EGBL LEGAL REPORT

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Landlords must comply with background check regulations

by Megan G. Heeg

Many residential landlords use third party reports - including credit reports and tenant screening service reports - to determine whether to rent to an applicant, demand a higher security deposit or require a cosigner. Guidelines recently issued by the Federal Trade Commission clarify that residential landlords who use such reports must comply with the duties imposed by the Fair Credit Reporting Act ("FCRA"). Moreover, some in the landlord-tenant industry believe the guidelines interpret FCRA to apply to a broader range of situations than previously thought.

FCRA was adopted to establish a fair and efficient system of investigating the creditworthiness, character and reputation of consumers. Under FCRA, landlords who base an "adverse action" against a rental applicant on information contained in a third-party report must notify the applicant, inform him or her of the adverse action, identify the agency that provided the report and advise the applicant of his or her rights under FCRA.

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In Memory

The EGBL family suffered a numbing blow when Annie Ehrmann Michals died unexpectedly on Aug. 2. Annie, Rolfe's 26-year-old daughter, was living in Highland Park, Ill., with her husband, Tim.

While the days since Annie's death have seen more than their share of tears, they also have seen a flood of fond memories and warm reminiscences. Annie worked in our office throughout high school and college and approached every task with a remarkable maturity, a knowing confidence and an irresistible smile. She continued to display those talents as she became a certified medical technologist, earning several awards and the highest respect of her peers.

Rolfe's loss, of course, is indescribable. Like the rest of us, though, Rolfe and Denise have found great comfort in the outpouring of support from our clients and friends. Your thoughtful words and prayers have meant more than words can express, and all of us are eternally grateful for your kindness. As horribly tragic as times like these are, they remind us how fortunate we are to work with so many good and caring people.

Inside

Home sellers now face more liability

by David W. Badger

Caveat Emptor - Let the Buyer Beware. This historic Latin phrase reminds a home buyer to carefully examine the residence to ensure it is in acceptable condition. If the home is not what it seems, after all, the judicial remedies historically have been quite limited.

In 1994, the Illinois legislature expanded those remedies, mandating that home sellers provide buyers a Residential Real Property Disclosure Report. The failure to adequately disclose material defects thus created a statutory cause of action against the seller. As an Illinois appellate court recently determined, however, inaccuracies in the Report also can lead to a claim for fraudulent misrepresentation.

In the case, a couple lived in a home that had a leaking roof. Each time a leak occurred, the husband, who was an architect, sealed the leak with silicone caulking. In the Report, the owners said they were unaware of any material defect in the roof, ceilings or chimney.

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Supreme Court ensures right to review HMO decisions

by Stephanie L. Shallenberger*

While Debra Moran might not be long remembered for her fight against her HMO, health care consumers across the country should be forever grateful that Moran took that fight all the way to the U.S. Supreme Court.

After her HMO disagreed with her physician about whether a $95,000 shoulder surgery was "medically necessary," Moran sued the HMO under an Illinois law that requires an independent review of such disputes. The HMO resisted the review, arguing that federal law - which does not require such reviews - overrode the Illinois law. In June, the U.S. Supreme Court, by a 5-4 vote, agreed with Moran.

When federal law specifically regulates a particular area, that law usually controls over contrary state or local laws. The federal law at issue in Moran's case, the Employee Retirement Income Security Act ("ERISA"), regulates employee benefits such as pensions, disability insurance and health insurance. ERISA, however, also provides that it may not be construed to preempt any state law that "regulates insurance." Likening an independent review to a second opinion, the majority of the Court said the independent review requirement was a regulation of insurance that did not violate ERISA.

Although the Court's opinion did not extend beyond the legality of the independent review requirement, some experts already are suggesting the decision could make it easier to sue HMOs for what would amount to medical malpractice.

To date, such actions against HMOs have not been allowed, as ERISA has been interpreted to permit only those suits seeking coverage for a specific procedure. Now, however, some attorneys believe that state laws that permit negligence claims against HMOs will be deemed to be insurance regulations that, under the Court's recent ruling, no longer are preempted by ERISA.

*Stephanie L. Shallenberger, a third-year law student at the Northern Illinois University School of Law, clerked at EGBL this summer.

Landlords . . .

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In at least two ways, the FTC guidelines, "Using Consumer Reports: What Landlords Need to Know," establish that the scope of FCRA is very broad indeed.

First, the guidelines define "consumer report" to include not only reports from the three major national credit bureaus (Trans Union, Experian and Equifax) but also reports from tenant screening services that describe an applicant's rental history based on reports from previous landlords or court records and reports from reference checking services that contact landlords or other parties listed on a rental application.

