporting the argument that Prudential Almon Realty's marketing efforts were the procuring cause of the sale, and that therefore, commission was owed.

The case is currently on appeal to Court of Appeals, Division III.

Futurewise v. Douglas County – Rural Cluster Development

Over the past three years, the North Central Washington Association of REALTORS® worked with homebuilders and other interests to ensure that the cluster development ordinance in Douglas County remained workable. Ultimately, the Douglas County Board of Commissioners agreed with the position taken by REALTORS® to protect the ability to build cluster developments. The County's decision was appealed to the Eastern Washington Growth Management Hearings Board.

REALTORS® Legal Affairs approved funding for the NCWAR to continue to participation in this issue by intervening in the growth hearings board appeal in support of the County's position. A decision from the hearings board is expected before the end of 2010.