

**LEGAL LIABILITY UPDATE --  
BUYER'S BROKER LIABILITY**

**I. INTRODUCTION**

For the past several years, the annual legal update seminar has included a discussion of cases from around the country, to provide examples of what "not to do" in various situations. This update concentrates on liability concerns for buyers' brokers. Because buyers' agency is a relatively new concept in residential real estate sales, and because buyer's agency has not received significant attention from Michigan courts to date, reviewing cases from other states may prove instructive. It is unlikely that each scenario described below would present an actionable case in Michigan. It is also not certain that buyer's agent missteps that were allowed in other states would be tolerated by Michigan courts. Nonetheless, these cases provide illustrations of what can go wrong.

The cases below discuss disclosure duties, misfeasance (i.e., negligently performing an acknowledged duty), and misrepresentations made by agents representing buyers. In many instances, the case descriptions below omit discussion of court procedures to focus on the conduct of the buyers' agents. Thus, if a REALTOR® is planning to rely on a case described below, a REALTOR®'s legal counsel should

review the case to ensure that no procedural irregularities exist in that case that render the case factually similar, but legally distinguishable from your situation.

## **II. DISCUSSION**

In general, buyers' agents owe a duty to disclose all information they know about the property to a buyer. Cases against buyer's agents often involve allegations that the buyer's agent withheld unfavorable information about a property from a buyer, creating the appearance that the agent was more concerned with closing the sale than protecting the buyer's best interests. In some instances, courts have expanded a buyer's agent's duties to require that the buyer's agent disclose facts that, based on the agent's experience, the agent should have known. These cases often involve a buyer's agent missing some "red flags" that arguably should have alerted the agent that there was a potential problem with the property. Other times, the buyer's agent simply failed to make certain that his client received all of the required disclosure forms.

### **A. Duty to Disclose Known Defects**

In a Rhode Island case, a buyer's agent found herself on legally weak footing as a result of her failure to disclose her knowledge of a shoreline erosion

problem to waterfront cottage buyers. In Stebbins v Wells, 818 A2d 711 (RI 2003), buyers who had vacationed for years in Rhode Island's coastal areas retained an agent to assist them in finding a suitable oceanfront vacation home. After viewing several properties, the buyers told the agent that they were no longer interested in purchasing coastal property, for fear of losing their investment to shoreline erosion. After some time passed, the buyers' agent contacted the buyers again to alert them of a cottage on a backwater or inlet, which presumably would not be exposed to the Atlantic coast wind and waves. The buyers made an offer to purchase and had the property inspected three separate times, but did not seek an opinion concerning shoreline erosion.

After the buyers closed the sale and took possession, they learned from the sellers' handyman that the sellers previously removed trees and vegetation from the shoreline. The handyman claimed that he had warned the sellers that they would lose natural erosion protection if they removed shoreline vegetation, but that the sellers had insisted that the trees and plants be removed. The handyman also told the buyers that the sellers had lost approximately ten feet of shoreline in the ten years since the vegetation was removed. When the buyers relayed this discussion to their agent, the agent indicated to the buyers that not only had she known the sellers' history of losing land to erosion, but also that she had formerly owned this property herself.

The Rhode Island Supreme Court ordered the trial court to determine the severity of the erosion and the extent to which the agent was aware of it. If the erosion was severe and the agent was aware of it, the Supreme Court held that the buyers' agent had a duty to disclose her knowledge about the erosion. Although not raised by the Supreme Court, this duty appears to have been heightened because the buyers specifically made their agent aware of their concerns regarding shoreline erosion.

Similarly, a Mississippi real estate agent, acting as a dual agent for both the buyers and sellers, was recently held to have breached her fiduciary duty to the buyers by failing to disclose a report documenting termite damage to the buyers after forwarding it to and discussing it with the sellers. Lane v Oustalet, 850 So2d 1143 (Miss App 2002). In Lane, the statutorily required seller's disclosure form indicated there was past termite damage in the home, and that the damage had been repaired. The purchase offer had what appeared to be a standard "right to inspect" contingency, whereby the buyers could withdraw their offer if the home did not pass an inspection. A termite inspector inspected the property and provided a written report to the dual agent indicating termite damage, and recommending that the damage be inspected by a contractor to determine if the home had been structurally compromised. The dual agent forwarded this report to the sellers, called the sellers to discuss the need for an additional inspection, and contacted a builder to evaluate the termite damage.

