

NO. 78928-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 23658-7-III

CAREY D. ERWIN, a single person, and HEALTHCARE
PROPERTIES, INC., a Washington corporation,

Respondents,

v.

COTTER HEALTH CENTERS, INC. a foreign corporation, and
JAMES F. COTTER, a single person,

Petitioners.

SUPPLEMENTAL BRIEF OF PETITIONERS

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WIGGINS & MASTERS, P.L.L.C.
Charles K. Wiggins, WSBA 6948
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorneys for Petitioner

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INTRODUCTION

Contrary to all of the relevant statutes, Erwin claims, and the appellate court held that Erwin's acts of marketing Cotter's properties, procuring tenants, and negotiating leases were not real estate brokerage services because Erwin specialized in nursing homes. In other words, under the court's decision, acts statutorily defined as brokerage services are exempted from statutory controls if the broker specializes. This is not and cannot be the law.

The court's holding allows Erwin to circumvent in-state brokerage licensing requirements in California and Texas, and indeed to do so in any foreign state in which he brokers real estate. The opinion creates a roadmap for any other Washington-licensed broker to provide brokerage services in any foreign state without an in-state license so long as he specializes in a certain type of property or business opportunity. In short, this contradicts the laws of every state in the Country, each of which requires a broker to be licensed in state, or meet non-resident licensing requirements.

The Agreement is illegal, void, and unenforceable, and Erwin cannot maintain suit for a commission. The Court should reverse, dismiss Erwin's claims, and award Cotter fees.

ARGUMENT

- A. Erwin was unlawfully providing brokerage services without the required license, and holding otherwise creates a roadmap for evading REBSA and other states' real estate brokerage licensing schemes.**

The appellate court's crucial error was holding that it does not matter where Erwin is licensed because he works in a "national market":

And we agree [with the trial court] given the nature of the undertaking here – transferring business interests in a national market – that it did not make a difference where Erwin lived or worked, or for that matter where he was licensed.

Erwin v. Cotter Health Centers, Inc., 133 Wn. App. 143, 153, 135 P.3d 547 (2006), ***rev. granted***, __ Wn.2d __ (2007). This holding contradicts the brokerage licensing requirements in every single state, each of which requires a broker to be licensed in state, or meet non-resident licensing requirements. Attached as Appendix A is a chart of each state's brokerage licensing statutes. Erwin cannot evade each state's brokerage licensing requirements by working across state lines; e.g. in a "national market." Allowing him to do so offends each state's right to regulate brokerage activities occurring within the state.

1. Every state in the Country has licensing requirements for real estate brokerage services provided within the state.

Every state has an in-state licensing requirement. In Washington, it is "unlawful" to broker real estate without an in-state license (RCW 18.85.100), and doing so is a "gross misdemeanor." RCW 18.85.340. An unlicensed broker may not sue for a commission. RCW 18.85.100. In California, it is "unlawful" to broker real estate without an in-state license and doing so is a "public offense." Cal. Bus. & Prof. Code §§ 10130, 10139. An unlicensed broker may not sue for compensation. *Id.* at § 10136. And in Texas, it is a misdemeanor to provide brokerage services without an in-state license (Tex. Occ. Code Ann. §§ 1101.351, 1101.756) and an unlicensed broker may not sue for a commission. *Id.* at § 1101.806(b).

Every other state similarly requires an in-state license and/or imposes criminal and/or civil penalties for brokering real estate without the required license. App. A. Many states, like Washington, California, and Texas, prohibit unlicensed brokers from suing for a commission. *E.g.*, Arkansas, A.C.A. § 17-42-107; Louisiana, La. RS. § 37:1445; Maine, 32 M.R.S. § 13004; Massachusetts, ALM GL Ch. 112 §; Mississippi, Miss. Code Ann. §

73-35-33; Oklahoma, 59 Okl. St. § 858-311; Rhode Island, R.I. Gen. Laws § 5-20.5-21; Wisconsin, Wis. Stat. § 452.20; Wyoming, Wyo. Stat. Ann. § 33-28-115.

Moreover, all states but Pennsylvania have statutes that allow non-resident brokers to lawfully broker real estate within the state.¹ App. A. These mechanisms include (1) associating with a broker licensed in state; (2) reciprocity agreements between states; and (3) relaxed versions of the in-state licensing requirements. *Id.* As such, both the trial and appellate court incorrectly concluded that Erwin would have to be licensed in every state “touched by the transaction.” 133 Wn. App. at 153. All Erwin had to do was comply with the applicable state statutes where he wanted to work.

