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Legislative Update

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**Legislation, Regulations, & Cases**

Richard C. Stevens, November 5, 2008

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# Topics

- n Legislation, Regulations, & Cases

- q Federal

- n EESA / TARP

- n ADA

- q State

- n Cases

- n Topeka Activity

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# Perspective

- n “If you like laws and sausages, you should never watch either one being made.”



-attrib. Otto von Bismarck

German Chancellor 1862-1890

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# Federal



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# EESA / TARP

- n EESA ?
- n Emergency Economic Stabilization Act of 2008 (aka Public Law 110-343 or the Bailout)
- n TARP ?
- n Troubled Assets Relief Program

(Incidentally, 700 billion dollars is enough money to cover a football field in 4.85 feet of one hundred dollar bills, having a weight of 7,709 tons.)

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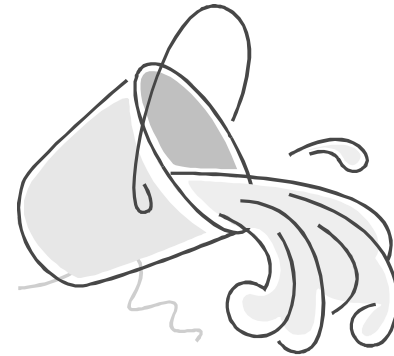
# EESA / TARP

- n The New Office of Financial Stability is in the Office of Domestic Finance of the United States Treasury
- n It is created by the Emergency Economic Stabilization Act of 2008 (EEAS)
- n To operate the Troubled Assets Relief Program (TARP)

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# EESA / TARP

- n **EESA created TARP Programs:**
  - q Mortgage-backed securities purchase program
  - q Whole loan purchase program
  - q Insurance program
  - q Equity purchase program
  - q Homeownership preservation
  - q Executive compensation
  - q Compliance



Source: Speech by U.S.TREASURY DEPARTMENT ASSISTANT  
SECRETARY FOR FINANCIAL STABILITY  
NEEL KASHKAR, October 14, 2008

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# EESA / TARP

## n EESA provides for:

- q Qualifying restaurant and leasehold improvements may now be depreciated over a 15-year period rather than a 39-year period (through 12-31-2009)
- q Retailers who own their own buildings may use the 15-year period for certain improvements to retail space as well as leaseholders
- q 300 tax code changes
- q \$150 billion in tax incentives

Source: 10-13-2008 AGH letter



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# ADA Developments

- n August 15, 2008 – Wichita Business Journal
  - q “Small business fears impact of new ADA rules”
  - q “Attorneys: Lawsuit a strong reminder of ADA compliance”
- n Sep. 2004 – Advanced Notice of Public Rulemaking (ANPRM)
- n Now – Notice of Proposed Rulemaking (NPRM).
- n Finalized in Nov. 2008



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# ADA Developments



## n Safe Harbors for Small Business?

- q 1991 Compliance
- q 1% gross revenue spent on barrier removal

## n Issues in Transactions

- q Landlord or Tenant?
- q Third party liability?
  - n Contractors
  - n Engineers / Architects
- q Renovation as trigger
- q Litigation Cost



**ADA Guides:**

<http://www.ada.gov/publicat.htm>



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# Cases



# Cases – Nonexclusive right-to-sell

## n ***ANTRIM, PIPER, WENGER INC. v. LOWE* (June 2007)**

- q **Lowe signed a nonexclusive right-to-sell agreement with an agent for APW to sell the Lowe's ranch**
- q **Terms: non-exclusive right to list and sell the property for \$1.5 million from March 22, 2004 and August 22, 2004 5% commission**
- q **Lewis was interested in the property and APW agent was not available to show the property – a contract was written by the Lowes with Lewis**
- q **Lowes refused to pay the commission & APW sued**
- q **Held: despite the Lowes having found the buyers in Sedan, showed them the property, and wrote the contract for sale, the key undisputed fact was that Lewis had been sent to them through the efforts of APW**
- q **It unreasonable to assume that Antrim would agree to go without a commission if the Lowes decided to use a 1031 IRS exchange to complete the sale of the property**

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# Cases – Nonexclusive right-to-sell

n Take away:

q “if the agent is the *procuring cause* of the deal, the agent is entitled to receive a commission”



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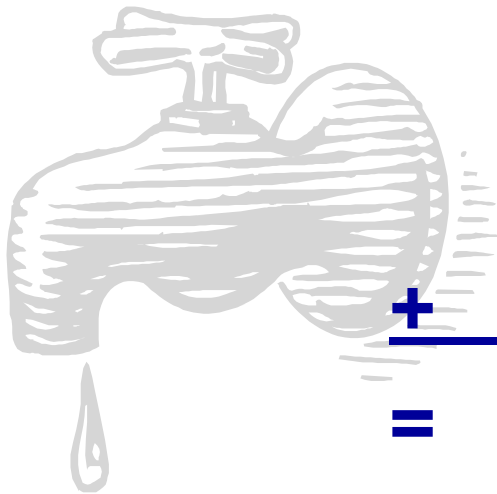
# Cases – H2O and disclosure