It should be noted, however, that "consumer report" includes only reports prepared by third parties. If a landlord (or his employee) compiles the information, FCRA does not apply.

Second, the guidelines clarify that a landlord's duty to provide an applicant with an adverse action notice is not limited to the landlord's decision to deny a request to rent an apartment. Instead, the definition of "adverse action" is broader and includes a landlord's decision to require a consigner on the lease, require a deposit that would not be required for another applicant, require a larger deposit than would be required for another applicant and raise the rent to a higher amount than would be charged to another applicant.

The guidelines also provide several examples to illustrate how a landlord's duties might arise under FCRA. Examples contained in the guidelines include:

- A landlord orders a consumer report from a credit bureau, and the information in that report leads to further investigation of the applicant. The rental application is denied because of that investigation. Under the guidelines, an adverse action notice must be given to the applicant.
- An applicant with an unfavorable credit history is denied an apartment. Although the credit history was considered in the decision, the applicant's poor reputation as a tenant played a more important role. Under the guidelines, the adverse action notice must be provided because the credit report played "a part, however minor, in the denial."
- An applicant had a previous bankruptcy, but the credit report uncovered no other negative indicators. Rather than deny the application, the landlord requires a higher security deposit. The landlord must provide the adverse action notice because the credit report influenced the landlord's decision to require the higher security deposit.

Depending upon the facts of the case, a landlord can be liable under FCRA for a consumer's actual damages or damages not less than $100 and not more than $1,000, as well as punitive damages and attorney fees.

Because of this potential liability, landlords must ensure that they comply with FCRA before taking any adverse action against an applicant.

Legislative Report

RESTRICTED CALL REGISTRY BILL GOES TO GOVERNOR

by Dana Nauman*

Heeding the cries of their constituents, Illinois legislators have overwhelmingly approved Senate Bill 1830, the Restricted Call Registry Act. The bill, which was sent to Gov. Ryan in June, is designed to provide a way for residential phone subscribers to avoid telemarketing calls.

The centerpiece of the legislation is a registry, or "do not call" list. By paying a fee that will not exceed $5, residential phone subscribers will be able to place their names on the registry. The legislation requires all telemarketing services to buy the registry, which is expected to initially cost approximately $1,000. Updates to the registry will be made quarterly, and telemarketers also will be required to purchase the updates.

Once a phone number is added to the list, telemarketers are given 45 days to remove the number from their call lists. All calls received by the subscriber after this 45-day period will subject the originator of the call to a fine. The first fine will be $1,000, and each fine thereafter will be $2,500.

The Act will not apply to solicitation calls made by a solicitor that has an existing business relationship with the customer or has received express permission from the customer to call. Real estate agents, insurers and charitable organizations also are exempt. Volunteers working for charitable organizations, however, must immediately disclose their full name and certain information about the organization on whose behalf they are calling.

If Gov. Ryan signs the bill, the registry is expected to be in place by July 1, 2003.

PUBLIC BODIES EYE WEBSITE POSTING REQUIREMENTS

by Stephanie L. Shallenberger

The Illinois House and Senate unanimously passed a bill amending the Open Meetings Act to require public bodies to post meeting notices and agendas on the body's website at least 48 hours before the scheduled meeting. The bill will affect only public bodies that have a website that is maintained by the staff of that body.

Current law mandates that all public bodies must give notice for open or closed meetings by posting a copy of the notice and meeting agenda at the principal office of the body holding the meeting and at the building in which the meeting is to be held at least 48 hours before the scheduled meeting. All public bodies must continue to comply with the current law.

The bill recently was sent to Gov. Ryan, who is expected to sign it. If signed, it appears the law will be effective immediately.

*Dana Nauman, a third-year law student at Drake University School of Law, clerked at EGBL this summer.

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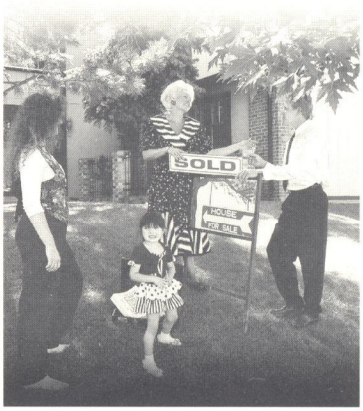
After the new owners moved in, they experienced several roof leaks. Because the one-year period during which they could sue under the Residential Real Property Disclosure Act had passed, the buyers sued the sellers for fraudulent misrepresentation. The sellers countered that at the time they completed the Report, they believed they had repaired the leaks. In fact, the sellers proved that, although they had experienced leaks from 1993 through 1996, no leaks occurred from 1996 through 1998, the year of the sale.



