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PERSPECTIVE

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Ninth Circuit upholds license requirement for business opportunity brokers

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In November 2023, the Ninth Circuit issued a noteworthy decision in *Carbon Crest, LLC v. Tencue Productions, LLC*, 2023 WL 8271969 (9th Cir. 2023), affirming in part and reversing in part the underlying 2022 judgment of the District Court for the Northern District of California. The case involved, among other questions, the applicability of Section 10130 of the California Business and Professions Code (the Real Estate Law), requiring real estate licenses for persons who provide broker services, as defined in the statute, in connection with the sale of business opportunities (as opposed to real property) and the question whether the statutory licensing mandate may be avoided based on equitable considerations. The Ninth Circuit affirmed the district court's holding that Section 10130 of the California Business and Professions Code rendered null and void the written broker agreement at issue because the broker did not have a real estate license, but reversed the trial court's holding that plaintiff, the unlicensed broker, was nonetheless entitled to a fee on a quantum meruit claim.

As spelled out in detail in the district court's opinion, Defendant Tencue Production LLC was a California event production company, and in 2017 it retained Plaintiff Carbon Crest to assist in its search for potential buyers. The contract at issue was a "Sales Process Advisory Agreement" (SPAA) signed by the parties in July 2017. Under the SPAA, Carbon Crest had agreed to "assist [Tencue] with representing [Tencue] in a potential sale transaction." *Carbon Crest, LLC v. Tencue Productions, LLC*, 2023 WL 1079045 *1 (N.D. Ca. Apr. 11, 2022). Among other things, Carbon Crest agreed to (1) "[e]valuate … potential buyers to provide … sale options for [Tencue] to explore"; (2) "[n]egotiate and maximize [Tencue's] value"; (3) "[n]egotiate an acquisition structure attractive to [Tencue]"; and (4) "[m]anage

the sale process through to the transaction closing date". *Id.* at *4. Neither Carbon Crest nor its sole owner had any professional licenses. *Id.* at *3.

Under the SPAA, Carbon Crest was to be paid a percentage of the sale price. *Id.* at *4. Either party could terminate the agreement by giving written notice, although Tencue's obligation to pay the contingent fee would survive termination for up to thirty-six (36) months. *Id.* at *5.

In the approximately eight months following the execution of the SPAA, Carbon Crest dutifully provided the agreed-to services, including negotiating the value of Tencue with potential buyers, advising Tencue regarding the same, preparing an "Information Memorandum" for potential buyers with financial projections, attending "roadshow meetings" with potential buyers, and working with an accounting firm to conform Tencue's accounting system to the Generally Accepted Accounting Principles (GAAP). *Id.* at *5. Due in large part to Carbon Crest's efforts, Tencue received multiple offers from potential buyers, and the district court found that Carbon Crest had done an "excellent job managing the sale process, arranging meetings, preparing financials, handling paperwork, and shepherding the process along." *Id.* at *6.

In February 2019, roughly nineteen months after the SPAA was signed, Tencue terminated the agreement. *Id.*at *9. About two and a half months before the termination, the first potential buyer that had approached Tencue, in 2017, attempted to reopen negotiations with Tencue – a communication that was apparently not disclosed to Carbon Crest. *See id.* Tencue did not re-engage in negotiations, however, until after it terminated the SPAA, and about three months after the termination Tencue accepted the buyer's offer. *Id.* On the same day that it accepted the offer, Tencue offered Carbon Crest one million dollars to release Tencue from its obligation to pay the substantially higher contingent fee owed under the SPAA, an offer Carbon Crest rejected. *Id.* at *10.

