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ATTORNEY GENERAL OPINION NO. 2014- 11

Sherry Diel, Executive Director
Kansas Real Estate Commission
120 SE 6th Ave., Ste. 200
Topeka, KS 66603

Re: Personal and Real Property—Real Estate Brokers and Salespersons; Brokerage Relationships—Imputed Knowledge

Synopsis: The Brokerage Relationships in Real Estate Transactions Act (BRRETA) limits, but does not entirely supplant, the common law liability of real estate licensees. The provisions of K.S.A. 58-30,111 apply equally to statutory agents and transaction brokers. Cited herein: K.S.A. 2013 Supp. 58-30,102; K.S.A. 58-30,106; 58-30,107; 58-30,111; K.S.A. 2013 Supp. 58-30,113; K.S.A. 77-109.

* * *

Dear Ms. Diel:

As Executive Director for the Kansas Real Estate Commission, you ask for our opinion on the liability of real estate statutory agents and their clients as compared to transaction brokers and their customers under K.S.A. 58-30,111, a provision of the Brokerage Relationships in Real Estate Transactions Act (BRRETA).

Statutory agents are real estate licensees who have an agency relationship with their clients and as such owe their clients certain fiduciary duties.[1] The duties of seller's agents are specified in K.S.A. 58-30,106, while the duties of buyer's agents are specified in K.S.A. 58-30,107. A transaction broker, on the other hand, is a licensee "who assists one or more parties with a real estate transaction without being an agent or advocate for the interests of any party to such transaction."[2] As one commentator puts

[1] K.S.A. 2013 Supp. 58-30,102(s).
[2] K.S.A. 2013 Supp. 58-30,102(u).

it, "[t]he best one-word definition of transaction brokerage is, 'facilitator.'"[3] Because no agency relationship exists between a transaction broker and a customer, transaction brokers do not have the same fiduciary duties as buyer's and seller's agents.[4] However, transaction brokers have the same legal duty as statutory agents to disclose adverse material facts actually known by the licensee to third parties.[5]

Your question concerns K.S.A. 58-30,111, which provides:

> (a) A client or customer shall not be liable for a misrepresentation or omission by the client's statutory agent or the transaction broker arising out of the agency or transaction broker agreement unless the client or customer knew of the misrepresentation or omission.
>
> (b) A statutory agent or transaction broker shall not be liable for a misrepresentation or omission by the agent's client or the transaction broker's customer arising out of the agency or transaction broker agreement unless the licensee knew of the misrepresentation or omission.
>
> (c) A statutory agent or transaction broker shall not be liable for an innocent or negligent misrepresentation in information provided to the seller or landlord or to the buyer or tenant if the licensee does not have personal knowledge of the error, inaccuracy or omission that is the basis for the claim of misrepresentation.

The Real Estate Commission interprets this statute as treating statutory agents the same as transaction brokers. Others, however, have suggested that a statutory agent assumes vicarious liability for the acts and omissions of a client while a transaction broker does not. Noting that vicarious liability is a common law concept, you explain that the Commission reads K.S.A. 58-30,111 as superseding the common law liability of real estate licensees. Thus, your question turns on the relationship between BRRETA and the common law.

The Kansas Supreme Court has consistently held that when a statute conflicts with the common law, the statute controls.[6] This holding is based in part on K.S.A. 77-109, which provides:

> The common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the General Statutes of this state; but the rule of the common law, that statutes in derogation thereof shall be strictly construed,

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[3] Vernon L. Jarboe, *Brokerage Relations in Real Estate Transaction Act*, 68 J. Kan. Bar Ass'n 36, 43 (1999).
[4] *See* K.S.A. 2013 Supp. 58-30,113.
[5] Compare K.S.A. 2013 Supp. 58-30,113(b)(2)(F)-(G) with K.S.A. 58-30,106(d)(1) and K.S.A. 58-30,107(d)(1).
[6] *See, e.g.*, *Board of County Commissioners of Neosho County v. Central Air Conditioning Company, Inc.*, 235 Kan. 977, 981 (1984).

> shall not be applicable to any general statute of this state, but all such statutes shall be liberally construed to promote their object.

Given this background, we conclude that BRRETA supersedes the common law liability of real estate licensees to the extent there is a conflict between the two, but only to that extent.