In awarding the buyers $59,000, the court held there was substantial evidence of chronic leaking problems that silicone caulking would not permanently eliminate and that the sellers therefore should have disclosed the problems. While acknowledging that the buyers could not sue under the Act, the court said the representation made by the sellers in the Report could support a fraud claim independent of the Act.

Caveat Vendor - Let the Seller Beware. If a court finds that a seller did not fully disclose the condition of property on the Report or concludes that the seller did not adequately remedy an undisclosed problem, the seller will pay the price.

Sellers should consider themselves warned.

Beneficiary designations control life insurance

by Stephanie L. Shallenberger

A federal appellate court recently confirmed that no amount of sympathy will overcome the written word.

In the case, a husband and wife were married in 1994. Shortly before their wedding, they named each other as beneficiaries of their life insurance policies. Approximately a year later, they bought additional policies, naming each other as beneficiaries. After their daughter was born, the wife purchased another policy, naming her daughter and husband as beneficiaries. The husband also purchased another policy, naming his wife as beneficiary.

During the marriage, it was clear that the wife bore more than her fair share of the couple's financial obligations. While the wife was a prominent physical therapist, the husband, in the court's words, "was a rather unsuccessful insurance salesman." The spouses kept their financial affairs almost entirely separate, never having a joint bank account or joint credit cards and never filing joint tax returns.

Without her husband's knowledge, the wife changed all of her policies to name her sister as the sole beneficiary. After the wife died unexpectedly, the husband sued to override the beneficiary designations in the policies. According to the husband, his wife broke an oral agreement to provide life insurance for each other.

The trial court accepted the husband's argument, but a federal appellate court reversed, holding that the husband's testimony was insufficient to overcome the written beneficiary designations. Absent a legal obligation to name her husband and daughter as beneficiaries, the court said, the wife was free to change the beneficiary designations as she desired.

In Print and At the Podium

Mr. Ehrmann recently was the guest speaker at a meeting of the Illinois Association of Municipal Clerks. He also addressed the Northwest Association of Mayors in July . . . **Mrs. Heeg**, a member of the Board of Directors of the Forreston Mutual Insurance Company, joined with other farm mutual company representatives who traveled to Springfield and Washington, D.C., in April and May to brief Illinois legislators on issues affecting the state's property/casualty insurance industry . . . **Mr. Gehlbach** has published an article on a U.S. Supreme Court decision affecting tenancies by the entirety, a frequently used title holding device for married couples . . . In his most recent commentary for the web site of The Freedom Forum First Amendment Center (www.freedomforum.org/first), **Mr. Lee** discussed a Texas court decision allowing public officials to sue a newspaper for publishing a satire critical of the officials . . . **Mr. Gehlbach** recently was appointed to the Real Estate Law Section Council of the Illinois State Bar Association. He was also reappointed Editor of the Council's Real Property newsletter, a post he has held for 17 years . . . **Mrs. Heeg** authored the "Claims Corner" in the February-March issue of the LAUTUM News, a publication of the Illinois Association of Mutual Insurance Companies. The article outlined state statutes and regulations aimed at improper claim practices . . . **Mr. Lee** has written two guest commentaries for the web site of the Center for Individual Freedom (www.cfif.org), one concerning the U.S. Supreme Court's decision not to hear a case involving the news gatherer's privilege and one concerning a book author's attempt to obtain media credentials to cover the Andrea Yates murder trial in Texas. **Mr. Lee**, on behalf of the Center, represented the author in a suit filed in the U.S. District Court for the Southern District of Texas.

Deals and Decisions

Mr. Lee recently represented a producer of "America's Most Wanted" in a battle in Henderson County, Ill., to obtain the producer's notes, video outtakes and other unpublished materials. The broadcast at issue concerned a brutal murder and attempted murder. The producer's materials were subpoenaed by one of the men charged with the crimes, who hoped to use the materials to impeach the state's primary witness. Citing the overriding rights of a defendant facing the death penalty, the trial judge ordered that some of the materials be turned over. The defendant, who ultimately was convicted and sentenced to life in prison, did not use any of the materials at trial . . . **Mr. Gehlbach** has helped a corporate client complete the relocation of a road by handling the client's dedication of the new road and the governmental entity's vacation of the old road . . . **Mr. Ehrmann** successfully tried a case involving an estate valued at more than $1 million . . . **Mr. Lee** and two other attorneys representing five clients injured in an auto accident recently obtained settlements totaling more than $800,000, the maximum available under the applicable insurance policy . . . **Mrs. Heeg** successfully represented an employee who suffered permanent injuries at work, obtaining for the client an amount in excess of eight times what the client originally was offered . . . **Mr. Ehrmann** completed municipal annexations of approximately six square miles involving more than 31 owners and businesses.