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No. 64826-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HILLCREST MEDIA, LLC,

Appellant,

v.

FISHER COMMUNICATIONS, INC., and
FISHER BROADCASTING, INC.

Respondents.

On Appeal From King County Superior Court
Hon. Michael J. Fox

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court committed error when it granted the Respondents' motion for judgment on the pleadings and dismissed Appellant Hillcrest Media, LLC's Complaint.

2. The trial court committed error by taking judicial notice of documents attached to Respondents' counsel's declaration filed in support of Respondents' motion for judgment on the pleadings, and by refusing to (a) permit Hillcrest Media, LLC to conduct discovery regarding the documents and (b) continue the hearing on the motion for judgment on the pleadings.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court commit error because it applied Washington law instead of Arkansas law to determine whether Hillcrest Media, LLC is entitled to recover a commission from the Respondents for its brokerage services related to Respondents' purchase of a business opportunity?

2. Did the trial court commit error because it concluded that Washington, rather than Arkansas, had the most significant relationship to whether Hillcrest Media, LLC is entitled to recover a commission from the Respondents for its brokerage services related to Respondents' purchase of

a business opportunity?

3. Did the trial court commit error by taking judicial notice of, and considering, additional evidence submitted by Respondents in support of their motion for judgment on the pleadings?

4. Did the trial court commit error by failing to give Hillcrest Media, LLC an opportunity to (a) conduct discovery regarding the evidence submitted by Respondents in support of their motion for judgment on the pleadings and (b) present a supplemental response to Respondents' motion for judgment on the pleadings?

III. STATEMENT OF THE CASE

A. Facts giving rise to lawsuit.¹

Appellant Hillcrest Media, LLC ("Hillcrest") is a limited liability company organized under the laws of Arkansas and was an affiliate of Equity Broadcasting Corporation. Clerk's Papers (CP) 1. Larry Morton is a resident of Arkansas, is licensed in Arkansas as a real estate broker and real estate agent, and was Hillcrest's agent. CP 1-2.

¹ The case was dismissed in the trial court on Respondents' CR 12(c) motion for judgment on the pleadings. CP 191-92. For purposes of deciding whether a motion for judgment on the pleadings should have been granted, facts alleged in a complaint must be presumed to be true. *North Coast Enterprises, Inc. v. Factoria Partnership*, 94 Wn. App. 855, 858-59, 974 P.2d 1257 (1999). The facts discussed in this brief were all alleged in Hillcrest Media, LLC's Complaint. CP 1-7.

Respondents Fisher Communications, Inc. (“Fisher Communications”) and Fisher Broadcasting Company (“Fisher Broadcasting”) are Washington corporations primarily doing business in King County, Washington. CP 1. Fisher Communications is the parent of Fisher Broadcasting. CP 1.

In January 2006, African-American Broadcasting Co. of Bellevue, Inc. (“African-American”) owned television station KWOG. CP 2. Fisher Communications communicated to Hillcrest its desire to acquire KWOG for itself or for Fisher Broadcasting, and authorized Hillcrest to act as its agent for purposes of acquiring KWOG. CP 2.

On or about January 21, 2006, Hillcrest and African-American and its President and sole shareholder, Christopher Racine, entered into a Letter of Intent whereby Hillcrest, or its assigns, agreed to purchase all of the stock of African-American, including KWOG and all broadcasting rights associated with it. CP 2. At the time the Letter of Intent was signed, it was Hillcrest’s intent to transfer the purchase rights under it to Fisher Communications or Fisher Communications’ designated assignee. CP 2.

Under the January 21, 2006 Letter of Intent, a final sales agreement was to be completed and executed by March 15, 2006. CP 2. Due to

exigencies beyond Hillcrest's control, a final sales agreement was not completed and executed by that time. CP 2.

On or about March 24, 2006, Fisher Communications and Hillcrest entered into a written agreement (the "Fee Agreement") whereby Fisher Communications agreed to pay Hillcrest a specified fee, based on purchase price, in the event Fisher Communications or its subsidiary acquired KWOG. CP 2-3. The Fee Agreement contemplated that Equity Broadcasting or Hillcrest, its affiliate, would enter into another Letter of Intent to acquire KWOG. CP 3. When the new Letter of Intent was signed, the purchase rights would be assigned to Fisher Communications or its designated subsidiary. CP 3. The negotiations for and execution of the Fee Agreement occurred, in substantial part, in Arkansas. CP 3.

Subsequent to the execution of the Fee Agreement, Hillcrest and Fisher Communications modified the provisions of the Fee Agreement to eliminate the requirement for Hillcrest to enter into another Letter of Intent with African-American, and to permit Fisher Communications or Fisher Broadcasting to contract directly with African-American and/or Mr. Racine to acquire KWOG. CP 3. Fisher Communications' obligation to pay Hillcrest a fee in the amount specified by the Fee Agreement in the event it or Fisher Broadcasting acquired KWOG was not modified. CP 3.

At some point subsequent to the execution of the Fee Agreement and without notice to Hillcrest, Fisher Communications and Fisher Broadcasting decided to purchase KWOG without paying Hillcrest the agreed-upon fee. CP 3. Unbeknownst to Hillcrest, Fisher Communications and Fisher Broadcasting completed and on June 26, 2006 executed an agreement for Fisher Broadcasting's purchase of all of Christopher Racine's shares in African-American and for the associated ownership of KWOG and its broadcasting rights. CP 3. No party to that agreement, nor Fisher Communications, disclosed the existence of the purchase agreement to Hillcrest. CP 3.

Under the June 26, 2006 purchase agreement, Fisher Broadcasting agreed to pay \$16,000,000 to acquire Christopher Racine's shares in African-American. CP 3. As provided in the purchase agreement, Fisher Broadcasting paid Racine \$4,000,000 at the execution date and acquired 25% of his stock contemporaneously; the remaining \$12,000,000 was to be paid, and Racine's remaining shares of stock were to be transferred to Fisher Broadcasting, on the closing date. CP 3-4.

Hillcrest did not learn that Christopher Racine, Fisher Broadcasting, and African-American had entered into the purchase agreement until July 31, 2006. CP 4. Racine transferred the remaining

shares of African-American to Fisher Broadcasting, and Fisher Communications or Fisher Broadcasting paid Racine the remaining \$12,000,000, on or about the closing date, which Hillcrest believes was September 26, 2006. CP 4.

Hillcrest requested Fisher Communications to pay it the \$ 500,000 fee required by the March 24, 2006 Fee Agreement, but Fisher Communications refused. CP 4.

B. Procedural history.

Hillcrest filed a Complaint in King County Superior Court against Fisher Communications and Fisher Broadcasting on July 24, 2009. In it, Hillcrest made the factual allegations discussed above, and further alleged that because Arkansas has the most substantial relationship to the Fee Agreement, Arkansas law should apply to determine the rights, obligations, and remedies due under it. CP 4. In the Complaint, Hillcrest alleged that it was the procuring cause resulting in Fisher Broadcasting's, or its assigns' acquisition of KWOG. CP 4. Hillcrest asserted causes of action against the Respondents for breach of contract, unjust enrichment, breach of the covenant of good faith, violation of Washington's Consumer Protection Act, and for punitive damages under Arkansas law. CP 4-6.

On November 16, 2009, Respondents filed their motion for

judgment on the pleadings and requested the trial court to dismiss Hillcrest's Complaint. CP 14-26. The Respondents argued, *inter alia*, that because neither Hillcrest nor Larry Morton are licensed real-estate brokers in Washington, neither of them had the right to recover the fee that the Respondents had promised to pay. CP 18-20. In support of Respondents' motion, Respondents' counsel filed a declaration to which was attached several documents that had not been attached to Hillcrest's Complaint and of which Respondents requested the trial court to take judicial notice, including, *inter alia*, (1) the June 26, 2006 Stock Purchase Agreement between Mr. Racine, African-American, and Fisher Broadcasting, to which neither Hillcrest, Equity Broadcasting, or Mr. Morton were parties and which none of them had seen; (2) correspondence between Respondents' agent/employee and Mr. Morton; and (3) an unsigned draft Asset Purchase Agreement between Equity Broadcasting and African-American that was prepared by Respondents' attorneys. CP 30-147.

Hillcrest opposed the motion for judgment on the pleadings. CP 148-173. In its response, Hillcrest objected to the Respondents' request that the Court take judicial notice of evidentiary documents that had not been attached to its Complaint. CP 158. Alternatively, Hillcrest requested

the opportunity to conduct discovery about the additional evidence if the Court was inclined to consider the documents. *Id.*

On December 18, 2009, King County Superior Court Judge Michael J. Fox granted the Respondents' motion for judgment on the pleadings and dismissed Hillcrest's Complaint with prejudice. CP 191-92. In ruling on the motion, he took judicial notice of and considered the evidence documents attached to Respondents' counsels' declarations. CP 191-192. Judge Fox did not permit Hillcrest to obtain discovery about the evidence submitted by the Respondents, did not permit Hillcrest to file a supplemental response, and did not continue the hearing on the motion. CP 192.

Hillcrest timely filed a Notice of Appeal from the trial court's dismissal of its Complaint. CP 193-97.

IV. SUMMARY OF ARGUMENT

The trial court judge did not properly apply the relevant standards governing motions for judgment on the pleadings when he granted the Respondents' motion and dismissed Hillcrest's Complaint.

For purposes of the motion, all of the allegations Hillcrest asserted in its Complaint had to be presumed to be true, and if there were any alleged or hypothetical set of facts consistent with the allegations in the

Complaint that would entitle Hillcrest to the relief it sought, the motion should have been denied. Because Hillcrest alleged facts in its Complaint and because there are conceivable hypothetical facts consistent with the Complaint that could exist that could result in the conclusion that this dispute should be governed by Arkansas law, and because under Arkansas law Hillcrest is entitled to recover the commission which it sued to collect, the trial court should not have granted the Respondents' motion for judgment on the pleadings.

Arkansas substantive law should apply to this dispute, and the trial court judge incorrectly applied Washington law when he dismissed Hillcrest's Complaint. Although under Washington law Hillcrest would not be able to recover its commission due under the Fee Agreement because it is not licensed in Washington as a real estate or business opportunity broker, under Arkansas law Hillcrest is entitled to recover the commission.

Hillcrest is attempting to recover a commission for its brokerage services related to the sale of the stock and assets of television station KWOG, the sale of a "business opportunity." RCW 18.85.100 requires a broker related to the sale of a business opportunity or real estate to be licensed in Washington to permit it to recover a commission. While

Arkansas law requires brokers to be licensed under Arkansas law to recover a commission related to the sale of real estate, no such licensing requirement is required for a broker to recover a commission related to the sale of a business opportunity. Hillcrest is not licensed as a broker in Washington or Arkansas, but its principal and owner, Larry Morton, is licensed as an Arkansas broker.

There are two bases for the application of Arkansas law instead of Washington law. First, Arkansas law applies because Hillcrest and Mr. Morton performed no brokerage services or acts in Washington. All of the work Hillcrest and Mr. Morton performed related to the sale of KWOG to Fisher Broadcasting was performed in Arkansas. Therefore, the broker licensing requirements of RCW Chapter 18.85 are inapplicable to this dispute, and RCW 18.85.100 is no bar to Hillcrest's action to recover the commission it is due.

Arkansas law also applies, and not Washington law, because Arkansas has the most significant relationship with and to the rights and obligations of the parties under the Fee Agreement. Because the outcome of this dispute will be different depending on what state's laws apply, there is an actual conflict which requires the Court to engage in a conflict of laws analysis. Washington has adopted the factors discussed in Sections 6

and 188 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) that must be examined to determine which state's laws apply to a contract. As to the factors enunciated in Section 188, four of the five favor the application of Arkansas law.

The first three factors are "the place of contracting," "the place of negotiation of the contract," and "the place of performance." The place of contracting and the place of negotiation of the Fee Agreement were both in Arkansas. Hillcrest and Larry Morton performed the broker services required under the Fee Agreement exclusively in Arkansas. Each of these three factors weigh heavily in favor of the application of Arkansas law.

As to the fourth factor stated in Section 188, because no discovery has occurred, it is unknown where the shares of KWOG were located, and it is just as likely that the shares were either unissued or in a state other than Washington as it is that they were located in Washington. Therefore, the "location of the subject matter of the contract" factor is neutral between the two states.

The fifth factor discussed in Section 188 is "the domicile, residence, nationality, place of incorporation and place of business of the parties." Hillcrest and Mr. Morton, its owner and agent, are Arkansas residents. Hillcrest is incorporated under Arkansas law and its principal place of

business is in Arkansas. While the Respondents are incorporated under Washington law and their principal place of business is in Washington, this fifth factor nevertheless favors the application of Arkansas law because Arkansas was the place of contracting and performance. Thus, four of the five factors stated in Section 188 favor the application of Arkansas law to this case.

With respect to the factors discussed in Section 6 of the Restatement, they either favor the application of Arkansas law or are neutral as to which state's law should apply. The primary factor is "the protection of justified expectations." Clearly, when Fisher Communications and Hillcrest entered into the Fee Agreement, it was their expectations that it would be valid and enforceable, and that upon Hillcrest's completion of the services provided for under the Agreement, it would be entitled to, and would be paid, the commission. The justified expectations of the parties' factor thus favors the application of Arkansas law.

Another of the Section 6 factors is "the needs of the interstate and international system." A decision which applies Arkansas law to the dispute would result in the fostering of interstate commerce, so this factor favors the application of Arkansas law.

In evaluating “the basic policies underlying the particular field of law” factor, both states have similar policies concerning the licensing of brokers in their states. But to apply the law of Washington would result in the invalidity of the rights bargained for by the parties, while the application of Arkansas law would sustain the validity of the contract. This Section 6 factor therefore favors the application of Arkansas law.

The remaining Section 6 factors favor neither Arkansas or Washington law. Therefore, on the whole, the factors enumerated in Sections 6 and 188 of the Restatement compel the application of Arkansas law. At a minimum, there are issues of fact about which state’s law should apply, issues that should not have been resolved on a motion for judgment on the pleadings. Trial court Judge Fox should not have summarily applied Washington law, and should not have summarily dismissed Hillcrest’s Complaint.

Judge Fox also should not have taken judicial notice of, and considered in deciding the Respondents’ motion for judgment on the pleadings, documents that were submitted by Respondents, but he did. At a minimum, Judge Fox should have given Hillcrest the opportunity to conduct discovery about these documents, continued the motion for judgment on the pleadings, and permitted Hillcrest to file a supplemental

response. On a motion for judgment on the pleadings, the trial court should take judicial notice only of public documents whose authenticity cannot reasonably be disputed, and of documents whose contents are alleged in the Complaint. Here, Judge Fox took judicial notice of, and considered, documents that are neither public documents nor whose contents were alleged in the Complaint. Although Hillcrest requested the opportunity to conduct discovery concerning these documents, for a continuance, and for the opportunity to file a supplemental response, Judge Fox rejected those requests. It is unclear to what extent Judge Fox based his dismissal of Hillcrest's Complaint on these documents, so this Court should not consider them at all when reviewing the dismissal order *de novo*.

In summary, this Court should reverse the trial court order granting Respondents' motion for judgment on the pleadings and should reinstate Hillcrest's Complaint.

V. ARGUMENT

Trial court Judge Fox committed error when he dismissed Hillcrest's Complaint on the Respondents' CR 12(c) motion. This Court should reverse Judge Fox's order and allow this case to proceed to trial.

A. Standards for review for order of dismissal under CR 12(c).

On appeal, the standard of review of an order granting a motion for judgment on the pleadings under CR 12(c) is *de novo*. *North Coast Enterprises, Inc.*, 94 Wn. App. at 858.

CR 12(c) provides as follows:

Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

In ruling on a motion for judgment on the pleadings, the facts alleged in the complaint, as well as hypothetical facts consistent with those facts, are to be viewed in the light most favorable to the nonmoving party. *Davenport v. Washington Educ. Ass'n*, 147 Wn. App. 704, 775, 197 P.3d 686 (2008). Facts alleged in a complaint must be presumed to be true, and if there are any set of facts consistent with the complaint that would entitle the claimant to relief, a motion for judgment on the pleadings should be denied. *North Coast Enterprises, Inc.*, 94 Wn. App. at 858-59. In making this determination, a court may consider hypothetical facts that are not included in the record. *Parmelee v. O'Neel*, 145 Wn. App. 223, 232, 186

P.3d 1094 (2008), *reversed in part on other issue*, __ Wn.2d __, __ P.3d __, 2010 WL 1077897 (2010) (citation omitted). The purpose of considering hypothetical facts is to “assist the court in establishing the ‘conceptual backdrop’ against which the challenge to the legal sufficiency of the claim is considered.” *Brown v. MacPherson’s Inc.*, 86 Wn. 2d 293, 298 n.2, 545 P.2d 13 (1975). Thus, the inquiry on a motion to dismiss is “whether any facts which would support a valid claim *can be conceived*.” *Bravo v. Dolsen*, 125 Wn. 2d 745, 751, 888 P.2d 147 (1975) (emphasis added). Dismissal is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would entitle it to recover. *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 634-35, 128 P.3d 627 (2006) (citation omitted).

Dismissals under CR 12(c) should be granted sparingly so that a plaintiff is not improperly denied adjudication on the merits. *Fondren v. Klickitat County*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995). Dismissal should be granted “only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Id.* (quoting 5A Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1357, at 344 (2d ed. 1990)). *See also Parmelee*, 145 Wn. App. at 232 (dismissal under CR 12 is appropriate only if it is beyond doubt that the plaintiff cannot prove any

set of facts to justify recovery).

The purpose of a judgment on the pleadings is to determine whether one or more genuine issues of fact exist, not to determine issues of fact. *City of Moses Lake v. Grant County*, 39 Wn. App. 256, 258, 693 P.2d 140 (1984). Thus, it is improper for a court to resolve factual issues on a motion for judgment on the pleadings. *Barnum v. State*, 72 Wn.2d 928, 930-31, 435 P.2d 678 (1965).

In this case, the trial court judge either applied the wrong standard for deciding a motion for judgment on the pleadings or ignored clear law which compels the conclusion that Hillcrest is entitled to recover on its Complaint. In either event, the trial court judge committed error, and his order of dismissal should be reversed.

B. Arkansas law should be apply, and under Arkansas law, Hillcrest is entitled to be paid its broker's commission.

This case turns on what law applies to the Fee Agreement between Fisher Communications and Hillcrest. Choice of law is an issue of law, which the appeals court is to review *de novo*. *Freestone Capital Partners, L.P. v. MKA Real Estate Opportunity Fund I, LLC*, __ Wn. App. __, __ P.3d __, 2010 WL 1645389, at *6 (2010) (citation omitted). In this case, the trial court judge incorrectly determined that Washington law applies, barring Hillcrest's action. Indeed, if Washington law applies, RCW 18.85.100 would not permit Hillcrest to recover a broker's fee on the

transaction between the defendants and African-American. RCW

18.85.100 provides as follows:

No suit or action shall be brought for the collection of compensation as a real estate broker ... without alleging and proving that the plaintiff was a duly licensed real estate broker ... prior to the time of offering to perform any such act or service or procuring any promise or contract for the payment of compensation for any such contemplated act or service.

A “real estate broker” includes “a person, while acting for another for commissions or other compensation or the promise thereof, ... who (a) Sells or offers for sale, ... buys or offers to buy real estate or business opportunities, or any interest therein, for others; [and] (b) Negotiates or offers to negotiate, either directly or indirectly, the purchase, sale, exchange, lease, or rental of real estate or business opportunities, or any interest therein, for others[.]” RCW 18.85.010(1). Hillcrest agrees that under Washington law, it would not be entitled to recover a commission from the Respondents.

However, Arkansas, not Washington, law should apply. Under Arkansas law, a broker of a business opportunity is not required to possess a real estate broker’s, agent’s or salesperson’s license in order to recover a commission for brokering the sale of an opportunity. *See* Ark.Stats. § 17-40-101, *et seq.*; *Frier v. Terry*, 323 S.W.2d 415, 419-21, 230 Ark. 302 (1959) (Arkansas licensing statutes do not require a broker of sale of all

stock of corporation to have a real estate broker's license).² Even if Arkansas law imposed such an requirement, Hillcrest's principal, Larry Morton, was and is a licensed Arkansas real estate broker.³ Thus, under Arkansas law Hillcrest is entitled to collect its fee under the contract with Fisher Communications.

1. RCW 18.85.100 does not bar Hillcrest's action to recover a commission because it conducted no broker services in Washington.

Because Hillcrest performed no broker acts in Washington, the Washington licensing requirements do not apply, and those of Arkansas do. The Washington Supreme Court's decision in *Estate of Stoddard v. Pacific National Bank of Seattle*, 60 Wn.2d 263, 373 P.2d 116 (1962), directs the application of Arkansas law to this case. In *Stoddard*, an Oregon real estate broker located an Oregon purchaser of Washington real estate; the seller refused to honor its commitment to pay a commission,

²The statutes in effect when *Frier v. Terry* was decided, Ark.Stat. § 71-1301, *et seq.*, have been repealed and recodified as Ark.Stats. § 17-40-101, *et seq.* The lack of a licensing requirement of licensing for business opportunity broker, however, is the same in the current Real Estate License Law as it was in the former statutes. *See* Appendix No. 3 (Ark.Stat. 71-1301, *et seq.* (repealed)), and Appendix No. 4 (Ark.Stat. 17-41-101, *et seq.*).

³Under Arkansas law, because Mr. Morton was Hillcrest's owner and agent and was a licensed broker, Hillcrest was entitled to sue to recover the commission even though it did not hold a separate broker's license. *Standard Abstract & Title Co., Inc., v. Rector-Phillips-Morse, Inc.*, 666 S.W.2d 696, 697, 282 Ark. 138 (1984). In fact, under the licensing statute, Hillcrest could not obtain a broker's license. *Id.*

arguing that because the broker was not licensed as a real estate broker or agent in Washington, she was not entitled to recover a commission. The Supreme Court disagreed, holding that RCW 18.85.100 does not apply if the out-of-state broker does not perform broker activities in Washington. Here, as noted above, Hillcrest performed all of its broker activities related to this case in Arkansas. Thus, RCW 18.85.100 does not apply.

Similarly, *Schmitt v. Coad*, 24 Wn. App. 661, 604 P.2d 507 (1979), is not relevant. In *Schmitt*, the Court ruled that an unlicensed real estate broker was not entitled to recover a commission related to the sale of stock in two corporations for which he performed brokerage services. However, there was no allegation that the broker procured the buyer for the stock of the corporations from outside the borders of Washington, so the decision is inapplicable.

In *Consul Limited v. Solide Enterprises, Inc.*, 802 F.2d 1143 (9th Cir. 1986), the Ninth Circuit Court of Appeals permitted a real estate broker licensed in North Carolina to recover a commission for the sale of real estate located in California, even though the broker was not licensed in California, because the broker performed no acts in California. California had a statute substantially similar to Washington's, requiring a party seeking to recover a commission for the sale of real estate in California to prove that he was a licensed California real estate broker or

agent. The court ruled that the bar of California's broker licensing statute did not apply because no brokerage services were performed in the state:

All relevant authority suggests that licensing schemes like California's do not apply to out-of-state activities regarding in-state land. Many courts have found real estate licensing statutes inapplicable to transactions in which brokers performed all of the regulated functions outside the state in which they were not licensed. Some of these courts rely on choice-of-law principles and refuse to apply the law of the state where the broker has no license, but has done little or no work. *E.g.*, *Coldwell Banker & Co. v. Karlock*, 686 F.2d 596, 599-602 (7th Cir.1982); *James v. Hiller*, 85 Ariz. 40, 330 P.2d 999, 1002 (1958); *Cochran v. Ellsworth*, 126 Cal.App.2d 429, 272 P.2d 904, 907-08 (1954). Others rely on the substantive ground that the licensing statutes do not apply to out-of-state activities. *E.g.*, *Lucas v. Gulf & Western Industries*, 666 F.2d 800, 803-04 (3d Cir.1981); *Paulson v. Shapiro*, 490 F.2d 1, 4-5 (7th Cir.1973); *Sun Sales Corp. v. Block Land, Inc.*, 456 F.2d 857, 862-63 (3d Cir.1972); *Richland Development Co. v. Staples*, 295 F.2d 122, 129 (5th Cir.1961); *Maas v. Merrell Associates*, 13 Ark.App. 240, 682 S.W.2d 769, 771 (1985); *Republic Funding Corp. v. Americable Associates*, 478 So.2d 1097, 1098 (Fla.App.1985); *Keenan Co. v. Pamlico, Inc.*, 245 Ga. 842, 268 S.E.2d 334, 336 (1980); *Johnson v. Allen*, 108 Utah 148, 158 P.2d 134, 139 (1945); *In re Estate of Stoddard*, 60 Wash.2d 263, 373 P.2d 116, 118-20 (1962). This is true even if the land is located in the forum state. *See, e.g.*, *Paulson*, 490 F.2d at 2.

The latter group of cases find no interference with the public policy of the state in which the broker is not licensed in allowing recovery for services performed out of state, *Coldwell Banker*, 686 F.2d at 601; *Sun Sales*, 456 F.2d at 863; *Richland Development*, 295 F.2d at 129, and have noted that the language "in this state" demonstrates that licensing statutes were "not intended to reach persons who render brokerage services outside" the state in question, *Lucas*, 666 F.2d at 803; *see Paulson*, 490 F.2d at 4; *Maas*, 682 S.W.2d at 771.

Id. at 1150 (footnote omitted). *Accord, Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 697, 167 P.3d 1112 (2007) (“California’s broker licensing statutes do not regulate out-of-state acts performed by a broker licensed in another state, even when those acts relate to California realty.”).

Similarly, in *All-Pro Reps, Inc. v. Lukenbill*, 961 F.2d 216 (table), 1992 WL 84295 (text) (9th Cir. 1992), the Ninth Circuit interpreted California’s business licensing statute, which is very similar Washington’s broker licensing statute, upholding a jury verdict in favor of a broker for an unpaid commission. The court ruled that the broker was not barred from collecting a commission for selling a business opportunity because he performed the broker services from outside California’s borders:

Defendants next assert that the district court erred by failing to rule that Davis is barred from enforcing the contract due to California's broker-licensing scheme. A broker of business opportunities in California is required to hold a California real estate broker license. Cal.Bus. & Prof.Code § 10131(a) (West 1987) (one who “solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of ... a business opportunity” is a real estate broker); *id.* § 10130 (unlawful for any person to act as a real estate broker without obtaining a license). An unlicensed broker may not sue to obtain his fee. *Id.* §10136. The district court correctly held that California’s licensing scheme did not bar Davis’s action because all of Davis’s broker services were performed outside California. (Citation omitted).

Id. at *3.

A similar result occurred in *Paulson v. Shapiro*, 490 F.2d 1 (7th

Cir. 1973). There, a real estate broker licensed in Illinois but not in Wisconsin procured a lessee for his principal's property in Wisconsin through negotiations in Illinois and Tennessee; no meetings, discussions, or negotiations occurred in Wisconsin. The court held that Wisconsin's licensing requirement that a broker be licensed in Wisconsin to recover a commission did not prevent the plaintiff from recovering his commission because the broker did not act as a broker in Wisconsin:

The record indicates that at all times during which plaintiff acted "for another" in an attempt to "negotiate a . . . rental of an interest . . . in real estate", he was acting outside the State of Wisconsin. As defendants' agent he was not attempting "to negotiate" the lease when conferring with his alleged principal in Wisconsin. Negotiation of the lease occurred when plaintiff, acting for another (his principal), met and conferred with the prospective tenant, The Downtowner Corporation. As previously noted, plaintiff's affidavits aver that all such negotiations occurred either in Illinois or in Tennessee.

Id. at 4.

In this case, Hillcrest's performed no broker services in Washington. The broker services Hillcrest performed were performed in Arkansas, so Arkansas law applies. RCW 18.85.100 is inapplicable and it does not prohibit Hillcrest from recovering its commission on the sale of African-American's shares to Fisher Broadcasting. Judge Fox committed error by dismissing Hillcrest's Complaint.

2. Arkansas law also applies, and not Washington's, because Arkansas has the most significant relationship to the issues presented by the Fee Agreement.

If Washington law applied, RCW 18.85.100 would bar Hillcrest's action to recover its broker commission. No such bar is presented by Arkansas law, however; under Arkansas law, Hillcrest is entitled to recover its commission. Because application of the different states' laws results in different results, the court must perform a conflict of laws analysis. *Seizer v. Sessions*, 132 Wn.2d 642, 648-49, 940 P.2d 261 (1997) (citation omitted) ("When the result of the issues is different under the laws of the two states, there is a 'real' conflict.").

The first step in resolving a choice of law dispute is to determine if there is an actual conflict between the laws of the two states on the disputed issue. *Erwin*, 161 Wn.2d at 692 (quoting *Seizer*, 132 Wn.2d at 648). As just demonstrated, there is indeed an actual conflict between Washington's laws and Arkansas' laws on the disputed issue, the enforceability of the Fee Agreement.

Washington has adopted the test stated in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971) ("the Restatement") for determining what law applies to govern a contract: "In the absence of an effective choice of law by the parties, the validity and effect of a contract are governed by the law of the state having the most significant

relationship with the contract.” *Mulcahy v. Farmers Ins. Co.*, 152 Wn.2d 92, 100, 95 P.3d 313 (2004) (citation omitted); *Seizer*, 132 Wn.2d at 650 (citations omitted) (where there is a conflict of laws between states, “the applicable law is decided by determining which jurisdiction has the most significant relationship to a given issue”).

Determining which state has the most significant relationship with a contract requires the Court to make a factual inquiry. *Hughes Wood Products, Inc. v. Wagner*, 18 S.W.3d 202, 204 (Tex. 2000) (while determining which state’s law governs an issue is a question of law, evaluating the state contacts to be considered by the court in making this determination involves a factual inquiry); *see also In re Cyrus II Partnership*, 413 B.R. 609, 621 (Bankr. S.D. Tex. 2008) (material issues of fact existed as to whether Ohio or Texas had most significant relationship to alleged fraudulent transfer of Ohio property to Ohio limited partnership that had its principal place of business in Texas).

Section 6 of the Restatement identifies the factors which determine which state has the most significant relationship to the transaction:

[T]he factors relevant to the choice of the applicable rule of law include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination

of the particular issue,
 (d) the protection of justified expectations,
 (e) the basic policies underlying the particular field
of law,
 (f) certainty, predictability and uniformity of result,
and
 (g) ease in the determination and application of law
to be applied.

Restatement § 6(2).

Section 188 of the Restatement was expressly adopted in *Mulcahy* for determining which contacts should be taken into account to apply the principles stated in Section 6 of the Restatement. They include:

 (a) the place of contracting,
 (b) the place of negotiation of the contract,
 (c) the place of performance,
 (d) the location of the subject matter of the contract, and
 (e) the domicile, residence, nationality, place of
incorporation and place of business of the parties.

Mulcahy, 152 Wn.2d at 101 (quoting Restatement § 188(2)). In applying the most significant relationship test, the Court is not to merely “count the contacts” between each state. *Potlatch No. 1 Fed. Credit Union v. Kennedy*, 76 Wn.2d 806, 810, 459 P.2d 32 (1969). “Rather these contacts are guidelines indicating where the interests of particular states may touch the transaction in question.” *Id.* “These contacts are to be evaluated according to their relative importance with respect to the particular issue.” *Mulcahy*, 152 Wn.2d at 101 (quoting Restatement § 188(2)). There is no precise rule that will provide a definitive answer to determine which state

has the most significant contacts, and each case must be evaluated on its own facts, as confirmed in the Restatement:

[T]he difficulties and complexities involved have as yet prevented the courts from formulating a precise rule, or series of rules, which provide a satisfactory accommodation of the underlying factors in all of the situations which may arise. All that can presently be done in these areas is to state a general principle, such as application of the local law “of the state of most significant relationship”, which provides some clue to the correct approach but does not furnish precise answers. In these areas, the courts must look in each case to the underlying factors themselves in order to arrive at a decision which will best accommodate them.