- n ***KATZENMEIER v. OPPENLANDER (March 2008)***
  - q K purchased eight-plexes from O who gave sellers' disclosure statement that represented no knowledge or history of problems
  - q both parties signed a buyers acknowledgment and agreement
  - q K hired inspectors who found no evidence of water damage but discovered problems, which could cause water and drainage issues
  - q K sued O alleging that O knew of and concealed serious leaking and moisture problems.
  - q Held: there is no right to rely on representations made in the disclosure statement where a purchaser chooses to:
    - n inspect the property before purchase
    - n and, learns of a defect

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# Cases – H2O and disclosure

n Take away:



**Seller Representation**  
**Buyer's prior Inspection**  
**Discovered Defect**  

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**= No Relief**

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# Cases – Mechanic's Lien

n ***BUCHANAN V. OVERLEY ET AL. (March 2008)***

- q Overleys contracted with Buchanan for the construction of a single-family
- q Arbitration agreement in the construction contract
- q During construction, Overleys objected to the quality of Buchanan's work
- q Buchanan refused to make satisfactory repairs, and Overleys stopped their progress payments
- q Arbitrators entered an award in favor of Buchanan in the amount of \$49,542.64 (a lien was also filed)
- q The Overleys objected and sought to vacate or modify the award. The district court denied relief and confirmed the arbitration award.



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# Cases – Mechanic's Lien

- n ***BUCHANAN V. OVERLEY ET AL. (March 2008) Continued***
  - q The Overleys then filed for bankruptcy.
  - q The parties agreed that Buchanan could pursue a state mechanic's lien foreclosure action
  - q As a result, Buchanan filed to foreclose his mechanic's lien.
  - q The Overleys claimed that Buchanan's lien statement was defective and had been filed untimely
  - q The district court granted Buchanan's motion to strike the Overleys' defenses and ordered foreclosure of the mechanic's lien.
  - q On appeal: Overley's successfully claimed that the lien was invalid because of an unverified address
  - q Note: the lien did not contain the address but the attachment had it **21** times

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# Cases – Mechanic's Lien

## n Take away:

- q Details matter on Mechanic's Liens no matter which side you are on



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# Legislature



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## K.A.R. § 86-3-9 Legal counsel.

“Each broker shall recommend to each client or customer that an attorney be retained by the client or customer to answer any legal questions involved in any real estate transaction.”

Nov. 16, 2007

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## K.A.R. § 86-3-26a Designated agents.

- “(a) If a supervising broker or branch broker designates . . . one or more designated agents to represent the interests of a buyer, seller, tenant, or landlord client, any other salespersons or associate brokers that are employed by or associated with the supervising broker or branch broker who are not specifically designated in the written agency agreement to represent the interests of the client shall not be deemed to have a brokerage relationship with the client.
- (b) If a designated agent has been appointed to represent a buyer, seller, tenant, or landlord in a transaction, the brokerage relationship disclosure in the contract or lot reservation agreement shall specify that a designated agent was appointed to represent the interests of the client.”

Nov. 16, 2007

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# K.A.R. § 86-3-15 Reporting of information.

- n “moral turpitude” and a list of other crimes removed from the 10 day reporting obligation
- n Added: “(4) any charge of, arrest or indictment for, plea of guilty or *nolo contendere* to, or conviction of any of the following: (A) Any misdemeanor that reflects on the licensee's honesty, trustworthiness, integrity, or competence to transact the business of real estate; or (B) any felony.”

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# Prohibited Acts

- n Real Estate Brokers' and Salespersons' License Act (HB 2746) – “No licensee shall:
  - (1) Threaten to engage in or engage in physical abuse towards a client, customer or another licensee;
  - (2) threaten to file or file a lien on residential property;
  - (3) engage in harassment towards a client, customer or another licensee;
  - (4) conduct real estate business with impaired judgment or objectivity as the result of mental illness or addiction to alcohol or controlled sub-stances;”

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# K.S.A. § 58-3078. Residential real estate sales contract; required language.

(a) On and after July 1, 2008, each contract for the sale of residential real estate shall contain as part of such contract the following language:

"Kansas law requires persons who are convicted of certain crimes, including certain sexually violent crimes, to register with the sheriff of the county in which they reside. If you, as the buyer, desire information regarding those registrants, you may find information on the homepage of the Kansas Bureau of Investigation (KBI) at <http://www.Kansas.gov/kbi> or by contacting the local sheriff's office."



