Denver Law Review

Volume 28 | Issue 6 Article 3

January 1951

The Lawyers' Side of the Suits against Real Estate Brokers

William Rann Newcomb

THE LAWYERS' SIDE OF THE SUITS AGAINST REAL ESTATE BROKERS*

WILLIAM RANN NEWCOMB
Chairman, Unauthorized Practice Committee, Denver Bar Association

It is difficult to speak on behalf of other lawyers because they, themselves, are likely to entertain many different opinions. However, you should not be misled by the occasional lawyer who expresses opposition to the activity on behalf of the bar associations in bringing these suits against real estate brokers. It is clear that the overwhelming majority of lawyers in Denver and in Colorado do support the purposes and the objectives of this litigation. You should also know that Colorado is not alone, and these suits are part of a nationwide movement to clarify and define the proper activities of title companies and real estate brokers.

WHAT ARE THE ISSUES IN THE SUITS?

The charge made by some people that we are trying to put real estate brokers out of business is the purest form of unadulterated bunk, for that cannot possibly be the result even if the plaintiffs are 100 per cent successful. We do not challenge the right of brokers to draw every instrument to which they may be a bona fide party—and that includes the listing. We do not challenge the right of any persons to act as their own lawyers in preparing instruments to which they are parties. However, we are challenging the right of brokers and salesmen and title companies to prepare contracts of sale, receipts and options, deeds, leases, notices to vacate, demands for rent or possession, mortgages, promissory notes secured by deeds of trust, and other documents involved in the closing of real estate transactions to which the brokers and salesmen are not parties.

WHY DID WE BRING THEM?

There are three motives behind these suits:

1. *The public interest.* The broker is not qualified by education, training or experience to prepare legal instruments. Although he may pick up a smattering of information as to how to fill in the blanks of a form, no one can reasonably argue that, as a class, he is as well qualified to do these things as a lawyer. Great harm has resulted in many instances to members of the public from improperly prepared contracts and conveyances.

> There is no question but what improperly prepared legal documents make for a great mass of the litigation in the courts of our land. It therefore follows that the preparation of legal documents should be confined to the care of those who are not only skilled by reason of their profession and their experience, but as well, their understanding of the legal significance of all terms employed in the documents.[1]

* A digest of an address given by Mr. Newcomb before a meeting of the Denver Realty Board on May 2, 1951.

[1] In re George A. Warl, Misc. 51808, Detroit, Michigan.

> Is it only in court or in legal proceedings that danger lies in such evils (unauthorized practice)? On the contrary, the danger there is at a minimum for very little can go wrong in a court where . . . the presiding officer is generally a man of judgment and experience . . . not so in the office . . . Ignorance and stupidity may here create damage which the courts of the land cannot thereafter undo.[2]

The public interest is further involved because a broker is disqualified through his interest, as a businessman, in his commission from attempting to represent both himself and both parties to a transaction. He attempts to serve three masters—himself, the seller, and the buyer. Virtually every lawyer in the state has seen instances of where this inherent conflict in interests has resulted in a disregard of the legal interests of the real parties to a transaction. The broker performs his task when he produces a buyer ready, willing and able to buy. Thereafter, the interests of the purchaser and seller should assume the controlling role.

2. *The interest of the lawyer.* The lawyer normally spends thousands of dollars securing his education. The law requires that he be examined and licensed. No one here today would claim that lawyers should not be licensed or that anyone, regardless of qualifications, should be allowed to practice law in our complex society. Consequently, in protecting his franchise, the lawyer is upholding the laws which exist for the protection of the public. The lawyer is at a competitive disadvantage with the layman who practices law because the layman can solicit business and advertise, whereas the lawyer is forbidden by his ethics from so doing. Therefore, this is not a matter of competing in the market place for legal business, but is a matter of preventing unauthorized practices in the first instance.