Statement of precise rules in many areas of choice of law is made even more difficult by the great variety of situations and issues, by the fact that many of these situations and issues have not been thoroughly explored by the courts, by the generality of statement frequently used by the courts in their opinions, and by the new grounds of decision stated in many of the more recent opinions.

Restatement § 6(2), cmt. c.

“The protection of justified expectations” is one of the factors identified in Section 6(2) of the Restatement. This important factor “may significantly tip the scales in favor of one jurisdiction’s laws being applied over another’s.” *Potlatch No. 1 Fed. Credit Union*, 76 Wn.2d at 810; accord Restatement § 6(2)(d), cmt. b; Restatement § 188(1), cmt. b. The Restatement explains the importance of the parties’ justified expectations:

[T]he protection of justified expectations of the parties is of considerable importance in contracts[.] ... In situations where the parties did not give advance thought to the

question of which should be the state of applicable law, or where their intentions in this regard cannot be ascertained, it may at least be said, subject perhaps to rare exceptions, that *they expected that the provisions of the contract would be binding on them.*

The need for protecting the expectations of the parties gives importance in turn to the values of certainty, predictability, and uniformity of result. For unless these values are attained, the expectations of the parties are likely to be disappointed.

Protection of the justified expectations of the parties by choice of law rules in the field of contracts is supported both by those factors in Subsection (2) of § 6 which are directed to the furtherance of the needs of the parties and by those factors which are directed to implementation of the basic policy underlying the field of contracts. *Protection of the justified expectations of the parties is the basic policy underlying the field of contracts.*

... Parties entering a contract will expect at the very least, subject perhaps to rare exceptions, that the provisions of the contract will be binding upon them. Their expectations should not be disappointed by application of the local law rule of a state which would strike down the contract or a provision thereof unless the value of protecting the expectations of the parties is substantially outweighed in the particular case by the interest of the state with the invalidating rule in having this rule applied. The extent of the interest of a state in having its rule applied should be determined in the light of the purpose sought to be achieved by the rule and by the relation of the transaction and the parties to that state. (Citation omitted).

Restatement § 188(1), cmt. b. Clearly, the reasonably justified expectations of Hillcrest and the Respondents at the time of contracting

were that the Fee Agreement would be valid and binding on them.⁴ If the contract is invalid under Washington law but valid under Arkansas law, the parties' expectations that the contract would be valid is a significant factor and weighs heavily in favor of application of Arkansas law.

Examining the other factors identified in the Restatement buttresses the conclusion that Arkansas law should apply. At a minimum, there are issues of fact which should have prevented the trial court from summarily determining, on the Respondents' motion for judgment on the pleadings, that Washington law applies and bars Hillcrest's action.

a. The place of contracting.

"[T]he place of contracting is the place where occurred the last act necessary, under the forum's rules of offer and acceptance, to give the contract binding effect, assuming, hypothetically, that the local law of the state where the act occurred rendered the contract binding." Restatement § 188(2), cmt. e. Here, it is a conceivable hypothetical fact consistent with the allegations of the Complaint that the last act necessary to give the contract binding effect was Mr. Morton's signing of it, and that act occurred in Arkansas. This factor weighs in favor of the application of

²The Court should presume that the parties intended their contract to be valid and enforceable, but even if there is no such presumption, it is a conceivable hypothetical fact that they did, which supports the reversal of the trial court's order of dismissal. *Bravo v. Dolsen*, 125 Wn. 2d at 751.

Arkansas law to this case.

In the trial court, the Respondents contended the place of contracting factor favored the application of Washington because Washington would have been the place where the last act necessary to make the fee contract binding would have occurred, *i.e.*, “the place where the broker produced a purchaser ready, able and willing to buy”. CP 24. However, the Respondents completed the transaction with African-American without informing Hillcrest, and Hillcrest had no control over where the “last act necessary” occurred. Had Fisher Communications not completed its purchase in secret, the Purchase Agreement could have been signed in Arkansas, or from any state other than Washington. Indeed, it is a conceivable fact consistent with the Complaint that the Purchase Agreement between Fisher and African-American was *not* signed in Washington – that is an issue to be learned in discovery. Hillcrest should not be penalized in the choice of law analysis because the Respondents attempted to prevent it from receiving its fee by secretly transacting with African-American.

b. The place of negotiation.

“The place where the parties negotiate and agree on the terms of their contract is a significant contact. Such a state has an obvious interest in the conduct of the negotiations and in the agreement reached.”

Restatement §188(2), cmt. e. Here, paragraph 9 of the Complaint alleges that “[t]he negotiations for and execution of the Fee Agreement occurred, in substantial part, in the State of Arkansas.” CP 3. This allegation must be regarded as true. *North Coast Enterprises., Inc.*, 94 Wn. App. at 858-59. Therefore, this factor weighs heavily in favor of the application of Arkansas law.

c. The place of performance.

It is a conceivably true that Hillcrest performed all of its services related to the Fee Agreement in Arkansas, and that had the Respondents not completed the transaction with African-American in secret, Hillcrest would have completed all its broker services in Arkansas. These factors favor the application of Arkansas law, and the non-application of the requirement that Hillcrest be a licensed Washington real estate broker.

The comments to Restatement §188(2)(c) explain:

The state where performance is to occur under a contract has an obvious interest in the nature of the performance and in the party who is to perform. So the state where performance is to occur has an obvious interest in the question whether this performance would be illegal. (Citation omitted). When both parties are to perform in the state, this state will have so close a relationship to the transaction and the parties that it will often be the state of the applicable law even with respect to issues that do not relate strictly to performance. And this is even more likely to be so if, in addition, both parties are domiciled in the state.

On the other hand, the place of performance can bear little

weight in the choice of the applicable law when (1) at the time of contracting it is either uncertain or unknown, or when (2) performance by a party is to be divided more or less equally among two or more states with different local rules on the particular issue.

Id., cmt. e (emphasis supplied). The Fee Agreement does not specify where Hillcrest's performance was to occur, and it is certainly a conceivable fact that the parties contemplated that Hillcrest would do its work exclusively from Arkansas. Hillcrest could have completed all of the work necessary to perform the services called for under the Fee Agreement, using the telephone, fax lines, and the internet. Nothing required it to perform any part of the work called for by the contract in Washington.

In the trial court, Respondents argued that the contract between Hillcrest and the Respondents was a "service contract," so Restatement §196 applies and favors the application of Washington law. CP 22-23. However, Section 196 is inapplicable, because the work called for under the Fee Agreement did not require it to be rendered in a single state:

The rule applies if the major portion of the services called for by the contract is to be rendered in a single state and it is possible to identify this state at the time the contract is made. It is necessary that the contract should state where the major portion of the services is to be rendered or that this place can be inferred either from the contract's terms or from the nature of the services involved or from other circumstances. For this reason, the rule of this Section is unlikely to aid in the determination of the law governing contracts for employment aboard a ship sailing the high

seas or to serve as a traveling salesman in two or more states. The same is true when the work called for by the contract can be done in any one of two or more states.

Restatement §196, cmt. a. Because Hillcrest's performance could have been rendered exclusively in Arkansas, Section 196 is inapplicable. When the place of negotiation and the place of performance are in the same state, as they are here, the local law of this same state will usually be applied to govern issues arising under the contract. Restatement §188(3).

Even if Section 196 does apply and the Court concludes that Washington is the state where Hillcrest's services were to be performed, Section 196 favors the application of Arkansas law to this dispute, because if Washington law applies Hillcrest has no right to recover its commission. Section 196 directs as follows:

When local law of the state where services are to be rendered will not be applied. On occasion, a state which is not the place where the contract requires that the services, or a major portion of the services, should be rendered will nevertheless, with respect to the particular issue, be the state of the most significant relationship to the transaction and the parties and hence the state of the applicable law. *This may be so, for example, when the contract would be invalid under the local law of the state where the services are to be rendered but valid under the local law of another state with a close relationship to the transaction and the parties.* In such a situation, the local law of the other state should be applied unless the value of protecting the expectations of the parties by upholding the contract is outweighed in the particular case by the interest of the state where the services are to be performed in having its invalidating rule applied.

Restatement §196, cmt. d (emphasis supplied).

In *Nelson v. Kaanapali Properties*, 19 Wn. App. 893, 578 P.2d 1319 (1978), this Court interpreted Section 196 to permit a Washington subcontractor, registered in Washington but not in Hawaii, to recover for construction services performed in Hawaii, even though Hawaii law required as a precondition to recovery for such work that the plaintiff be registered as a contractor under Hawaii's registration statute. The Court ruled concluded that Hawaii's public policy requiring contractors to perform work there to be registered as Hawaiian contractors was outweighed by a number of other factors, most significantly the expectations of the parties:

The desire of the parties at the time of contracting was to create an enforceable contract. [Defendant] Kaanapali expected the work to be performed and [Plaintiff] Nordic Tile expected to be paid and to make a profit. Consideration of the expectation interests of the parties would weigh heavily in upholding the validity of the contract against the interests and public policy of Hawaii.

Id. at 898. The Court permitted the contractor to recover for the work it performed in Hawaii, even though it was not registered as a contractor in Hawaii. *Id.* at 899-900.

If the Court determines that Restatement Section 196 applies, it should nevertheless conclude that Arkansas law applies because to rule otherwise would transform Washington's real estate broker statute "into an

unwarranted shield for the avoidance of a just obligation.” *Id.* at 899 (quoting *Andrews Fixture Co. v. Olin*, 2 Wn. App. 744, 750, 472 P.2d 420 (1970)). Thus, under either analysis – whether Section 196 does or does not apply – the “place of performance” factor heavily favors the application of Arkansas law to this case.

d. The location of the subject matter of the contract.

Because the motion for judgment on the pleadings was granted early in the case, prior to the completion of any discovery, it is unknown whether the shares of the stock of African-American had been issued prior to Fisher Communications’ agreement to purchase them. It is also unknown where they were located if they had been issued. It is conceivable that the shares was held in a state other than Washington. Under that possible fact, the location of the subject matter of the contract would favor the application of neither Washington nor Arkansas law.

The comment to Restatement §188(2)(d) provides:

When the contract deals with a specific physical thing, such as land or a chattel ... the location of the thing ... is significant. (Citation omitted). The state where the thing or the risk is located will have a natural interest in transactions affecting it. Also the parties will regard the location of the thing or of the risk as important.

Id., cmt. e.

It is just as conceivable that the shares of African-American were being held outside of Washington as it is that they were being held in

Washington. Thus, this factor does not favor the application of either Washington or Arkansas law, and certainly did not justify dismissal of Hillcrest's claim prior to the completion of discovery.

e. Domicil, residence, nationality, place of incorporation, and place of business of the parties.

The fifth Restatement factor for determining which state has the most significant relationship to the transaction is the domicil, residence, nationality, place of incorporation, and place of business of the parties. This factor weighs in favor of the application of Arkansas law to this dispute.

The comment to Restatement §188(2)(5) states,

Domicil, residence, nationality, place of incorporation, and place of business of the parties. These are all places of enduring relationship to the parties. Their significance depends largely upon the issue involved and upon the extent to which they are grouped with other contacts. So, for example, when a person has capacity to bind himself to the particular contract under the local law of the state of his domicil, there may be little reason to strike down the contract because that person lacked capacity under the local law of the state of contracting or of performance. (Citation omitted). *The fact that one of the parties is domiciled or does business in a particular state assumes greater importance when combined with other contacts, such as that this state is the place of contracting or of performance or the place where the other party to the contract is domiciled or does business.*

Id., cmt. e. Here, Hillcrest and Mr. Morton, its agent, are Arkansas residents. Hillcrest is incorporated under Arkansas law and its principal

place of business is in Arkansas. Respondents, on the other hand, are incorporated under Washington law and their principal place of business is in Washington. This appears to be a toss-up as to whether this factor favors the application of Arkansas and Washington law, but because Arkansas was the place of contracting and performance the scales are tipped slightly towards the application of Arkansas law for this factor.

Accordingly, four of the five factors identified in Section 188(2) of the Restatement for determining which state has the greater contacts with the subject transaction favor the application of Arkansas law, and one of the five issues is neutral. Thus, under Section 188(2) of the Restatement, Arkansas law should apply, and Hillcrest is entitled to recover its commission.

f. The competing public policies of the involved states favor the application of Arkansas law.

Section 6(c) of the Restatement directs that in determining which of two competing states' laws should apply to a dispute, the Court should also consider the relevant policies of the interested states and the relative interests of those states in the determination of the particular issue.

Restatement § 6(2)(c). As stated by the court in *Nelson v. Kaanapali Properties*,

Certainly an identification of contacts is meaningless without consideration of the interests and public policies of potentially concerned states and a regard as to the manner

and extent of such policies as they relate to the transaction in issue. These competing policies must also be weighed against the justified expectations of the parties.

Nelson v. Kaanapali Properties, 19 Wn. App. at 898.

However, public policy does not favor the application of Washington law simply because Washington is the forum state, as explained in the comment to the Restatement:

In determining a question of choice of law, the forum should give consideration not only to its own relevant policies (citation omitted) but also to the relevant policies of all other interested states. The forum should seek to reach a result that will achieve the best possible accommodation of these policies. The forum should also appraise the relative interests of the states involved in the determination of the particular issue. In general, it is fitting that the state whose interests are most deeply affected should have its local law applied. Which is the state of dominant interest may depend upon the issue involved.

Restatement § 6(2)(c), cmt. e.

Washington has an interest in regulating the conduct of brokers that perform services in Washington state. “Real estate and business opportunity brokers statutes are designed to protect the public from fraud and misrepresentation by dishonest persons.” *Schmitt v. Coad*, 24 Wn. App. at 665. The statute requiring brokers to be licensed before recovering for broker services conducted in Washington supports this policy. However, that policy is not implicated here, because Hillcrest and Mr. Morton carried out no broker activities in Washington.

The negotiations for the brokerage contract and Hillcrest's performance under the contract all occurred in Arkansas. This favors the application of Arkansas law: "If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied[.]" Restatement § 188(3). "A state having these contacts will usually be the state that has the greatest interest in the determination of issues arising under the contract." Restatement §188(3), cmt. f. Thus, Arkansas has the greatest interest in the regulation of the transaction between Hillcrest and the Respondents – another factor which favors the application of Arkansas law to the dispute.

g. The "needs of the interstate and international systems" are better served by the application of Arkansas law to the transaction.

As to "[t]he needs of the interstate and international systems," it is "[p]robably the most important function of choice-of-law rules ... to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them."

Restatement § 6(2)(a), cmt. d. Hillcrest submits that a result which would invalidate the contract obligations owed to it would not facilitate commercial intercourse between states, and would be counterproductive to the fostering of "harmonious relations" between Arkansas and

Washington. Accordingly, this factor favors the application of Arkansas law.

h. “The basic policies underlying the particular field of law” factor stated in Section 6(2)(e) of the Restatement favors the application of Arkansas law.

The factor stated in Section 6(2)(e) is “the basic policies underlying the particular field of law.” The comment to the Restatement explains the meaning of this factor:

This factor is of particular importance in situations where the policies of the interested states are largely the same but where there are nevertheless minor differences between their relevant local law rules. In such instances, there is good reason for the court to apply the local law of that state which will best achieve the basic policy, or policies, underlying the particular field of law involved. This factor explains in large part why the courts seek to apply a law that will sustain the validity of a contract against the charge of commercial usury or the validity of a trust of movables against the charge that it violates the Rule Against Perpetuities.

Restatement § 6(2)(e), cmt. h (citations omitted).

The policies underlying the broker licensing statutes in Arkansas Washington and Arkansas are similar, to protect the public from fraud and misrepresentation by dishonest persons (*see, e.g., Schmitt v. Coad*, 24 Wn. App. at 665), and to protect the public from unlicensed brokers and salespersons (*Standard Abstract & Title Co, Inc. v. Rector-Phillips-Morse, Inc.*, 666 S.W.2d at 697). But Mr. Morton is licensed as a broker in Arkansas and there are minor differences between the laws of the two

states, so, as suggested by the comment to the Restatement, this Court should seek to apply the law of the state that will sustain the validity of the contract. Thus, this factor favors the application of Arkansas law.

i. The “[c]ertainty, predictability and uniformity of result” factor is neutral between the two states.

Section 6(2)(f) requires the Court to evaluate the “certainty, predictability and uniformity of result” when deciding which state’s law to apply. The comment to the Restatement explains when this factor comes into play:

These are important values in all areas of the law. To the extent that they are attained in choice of law, forum shopping will be discouraged. These values can, however, be purchased at too great a price. In a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules. Predictability and uniformity of result are of particular importance in areas where the parties are likely to give advance thought to the legal consequences of their transactions. It is partly on account of these factors that the parties are permitted within broad limits to choose the law that will determine the validity and effect of their contract and that the law that would be applied by the courts of the state of the situs is applied to determine the validity of transfers of interests in land. Uniformity of result is also important when the transfer of an aggregate of movables, situated in two or more states, is involved. Partly for this reason, the law that would be applied by the courts of the state of a decedent’s domicile at death is applied to determine the validity of his will in so far as it concerns moveables and the distribution of his movables in the event of intestacy.

Restatement § 6(2)(f), cmt. i (citations omitted).

This factor does not appear to favor either the application of Washington or Arkansas law to this dispute. While there is value in a rule which requires that all brokers that contract with reference to a business located in Washington be licensed in Washington, the rule in Arkansas that business opportunity brokers do not need to hold a real estate broker's license is well-established. It would detract from the predictability of Arkansas law if a different rule is applied in this case to an Arkansas broker that performed no broker services in Washington. Nor are any of the examples discussed in the comment to this Restatement factor applicable. Accordingly, this factor favors neither application of Washington or Arkansas law.

j. The “ease in the determination and application of law to be applied” factor favors neither Arkansas nor Washington law.

The final factor discussed in Section 6(2) of the Restatement is “ease in the determination and application of law to be applied.” The comment to the Restatement indicates that this factor is not to be accorded significant weight:

Ideally, choice-of-law rules should be simple and easy to apply. this policy should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results. The policy does, however, provide a goal for which to strive.

In view of the fact that there are bright-line rules for the recovery of broker commissions in both Arkansas and Washington, and in view of the other factors that have been discussed in detail in this brief, this factor does not appear to favor either the application of Arkansas or Washington law to this dispute.

In summary, the expectations of the parties were that they had a valid and enforceable contract. Hillcrest, acting for Fisher Communications or its assigns, was going to broker the purchase of all the shares of African-American, and Hillcrest would be compensated for its services. The parties, after negotiating the contract primarily in Arkansas, finalized their contract in Arkansas when Mr. Morton signed the agreement and transmitted it back to Fisher Communications. Hillcrest performed the broker services contemplated by the agreement in Arkansas. Hillcrest was incorporated in and did business in Arkansas, and Mr. Morton resided in Arkansas. Because the negotiations for the Fee Agreement and the place of performance occurred in Arkansas and Hillcrest performed no broker services in Washington, public policy supports the application of Arkansas law to the dispute. Accordingly, Arkansas law should apply, and Hillcrest should be permitted to recover its commission due under the Fee Agreement. At a minimum, there are issues of fact that precluded the summary application of Washington law

and the dismissal of Hillcrest's Complaint. The trial court should not have granted the Respondents' motion for judgment on the pleadings or dismissed Hillcrest's Complaint.

C. The trial court should not have taken judicial notice of the content of documents submitted by Respondents in support of the motion for judgment on the pleadings, or should have given Hillcrest an opportunity to conduct discovery concerning the evidence and to file a supplemental response.

In support of their motion for judgment on the pleadings, the Respondents relied and made arguments based on several documents that were not attached to Hillcrest's Complaint. CP 15-17. It is unclear to what extent the trial court relied on the additional evidence in granting the motion. However, it does not matter to what extent the trial court considered the additional evidence, because this Court's review of the trial court order is *de novo*. *North Coast Enterprises, Inc.*, 94 Wn. App. at 858. This Court should reverse the trial court's dismissal order without considering the additional evidence.

If matters outside of the pleadings are submitted to and considered by the Court, a motion for judgment on the pleadings is converted to one for summary judgment. *City of Moses Lake v. Grant County*, 39 Wn. App. at 258-59. However, whether to consider such additional matters is within the Court's discretion. 3A Orland and Tegland, WASH. PRAC.: Rule 12, at 250 (4th ed. 1992) ("The court is not required to accept the tender of

materials extraneous to the pleadings in considering motions under Subdivisions (b)(6) and (c) of Rule 12. Until counsel is in court, he does not know whether his motion will be converted.”). If the Court decides to consider additional material submitted with the motion and treat the motion as one for summary judgment, the plaintiff is entitled to a reasonable opportunity to present pertinent material in opposition to the motion. *Bly v. Pilchuck Tribe No. 42, Improved Order of Red Men*, 5 Wn. App. 606, 607, 489 P.2d 937 (1971); *Blenheim v. Dawson & Hall Ltd.*, 35 Wn. App. 435, 439, 667 P.2d 125 (1983) (if a trial court considers a motion under CR 12(c) as one for summary judgment, it must ask all parties if they wish to present materials to oppose the motion).

In ruling on a motion under Civil Rule 12, a trial court may take judicial notice of public documents whose authenticity cannot reasonably be disputed and documents whose contents are alleged in a complaint but which are not physically attached to the complaint. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008). The corollary, however, is that the trial court should not take judicial notice of public documents whose authenticity may be disputed or documents whose contents are not alleged in a complaint. *See, e.g., Aecon Bldgs., Inc. v. Zurich North America*, 2008 WL 786654, at *6 (W.D. Wash. 2008) (J. Pechman) (court denied defendant’s request to take judicial notice under

Fed. R. Evid. 201 of a complaint and an answer filed in another case, as “these pleadings are not ‘sources whose accuracy cannot reasonably be questioned.’”).

In this case, the trial court should not have taken judicial notice of all of the additional evidence proffered by the Respondents in support of their motion. With respect to the evidence attached to the Declaration of Harry H. Schneider, Jr. (CP 30-147), Exhibit 1 was the thirty-eight page, June 26, 2006 Stock Purchase Agreement between Mr. Racine, African-American, and Fisher Broadcasting. The only references to this Agreement in Hillcrest’s Complaint were in Paragraphs 11 and 12:

11. At some point subsequent to the execution of the Fee Agreement, and without notice to Hillcrest, Fisher Communications and Fisher Broadcasting decided to purchase KWOG without paying Hillcrest the agreed-upon fee. Unbeknownst to Hillcrest, Fisher Communications and Fisher Broadcasting completed and on June 26, 2006 executed an agreement for Fisher Broadcasting’s purchase of all of Christopher Racine’s shares in African-American and for the associated ownership of KWOG and its broadcasting rights. No party to that agreement, nor Fisher Communications, disclosed the existence of the purchase agreement to Hillcrest.

12. Pursuant to the provisions of the June 26, 2006 purchase agreement, Fisher Broadcasting agreed to pay \$16,000,000 to acquire Christopher Racine’s shares in African-American. Pursuant to the provisions of the purchase agreement, Fisher Broadcasting paid Racine \$4,000,000 at the execution date and acquired 25% of his stock contemporaneous therewith; the remaining \$12,000,000 was to be paid, and Racine’s remaining shares of stock were to be transferred to Fisher Broadcasting, on

the closing date.

CP 3. The Stock Purchase Agreement is not a public document, and by no means did the passing reference to it in Paragraphs 11 and 12 of Hillcrest's Complaint come close to "alleging its contents." Hillcrest knew nothing about the Stock Purchase Agreement, was not a party to it, and had no part in its drafting. The trial court should not have taken judicial notice of the Stock Purchase Agreement.

Similarly, Exhibit 5 to Mr. Schneider's declaration was the fifty-one page draft Asset Purchase Agreement between Equity Broadcasting and African-American. CP 91-145. This document is not a public document and its contents are not alleged in Hillcrest's Complaint. It is not even mentioned in the Complaint. The trial court should not have taken judicial notice of it.

Exhibit 6 to Mr. Schneider's declaration was correspondence from Robert Bateman, an employee of one of the Respondents, to Mr. Morton. CP 147. This document is not a public document and its contents were not referenced in Hillcrest's Complaint, so the trial court should not have taken judicial notice of its contents.

There was no legal basis for the trial court to have taken judicial notice of Exhibits 1, 5, or 6. If the trial court was going to consider the additional evidence, it should have given Hillcrest the opportunity to

conduct discovery about the evidence and to file a supplemental response to the motion. *Bly*, 5 Wn. App. at 607; *Blenheim*, 35 Wn. App. at 439. As just one example, the opportunity for discovery might have revealed that the shares of African-American were located in a state other than Washington. Discovery may also have revealed that Mr. Racine did not reside in Washington state. Accordingly, because Hillcrest did not have the opportunity to conduct discovery, the trial court record unfairly favored the Respondents. For that reason, this Court should reverse the trial court dismissal order without reviewing the additional evidence. At a minimum, the Court should remand the case to the trial court with instructions to vacate the dismissal order and permit Hillcrest to conduct discovery and to file a supplemental response to the motion for judgment on the pleadings when discovery is completed.

IV. CONCLUSION

Arkansas law should apply to the dispute between Hillcrest and the Respondents because it has the most significant relationship to the transaction and the parties. Under Arkansas law, Hillcrest is entitled to recover the commission the Respondents owe it for being the procuring cause of the transfer of African-American's stock to Fisher Broadcasting. Therefore, the Court should apply Arkansas law and reverse the trial court order granting the Respondents' motion for judgment on the pleadings and

dismissing Hillcrest's Complaint. At a minimum, the Court should remand the case to the trial court with instructions to vacate the dismissal order and to permit Hillcrest to conduct discovery and file a supplemental response to the motion for judgment on the pleadings.

DATED THIS 5th day of May, 2010.

BERRY & BECKETT, PLLP



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1708 Bellevue Ave.
Seattle, WA 98122
Tel: 206.441.5444

Attorneys for Appellant

DECLARATION OF SERVICE

Guy W. Beckett declares:

On May 5, 2010, I mailed a copy of the foregoing document by

United States first-class mail, with proper postage affixed, to:

Harry H. Schneider, Jr., WSBA #9404
Jeffrey M. Hanson, WSBA #34871
PERKINS COIE LLP
1201 Third Ave., Ste. 4800
Seattle, WA 98101-3099

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED THIS 5th day of May, 2010, at Seattle, Washington.



Guy W. Beckett

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APPENDIX NO. 1
RCW 18.85.100

RCW 18.85.100

License required — Prerequisite to suit for commission. (*Effective until July 1, 2010.*)

It shall be unlawful for any person to act as a real estate broker, associate real estate broker, or real estate salesperson without first obtaining a license therefor, and otherwise complying with the provisions of this chapter.

No suit or action shall be brought for the collection of compensation as a real estate broker, associate real estate broker, or real estate salesperson, without alleging and proving that the plaintiff was a duly licensed real estate broker, associate real estate broker, or real estate salesperson prior to the time of offering to perform any such act or service or procuring any promise or contract for the payment of compensation for any such contemplated act or service.

[1997 c 322 § 6; 1972 ex.s. c 139 § 9; 1951 c 222 § 8. Formerly: (i) 1941 c 252 § 6; Rem. Supp. 1941 § 8340-29. (ii) 1941 c 252 § 25; Rem. Supp. 1941 § 8340-48.]

APPENDIX NO. 2
RCW 18.85.010

RCW 18.85.010
Definitions. (*Effective until July 1, 2010.*)

In this chapter words and phrases have the following meanings unless otherwise apparent from the context:

- (1) "Real estate broker," or "broker," means a person, while acting for another for commissions or other compensation or the promise thereof, or a licensee under this chapter while acting in his or her own behalf, who:
 - (a) Sells or offers for sale, lists or offers to list, buys or offers to buy real estate or business opportunities, or any interest therein, for others;
 - (b) Negotiates or offers to negotiate, either directly or indirectly, the purchase, sale, exchange, lease, or rental of real estate or business opportunities, or any interest therein, for others;
 - (c) Negotiates or offers to negotiate, either directly or indirectly, the purchase, sale, lease, or exchange of a manufactured or mobile home in conjunction with the purchase, sale, exchange, rental, or lease of the land upon which the manufactured or mobile home is, or will be, located;
 - (d) Advertises or holds himself or herself out to the public by any oral or printed solicitation or representation that he or she is so engaged; or
 - (e) Engages, directs, or assists in procuring prospects or in negotiating or closing any transaction which results or is calculated to result in any of these acts;
- (2) "Real estate salesperson" or "salesperson" means any natural person employed, either directly or indirectly, by a real estate broker, or any person who represents a real estate broker in the performance of any of the acts specified in subsection (1) of this section;
- (3) An "associate real estate broker" is a person who has qualified as a "real estate broker" who works with a broker and whose license states that he or she is associated with a broker;
- (4) The word "person" as used in this chapter shall be construed to mean and include a corporation, limited liability company, limited liability partnership, or partnership, except where otherwise restricted;
- (5) "Business opportunity" shall mean and include business, business opportunity and good will of an existing business or any one or combination thereof;
- (6) "Commission" means the real estate commission of the state of Washington;
- (7) "Director" means the director of licensing;
- (8) "Real estate multiple listing association" means any association of real estate brokers:
 - (a) Whose members circulate listings of the members among themselves so that the properties described in the listings may be sold by any member for an agreed portion of the commission to be paid; and
 - (b) Which require in a real estate listing agreement between the seller and the broker, that the members of the real estate multiple listing association shall have the same rights as if each had executed a separate agreement with the seller;
- (9) "Clock hours of instruction" means actual hours spent in classroom instruction in any tax supported, public technical college, community college, or any other institution of higher learning or a correspondence course from any of the aforementioned institutions certified by such institution as the equivalent of the required number of clock hours, and the real estate commission may certify courses of instruction other than in the aforementioned institutions;
- (10) "Incapacitated" means the physical or mental inability to perform the duties of broker prescribed by this chapter; and
- (11) "Commercial real estate" means any parcel of real estate in this state other than real estate containing one to four residential units. "Commercial real estate" does not include a single-family residential lot or single-family residential units such as condominiums, townhouses, manufactured homes, or homes in a subdivision when sold, leased, or otherwise conveyed on a unit-by-unit basis, even when those units are part of a larger building or parcel of real estate, unless the property is sold or leased for a commercial purpose.

[2003 c 201 § 1; 1998 c 46 § 2; 1997 c 322 § 1; 1987 c 332 § 1; 1981 c 305 § 1; 1979 c 158 § 68; 1977 ex.s. c 370 § 1; 1973 1st ex.s. c 57 § 1; 1972 ex.s. c 139 § 1; 1969 c 78 § 1; 1953 c 235 § 1; 1951 c 222 § 1; 1943 c 118 § 1; 1941 c 252 § 2; Rem. Supp. 1943 § 8340-25. Prior: 1925 ex.s. c 129 § 4.]

APPENDIX NO. 3
ARK.STAT. 71-130, *et seq.* (repealed)

improper installation of natural gas and that this Act is necessary for the public health and safety, and an emergency is hereby declared

to exist and this Act shall be in full force and effect from and after its passage and approval." Approved April 7, 1975.

