

## A Realtor May Not Purchase a Property if She Has Acted as an Agent to Purchase that Property If the Client Still Expresses Interest

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Monday, the Indiana Court of Appeals issued an opinion that will help define agency law, particularly how that body of law affects realtors in *Demming v. Underwood*, Case No. 53A01-1005-PL-252. The decision deals with both the common law and statutory duties that a realtor owes to the people who she is working with. It contains a lot of material, so this will be a lengthy post.

In this case, Demming was interested in purchasing two properties in Bloomington, Indiana, as part of her investment strategy. She asked Underwood, a realtor, to ask the realtor managing the properties (Costley) whether they were for sale. After being told that the properties weren't for sale, Demming and Underwood "strategized" together on how Demming could acquire the properties, and Underwood offered to contact Costley every few months to inquire about the properties' availability. Over the next few years, Underwood contacted Costley on Demming's behalf regarding the properties "every four of five months." Additionally, in May, August, and October 2006, Underwood contacted Costley to inquire into the availability of the properties after Demming specifically instructed her to do so. While Underwood was not compensated for these services, it was discussed and understood that Underwood would be paid a real estate commission, at closing, in the customary amount of seven percent of the sales price. Unbeknownst to Demming, Underwood became interested in purchasing the properties for herself after she acquired a neighboring property in May 2006.

In February 2007, Demming again instructed Underwood to call Costley and inquire into the availability of the properties for purchase. Costley responded that she would contact the properties' owner, but she expressed doubt as to whether the owner would be willing to sell. The next day, Underwood told Demming that the Properties were not for sale. Demming instructed Underwood to "stay on it" because she believed that the owner would be willing to sell in the near future.

A few days later, Costley contacted the owner, who instructed her to request that anyone interested in purchasing the properties tender a written offer. When Costley informed

Underwood that the owner was willing to entertain an offer, Underwood did not relay this information to Demming. Instead, Underwood and a partner tendered their own written offer to purchase the properties and eventually purchased the properties.

Demming sued Underwood for breach of fiduciary duty and constructive fraud and asked the court to impose a constructive trust compelling Underwood and her partner to convey title of the properties to Demming. Underwood moved for summary judgment and the trial court granted that motion, finding that no agency relationship existed between Demming and Underwood as a matter of law. Demming appealed.

On appeal, the Court first addressed whether Underwood was Demming's agent under the common law. It held that the facts supported an inference that Underwood agreed to act as Demming's agent, which created a genuine issue of material fact precluding entry of summary judgment. It held that a principal "need not exercise complete control over every aspect of the agent's activities within the scope of the agency" and that "it was enough that Demming instructed Underwood to make contact with Costley." The Court then turned to the question of whether Underwood had breached the duties she owed Demming.

These facts, when taken together, support an inference that Underwood was Demming's agent not only for the purposes of making a few, isolated contacts with Costley regarding the Properties, but for the broader purpose of actually acquiring the Properties.

"This is not to suggest that the agency relationship between Demming and Underwood would continue indefinitely until Demming acquired the Properties." But that relationship lasted at least as long as the time within Underwood purchased the properties. "Underwood clearly would have breached the fiduciary duties arising out of that relationship by purchasing the Properties for herself without informing Demming that Mrs. Morris was entertaining offers." Therefore, the trial court erred in granting summary judgment to Underwood.

The Court next addressed Underwood's statutory duties to Demming. It noted the relative paucity of cases interpreting I.C. Chapter 25-34.1-10, which governs real estate agency relationships, noted ambiguities in that Chapter, and concluded that Underwood could have been agent under those statutes.

These definitions highlight the perplexities inherent in the Agency Chapter. Section 25-34.1-10-9.5(a)(2) provides that a real estate licensee has an agency relationship with and is representing the person with whom the licensee is working unless the licensee is assisting that person as a customer without compensation. But a customer is someone who is not a client, and client is defined as someone who has entered into an agency relationship with a licensee. Thus, under

section 25-34.1-10-9.5(a)(2), a person with whom a licensee is working is a client unless he or she is not a client and is not paying for the licensee's services.