3. *The interest of promoting more harmonious relations between brokers and lawyers.* The bickering and back-biting between our two groups which I have witnessed in my eight years of practice, and which has gone on, undoubtedly, for years before that, is a direct result of a lack of clarification as to the proper role of brokers and attorneys in real estate transactions. Just as a lawyer normally has no business advising his client as to values, the broker has no business advising a purchaser that the title is all right because some mortgage company lent money on it five years or six months ago. If these suits result in clarifying and defining the "rules of the game," there is no reason why brokers and attorneys cannot work together in the interests of the public who desire that their real estate transactions shall be handled efficiently, economically, and with due regard to the legal rights of all parties.

WHAT IS THE POSSIBLE OUTCOME OF THEM?

You real estate men will not be put out of business, even if you are restrained from drawing what you call "our contracts." We know that many of these contracts are prepared at night and over weekends when lawyers are not available, but see no legiti-

[2] People v. Alfani, 227 N. Y. 334, 125 N.E. 671 (1919).

mate reason as to why a short delay to provide for a proper contract would unduly hamper your activities. If the deal itself was not over-induced by "high pressure" salesmanship, there would be no withdrawal by the purchaser in this interim period in the vast majority of cases. We think that the importance of these transactions, in any event, justifies mature deliberation and a proper agreement between the parties. We further feel that even though an occasional deal may fall through, to the chagrin of the broker, the total volume of real estate transactions will not vary one iota. We further see a possibility of working out some form of simple receipt wherein the purchaser would evidence his good faith by making a deposit, subject to a contract being written within a very short period of time by an attorney of his selection, or of the seller's selection, satisfactory to both. Of course, by its very nature, such a receipt, if our theory of these suits is correct, could not constitute a contract binding upon the parties.

I wish to emphasize that when the law is clarified as a result of these suits, we will wish to sit down with you and attempt to work out a practical, workable understanding which will not interfere with your legitimate operations and which will be in accord with whatever decision the courts ultimately render. There is historical precedent for this in the Denver banks case where an agreement was made between the Denver Clearing House Banks Association and the Denver Bar Association pending the litigation.

EDITOR'S NOTE: There follows a copy of the complaint against one of the real estate brokers in the suits described above by Mr. Newcomb. The suits against the other two brokers and against the Title Guaranty Company and the Record Abstract and Title Insurance Company are very similar. The complaint is reproduced here in its entirety for the information and enlightenment of our own profession.

IN THE DISTRICT COURT IN AND FOR
THE CITY AND COUNTY OF DENVER
AND STATE OF COLORADO
CIVIL ACTION NO. ..... DIV. .....

THE DENVER BAR ASSOCIATION, a corporation; THE COLORADO BAR ASSOCIATION, a corporation; WM. RANN NEWCOMB, as Chairman of the Committee of The Denver Bar Association on Unauthorized Practice; LAWRENCE A. LONG, as Chairman of the Committee of The Colorado Bar Association on Unauthorized Practice; and WM. RANN NEWCOMB and LAWRENCE A. LONG, individually, Plaintiffs vs JOHN F. BRUNO, Defendant	COMPLAINT in Action for Injunction

The plaintiffs allege:

1. That the plaintiff, The Denver Bar Association, and the plaintiff, The Colorado Bar Association, are corporations, other than for pecuniary profit, organized and existing under and by virtue of the laws of the State of Colorado, and that each of them is organized for the following purposes and objects among others: to advance the science of jurisprudence; to promote the administration of justice; to encourage a thorough legal edcuation; and to uphold the honor and dignity of the Bar. That all of the members of each of them are attorneys duly licensed to practice law in the State of Colorado. And that they bring this action on behalf of the public and on behalf of themselves and on behalf of their members.