71-1217. Disposition of fees — Plumber's licensing fund. — All fees or payments of any type collected by the Board under this Act [§§ 71-1205 — 71-1217] prior to July 1, 1957, and held in bank accounts shall to the extent of the unencumbered amount thereof be deposited in the State Treasury on or before August 1, 1957. Commencing on July 1, 1957, and thereafter, all fees or payments of any type collected by the Board under this Act shall be deposited in the State Treasury on or before the fifth day of the month next following the month of collection thereof, and the State Treasurer shall credit the same to the credit of the "Plumbers Licensing Fund" which is hereby created. All funds deposited in the Plumbers Licensing Fund shall be used for the maintenance, operation and improvement of the plumbers licensing and inspection services of the State Board of Health. [Acts 1951, No. 200, § 13, p. 450; 1957, No. 372, § 1, p. 1057.]

Repealing Clause. Section 2 of Acts 1957, No. 372 repealed all laws and parts of laws in conflict therewith.

Separability. Section 14 of Acts 1951, No. 200 read: "This Act being for the regulation of plumbing and for the protection of the public the provisions hereof are declared to be separable, and the invalidity of any clause, sentence, paragraph or section hereof shall not affect the validity of the remainder of this Act."

Emergency. Section 15 of Acts 1951, No. 200 read: "The Legislature hereby finds that

the public has been and will be injured through improper plumbing and improper construction of sewage and drain pipes and that this Act is necessary for the public health and safety, and an emergency is hereby declared to exist and this Act shall be in full force and effect from and after its passage and approval." Approved February 28, 1951.

Effective Date. Section 3 of Acts 1957, No. 372 provided the Act should become effective on July 1, 1957.

CHAPTER 13

REAL ESTATE BROKERS AND SALESMEN

SECTION.

71-1301. Acting as real estate broker or salesman without license unlawful — Penalty.

71-1302. "Real estate broker" and "real estate salesman" defined — Parties excepted from act — Complaint to recover commission — Violations.

71-1303. Arkansas real estate commission — Appointment — Qualifications — Term — Vacancies — Organization — Compensation and expenses — Employees — Powers and duties — Disposition of fees and charges.

71-1304. Qualifications of applicants.

71-1304.1. Qualifications of applicants.

71-1304.2. Prerequisites to taking original broker's license examination.

SECTION.

71-1304.3. Filing of course of instruction certificate by applicant for an original salesman's license.

71-1304.4. Conduction of classroom hours.

71-1304.5. Correspondence courses.

71-1305. Application for license — Recommendation — Contents — License fee.

71-1306. License — Form — Display — Fees — Expiration — Maintenance of place of business — Duplicate license required of firm members — Reissuance of license upon change of business location — Cancellation of license — Transfers.

71-1307. Revocation of license — Causes.

71-1308. Conduct of hearings prior to denying application or

SECTION.

- 71-1309. suspending or revoking license.
- 71-1309. Nonresident real estate brokers — Prerequisites to doing business in Arkansas.
- 71-1310. Commission to publish names of licensees and other information.
- 71-1311. Penalties and prosecution for violation of act — Enforcement by injunction.
- 71-1312. Number of employees of commission — Maximum salaries.
- 71-1313. Membership in retirement system.
- 71-1314. Contributions by commission to retirement system fund.
- 71-1315. Rights of employees under retirement system.

SECTION.

- 71-1316. Service prior to 1957.
- 71-1317. Current service credit — Payment of contributions for previous years.
- 71-1318. Crediting of payments.
- 71-1319. Real estate recovery fund — Creation — Administration.
- 71-1320. Fee — Expenditures.
- 71-1321. Awards — Jurisdiction of commission — Appeals.
- 71-1322. Authority of commission — Fee — Investments — Use of funds.
- 71-1323. Assignment of claims to commission — Suspension pending reimbursement — Interest.
- 71-1324. Application.
- 71-1325. Construction.

71-1301. Acting as real estate broker or salesman without license unlawful — Penalty. — It shall be unlawful for any person, firm, partnership, copartnership, association or corporation to act as a real estate broker or real estate salesman in Arkansas or to advertise or assume to act as such real estate broker or real estate salesman without first having complied with every provision of this Act [§§ 71-1301 — 71-1311] and having secured a regular, valid license issued by the Arkansas Real Estate Commission, authorizing the performance of such acts. It shall be unlawful for any person, firm, partnership, copartnership, association or corporation to serve as auctioneer or participate in or supervise the auctioning of any real property in this State unless such persons shall have a regular, valid license issued by the Arkansas Real Estate Commission authorizing said person to act as a real estate broker or real estate salesman; and shall have been a resident of Arkansas at least one [1] year prior to the time of application for such license; provided, that such person shall conform to all of the requirements of law, that may be in addition hereto, governing auctioneers and auctions. Any person violating the provisions of this Section shall be guilty of a misdemeanor and shall upon conviction thereof be fined in a sum not less than two hundred and fifty dollars (\$250.00) nor more than one thousand dollars (\$1,000.00), or be imprisoned in the county jail not less than thirty (30) nor more than ninety (90) days, or be both so fined and imprisoned. [Acts 1929, No. 148, § 1, p. 742; Pope's Dig., § 12476; Acts 1953, No. 98, § 1, p. 287.]

Application of Amendment. Section 2 of Acts 1953, No. 98 read: "The provisions of this Act shall not apply to the sale of real property in this State that is ordered or approved by a court of competent jurisdiction of this State. Nor, shall the provisions of this Act apply to any sale of real property in this State where the person offering such property for sale is the owner. Nor, shall the provisions of this Act apply to any sale of real property in this State where the broker or salesman is duly

licensed as an attorney at law in this State." Similar provisions are contained in § 71-1302.
Repealing Clause. Section 3 of Acts 1953, No. 98 repealed all laws and parts of laws in conflict therewith.
Emergency. Section 4 of Acts 1953, No. 98 read: "It is hereby determined by the General Assembly that many persons are engaging in the auctioneering of real property in this State who do not possess the proper professional and ethical standards for the

shall be in full force and after its passage and April 7, 1975.
fund. — All fees or Act [§§ 71-1205 — shall to the extent State Treasury on and thereafter, all er this Act shall be of the month next te Treasurer shall ng Fund" which is nsing Fund shall nt of the plumbers Health. [Acts 1951,

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proper protection of the public and that the passage of this Act will correct such situation. Therefore, an emergency is hereby declared to exist and this Act being necessary for the protection of the public peace, health and safety shall be in full force and effect from and after its passage and approval." Approved February 19, 1953.

Cross-References. See notes to § 71-1302.

Legal Periodicals. Conflict of Laws 1948-1954, 9 Ark. L. Rev. 1.

Real Estate Brokers in Arkansas, 17 Ark. L. Rev. 57.

Cited: Wilhelm v. McLaughlin, 229 Ark. 118, 313 S.E.2d 821 (1958); Williams v. Hency, 254 Ark. 685, 495 S.W.2d 875 (1973); Parker v. Arkansas Real Estate Comm'n, 256 Ark. 149, 506 S.W.2d 125 (1974).

NOTES TO DECISIONS

ANALYSIS

Agents as owners.
Commission.
Commission of unlicensed salesman.
— Unenforceable contracts.
Constitutionality.
Injunctions.
Sale at auction.
Unlawful practice of law.

Agents as Owners.

Where the property sold was jointly owned by partners in real estate partnership, they could not be considered agents or brokers within the meaning of § 71-1302 and thus they did not come within the provisions of §§ 71-1301 — 71-1311 and therefore were not covered by the surety bond required by § 71-1305 (c). Rothgeb v. Safeco Ins. Co. of America, 259 Ark. 530, 534 S.W.2d 759 (1976).

Commission.

Where real estate agent brought action for commission under name of purported real estate corporation, none of the statutory requirements having been met for incorporation, fact that purported corporation did not possess a license in accordance with this and subsequent sections was not a defense to agent's action, it appearing that the agent himself was a licensed real estate broker and that he, as an individual, had been substituted as a plaintiff in the action. Childs v. Philpot, 253 Ark. 589, 487 S.W.2d 637 (1972).

Commission of Unlicensed Salesman.

— Unenforceable Contracts.

A salesman without a license cannot recover any commission; moreover where a statute prohibits engaging in a business or calling without having procured a required license, all contracts made by unlicensed persons engaged in such business or calling are invalid and cannot be enforced. Dunn v. Phoenix Village, Inc., 213 F. Supp. 936 (W.D. Ark. 1963).

Constitutionality.

This act as amended is constitutional. State

v. Hurlock, 185 Ark. 807, 49 S.W.2d 611 (1932).

Injunctions.

Notwithstanding the fact that this section contains criminal penalties for its violation, an action to enjoin the commission of the acts prohibited by this section is not a criminal action entitling the defendant to a jury trial. Phillips v. Arkansas Real Estate Comm'n, 244 Ark. 577, 426 S.W.2d 412 (1968).

Sale at Auction.

A party who sells a tract of real estate at auction under a power of attorney executed by the owner would be subject to the penal provisions of this section, if the party is not licensed as a real estate broker or salesman. Henson v. State, 262 Ark. 456, 557 S.W.2d 617 (1977).

Unlawful Practice of Law.

In case involving the alleged unlawful practice of law by real estate brokers submitted upon an agreed statement of facts of certain instruments being specified as among those customarily prepared by real estate brokers which was alleged to be the act constituting the unlawful practice of law, the court held that the preparation of any of such instruments or other instruments involving real property rights for others either with or without pay save and except "offers and acceptances" constituted the practice of law for obviously instruments of offers and acceptance contemplate the subsequent preparation of deed to the property involved and possible related instruments such as mortgages, leases, easements, etc., to complete the transaction which only a licensed lawyer equipped with requisite legal training, knowledge and skill could prepare. Arkansas Bar Ass'n v. Block, 230 Ark. 430, 323 S.W.2d 912, cert. denied, 361 U.S. 836, 80 S. Ct. 87, 4 L. Ed. 2d 76 (1959).

The decision in Arkansas Bar Assn. v. Block, 230 Ark. 430, 323 S. W. (2d) 912, should be modified to provide that a real estate broker, when the person for whom he is acting has declined to employ a lawyer to prepare the necessary instruments and has authorized

Conflict of Laws
v. 1.
in Arkansas, 17 Ark.

McLaughlin, 229 Ark.
8); Williams v. Hency,
2d 875 (1973); Parker
v. Comm'n, 256 Ark.
374).

807, 49 S.W.2d 611

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v. Block, 230 Ark. 430,
denied, 361 U.S. 836, 80
76 (1959).

Arkansas Bar Assn. v.
23 S. W. (2d) 912, should
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the real estate broker to do so, may be permitted to fill in the blanks in simple printed standardized real estate forms, which forms must be approved by a lawyer; it being understood that these forms shall not be used for other than simple real estate transactions which arise in the usual course of the broker's

business and that such forms shall be used only in connection with real estate transactions actually handled by such brokers as a broker and then without charge for the simple service of filling in the blanks. Creekmore v. Izard, 236 Ark. 558, 367 S.W.2d 419 (1963).

Collateral Reference

Constitutionality of statute or ordinance requiring real estate brokers to procure a license. 39 A.L.R.2d 606.

Liability of real estate broker to principal for negligence in carrying out agency. 94 A.L.R.2d 468.

71-1302. "Real estate broker" and "real estate salesman" defined — Parties excepted from act — Complaint to recover commission — Violations. — A real estate broker within the meaning of this Act [§§ 71-1301 — 71-1311], means an individual other than a real estate salesman, who for another, and for compensation or the expectation of compensation: (a) sells, exchanges, purchases, rents, or leases real estate. (b) offers to sell, exchange, purchase, rent, or lease real estate. (c) negotiates, offers, attempts, or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate. (d) lists, offers, attempts, or agrees to list real estate for sale, lease, or exchange. (e) auctions, offers, attempts, or agrees to auction real estate. (f) buys, sells, offers to buy or sell, or otherwise deals in options on real estate or improvements thereon. (g) collects, offers, attempts, or agrees to collect rent for the use of real estate. (h) advertises, or holds himself out as being engaged in the business of buying, selling, exchanging, rental, or leasing of real estate. (i) assists or directs in the procuring of prospects calculated to result in the sale, exchange, leasing, or rental of real estate. (j) assists or directs in the negotiation of any transaction calculated or intended to result in the sale, exchange, leasing or rental of real estate. (k) engages in the business of charging an advance fee in connection with any contract whereby he undertakes to promote the sale of real estate, either through its listing in a publication issued for such purpose or for referral of information concerning such real estate brokers or both. (l) performing any of the foregoing acts as an employee of or on behalf of the owner of real estate, or interest therein, or improvements affixed thereon for compensation. A real estate salesman within the meaning of this Act is any individual who performs any of the activities mentioned above while under the supervision of, or in the employ of, or affiliated with a licensed real estate broker.

Any person who directly or indirectly for another with the intention, or on the promise, of receiving any valuable consideration, offers, attempts, or agrees to perform any single act described in this subsection, whether as part of a transaction, or as an entire transaction, shall be deemed a broker or salesman within the meaning of this Act, the commission of a single such act, by a person, required to be licensed under this Act and not so licensed, shall constitute a violation of this Act.

The provisions of this Act shall not apply to any person, firm, partnership, co-partnership, association or corporation, who as owner or lessor shall perform any of the acts aforesaid with reference to property, owned or leased by them where such acts are performed in the regular course of, or as incident to the management of such property and the investment therein; nor shall the provisions of this Act apply to persons acting as attorney in fact under a full executed power of attorney from the owner authorizing the final consummation by performance of any contract for the sale, lease, or exchange of real estate, nor shall this Act be construed to include in any way the services rendered by an attorney at law in the performance of his duties as such attorney at law; nor shall it be held to include, while acting as such, a receiver, trustee in bankruptcy, guardian, administrator or executor, or any such person acting under order of any court, nor to include a trustee acting under a trust agreement, deed of trust or will.

Any person acting as the resident manager for the owner, or an employee acting as the resident manager for a broker managing an apartment building, duplex, or apartment complex, when such resident manager resides on the premises and is engaged in the leasing of property in connection with his employment, or any officer or employee of a Federal agency in the conduct [of] his official duties or any officer or employee of the State government or any political subdivision thereof performing his official duties, any multiple listing service wholly owned by a nonprofit organization or Association of Real Estate Brokers, shall not be required to be licensed under the provisions of this Act.

Nothing in this Act shall be so construed as to require a license for an owner to personally sell or lease his own property. No recovery may be had by any broker or salesman in any court in this State on a suit to collect a commission due him unless he is licensed under the provisions of this Act and unless such fact is stated in his complaint. [Acts 1929, No. 148, § 2, p. 742; 1931, No. 142, § 1[2], p. 380; Pope's Dig., § 12477; Acts 1975, No. 482, § 1, p. 466-A.]

Compiler's Notes. The bracketed word "of" in the fourth paragraph was inserted by the compiler.

Amendments. Prior to the 1975 amendment this section read: "A real estate broker within the meaning of this Act is any person, firm, partnership, copartnership, association or corporation, who for a compensation or valuable consideration sells or offers for sale, buys or offers to buy, auctions or offers to auction, or negotiate the purchase or sale or exchange of real estate, or who leases or offers to lease, or who sells or offers to sell leases or royalties of whatsoever character, or rents or offers for rent, any real estate or negotiates leases thereof or of the improvements thereon, for others, as a whole or partial vocation."

"The term real estate broker shall also include any person, firm, partnership, copartnership, association or corporation

employed by the owner of lots or other parcels of real estate, at a stated salary or commission, to sell such real estate, and who shall sell or exchange or offer or attempt to negotiate the sale or exchange of such lot or parcel of real estate.

"A real estate salesman within the meaning of this Act is any person who for a compensation or valuable consideration is employed, whether directly or indirectly, by a real estate broker as a whole or partial vocation to sell or offer to sell, or buy or offer to buy, or to auction or offer to auction, or to negotiate the purchase or sale or exchange of real estate, or to lease, to rent or offer for rent any real estate, or to sell or offer to sell leases or royalties of whatsoever character, or to negotiate leases on any real estate, or of the improvements thereon, as a whole or partial vocation.

"One act for a compensation or valuable

firm, partnership, or lessor shall, owned or leased course of, or as investment therein; as attorney in authorizing the sale, lease, or to include in any performance of his role, while acting administrator or court, nor to include will.

or, or an employee of an apartment resident manager of property in office of a Federal or employee of of performing his duty by a nonprofit not be required to

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consideration as set forth in the two preceding paragraphs shall constitute the one performing it a real estate broker or real estate salesman within the meaning of this Act.

"The provisions of this Act shall not apply to any person, firm, partnership, copartnership, association or corporation, who as owner or lessor shall perform any of the acts aforesaid with reference to property owned or leased by them where such acts are performed in the regular course of, or as incident to the management of such property and the investment therein; nor shall the provisions of this Act apply to persons acting as attorney-in-fact under a duly executed power of attorney from the owner authorizing the final consummation by performance of any contract for the sale, lease, or exchange of real estate, nor shall this Act be construed to include in any way the services rendered by an attorney-at-law on the performance of his duties as such attorney-at-law; nor shall it be held to include, while acting as such, a

receiver, trustee in bankruptcy, guardian, administrator or executor, or any such person acting under order of any court, not to include a trustee acting under a trust agreement, deed of trust or will.

"Nothing in this Act shall be so construed as to require a license for an owner to personally sell or lease his own property.

"No recovery may be had by any broker or salesman in any court in this State on a suit to collect a commission due him unless he is licensed under the provisions of this Act and unless such fact is stated in his complaint."

Cross-References. See notes to § 71-1301, under heading agents as owners, Rothgeb v. Safeco Ins. Co. of America, 322 Ark. 259, 534 S.W.2d 759 (1976).

Section to Section References. This section is referred to in § 71-1306.

Legal Periodicals. Conflict of Laws 1948-1954, 9 Ark. L. Rev. 1.

• Cited: Williams v. Hency, 254 Ark. 685, 495 S.W.2d 875 (1973).

NOTES TO DECISIONS

ANALYSIS

Activities constituting broker.
Activities not constituting broker.
Agents as owners.
Right to commission.
—Complaint.
Sale at auction.
Suit by nonresident.

Activities Constituting Broker.

If real estate agent resident in Mississippi brings a prospect to Arkansas to show him land in Arkansas, such act is the act of a real estate broker in Arkansas, and Arkansas state licensing law applied to the transaction. Campbell v. Duncan, 84 F. Supp. 732 (E.D. Ark. 1949).

Evidence showing that plaintiff made contracts, held himself out as a real estate man, took options, quoted prices, advertised and in other respects invited interested parties to utilize his services showed activities which brought plaintiff within the interdictions of this act precluding recovery of commission by unlicensed brokers. McMillan v. Dunlap, 206 Ark. 434, 175 S.W.2d 987 (1943).

One who, for a monetary consideration, gave to another an option to purchase real estate not owned by the one giving the option and afterward obtained, for a monetary consideration, an option to purchase said real estate from the owner thereof was acting as a real estate broker as that term is defined in

this section. Phillips v. Arkansas Real Estate Comm'n, 244 Ark. 577, 426 S.W.2d 412 (1968).

Activities not Constituting Broker.

Stock brokers, business brokers and other kinds of brokers are not covered by the statutory provisions in these sections. Frier v. Terry, 230 Ark. 302, 323 S.W.2d 415 (1959).

The business broker seeking to recover a commission does not come within the purview of the Arkansas statute inasmuch as he was not selling real estate, he being engaged in the sale of a business of certain corporations in which the stock of such corporations were exchanged for stock in another company and the only real estate sold was that owned by individual stockholders as to which such broker claimed no contract or commission, therefore it could not be concluded that the business broker was engaged in the sale of real estate. Frier v. Terry, 230 Ark. 302, 323 S.W.2d 415 (1959).

Agents as Owners.

Where the property sold was jointly owned by partners in real estate partnership, they could not be considered agents or brokers within the meaning of this section and thus they did not come within the provisions of §§ 71-1301 — 71-1311 and therefore were not covered by the surety bond required by § 71-1305 (c). Rothgeb v. Safeco Ins. Co. of America, 259 Ark. 322, 534 S.W.2d 759 (1976).

Right to Commission.

A broker having made no application for a license before effecting a sale of land was not

entitled to recover a commission. *Birnback v. Kirspel*, 188 Ark. 792, 67 S.W.2d 730 (1934); *Nelson v. Stolz*, 197 Ark. 1053, 127 S.W.2d 138 (1939); *McMillan v. Dunlap*, 206 Ark. 434, 175 S.W.2d 987 (1943).

A broker, not licensed at the time contract was made for sale of property nor at the time the sale was made and parties entered into escrow agreement pending perfection of title, was not entitled to commission though he secured license prior to completion of escrow agreement. *Nelson v. Stolz*, 197 Ark. 1053, 127 S.W.2d 138 (1934).

In action on a note where credit was claimed by maker for sum payee agreed to pay for finding purchaser for realty, question of whether maker, having not complied with this act, was entitled to charge any commission, not having been raised in the trial court, could not be raised on appeal. *St. Louis Union Trust Co. v. Hammans*, 204 Ark. 298, 161 S.W.2d 950 (1942).

— Complaint.

Where broker suing to recover real estate commission did not allege in his complaint that he was a licensed real estate dealer but evidence to that effect was introduced without objection, trial court could properly treat the complaint as amended to conform to the proof. *Dacus v. Burns*, 206 Ark. 810, 177 S.W.2d 748 (1944).

When after case had been submitted to jury and appellee moved for a directed verdict on ground that complaint of real estate broker in suit for commission failed to allege broker was licensed, it was within discretion of trial court to permit broker to be recalled and testify she

was licensed, treating the pleadings as amended to conform to the proof. *El Dorado Real Estate Co. v. Garrett*, 240 Ark. 483, 400 S.W.2d 497 (1966).

Sale at Auction.

A party who sells a tract of real estate at auction under a power of attorney executed by the owner would be subject to the penal provisions of § 71-1301, if the party is not licensed as a real estate broker or salesman. *Henson v. State*, 262 Ark. 456, 557 S.W.2d 617 (1977).

Suit by Nonresident.

Nonresident real estate agent cannot sue in the state courts of Arkansas, or in the federal courts for Arkansas, to collect a note given him as a commission for sale of land in Arkansas, if he does not have an Arkansas real estate license. *Campbell v. Duncan*, 84 F. Supp. 732 (E.D. Ark. 1949).

Nonresident engineering partners were brokers under this section when they engaged in only the single isolated transaction under a written memorandum, to get for a percentage of a stipulated sales price, one of their clients to purchase Arkansas land, even though they alleged an oral contract for the percentage based on engineering services, and therefore they could not maintain a suit for furnishing a buyer where they did not comply with licensing provisions of §§ 71-1302 — 71-1311. *Savo v. Miller*, 224 Ark. 799, 276 S.W.2d 67 (1955).

Collateral References. Who is real estate agent, salesman or broker within meaning of statute. 56 A.L.R. 480, 167 A.L.R. 774.

71-1303. Arkansas real estate commission — Appointment — Qualifications — Terms — Vacancies — Organization — Compensation and expenses — Employees — Powers and duties — Disposition of fees and charges. — There is hereby created the Arkansas Real Estate Commission, hereinafter called the Commission. The Governor shall appoint from a list of twelve (12) nominees submitted by the Arkansas Real Estate Association three (3) persons whose vocation for a period of at least five (5) years prior to the date of their appointment shall have been that of a real estate broker or a real estate salesman; no two (2) of whom shall be from the same congressional district. One (1) member shall be appointed for a term of one (1) year; one (1) member shall be appointed for a term of two (2) years; one (1) member shall be appointed for a term of three (3) years; and until their successors are appointed and qualified; thereafter the term of the members of said Commission shall be for three (3) years and until their successors are appointed and qualify. The Governor shall appoint members to fill vacancies from a list of four (4) nominees submitted by the Arkansas Real Estate Association; each such nominee shall be a licensed real estate broker or a

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The Commission immediately upon the qualification of the member appointed in each year shall meet and organize by selecting from its members a chairman, and may do all things necessary and convenient for carrying into effect the provisions of this Act and may from time to time promulgate necessary rules and regulations.

Each Commissioner shall receive as full compensation for his services the sum of twenty-five dollars (\$25.00) per day for each day actually spent on the work of the Commission, and his actual and necessary traveling expenses incurred in the performance of the duties pertaining to his office.

The Commission shall employ a secretary and such clerical assistance as may be necessary to carry out the provisions of this Act and to put into effect such rules and regulations as the Commission may promulgate, and the Commission shall fix the salaries of such employees, and may, if it deems it advisable, require such employees to make good and sufficient surety bond for the faithful performance of their duties.

The Commission shall have power to administer oaths, and shall adopt a seal with such design as it may prescribe, engraved thereon, by which it shall authenticate its proceedings. Copies of all records and papers in the office of the Commission, duly certified and authenticated by the seal of said Commission, shall be received in evidence in all courts equally and with like effect as the original.

All fees and charges collected by the Commission under the provisions of this Act shall be deposited in a fund to be known as the Arkansas Real Estate Commission Fund, and the said Commission is hereby empowered to expend said funds for the requirements, purposes and expenses of said Commission under the provisions of this Act, upon voucher signed by the Secretary of the Commission and countersigned by the Chairman thereof, provided the total expense for every purpose incurred shall not exceed the total fees and charges collected by the Commission under the provisions of this Act.

The Commission may conduct or assist in conducting real estate institutes and seminars, and incur and pay the reasonable and necessary expenses in connection therewith, which institutes or seminars shall be open to all licensees. [Acts 1929, No. 148, § 3, p. 742; 1931, No. 142, § 1[3], p. 380; Pope's Dig., § 12478; Acts 1971, No. 152, § 1, p. 390; 1973, No. 630, § 1, p. 1726; 1975, No. 487, § 2, p. 1344.]

Compiler's Notes. Acts 1977, No. 100 compiled as §§ 5-1201 — 5-1212 provides for a system for the termination, study, review, continuation or reestablishment of all state agencies, departments, boards, commissions, institutions and programs of the State of Arkansas. Under such act all such agencies, departments, boards, commissions, institutions and programs are to be terminated on a date provided in the act and may be continued or reestablished by the general assembly by the adoption of a law

providing for reestablishment thereof. See §§ 5-1201 — 5-1212.

The date established by such act for the termination of the Real Estate Commission is June 30, 1983. See § 5-1205.

Amendments. The 1975 amendment added the last paragraph.

Repealing Clause. Section 2 of Acts 1971, No. 152, repealed all laws and parts of laws in conflict therewith.

Section 2 of Acts 1973, No. 630 repealed all laws and parts of laws in conflict therewith.

Separability. Section 3 of Acts 1971, No. 152, read: "If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared severable."

Emergency. Section 4 of Acts 1971, No. 152, read: "It is hereby found and determined by the General Assembly that the present law providing for the filling of vacancies on the Arkansas Real Estate Commission is not clear and does not specify the exact qualification of the nominees or the manner in which nominees are submitted to the Governor for appointment; and that in order to clarify this law and to prevent further confusion in this area, it is necessary that this Act become

effective immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall become effective from and after its passage and approval." Approved February 22, 1971.

Cross-References. Addition to boards of member not engaged in profession, § 6-617. Conduct of hearings relative to licenses, § 71-1308.

Consultant, contract with state agency, report on and withholding of state income tax under, §§ 6-620 — 6-622.

Damages adjudged against state officers and employees, payment by state, §§ 12-3401 — 12-3406.

Fee schedule, § 71-1306.

Increase in number of board members, §§ 6-613 — 6-615.

NOTES TO DECISIONS

ANALYSIS

Authority to approve business schools.
Nomination by association.
Pension plans.

Authority to Approve Business Schools.

Where real estate commission adopted regulation requiring business schools training applicants for licenses as real estate brokers to be accredited by the "Accrediting Commission for Business Schools," such regulation was beyond the commission's statutory authority and invalid since the legislature by § 80-4302 has declared that the state board of education shall have sole authority to approve all schools offering courses below college level leading to an

occupational objective. *Gelly v. West*, 253 Ark. 373, 486 S.W.2d 31 (1972).

Nomination by Association.

Governor could appoint as a member of the Arkansas Real Estate Commission a person who had not been nominated by the Arkansas Real Estate Association. *McCarley v. Orr*, 247 Ark. 109, 445 S.W.2d 65 (1969).

Pension Plans.

This section does not authorize the adoption of an employee pension plan and the plan adopted in 1964 was therefore void from its inception. *Parker v. Arkansas Real Estate Comm'n*, 256 Ark. 149, 506 S.W.2d 125 (1974).

71-1304. Qualifications of applicants. — (a) Licenses shall be granted only to applicants who bear a good reputation for honesty, truthfulness and fair dealing; are competent to transact the business of real estate brokers or real estate salesmen in such manner as to safeguard the interests of the public; and pass a written examination.

(b) Each applicant for an original broker's license shall, at the time of filing the application and as a prerequisite to taking the examination, file a certificate (or authenticated copy thereof) stating that the applicant has successfully completed a course of instruction in the basic principles of real estate, either

(1) By actual classroom attendance for not less than thirty (30) hours of instruction, including time spent on examination, conducted by

(A) A university or duly accredited college wherever situated,

(B) A reputable, bona fide business school situated in the State of Arkansas; or

(C) The Arkansas Real Estate Association Education Committee; or

mediately. Therefore, an hereby declared to exist and this necessary for the immediate of the public peace, health and become effective from and after and approval." Approved 1971.

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contract with state agency, withholding of state income tax 0 — 6-622.

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(2) By correspondence, where such course of instruction is part of an extension department of a university or duly accredited college.

(c) Each applicant for an original salesman's license shall, at the time of filing the application or within one year after passing the salesman's examination, file a certificate (or authenticated copy thereof) stating that the applicant has successfully completed a course of instruction in the basic principles of real estate by actual classroom attendance or by correspondence as provided in the preceding paragraph (b). Failure to file such certificate shall automatically cancel the license issued. [Acts 1929, No. 148, § 4, p. 740; Pope's Dig., § 12479; Acts 1963, No. 541, § 1, p. 1656; 1965 (1st Ex. Sess.), No. 46, § 1, p. 2619; 1969, No. 364, § 1, p. 1061.]

Compiler's Notes. Section 2 of Acts 1969, No. 364, read: "The provisions of this Act shall not be applicable to nor shall the same affect any person already licensed as a real estate broker in this State on the effective date of this Act under the provisions of Act 148 of 1929, as amended, the same being Section 71-1304 of the Arkansas Statutes (1947); and any such person already licensed shall comply with the provisions of that law as it was in effect prior to this amendment."

This section, except for perhaps subsection (c), is superseded by Acts 1975, No. 481, §§ 1-5 compiled herein as §§ 71-1304.1 — 71-1304.5, effective June 1, 1976.

Separability. Section 3 of Acts 1969, No. 364, read: "If any provisions of this Act or the application thereof to any person or

circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

Effective Dates. Section 2 of Acts 1963, No. 541 provided the act should become effective March 1, 1964.

Cross-References. Licenses and permits, removal of disqualification for criminal offenses, §§ 71-2601 — 71-2606.

See note to § 71-1303. *Gelly v. West*, 253 Ark. 373, 486 S.W.2d 31 (1972).

Cited: *McCarley v. Orr*, 247 Ark. 109, 445 S.W.2d 65 (1969); *Parker v. Arkansas Real Estate Comm'n*, 256 Ark. 149, 506 S.W.2d 125 (1974).

71-1304.1. Qualifications of applicants. — Licenses shall be granted only to applicants who bear a good reputation for honesty, truthfulness and fair dealing; are competent to transact the business of real estate brokers or real estate salesmen in such manner as to safeguard the interest of the public, and pass a written examination. [Acts 1975, No. 481, § 1, p. 1318.]