2. Erwin was providing brokerage services as defined by the Agreement, his own testimony, the Court of Appeals’ opinion, and all relevant statutes.

The appellate court’s decision does an end-run around these licensing requirements, holding that Erwin was not performing brokerage services, but “consulting” services, which – according to

¹ Former 63 P.S. § 445(a) “implicitly sanctioned” a broker licensed in a foreign state to broker real estate in Pennsylvania if he entered a joint venture with an in-state broker. *Gold & Co., Inc. v. Northeast Theater Corp.*, 421 A.2d 1151 (1980). There does not appear to be a similar provision in the current act. § 445.101 *et seq.*

the court – are not governed by the brokerage statutes. 133 Wn. App. at 153-54. Regardless of what Erwin calls himself or his services, he was providing brokerage services as defined by the Agreement, his own testimony, the opinion, and all relevant statutes.

In the Agreement, Erwin represented that he “performed functions involving . . . purchase and sale agreements or contracts, leases, financing, negotiating and closing health care facility(ies).” Pet. for Rev. App A ¶ 10. He professed knowledge of “prevailing market conditions” (*id.*) and requested materials to “effectively market [Cotter’s] facility(ies).” *Id.* at ¶ 12. The Agreement states that Erwin has “been directly involved in the negotiation of numerous purchase and sale and lease agreements,” and provides that he will be involved in “the preparation of any purchase and sales, lease or sublease agreement.” *Id.* at ¶ 13.

According to Erwin, his job is to “bring parties together,” and to “cultivate and facilitate transactions.” BR 12. Erwin puts together a package of materials for each property he markets, including financials, inspections, and lease documents. BR 10. Of note, he testified that the “broker” representing a health care facility should be aware of the licensure status. *Id.*

The appellate court described the services Erwin provided as “the sale and lease of health care facilities,” and “the transfer of leases from one entity to another.” 133 Wn. App at 146, 151. Erwin “represented clients on both sides of [these] real estate transactions.” *Id.* at 146. Specifically, Cotter agreed to pay Erwin a commission to “provided [Cotter] a select category of clients who operate nursing homes.” *Id.* at 147. Erwin “renegotiated” existing leases on Cotter’s nursing homes to arrive at new leases for new tenants Erwin provided. *Id.* at 147-48.

Under the relevant statutes, the services Erwin provided are nothing other than brokerage services. This argument is fully briefed at BA 22-24, Reply Br. 5-7, and Pet. for Rev. 12-13. In short, in Washington, a person who “assists in procuring prospects,” and/or negotiates the lease or sale of real property or business opportunities is a broker. RCW 18.85.010. In California, a person who solicits tenants and negotiates leases for real property or business opportunities is a broker. Cal. Bus. & Prof. Code § 10131. And in Texas, a person who procures prospective tenants and negotiates leases is a broker. Tex. Occ. Code § 1101.002(1)(A).

It is undisputed that Erwin procured tenants and negotiated new leases for Cotter's nursing homes. Erwin marketed Cotter's facilities (Pet. for Rev. App A ¶ 12) and brought the parties together. BR 12. He renegotiated the leases on the facilities to provided new leases for new clients. 133 Wn. App. at 147-48. Under any of the relevant statutes, these were brokerage services.

3. Erwin's brokerage services are not transformed into something else simply because he specialized in nursing homes.

The appellate court seems to have recognized that the services Erwin provided are brokerage services, holding that Erwin chose Washington law because it is the only state in which he is licensed:

Erwin's services required transfer of leases from one entity to another. That naturally suggested Washington as the forum state, because Erwin was licensed only in Washington.

133 Wn. App. at 151. Of course, Erwin's brokerage license is relevant only if he was providing brokerage services. Yet the court was persuaded that Erwin's services were not brokerage services because he specialized in a particular type of business opportunity:

This was not a typical "listing agreement." It was instead a hybrid "consulting agreement" calculated to capitalize on Erwin's unique expertise in this highly regulated industry and his contacts in the industry, throughout the country.

133 Wn. App. at 153.

The statutes, not the Agreement Erwin drafted, or his personal job description, govern whether services provided are brokerage services that must be properly licensed. This Court has consistently held that a broker cannot “evade” the licensing requirements “by referring to the services as originating or introducing or any other fantastic term.” ***Grammer v. Skagit Valley Lumber Co.***, 162 Wash. 677, 685, 299 P. 376 (1931); *see also* ***Shorewood, Inc. v. Standring***, 19 Wn.2d 627, 638, 144 P.2d 243 (1943). The appellate courts have consistently followed suit. ***Main v. Taggares***, 8 Wn. App. 6, 8, 10, 504 P.2d 309 (1972) (rejecting the argument that an agreement to “materially assist[]” the seller with his financial affairs was not a brokerage agreement, holding that “The name given an instrument does not necessarily determine what it is in law”); Pet. for Rev. at 11.