2. That the plaintiff, Wm. Rann Newcomb, is the Chairman of the Committee of The Denver Bar Association on Unauthorized Practice, and that he brings this action as such Chairman, pursuant to express authorization by said The Denver Bar Association. That the plaintiff, Lawrence A. Long, is the Chairman of the Committee of The Colorado Bar Association on Unauthorized Practice, and that he brings this action as such chairman, pursuant to express authorization by said The Colorado Bar Association. That the said plaintiffs Wm. Rann Newcomb and Lawrence A. Long, also bring this action individually on behalf of themselves and on behalf of all other duly licensed attorneys in the State of Colorado and on behalf of the public.

3. That the defendant is a real estate broker duly licensed as such under the statutes of the State of Colorado. That the defendant now is and for many years last past has been engaged in carrying on in the City and County of Denver, Colorado the business of a real estate broker.

4. That the defendant never has been licensed by the Supreme Court of the State of Colorado to practice law in the State of Colorado and that he therefore cannot lawfully practice law in the State of Colorado, either in his own person or through his agents, servants or employees, whether they be attorneys or not.

5. That for many years last past the defendant has been engaged in the unlawful practice of law in the State of Colorado by preparing for persons other than himself, as a practice and in numerous transactions, either in his own person or through his agents, servants and employees, instruments relating to and affecting real estate and the title to real estate, including deeds conveying real estate, deeds of trust and mortgages encumbering real estate, promissory notes secured by such deeds of trust or mortgages, releases of deeds of trust and mortgages upon real estate, receipts and options for purchase contracts of sale and agreements, and by giving advice to the parties to instruments as to the legal effect thereof.

6. That, in doing the acts set out in paragraph numbered 5 hereof, the defendant, in his own person or through his agents, servants and employees, customarily in each instance: conferred with one or more of the parties to the transaction or their agents; elicited in such conference what were considered to be the pertinent facts; in the light of the information so elicited and the information contained in the abstract of title, selected and determined upon the blank form or forms to be used; and then prepared one or more of the instruments mentioned in said paragraph numbered 5 by filling in such form or forms in such manner as the defendant himself or the agent, servant or employee of the defendant preparing same, in his or her judgment, deemed proper in the light of the information elicited in such conference and the information contained in the abstract of title; and gave advice to the parties to such instruments as to legal effect of the instrument so prepared.

7. That the defendant was not a party to any of the deeds of conveyance, deeds of trust, mortgages, promissory notes, releases, receipts and options for purchase, contracts of sale, agreements and other instruments prepared by him or his agents, servants and employees as alleged in paragraph numbered 5 hereof, except that the deposit upon the purchase price,. the receipt of which was acknowledged by each receipt and option for purchase, was paid to and

held by the defendant as agent or broker; that the only connection of the defendant with the transactions, as a part of which said instruments were prepared and executed, was in the fact that the purchasers of the properties involved in such transactions had been procured by the defendant or that the lender and the borrower had been brought together by the defendant and the defendant received commissions for his services as a real estate broker in procuring such purchasers or in bringing together the lenders and the borrowers and in the fact that the receipts and options recited that the deposit on the purchase price was paid to and was to be held by the defendant as agent or broker and in the performance by the defendant (either in his own person or by his agents, servants and employees) of the services in the preparation of said instruments and in the consummation or closing of the sale of or the loan upon the real estate involved in the transactions; that, in some loan transactions, although the defendant was named in the promissory note and in the deed of trust or mortgage as being the payee of such promissory note and therefore appeared on the face of the said instruments to be a party to such instruments, either the money loaned was the money of a principal for whom the defendant was then acting and, shortly after the making of the loan, the defendant endorsed and transferred the promissory note to his said principal or it had, prior to the preparation and execution of said instruments, been agreed between the defendant and a lending corporation that the defendant should make the loan in his own name and should then endorse and transfer the promissory note to the lending corporation and that the lending corporation should then repay to the defendant the amount so loaned and such agreement was carried out.

8. That, in almost all of the transactions in which the defendant and his agents, servants and employees prepared legal instruments in the manner and circumstances hereinbefore mentioned, the defendant had been employed as a real estate broker to procure purchasers for the properties involved in the transactions and had procured purchasers for such properties and had become entitled to and was paid commissions for his services as a real estate broker in procuring such purchasers, or the defendant had been employed as a real estate broker to bring together the lender and the borrower and had brought them together and had become entitled to and was paid commissions as a real estate broker for doing so.