71-1304.2. Prerequisites to taking original broker's license examination. — Each applicant for an original broker's license shall as a prerequisite to taking the examination satisfy the following requirements:

(a) serve an active, bona fide apprenticeship by holding a valid real estate salesman's license issued by the Arkansas Real Estate Commission, or the appropriate licensing agency of another state, for a period of not less than twenty-four (24) months within the previous forty-eight (48) month period immediately preceding issuance of a broker's license; and, in addition thereto file a certificate (or authenticated copy thereof) stating that the applicant has successfully completed a course of instruction in the basic principles of real estate by actual classroom attendance for not less than thirty (30) hours, including time spent on examination; or

(b) file a certificate (or authenticated copy thereof) stating that the applicant has successfully completed one or more real estate courses by actual classroom attendance for not less than ninety (90) hours of instruction, including examinations; or

(c) file a certified copy of a transcript from a duly accredited college or university reflecting the successful completion of not less than six (6) college credit hours in real estate, three of which must be in Basic Principles of Real Estate. [Acts 1975, No. 481, § 2, p. 1318.]

Compiler's Notes. The words in parentheses so appeared in the law as enacted.

71-1304.3. Filing of course of instruction certificate by applicant for an original salesman's license. — Each applicant for an original salesman's license shall within one year after passing the salesman's examination file a certificate (or authenticated copy thereof) stating that the applicant has successfully completed a course of instruction in the basic principles of real estate by actual classroom attendance for not less than thirty (30) hours, including time spent on examination. [Acts 1975, No. 481, § 3, p. 1318.]

Compiler's Notes. The words in parentheses so appeared in the law as enacted.

71-1304.4. Conduction of classroom hours. — All classroom hours required by this Act [§§ 71-1304.1 — 71-1304.5] shall be conducted by:

- (a) a duly accredited college or university wherever situated; or
- (b) a reputable bona fide business school situated in the State of Arkansas;

or

(c) The Arkansas Realtors Association Education Committee. [Acts 1975, No. 481, § 4, p. 1318.]

71-1304.5. Correspondence courses. — The thirty (30) hour course of instruction requirement as provided by Section 2(a) [subsection (a) of § 71-1304.2] and Section 3 [§ 71-1304.3] herein may be satisfied by successful completion of a correspondence course requiring submission of a minimum of sixteen (16) weekly lessons in writing, when such correspondence course of instruction is offered by a duly accredited college or university; however, the ninety (90) hour course of instruction requirement provided for in Section 2(b) herein and the six (6) college credit hours requirement in Section 2(c) herein must have been acquired through actual classroom attendance and not through a correspondence course. [Acts 1975, No. 481, § 5, p. 1318.]

Repealing Clause. Section 7 of Acts 1975, No. 481 repealed all laws and parts of laws in conflict therewith.

Separability. Section 8 of Acts 1975, No. 481 read: "If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or

applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

Effective Dates. Section 6 of Acts 1975, No. 481 provided that the act should become effective June 1, 1976.

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All classroom hours
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71-10-32-5000

71-1305. Application for license — Recommendation — Contents — License fee. — (a) Every applicant for a real estate broker's or salesman's license shall apply therefor in writing upon blanks prepared or furnished by the Commission. Such application shall be accompanied by the recommendation of at least five (5) citizens, real estate owners, not related to the applicant, who have owned real estate for a period of five (5) years or more, in the county in which said applicant resides or has his place of business which recommendation shall certify that the applicant bears a good reputation for honesty, truthfulness, fair dealing and competency, and whose license has not been revoked or suspended, and recommending that a license be granted to the applicant, provided, that if any person to whom a valid real estate broker's or salesman's license may have been issued, permits such license to lapse for a period not exceeding five (5) years, the Commission shall issue to such person a current license without requiring such person to submit to any examination if said person furnishes the information provided for in this subsection and pays a fee of forty dollars (\$40.00) per year or fraction thereof for the renewal of a broker's license and a fee of ten dollars (\$10.00) per year or fraction thereof for the renewal of a salesman's license.

(b) Every application for a license, under the provisions of this Act [§§ 71-1301 — 71-1311] shall be accompanied by any such application fee that the Commission may by regulation require; provided, however, that no application fee for a real estate salesman shall exceed Fifteen Dollars (\$15.00), and no application fee for a real estate broker shall exceed Twenty Five Dollars (\$25.00). If the applicant passes the examination, he shall be so notified by the Commission. The successful applicant shall then file with the Commission within sixty (60) days from the date of the examination which he successfully completed, the license fee prescribed in Arkansas Statutes Annotated Section 71-1306 (b). If the applicant fails to pay such license fee within the prescribed time, he shall be required to make new application and re-take the examination, as an original applicant.

(c) — (h) [Repealed.]
[Acts 1929, No. 148, § 7, p. 742; Pope's Dig., § 12482; Acts 1959, No. 9, § 1, p. 18; 1963, No. 157, § 1, p. 433; 1973, No. 178, § 1, p. 626; 1975, No. 487, § 3, p. 1344; 1977, No. 163, § 1, p. 183; 1979, No. 73, § 8, p. —.]

Compiler's Notes. Subsections (c), (d), (e), (f), (g) and (h) of this section were repealed by Acts 1979, No. 73, § 8, as of December 31, 1979.

Amendments. Prior to the 1975 amendment, subsection (b) read: "Every application for a license, under the provisions of this Act shall be accompanied by the license fee herein prescribed. In the event that the Commission refuses to issue the license, the fee shall be returned to the applicant."

The 1975 amendment amended subsection (b) to read: "Every application for a license, under the provisions of this Act shall be accompanied by the license fee herein

prescribed and by any such application fee that the Commission may by regulation require, provided, however, that no application fee for real estate salesmen shall exceed fifteen dollars (\$15.00) and no application fee for real estate brokers exam shall exceed twenty-five dollars (\$25.00). In the event that the Commission refuses to issue the license, the license fee shall be returned to the applicant."

The 1977 amendment in subsection (b) in the first sentence, deleted "by the license fee herein prescribed and" following "accompanying" and substituted "a real estate broker" for "real estate brokers

exams;" and deleted the former second sentence and added the present second, third, and fourth sentences.

Repealing Clause. Section 2 of Acts 1951, No. 395, repealed all laws and parts of laws in conflict therewith.

Section 2 of Acts 1955, No. 362 repealed all laws and parts of laws in conflict therewith.

Section 3 of Acts 1973, No. 178 repealed all laws and parts of laws in conflict therewith.

Separability. Section 2 of Acts 1973, No. 178, read: "If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

Section 9 of Acts 1979, No. 73, read: "If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

Emergency. Section 3 of Acts 1955, No. 362 read: "It is hereby determined by the General Assembly that a number of persons to whom have been issued real estate broker's and salesmen's licenses have permitted such licenses to lapse, and that the immediate passage of this Act is necessary in order that said licenses may be renewed without additional examination or delay. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval." Approved March 24, 1955.

Section 4 of Acts 1973, No. 178 read: "It is hereby found and determined by the General Assembly that the present requirement regarding the bonds of real estate brokers is unduly restrictive in that it requires an individual surety bond to be posted by each broker when a blanket bond may be provided for such brokers through recognized associations at a substantial savings and that

this Act should be given effect immediately to correct this undesirable and inequitable requirement. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval." Approved February 22, 1973.

Section 2 of Acts 1977, No. 163 read: "It is hereby found and determined by the General Assembly that the current procedure whereby the Commission collects license fees from applicants prior to the examination is not fair and equitable to the applicants, and it creates difficult administrative problems for the Commission staff, who must return the license fees to the unsuccessful applicants, and this Act is therefore necessary to remedy such problems. An emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval." Approved February 14, 1977.

Section 10 of Acts 1979, No. 73, read: "It is hereby found and determined by the General Assembly that the current methods of bonding real estate brokers and salesmen are ineffective to secure appropriate relief to victims of unethical and unscrupulous brokers and salesmen, and that this Act is immediately necessary in order to remedy such situation. An emergency is therefore declared to exist and this Act, being necessary for the preservation of the public peace, health, welfare, and safety, shall be effective from and after its passage and approval." Approved February 7, 1979.

Cross-References. Licenses and permits, removal of disqualification for criminal offenses, §§ 71-2601 — 71-2606.

Payment made by check, penalty where check returned by bank, § 84-1735.

See notes to § 71-1301, Agents as Owners. *Rothgeb v. Safeco Ins. Co. of America*, 259 Ark. 530, 534 S.W.2d 759 (1976).

See note to § 71-1307. *American Ins. Co. v. Robertson*, 239 Ark. 460, 389 S.W.2d 880 (1965).

Cited: *Johnson v. Safeco Ins. Co. of America*, — Ark. —, 576 S.W.2d 220 (1979).

NOTES TO DECISIONS

ANALYSIS

Agents as owners.
Liability on bond.

Agents as Owners.

Where the property sold was jointly owned by partners in real estate partnership, they could not be considered agents or brokers within the meaning of § 71-1302 and they did

not come within the provisions of §§ 71-1301 — 71-1311 and therefore were not covered by the surety bond required by subsection (c) of this section. *Rothgeb v. Safeco Ins. Co. of America*, 259 Ark. 530, 534 S.W.2d 759 (1976).

Liability on Bond.

A surety on bond cannot avoid liability on contention that bonded broker acted only as

agent of real estate company, and therefore was not personally liable. *American Ins. Co. v. Robertson*, 239 Ark. 460, 389 S.W.2d 880 (1965). **Collateral References.** Character and extent of liability on real estate broker's statutory bond. 17 A.L.R.2d 1012.

71-1306. License — Form — Display — Fees — Expiration — Maintenance of place of business — Duplicate license required of firm members — Reissuance of license upon change of business location — Cancellation of license — Transfers. — (a) The commission shall issue to each licensee a license in such form and size as it may prescribe. A broker's license shall be at all times conspicuously displayed in his place of business. A salesman's license shall be retained in the office of his employing broker.

(b) The original fee for each real estate broker's license shall be forty dollars (\$40.00) and the biennial renewal fee shall be forty dollars (\$40.00). The original fee for each real estate salesman's license shall be ten dollars (\$10.00) and the biennial renewal fee shall be ten dollars (\$10.00).

(c) Every license shall expire on the 31st day of December of each odd number[ed] year. The commission shall issue a new license for each ensuing two [2] years, in the absence of any reasons or condition which might warrant the refusal of the granting of a license, upon receipt of the written request of the applicant no later than the 30th day of November of each odd number[ed] year upon forms provided by the commission and the biennial fee therefor, as herein required. In the event an application for [a] renewed license is filed after the 30th of November of an odd numbered year, then such application shall be treated as an application to renew a lapsed license. The surrender, suspension or revocation of a broker's license shall automatically cancel every real estate salesman's license granted to any person by virtue of his employment by such broker pending a change of employer and the issuance of a new license. Such new license shall be issued without charge, if granted during the same biennium in which the original license was granted.

(d) Every real estate broker shall maintain a place of business in this State and shall display a sign bearing his name or the name of his firm and the words "Real Estate" in front of his place of business. If the real estate broker maintains more than one [1] place of business within the State, a duplicate license shall be issued without charge to such broker for each office maintained.

(e) Every active member and active officer of a firm, partnership, co-partnership, association or corporation who performs any of the functions set forth in section 2 (section 71-1302, Arkansas Statutes, 1947), shall be required to obtain a duplicate broker's license for which a biennial fee of ten dollars (\$10.00) and biennial renewal fee of ten dollars (\$10.00) shall be paid.

(f) Notice in writing shall be given to the commission by each licensee of any change of principal business location, whereupon the commission shall issue a new license for the unexpired period upon the payment of three dollars (\$3.00) for each license to be reissued. The change of business location without notification to the commission shall automatically cancel any license heretofore issued.

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(g) When any real estate salesman shall be discharged or shall terminate his employment with the real estate broker by whom he is employed, it shall be the duty of such real estate broker to so notify the commission by certified mail and return the salesman's license and pocket card. Such notification shall automatically cancel the salesman's license.

(h) If a real estate broker fails to notify the commission of the termination of a salesman's employment with him it shall be cause for the suspension or cancellation of his broker's license.

(i) If a salesman terminated under section (g) above shall transfer his license to another firm he must file a transfer application signed by the new broker accompanied by (1) his license, (2) his pocket card, (3) a statement that he is not taking any listings, copies thereof, or pertinent information belonging to his former broker, and (4) the transfer fee. The transfer fee for the first transfer in a renewal period shall be three dollars (\$3.00), the second transfer fee in a renewal period shall be thirty dollars (\$30.00), and the third and any subsequent transfers in a renewal period shall be one hundred dollars (\$100). When a licensed broker shall be discharged or shall terminate his employment with the real estate broker by whom he is employed, he shall return his pocket card to the Commission immediately. If he shall transfer from one firm to another, he must file a transfer application, accompanied by (1) his license, if any, (2) his pocket card, (3) the licenses of any salesmen assigned under him, and (4) the appropriate transfer fee. The fee for the first broker transfer in a renewal period shall be ten dollars (\$10.00), the fee for the second transfer in a renewal period shall be thirty dollars (\$30.00), and the fee for the third and any subsequent transfers in a renewal period shall be one hundred dollars (\$100). [Acts 1929, No. 148, § 6, p. 742; 1931, No. 142, § 1[6], p. 380; Pope's Dig., § 12481; Acts 1959, No. 9, § 2, p. 18; 1963, No. 157, § 2, p. 433; 1975, No. 487, § 4, p. 1344.]

Compiler's Notes. The bracketed letters "ed" and the word "a" were added by the compiler in subsection (c).

Amendments. The 1975 amendment in subsection (c) substituted "no" for "not" in the second sentence; substituted "suspension, or revocation" for "or the revocation" and "cancel" for "suspend" in the fourth sentence; and added subsection (i).

Repealing Clause. Section 6 of Acts 1975, No. 487 repealed all laws and parts of laws in conflict therewith.

Separability. Section 5 of Acts 1975, No. 487, read: "If any provisions of this Act or the

application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

Cross-References. Payment made by check, penalty where check returned by bank, § 84-1735.

Cited: Parker v. Arkansas Real Estate Comm'n, 256 Ark. 149, 506 S.W.2d 125 (1974).

71-1307. Revocation of license — Causes. — The Commission may upon its own motion and shall upon the verified complaint in writing of any person, provided such complaint, or such complaint with evidence, documentary or otherwise, presented in connection therewith shall make out a prima facie case, investigate the actions of any real estate broker or real estate salesman, of [or] any person who shall assume to act in either such capacity within this State and shall have power to suspend or to revoke

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any license issued under the provisions of this Act [§§ 71-1301 — 71-1311];
at any time where the licensee has by false or fraudulent representation
obtained a license, or where the licensee in performing or attempting to
perform any of the acts mentioned herein is deemed to be guilty of:

- (a) Making any substantial misrepresentation, or
- (b) Making any false promises of a character likely to influence, persuade
or induce, or
- (c) Pursuing a continued and flagrant course of misrepresentation or
making of false promises through agents or salesmen or advertising or
otherwise, or
- (d) Acting for more than one party in a transaction without the knowledge
of all parties for whom he acts, or
- (e) Accepting a commission or valuable consideration as a real estate
salesman for the performance of any of the acts specified in this Act, from
any person, except the licensed broker by whom he is employed, or
- (f) Representing or attempting to represent a real estate broker other
than the employer, without the express knowledge and consent of the
employer, or
- (g) Failing, within a reasonable time, to account for or to remit any
moneys coming to his possession which belong to others, or
- (h) Being unworthy or incompetent to act as a real estate broker or
salesman in such manner as to safeguard the interests of the public, or
- (i) Paying a commission or valuable consideration to any person for acts
or services performed in violation of this Act, or
- (j) Any other conduct whether of the same or a different character from
that hereinbefore specified which constitutes improper, fraudulent or
dishonest dealing. [Acts 1929, No. 148, § 7, p. 742; Pope's Dig., § 12482.]

Compiler's Notes. The bracketed word "or"
in the first paragraph was inserted by the
compiler.

Cross-References. Administrative pro-
cedure, occupational and professional
licensing boards, §§ 5-701 — 5-725.

Section to Section References. This section
is referred to in § 71-1305.

Cited: Parker v. Arkansas Real Estate
Comm'n, 256 Ark. 149, 506 S.W.2d 125 (1974).

NOTES TO DECISIONS

ANALYSIS

- Agents as owners.
- Appeal.
- Commission's findings.
- Evidence.
- Liability on bond.
- Notice.
- Unlawful practice of law.

Agents as Owners.

Where the property sold was jointly owned
by partners in real estate partnership, they
could not be considered agents or brokers
within the meaning of § 71-1302 and thus
they did not come within the provisions of
§§ 71-1301 — 71-1311 and therefore were not

covered by the surety bond required by
§ 71-1305 (c). Rothgeb v. Safeco Ins. Co. of
America, 259 Ark. 530, 534 S.W.2d 759 (1976).

Appeal.

Where real estate commission after notice
and hearing revoked appellant's license for
cause, the circuit court did not err in refusing
to allow the appellant to present additional
evidence on appeal since appellant failed to
make the required statutory showing that the
additional evidence he wanted to present was
material and that there were good reasons for
his failure to present it to the commission.
Woolsey v. Arkansas Real Estate Comm'n, —
Ark. —, 565 S.W.2d 22 (1978).

Commission's Findings.

Commission's findings that broker misrepresented price, services, and improvements on property in advertisements and letters in which broker falsely represented that his advertised property had paved roads, privately owned water wells, electricity, telephone service, and recreational area at time when such services did not exist supported the commission's order suspending broker's license for a period of six months. *Fowler v. Arkansas Real Estate Comm'n*, 258 Ark. 292, 524 S.W.2d 230 (1975).

Evidence.

Even though the evidence that some of defendant's alleged unprofessional conduct occurred prior to the issuance of a real estate broker's license to him by the commission and as such could not sustain the commission's decision to suspend defendant's license, evidence of defendant's behavior after receiving the license, in misrepresenting the price, services and improvements on the property, was sufficient to sustain the commission's decision to suspend the license for six months for unprofessional conduct. *Fowler v. Arkansas Real Estate Comm'n*, 258 Ark. 292, 524 S.W.2d 230 (1975).

Liability on Bond.

Contention of surety on bond of real estate broker that broker only acted as agent of real estate company would not permit surety to escape liability for action of broker in inducing purchaser of realty to reconvey

property by falsely promising payment for reconveyance. *American Ins. Co. v. Robertson*, 239 Ark. 460, 389 S.W.2d 880 (1965).

Notice.

The commission's order and notice of hearing charging broker with performing specified acts before he held a valid license but also charging him with violating statute prohibiting certain conduct by holders of real estate broker licenses gave broker adequate notice of charges against him where broker's testimony and exhibits at the hearing indicated he was prepared to answer the charges. *Fowler v. Arkansas Real Estate Comm'n*, 258 Ark. 292, 524 S.W.2d 230 (1975).

Unlawful Practice of Law.

A real estate broker, when the person for whom he is acting has declined to employ a lawyer to prepare the necessary instruments and has authorized the real estate broker to do so, may be permitted to fill in the blanks in simple printed standardized real estate forms, which forms must be approved by a lawyer; it being understood that these forms shall not be used for other than simple real estate transactions which arise in the usual course of the broker's business and that such forms shall be used only in connection with real estate transactions actually handled by such brokers as a broker and then without charge for the simple service of filling in the blanks. *Creekmore v. Izard*, 236 Ark. 558, 367 S.W.2d 419 (1963).

Collateral References

Broker's nondisclosure or misrepresentation of sale price of other property as affecting his rights against principal. 32 A.L.R.2d 728.

Competing properties of different owners, right of real estate brokers to list. 71 A.L.R. 699.

Duty of real estate broker to disclose that prospective purchaser is a relative. 26 A.L.R.2d 1307.

Effect of statement of real estate broker to prospective purchaser that property may be bought for less than list price as breach of duty to vendor. 17 A.L.R.2d 904.

Real estate broker's power to bind principal by representations as to character, condition,

location, quantity or title of property. 58 A.L.R.2d 10.

Real estate broker's right to commission where purchaser refuses to go through with executory contract because of reckless misrepresentation made to him by broker respecting property. 9 A.L.R.2d 504.

Revocability of license for fraud or other misconduct before or at the time of its issuance. 165 A.L.R. 1138.

Stay pending review of judgment or order revoking or suspending a professional, trade or occupational license. 166 A.L.R. 575.

71-1308. Conduct of hearings prior to denying application or suspending or revoking license. — The Commission shall, before denying an application for license or before suspending or revoking any license, set the matter down for a hearing, and at least ten (10) days prior to the date set for the hearing, it shall notify in writing the applicant or licensee, of any

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charges made, and shall afford said applicant or licensee an opportunity to be heard in person or by counsel and he shall be allowed to offer oral testimony, affidavit or depositions in reference thereto.

The Commission shall have the power to subpoena and bring before it any person in this State or take testimony of any such person by deposition with the same fees and mileage in the same manner as prescribed by law in judicial procedure in courts of this State in civil cases. Such fees and mileage shall be paid by the party at whose request such witness or witnesses are subpoenaed. If the Commission shall determine that any applicant is not qualified to receive a license, a license shall not be granted to said applicant. If the Commission shall determine that the licensee is guilty of a violation of the provisions of this Act [§§ 71-1301 — 71-1311], his or its license shall be suspended or revoked. The findings of fact made by the Commission, acting within its powers, shall be taken as prima facie true. [Acts 1929, No. 148, § 8, p. 742; Pope's Dig., § 12483.]

Section to Section References. This section
is referred to in § 71-1305.

71-1309. Nonresident real estate brokers — Prerequisites to doing business in Arkansas. — A nonresident of this State who performs any of the acts of a real estate broker or a real estate salesman within this State must conform to all of the provisions of this Act [§§ 71-1301 — 71-1311], including the maintenance of an office in Arkansas; provided, however, that in lieu of the maintenance of an office in Arkansas, such broker or salesman may operate through or in conjunction with a resident real estate broker licensed under the provisions of this Act, and provided, further, that as a prerequisite to the issuance of a license every nonresident broker or salesman shall file an irrevocable consent that suits and actions may be instituted against such broker or salesman in the proper court of any county of this State in which a cause of action may arise, or in which the plaintiff may reside, by the service of any process, or pleading authorized by the laws of the State, on the Chairman of the Commission.

The Commission shall have the power, and may in its discretion in the interest of mutual trade relations with border states, waive the requirements of the maintenance of an office in this State by applicants for license from border states. [Acts 1929, No. 148, § 9, p. 742; 1931, No. 142, § 1[9], p. 380; Pope's Dig., § 12484.]

Legal Periodicals. Conflict of Laws from, application and effect of statute relating
1948-1954, 9 Ark. L. Rev. 1. to real estate brokers. 86 A.L.R. 640.

Collateral References. Out of state, brokers

71-1310. Commission to publish names of licensees and other information. — The Commission shall annually publish a list of the names and addresses of all licensees licensed by it under the provisions of this Act [§§ 71-1301 — 71-1311], and of all persons whose license has been suspended

or revoked during that period, together with such other information relative to the enforcement of the provisions of this Act, as it may deem of interest to the public; and also a statement of all funds received and an itemized statement of all disbursements. [Acts 1929, No. 148, § 10, p. 742; Pope's Dig., § 12485.]

71-1311. Penalties and prosecution for violation of act — Enforcement by injunction. — Any person violating the provisions of this Act [§§ 71-1301 — 71-1311] shall, upon conviction thereof, be deemed guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars (\$25.00) and not more than five hundred dollars (\$500.00), or by imprisonment for a term not to exceed six [6] months, or by both such fine and imprisonment, in the discretion of the court. Any officer or agent of a corporation, or member or agent of a firm, partnership, copartnership, or association who shall personally participate in or in any way be accessory to any violation of this Act, by such firm, partnership, copartnership, association or corporation, shall be subject to all the penalties herein prescribed for individuals. This law shall not be construed to release any person from civil liability or criminal prosecution under the general laws of this State.

Any member of the Commission, its secretary, or any citizen of the county holding a license as authorized by this Act, may by affidavit institute criminal prosecution before any municipal court or justice of the peace against any violator of the terms of this Act without filing bond for costs, and shall, in the name of the State, have the same right of appeal as has the defendant.

It shall be the duty of the prosecuting attorney to prosecute such actions, though such appearance shall not be essential, and if he appears and prosecutes he shall receive a fee of twenty-five dollars (\$25.00), which shall be taxed as part of the costs, except in such counties in which he is paid a stipulated salary for his services.

Each day the defendant shall operate without a license shall constitute a separate offense.

Upon petition of any member of the Commission, its secretary, or any holder of a license thereunder, the chancery court shall enjoin a violation of this Act if and when it shall appear that such action is necessary to protect the interest of those who have complied with the terms of this Act and who are operating legitimately. [Acts 1929, No. 148, § 11, p. 742; 1931, No. 142, § 1[11], p. 380; Pope's Dig., § 12486.]

Repealing Clauses and Effective Dates. Section 13 of Acts 1929, No. 148 and section 2 of Acts 1931, No. 142 repealed all laws and parts of laws in conflict therewith and provided that the acts take effect from and after passage. Approved March 14, 1929 and March 20, 1931, however such effective dates would be invalid under decisions in *Arkansas Tax Comm'n v. Moore*, 103 Ark. 48, 145 S.W. 199 (1912), and *Cunningham v. Walker*, 198 Ark. 928, 132 S.W.2d 24 (1939).

Separability. Section 12 of Acts 1929, No. 148 read: "If any section, subsection, sentence, clause, phrase or requirement of this Act is for any reason held to be unconstitutional, such decisions shall not affect the validity of the remaining portions thereof."

Legal Periodicals. Case Notes — Equity — Injunctions — Unlicensed Practice of a Profession, 11 Ark. L. Rev. 177.

Cited: *Parker v. Arkansas Real Estate Comm'n*, 256 Ark. 149, 506 S.W.2d 125 (1974).

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NOTES TO DECISIONS

ANALYSIS

Appeals by individuals.
Commission of unlicensed salesman —
Unenforceable contracts.
Information.
Injunctions.

Appeals by Individuals.

It was not necessary to determine the validity of the provision of this section authorizing appeals by individuals on behalf of the state where the appeal was actually taken by the prosecuting attorney. *State v. Hurlock*, 185 Ark. 807, 49 S.W.2d 611 (1932).

Commission of Unlicensed Salesman — Unenforceable Contracts.

A salesman without a license cannot recover any commission; moreover where a statute prohibits engaging in a business or calling without having procured a required license, all contracts made by unlicensed

persons engaged in such business or calling are invalid and cannot be enforced. *Dunn v. Phoenix Village, Inc.*, 213 F. Supp. 936 (W.D. Ark. 1963).

Information.

An information relating to the defendants acting as real estate brokers or salesmen without license charged a public offense within terms of this section. *State v. Hurlock*, 185 Ark. 807, 49 S.W.2d 611 (1932).

Injunctions.

Notwithstanding the criminal penalties provided by this section, an action for injunction under the final paragraph of this section is not a criminal prosecution entitling the defendant to the constitutional guaranties applicable to such prosecutions. *Phillips v. Arkansas Real Estate Comm'n*, 244 Ark. 577, 426 S.W.2d 412 (1968).

71-1312. Number of employees of commission — Maximum salaries. — Effective March 1, 1970, there is hereby established for the Arkansas Real Estate Commission the maximum number of employees necessary for the maintenance and operation of said department, and the maximum rates of salaries for said officials and employees, and the Arkansas Real Estate Commission is hereby authorized to make payment for such services, salaries, and other purposes, from the funds received by the Commission from the licenses, fees, other charges and from other moneys collected, as set out herein the following:

(a) Officials and Employees.

1. One (1) Executive Secretary at a salary of not to exceed \$12,000.00 per annum.
2. One (1) Assistant Secretary at a salary of not to exceed \$9,000.00 per annum.
3. One (1) License Clerk at a salary of not to exceed \$6,468.00 per annum.
4. One (1) Office Secretary at a salary of not to exceed \$5,940.00 per annum.
5. One (1) Office Secretary at a salary of not to exceed \$5,280.00 per annum.

[Acts 1970 (Ex. Sess.), No. 184, § 1, p. 498.]

Cited: *Parker v. Arkansas Real Estate Comm'n*, 256 Ark. 149, 506 S.W.2d 125 (1974).

71-1313. Membership in retirement system. — The Board of Trustees of the Arkansas State Employees Retirement System is hereby directed to include within the membership of the Arkansas State Employees Retirement System, as created by Act 177 of 1957, as amended [§§ 12-2501

— 12-2515], all employees of the Arkansas Real Estate Commission, or its successor, who are not members of or eligible for membership in some other state supported Retirement System other than Social Security. [Acts 1970 (Ex. Sess.), No. 184, § 2, p. 498.]

71-1314. Contributions by commission to retirement system fund. — The Arkansas Real Estate Commission, or its successor, shall pay into the Arkansas State Employees Retirement System Fund such sums of money as are necessary to match the contributions of its employees in the same form and manner as other public employers, and shall be subjected to all the provisions of Act 177 of 1957, as amended [§§ 12-2501 — 12-2515], to the same extent as other public employers. [Acts 1970 (Ex. Sess.), No. 184, § 3, p. 498.]

Section to Section References. This section is referred to in § 71-1318.

71-1315. Rights of employees under retirement system. — The effective date of membership of such employees in the Retirement System shall be July 1, 1969, and all such employees enrolled in the System shall be subject to the rights, privileges and limitations prescribed in Act 177 of 1957, as amended [§§ 12-2501 — 12-2515], and every such employee shall become a member of the System as a condition of continuing in, or obtaining employment with the Arkansas Real Estate Commission, or its successor. It is the specific intent of this Act [§§ 71-1312 — 71-1318] that all employees of the Arkansas Real Estate Commission who were employed by said Commission on July 1, 1969, whether presently employed or not, shall be eligible for membership in the State Employees Retirement System. Provided, that any employee of the Arkansas Real Estate Commission who was employed by said Commission on July 1, 1969, but who is not employed by said Commission on the effective date of this Act, who desires to obtain benefits of membership in the State Employees Retirement System, for the years of service as an employee of the Arkansas Real Estate Commission, shall make application therefor to the State Employees Retirement System within one (1) year from the effective date of this Act [March 27, 1970] and shall contribute to the State Employees Retirement System the employee contribution required by law for the authenticated years of current service and prior service credit for which such employee makes application, and the State Employees Retirement System shall certify to the Arkansas Real Estate Commission the amount of employer matching contribution that is required in behalf of such employees and said Commission shall make payment therefor to the State Employees Retirement System. [Acts 1970 (Ex. Sess.), No. 184, § 4, p. 498.]

71-1316. Service prior to 1957. — Any such employee included within the membership of the Retirement System pursuant to this act [§§ 71-1312 — 71-1318] shall be given credit for Prior Service rendered prior to July 1, 1957, as an employee of a public employer, as that term is defined in Act 177 of 1957, as amended [§§ 12-2501 — 12-2515], or as an employee of the

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Arkansas Real Estate Commission, or its successor, if such employee was so employed on July 1, 1957, and is so employed on July 1, 1969. [Acts 1970 (Ex. Sess.), No. 184, § 5, p. 498.]