Erwin cannot change the nature of his services by calling himself a consultant rather than a broker. Pet. for Rev. 10-11. Yet the appellate court allowed him to do just that, holding that services that clearly fall within the statutory definitions of brokerage services are not in fact brokerage services simply because Erwin operated in a niche market. 133 Wn. App. at 153. In other words, the Court

allowed Erwin to self-define his profession right out of the statutory licensing requirements.

In allowing Erwin to define his services out of the statutory licensing requirements, the trial court and appellate court created a roadmap for contracting to evade every state's real estate brokerage licensing requirements – specialize. Not one of the relevant statutes defines brokerage services as those provided for in a “typical ‘listing agreement.’” (133 Wn. App. at 153) such as where a residential broker might list a house on the multiple listing service. BR 12. Nor do these statutes suggest that one is not a broker if he markets properties or business opportunities in a “regulated industry” or has contacts that cross state boundaries. In fact, it is incredible to suggest that a broker can avoid licensing requirements in every state simply because he works in many states. The appellate court did just that and the Court should reverse.

4. **Since Erwin was providing brokerage services, he had to be licensed in the state where the services were provided, or satisfy that state's non-resident broker requirements.**

As discussed above (*supra* § A 1), and as the appellate court correctly held, the relevant states all have in-state licensing requirements:

Providing real estate brokerage services for commission without a license is illegal in all three states – Washington, California, and Texas – and no action to recover a commission may be maintained in any of these states. RCW 18.85.100; Cal. Bus. & Prof. Code § 10136; Tex. Occ. Code § 1101.351.

133 Wn. App. at 153 (footnote omitted). In fact, all states have in-state licensing requirements. *Supra* § A 1; App. A.

Yet Erwin suggests that a broker need only be “duly licensed” in Washington in order to practice in California. Ans. to Pet. 10-11 & 10 n.6. This flatly ignores §10130, which makes it unlawful to broker real estate in California “without first obtaining a real estate license from the department.” It should go without saying that requiring a “license from the department” – “the Department of Real Estate in the Business and Transportation Agency” – means a California license, not a license from Washington or any other state. Cal Bus & Prof Code § 10004;

Consul Ltd. v. Solide Enterprises, Inc., 802 F.2d 1143, 1150-51 (9th Cir. 1986).

B. California law should govern the Agreement because enforcing the contractual choice of Washington law violates a fundamental policy of the state having a materially greater interest in the issue – California.

Cotter's briefing provides a comprehensive conflicts analysis that need not be repeated here. BA 26-36; Reply Br. 5-16; Pet. for Rev. 16-19.

The court erroneously concluded that applying Washington law does not offend California policy. 133 Wn. App. at 154. The court reasoned that the policy behind California's brokerage licensing requirements is satisfied by any brokerage license, where California does not require "exact compliance" with its licensing laws:

California courts recognize that [its brokerage licensing] policy is satisfied by proof of a valid real estate broker's license. **Estate of Baldwin**, 34 Cal. App. 3d 596, 605, 110 Cal. Rptr. 189 (1973). . . . California does not construe its licensing laws so literally as to require exact compliance if to do so "would transform the statute into an "unwarranted shield for the avoidance of a just obligation."” *Id.* (quoting **Schantz [v. Ellsworth]**, 19 Cal. App. 3d [289] 293, 96 Cal. Rptr. 783 [(1971)]) (quoting **Latipac, Inc. v. Superior Court of Marin County**, 64 Cal. 2d 278, 281, 411 P.2d 564, 49 Cal. Rptr. 676 (1966)).

133 Wn. App. at 154. The cases cited are inapposite – each involves a party duly licensed under California law: whether a

commission could be avoided for the failure to hold a branch office and/or fictitious name brokerage license (*Baldwin* and *Schantz*) and whether a contractor who held a license when the contract was entered had substantially complied with a statute requiring contractors to have a license to sue to recover sums owed for contracting services (*Latipac*). While California may not require a broker licensed in state to strictly comply with every minutia of the licensing statutes, it grossly misreads these cases to suggest that they stand for the proposition that a license from another state is sufficient to satisfy California policy on regulating real estate brokers. Holding that an out-of-state license is sufficient to satisfy California policy flatly contradicts California's in-state licensing requirements and the Court should reverse.