9. That, in the transactions in which the defendant and his agents, servants and employees prepared legal instruments in the manner and circumstances hereinbefore mentioned, the defendant made no charge for services in preparing said instruments, other than his commission for procuring the purchaser or for bringing together the lender and the borrower.

10. That the defendant is now continuing the unlawful practice of law in the manner and circumstances hereinbefore set out and that, unless restrained by order of court, the defendant will continue such unlawful practice of law.

11. That, under the statutes of the State of Colorado and the rules of the Supreme Court of the State of Colorado, no person is permitted to practice law in the State of Colorado without having previously obtained a license for that purpose from the said Supreme Court of the State of Colorado and that, under such statutes, each person to whom such a license to practice law is issued must, before being permitted to practice law in said State, take and subscribe on oath or affirmation that he will support the Constitution of the United States and of the State of Colorado and that he will in all things faithfully execute the duties of an attorney and counselor at law according to the best of his understanding and abilities. That, under the rules of the Supreme Court of the State of Colorado, in order to receive such a license to practice law in the State of Colorado, a person must submit proof of his moral and ethical qualifications and his moral and ethical qualifications must be examined into and must be found satisfactory by the said Supreme Court, and, in addition thereto, either he must have been admitted outside of the State of Colorado to the practice of law by the highest court of the jurisdiction having such power and

have practiced law in such jurisdiction for a specified number of years or he must have successfully completed two years of work in an approved college or university preliminary to the study of law and completed the three year course of an approved law school and passed a rigid examination as to his legal educational qualifications. That the practice of law in the State of Colorado is, and of right should be, confined to those persons who are so found by the Supreme Court of the State of Colorado to possess the necessary qualifications for the practice of law in said State and who satisfactorily meet the tests and furnish proof of the qualifications required by the said statutes and said rules of said Supreme Court.

12. That each of the plaintiffs Wm. Rann Newcomb and Lawrence A. Long now is and for a number of years last past has been an attorney duly licensed by the Supreme Court of the State of Colorado to practice law in the State of Colorado and actually practicing law in said State with his office in the City and County of Denver, Colorado. That the licenses which they and other attorneys have received to practice law in the State of Colorao are privileges and franchises creating property rights in them and that the same have been and are now being encroached upon and damaged by the unlawful practice of law by the defendant in the manner and circumstances hereinbefore set out and that, if such unlawful practice of law by the defendant is not restrained by order of court, the said plaintiffs Wm. Rann Newcomb and Lawrence A. Long as well as all other attorneys duly licensed to practice law in the State of Colorado and the public generally, will be greatly and irreparably damaged thereby.

13. That the interests of the public and particularly of those persons owning, buying and selling real estate and those persons making and securing loans on real estate require that the persons who, pursuant to employment prepare, in the State of Colorado, for others than themselves legal instruments by which real estate and interests therein are conveyed, acquired, encumbered released and otherwise affected shall be limited to those persons who have been found by the Supreme Court of the State of Colorado to be qualified by their education and moral and ethical qualifications to practice law in said State.

14. That plaintiffs have no adequate remedy at law.

SECOND AND FURTHER CAUSE OF ACTION

AND, FOR A SECOND AND FURTHER CAUSE OF ACTION, The plaintiffs:

1. Adopt by reference each and every allegation contained in paragraphs numbered 1, 2, 3 and 4 of the First Cause of Action hereinbefore set out.

2. Allege that for many years last past the defendant has been engaged in the unlawful practice of law in the State of Colorado by preparing for persons other than himself, as a practice and in numerous transactions, either in his own persons or through his agents, servants and employees, leases of real estate, notices terminating tenancy of real estate and demands to pay rent or vacate real estate and other instruments creating, continuing, modifying or terminating the relation of landlord and tenant with respect to real estate and by giving advice to the parties to such instruments as to the legal effect thereof.