71-1317. Current service credit — Payment of contributions for previous years. — Any employee included within the membership of the Retirement System by this Act [§§ 71-1312 — 71-1318] who is an employee of the Arkansas Real Estate Commission, or its successor, on July 1, 1969, may apply for and receive Current Service credit for service rendered the Arkansas Real Estate Commission, or its successor, from July 1, 1957, to July 1, 1969, provided such employee pays or causes to be paid to the Retirement System Fund all necessary contributions at the rate of 4% for the employee and 4% for the employer from July 1, 1957, to July 1, 1967, that would have been paid had the employee been a member of the system during that time. From July 1, 1967, to July 1, 1969, the rate of contributions shall be 4% for employee on salary earned and 5% for the employer. From July 1, 1969, to July 1, 1970, the rate of contributions shall be 5% for employees on salary earned and 7% for the employer. Interest at the rate of 4% per annum compounded annually from July 1, 1957, shall be paid on all employee and employer contributions. Such contributions shall be paid in full on or (of) before July 1, 1971. [Acts 1970 (Ex. Sess.), No. 184, § 6, p. 498.]

Compiler's Notes. The word "of" enclosed in parentheses should be omitted.

71-1318. Crediting of payments. — The payments received by the system under Section 3 [§ 71-1314] above shall be credited to the applicable Employers Accumulation Account. The employee payments shall be credited to the members individual account in the Members Deposit Account. [Acts 1970 (Ex. Sess.), No. 184, § 7, p. 498.]

Repealing Clause. Section 8 of Acts 1970 (Ex. Sess.), No. 184, repealed all laws and parts of laws in conflict therewith.

Emergency. Section 9 of Acts 1970 (Ex. Sess.), No. 184, read: "It is hereby found and determined by the General Assembly that the employees of the Arkansas Real Estate Commission, or its successor, have been ineligible for membership in the Retirement System and that such employees are employees of the State and that the immediate passage of this Act is necessary to

enable such employees to become members of the System and to pay such necessary contributions therefor and to establish the number of officials and employees and their rates of pay. Now, therefore, an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after the date of its passage and approval." Law without signature of governor, March 28, 1970.

71-1319. Real estate recovery fund — Creation — Administration. — There is hereby created and established the Real Estate Recovery Fund (hereinafter "Fund"), which shall be maintained and administered by the Arkansas Real Estate Commission (hereinafter "Commission") as hereinafter provided. [Acts 1979, No. 73, § 1, p. —.]

Compiler's Notes. The words in parentheses so appeared in the law as enacted.

71-1320. Fee — Expenditures. — In addition to the other fees provided for in the Real Estate License Law (Ark. Stat. Ann. 71-1301 et seq.) and Commission regulations, each licensed real estate broker and salesman, (hereinafter "licensee") shall, effective with the biennial renewal period beginning January 1, 1980, pay to the Commission for the benefit of the Fund such fee as the Commission may require, not to exceed the lesser of (1) \$25.00 per biennial renewal, or (2) an amount sufficient to restore the Fund balance to \$250,000.00. Likewise, each person who becomes a licensee (for the first time) shall at such time pay to the Commission for the benefit of the Fund such fee as the Commission may require, not to exceed \$25.00. No fees collected under the provisions of this Act may be expended from the Fund except for the purposes set forth in this Act [§§ 71-1319 — 71-1325]. [Acts 1979, No. 73, § 2, p. —.]

Compiler's Notes. The words in parentheses so appeared in the law as enacted.

71-1321. Awards — Jurisdiction of commission — Appeals. — (a) In any disciplinary hearing before the Commission which involves any licensee who has allegedly violated any provision of the Real Estate License Law or Commission regulations, the Commission shall first determine whether such violation has occurred and, if so, the Commission shall then determine the amount of damages, if any, suffered by the aggrieved party or parties; provided, however, that such damages shall be limited to actual damages in accordance with subsection (b) of this Section 3 [this section]. The Commission shall then direct the licensee to pay such amount to the aggrieved party or parties. If such amount has not been paid within 30 days following entry of the Commission's final order in the matter, and the order has not been appealed to the Circuit Court, the Commission shall, upon request, pay from the Fund to the aggrieved party or parties the amount specified, provided, however, that the Commission shall not pay in excess of \$10,000.00 for any one violation or continuing series of violations of a given licensee, and provided further that the commission shall in no event be required to pay an amount in excess of the Fund balance. The question of whether or not certain violations constitute a continuing series of violations shall be a matter solely within the discretion and judgment of the Commission. Nothing, however, within this Section shall obligate the Fund for any amount in excess of \$50,000 with respect to the acts of any one licensee.

(b) The Commission's jurisdiction and authority to award damages to an aggrieved party pursuant to subsection (a) is limited to actual, compensatory damages, and the Commission shall not award punitive or exemplary damages. Likewise, the appellate jurisdiction of the Circuit Court is also limited to the awarding of actual, compensatory damages, and the Circuit

Court shall have no authority or jurisdiction to assess punitive or exemplary damages under this Act [§§ 71-1319 — 71-1325].

(c) An appeal may be taken to the Circuit Court from a final order of the Commission in accordance with the Arkansas Administrative Procedure Act [§§ 5-701 — 5-725] provided, however, that such appeal shall automatically stay the portion of the Commission order which directs the payment of damages and neither the licensee nor the Commission shall be obligated to pay such damages to the aggrieved party or parties until such time as the appeal is finally decided, whether in the Circuit Court or the Supreme Court.

The Circuit Court's jurisdiction over the Fund shall be limited to appeals from the Commission, and the Circuit Court shall have no jurisdiction or authority to order payments from the Fund in any amount in excess of either (1) the amount determined by the Commission, or (2) the limits set forth herein. [Acts 1979, No. 73, § 3, p. —.]

71-1322. Authority of commission — Fee — Investments — Use of funds. — (a) The Commission shall set the fees at such amount as it deems necessary to initially establish the Fund and to reestablish the Fund at the beginning of each biennial renewal period; provided, however, that the fee shall not exceed the limits set forth in Section 2 [§ 71-1320] of this Act. The assets of the Fund may be invested and reinvested as the Commission may determine, with the advice of the State Board of Finance.

(b) Any amounts in the Fund, including accumulated interest, may be used by the Commission for the following additional purposes;

(1) To fund educational seminars and other forms of educational projects for the use and benefit generally of licensees;

(2) To fund real estate chairs or courses at various state institutions of higher learning for the purpose of making such courses available to licensees and the general public;

(3) To fund research projects in the field of real estate; and

(4) To fund any and all other educational and research projects of a similar nature having to do with the advancement of the real estate field in Arkansas. [Acts 1979, No. 73, § 4, p. —.]

71-1323. Assignment of claims to commission — Suspension pending reimbursement — Interest. — (a) Upon the payment by the Commission of any amount of money under the provisions of Section 3 [§ 71-1321] hereof, (1) the recipients [recipients] of such payment shall, to the extent of such payment, assign to the Commission all rights and claims that they may have against the licensee involved; (2) the Commission shall be subrogated to all of the rights of the recipients of the payment, to the extent of the payment; and (3) in addition to any other disciplinary action taken against the licensee on the merits of the hearing, his license shall be immediately suspended until such time as he has completely reimbursed the Commission for such payment plus interest at a rate to be determined by the Commission which rate shall not exceed 10% per annum. [Acts 1979, No. 73, § 5, p. —.]

Compiler's Notes. The bracketed word "recipients" was inserted by the compiler.

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71-1324. Application. — The provisions of this Act [§§ 71-1319 — 71-1325] shall apply only to (a) licensees who were licensed at the time of the occurrence of the acts or violations complained of, and (b) acts or violations which occur after December 31, 1979. [Acts 1979, No. 73, § 6, p. —.]

71-1325. Construction. — Nothing herein shall be construed to limit or restrict in any manner other civil and/or criminal remedies which may be available to any person. [Acts 1979, No. 73, § 7, p. —.]

Compiler's Notes. Section 8 of Acts 1979, No. 73 is compiled as § 71-1305.

CHAPTER 14

SECONDHAND DEALERS IN OIL FIELD EQUIPMENT

SECTION.

71-1401. Inventory of sales of oil field equipment to be filed with county recorder.

SECTION.

71-1402. Duties of recorder — Fee.
71-1403. Penalty for violation.

71-1401. Inventory of sales of oil field equipment to be filed with county recorder. — Every corporation, firm, individual or association of individuals who shall purchase secondhand equipment, pipe, boilers, pumps, pulleys, engines, pipe fittings or any other secondhand oil field equipment, material or supplies, shall, at the time of such purchase, make in duplicate an itemized inventory of such items so purchased as aforesaid in which there shall be stated the name of the seller, the name of the person actually delivering [delivering] the same and the name of the owner of the team or teams which deliver the same, together with the date of such purchase. Such inventory shall be verified by the affidavit of such purchaser and one [1] copy of the same shall be filed with the Recorder of the county wherein such materials were purchased within forty-eight [48] hours after the date of such purchase. The other copy of such inventory shall be kept by said purchaser for the inspection of any interested person including peace officers. Such inventory shall be made upon blanks for that purpose to be furnished by said Recorder. [Acts 1925, No. 132, § 1, p. 377; Pope's Dig., §§ 3649, 6078.]

Compiler's Notes. The bracketed word "delivering" in the first sentence was inserted by the compiler.

71-1402. Duties of recorder — Fee. — It shall be the duty of the Recorder to receive and file the verified inventory mentioned in the foregoing section and to enter in a separate record, to be kept by him for that purpose, an abstract of each said inventory, which said abstract shall be alphabetically indexed and for his services in filing said inventory and abstracting the same, said Recorder shall collect and receive a fee of 25¢ for each such inventory. Said inventory and the abstract thereof shall be subject to the inspection of the public and certified copies of the same shall be supplied

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by said Recorder upon payment of the usual fee for such service. [Acts 1925, No. 132, § 2, p. 377; Pope's Dig., §§ 3650, 6079.]

71-1403. Penalty for violation. — Any purchaser of secondhand oil field materials or equipment who fails to file the verified inventory mentioned in section 1 [§ 71-1401] hereof within the time therein specified shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than \$25.00 nor more than \$200.00 and each day such purchaser fails to file said verified inventory after the expiration of forty-eight [48] hours shall constitute a separate offense. [Acts 1925, No. 132, § 3, p. 377; Pope's Dig., §§ 3651, 6080.]

Effective Date. Section 4 of Acts 1925, No. 132 read: "This act shall be and take effect from its passage." It was approved March 3, 1925, however, such effective date would be

invalid under decisions in Arkansas Tax Comm'n v. Moore, 103 Ark. 48, 145 S.W. 199 (1912) and Cunningham v. Walker, 198 Ark. 928, 132 S.W.2d 24 (1939).

CHAPTER 15

JUNK DEALERS

SECTION.

- 71-1501. Records of purchases.
- 71-1501.1. Records of copper purchases — Contents — Availability to law officers.
- 71-1501.2. Failure to keep records — Penalty.
- 71-1501.3. Giving false information for dealer's record — Penalty.
- 71-1501.4. Records of scrap copper utility wire purchases — Contents — Availability.
- 71-1501.5. Purchases from individuals — Notice of theft.
- 71-1501.6. Penalties for violation of §§ 71-1501.4, 71-1501.5.

SECTION.

- 71-1502. Records available to law enforcement officers.
- 71-1503. Violation of act — Penalty.
- 71-1504. Records of bronze cemetery memorials purchases — Contents.
- 71-1505. Inspection of records of bronze purchases.
- 71-1506. Violations of bronze purchase law — Penalties.
- 71-1507. Disposal of unclaimed junked vehicles — Notice requirement.

71-1501. Records of purchases. — Hereafter from the passing of this Act [§§ 71-1501 — 71-1503] all dealers, or purchasers of junk and scrap metals and materials doing business in the State of Arkansas, shall prepare and keep records showing: (1) from whom purchases have been made; (2) the type of scrap metals and material so purchased; (3) the weights of such material; (4) the license number of the vehicle used in transporting such material to the place of business. Such records herein provided for shall be kept for a period of three [3] years. [Acts 1953, No. 139, § 1, p. 475; 1957, No. 240, § 1, p. 742.]

Repealing Clause. Section 2 of Acts 1957, No. 240 repealed all laws and parts of laws in conflict therewith.

Collateral References. Regulation and licensing of junk dealers. 45 A.L.R.2d 1396.

71-1501.1. Records of copper purchases — Contents — Availability to law officers. — On and after the effective date of this act [§§ 71-1501.1 — 71-1501.3], every owner, keeper or proprietor of a junk shop, junk store, salvage yard, scrap yard, possessor of a junk car or other vehicle, or both,

CHAPTER 13

REAL ESTATE BROKERS AND SALESMEN

SECTION.

71-1303. Arkansas real estate commission — Appointment — Qualifications — Terms — Vacancies — Organization — Compensation and expenses — Employees — Powers and duties — Disposition of fees and charges.

71-1304.2. Prerequisites to taking original broker's license examination.

SECTION.

71-1304.5. Correspondence courses.
71-1305. Application for license — Recommendation — Contents — License fee.

71-1306. License — Form — Display — Fees — Expiration — Maintenance of place of business — Duplicate licenses — Notification requirements — Reissuance — Cancellation — Transfers — Charges for material and services.

71-1301. Acting as real estate broker or salesman without license unlawful, etc.

Legal Periodicals. Owen, Survey of Arkansas Law: Property, 2 UALR L.J. 275 (1979).

NOTES TO DECISIONS

ANALYSIS

Commission of unlicensed salesmen.

—Enforceable contracts.

Regulation of advertising.

Commission of Unlicensed Salesmen.

—Enforceable Contracts.

An out-of-state broker does not have to be licensed in Arkansas in order to enforce his contract in this State, provided the contract does not require him to perform brokerage services in this State; however, it is unlawful to act as a real estate broker or salesman in Arkansas without a license issued by the Arkansas Real Estate Commission.

71-1302. "Real estate broker" and "real estate salesman" defined, etc.

Legal Periodicals. Owen, Survey of Arkansas Law: Property, 2 UALR L.J. 275 (1979).

Maas v. Merrell Assocs., — Ark. App. —, 682 S.W.2d 769 (1985).

Regulation of Advertising.

Where Arkansas real estate commission adopted rule requiring that Arkansas real estate broker's name appear equally prominent with that of the franchise real estate broker's name, it attempted to regulate advertising by brokers, which is beyond its statutory authority under § 71-1301 et seq. even though it is empowered to do all things necessary and convenient for carrying the act into effect. Century 21 Real Estate of N. Tex., Inc. v. Arkansas Real Estate Comm'n, 271 Ark. 933, 611 S.W.2d 515 (1981).

Cited: Storey v. Johnson, 270 Ark. 392, 605 S.W.2d 480 (1980).

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 1-1304.5. Correspondence courses.
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Regulation of Advertising.
 Where Arkansas real estate commission adopted rule requiring that Arkansas real estate broker's name appear prominently with that of the franchised real estate broker's name, it attempted to regulate advertising by brokering which is beyond its statutory authority under § 71-1301 et seq. even though it is empowered to do all things necessary and convenient for carrying the act into effect. *Century 21 Real Estate of N. Tex., Inc. v. Arkansas Real Estate Comm'n*, 271 Ark. 933, 611 S.W.2d 515 (1981).

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id: Storey v. Johnson, 270 Ark. 35 S.W.2d 480 (1980).

NOTES TO DECISIONS

ANALYSIS

- Activities of a real estate broker.
- Doing business as corporation.
- Right to commission.
- Suit in corporate name.
- Suit by nonresident.
- Waiver of defense.

Activities of a Real Estate Broker.

Actions and activities which are considered to be within the realm of real estate transactions, requiring a license, must be performed for compensation or with the expectation of compensation to be considered activities of a real estate broker or salesman. *Arkansas Real Estate Comm'n v. Harrison*, 266 Ark. 339, 585 S.W.2d 34 (1979).

Doing Business as Corporation.

The purpose of the real estate statutes is to protect the public from unlicensed brokers and salespersons, not to prevent those properly licensed persons from doing business in a corporate form. *Standard Abstract & Title Co. v. Rector-Phillips-Morse, Inc.*, 282 Ark. 138, 666 S.W.2d 696 (1984).

Right to Commission.

— **Suit in Corporate Name.**

Since corporations can only act through their agents, so long as the salespersons and brokers employed by real estate firms are licensed, then the requirements mandated by this section are being met. Construing the statute in

favor of the party against whom the penalty would be imposed; this section does not prevent licensed real estate brokers and salespersons from suing in their corporate name to collect a commission due them. *Standard Abstract & Title Co. v. Rector-Phillips-Morse, Inc.*, 282 Ark. 138, 666 S.W.2d 696 (1984).

Suit by Nonresident.

An out-of-state broker does not have to be licensed in Arkansas in order to enforce his contract in this State, provided the contract does not require him to perform brokerage services in this State; however, it is unlawful to act as a real estate broker or salesman in Arkansas without a license issued by the Arkansas Real Estate Commission. *Maas v. Merrell Assocs.*, — Ark. App. —, 682 S.W.2d 769 (1985).

Waiver of Defense.

Where defendant in action to recover real estate commission did not plead this section in its answers, or state it as the grounds for its motion for a directed verdict, the defense provided for by the statute was waived and could not be the basis of defendant's motion for judgment notwithstanding the verdict, since such a judgment is technically only a renewal of the motion for a directed verdict made at the close of the evidence and, as such, cannot assert a ground not included in the motion for a directed verdict. *Dodson Creek, Inc. v. Fred Walton Realty Co.*, 2 Ark. App. 128, 620 S.W.2d 947 (1981).

71-1303. Arkansas real estate commission — Appointment — Qualifications — Terms — Vacancies — Organization — Compensation and expenses — Employees — Powers and duties — Disposition of fees and charges.

The Commission shall have the power to purchase an office facility or to purchase land and construct an office facility suitable for the Commission's needs. [Acts 1929, No. 148, § 3, p. 742; 1931, No. 142, § 1[3], p. 380; Pope's Dig., § 12478; Acts 1971, No. 152, § 1, p. 390; 1973, No. 630, § 1, p. 1726; 1975, No. 487, § 2, p. 1344; 1985, No. 979, § 1, p. —.]

Compiler's Notes. Section 2 of Acts 1983, No. 764, compiled as § 5-1203.10, provided that the Real Estate Commission should continue to function from and after June 30, 1983 the same as if Act 100 of 1977 and Section 3 of Act 883 of 1981 had never been enacted.

Amendments. The 1985 amendment added the final paragraph.

Compliance with Other Laws. Acts

1985, No. 979, § 2 read: "The General Accounting and Budgetary Procedures Law (Ark. Stats. 13-303.1 — 13-365), State Building Services Act (Ark. Stats. 5-1018 — 1025.3), Public Works Act (Ark. Stats. 14-6111 — 14-614.6) and other applicable fiscal laws of this State shall be complied with regarding this Act."

71-1304.2. Prerequisites to taking original broker's license examination.

Each applicant for an original broker's license, where application for examination is received by the Commission subsequent to the effective date [June 28, 1985] of this Act of the 1985 Session of the Arkansas General Assembly, shall as a prerequisite to taking the examination satisfy the following requirements: serve an active, bona fide apprenticeship by holding a valid real estate salesmen's license issued by the Arkansas Real Estate Commission, or the appropriate licensing agency of another State, for a period of not less than twenty-four (24) months within the previous forty-eight (48) month period immediately preceding issuance of a broker's license; and, in addition thereto file a certificate (or authenticated copy thereof) stating that the applicant has successfully completed a course of instruction in the basic principles of real estate by actual classroom attendance for not less than thirty (30) hours, including time spent on examination. [Acts 1975, No. 481, § 2, p. 1318; 1985, No. 1016, § 1, p. —.]

Compiler's Notes. The words in parentheses so appeared in the law as enacted.

Amendments. The 1985 amendment inserted ", where application for examination is received by the Commission

subsequent to the effective date of this Act of the 1985 Session of the Arkansas General Assembly,"; undesignated the former subdivision (a); and deleted former subdivisions (b) and (c) as they appear in the bound volume.

71-1304.5. Correspondence courses.

The thirty (30) hour course of instruction requirement as provided by Section 2 (71-1304.2) and Section 3 (71-1304.3) herein may be satisfied by successful completion of a correspondence course requiring submission of a minimum of sixteen (16) weekly lessons in writing, when such correspondence occurs [course] of instruction is offered by a duly accredited college or university. [Acts 1975, No. 481, § 5, p. 1318; 1985, No. 1016, § 2, p. —.]

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Compiler's Notes. Acts 1951, No. 395, § 1, p. 952 and Acts 1955, No. 362, § 1, p. 851 were inadvertently omitted from the historical citation of this section as it appears in the bound volume.

Amendments. The 1983 amendment, in the first sentence of subsection (a), substituted "make application" for "apply," substituted "forms" for "blanks" and added "and shall furnish such information as the Commission may reasonably require to determine the eligibility of the applicant" at the end the sentence; in the second sentence of subsection (a), substituted "The" for "Such" at the beginning of the sentence and inserted a period after "business," thereby creating a new third sentence; in the present third sentence of subsection (a), substituted "The" for "which," substituted "shall recommend" for "whose license has not been revoked or suspended, and recommending" and deleted a former proviso at the end of the sentence which read: "provided, that if any person to whom a valid real estate broker's or salesman's license may have been issued, permits such license to lapse for a period not exceeding five (5) years, the Commission shall issue to such person a current license without requiring such person to submit to any examination if said person furnishes the information provided for in this subsection and pays a fee of forty dollars

(\$40.00) per year or fraction thereof for the renewal of a broker's license and a fee of ten dollars (\$10.00) per year or fraction thereof for the renewal of a salesman's license"; in the first sentence of subsection (b), substituted "an" for "any such" preceding "application," substituted "by" for "be" and substituted the period at the end of the sentence for "provided" thereby creating a new second sentence; in the present second sentence of subsection (b), deleted "that" preceding "no," substituted "salesman's or a real estate broker's license" for "salesman," and substituted "Thirty-five Dollars (\$35.00)" for "Fifteen Dollars (\$15.00), and no application fee for a real estate broker shall exceed Twenty-Five Dollars (\$25.00)"; added the third through fifth sentences of subsection (b); in the present seventh sentence of subsection (b), substituted "pay to" for "file with," substituted "ninety (90)" for "sixty (60)" and substituted "Section 6(b) of this Act [Ark. Stat. 71-1306(b)]" for "Arkansas Statutes Annotated Section 71-1306(b)"; in the present eighth sentence of subsection (b), substituted "a successful" for "the," substituted "shall fail" for "fails," substituted "the prescribed" for "such license" and substituted "ninety (90) days following the day of the examination, the examination results shall be null and void, and the applicant" for "the prescribe time."

71-1306. License — Form — Display — Fees — Expiration — Maintenance of place of business — Duplicate licenses — Notification requirements — Reissuance — Cancellation — Transfers — Charges for material and services.

(a) The Commission shall issue to each licensee a license in such form and size as it may prescribe. A broker's license shall be at all time [times] conspicuously displayed in his place of business. A salesman's license shall be issued under the sponsorship of a supervising broker and shall be displayed in the office of the supervising broker.

(b) The original fee and the annual renewal fee for each real estate broker's license and each real estate salesman's license shall be such amount as the Commission may by regulation require. However, the original fee for each real estate broker's license shall not exceed Forty Dollars (\$40.00) and the annual renewal fee shall not exceed Forty Dollars (\$40.00). The original fee for each real

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(\$40.00) per year or fraction thereof for the renewal of a broker's license and a fee of ten dollars (\$10.00) per year or fraction thereof for the renewal of a salesman's license"; in the first sentence of subsection (b), substituted "an" for "any such" preceding "application," substituted "by" for "be" and substituted "the period at the end of the sentence for provided" thereby creating a new second sentence; in the present second sentence of subsection (b), deleted "that" preceding "no," substituted "salesman's real estate broker's license" for "salesman," and substituted "Thirty-five Dollars (\$35.00)" for "Fifteen Dollars (\$15.00), and no application fee for a real estate broker shall exceed Twenty-five Dollars (\$25.00)"; added the third through fifth sentences of subsection (b); the present seventh sentence of subsection (b), substituted "pay to" for "file," substituted "ninety (90)" for "sixty (60)" and substituted "Section 71-1306(b)" for "Section 71-1306(b)"; in the present eighth sentence of subsection (b), substituted "a successful" for "the," substituted "shall" for "fails," substituted "the prescribed" for "such license" and substituted "ninety (90) days following the date of the examination, the examination results shall be null and void, and the license shall be null and void, and the applicant" for "the prescribe time."

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estate salesman's license shall not exceed Twenty Dollars (\$20.00) and the annual renewal fee shall not exceed Twenty Dollars (\$20.00).

(c) Every license shall expire on the 31st day of December of each year. The Commission shall issue a new license for each ensuing year, in the absence of any reason or condition which might warrant the refusal of the granting of a license, upon receipt of the written request of the applicant no later than the 30th day of September of each year upon forms provided by the Commission together with the annual fee therefor. In the event an application for the renewal of a license is filed after the 30th day of September of any year, then such application shall be treated as an application to renew a lapsed license. If any person to whom a valid real estate broker's or salesman's license may have been issued permits such license to lapse for a period not exceeding five [5] years, the Commission shall issue to such a person a current license without requiring such person to submit to any examination if said person furnishes the information provided for in Section 7(a) and pays a fee that the Commission may by regulation require. However, the fee for the renewal of a broker's lapsed license shall not exceed Eighty Dollars (\$80.00) per year or fraction thereof, and that of a salesman's lapsed license shall not exceed Forty Dollars (\$40.00) per year or fraction thereof. The surrender, suspension, or revocation of a broker's license shall automatically cancel every real estate salesman's or broker's license granted to any person by virtue of such sponsorship by or affiliation with such broker pending a change of sponsor and the issuance of a new license.

(d) Every real estate broker [broker] shall maintain a place of business in this State and shall display a sign bearing the name of the firm and the words "Real Estate" or other words approved by the Commission which clearly indicate to the public that the firm is engaged in the real estate business.

(e) If a real estate broker maintains more than one (1) place of business within the State, a duplicate license shall be issued to that broker upon payment of an initial fee and thereafter of an annual renewal fee both of which the Commission may by regulation require. However, no initial duplicate license fee or renewal duplicate license fee shall exceed Twenty Dollars (\$20.00). Such a duplicate license shall not be issued to a supervising broker for any additional office at which salesmen will be assigned unless such other office has another supervising broker responsible for any such salesmen.

(f) Notice in writing shall be promptly given to the Commission by each licensee of any change of name or address shown on his license issued by the Commission, or of the loss of a license or pocket card. Failure to notify the Commission shall automatically cancel any license heretofore issued. Upon receipt of such notice, the Commission shall issue a new license for the unexpired period of the lost

license upon the payment of a fee that the Commission may by regulation require. However, no license reissuance fee shall exceed Twenty Dollars (\$20.00).

(g) When any real estate salesman or broker shall be discharged or shall terminate sponsorship by the real estate broker by whom he is sponsored, it shall be the duty of such sponsoring real estate broker to so notify the Commission and to return the terminated broker's or salesman's license and pocket card. Such notification shall automatically cancel the license.

(h) If a real estate broker who has sponsored a broker or salesman fails to notify the Commission of the termination of a salesman's or broker's affiliation with him, it shall be cause for the suspension or cancellation of his broker's license.

(i) If a broker or salesman terminated under Section [subsection] (g) above shall transfer his license to another firm he must, after his license and pocket card have been returned, file a transfer application signed by the new sponsoring broker accompanied by (1) a statement that he is not taking any listings, copies thereof, or pertinent information belonging to his former sponsoring broker, and (2) payment of a transfer fee that the Commission may by regulation require. However, no transfer fee shall exceed Twenty Dollars (\$20.00).

(j) The Commission is authorized to make charges for materials provided by the Commission and for services performed in connection with providing such materials. Such charges shall be determined by the Commission and shall be reasonably calculated to cover the approximate cost to the Commission of providing such materials. [Acts 1929, No. 148, § 6, p. 742; 1931, No. 142, § 1[6], p. 380; Pope's Dig., § 12481; Acts 1959, No. 9, § 2, p. 18; 1963, No. 157, § 2, p. 433; 1975, No. 487, § 4, p. 1344; 1983, No. 555, § 2, p. 1176.]

Compiler's Notes. The bracketed words "times" in subsection (a), "broker" in subsection (d), and "subsection" in subsection (i), were inserted by the compiler.

The reference to "Section 7(a)," in the fourth sentence of subsection (c), is apparently an incorrect reference since section 7(a), § 71-1307(a), does not require the furnishing of information. Section 71-1305(a), which does require the furnishing of certain specific information, appears to have been the intended reference.

Amendments. The 1983 amendment, in the second sentence of subsection (a), substituted "time" for "times"; in the third sentence of subsection (a), substi-

tuted "issued under the sponsorship of a supervising broker and shall be displayed" for "retained" and substituted "the supervising" for "his employing"; in the first sentence of subsection (b), inserted "and the annual renewal fee," inserted "and each real estate salesman's" and substituted "such amount as the Commission may by regulation require" for "forty dollars (\$40.00) and the biennial renewal fee shall be forty dollars (\$40.00); inserted the present second sentence of subsection (b); in the present third sentence of subsection (b), substituted "not exceed Twenty Dollars (\$20.00)" for "be ten dollars (\$10.00)" in two places and substituted "annual" for "biennial"; in the first sentence of sub-

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42; 1931, No. 142, § 1[6], p.
9, § 2, p. 18; 1963, No. 157,
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issued under the sponsorship of a
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es and substituted "annual" for
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section (c), deleted "odd number" preced-
ing "year"; in the second sentence of
subsection (c), substituted "year" for
"two years" following "ensuing," substi-
tuted "reason" for "reasons," substituted
"September" for "November," deleted
"odd number" following "of each" and
substituted "together with the annual
fee therefor" for "and the biennial fee
therefor, as herein required"; in the
third sentence of subsection (c), substi-
tuted "the renewal of a" for "renewed,"
inserted "day" following "30th," substi-
tuted "September" for "November" and
substituted "any" for "an odd num-
bered"; inserted the present fourth
through sixth sentences of subsection
(c); in the present sixth sentence of
subsection (c), inserted "or broker's,"
substituted "such sponsorship by or af-
filiation with" for "his employment by"
and substituted "sponsor" for "em-
ployer"; deleted the former last sentence
of subsection (c) which read: "Such new
license shall be issued without charge, if
granted during the same biennium in
which the original license was granted";
in subsection (d), substituted "broker"
for "borker," deleted "his name or" fol-
lowing "bearing," substituted "the" for
"his" preceding "firm" and substituted
"or other words approved by the Com-
mission which clearly indicate to the
public that the firm is engaged in the
real estate business" for "in front of his
place of business"; deleted the former
second sentence of subsection (d) which
read: "If the real estate broker main-
tains more than one place of business
within the State, a duplicate license
shall be issued without charge to such
broker for each office maintained"; sub-
stituted present subsections (e) and (f)
for the subsections which appear in the
bound volume; in the first sentence of
subsection (g), inserted "or broker," sub-

stituted "sponsorship by" for "his em-
ployment with," substituted "sponsored"
for "employed," inserted "sponsoring,"
deleted "by certified mail" following
"Commission," inserted "to" preceding
"return" and inserted "terminated bro-
ker's or"; in the second sentence of
subsection (g), deleted "salesman's" pre-
ceding "license"; in subsection (h), in-
serted "who has sponsored a broker or
salesman" and substituted "or broker's
affiliation" for "employment"; substi-
tuted present subsection (i) for the sub-
section as it appears in the bound vol-
ume; added subsection (j).