C. Under California Law, the Agreement is illegal, void, and unenforceable.

This argument is detailed at length in the prior briefing. BA 34-36; Reply 11-13, 16; Pet. for Rev. 16-19. In short, under California law, a contract to broker real estate in California without an in-state license is "illegal, void and unenforceable." *Consul Ltd.*, 802 F.2d at 1148; *Baldwin*, 34 Cal. App. 3d at 604; *Fellom v. Adams*, 274 Cal. App. 2d 855, 862, 79 Cal. Rptr. 633 (1969);

Estate of Prieto, 243 Cal. App. 2d 79, 85, 52 Cal. Rptr. 80 (1966); see also **Abrams v. Guston**, 110 Cal. App. 2d 556, 557, 243 P.2d 109 (1952). An unlicensed broker may not sue to recover a commission (§ 10136) and is subject to criminal penalties. § 10139. The purpose of these laws is to prevent an unlicensed party from recovering a commission. **Fellom**, 274 Cal. App. 2d at 862. The Agreement provides that Erwin will broker real estate in California and acknowledges that he is not licensed to do so. *Supra* § A 2. Thus, the Agreement is “illegal, void and unenforceable” and the Court should reverse. **Consul, Baldwin**, and **Fellom supra**. Erwin could not even sue to recover a commission, and the Court should reverse.

The Agreement is illegal for the additional reason that it purports to waive California's brokerage licensing statutes. Pet. for Rev. App. A ¶ 9. Erwin concedes that he drafted the Agreement to avoid California licensing requirements:

[T]he Agreement specifically provides that Washington law applies and waives all other state's licensing requirements.

BR 41-42. But parties cannot waive applicable law by contract:

Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.

Cal. Civ. Code § 3513. California's brokerage licensing statutes were "established for the public reason" of "protect[ing] the public from . . . incompetent or untrustworthy real estate practitioners." *Schantz*, 19 Cal. App. 3d at 292-293. The parties could not contract to waive these laws. Cal. Civ. Code § 3513.

D. Washington law and Erwin's Washington license do not permit Erwin to broker real estate in another state.

Erwin's Washington license and the Washington brokerage licensing statutes do not allow him to broker real estate in California (or any other foreign state) any more than a California license would allow a party to broker real estate in Washington. As discussed above, Washington law simply does not govern Erwin's brokerage activities in California. *Supra* § B. As a general matter, however, contracts for unlicensed brokerage services performed in Washington are void and/or unenforceable under Washington law. BA 36-40. In other words, if the situation were reversed, and Erwin was licensed in California but brokering real estate in Washington, under Washington law, the agreement would be unlawful, his acts

would be criminal, and he could not sue for a commission.² *Id.*;
supra § A 1.

E. The Court should award fees to Cotter and remand for an award of trial fees.

Where, as here, a contract provides for an award of attorneys' fees to one of the parties (Pet. for Rev. App A ¶ 5) the prevailing party is entitled to fees even if he is not the party specified in the contract, and may recover fees even if the contract is invalidated. ***Labriola v. Pollard Group, Inc.***, 152 Wn.2d 828, 839, 100 P.3d 791 (2004); RCW 4.84.330. Since the Agreement is void and unenforceable, Erwin is not a prevailing party, and is not entitled to attorneys' fees. ***Labriola***, 152 Wn.2d at 839. The Court should award Cotter fees incurred defending against Erwin's efforts to enforce the unlawful Agreement and on appeal, and remand for an award of fees incurred at trial. *Id.*

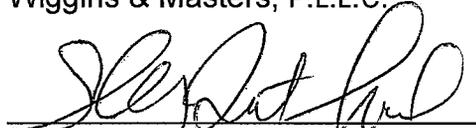
² In other highly regulated fields, Washington has also long recognized that parties may not contract to avoid regulations and statutes. ***Fallahzadeh v. Ghorbanian***, 119 Wn. App. 596, 601-03, 82 P.3d 684 (2004); ***State v. Boren***, 36 Wn.2d 522, 531-32, 219 P.2d 566 (1950).

CONCLUSION

The Agreement is illegal, void, and unenforceable. Erwin's services are criminal, and he cannot sue to recover the commission. The Court should reverse and remand for dismissal of all claims.

RESPECTFULLY SUBMITTED this 15th day of April 2007.

Wiggins & Masters, P.L.L.C.



