



# Business Law Newsletter

## Realtors' Fiduciary Duties—by James V. Irving

In Virginia, as in virtually all jurisdictions, real estate sales contracts must be in writing to be enforceable. While the written contract is principally designed to establish the rights and obligations between buyer and seller, realtors must remember that provisions imposing duties on them are no less enforceable than any other provision of the contract. By accepting the designation of escrow agent or of agent for either buyer or seller, the realtor expressly accepts substantial performance obligations that are avoided at the realtor's financial risk.

On January 5, 2005, the case of Brent Sedler v. Select Properties, Inc. went to trial in the Circuit Court of Loudoun County. At the conclusion of the case, Judge James H. Chamblin awarded a judgment of \$13,201.39 plus costs and interest against Select, the corporation named as escrow agent under the terms of the sales contract. Judge Chamblin ruled that anyone knowingly accepting the role of escrow agent accepts with it certain fiduciary duties and that the party to whom those duties are owed is entitled to recover damages if the agent fails to perform those duties scrupulously.

The *Sedler* case arose from what appeared to be a run-of-the-mill sales contract. The opinion suggests that when the transaction got off track, the realtor ignored his duties and remained focused on making the deal happen, but Judge Chamblin makes it abundantly clear that business imperatives do not excuse a failure to observe fiduciary duties. That duty, said Chamblin, is "no different that the duty imposed upon an executor or a trustee."

Plaintiff Sedler contracted to sell his property to National Orphans & Widows Assistance ("NOWA") by way of a contract dated September 7, 2000. Under the terms of the Contract, Select was charged with holding Buyer's \$5,000.00 deposit in trust until disbursed pursuant to the terms of the Contract. Select delayed almost a month before depositing the check, which was dishonored on October 16 due to a stop payment order. Despite this shortcoming, and apparently in the expectation that a replacement check would clear, Select gave NOWA the keys to the property. However NOWA was not prepared to settle on the November 15, 2000 closing date. Select then waited until December 1 before telling the Plaintiff of the Buyer's default.

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## Alexandria City Council Adopts Major Innovation Business License Tax Relief, Reform, and Simplification

At its June 21 meeting, the Alexandria City Council adopted an ordinance establishing a new tax structure for small and medium sized businesses during their first two years of operation in the City.

The new structure will reduce the tax burden for businesses with estimated gross receipts of between \$100,000 and \$2 million to only \$50 in the first year. Tax cuts in the second year will be about 50%, on average of previous tax burdens. Subsequent-year complicated true-ups are to be eliminated for these businesses.

Businesses with estimated gross receipts of \$2 million or less in the first year of operation will pay a one-time \$50 fee to obtain a business license. In the second year of operation, the businesses will pay a business license tax based on the first year's actual gross receipts. The previous practice was to base the tax on the second year's estimated gross receipts. Businesses will pay the business license tax in the third year based upon the second year's actuals.

By implementing these reforms, the City intends to make funds available for start-up businesses.

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Because the Seller placed a special confidence in the Defendant, Select had a duty to hold and apply the deposit as required by the Contract, and to timely advise Seller of Buyer's default to allow him to protect his interests. For example, had Seller known of Buyer's default, he could have had immediate recourse to his remedies under the Contract and presumably would not have allowed Select to give the Buyer the keys to the premises.

The Court found that the Plaintiff was entitled to all his foreseeable damages, including lost rent and the costs and expenses incurred in evicting NOWA from the property. Select was fortunate that the damages were not greater.

While most realtors are scrupulous in the performance of their duties, these can sometimes be overlooked in the crush of day to day business. *Sedler* reminds us that fiduciary duties create not only obligations, but possible liability as well.

## MEET OUR LAWYERS CHARLES B. THOMAS

After practicing law for years in Washington D.C., Charles Thomas became a shareholder with Bean, Kinney and Korman in 2004. He brings more than thirty years of experience to a client base that includes new and established business entities, family businesses, entrepreneurs, professionals, national associations, retail shopping centers and office building owners.