Emergency. Section 4 of Acts 1983,
No. 555, read: "It is hereby found and
determined by the General Assembly
that the present schedule of fees which
the Arkansas Real Estate Commission
is authorized to charge provides inade-
quate funds to finance the essential
functions of the Commission; that this
Act is designed to permit the Commis-
sion to increase various fees charged by
the Commission, within the limits pre-
scribed, in order to provide the neces-
sary funds for the Commission to carry
out the responsibilities of the Commis-
sion as prescribed by law; that this Act
should be given effect at the earliest
possible date in order to enable the
Commission to adopt appropriate regu-
lations and policies necessary to effec-
tively and efficiently carry out the pur-
pose and intent of this Act. Therefore,
an emergency is hereby declared to exist
and this Act being necessary for the
preservation of the public peace, health
and safety shall be in full force and
effect from and after its passage and
approval." Approved March 21, 1983.

Cited: Standard Abstract & Title Co.
v. Rector-Phillips-Morse, Inc., 282 Ark.
138, 666 S.W.2d 696 (1984).

71-1307. Revocation of license — Causes.

Legal Periodicals. Watkins, Access
to Public Records under the Arkansas

Freedom of Information Act, 37 Ark. L.
Rev. 741 (1984).

NOTES TO DECISIONS

ANALYSIS

Activities of a real estate broker. Authority of commission. Evidence.

Activities of a Real Estate Broker.

Actions and activities which are considered to be within the realm of real estate transactions, requiring a license, must be performed for compensation or with the expectation of compensation to be considered activities of a real estate broker or salesman. Arkansas Real Estate Comm'n v. Harrison, 266 Ark. 339, 585 S.W.2d 34 (1979).

Authority of Commission.

The Real Estate Commission has the authority to govern the acts of licensed salesmen and brokers who are acting on matters which do not require a license. Black v. Arkansas Real Estate Comm'n, 275 Ark. 55, 626 S.W.2d 954 (1982).

In reading this section in its totality it states that the commission shall have the power, under circumstances stated therein, to discipline a real estate broker or salesman or "... any person who shall assume to act in either such capac-

ity . . ."; the last quoted portion is an attempt to give the commission authority over persons who assume to act as brokers or salesmen. Black v. Arkansas Real Estate Comm'n, 275 Ark. 55, 626 S.W.2d 954 (1982).

Evidence.

Where most of the sales of lots owned by the defendant real estate broker and his wife were initiated in his real estate office where his broker's license was prominently displayed, the purchasers were entitled to rely upon the defendant to act in the manner in which a broker or salesman should act, and, where there was substantial evidence to support the commission's finding that the defendant had misrepresented matters and made false promises in connection with the sales, the commission had the authority to suspend his broker's license for a period of six months, notwithstanding the fact that the defendant could have performed these very same transactions had he possessed no license at all. Black v. Arkansas Real Estate Comm'n, 275 Ark. 55, 626 S.W.2d 954 (1982).

CHAPTER 15

JUNK DEALERS

SECTION. 71-1507. [Repealed.]

71-1507. Disposal of unclaimed junked vehicles — Notice requirement. [Repealed.]

Repeal. This section (Acts 1977, No. 579, § 1, p. 1541) was repealed by Acts 1981, No. 886, § 3, effective March 28, 1981.

SECTION. 71-1601. 71-1604.

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APPENDIX NO. 4
ARK.STAT. 17-41-101, *et seq.*

17-40-354. Fingerprint cards.

The Identification Bureau of the Department of Arkansas State Police may retain the fingerprint card collected for each individual who is fingerprinted under this chapter.

History. Acts 2005, No. 2237, § 13.

Chapter 41 Professional Fund Raisers and Solicitors

17-41-101 — 17-41-111. [Repealed.]

17-41-101 — 17-41-111. [Repealed.]

Publisher's Notes. This chapter was repealed by Acts 1999, No. 1198, § 18. The chapter was derived from the following sources:

17-41-101. Acts 1959, No. 253, § 1; A.S.A. 1947, § 64-1608; Acts 1991, No. 842, § 1; 1991, No. 1177, § 1.

17-41-102. Acts 1959, No. 253, § 7; A.S.A. 1947, § 64-1614; Acts 1991, No. 842, § 2; 1991, No. 1177, § 1.

17-41-103. Acts 1959, No. 253, § 5; 1979, No. 400, § 2; A.S.A. 1947, § 64-1612; Acts 1991, No. 842, § 3; 1991, No. 1177, § 1.

17-41-104. Acts 1959, No. 253, § 2; A.S.A. 1947, § 64-1609; Acts 1991, No. 842, § 4; 1991, No. 1177, § 1.

17-41-105. Acts 1959, No. 253, § 4; A.S.A. 1947, § 64-1611; Acts 1991, No. 842, § 5; 1991, No. 1177, § 1.

17-41-106. Acts 1959, No. 253, § 6; A.S.A. 1947, § 64-1613; Acts 1991, No. 842, § 6; 1991, No. 1177, § 1.

17-41-107. Acts 1959, No. 253, § 3; 1979, No. 400, § 1; 1983, No. 363, § 1; A.S.A. 1947, § 64-1610; Acts 1991, No. 842, § 7; 1991, No. 1177, § 1.

17-41-108. Acts 1959, No. 253, § 8; A.S.A. 1947, § 64-1615; Acts 1991, No. 842, § 8; 1991, No. 1177, § 1.

17-41-109. Acts 1969, No. 240, § 1; A.S.A. 1947, § 64-1616; Acts 1991, No. 842, § 9; 1991, No. 1177, § 1.

17-41-110. Acts 1991, No. 1177, § 1; 1993, No. 1055, §§ 1, 2.

17-41-111. Acts 1991, No. 1177, § 1.

For present law, see § 4-28-401 et seq.

Chapter 42 Real Estate License Law

Subchapter 1 — Real Estate License Law — General Provisions

Subchapter 2 — Arkansas Real Estate Commission

Subchapter 3 — Licenses

Subchapter 4 — Applicability — Real Estate Recovery Fund — Disciplinary Actions

Subchapter 5 — Renewal of Licenses

Subchapter 6 — Interest on Trust Accounts Program

Subchapter 7 — Interference with Real Estate Licensee Relationships

A.C.R.C. Notes. References to "this chapter" in §§ 17-42-101 to 17-42-409 and §§ 17-42-501 to 17-42-603 may not apply to § 17-42-410 which was enacted subsequently.

Publisher's Notes. Prior to the 1995 replacement of this volume, this chapter was codified as § 17-35-101 et seq.

Former chapter 35, concerning Real Estate Brokers And Salesmen, was repealed by Acts 1993, No. 690, § 29, effective January 1, 1994. The former chapter was derived from the following sources:

- 17-35-101. Acts 1929, No. 148, § 2; 1931, No. 142, § 1; Pope's Dig., § 12477; Acts 1975, No. 487, § 1; A.S.A. 1947, § 71-1302; Acts 1989, No. 887, § 1.
- 17-35-102. Acts 1929, No. 148, § 2; 1931, No. 142, § 1; Pope's Dig., § 12477; Acts 1975, No. 487, § 1; A.S.A. 1947, § 71-1302; Acts 1987, No. 1038, §§ 1, 2.
- 17-35-103. Acts 1929, No. 148, § 9; 1931, No. 142, § 1; Pope's Dig., § 12484; A.S.A. 1947, § 71-1309.
- 17-35-104. Acts 1929, No. 148, § 11; 1931, No. 142, § 1; Pope's Dig., § 12486; A.S.A. 1947, § 71-1311; Acts 1991, No. 675, § 3.
- 17-35-105. Acts 1929, No. 148, § 11; 1931, No. 142, § 1; Pope's Dig., § 12486; A.S.A. 1947, § 71-1311.
- 17-35-201. Acts 1929, No. 148, § 3; 1931, No. 142, § 1; Pope's Dig., § 12478; Acts 1971, No. 152, § 1; 1973, No. 630, § 1; 1975, No. 487, § 2; 1977, No. 113, §§ 1-3; 1981, No. 717, § 2; 1983, No. 131, §§ 1-3, 5; 1983, No. 135, §§ 1-3, 5; A.S.A. 1947, §§ 6-617 — 6-619, 6-623 — 6-626, 71-1303; Acts 1989, No. 804, § 1.
- 17-35-202. Acts 1929, No. 148, § 3; 1931, No. 142, § 1; Pope's Dig., § 12478; Acts 1971, No. 152, § 1; 1973, No. 630, § 1; 1975, No. 487, § 2; A.S.A. 1947, § 71-1303.
- 17-35-203. Acts 1929, No. 148, §§ 3, 6, 10; 1931, No. 142, §§ 1, 1[6]; Pope's Dig., §§ 12478, 12485; Acts 1971, No. 152, § 1; 1973, No. 630, § 1; 1975, No. 487, §§ 2, 4; 1983, No. 555, § 2; 1985, No. 979, § 1; A.S.A. 1947, §§ 71-1303, 71-1306, 71-1310.
- 17-35-204. Acts 1929, No. 148, § 3; 1931, No. 142, § 1; Pope's Dig., § 12478; Acts 1971, No. 152, § 1; 1973, No. 630, § 1; 1975, No. 487, § 2; A.S.A. 1947, § 71-1303.
- 17-35-205. Acts 1991, No. 1243, § 1.
- 17-35-301. Acts 1929, No. 148, §§ 1, 2; 1931, No. 142, § 1; Pope's Dig., §§ 12476, 12477; Acts 1953, No. 98, §§ 1, 2; 1975, No. 487, § 1; A.S.A. 1947, §§ 71-1301, 71-1301n, 71-1302; Acts 1991, No. 675, §§ 1, 2.
- 17-35-302. Acts 1975, No. 481, § 1; A.S.A. 1947, § 71-1304.1.
- 17-35-303. Acts 1975, No. 481, §§ 2-5; 1985, No. 1016, §§ 1, 2; A.S.A. 1947, §§ 71-1304.2 — 71-1304.5; Acts 1987, No. 1041, § 1; 1991, No. 1142, §§ 1-4.
- 17-35-304. Acts 1929, No. 148, § 5; Pope's Dig., § 12480; Acts 1951, No. 395, § 1; 1955, No. 362, § 1; 1959, No. 9, § 1; 1963, No. 157, § 1; 1973, No. 178, § 1; 1975, No. 487, § 3; 1977, No. 163, § 1; 1979, No. 73, § 8; 1983, No. 555, § 1; A.S.A. 1947, § 71-1305; Acts 1991, No. 423, §§ 1, 2.
- 17-35-305. Acts 1929, No. 148, § 6; 1931, No. 142, § 1; Pope's Dig., § 12481; Acts 1959, No. 9, § 2; 1963, No. 157, § 2; 1975, No. 487, § 4; 1983, No. 555, § 2; A.S.A. 1947, § 71-1306; Acts 1989, No. 887, § 2.
- 17-35-306. Acts 1929, No. 148, § 6; 1931, No. 142, § 1; Pope's Dig., § 12481; Acts 1959, No. 9, § 2; 1963, No. 157, § 2; 1975, No. 487, § 4; 1983, No. 555, § 2; A.S.A. 1947, § 71-1306; Acts 1991, No. 423, § 3.
- 17-35-307. Acts 1929, No. 148, § 6; 1931, No. 142, § 1; Pope's Dig., § 12481; Acts 1959, No. 9, § 2; 1963, No. 157, § 2; 1975, No. 487, § 4; 1983, No. 555, § 2; A.S.A. 1947, § 71-1306; Acts 1989, No. 887, § 3; 1991, No. 423, § 4.
- 17-35-308. Acts 1929, No. 148, § 6; 1931, No. 142, § 1; Pope's Dig., § 12481; Acts 1959, No. 9, § 2; 1963, No. 157, § 2; 1975, No. 487, § 4; 1983, No. 555, § 2; A.S.A. 1947, § 71-1306; Acts 1991, No. 423, § 5.
- 17-35-309. Acts 1929, No. 148, § 7; Pope's Dig., § 12482; A.S.A. 1947, § 71-1307.
- 17-35-310. Acts 1929, No. 148, § 8; Pope's Dig., § 12483; A.S.A. 1947, § 71-1308; Acts 1989, No. 59, § 1.
- 17-35-311. Acts 1929, No. 148, § 6; 1931, No. 142, § 1; Pope's Dig., § 12481; Acts 1959, No. 9, § 2; 1963, No. 157, § 2; 1975, No. 487, § 4; 1983, No. 555, § 2; A.S.A. 1947, § 71-1306.
- 17-35-312. Acts 1929, No. 148, § 6; 1931, No. 142, § 1; Pope's Dig., § 12481; Acts 1959, No. 9, § 2; 1963, No. 157, § 2; 1983, No. 555, § 2; A.S.A. 1947, § 71-1306; Acts 1991, No. 423, § 6.
- 17-35-313. Acts 1929, No. 148, § 6; 1931, No. 142, § 1; Pope's Dig., § 12481; Acts 1959, No. 9, § 2; 1963, No. 157, § 2; 1975, No. 487, § 4; 1983, No. 555, § 2; A.S.A. 1947, § 71-1306; Acts

1991, No. 423, § 7.
 17-35-314. Acts 1991, No. 278, §§ 1-4.
 17-35-401. Acts 1979, No. 73, § 6; A.S.A. 1947, § 71-1324.
 17-35-402. Acts 1979, No. 73, § 7; A.S.A. 1947, § 71-1325.
 17-35-403. Acts 1979, No. 73, § 1; A.S.A. 1947, § 71-1319.
 17-35-404. Acts 1979, No. 73, § 4; A.S.A. 1947, § 71-1322.
 17-35-405. Acts 1979, No. 73, § 2; A.S.A. 1947, § 71-1320.
 17-35-406. Acts 1979, No. 73, § 3; A.S.A. 1947, § 71-1321; Acts 1989, No. 888, §§ 1, 2.
 17-35-407. Acts 1979, No. 73, § 3; A.S.A. 1947, § 71-1321.
 17-35-408. Acts 1979, No. 73, § 3; A.S.A. 1947, § 71-1321.
 17-35-409. Acts 1979, No. 73, § 5; A.S.A. 1947, § 71-1323.
 17-35-501. Acts 1987, No. 453, § 1; 1991, No. 814, § 1.
 17-35-502. Acts 1987, No. 453, § 9.
 17-35-503. Acts 1987, No. 453, § 2; 1991, No. 814, § 2.
 17-35-504. Acts 1987, No. 453, § 3; 1991, No. 814, § 3.
 17-35-505. Acts 1987, No. 453, § 4; 1991, No. 814, § 4.
 17-35-506. Acts 1987, No. 453, § 5; 1991, No. 814, § 5.
 17-35-507. Acts 1987, No. 453, § 6; 1991, No. 814, § 6.
 17-35-508. Acts 1987, No. 453, § 8; 1991, No. 814, § 7.
 17-35-601. Acts 1989, No. 340, § 1.
 17-35-602. Acts 1989, No. 340, § 1.
 17-35-603. Acts 1989, No. 340, §§ 1, 2.
Effective Dates. Acts 1993, No. 690, § 25: Jan. 1, 1994.

Research References

ALR.

Revocation or suspension of license for conduct not connected with business as broker. 22 A.L.R.4th 136.
 Application of state antitrust laws to activities or practices of real estate agents or associations. 22 A.L.R.4th 103.
 Attorneys: right to become licensed as real estate brokers. 23 A.L.R.4th 230.
 Brokers misrepresentation to, or failure to inform vendor regarding vendor's property. 33 A.L.R.4th 944.
 Real estate broker's rights and liabilities as affected by failure to disclose financial information concerning purchaser. 34 A.L.R.4th 191.
 Grounds for revocation or suspension of license of real estate broker or salesperson. 7 A.L.R.5th 479.
 Broker's liability for failure to disclose information concerning offsite conditions affecting value of property. 41 A.L.R.5th 157.
Am. Jur. 12 Am. Jur. 2d, Brokers, § 5 et seq.
Ark. L. Rev.
 Real Estate Brokers in Arkansas, 17 Ark. L. Rev. 57.
C.J.S. 12 C.J.S., Brokers, § 5 et seq.

Case Notes

Applicability.
 Constitutionality.
 Real Estate Corporations.
 Unlawful Practice of Law.

Applicability.

Stock brokers, business brokers, and other kinds of brokers are not covered by former subchapters 1-3 of this chapter. *Frier v. Terry*, 230 Ark. 302, 323 S.W.2d 415 (1959).

Constitutionality.

Former subchapters 1-3 of this chapter are constitutional. *State v. Hurlock*, 185 Ark. 807, 49 S.W.2d 611 (1932).

Real Estate Corporations.

The purpose of the real estate statutes is to protect the public from unlicensed brokers and salespersons, not to prevent those properly licensed persons from doing business in a corporate form. *Standard Abstract & Title Co. v. Rector-Phillips-Morse, Inc.*, 282 Ark. 138, 666 S.W.2d 696 (1984).

Unlawful Practice of Law.

In case involving the alleged unlawful practice of law by real estate brokers, the court held that the preparation of certain instruments which were customarily prepared by real estate brokers or other instruments involving real property rights for others, either with or without pay, except "offers and acceptances," constituted the practice of law. *Arkansas Bar Ass'n v. Block*, 230 Ark. 430, 323 S.W.2d 912 (1959), cert. denied, *Block v. Bar Asso. of Arkansas*, 361 U.S. 836, 80 S. Ct. 87 (1959), overruled in part, *Creekmore v. Izard*, 236 Ark. 558, 367 S.W.2d 419 (Ark. 1963). The decision in *Arkansas Bar Ass'n v. Block* 230 Ark. 430, 323 S.W.(2d) 912, is modified to provide that, under certain conditions and when the person for whom he is acting has declined to employ a lawyer to prepare the necessary instruments, a real estate broker is permitted to fill in the blanks in simple printed standardized real estate forms which then must be approved by a lawyer. *Creekmore v. Izard*, 236 Ark. 558, 367 S.W.2d 419 (Ark. 1963).

Subchapter 1

— Real Estate License Law — General Provisions

- 17-42-101. Title.
- 17-42-102. Legislative findings and intent.
- 17-42-103. Definitions.
- 17-42-104. Exemptions.
- 17-42-105. Criminal sanctions.
- 17-42-106. Injunction.
- 17-42-107. Capacity to sue and be sued.
- 17-42-108. Disclosure requirement.

Effective Dates. Acts 1995, No. 399, § 5: Feb. 21, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that the laws of this state are in need of revision to clarify the laws; and this act is necessary to provide adequate protection to real estate licensees. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

17-42-101. Title.

This chapter shall be known as the "Real Estate License Law".

History. Acts 1993, No. 690, § 25.

Research References

U. Ark. Little Rock L.J.

Owen, *Survey of Arkansas Law: Property*, 2 U. Ark. Little Rock L.J. 275.

Case Notes

Brokers.

Property Owners.

Brokers.

Evidence sufficient to find that nonresident engineering partners had acted as real estate brokers under prior similar provisions without complying with licensing provisions of this chapter. *Savo v. Miller*, 224 Ark. 799, 276 S.W.2d 67 (1955).

One who, for a monetary consideration, gave to another an option to purchase real estate not

owned by the one giving the option and afterward obtained, for a monetary consideration, an option to purchase the real estate from the owner thereof was acting as a real estate broker as that term is defined in prior similar provisions. *Phillips v. Arkansas Real Estate Comm'n*, 244 Ark. 577, 426 S.W.2d 412 (1968).

Where sale of real estate did not occur in seller's real estate office and purchaser never met the seller, but purchaser testified that in agreeing to purchase he relied on the fact that seller was a licensed broker, owning the property being sold, and acting as escrow agent, there was sufficient evidence of purchaser's reliance on seller's status as a broker to invoke real estate commission's exercise of jurisdiction. *Eckels v. Arkansas Real Estate Comm'n*, 30 Ark. App. 69, 783 S.W.2d 864 (1990).

Property Owners.

Where the property sold was jointly owned by partners in real estate partnership, they could not be considered agents or brokers within the meaning of prior similar provisions and thus they did not come within the provisions of former subchapters 1-3 of this chapter. *Rothgeb v. Safeco Ins. Co. of Am.*, 259 Ark. 530, 534 S.W.2d 759 (1976).

Cited: *Keahey v. Plumlee*, 94 Ark. App. 121, 226 S.W.3d 31 (2006).

17-42-102. Legislative findings and intent.

The legislature finds that it is necessary to regulate the practice of real estate brokers and salespersons in order to protect the public health, safety, and welfare. It is the legislature's intent that only individuals who meet and maintain minimum standards of competence and conduct may provide service to the public.

History. Acts 1993, No. 690, § 1.

Research References

U. Ark. Little Rock L.J.

Owen, Survey of Arkansas Law: Property, 2 U. Ark. Little Rock L.J. 275.

17-42-103. Definitions.

As used in this chapter, unless the context otherwise requires:

(1) "Associate broker" means an individual who has a broker's license and who is employed by a principal broker, or is associated with a principal broker as an independent contractor, and who participates in any activity described in subdivision (12) of this section while under the supervision of a principal broker or executive broker. However, an associate broker shall have no supervisory authority over any other licensee;

(2) "Board" means the State Board of Private Career Education;

(3) "Branch office" means a real estate principal broker's office other than his or her principal place of business;

(4) "Classroom hour" means a period of at least fifty (50) minutes, but not more than sixty (60) minutes, of actual classroom instruction with the instructor present;

(5) "Commission" means the Arkansas Real Estate Commission;

(6) "Continuing education" means postlicensure education derived from participation in courses in real estate-related subjects which have been approved by the board or which are not required to be approved by the board;

(7) "Continuing education unit" means a period of ten (10) contact hours of actual classroom instruction with the instructor present;

(8) "Director" means the Executive Director of the Arkansas Real Estate Commission;

(9) "Executive broker" means an individual who has a broker's license and who

is employed by a principal broker or associated with a principal broker as an independent contractor and who participates in any activity described in subdivision (12) of this section while under the supervision of a principal broker. However, an executive broker may supervise associate brokers and salespersons;

(10) (A) “Licensee” means an individual who holds any type of license issued by the commission and, unless the context clearly requires otherwise, shall include a principal broker, an executive broker, an associate broker, and a salesperson.

(B) Nothing in this chapter shall preclude a licensee from:

(i) Doing business as a professional corporation under § 4-29-101

et seq.; or

(ii) Receiving payment from a real estate firm or principal broker of an earned commission to the licensee's legal business entity if the licensee earned the commission on behalf of the real estate firm or principal broker;

(11) “Participate in a real estate auction” means any act or conduct done for compensation or the expectation thereof and designed, intended, or expected to affect the bidding or results of a real estate auction, including, without limitation, serving as an auctioneer or ringman or encouraging, soliciting, or receiving bids;

(12) “Principal broker” means an individual, while acting for another for a fee, commission, or other consideration, or the expectation thereof, who:

(A) Sells, exchanges, purchases, rents, or leases real estate;

(B) Offers to sell, exchange, purchase, rent, or lease real estate;

(C) Negotiates, offers, attempts, or agrees to negotiate the sale, exchange, purchase, rent, or lease of real estate;

(D) Lists, offers, attempts, or agrees to list real estate for sale, lease, or exchange;

(E) Auctions, offers, attempts, or agrees to auction real estate, or participates in a real estate auction;

(F) Buys, sells, offers to buy or sell, or otherwise deals in options on real estate or improvements thereon;

(G) Collects, offers, attempts, or agrees to collect rent for the use of real estate;

(H) Advertises or holds himself or herself out as being engaged in the business of buying, selling, exchanging, renting, or leasing real estate;

(I) Assists or directs in the procuring of prospects calculated to result in the sale, exchange, lease, or rent of real estate;

(J) Assists or directs in the negotiation of any transaction calculated or intended to result in the sale, exchange, lease, or rent of real estate;

(K) Engages in the business of charging an advance fee in connection with any contract whereby he or she undertakes to promote the sale or lease of real estate either through its listing in a publication issued for such a purpose or for referral of information concerning the real estate to brokers, or both; or

(L) Performs any of the foregoing acts as an employee of or on behalf of the owner of, or any person who has an interest in, real estate;

(13) (A) “Real estate” means and include leaseholds or any other interest or estate in land and shall include the sale and resale of time-share units.

(B) Unless the context otherwise requires, the words “real estate” and

“real property” shall be synonymous; and

(14) “Salesperson” means an individual who has a salesperson's license and who is employed by a principal broker or is associated with a principal broker as an independent contractor and who participates in any activity described in subdivision (12) of this section while under the supervision of a principal broker or executive broker.

History. Acts 1993, No. 690, § 3; 2007, No. 263, § 1.

Amendments. The 2007 amendment added (10)(B)(ii), redesignated part of (10)(B) as (10)(B)(i), and made related changes.

Case Notes

Cited: Keahey v. Plumlee, 94 Ark. App. 121, 226 S.W.3d 31 (2006).

17-42-104. Exemptions.

(a) The provisions of this chapter shall not apply to:

(1) Any person not licensed under this chapter who performs any of the acts described in § 17-42-103(12) with regard to the property owned, leased, or purchased by him or her;

(2) An attorney in fact under a duly executed and recorded power of attorney from the owner or lessor authorizing the final consummation by performance of any contract for the sale, lease, or exchange of real estate, provided that the attorney in fact receives no fee, commission, or other consideration and has no expectation thereof, directly or indirectly, for performing any such act;

(3) An attorney at law in the performance of his or her duties as an attorney at law;

(4) Any person acting as a receiver, trustee in bankruptcy, administrator, executor, or guardian, or while acting under a court order or under the authority of a will or of a trust instrument;

(5) Any person acting as a resident manager when the resident manager resides on the premises and is engaged in the leasing of real property in connection with his or her employment;

(6) Any person employed only at a salaried or hourly rate to engage in the leasing of real property for or on behalf of a licensed principal broker, the real estate firm of a licensed principal broker, or an owner of real estate, if the person performs one (1) or more of the following activities:

(A) Delivery of a lease application, lease, or an amendment to a lease application or lease to any person;

(B) Receiving a lease application, lease, or an amendment to a lease application for delivery to the principal broker, real estate firm, or owner;

(C) Receiving a security deposit, rental payment, or any related payment for delivery to and made payable to the principal broker, real estate firm, or owner;

(D) Acting under the direct written instructions of the principal broker, real estate firm, or owner:

(i) Showing a rental unit to any person; or

(ii) Assisting in the execution of a preprinted lease or rental agreement containing terms established by the principal broker, real estate firm, or owner; or

(E) Conveying information prepared by the principal broker, real estate

firm, or owner about a lease application, lease, the status of a security deposit, or the payment of rent to or from any person;

(7) Any officer or employee of a federal agency or state government, or any political subdivision thereof, in the performance or conduct of his or her official duties;

(8) Any multiple listing service wholly owned by a nonprofit organization or association of real estate licensees; or

(9) An officer of a corporation or a general partner of a partnership with respect to real property owned or leased by the corporation or partnership, or in connection with the proposed purchase or leasing of real property by the corporation or partnership, provided that such acts are not performed by the officer or partner for or in expectation of special compensation and provided further that such acts are not performed as a vocation of the officer or partner.

(b) Any real estate broker licensed by the Arkansas Real Estate Commission on or before January 1, 1985, who is engaged in the sale of real estate by auction only is authorized to employ real estate salespersons to work under the license of the broker even though the broker is employed in a non-real estate-related field and is only a part-time broker.

History. Acts 1993, No. 690, § 4; 2007, No. 263, § 2.

Amendments. The 2007 amendment inserted (a)(6), and redesignated the following subdivisions accordingly.

Case Notes

Exemption Not Found.

Exemption Not Found.

Where sale of real estate did not occur in seller's real estate office and purchaser never met the seller, but purchaser testified that in agreeing to purchase he relied on the fact that seller was a licensed broker, owning the property being sold, and acting as escrow agent, there was sufficient evidence of purchaser's reliance on seller's status as a broker to invoke real estate commission's exercise of jurisdiction. *Eckels v. Arkansas Real Estate Comm'n*, 30 Ark. App. 69, 783 S.W.2d 864 (1990).

17-42-105. Criminal sanctions.

(a) Any person acting as a real estate broker or salesperson within this state who does not hold a valid active Arkansas license or who otherwise violates any of the provisions of this chapter shall be guilty of a Class D felony and, upon conviction, punished accordingly.

(b) Any officer or agent of a corporation or member or agent of a firm, partnership, copartnership, or association who shall personally participate in or in any way be accessory to any violation of this chapter by the firm, partnership, copartnership, association, or corporation shall be subject to all the penalties prescribed in this section for individuals.

(c) Any commissioner of the Arkansas Real Estate Commission, the Executive Director of the Arkansas Real Estate Commission, or other designee, or any licensee residing in the county where the violation occurs may by affidavit institute criminal proceedings against any violator of this chapter without having to file a bond for costs.

(d) The prosecuting attorney for each county shall prosecute any violation of the provisions of this chapter which occurs in his or her county.

History. Acts 1993, No. 690, § 20.

Case Notes

Appeals by Individuals.
Information.

Appeals by Individuals.

Validity of the provision of prior similar provisions authorizing appeals by individuals on behalf of the state would not be determined where the appeal was actually taken by the prosecuting attorney. *State v. Hurlock*, 185 Ark. 807, 49 S.W.2d 611 (1932).

Information.

An information relating to the defendants acting as real estate brokers or salesmen without license charged a public offense within terms of prior similar provisions. *State v. Hurlock*, 185 Ark. 807, 49 S.W.2d 611 (1932).

17-42-106. Injunction.

- (a) Whenever there is reason to believe that any person, licensed or unlicensed, has violated any provision of this chapter, or any order, license, decision, demand, or requirement issued or made pursuant to this chapter, the Arkansas Real Estate Commission, the Executive Director of the Arkansas Real Estate Commission, or other designee may bring an action in the circuit court of any county in which the person resides or does business to enjoin such a person from continuing such violation or engaging therein or doing any act or acts in furtherance thereof.
- (b) Whenever there is reason to believe a person is acting as a real estate broker or salesperson in this state without a valid active Arkansas license, any licensee within the county where the violation occurs may bring an action in the circuit court to enjoin such a person from continuing such a violation or engaging therein or doing any act or acts in furtherance thereof.
- (c) In any action brought pursuant to this section, the circuit court shall have jurisdiction and authority to enter such preliminary or final injunction or such other relief as may be appropriate.

History. Acts 1993, No. 690, § 21.

Cross References. Jurisdiction of circuit courts, Ark. Const. Amend. 80, §§ 6, 19.

Case Notes

Defendant's Rights.

Defendant's Rights.

Action for injunction under prior similar provisions is not a criminal prosecution entitling the defendant to the constitutional guaranties applicable to such prosecutions. *Phillips v. Arkansas Real Estate Comm'n*, 244 Ark. 577, 426 S.W.2d 412 (1968).

17-42-107. Capacity to sue and be sued.

- (a) No action or suit shall be instituted, nor recovery be had, in any court of this state by any person or other legal entity for compensation for performance of any acts described in § 17-42-103(12) unless at the time of offering to perform and performing any such act or procuring any promise to contract for the payment of compensation for any such contemplated act:

(1) The person holds an active license under this chapter as a principal broker; or
(2) The person or other legal entity was the owner of the real estate firm which contracted for or otherwise performed the acts for the compensation which is the subject of the action or suit through either a principal broker or a person approved by the Arkansas Real Estate Commission under § 17-42-301(f) while licensed or approved by the commission at the time of the acts.

(b) No salesperson, executive broker, or associate broker may sue in his or her own capacity for the recovery of fees, commissions, or compensation for services as a salesperson, executive broker, or associate broker unless the action is against the principal broker with whom he or she is licensed or was licensed at the time the acts were performed.