Charles K. Wiggins, WSBA 6948
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing SUPPLEMENTAL BRIEF OF PETITIONERS postage prepaid, via U.S. mail on the 5th day of April 2007, to the following counsel of record at the following addresses:

Counsel for Respondent

James Stephan Berg
James S. Berg, PLLC
105 N 3rd Street
Yakima, WA 98901-2704

Co-Counsel for Appellant

James E. Montgomery, Jr.
12175 Network Drive
San Antonio, Texas 78249



Shelby R. Frost Lemmel, WSBA 33099
Attorney for Appellant

State	Statute	License	Penalty	Association	Other—Out of State
Alabama	Code of Ala	34-27-30	37-27-11		34-27-32
Alaska	Alaska Stat.	8.88.161	8.88.167		08.88.263
Arizona	Arizona Stat.	32-2122	32-2160.01	32.2163	
Arkansas	A.C.A.§	17-42-301	17-42-105	17-42-305	
California	Cal Bus & Prof Code §	10130	10139		10151.5
Colorado	C.R.S.	12-61-102	12-61-119		12-61-107
Connecticut	Conn. Gen Stat.	20-312	20-325		20-317
Delaware	24 Del. C. §	2906	2926		2909
Florida	Fla. Stat. §	475.42	475.42		457.180
Georgia	O.C.A. §	43-40-31	43-40-30,31	43-40-9	
Hawaii	HRS §	467-7	467-26		467-7-5
Idaho	Idaho Code §	54-2002	54-2065		54-2015
Illinois	225 ILCS	4511/5-15	545/20-10		45415-60
Indiana	Burns Ind. Code Ann. §	25-34.1-3-2	25-34.1-62	25-34.1-3-11	25-34.1-3-5
Iowa	Iowa Code §	543B.1	543B.43		543B.21
Kansas	K.S.A. §	58-3036	58-3065	58-3040(b)	58-3040(a)
Kentucky	KRS §	324.020	324.160		324.141
Louisiana	La. RS.	37:1436	37:1458, 1459	37:1437	
Maine	32 M.R.S. §	13003	13005		13193
Maryland	Md. BUSINESS OCCUPATIONS AND PROFESSIONALS ASSOCIATION Code. Ann. §	17-301, 601	17-613		17-308
Mass.	ALM GL Ch. 112	87RR	87CCC	87WW	
Michigan	MCL §	2502(a)	339.2512a		339.2514
Minnesota	Minn. Stat. §	82.41	82.40		82.44
Mississippi	Miss. Code Ann.	73-35-1	73-35-31	73-35-11	73-35-8
Missouri		§339.020 RS Mo.	§339.170 RS Mo.		§339.090 RS Mo.
Montana	Mont. Code Anno. §	37-51-301	37-51-323		37-51-306
Nebraska	RRS. Neb. §	81-885-02	81-885-45		81-885-17
Nevada	Nev. Rev. Stat. Ann. §	645-230	645-990	645-605	645-332
New Hampshire	NH RSA	331-A:3	331-A:34	331-A:22-a	331-A:11-a, 331-A:22
New Jersey	N.J. Stat. §	45:15-1	45:15-16:46		45:15-20
New Mexico	N.M. Stat. Ann. §	69-29-1	16-29-17, 17.2		69-29-16.1

State	Statute	License	Penalty	Association	Other-Out of State
New York	N.Y. CLS Real P	440-a	442-e		442-g
North Carolina	N.C. Gen. Stat.	93A-1§	93A-8	93A-9, 10	
North Dakota	N.D. Cent. Code §	43-23-05	43-23-17		43.23.10
Ohio	ORC Ann.	4735.02	4735.052	4735.022	4735.17
Oklahoma	59 Okl. St. §	858-301	858-401	858-306	858-306
Oregon	ORS §	696.020	696.990	696.290	699.265
Pennsylvania	63 P.S. §	455.301	455.303, 305		
Rhode Island	R.I. Gen. laws	5.20.5-6	5-20.5-17		5-20.5-10
South Carolina	S.C. Code Ann. §	40-57-20	47-57-220		47-57-120
South Dakota	S.D.codified Laws		36-21A-28		36-21A-54
Tennessee	Tenn. Code Ann.	62-13-301	62-13-110		62-13-314
Texas	Tex. OCC. Code	1101.351	1101.753		1101.360
Utah	Utah Code Ann.	61-2-1	61-2-17	61-2-6	61-2-6
Vermont	26 V.S.A. §	2212	2213		2297
Virginia	Va. Code Ann.	54-1-2106.1	54.1-2105.2		54.1-2111
Washington	RCW	18.85.100	18.85.340	18.85.560	
West Virginia	W.Va. Code	30-40-3	30-40-22		30-40-15
Wisconsin	Wis. Stat.	452.03	452.17		452.11
Wyoming	Wyo. Stat. §	33-28-101	33-28-114		33-28-110