

Oregon Ban on Home Buyers' 'Love Letters' to Sellers Violates First Amendment, Federal Court Rules

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After becoming the first state to ban real estate “love letters,” Oregon’s novel law has been found to violate the First Amendment and enjoined from enforcement by a federal Court in Oregon. *Total Real Estate Group v. Strobe*, No. 3:21-cv-01677 (D. Or. Mar. 3, 2022). In a constitutional challenge brought by a real estate firm seeking to strike the law down, the court granted a preliminary injunction prohibiting its enforcement. As a result of the court’s ruling, Oregon’s “love letter” ban cannot be enforced — at least for now.

The law (HB 2550), which took effect at the start of 2022, required sellers’ agents to “reject any communication other than customary documents in a real estate transaction, including photographs, provided by a buyer.” The prohibition against transmitting non-customary documents, according to the court, includes banning “love letters and any other speech beyond disclosure forms, sales agreements, counteroffers, addenda, and reports.” In the court’s view, a restriction on commercial speech of this scope is unenforceable under the First Amendment.

Background

The Oregon law prohibited buyer’s agents from providing seller’s agents with letters written by buyers hoping to persuade sellers to accept their offers. The use of such love letters has become a common tactic to pull at sellers’ heartstrings, especially in a sellers’ market, where many buyers are bidding for a property (often significantly over the asking price).

The practice usually involves buyers writing about how much they love the home and how they imagine their family living there. However, these letters may include descriptive details and family photos, which could reveal protected characteristics, such as a person’s race, national origin, skin color, sex, religion, sexual orientation, familial status, or marital status. The rationale for the ban was that information in these letters could be used by the seller, whether consciously or not, and create potential unlawful biases in the seller’s decision-making process on whose offer to accept.

Constitutional Challenge

The real estate firm sought to have the law declared unconstitutional under the First Amendment. In moving for a preliminary injunction, it asserted that the law was an impermissible regulation of and interference with commercial speech. The firm argued the law’s restriction of speech would lead to dissatisfied clients, unfulfilled duties to disclose known material facts, and limited abilities for buyers to compete with higher offers. While the firm agreed Oregon had a substantial government interest in preventing housing discrimination, it asserted the state’s ban on “love letters” was more restrictive than necessary to achieve that goal.

Oregon asserted that the real estate firm lacked standing to challenge the law, and, even if there were standing, the law did not violate the First Amendment. Oregon argued in part that its law restricted conduct, not speech, and, thus, it did not unconstitutionally regulate speech.

However, the court disagreed with Oregon and concluded the law was an overbroad regulation of protected commercial speech.

The court first determined the real estate firm had both direct and third-party standing to challenge Oregon's law. Direct standing existed because real estate agents of the firm often drafted or edited client "love letters." Third-party standing existed because the plaintiff-real estate firm had a sufficiently close relationship with its clients whose "love letter" speech was prohibited by the law.

On the merits, the court agreed that Oregon had a substantial interest in addressing a history of housing discrimination in the state, but it found the ban went too far. Applying intermediate scrutiny, the court held the ban violated the First Amendment because it was overinclusive, not adequately tailored, and significantly limited truthful, non-misleading speech. Not only did the ban prohibit transmitting all non-customary documents, the court noted, but it also prohibited speech in "love letters" unconnected to protected characteristics, such as a prospective buyer's affinity for the neighborhood. Moreover, the court identified four reasonable alternatives less restrictive of speech: (1) requiring agents to redact protected characteristics from client "love letters"; (2) prohibiting inclusion of photos; (3) requiring a fair housing disclosure in real estate transactions; and (4) increasing fair housing training for real estate agents.

Accordingly, the court held Oregon's "love letter" law violated the First Amendment and enjoined its enforcement. The preliminary injunction will remain in place until the case is fully resolved following discovery.

While the court's injunction suggests complete bans on "love letters" do not pass muster under the First Amendment, the door remains open for some regulation. For instance, each of four reasonable alternatives identified by the court would be more likely to survive a constitutional challenge.

Finally, as suggested by the ruling, real estate brokers should provide regular training to their agents and employees on housing discrimination issues and the potential for materials submitted in support of a home purchase to open the door to claims of housing discrimination.

Please contact a Jackson Lewis attorney with any questions about the latest ruling or for assistance with fair housing compliance.

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