Adding another layer of difficulty is Indiana Code section 25-34.1-10-0.5 (2010), which separately defines "agency relationship" as "a relationship in which a licensee represents a client in a real estate transaction." "Real estate transaction" is defined as "the sale or lease of any legal or equitable interest in real estate." Ind. Code § 25-34.1-10-8 (2010).

The relationship between Demming and Underwood in this case could qualify as an agency relationship because "the statutory definition of real estate transaction contains no requirement that the real estate at issue be listed for sale, and it is not our prerogative to engraft such a requirement into the statute. Thus, the fact that the Properties were not listed for sale at the time Underwood contacted Costley does not necessarily preclude a conclusion that Underwood was Demming's agent under the Agency Chapter." Similarly, the statutes did not require "that an individual compensate a licensee for his or her services in order to qualify as a client." Thus, "the trial court erred when it concluded as a matter of law that no statutory agency relationship existed between Demming and Underwood."

When the Court addressed the issue of whether Underwood breached her statutory duties, it noted "that statutory real estate agency relationships are not perennial." Nevertheless, it could not conclude that the agency relationship had terminated prior to Underwood's purchase of the properties for the same reasons it rejected a similar argument related to the common law duties, described above. Underwood argued that nothing in the statute prevented her from purchasing the properties and because the plain meaning of the statute does not prohibit the practice, it must necessarily permit it. The Court "strongly" disagreed.

Under our common law of agency, it is axiomatic that an agent has a duty to act solely for the principal's benefit and may not place herself in a position where her own interests are potentially antagonistic to those of the principal. In enacting section 25-34.1-10-11(e), the legislature made no clear declaration or unmistakable implication that it intended to abandon this fundamental principle and allow real estate licensees representing buyers to purchase properties "out from under" their clients. Rather, the statute takes the smaller step of allowing real estate licensees to represent multiple buyers who are interested in the same parcel. And there is a good reason for this distinction; a licensee representing multiple buyers presumably has no personal stake in which buyer ultimately purchases the parcel, and therefore has no incentive to treat any of them unfairly. But if the licensee herself wishes to purchase the parcel, this desire introduces an element of competition between the licensee and client, and such a conflict of interest may lead to abuses by the licensee. We therefore conclude that Indiana Code section 25-34.1-10-11(e) does not allow a licensee representing a buyer to purchase

properties during the course of the agency with respect to which he or she has acted as the buyer's agent and in which the client has expressed interest.

Underwood argued that she could not be found liable for constructive fraud because the fifth element of a claim for constructive fraud is "the gaining of an advantage by the party to be charged at the expense of the complaining party" and no real estate transaction took place between Demming and Underwood. The Court again disagreed.

Keeping in mind the equitable principles underlying the doctrine of constructive fraud, we reject the Defendants' contention that an action for constructive fraud cannot be maintained in the absence of a transaction between the parties to a confidential or fiduciary relationship. Rather, we hold that where an agent has acquired an advantage from a third party at the principal's expense as a result of actions taken in furtherance of the underlying agency between the principal and agent, the principal has satisfied his or her burden with respect to a constructive fraud claim as set forth in *Strong*.

Finally, Underwood's partner argued that he could not be found vicariously liable for Underwood's breach of fiduciary duty and constructive fraud. The Court disagreed, because there was evidence that the partnership was formed before Underwood tendered the first offer to purchase.

### Lessons:

1. An agency relationship exists between a realtor and a client if the client orders the realtor to inquire into the availability of a property for purchase.
2. An agency relationship will last for a reasonable period of time if the duration is not specified.
3. A person can be a realtor's client under I.C. Chapter 25-34.1-10 even if there is no agreement regarding compensation and the particular property being investigated is not currently listed for sale.
4. A realtor cannot purchase a property that her client is expressing interest in purchasing.
5. A principal can prove constructive fraud if an agent has acquired an advantage from a third party at the principal's expense as a result of actions taken in furtherance of the underlying agency between the principal and agent.