Charles played baseball at Brown University, where he earned a Bachelor of Arts degree in History and Political Science in 1970. After fulfilling his military obligation, he earned his Juris Doctor from

Georgetown University Law Center in 1974. He is a member of the bars of Virginia, Florida and the District of Columbia.

Charles' experience in commercial leasing, equipment and real estate sales and purchases, landlord and tenant matters, and business growth and financing is both broad and deep, allowing him to develop creative, individualized solutions to the complex legal facing his clients.

An avid golfer with a single digit handicap, Charles has played in Senior Men's Baseball leagues for 10 years and his teams regularly participate in the Senior World Series in Arizona and Florida. He and his wife, Martha are the parents of three grown children.

## Piercing the Corporate Veil

by James V. Irving

Virginia courts are empowered to “Pierce the Veil” of a corporation or limited liability company and hold a shareholder or member personally liable for the debts of the entity. While this extraordinary remedy is reserved for extraordinary circumstances, its availability serves as a reminder that established formalities must be observed and followed, and that an LLC or corporation may not be used as an alter-ego for its principal.

The case of Stephen F. Brooks v. Ronald D. Becker went to trial in the Circuit Court of Fairfax County, on November 2, 2004. On January 31, 2005, the Honorable Jane Marum Roush issued her Opinion Letter piercing the veil of Becker Interiors, Inc. (“BII”), making its principal, Ronald D. Becker liable for a judgment entered against the corporation in 2002. The judgment became uncollectible when Becker liquidated the corporation’s assets.

In 2002, Stephen F. Brooks obtained a \$54,597.09 judgment against BII for sub-contracting work he had performed to renovate a residential property in McLean owned by BII. When BII proved unable to satisfy the judgment, Brooks sued at law, asking the Court, among other things to find that Becker, as the sole shareholder, officer, and director of a sham corporation, was personally responsible for the debt.

At trial, the Court found that Becker and his companion Robert LaPointe, had used approximately \$100,000.00 of BII funds to renovate their personal residence and that Becker used corporate funds to pay Becker and LaPointe’s personal credit card bills. As

part of the process of liquidating BII, Becker sold corporate vehicles for \$73,700.00 and deposited the checks into his personal account. Finally, he took an Income Tax refund made payable to the corporation and deposited it into his own account.

Judge Roush noted the presumption against piercing the corporate veil, writing that the decision “to ignore the separate existence of the corporate entity and impose personal liability on shareholders for debts of the corporation is an extraordinary act to be taken only when necessary to promote justice.” Judge Roush concluded that Becker had used the corporate assets as his own and had intermingled them at will with his personal assets. She found Becker’s testimony that the corporate expenditures on his personal residence were legitimate business expenses because he wanted to use the residence as a showcase for his work “not credible.” Nor did the Court believe that he commingled his personal funds with the corporation’s funds under the advice of his accountant.

Judge Roush concluded that this was “a rare case when the unity of interest and ownership is such that separate personalities of the corporation and the individual no longer exist and to adhere to the separateness would work an injustice.” While the Becker opinion emphasizes that piercing the corporate veil is an extraordinary remedy, it is a reminder to those in control of limited liability companies and corporations that the corporate structure must be preserved to ensure that the entity will be honored.

## Alexandria City Council Adopts Major Innovation Business License Tax Relief, Reform, and Simplification

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The tax reform is intended to serve as an incentive for businesses to locate in Alexandria.

Based on the number and tax returns for new businesses received in prior years, the ordinance is expected to benefit approximately 100 new businesses in FY 2006 at a cost of \$200,000. In FY 2007 and beyond, the estimated costs is \$400,000 and would benefit approximately 200 new businesses per year.

*This paper was prepared by Bean, Kinney & Korman, P.C. as a service to clients and friends of the firm. The purpose of this paper is to provide a general review of current issues. It is not intended as a source of specific legal advice. © Bean, Kinney & Korman, P.C. 2005.*



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