However, no evaluation of termite damage was made prior to closing, and the dual agent failed to forward this report to the buyers. When the buyers (now in possession of the house) hired a firm for regular pest control, the pest control company noticed the termite damage. Around the same time, the buyers received the pre-closing report indicating damage and recommending a structural inspection.

The buyers sued the dual agent claiming breach of fiduciary duty, including the duty of full disclosure, and for (what appears to be) Mississippi's version of silent fraud.<sup>1</sup> In its analysis, the Mississippi court stressed the heightened care required of dual agents, and relied on authorities, which emphasized the heavy reliance homebuyers place on their buyer's agent's skill and knowledge. The court also stressed the complexity of the home purchase transaction and a typical buyer's lack of experience in home purchases. In the present case, the Mississippi court found that the agent's duty was breached when she called the sellers to inform them of information in the termite report, but did not contact her other client, the buyer.

The lesson to be learned from these cases is a straightforward one. A buyer's agent should disclose to his/her buyer all information that the agent knows about a property that could possibly affect the buyer's decision to purchase. If a buyer

---

<sup>1</sup> Silent fraud claims involve a failure to disclose information under circumstances where there is a duty to disclose the information. Courts tend to view an agent withholding material adverse information from his principal in the same unfavorable manner as they view an agent intentionally misinforming a principal to whom they owe a duty.

can establish that his agent knowingly withheld information, it is almost certain that the agent will be found liable.

### **B. Duty to Qualify Opinions as to Valuation**

California has long been considered one of the most high risk states for REALTORS® in general. California also appears to be taking the lead in creating legal duties for buyer's agents. For example, in Holguin v Coleman, 2002 WL 31854851 (Cal App 2002) (unpublished), a buyer's agent faced liability for making false representations to a buyer about the value of an interest in an apartment complex the buyer was purchasing.

The buyer's agent in Holguin argued that regardless of what he had said about the value of the property, the case should be thrown out because the agent had recommended that the buyer get an appraisal, which had the buyer obtained, would have disclosed the true value of the apartment complex. The California court rejected this argument, holding that "the mere fact that a buyer does not exercise the right . . . to have an appraisal conducted is not sufficient to put the buyer on notice that the value of the property is not as represented by their real estate agent."

### **C. Duty to Discover Defects**

In Bedwell v Schmitt, 2002 WL 31813019 (Ohio App, December 13, 2002) (unpublished), the buyers discovered an underground gas well on their property after closing. Believing that this was a defect in the property, the buyers brought suit against the sellers, the sellers' agent, and their own agent, arguing that they should have been told of this condition. Evidence at trial showed that the sellers were aware of the gas well and had disclosed it to their agent. However, neither the sellers nor their agent had provided the buyer with an Ohio seller's disclosure form (much like the Michigan seller's disclosure form) in connection with the sale. The buyer's agent had apparently failed to request or insist upon such disclosure form.

In discussing the duties of real estate agents, the court found that Ohio law imposes the following fiduciary duties on real estate agents: the duty to use their best efforts to further the interests of their client; the duty to exercise reasonable skill and care; the duty to perform the terms of any written agency agreement; the duty to follow lawful instructions of their clients; the duty to perform all duties with loyalty; the duty to comply with relevant Ohio law; the duty to disclose to clients "any material facts of the transaction of which the [real estate agent] is aware or should be aware in the exercise of reasonable skill and care"; and the duty to advise clients to obtain expert advice where appropriate.

In this instance, there was no proof that the buyers' agent knew of the underground gas well prior to closing. However, the buyers' agent tried to have the buyers sign an addendum to the closing documents after closing to make it appear as if the buyers purchased the property with knowledge of the gas well. To the court, this "demonstrate[d] an appearance of impropriety" on the part of the buyers' agent, who appeared to be trying to cover her tracks through post-closing documents. In addition, because the location of the gas well was a matter of public record and appeared on the plat map for the subdivision in question, the court found that the buyers' agent's duty of providing competent assistance included a duty to inspect the public record for defects, and to alert the buyers to those defects prior to closing the sale.<sup>2</sup>

In Ross v Century 21 Bill Pike Realty, 2003 WL 1849245 (Cal App 2003), a buyer's agent was found to have breached a duty to disclose the existence of public development restrictions on a parcel that prevented the buyer from using the parcel to build an "adult entertainment" facility as planned. What is most interesting in this case is the court's list of duties that a buyer's agent owes to a buyer in California.