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# Additional Items

- n HB 2315 set up standards for home inspectors including licensing & prohibited acts
- n HB 2520 makes developers responsible for property taxes on “convertible land”
- n HB 2772 requires Radon Disclosure with specific language (from July 1, 2009)

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# HB 2772 continued

- n HB 2772 also set up an appraiser licensing process and prohibits all but a licensed appraiser from:
  - q giving written appraisal in connection with a real estate transaction; and
  - q advertising or representing that you are a licensed appraiser.
  
- n The bill adds the definitions:
  - q “broker price opinion”
  - q “comparative market analysis”

“an analysis . . . prepared by an individual licensed as a real estate broker or salesperson relating to the price of specified interests in or aspects of identified real estate property . . . .”

# SB379 - Indemnification Agreements

## **K.S.A. § 16-121 - Construction contracts; certain indemnification provisions void, when.**

- n "Construction contract" means an agreement for the design, construction, alteration, renovation, repair or maintenance of a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance or other **improvement to real property**, including any moving, demolition or excavation, except that no deed, lease, easement, license or other instrument granting an interest in or the right to possess property shall be deemed to be a construction contract even if the instrument includes the right to design, construct, alter, renovate, repair or maintain improvements on such real property.



# SB379 - Indemnification Agreements

## K.S.A. § 16-121 - Continued

- n An indemnification provision in a construction contract or other agreement, including, but not limited to, a right of entry, entered into in connection with a construction contract, which requires the indemnitor to indemnify the indemnitee for the indemnitee's [own] negligence is against public policy and is void and unenforceable.



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# SB379 - Indemnification Agreements

## **K.S.A. § 16-121 – Revised**

(effective for agreement entered into after 1-1-2009)

- n Still basic definition “improvement to real property” plus some oil and gas related exceptions
- n But, “Contract’ [now] means any
  - q construction contract,
  - q motor carrier transportation contract,
  - q dealer agreement or
  - q franchise agreement.”

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# SB379 - Indemnification Agreements

- n A provision that requires the promisor to indemnifies the promisee for the promisee's [own] negligence or intentional acts or omissions [or]
- n A provision that requires a party to provide liability coverage to another party, as an additional insured, for the other party's own negligence or intentional acts or omissions
- n ***is against public policy and is void and unenforceable***

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# SB379 - Indemnification Agreements

- n "Mutual indemnity obligation" means an indemnity obligation in a contract in which the parties agree to indemnify each other . . . .
- n "Unilateral indemnity obligation" means an indemnity obligation in a contract in which one of the parties as promisor agrees to indemnify the other party as promisee

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# SB379 - Indemnification Agreements

## **If the indemnity obligation will be supported by liability insurance coverage to be furnished by the promisor:**

- n In a mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as promisor has agreed to obtain for the benefit of the other party as promisee.
- n With respect to a unilateral indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance the promisor has agreed to obtain for the benefit of the other party as promisee. Such indemnity obligation shall be at the promisee's expense and shall be a separate liability insurance policy.



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# SB379 - Indemnification Agreements

- n This act shall not be construed to affect or impair: . . . a separately negotiated provision or provisions whereby the parties mutually agree to a reasonable allocation of risk, if each such provision is: (A) Based on generally accepted industry loss experience; and (B) supported by adequate consideration; and

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# Recap 1 of 3

## n EESA & TARP

- q Emergency Economic Stabilization Act of 2008
- q Troubled Assets Relief Program
- q 15-year period rather than a 39-year period

## n ADA

- q New rules awaited this month
- q Look at your deal documents and determine if its an issue

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# Recap 2 of 3

- n Nonexclusive right to sell: “if the agent is the procuring cause of the deal, the agent is entitled to receive a commission”
- n Seller Representation + Buyer’s prior Inspection + Discovered Defect = No Relief
- n Details matter on Mechanic’s Liens no matter which side you are on
- n Send your clients to their Attorney

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# Recap 3 of 3

- n Designate agency in writing specifically
- n Don't physically threaten your clients
- n Use Criminal Registration Disclosure and Radon Disclosure Language in Residential Deals
- n Refer your residential clients to licensed appraisers
- n Don't call what you do an appraisal unless you are a licensed appraiser
- n Check your indemnities & Question others'

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# THE END

## Credits:

- q Case Summaries:
  - n <http://www.ksbar.org/>
- q Images:
  - n <http://www.flickr.com/photos/taomaster123/>
  - n <http://www.ssa.gov/history/ottob.html>
- q Quote:
  - n <http://www.bartleby.com/73/996.html>
- q Sites of note:
  - n <http://www.ada.gov/publicat.htm>
  - n <http://www.kslegislature.org/>
  - n <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/28/AR2008092800900.html>

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## Thank You

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