

**Sandler v. Sanchez**

# COURT EASES CONFUSION ON BROKER LIABILITY

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California Mortgage Brokers licensed under the California Department of Real Estate can breathe a little easier now. The courts have reaffirmed

that if a broker has properly incorporated then they will ordinarily not be personally liable for the acts committed by the corporate employees or agents.

Most brokers have understood that they are shielded from personal liability by incorporating a business and having the license held by the corporation while remaining as the broker of record. Likewise, many California attorneys have shared this opinion, and the leading California Real Property treatise also shared this viewpoint.

However, the issue of the scope of a designated real estate broker's liability for the actions of the corporation had been called into question by a Ninth Circuit opinion, *Holley v. Crank*, (9<sup>th</sup> Cir. 2005) 400 F.3d 667. In the opinion of this author, in the *Holley* case the Ninth Circuit aggressively read the legislative history of Business and Professions Code, section 10159.2 in an attempt to reach an equitable result. Notably, the underlying claim involved a borrower having

been racially discriminated against in violation of the Fair Housing Act.

The specific portion of the pertinent statute at issue was:

*[t]he officer designated by a corporate broker licensee pursuant to Section 10211 shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in performance of acts for which a real estate license is required.*

Ultimately the Ninth Circuit held that the purpose of the statute was to "insure licensed supervision of real estate corporation activity by holding designated officers personally responsible for that supervision." *Id.* at 672. As stated above, the Ninth Circuit appears to have done this in order to arrive at an equitable result. In addition to the discriminatory acts, the case allegedly involved a situation where the qualifying broker turned over all operations of the brokerage company to a non-licensed person.

While these were significant distinguishing facts, in many cases Plaintiffs, including distressed borrowers, had relied on the case to support claims against a qualified mortgage broker. The potential confusion caused

by *Holley* now has been largely resolved in the California opinion in *Sandler v. Sanchez* (2012) 206 Cal.App.4th 1431.

## THE SANDLER DECISION

The Court in *Sandler* again faced the question of personal liability of a broker for certain non-disclosures made by the loan officer.

The Court first addressed the interpretation of the code section relied on in the *Hol-*

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*ley* case - Bus. & Prof. Code S. 10159.2.

The Court held that the duties under this code section do not extend to third parties. *Id.* at 1438-1440. Rather, the qualified broker owes the duty to the corporation and that it is the Department of Real Estate that can hold the qualified broker accountable. The Court decided that the intent of the statute was to make express that the qualified broker did have a duty to supervise. The Court further found that the purpose of the statute was to create a regulatory sanction, but not a duty to third parties, such as borrowers, or other lenders.

Second, the Court found it persuasive that in other similar statutory schemes the qualifying licensed person does not have a duty to third parties. The Court cited the statutory scheme for licensed construction contractors. *Id.* 1441. The Court noted that the language for licensed construction contractors is substantially similar to that for brokers. However, the law is clear that for licensed construction contractors there is no duty to third parties by the company's responsible managing licensee. *Id.*

Third, the Court directly addressed *Holley*. The Court honed in on one critical fact in the *Holley* case. This critical, distinguishing fact was that the qualified broker had sold the business to the person that allegedly conducted the racial discrimination, and that the broker had agreed that he would remain the designated officer/broker in name only until the bad actor received his broker's license. *Id.* at 1444. The Court ruled that there was not simply an implied delegation of responsibility in *Holley*, but instead

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an actual agreement that the bad actor "would assume the responsibilities imposed on the designated officer/broker by section 101059.2." *Id.* at 1445.

Based on these findings, the Court ruled that the Plaintiff's underlying claim in the *Sandler* case failed where the allegation was that the designated broker did not supervise the loan officer managing the transaction. Plaintiff's claims were proper against the corporation, but not the qualified broker.

In summary, this opinion should reduce the naming of mortgage broker's individually as defendants, and provide further clarification to the courts in ruling on early motions to dismiss the individual brokers.

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