---

<sup>2</sup> Incidentally, the sellers' agent argued it had no duty to the buyers in light of the fact that the buyers had their own representative. The Ohio court found otherwise. Here, the court looked to Ohio's canons of professional ethics to find that real estate agents are agents to the public at large, which must maintain high standards of integrity and which must disclose known material defects in a property to those on the other side of the transaction. This differs from Michigan law, where the general rule is that an agent owes no duty to the opposing party in a transaction. Further, in this case, the sellers' agents lost all sympathy from the court when they revealed that they had sold several properties from this plat with knowledge of undisclosed underground gas wells beneath.

Remember that traditionally, California has imposed a higher level of responsibility on real estate agents from any other state. According to this California court, a real estate agent's duties may include inspecting the property and disclosing material defects to the buyer; maintaining the highest good faith and undivided service and loyalty to the buyer; learning the material facts that may affect the buyer's decision to purchase; performing necessary research and investigation to know which important matters will affect the buyer's decision regarding purchase; disclosing reasonably obtainable material information about the property; placing him or herself in the position of the buyer to determine if the buyer is making a well-informed decision; investigating facts not known to the agent; and disclosing all material facts that might be reasonably discovered by the agent, including facts revealed in public records, titles or permits concerning the property.<sup>3</sup>

In Ross, the court found that the buyer's agent had a duty to learn the material facts concerning development restrictions, a duty to perform necessary research or factual investigation, a duty to inform the buyer of the results of that investigation, and a duty to disclose material facts known to the agent that might have influenced the buyer. In this case, the evidence revealed that there were public land use

---

<sup>3</sup> The Ross court relied on Smith v Rickard, 205 Cal App 3d 1354 (1988) and Field v Century 21 Klowden-Forness Realty, 63 Cal App 4th 18 (1998) to establish these highly specific duties.

restrictions preventing use of the subject property for an adult entertainment facility, which the court found that buyer's agent knew of or should have known of, and should have disclosed to the buyer. Since the buyer's agent also represented the seller, under a disclosed dual agency arrangement, it appeared to the court that the agent was more interested in closing the sale and receiving a commission than safeguarding the best interests of the buyer.

Although California imposes duties on agents that are far more exacting than those established by Michigan courts, a buyer's agent in Michigan is well advised to investigate all available information that may make the property unsuitable for his particular buyer. Several states in addition to California have imposed a duty upon buyer's agents to inspect public records. Courts seem particularly inclined to do so when a buyer has expressed a particular concern about the property or the buyer's intended use of the property. A buyer's agent may be able to protect himself by referring his client to an appropriate third party expert, such as a lawyer, appraiser or engineer, to more fully address the buyer's concerns.

**D. Duty to Require Seller to Comply with Statutory Disclosure Requirements**

One court has held that the federal Lead-Based Paint Hazard Reduction Act (requiring certain lead-based paint disclosures), by its own terms, does not place any duty on buyer's agents to ensure the seller makes proper lead-based paint

disclosures. However, the same court held that Maine common law negligence doctrine and Maine statutes require a buyer's agent to disclose the potential risks of lead-based paint to a buyer. Keegan v The Downing Agency, Inc, 2003 WL 21210326 (D ME, 2003) (slip op) (federal court applying federal and Maine state law). In Keegan, the plaintiff, an aggrieved purchaser who bought a house later revealed to require \$35,000 worth of lead paint abatement, sued several parties, including the buyer's agent, for failure to disclose lead paint on the premises, failure to provide a lead warning statement, and failure to provide notice of the buyer's opportunity to conduct a lead-based paint risk assessment or inspection. The court found that the buyers stated an actionable case under Maine law, even if there was no violation of federal law by the buyer's agent.

The South Dakota Supreme Court recently held that a buyers' agent had an affirmative duty to advise the buyers of a state statutory requirement that sellers provide buyers with a property disclosure form. Saiz v Horn, 668 NW2d 332 (SD 2003). In Saiz, the buyers had no previous experience purchasing a home, and retained a buyers' agent to assist them. The buyers made a written purchase offer on a home, without knowing that the sellers had completed a disclosure form indicating water penetration problems in walls, the basement, floors and other areas of the home.