3. Allege that the defendant was not a party to any of the leases of real estate, notices terminating tenancy of real estate and demands to pay rent or vacate real estate and other instruments creating, continuing, modifying or terminating the relation of landlord and tenant with respect to real estate prepared by him or his agents, servants and employees as alleged in paragraph numbered 2 of this cause of action, except that, in some instances, the defendant was, for convenience, named in said instruments as the lessor, although he did not then own any interest in the real estate which was the subject of said instruments and, in so doing, he was acting only as the agent of the lessor. And allege that the only connection of the defendant with the transactions, as a part of which said instruments were prepared and executed, was in the facts that the tenant had been procured by the defendant or that the landlord and the tenant had been brought together by the defendant or that the defendant had been employed by the owner of the real estate involved to manage the said real estate and that the defendant received commissions or

other form of compensation for his services as a real estate broker in procuring the tenant or in bringing together the landlord and the tenant or in managing the said real estate or that, as hereinbefore alleged, the defendant was for convenience, named in said instruments as the lessor, although he did not then own any interest in the real estate involved and, in so doing, he was acting only as agent for the lessor.

4. Allege that, in the transactions in which the defendant and his agents servants and employee prepared legal instruments in the manner and circumstances mentioned in this cause of action, the defendant made no charge for services in preparing said instruments, other than his commission or other form of compensation for procuring the tenant or for bringing together the landlord and the tenant or for managing the real estate.

5. Adopt by reference each and every allegation contained in paragraphs numbered 10, 11, 12, 13 and 14 of the First Cause of Action hereinbefore set out.

WHEREFORE, Plaintiffs pray that this Court adjudge and decree that the defendant has been and is unlawfully practicing law in the manner and circumstances hereinbefore set out and that this Court grant an injunction restraining and enjoining the defendant and his agents, servants and employees from preparing, on behalf of other persons, deeds conveying real estate, deeds of trust and mortgages encumbering real estate, promissory notes secured by such deeds of trust or mortgages, releases of deeds of trust and mortgages upon real estate, receipts and options for purchase, contracts of sale of real estate and agreements relating to and affecting real estate and the title to real estate, leases of real estate, notices terminating tenancy of real estate and demands to pay rent or vacate real estate and other instruments creating, continuing, modifying or terminating the relation of landlord and tenant with respect to real estate, or any of said instruments, whether or not the defendant charges or receives compensation for the same and whether or not the defendant has been employed as a real estate broker by one of the parties to the transaction or has procured the purchaser or the seller of the real estate involved or has brought together the lender and the borrower or the landlord and the tenant or has been employed by the owner of the real estate involved to manage the said real estate and whether or not the preparation of such legal instruments is done by or under the supervision of an attoreny employed by the defendant, and that plaintiffs have such other relief as to the Court shall deem proper, besides the costs of this action.

PERCY S. MORRIS,
Attorney for Plaintiffs
715 Security Life Bldg.,
Denver 2, Colorado.

The address of the Plaintiff The Denver Bar Association,, a corporation, is 319 Chamber of Commerce Bldg., Denver 2, Colorado.

WM. RANN NEWCOMB pro se,
722 Symes Building,
Denver 2, Colorado.

The address of the Plaintiff The Colorado Bar Association, a corporation, is 319 Chamber of Commerce Bldg., Denver 2, Colorado.

LAWRENCE A. LONG pro se
418 Symes Building,
Denver 2, Colorado.

DAY GIVES EVENING LECTURES AT REGIS

Judge Edward C. Day, of the Denver District Court will lecture from June 12 to August 3 on Employer-Employee Relationships and on Court Procedure in the summer evening classes conducted by Regis College on the campus. Judge Day's course, among the 30 being offered at Regis this summer, will be held from 6:30-8:20 on Tuesday and Thursday evenings.