Carbon Crest filed suit in December 2019, alleging breach of the SPAA and quasi-contract claims. After a four-day bench trial, the district court held, among other things, that the SPAA was void under Section 10130 of the Business and Professions Code. *Id.* Section 10130 makes it "unlawful for any person to engage in the business of, act in the capacity of, advertise as, or assume to act as a real estate broker or a real estate salesperson within the state without first obtaining a real estate license …." Cal. Bus. & Prof. Code § 10130. Section 10131 of the Business and Professions Code in turn makes it clear that the scope of services covered by Section 10130 includes not only the sale of real estate, but also the sale of any "business opportunity". Under Section 10131, a real estate broker is defined to include a person who "[s]ells or offers to sell, buys or offers to buy, solicits prospective sellers or buyers of, solicits or obtains listing of, or negotiates the purchase, sale, or exchange of real property or a *business opportunity." Id.* § 10131. (Emphasis added.) As the district court in Carbon Crest noted, a transaction involving a "business opportunity" need not include real property. *Carbon Crest*, 22 WL 1079045 at *11. "Rather, 'the sale or purchase of a 'business opportunity' encompasses any transfer of the ownership of an entire ongoing business in corporate form whether by transfer of all the stock or all the assets.'" *Id.*, quoting *All Points Traders, Inc. v. Barrington Assoc.* (1989) 211 Cal.App.3d 723, 724 and citing *Salazar v. Interland, Inc.* (2007) 152 Cal.App.4th 1031, 1039.

The district court held that the sale of Tencue constituted the sale of a business opportunity and that Carbon Crest "was a broker within the meaning of the Business and Professions Code." *Carbon Crest*, 22 WL 1079045 at *11. And, because neither Carbon Crest nor its sole owner was licensed as a real estate broker, the SPAA was void as a matter of law. *See Id.* at *12. Nor did the doctrine of severability breathe life into the SPAA; citing California Civil Code Section 1598, the court concluded that the entire agreement was void because "the contract had but a single, unlawful object: to sell Tencue. Four of Carbon Crest's six duties under the agreement called for Carbon Crest to negotiate favorable terms of sale, which is unlawful to do without a broker's license under the Business and Professions Code. Further, Carbon Crest's remaining contractual duties were not 'wholly independent of the unlawful object.'" *Id.*, quoting *MKB Mgmt., Inc. v. Melikian* (2010) 184 Cal. App. 4th 796, 805. (Section 10008.5 of the Business and Professions Code carves out an exception for persons "licensed at the time of the transaction as a securities broker or securities dealer under any law of this state or of the United States." Neither the district court nor Ninth Circuit discussed the exception apparently because of the district court's finding that Carbon Crest had no professional licenses of any kind.)

Having concluded that the SPAA was void as a matter of law, the district court turned to Carbon Crest's equitable claims and concluded that its "findings of fact … show this is a 'compelling case' justifying quasi-contractual recovery." *Id.* at *16. The court explained that Carbon Crest had done "excellent work to position [Tencue] for an eventual sale at twice the amount [Tencue] had been willing to accept." *Id.* at *15. Thus, according to the district court, Carbon Crest was entitled to "recover in quasi-contract" on a claim for quantum meruit. *See Id.* at *17. The court awarded Carbon Crest 1.5 million dollars as the reasonable value of its services based on Tencue's expert's testimony on the normal fee range for such broker transactions. *Id.* at *18.

Carbon Crest in due course appealed the district court's denial of its breach of contract claim, and Tencue cross-appealed the district court's order granting equitable relief. *Carbon Crest*, 2023 WL 8271969 *1. In a brief opinion, the Ninth Circuit agreed with the district court that Carbon Crest had "unlawfully provided broker services in California without a license under the SPAA", noting that Carbon Crest had done "more than 'the bare act of introduction' … or 'merely bringing the parties together.'" *Id.* at *2 (citations omitted). The court also agreed with the district court that the SPAA was not severable between broker and non-broker services, as the "SPAA provided for one payment and a single object: the sale of Tencue." *Id.*

The Ninth Circuit, however, rejected the district court's decision to grant Carbon Crest equitable relief. It broadly observed that "[u]nder California law, a plaintiff who has no contract remedy for work performed because that plaintiff was an unlicensed broker cannot recover in equity." *Id.* Nor did the facts present a "'compelling case' in which we should depart from the usual rule," notwithstanding that Carbon Crest had provided "excellent services" and that Tencue had "left Carbon Crest high and dry." *Id.* at *3. The Ninth Circuit reasoned that "'[b]rokers are less likely to enter into illegal arrangements'" if Carbon Crest is denied a recovery in equity. *Id.* (citations omitted).

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