(c) (1) As used in this subsection, “systematic residential rental property inspection program” means a program that requires all persons who reside outside of the State of Arkansas and are owners of residential rental property located within the corporate limits of a municipality in this state to designate an agent for service of process.

(2) In any municipality that has established a systematic residential rental property inspection program, a licensee as defined under § 17-42-103 shall not have criminal or civil liability to the municipality, to the nonresident owner, or otherwise for any action or inaction of the municipality or owner:

(A) When acting as an agent for service of process for a nonresident owner;

(B) Arising from the agent's performance of duties as the agent for service of process; and

(C) If within three (3) business days of receipt of service of process or at other times established by ordinance in effect as of August 12, 2005, the licensee sends the service of process to the last known address of the nonresident owner.

(3) This subsection supersedes any provision of common law to the contrary.

History. Acts 1993, No. 690, § 8; 2001, No. 1172, § 1; 2005, No. 1840, § 1.

Amendments. The 2001 amendment, in (a), inserted “or other legal entity,” and substituted “at the time ... act or” for “such person was duly licensed under this chapter as a principal broker at the time of offering to perform any such”; and added (a)(1) and (a)(2). The 2005 amendment added (c).

Case Notes

Construction.

Purpose.

Attorney Fees.

Construction.

Legislature did not intend subsection (b) of this section, regarding the capacity to sue for real estate commissions, to operate to prohibit individuals from consummating their arbitration proceeding by having a circuit court confirm their award and enter judgment thereon; to hold otherwise would deprive arbitrating parties of their traditional remedies, and the confirmation of an arbitration award could not be likened to filing suit. *Keahey v. Plumlee*, 94 Ark. App. 121, 226 S.W.3d 31 (2006)Supp. Op.94 Ark. App. 121, 226 S.W.3d 31 (2006).

Purpose.

The purpose of this section is to ensure that actions for commissions against third parties are brought by the real party in interest, the principal broker, rather than a sub-agent. *Keahey v. Plumlee*, 94 Ark. App. 121, 226 S.W.3d 31 (2006)Supp. Op.94 Ark. App. 121, 226 S.W.3d 31

(2006).

Attorney Fees.

Circuit court did not err in denying attorney fees because there was not a complete absence of justiciable issues; the applicability of subsection (b) of this section, regarding capacity to sue for real estate commissions, had not, until the instant appeal, been interpreted by Arkansas' courts and, further, the language of the statute was sufficiently unclear that a party or his attorney would be justified in making an argument regarding its meaning. *Keahey v. Plumlee*, 94 Ark. App. 121, 226 S.W.3d 31 (2006)Supp. Op.94 Ark. App. 121, 226 S.W.3d 31 (2006).

17-42-108. Disclosure requirement.

(a) (1) In every real estate transaction involving a licensee, the licensee shall clearly disclose to all parties or to their agents which party or parties he or she is representing.

(2) A licensee may represent more than one (1) party to a real estate transaction pursuant to and subject to regulations and rules of the Arkansas Real Estate Commission.

(b) The timing, method, and other requirements of such a disclosure shall be established by the commission, and the commission shall also determine the consequences of failure to make disclosure in accordance with such requirements.

History. Acts 1993, No. 690, § 16; 1995, No. 399, § 1.

Subchapter 2

— Arkansas Real Estate Commission

17-42-201. Creation — Members.

17-42-202. Organization — Employees.

17-42-203. Powers and duties.

17-42-204. Disposition of funds — Fund created.

17-42-205. Subpoenas and subpoenas duces tecum.

Effective Dates. Acts 1997, No. 250, § 258: Feb. 24, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that Act 1211 of 1995 established the procedure for all state boards and commissions to follow regarding reimbursement of expenses and stipends for board members; that this act amends various sections of the Arkansas Code which are in conflict with the Act 1211 of 1995; and that until this cleanup act becomes effective conflicting laws will exist. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor [sic], it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

17-42-201. Creation — Members.

(a) (1) The Arkansas Real Estate Commission shall consist of five (5) members, appointed by the Governor for terms of three (3) years, whose terms shall begin on January 1 and end on December 31 of the third year or when their respective successors are appointed and qualified.

(2) (A) Three (3) members shall have been licensed real estate brokers or licensed real estate salespersons for not fewer than five (5) years prior to their nominations.

(B) The Governor shall appoint members to fill vacancies from a list of

four (4) nominees submitted by the Arkansas Realtors Association.

(3) (A) Two (2) members shall not be actively engaged in or retired from the business of real estate.

(B) One (1) shall represent consumers, and one (1) shall be sixty (60) years of age or older and shall represent the elderly.

(C) Both shall be appointed from the state at large, subject to confirmation by the Senate, but shall not be required to be appointed from a list submitted by the Arkansas Realtors Association.

(D) The two (2) positions may not be held by the same person.

(E) Both shall be full voting members but shall not participate in the grading of examinations.

(b) Each commissioner may receive expense reimbursement and stipends in accordance with § 25-16-901 et seq.

History. Acts 1993, No. 690, § 5; 1997, No. 250, § 147.

A.C.R.C. Notes. Acts 1993, No. 690, § 5 provided, in part that:

"The Arkansas Real Estate Commission as previously created and established shall continue in existence."

Acts 1993, No. 690, § 5, also provided in part that:

"The persons previously appointed and now serving as Commissioners under existing law shall continue to serve the remainder of their respective terms, except that their terms are hereby extended to December 31 of the same calendar year in which they are presently scheduled to expire."

Amendments. The 1997 amendment rewrote (b).

Case Notes

Nomination by Association.

Nomination by Association.

Governor could appoint as a professional member of the Arkansas Real Estate Commission a person who had not been nominated by the Arkansas Real Estate Association. *McCarley v. Orr*, 247 Ark. 109, 445 S.W.2d 65 (1969) (decision prior to 1971 amendment).

17-42-202. Organization — Employees.

(a) (1) Immediately upon the qualification of the member appointed in each year, the Arkansas Real Estate Commission shall meet and organize by selecting from its members a chair and vice chair.

(2) A simple majority shall constitute a quorum.

(3) The commission shall meet as often as necessary or desirable in order to conduct its business.

(b) (1) The commission shall employ an executive director and such staff as may be necessary to carry out the provisions of this chapter and to put into effect the rules and regulations the commission may promulgate.

(2) The executive director shall have such duties, authority, and responsibility as the commission may designate, or as necessarily implied herein.

(3) The commission shall fix the salaries of employees.

History. Acts 1993, No. 690, §§ 5, 6.

17-42-203. Powers and duties.

- (a) The Arkansas Real Estate Commission may do all things necessary and convenient for carrying into effect the provisions of this chapter and may from time to time promulgate necessary or desirable rules and regulations.
- (b) The commission shall have power to administer oaths.
- (c) The commission shall adopt a seal with such design as it may prescribe engraved thereon.
- (d) Copies of all records and papers in the office of the commission, certified and authenticated by the commission, shall be received in evidence in all courts equally and with like effect as the originals.
- (e) The commission:
 - (1) Shall maintain in writing or in electronic format a list of the names and addresses of all active licensees licensed by it under the provisions of this chapter; and
 - (2) May publish in writing or in electronic format the names of all persons who have been sanctioned under § 17-42-312 or by consent order, together with other information relative to the enforcement of the provisions of this chapter as it may deem of interest to the public.
- (f) The commission may conduct or assist in conducting real estate institutes and seminars and incur and pay the reasonable and necessary expenses in connection therewith. The institutes or seminars shall be open to all licensees.
- (g) The commission is authorized to make reasonable charges for materials provided by the commission and for services performed in connection with providing materials.
- (h) (1) The commission is authorized to establish reasonable procedures that shall be used by real estate licensees in conducting real estate auctions.
 - (2) For the protection of the public, real estate licensees who manage and conduct real estate auctions also shall be required to be licensed by the Auctioneer's Licensing Board.
 - (3) Notwithstanding subdivision (h)(2) of this section, the commission shall have sole jurisdiction over real estate licensees and their actions when managing or conducting real estate auctions.

History. Acts 1993, No. 690, § 5; 2005, No. 1173, § 1; 2007, No. 263, § 3.

Amendments. The 2005 amendment added (h). The 2007 amendment subdivided (e) into (e)(1) and (e)(2); substituted "Shall maintain in writing or in electronic format" for "shall annually publish" in (e)(1); in (e)(2), inserted "May publish in writing or in electronic format the names," and substituted "who have been sanctioned under § 17-42-312 or by consent order" for "whose licenses have been suspended or revoked during that period"; and made related changes.

Case Notes

Pension Plans.
Regulations.

Pension Plans.

The commission was not authorized to adopt an employee pension plan, and plan adopted by commission was therefore void from its inception. *Parker v. Arkansas Real Estate Comm'n*, 256 Ark. 149, 506 S.W.2d 125 (1974).

Regulations.

Regulation organizing accreditation of schools training real estate brokers was beyond commission's authority and was invalid. *Gelly v. West*, 253 Ark. 373, 486 S.W.2d 31 (1972). Where commission adopted rule requiring that Arkansas real estate broker's name appear

equally prominent with that of the franchise real estate broker's name, it attempted to regulate advertising by brokers, which is beyond its statutory authority under former subchapters 1-3 of this chapter, even though it is empowered to do all things necessary and convenient for carrying those subchapters into effect. *Century 21 Real Estate of N. Tex., Inc. v. Arkansas Real Estate Comm'n*, 271 Ark. 933, 611 S.W.2d 515 (1981).

17-42-204. Disposition of funds — Fund created.

(a) Except as otherwise provided herein, all fees, charges, fines, and penalties collected by the Arkansas Real Estate Commission shall be deposited into a fund to be known as the "Arkansas Real Estate Commission Fund".

(b) The commission is empowered to expend funds appropriated from the Arkansas Real Estate Commission Fund for the requirements, purposes, and expenses of the commission under the provisions of this chapter.

History. Acts 1993, No. 690, § 5; 2007, No. 263, § 4.

Amendments. The 2007 amendment deleted "upon vouchers signed by the executive director or deputy executive director of the commission and countersigned by the chair or vice chair thereof" at the end of (b), and made a related change.

17-42-205. Subpoenas and subpoenas duces tecum.

(a) The Arkansas Real Estate Commission shall have the power to issue subpoenas and subpoenas duces tecum in connection with both its investigations and hearings.

(b) A subpoena duces tecum may require any book, writing, document, or other paper or thing which is germane to an investigation or hearing conducted by the commission to be transmitted to the commission.

(c) (1) Service of a subpoena shall be as provided by law for the service of subpoenas in civil cases in the circuit courts of this state, and the fees and mileage of officers serving the subpoenas and of witnesses appearing in answer to the subpoenas shall be the same as provided by law for proceedings in civil cases in the circuit courts of this state.

(2) (A) The commission shall issue a subpoena or subpoena duces tecum upon the request of any party to a hearing before the commission.

(B) The fees and mileage of the officers serving the subpoena and of the witness shall be paid by the party at whose request a witness is subpoenaed.

(d) (1) In the event a person shall have been served with a subpoena or subpoena duces tecum as herein provided and fails to comply therewith, the commission may apply to the circuit court of the county in which the commission is conducting its investigation or hearing for an order causing the arrest of the person and directing that the person be brought before the court.

(2) The court shall have the power to punish the disobedient person for contempt as provided by law in the trial of civil cases in the circuit courts of this state.

History. Acts 1993, No. 690, § 5.

**Subchapter 3
— Licenses**

17-42-301. License required — Violations.

17-42-302. Issuance or denial of license.

17-42-303. Education and experience requirements.

- 17-42-304. Fees.
- 17-42-305. Nonresident license requirements.
- 17-42-306. Application procedure — Licensing examination required.
- 17-42-307. Expiration and renewal.
- 17-42-308. Inactive license.
- 17-42-309. Place of business.
- 17-42-310. Change of name or address — Lost license or card.
- 17-42-311. Violations.
- 17-42-312. Investigation of complaint — Penalties.
- 17-42-313. Dismissal of complaint — Appeal.
- 17-42-314. Hearings.
- 17-42-315. Criminal background check.

Cross References. Licenses and permits, removal of disqualification for criminal offenses, § 17-1-103.

Effective Dates. Acts 1995, No. 729, § 5: Mar. 22, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that it is necessary and desirable for the Arkansas Real Estate Commission to be granted the authority to accept alternative experience as meeting the licensure requirements for real estate brokers and that therefore, immediate effect should be given to this measure. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval." Acts 1995, No. 1285, § 8: became law without the Governor's signature. April 14, 1995.

Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that it is necessary and desirable for the Arkansas Real Estate Commission to be granted the authority to increase fees in order to have sufficient funds with which to efficiently and effectively administer the laws and regulations pertaining to the licensure and regulation of real estate brokers and salespersons and to effectively administer the continuing education requirements for such licensees, and that, therefore, immediate effect should be given to this measure. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 2007, No. 53, § 3: Feb. 6, 2007: Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that current Arkansas law prevents an applicant from sitting for the real estate examination until the receipt of a state and federal background check by the Arkansas Real Estate Commission; that these background checks take a great deal of time to complete; and that requiring an applicant to delay taking the examination until the background checks are received unfairly punishes the applicant and negatively affects the real estate profession. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Research References

Ark. L. Rev.

Case Notes — Equity — Injunctions — Unlicensed Practice of a Profession, 11 Ark. L. Rev. 177.

17-42-301. License required — Violations.

- (a) No person shall practice or represent himself or herself as a real estate broker or salesperson without first applying for and receiving a license to practice under this chapter.
- (b) Any person who directly or indirectly for another with the intention, or on the

promise of receiving any valuable consideration, offers, attempts, or agrees to perform any single act described in § 17-42-103(12), whether as part of a transaction or as an entire transaction, shall be deemed a broker or salesperson within the meaning of this chapter.

(c) The commission of a single act by a person required to be licensed under this chapter and not so licensed shall constitute a violation of this chapter.

(d) It shall be unlawful for any person, directly or indirectly, to act as a real estate broker or salesperson without first obtaining a license and otherwise complying with the provisions of this chapter.

(e) (1) Notwithstanding the provisions of this section, a person or other legal entity not licensed by the Arkansas Real Estate Commission may own a real estate firm, provided the employees or agents employed by or associated with the firm who perform real estate activities identified under § 17-42-103(12) hold an active license under this chapter.

(2) The firm may enter into contracts or otherwise perform activities identified under § 17-42-103(12) only through a principal broker and any licensee employed by or associated with the principal broker that holds an active license issued by the commission at the time of performing the contract or activities.

(f) The commission may provide for the continuing temporary operation of a real estate firm having all rights under § 17-42-107(a) upon the death, resignation, termination, or incapacity of the principal broker or upon the closing of a real estate firm, under the direction of a person approved by the commission, subject to time limitations and other conditions imposed by the commission.

History. Acts 1993, No. 690, § 2; 2001, No. 1172, § 2.

Amendments. The 2001 amendment added (e) and (f).

Research References

U. Ark. Little Rock L.J.

Owen, Survey of Arkansas Law: Property, 2 U. Ark. Little Rock L.J. 275 (1979).

Case Notes

Acting as Broker.

Auctions.

Corporations.

Injunctions.

Nonresident Brokers.

Recovery of Commission.

—Appeal.

—Complaint.

—Suit in Corporate Name.

—Waiver.

Acting as Broker.

Business broker claiming commission with respect to sale of corporate business was not engaged in sale of real estate where he claimed no commission on sale of real estate made in connection with the business transaction. *Frier v. Terry*, 230 Ark. 302, 323 S.W.2d 415 (1959). Actions and activities which are considered to be within the realm of real estate transactions requiring a license must be performed for compensation or with the expectation of compensation to be considered activities of a real estate broker or salesman. *Arkansas Real Estate Comm'n v. Harrison*, 266 Ark. 339, 585 S.W.2d 34 (1979).

Auctions.

A party who sells a tract of real estate at auction under a power of attorney executed by the owner is subject to penal provisions if the party is not licensed as a real estate broker or salesman. *Henson v. State*, 262 Ark. 456, 557 S.W.2d 617 (1977).

Corporations.

Since corporations can only act through their agents, so long as the salespersons and brokers employed by real estate firms are licensed, then the requirements mandated by prior similar provisions are being met. *Standard Abstract & Title Co. v. Rector-Phillips-Morse, Inc.*, 282 Ark. 138, 666 S.W.2d 696 (1984).

Prior similar provisions did not prevent licensed real estate brokers and salespersons from suing in their corporate name to collect a commission due them. *Standard Abstract & Title Co. v. Rector-Phillips-Morse, Inc.*, 282 Ark. 138, 666 S.W.2d 696 (1984).

Injunctions.

Notwithstanding the fact prior similar provisions contains criminal penalties for its violation, an action to enjoin commission of the acts prohibited by prior similar provisions is not a criminal action entitling the defendant to a jury trial. *Phillips v. Arkansas Real Estate Comm'n*, 244 Ark. 577, 426 S.W.2d 412 (1968).

Nonresident Brokers.

If nonresident real estate agent brings a prospect to Arkansas to show him land, the act is the act of a real estate broker in Arkansas, and Arkansas state licensing law applies to the transaction. *Campbell v. Duncan*, 84 F. Supp. 732 (E.D. Ark. 1949).

Nonresident real estate agent cannot sue in the state courts of Arkansas, or in the federal courts for Arkansas, to collect a note given him as a commission for sale of land in Arkansas if he does not have an Arkansas real estate license. *Campbell v. Duncan*, 84 F. Supp. 732 (E.D. Ark. 1949). Evidence sufficient to find that nonresident engineering partners had acted as real estate brokers under prior similar provisions without complying with licensing provisions of this chapter. *Savo v. Miller*, 224 Ark. 799, 276 S.W.2d 67 (1955).

An out-of-state broker does not have to be licensed in Arkansas in order to enforce his contract in this state, provided the contract does not require him to perform brokerage services in this state. However, it is unlawful to act as a real estate broker or salesman in Arkansas without a license issued by the Arkansas Real Estate Commission. *Maas v. Merrell Assocs.*, 13 Ark. App. 240, 682 S.W.2d 769 (1985).

Recovery of Commission.

A broker who made no application for a license before effecting a sale of land was not entitled to recover a commission. *Birnbach v. Kirspele*, 188 Ark. 792, 67 S.W.2d 730 (1934); *Nelson v. Stolz*, 197 Ark. 1053, 127 S.W.2d 138 (1939); *McMillan v. Dunlap*, 206 Ark. 434, 175 S.W.2d 987 (1943).

A salesman without a license cannot recover any commission; moreover, contracts made by unlicensed salesmen are invalid and cannot be enforced. *Dunn v. Phoenix Village, Inc.*, 213 F. Supp. 936 (W.D. Ark. 1963).

—Appeal.

Where entitlement of unlicensed person to commission on real estate transaction was not raised in trial court it could not be raised on appeal. *St. Louis Union Trust Co. v. Hammans*, 204 Ark. 298, 161 S.W.2d 950 (1942).

—Complaint.

Where broker suing to recover real estate commission did not allege in his complaint that he was a licensed real estate dealer but evidence to that effect was introduced without objection, trial court could properly treat the complaint as amended to conform to the proof. *Dacus v. Burns*, 206 Ark. 810, 177 S.W.2d 748 (1944).

After case had been submitted to jury and defendant moved for a directed verdict on ground that complaint of real estate broker in suit for commission failed to allege broker was licensed, it was within discretion of trial court to permit broker to be recalled and testify that she was licensed, treating the pleadings as amended to conform to the proof. *El Dorado Real Estate Co. v. Garrett*, 240 Ark. 483, 400 S.W.2d 497 (1966).

—Suit in Corporate Name.

Where real estate agent brought action for commission under name of unlicensed real estate corporation but later substituted himself individually as plaintiff, it was not a defense to action that

**APPENDIX NO. 5
RESTATEMENT (SECOND) OF
CONFLICT OF LAWS § 6 (1971)**

Restatement of the Law — Conflict of Laws
Restatement (Second) of Conflict of Laws
Current through August 2009

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Chapter 1. Introduction

§ 6. Choice-Of-Law Principles

[Link to Case Citations](#)

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include**
- (a) the needs of the interstate and international systems,**
 - (b) the relevant policies of the forum,**
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,**
 - (d) the protection of justified expectations,**
 - (e) the basic policies underlying the particular field of law,**
 - (f) certainty, predictability and uniformity of result, and**
 - (g) ease in the determination and application of the law to be applied.**

Comment on Subsection (1):

a. Statutes directed to choice of law. A court, subject to constitutional limitations, must follow the directions of its legislature. The court must apply a local statutory provision directed to choice of law provided that it would be constitutional to do so. An example of a statute directed to choice of law is the Uniform Commercial Code which provides in certain instances for the application of the law chosen by the parties (§ 1-105(1)) and in other instances for the application of the law of a particular state (§§ 2-402, 4-102, 6-102, 8-106, 9-103). Another example is the Model Execution of Wills Act which provides that a written will subscribed by the testator shall be valid as to matters of form if it complies with the local requirements of any one of a number of enumerated states. Statutes that are expressly directed to choice of law, that is to say, statutes which provide for the application of the local law of one state, rather than the local law of another state, are comparatively few in number.

b. Intended range of application of statute. A court will rarely find that a question of choice of law is explicitly covered by statute. That is to say, a court will rarely be directed by statute to apply the local law of one state, rather than the local law of another state, in the decision of a particular issue. On the other hand, the court will constantly be faced with the question whether the issue before it falls within the intended range of application of a particular statute. The court should give a local statute the range of application intended by the legislature when these intentions can be ascertained and can constitutionally be given effect. If the legislature intended that the statute should be applied to the out-of-state facts involved, the court should so apply it unless constitutional considerations forbid. On the other hand, if the legislature intended that the statute should be applied only to acts taking place within the state, the statute should not be given a wider range of application. Sometimes a statute's intended range of application will be apparent on its face, as when it expressly applies to all citizens of a state including those who are living abroad.

When the statute is silent as to its range of application, the intentions of the legislature on the subject can sometimes be ascertained by a process of interpretation and construction. Provided that it is constitutional to do so, the court will apply a local statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choice-of-law principles.

Comment on Subsection (2):

c. Rationale. Legislatures usually legislate, and courts usually adjudicate, only with the local situation in mind. They rarely give thought to the extent to which the laws they enact, and the common law rules they enunciate, should apply to out-of-state facts. When there are no adequate directives in the statute or in the case law, the court will take account of the factors listed in this Subsection in determining the state whose local law will be applied to determine the issue at hand. It is not suggested that this list of factors is exclusive. Undoubtedly, a court will on occasion give consideration to other factors in deciding a question of choice of law. Also it is not suggested that the factors mentioned are listed in the order of their relative importance. Varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law. So, for example, the policy in favor of effectuating the relevant policies of the state of dominant interest is given predominant weight in the rule that transfers of interests in land are governed by the law that would be applied by the courts of the situs (see §§ 223-243). On the other hand, the policies in favor of protecting the justified expectations of the parties and of effectuating the basic policy underlying the particular field of law come to the fore in the rule that, subject to certain limitations, the parties can choose the law to govern their contract (see § 187) and in the rules which provide, subject to certain limitations, for the application of a law which will uphold the validity of a trust of movables (see §§ 269-270) or the validity of a contract against the charge of commercial usury (see § 203). Similarly, the policy favoring uniformity of result comes to the fore in the rule that succession to interests in movables is governed by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death (see §§ 260 and 263).

At least some of the factors mentioned in this Subsection will point in different directions in all but the simplest case. Hence any rule of choice of law, like any other common law rule, represents an accommodation of conflicting values. Those chapters in the Restatement of this Subject which are concerned with choice of law state the rules which the courts have evolved in accommodation of the factors listed in this Subsection. In certain areas, as in parts of Property (Chapter 9), such rules are sufficiently precise to permit them to be applied in the decision of a case without explicit reference to the factors which underlie them. In other areas, such as in Wrongs (Chapter 7) and Contracts (Chapter 8), the difficulties and complexities involved have as yet prevented the courts from formulating a precise rule, or series of rules, which provide a satisfactory accommodation of the underlying factors in all of the situations which may arise. All that can presently be done in these areas is to state a general principle, such as application of the local law "of the state of most significant relationship", which provides some clue to the correct approach but does not furnish precise answers. In these areas, the courts must look in each case to the underlying factors themselves in order to arrive at a decision which will best accommodate them.

Statement of precise rules in many areas of choice of law is made even more difficult by the great variety of situations and of issues, by the fact that many of these situations and issues have not been thoroughly explored by the courts, by the generality of statement frequently used by the courts in their opinions, and by the new grounds of decision stated in many of the more recent opinions.

The Comments which follow provide brief discussion of the factors underlying choice of law which are mentioned in this Subsection.

d. Needs of the interstate and international systems. Probably the most important function of choice-of-law rules is to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states. Rules of choice of law formulated with regard for such needs and policies are likely to commend themselves to other states and to be adopted by these states. Adoption of the same choice-of-law rules by many states will fur-

ther the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result.

e. Relevant policies of the state of the forum. Two situations should be distinguished. One is where the state of the forum has no interest in the case apart from the fact that it is the place of the trial of the action. Here the only relevant policies of the state of the forum will be embodied in its rules relating to trial administration (see Chapter 6). The second situation is where the state of the forum has an interest in the case apart from the fact that it is the place of trial. In this latter situation, relevant policies of the state of the forum may be embodied in rules that do not relate to trial administration.

The problem dealt with in this Comment arises in the common situation where a statute or common law rule of the forum was formulated solely with the intrastate situation in mind or, at least, where there is no evidence to suggest that the statute or rule was intended to have extraterritorial application. If the legislature or court (in the case of a common law rule) did have intentions with respect to the range of application of a statute or common law rule and these intentions can be ascertained, the rule of Subsection (1) is applicable. If not, the court will interpret the statute or rule in the light of the factors stated in Subsection (2).

Every rule of law, whether embodied in a statute or in a common law rule, was designed to achieve one or more purposes. A court should have regard for these purposes in determining whether to apply its own rule or the rule of another state in the decision of a particular issue. If the purposes sought to be achieved by a local statute or common law rule would be furthered by its application to out-of-state facts, this is a weighty reason why such application should be made. On the other hand, the court is under no compulsion to apply the statute or rule to such out-of-state facts since the originating legislature or court had no ascertainable intentions on the subject. The court must decide for itself whether the purposes sought to be achieved by a local statute or rule should be furthered at the expense of the other choice-of-law factors mentioned in this Subsection.

f. Relevant policies of other interested states. In determining a question of choice of law, the forum should give consideration not only to its own relevant policies (see Comment *e*) but also to the relevant policies of all other interested states. The forum should seek to reach a result that will achieve the best possible accommodation of these policies. The forum should also appraise the relative interests of the states involved in the determination of the particular issue. In general, it is fitting that the state whose interests are most deeply affected should have its local law applied. Which is the state of dominant interest may depend upon the issue involved. So if a husband injures his wife in a state other than that of their domicile, it may be that the state of conduct and injury has the dominant interest in determining whether the husband's conduct was tortious or whether the wife was guilty of contributory negligence (see § 146). On the other hand, the state of the spouses' domicile is the state of dominant interest when it comes to the question whether the husband should be held immune from tort liability to his wife (see § 169).

The content of the relevant local law rule of a state may be significant in determining whether this state is the state with the dominant interest. So, for example, application of a state's statute or common law rule which would absolve the defendant from liability could hardly be justified on the basis of this state's interest in the welfare of the injured plaintiff.

g. Protection of justified expectations. This is an important value in all fields of the law, including choice of law. Generally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state. Also, it is in part because of this factor that the parties are free within broad limits to choose the law to govern the validity of their contract (see § 187) and that the courts seek to apply a law that will sustain the validity of a trust of movables (see §§ 269-270).

There are occasions, particularly in the area of negligence, when the parties act without giving thought to the legal consequences of their conduct or to the law that may be applied. In such situations, the parties have no justified ex-

pectations to protect, and this factor can play no part in the decision of a choice-of-law question.

h. Basic policies underlying particular field of law. This factor is of particular importance in situations where the policies of the interested states are largely the same but where there are nevertheless minor differences between their relevant local law rules. In such instances, there is good reason for the court to apply the local law of that state which will best achieve the basic policy, or policies, underlying the particular field of law involved. This factor explains in large part why the courts seek to apply a law that will sustain the validity of a contract against the charge of commercial usury (§ 203) or the validity of a trust of movables against the charge that it violates the Rule Against Perpetuities (§§ 269-270).

i. Predictability and uniformity of result. These are important values in all areas of the law. To the extent that they are attained in choice of law, forum shopping will be discouraged. These values can, however, be purchased at too great a price. In a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules. Predictability and uniformity of result are of particular importance in areas where the parties are likely to give advance thought to the legal consequences of their transactions. It is partly on account of these factors that the parties are permitted within broad limits to choose the law that will determine the validity and effect of their contract (see § 187) and that the law that would be applied by the courts of the state of the situs is applied to determine the validity of transfers of interests in land (see § 223). Uniformity of result is also important when the transfer of an aggregate of movables, situated in two or more states, is involved. Partly for this reason, the law that would be applied by the courts of the state of a decedent's domicile at death is applied to determine the validity of his will in so far as it concerns movables (see § 263) and the distribution of his movables in the event of intestacy (see § 260).

j. Ease in the determination and application of the law to be applied. Ideally, choice-of-law rules should be simple and easy to apply. This policy should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results. The policy does, however, provide a goal for which to strive.

k. Reciprocity. In formulating common law rules of choice of law, the courts are rarely guided by considerations of reciprocity. Private parties, it is felt, should not be made to suffer for the fact that the courts of the state from which they come give insufficient consideration to the interests of the state of the forum. It is also felt that satisfactory development of choice-of-law rules can best be attained if each court gives fair consideration to the interests of other states without regard to the question whether the courts of one or more of these other states would do the same. As to whether reciprocity is a condition to the recognition and enforcement of a judgment of a foreign nation, see § 98, Comment *e*.

States sometimes incorporate a principle of reciprocity into statutes and treaties. They may do so in order to induce other states to take certain action favorable to their interests or to the interests of their citizens. So, as stated in § 89, Comment *b*, many States of the United States have enacted statutes which provide that a suit by a sister State for the recovery of taxes will be entertained in the local courts if the courts of the sister State would entertain a similar suit by the State of the forum. Similarly, by way of further example, some States of the United States provide by statute that an alien cannot inherit local assets unless their citizens in turn would be permitted to inherit in the state of the alien's nationality. A principle of reciprocity is also sometimes employed in statutes to permit reciprocating states to obtain by cooperative efforts what a single state could not obtain through the force of its own law. See, e.g., Uniform Reciprocal Enforcement of Support Act; Uniform (Reciprocal) Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings; Interpleader Compact Law.

REPORTER'S NOTE

The rule of this Section was cited and applied in Mitchell v. Craft, 211 So.2d 509 (Miss.1968). Subsection (1) of the rule was cited and applied in Oxford Consumer Discount Company v. Stefanelli, 102 N.J.Super. 549, 246 A.2d

460 (1968).

See generally Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L.Rev. 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 Calif.L.Rev. 1584 (1966); Traynor, *Is This Conflict Really Necessary?* 37 Texas L.Rev. 657 (1954); Cheatham and Reese, *Choice of the Applicable Law*, 52 Colum.L.Rev. 959 (1952); Reese, *Conflict of Laws and the Restatement Second*, 28 Law & Contemp. Prob. 679 (1963).

Cases where the court explicitly looked to similar factors in deciding a question of choice of law are Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Heath v. Zellmer, 35 Wis.2d 578, 151 N.W. 2d 664 (1967).