The legislative history of BRRETA confirms this was the legislative intent. As originally introduced, the bill that became BRRETA contained a section supplanting the common law with respect to brokerage relationships, but this section was removed by the Legislature.[7] When major changes to BRRETA were made in 1997, that bill also initially contained a provision superseding the common law. Again, the Legislature deleted this provision before passage.[8] The following explanation was placed in the minutes of the Senate Judiciary Committee:

> BRRETA is intended to modify the common law rules governing the relationship between brokers or salespersons and their clients or customers. BRRETA establishes a scheme of statutory agency to replace Common Law rules. It is the intent that where BRRETA and Common Law conflict, BRRETA will be applied, but where BRRETA is silent, the Common Law is applied.[9]

Turning to K.S.A. 58-30,111, we do not believe that this statute entirely supplants the common law liability of real estate licensees as your letter suggests. The plain language of subsections (b) and (c) cannot be interpreted as abolishing common law liability and creating new causes of action against real estate licensees. Instead, we read the phrases "shall not be liable . . . unless" in subsection (b) and "shall not be liable . . . if" in subsection (c) as modifying and restricting common law liability rules.

Our conclusion is supported by the Kansas Supreme Court's recent decision in *Stechschulte v. Jennings*.[10] In *Stechschulte*, a home buyer brought a common law cause of action for negligent misrepresentation against the seller's real estate agent. The agent argued that BRRETA abrogated this common law cause of action, but the Kansas Supreme Court disagreed, holding:

> BRRETA does not eliminate the possibility of a common-law cause of action against a real estate agent or broker for negligent misrepresentation. It merely requires evidence of the agent's or broker's actual knowledge of an otherwise undisclosed adverse material fact about the subject property.[11]

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[7] Minutes of the Senate Judiciary Committee (March 21, 1995).
[8] Minutes of the House Judiciary Committee (February 24, 1997).
[9] Minutes of the Senate Judiciary Committee (March 24, 1997).
[10] 297 Kan. 2 (2013).
[11] *Id*. at 26.

In other words, while BRRETA "protect[s] agents and brokers from common-law liability," it does not entirely supplant the common law in this area.[12]

Your letter refers specifically to common law vicarious liability. We are unaware of any common law principle under which a real estate agent would be vicariously liable for the acts or omission of a client. After all, vicarious liability is a doctrine under which a principal is held liable for the acts of an agent, not vice versa.[13] And in the real estate context, the client, not the real estate agent, is the principal. In any event, to whatever extent (if any) a real estate licensee could have been held vicariously liable for the actions of a client or customer at common law, K.S.A. 58-30,111 provides equal protection from that liability for both statutory agents and transaction brokers. The statute does not distinguish between transaction brokers and statutory agents, as you indicate others have suggested. Under the plain language of K.S.A. 58-30,111(b) and (c), both statutory agents and transaction brokers may be held liable only if they had personal knowledge of a client's or customer's misrepresentations or omissions. This is really a form of direct liability since liability is based on a failure to disclose adverse material facts actually known by the licensee.

You also ask about subsection (a) of K.S.A. 58-30,111, which addresses the liability of clients and customers for the misrepresentations or omissions of their agents and transaction brokers. As with subsections (b) and (c) of the statue, we read this provision as modifying or limiting the common law, not completely supplanting it or creating a new cause of action. And like subsections (b) and (c), the protection provided by subsection (a) is the same regardless of whether a statutory agent or transaction broker is involved.

Sincerely,

Derek Schmidt
Attorney General

Dwight Carswell
Assistant Attorney General

DS:AA:DC:sb

[12] *Id*. at 25-26 ("the legislature's requirement of disclosure of actual knowledge of adverse information merely limited the duty owed rather than destroying it altogether").
[13] *See, e.g.*, *Leiker v. Gafford*, 245 Kan. 325, 355 ("Vicarious liability depends upon the relationship of the parties, such as employer and employee or principal and agent. In such cases, the employer or principal is held liable for the negligent act of the employee or agent solely by reason of the relationship and not because the employer or principal actually committed an act of negligence."), disapproved of on other grounds by *Martindale v. Tenny*, 250 Kan 621 (1992).