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The Law Office of Kevin F. Jursinski & Associates, P.A.
COMMERCIAL LEASE NEWSLETTER

REDUCE THE RISK

Real estate professionals, including commercial leasing agents, are always at risk of being sued for professional malpractice or misconduct. Fortunately, liability under the numerous causes of action can be mitigated through careful preparation of listing agreements, contracts and disclosures. This article will discuss the types of liability to which commercial leasing agents are exposed, and strategies to minimize the risk of lawsuit.

Commercial leasing transactions frequently involve large sums of money, and therefore, a commercial leasing agent's potential liability in a lawsuit is also substantial. Causes of action to pursue damages against a leasing agent include common law claims such as simple negligence as well as statutory actions including Real Estate licensing law and the Florida Deceptive and Unfair Trade Practice Act ("FDUPTA").

FDUPTA is a statutory tort claim that can be brought against leasing agents and property managers. FDUPTA is a serious professional liability concern because the damages and claims can be substantial and can include attorney fees. Furthermore, the statute is broad and the terms are applicable to numerous factual scenarios common to commercial leasing and property management.

The Florida Deceptive and Unfair Trade Practice Act "FDUPTA" provides as follows:

Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. See Florida Statutes Section 501.204(1).

The prohibited practices are extremely broad, as demonstrated by the expansive terms, i.e. "unfair acts", which exposes virtually any alleged misconduct to FDUPTA lawsuit. There is an apparent exclusion of real estate activity to FDUPTA claims, but the exception is uncertain and should not be relied upon as an absolute shield to liability. The exception reads as follows:

501.212 Application.—This part does not apply to:

(6) An act or practice involving the sale, lease, rental, or appraisal of real estate by a person licensed, certified, or registered pursuant to chapter 475, which act or practice violates s. 475.42 or s. 475.626.

Despite the exclusion of certain real estate activity from this statute, Florida Statute §475.42 is not the primary disciplinary statute, and is not an exhaustive list of potentially alleged unfair acts by a leasing agent.

Furthermore, under FDUTPA, the exposure to risk is not limited to the Plaintiff's claim for ordinary damages; it includes a provision for prevailing party attorney fees. Given the risk associated with FDUPTA, proper preparation and risk management is a necessity.

The risk of suit can be mitigated by sound practices and procedures in regard to document preparation, strategic use of listing and representation agreements and proper transaction file documentation.

Careful preparation of agreements can reduce and indemnify against the risk of lawsuits. Listing agreements must be prepared to harmonize the protections provided by an indemnification agreement with any other terms such as dispute resolution. Additionally, as in most matters, proper documentation of a transaction file will mitigate against the risk of professional liability. This includes completion and retention of agency disclosures, listing agreements, contracts and correspondence.

Documents are the best evidence of the factual circumstances that give rise to lawsuits. Liability can be reduced and even avoided entirely if a clear record of the facts can be presented in opposition to a potential plaintiff's initial demand. This is a practice that will reduce liability and the potential expense of fees associated with defending a lawsuit.

In conclusion, there is a wide range of actions to which a leasing agent is exposed. The actions include potential liability for damages associated with the transaction including attorney's fees. Although the risk of lawsuit cannot be eliminated, it can be substantially reduced and defrayed through the proper use and preparation of listing agreements and contracts, and the retention of client related documents.

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