Comment k: On the subject of reciprocity, see Lenhoff, *Reciprocity and the Law of Foreign Judgments*, 16 La.L.Rev. 465 (1956); Lenhoff, *Reciprocity in Function*, 15 U.Pitt.L.Rev. 44 (1954); Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 44 Nw.U.L.Rev. 619, 662 (1952).

On rare occasions, the courts have incorporated the reciprocity principle into a common law rule of choice of law. See e.g., Forgan v. Bainbridge, 34 Ariz. 408, 274 Pac. 155 (1928); Union Securities Co. v. Adams, 33 Wyo. 45 236 Pac. 513 (1925).

Case Citations

(1971)

END OF DOCUMENT

**APPENDIX NO. 6
RESTATEMENT (SECOND) OF
CONFLICT OF LAWS § 188 (1971)**

Restatement of the Law — Conflict of Laws
Restatement (Second) of Conflict of Laws
Current through August 2009

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Chapter 8. Contracts
Topic 1. Validity Of Contracts And Rights Created Thereby
Title A. General Principles

§ 188. Law Governing In Absence Of Effective Choice By The Parties

[Link to Case Citations](#)

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and

(e) the domicile, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

Comment:

a. Scope of section. The rule of this Section applies in all situations where there has not been an effective choice of the applicable law by the parties (see § 187).

Comment on Subsection (1):

b. Rationale. The principles stated in § 6 underlie all rules of choice of law and are used in evaluating the significance of a relationship, with respect to the particular issue, to the potentially interested states, the transaction and the parties. The factors listed in Subsection (2) of the rule of § 6 can be divided into five groups. One group is concerned with the fact that in multistate cases it is essential that the rules of decision promote mutually harmonious and beneficial relationships in the interdependent community, federal or international. The second group focuses upon the purposes, policies, aims and objectives of each of the competing local law rules urged to govern and upon the concern of the potentially interested states in having their rules applied. The factors in this second group are at times referred to as “state interests” or as appertaining to an “interested state.” The third group involves the needs of the parties, namely the protection of their justified expectations and certainty and predictability of result. The fourth group is directed to implementation of the basic policy underlying the particular field of law, such as torts or con-

tracts, and the fifth group is concerned with the needs of judicial administration, namely with ease in the determination and application of the law to be applied.

The factors listed in Subsection (2) of the rule of § 6 vary somewhat in importance from field to field and from issue to issue. Thus, the protection of the justified expectations of the parties is of considerable importance in contracts whereas it is of relatively little importance in torts (see § 145, Comment *b*). In the torts area, it is the rare case where the parties give advance thought to the law that may be applied to determine the legal consequences of their actions. On the other hand, parties enter into contracts with forethought and are likely to consult a lawyer before doing so. Sometimes, they will intend that their rights and obligations under the contract should be determined by the local law of a particular state. In this event, the local law of this state will be applied, subject to the qualifications stated in the rule of § 187. In situations where the parties did not give advance thought to the question of which should be the state of the applicable law, or where their intentions in this regard cannot be ascertained, it may at least be said, subject perhaps to rare exceptions, that they expected that the provisions of the contract would be binding upon them.

The need for protecting the expectations of the parties gives importance in turn to the values of certainty, predictability and uniformity of result. For unless these values are attained, the expectations of the parties are likely to be disappointed.

Protection of the justified expectations of the parties by choice-of-law rules in the field of contracts is supported both by those factors in Subsection (2) of § 6 which are directed to the furtherance of the needs of the parties and by those factors which are directed to implementation of the basic policy underlying the particular field of law. Protection of the justified expectations of the parties is the basic policy underlying the field of contracts.

Protection of the justified expectations of the parties is a factor which varies somewhat in importance from issue to issue. As indicated above, this factor is of considerable importance with respect to issues involving the validity of a contract, such as capacity, formalities and substantial validity. Parties entering a contract will expect at the very least, subject perhaps to rare exceptions, that the provisions of the contract will be binding upon them. Their expectations should not be disappointed by application of the local law rule of a state which would strike down the contract or a provision thereof unless the value of protecting the expectations of the parties is substantially outweighed in the particular case by the interest of the state with the invalidating rule in having this rule applied. The extent of the interest of a state in having its rule applied should be determined in the light of the purpose sought to be achieved by the rule and by the relation of the transaction and the parties to that state (see Comment *c*).

Protection of justified expectations plays a less significant role in the choice-of-law process with respect to issues that involve the nature of the obligations imposed by a contract upon the parties rather than the validity of the contract or of some provision thereof. By and large, it is for the parties themselves to determine the nature of their contractual obligations. They can spell out these obligations in the contract or, as a short-hand device, they can provide that these obligations shall be determined by the local law of a given state (see § 187, Comment *c*). If the parties do neither of these two things with respect to an issue involving the nature of their obligations, as, for example, the time of performance, the resulting gap in their contract must be filled by application of the relevant rule of contract law of a particular state. All states have gap-filling rules of this sort, and indeed such rules comprise the major content of contract law. What is important for present purposes is that a gap in a contract usually results from the fact that the parties never gave thought to the issue involved. In such a situation, the expectations of the parties with respect to that issue are unlikely to be disappointed by application of the gap-filling rule of one state rather than of the rule of another state. Hence with respect to issues of this sort, protection of the justified expectations of the parties is unlikely to play so significant a role in the choice-of-law process. As a result, greater emphasis in fashioning choice-of-law rules in this area must be given to the other choice-of-law principles mentioned in the rule of § 6.

c. Purpose of contract rule. The purpose sought to be achieved by the contract rules of the potentially interested states, and the relation of these states to the transaction and the parties, are important factors to be considered in de-

termining the state of most significant relationship. This is because the interest of a state in having its contract rule applied in the determination of a particular issue will depend upon the purpose sought to be achieved by that rule and upon the relation of the state to the transaction and the parties. So the state where a party to the contract is domiciled has an obvious interest in the application of its contract rule designed to protect that party against the unfair use of superior bargaining power. And a state where a contract provides that a given business practice is to be pursued has an obvious interest in the application of its rule designed to regulate or to deter that business practice. On the other hand, the purpose of a rule and the relation of a state to the transaction and the parties may indicate that the state has little or no interest in the application of that rule in the particular case. So a state may have little interest in the application of a rule designed to protect a party against the unfair use of superior bargaining power if the contract is to be performed in another state which is the domicile of the person seeking the rule's protection. And a state may have little interest in the application of a statute designed to regulate or to deter a certain business practice if the conduct complained of is to take place in another state.

Whether an invalidating rule should be applied will depend, among other things, upon whether the interest of the state in having its rule applied to strike down the contract outweighs in the particular case the value of protecting the justified expectations of the parties and upon whether some other state has a greater interest in the application of its own rule.

Frequently, it will be possible to decide a question of choice of law in contract without paying deliberate attention to the purpose sought to be achieved by the relevant contract rules of the interested states. This will be so whenever by reason of the particular circumstances one state is obviously that of the applicable law.

d. The issue involved. The courts have long recognized that they are not bound to decide all issues under the local law of a single state. Thus, in an action on a contract made and to be performed in a foreign state by parties domiciled there, a court under traditional and prevailing practice applies its own state's rules to issues involving process, pleadings, joinder of parties, and the administration of the trial (see Chapter 6), while deciding other issues-- such as whether the defendant had capacity to bind himself by contract--by reference to the law selected by application of the rules stated in this Chapter. The rule of this Section makes explicit that selective approach to choice of the law governing particular issues.

Each issue is to receive separate consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states.

Comment on Subsection (2):

e. Important contacts in determining state of most significant relationship. In the absence of an effective choice of law by the parties (see § 187), the forum, in applying the principles of § 6 to determine the state of most significant relationship, should give consideration to the relevant policies of all potentially interested states and the relative interests of those states in the decision of the particular issue. The states which are most likely to be interested are those which have one or more of the following contacts with the transaction or the parties. Some of these contacts also figure prominently in the formulation of the applicable rules of choice of law.

The place of contracting. As used in the Restatement of this Subject, the place of contracting is the place where occurred the last act necessary, under the forum's rules of offer and acceptance, to give the contract binding effect, assuming, hypothetically, that the local law of the state where the act occurred rendered the contract binding.

Standing alone, the place of contracting is a relatively insignificant contact. To be sure, in the absence of an effective choice of law by the parties, issues involving the validity of a contract will, in perhaps the majority of situations, be determined in accordance with the local law of the state of contracting. In such situations, however, this state will be the state of the applicable law for reasons additional to the fact that it happens to be the place where occurred the last act necessary to give the contract binding effect. The place of contracting, in other words, rarely stands alone

and, almost invariably, is but one of several contacts in the state. Usually, this state will be the state where the parties conducted the negotiations which preceded the making of the contract. Likewise, this state will often be the state of the parties' common domicil as well. By way of contrast, the place of contracting will have little significance, if any, when it is purely fortuitous and bears no relation to the parties and the contract, such as when a letter of acceptance is mailed in a railroad station in the course of an interstate trip.

The place of negotiation. The place where the parties negotiate and agree on the terms of their contract is a significant contact. Such a state has an obvious interest in the conduct of the negotiations and in the agreement reached. This contact is of less importance when there is no one single place of negotiation and agreement, as, for example, when the parties do not meet but rather conduct their negotiations from separate states by mail or telephone.

The place of performance. The state where performance is to occur under a contract has an obvious interest in the nature of the performance and in the party who is to perform. So the state where performance is to occur has an obvious interest in the question whether this performance would be illegal (see § 202). When both parties are to perform in the state, this state will have so close a relationship to the transaction and the parties that it will often be the state of the applicable law even with respect to issues that do not relate strictly to performance. And this is even more likely to be so if, in addition, both parties are domiciled in the state.

On the other hand, the place of performance can bear little weight in the choice of the applicable law when (1) at the time of contracting it is either uncertain or unknown, or when (2) performance by a party is to be divided more or less equally among two or more states with different local law rules on the particular issue.

It is clear that the local law of the place of performance will be applied to govern all questions relating to details of performance see § 206).

Situs of the subject matter of the contract. When the contract deals with a specific physical thing, such as land or a chattel, or affords protection against a localized risk, such as the dishonesty of an employee in a fixed place of employment, the location of the thing or of the risk is significant (see §§ 189-193). The state where the thing or the risk is located will have a natural interest in transactions affecting it. Also the parties will regard the location of the thing or of the risk as important. Indeed, when the thing or the risk is the principal subject of the contract, it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the thing or risk was located would be applied to determine many of the issues arising under the contract.

Domicil, residence, nationality, place of incorporation, and place of business of the parties. These are all places of enduring relationship to the parties. Their significance depends largely upon the issue involved and upon the extent to which they are grouped with other contacts. So, for example, when a person has capacity to bind himself to the particular contract under the local law of the state of his domicil, there may be little reason to strike down the contract because that person lacked capacity under the local law of the state of contracting or of performance (see § 198). The fact that one of the parties is domiciled or does business in a particular state assumes greater importance when combined with other contacts, such as that this state is the place of contracting or of performance or the place where the other party to the contract is domiciled or does business. As stated in § 192, the domicil of the insured is a contact of particular importance in the case of life insurance contracts. At least with respect to most issues, a corporation's principal place of business is a more important contact than the place of incorporation, and this is particularly true in situations where the corporation does little, or no, business in the latter state.

Illustrations:

1. A, who is domiciled in state X, is declared a spendthrift by an X court. Thereafter, A borrows money in state Y from B, a Y domiciliary, who lends the money in ignorance of A's spendthrift status. Under the terms of the loan, the money is to be repaid in Y. A does not pay, and B brings suit in state Z. A would not be liable under X

local law because he has been declared a spendthrift; he would, however, be liable under the local law of Y. The first question for the Z court to determine is whether the interests of both X and Y would be furthered by application of their respective local law rules. This is a question that can only be determined in the light of the respective purposes of these rules (see Comment *c*). The purpose of the X local law rule is obviously to protect X domiciliaries and their families. Hence the interests of X would be furthered by application of the X spendthrift rule. On the other hand, Y's interests would be furthered by the application of its own rule, which presumably was intended for the protection of Y creditors and also to encourage persons to enter into contractual relationships in Y. Since the interests of X and Y would each be furthered by application of their respective rules, the Z court must choose between them. Among the questions for the Z court to determine are whether the value of protecting the justified expectations of the parties and the interest of Y in the application of its rule outweigh X's interest in the application of its invalidating rule. Factors which would support an affirmative answer to this question, and which indicate the degree of Y's interest in the application of its rule, are that A sought out B in Y, that B is domiciled in Y, that the loan was negotiated and made in Y and that the contract called for repayment in Y (see § 195). If it is found that an X court would not have applied its rule to the facts of the present case, the argument for applying the Y rule would be even stronger. For it would then appear that, even in the eyes of the X court, X interests were not sufficiently involved to require application of the X rule (see § 8, Comment *k*).² A, a married woman, who is domiciled in state X, comes to state Y and there borrows money from B. The loan contract provides that the money is to be repaid in Y. A does not pay, and B brings suit in state Z. A defends on the ground that under Y local law married women lack capacity to bind themselves by contract; they do have such capacity, however, under the local law of X. It is questionable in this case whether the interests of either X or Y would be furthered by application of their respective rules. Y's rule of incapacity was presumably designed to protect Y married women. On the other hand, X's rule of capacity was presumably designed, at least primarily, to protect X transactions. It seems clear in any event that the value of protecting the justified expectations of the parties is not outweighed in this case by any interest Y may have in the application of its rule of incapacity. Under the circumstances, the contract should be upheld on the issue of A's capacity by application of the X rule.

Comment on Subsection (3):

f. When place of negotiation and place of performance are in the same state. When the place of negotiation and the place of performance are in the same state, the local law of this state will usually be applied to govern issues arising under the contract, except as stated in §§ 189-199 and 203. A state having these contacts will usually be the state that has the greatest interest in the determination of issues arising under the contract. The local law of this state should be applied except when the principles stated in § 6 require application of some other law. As stated in Comment *c*, the extent of a state's interest in having its contract rule applied will depend upon the purpose sought to be achieved by that rule.

g. For reasons stated in § 186, Comment *b*, the reference is to the "local law" of the state of the applicable law and not to that state's "law" which means the totality of its law including its choice-of-law rules.

h. As to the situation where the local law rule of two or more states is the same, see § 186, Comment *c*.

REPORTER'S NOTE

See Rungee v. Allied Van Lines, Inc., 92 Idaho 718, 449 P.2d 378 (1968) (quoting and applying rule of Section).

See generally Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 161-162 (1946) (a case involving the validity of a covenant contained in a mortgage indenture where the Court said: "In determining which contract is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law. Determination requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states."); Rutas Aereas Nacionales, S.A. v. Robinson, 339 F.2d 265 (5th Cir.1964); Whitman v. Green, 289 F.2d 566 (9th Cir.1961) (note executed in Idaho by Idaho resident and secured by Idaho

reality upheld against charge of usury by application of local law of Washington where note was delivered and payable. "In the case at bar the lender did not seek out the borrower in the State of Idaho, nor sit in wait for him in that state. Rather, the borrower sought out the lender in the State of Washington."); Perrin v. Pearlstein, 314 F.2d 863 (2d Cir.1963); Teas v. Kimball, 257 F.2d 817, 824 (5th Cir.1958) ("... the focus of the contract was so centered in Texas that its validity should be determined by the laws of contract of that state"); Global Commerce Corp. v. Clark-Babbitt Industries, 239 F.2d 716 (2d Cir.1956); Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295 (9th Cir.1954); Grace v. Livingstone, 195 F.Supp. 933, 935 (D.Mass.1961), aff'd per curiam 297 F.2d 836 (1962), cert. den. sub. nom. 369 U.S. 871 (1962) ("In the silence of the parties, Massachusetts law governs for reasons well explained in the notes accompanying the April 22, 1960, amendments to the Second Restatement of Conflict of Laws, Tentative Draft No. 6."); Metzenbaum v. Golwynne Chemicals Corp., 159 F.Supp. 648 (S.D.N.Y.1958); Mutual Life Ins. Co. v. Simon, 151 F.Supp. 408 (S.D.N.Y.1957); Fricke v. Isbrandtsen Co., Inc., 151 F.Supp. 465, 467 (S.D.N.Y.1957) ("Ordinarily the federal courts determine which law governs a contract by 'grouping of contacts' or 'finding the center of gravity' of the contract. The law of the jurisdiction having the closest relation to the contract is selected because, it is felt, the parties contracted probably with that law (if any law) in mind, and that jurisdiction would probably have the greatest interest in defining the rights of the contracting parties. This doctrine, however nebulous in its statement, seems to fulfill more adequately the expectations of the parties than the definitively worded, but often artificially applied, doctrine of *lex loci contractus*."); Mulvihill v. Furness, Withy & Co., 136 F.Supp. 201, 206 (S.D.N.Y.1955) ("... the most salutary resolution of the conflicts problem is to ascertain the forum having the closest connection with the matters raised by the litigation."); Bernkrant v. Fowler, 55 Cal.2d 88, 360 P.2d 906 (1961) (application of Nevada local law to uphold an oral contract to make a will which would be invalid under the statute of frauds of California, the state of the decedent's domicile, based upon the interests of the two states, protection of the justified expectations of the parties, and the relevant contacts); Cochran v. Ellsworth, 126 Cal.App.2d 429, 437, 272 P.2d 904, 909 (1954) ("In this situation the bare physical act of signing the written instrument was a fortuitous, fleeting and relatively insignificant circumstance in the total contractual relationship between the parties. It should not be elevated to paramount importance, particularly when to do so will serve only the purpose of rendering invalid an otherwise legal agreement."); Graham v. Wilkins, 145 Conn. 34, 138 A.2d 705 (1958) (contract made in Pennsylvania to be performed in various states held governed by Connecticut local law on the ground that it had its "beneficial operation and effect" in Connecticut); Gregg v. Fitzpatrick, 54 Ga.App. 303, 187 S.E. 730 (1936) (contacts enumerated and local law of state in which majority of contacts were grouped applied); W. H. Barber Co. v. Hughes, 223 Ind. 570, 586, 63 N.E.2d 417, 423 (1945) ("The court will consider all acts of the parties touching the transaction in relation to the several states involved and will apply as the law governing the transaction the law of that state with which the facts are in most intimate contact."); H I M C Investment Co. v. Sicialiano, 103 N.J.Super. 27, 246 A.2d 502 (1968); Spahr v. P. & H. Supply Co., 223 Ind. 591, 63 N.E.2d 425 (1945); Auten v. Auten, 308 N.Y. 155, 161, 124 N.E.2d 99, 102 (1954) ("Although this 'grouping of contacts' theory may, perhaps, afford less certainty and predictability than the rigid general rules ... the merit of its approach is that it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation' Moreover, by stressing the significant contacts, it enables the court not only to reflect the relative interests of the several jurisdictions involved ... but also to give effect to the probable intention of the parties and consideration to 'whether one rule or the other produces the best practical result.'"); Rubin v. Irving Trust Co., 305 N.Y. 288, 113 N.E.2d 424 (1953); Lilienthal v. Kaufman, 239 Or. 1, 395 P.2d 543 (1964); Johnston v. Commercial Travelers Mut. Acc. Ass'n, 242 S.C. 387, 131 S.E.2d 91 (1963); Boston Law Book Co. v. Hathorn, 119 Vt. 416, 423, 127 A.2d 120, 125 (1956) ("... where the contract contains no explicit provision that it is to be governed by some particular law the courts 'examine all the points of contact which the transaction has with the two or more jurisdictions involved, with the view to determine the "center of gravity" of the contract, or of that aspect of the contract immediately before the court, and when they have identified the jurisdiction with which the matter at hand is predominantly or most intimately concerned, they conclude that this is the proper law of the contract which the parties presumably had in view at the time of contracting.' "); Peterson v. Warren, 31 Wis.2d 547, 143 N.W.2d 560 (1966) (citing §§ 332 and 346 of Tent.Draft No. 6, 1960 and § 599d of Tent.Draft No. 11, 1965); Wojciuk v. United States Rubber Co., 19 Wis.2d 224, 122 N.W.2d 737 (1963) (rights of parties for breach of warranty will be determined by the law of the place "most closely associated with the transaction"); Potlatch No. 1 Federal Credit Union v. Kennedy, Wash.2d _____, 459 P.2d 32 (1969) (quoting and applying rule of Section); Baffin Land Corp. v. Monticello Motor

Inn. Inc., 70 Wash.2d 893, 425 P.2d 623 (1967) (quoting and applying rule as stated in § 332 of Tent.Draft No. 6, 1960); In re Estate of Knippel, 7 Wis.2d 335, 96 N.W.2d 514 (1959).

Comment b: The importance of protecting the justified expectations of the parties in contract choice-of-law cases has been frequently emphasized. See, e.g., Kossick v. United Fruit Co., 365 U.S. 731, 741 (1961) (“... we are dealing here with a contract, and therefore with obligations, by hypothesis, voluntarily undertaken.... This fact in itself creates some presumption in favor of applying the law tending toward the validation of the alleged contract.”); Pritchard v. Norton, 106 U.S. 124 (1882); Teas v. Kimball, 257 F.2d 817 (5th Cir.1958); Heede, Inc. v. West India Machinery and Supply Co., 272 F.Supp. 236 (S.D.N.Y.1967); Bernkrant v. Fowler, supra; Ehrenzweig, Contracts in the Conflict of Laws, 59 Colum.L.Rev. 973, 1171 (1959). This policy is of little assistance in situations where the question is whether an individual provision of a contract should be invalidated in order to preserve the principal obligation. See, e.g., Zogg v. Penn Mutual Life Insurance Co., 276 F.2d 861 (2d Cir.1960); Auten v. Auten, supra.

The desire of the courts to uphold contracts is demonstrated by the usury cases cited in the Reporter's Note to § 203.

The Uniform Commercial Code provides in § 1-105 that, in the absence of an effective choice of law by the parties, its provisions are applicable to “transactions bearing an appropriate relation to this state.”

For a suggestion that where the parties are to perform in different states the obligations of each party under the contract will be determined, at least on occasion, by the local law of the state where he was to perform, see Auten v. Auten, supra.

For a suggested alternative formulation, see Weintraub, Choice of Law in Contract, 54 Iowa L.Rev. 399 (1968).

Case Citations

(1971)

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APPENDIX NO. 7
RESTATEMENT (SECOND) OF
CONFLICT OF LAWS § 196 (1971)

Restatement of the Law — Conflict of Laws
Restatement (Second) of Conflict of Laws
Current through August 2009

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Chapter 8. Contracts
Topic 1. Validity Of Contracts And Rights Created Thereby
Title B. Particular Contracts

§ 196. Contracts For The Rendition Of Services

[Link to Case Citations](#)

The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which the event the local law of the other state will be applied.

Comment:

a. Scope of section. The rule of this Section applies to contracts for the rendition of services whether these are to be rendered by the contracting party himself or by others in his behalf. The rule applies to contracts with servants, independent contractors and agents and with persons exercising a public profession, as lawyers, doctors, brokers, commission agents and factors.

The rule applies if the major portion of the services called for by the contract is to be rendered in a single state and it is possible to identify this state at the time the contract is made. It is necessary that the contract should state where the major portion of the services is to be rendered or that this place can be inferred either from the contract's terms or from the nature of the services involved or from other circumstances. For this reason, the rule of this Section is unlikely to aid in the determination of the law governing contracts for employment aboard a ship sailing the high seas or to serve as a traveling salesman in two or more states. The same is true when the work called for by the contract can be done in any one of two or more states.

The law selected by application of the present rule determines such questions as the duration of the contract, the circumstances under which either party may terminate the contract, the validity of a clause forbidding the employee from entering a business competitive with that of the employer for a stated period after the termination of the employment, and whether the contract of employment must be in writing to be binding.

b. Place where services are to be rendered. The importance in the choice-of-law process of the place where the services, or a major portion of the services, are to be rendered depends somewhat upon the nature of the services involved. This place enjoys greatest significance when the work is to be more or less stationary and is to extend over a considerable period of time. This is true of a contract for employment on the ordinary labor force of a particular factory or of a contract with an independent contractor who will provide labor on a construction project. By way of contrast, the place where the services are to be rendered is of lesser importance when the services are to be of rela-

tively brief duration, such as when a workman is employed to do a minor repair job in a given state, or when the employee's duties will require him to travel with fair frequency between two or more states. Even in these latter situations, the place where the major portion of the services is to be rendered, provided that there is such a place, is the contact that will be given the greatest weight in determining, with respect to most issues, the state of the applicable law.

c. Rationale. In the absence of an effective choice of law by the parties (see § 187), the rule of this Section calls for the application of the local law of the state where the contract requires that the services, or a major portion of the services, be rendered unless, with respect to the particular issue, some other state has a more significant relationship to the transaction and the parties. Whether there is such other state should be determined in the light of the choice-of-law principles stated in § 6. For a general discussion of the application of these principles to the contracts area and of the principle favoring application of a law that would sustain the validity of the contract, see § 188, Comments *b-d*. What is said in these Comments is applicable here.

Several factors serve to explain the importance attributed by the rule to the place where the contract requires that the services, or a major portion of the services, be rendered. The rendition of the services is the principal objective of the contract, and the place where the services, or a major portion of the services, are to be rendered will naturally loom large in the minds of the parties. Indeed, it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the services, or a major portion of the services, are to be rendered would be applied to determine many of the issues arising under the contract. The state where the services are to be rendered will also have a natural interest in them and indeed may have an overriding interest in the application to them of certain of its regulatory rules. The rule of this Section also furthers the choice-of-law values of certainty, predictability and uniformity of result and, since the place where the contract requires that the services, or a major portion of the services, are to be rendered will be readily ascertainable, of ease in the determination of the applicable law.

d. When local law of state where services are to be rendered will not be applied. On occasion, a state which is not the place where the contract requires that the services, or a major portion of the services, should be rendered will nevertheless, with respect to the particular issue, be the state of most significant relationship to the transaction and the parties and hence the state of the applicable law. This may be so, for example, when the contract would be invalid under the local law of the state where the services are to be rendered but valid under the local law of another state with a close relationship to the transaction and the parties. In such a situation, the local law of the other state should be applied unless the value of protecting the expectations of the parties by upholding the contract is outweighed in the particular case by the interest of the state where the services are to be performed in having its invalidating rule applied. The latter state may well have such an overriding interest in situations where the rendition of the services would be contrary to its local law, either by reason of their nature or because of the circumstances in which they are to be performed. There will also be occasions when the local law of some state other than that where the services are to be performed should be applied in any event, because of the intensity of the interest of that state in having its local law applied to determine the particular issue (see Illustration 3).

Illustrations:

1. In state X, A and B, who are domiciled in that state, enter into a contract in which A agrees to render services for B in state Y. The contract is invalid under Y local law because the memorandum evidencing the parties' agreement was initialed but not subscribed by the party to be charged. The contract is valid under X local law. The contract should be upheld on the ground that any interest of Y in the application of its invalidating rule should be held to be outweighed by the countervailing interest of X and particularly by the value of protecting the justified expectations of the parties. 2. In state X, A and B, who are domiciled in that state, enter into a contract in which A employs B to act as a broker in selling land owned by A in state Y. It is understood that B will confine his activities to X. In X, B finds a purchaser for the land and now brings suit for his commissions in state Z. The contract is void under Y local law because B lacked a proper license; it is valid under X local law. Among the questions for the Z court to decide are whether Y's interest in the application of its rule of invalidity is so overriding as to re-

quire the application of the rule in the present case. The fact that both A and B are domiciled in X and that the services were to be rendered there lends strong support to the view that Y does not have such an overriding interest and accordingly that its rule of invalidity should not be applied. The situation would be different if the contract required B to render his services in Y, and B found the purchaser in Y. Here Y would presumably have such an overriding interest that its rule of invalidity should be applied. If, however, it were to appear that the Y courts would not apply their rule of invalidity in such a situation, there would be ground for the conclusion that no important interest of Y would be affected if the Z court were to uphold the contract by application of X local law. In state X, H and W, husband and wife, who are domiciled in X, enter into a contract in which W agrees to render services for H in state Y. The contract is invalid under Y local law because under that law spouses lack capacity to contract with each other. They do have such capacity under X local law. Strong support for the application of X local law to this issue of capacity is to be found (a) in the fact that X, being the state of matrimonial domicile, has a great interest in this issue and (b) in the value of protecting the justified expectations of the parties by upholding the contract. Clearly, X local law should be applied to the issue of capacity if it were also to appear that the Y courts would not apply their rule of incapacity to the facts of the present case.

Comment:

e. For reasons stated in § 186, Comment b, the reference is to the "local law" of the state of the applicable law and not to that state's "law," which means the totality of its law including its choice-of-law rules.

f. As to the situation where the relevant local law rule of two or more states is the same, see § 186, Comment c. Particular issues are discussed in Title C (§§ 198-207).

g. As to workmen's compensation, see §§ 181-185.

REPORTER'S NOTE

See Baffin Land Corp. v. Monticello Motor Inn, Inc., 70 Wash.2d 893, 425 P.2d 623 (1967) (citing § 346 1 of Tent.Draft No. 6, 1960).

On occasion, the place where the services were to be rendered has coincided with that where the contract was made. Donnellan v. Halsey, 114 N.J.L. 175, 176 Atl. 176 (1935). The local law of the state where the services were to be rendered has been applied to govern the employment contract even though the contract itself was made elsewhere (Alexander v. Barker, 64 Kan. 396, 67 Pac. 829 (1902); Garnes v. Frazier & Foster, 118 S.W. 998 (Ky.Ct.App.1909); Denihan v. Finn-Iffland & Co., 143 Misc. 525, 256 N.Y.Supp. 801 (Mun.Ct.1932); Cookson v. Knauff, 157 Pa.Super. 401, 43 A.2d 402 (1945)), or where the place of making did not appear. Elk River Coal & Lumber Co. v. Funk, 222 Iowa 1222, 271 N.W. 204 (1937); Watts v. Long, 116 Neb. 656, 218 N.W. 410 (1928). In each of these cases, except the Denihan and Cookson cases, all the work was to be done in a single state. In the Denihan case, however, the employee was assigned to work in New York but made sporadic trips to other States. The court held that New York local law governed since the employee performed the major portion of his work in that state. In the Cookson case the employee was hired in Canada to look after cattle being transported from Canada to Pennsylvania. The court considered Pennsylvania the place of performance and applied the local law of that state.

The same result has also been reached where the services were to be rendered by independent contractors and their servants. United States-Alaska Packing Co. v. Luketa, 58 F.2d 944 (9th Cir.1932) (local law of state where services were to be rendered applied even though the contract was made elsewhere); Pratt v. Sloan, 41 Ga.App. 150, 152 S.E. 275 (1930) (same).

The local law of the employer's principal place of business has been applied where there was no identifiable place of employment. Helfer v. Corona Products, 127 F.2d 612 (8th Cir.1942); Weiner v. Pictorial Paper Package Corp., 303 Mass. 123, 20 N.E.2d 458 (1939). In the second case, the principal office was located in the same state where

the contract was made. The same may have been true in the first case, but the opinion does not make this clear.

As to the law governing contracts for brokers' services in buying or selling securities or commodities on an exchange, see Lyons Milling Co. v. Goffe & Carkener, 46 F.2d 241 (10th Cir.1931); Hoyt v. Wickham, 25 F.2d 777 (8th Cir.1928); Jacobs v. Hyman, 286 Fed. 346 (5th Cir.1923); Berry v. Chase, 146 Fed. 625 (6th Cir.1906).

See generally 3 Rabel, Conflict of Laws 181-203 (1950).

Case Citations

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