The court acknowledged that South Dakota's disclosure statute made the seller, not the buyers' agent, responsible for making this disclosure. However, the court

advised that “real estate agents are expected to advise their principals on the rules and procedures involved in a real estate transaction. Why have realty agents for buyers, if agents, supposedly knowledgeable in real estate transactions, have no obligation to tell clients that sellers are required by law to give a disclosure statement?”

The combined effect of the cases reviewed above may lead one to believe that there are few, if any, limits to a buyer’s agent’s duties. These duties may include the duty to make certain that the sellers are making all necessary statutory disclosures, and the duty to advise buyers of their rights to receive such seller disclosures. The lesson here is clear: when representing buyers, insist that the sellers make all necessary statutory disclosures. Even if the technical statutory duty to disclose falls on the sellers, a buyer’s agent may be deemed negligent for failing to advise the buyer of the seller’s disclosure responsibilities.

**E. Courts Do Occasionally Find Buyer’s Claims Invalid**

There have been a few cases where courts have refused to expand upon the duties placed on buyer’s agents. For instance, a Delaware court recently held that a buyer’s agent does not have any duty to inspect the property the agent is showing to the buyer for dangerous hidden conditions on the land. *See, Johnson v Chupp*, 2003 WL 292168 (Del Super 2003) (unpublished). In *Johnson*, the buyers’ agent was leading prospective buyers through an undeveloped lot that was overgrown with weeds and

brush. One of the prospective buyers was injured when she fell into a well that was hidden from view by weeds and brush.

In analyzing whether a buyer's agent had a duty to inspect or make safe the property of a seller, the Delaware court indicated that New Jersey, Washington and California have placed a duty to inspect for dangers on a seller's agent under the theory that the seller gives the seller's agent constructive possession of the property to sell. The Delaware court also indicated that Texas has refused to put such a duty on a seller's agent. The Delaware court further observed that no court has imposed such a duty on a buyers' agent, and the Delaware court refused to be the first court to do so. Thus, the buyers' agents were dismissed from the case, and the case continued against the seller and seller's agent.

Similarly, the Oregon Supreme Court refused to create a duty for a buyers' agent to guard against emotional distress suffered by buyers after their agent allegedly pushed them into making an offer on a home they later regretted making. See, Rathgeber v Hemenway, 69 P3d 710 (OR 2003). Here, the buyer's agent had shown the plaintiffs approximately 50 homes. Plaintiffs had put in offers on four properties, one of which was accepted by the seller. After discovering various problems with this property, the plaintiffs refused to close and the sellers brought suit for specific

performance. That suit eventually settled and the plaintiffs then filed suit against their buyer's agent. According to the court:

[P]laintiffs presented evidence that [the agent] failed to adequately investigate the property to discover foundation problems; failed to procure a dependable dry rot report; relied on a dry rot report that should have been questioned; failed to bring to plaintiffs' attention potential problems with the roofing and a loose light-switch cover that he noticed; failed to insert in the purchase offer a contingency clause related to the sale of plaintiffs' [current] home; failed to provide plaintiffs a property disclosure statement at the proper time; glossed over electrical problems and trash discovered on the property after plaintiffs took possession; pressed plaintiffs to proceed to closing despite plaintiffs' reservations; and failed to tell plaintiffs at any time that they had five days to rescind the transaction.

The buyer had alleged that these actions constituted a violation of duties placed on a buyer's agent under Oregon law. The buyers also brought suit under Oregon's Fair Trade Practices Act (similar to Michigan's Consumer Protection Act). The jury determined that the buyer's agent had breached his fiduciary duties and awarded \$13,600 in economic damages and \$20,000 in noneconomic damages for emotional distress. Plaintiff buyers also were awarded their attorney's fees under Oregon's Fair Trade Practices Act.

On appeal, the Oregon Supreme Court held that there was no evidence to show a violation of Oregon's Fair Trade Practices Act. Plaintiff-buyers could not prove that the buyers' agent intentionally violated the act, by making representations

concerning his competence in rural property acquisitions that were knowingly false at the time they were made. The court also held that there was no duty for a buyers' agent to guard against a buyer being emotionally traumatized by a failed transaction. Thus, plaintiff-buyers could not recover either their attorney fees or emotional distress damages.

### **III. CONCLUSION**

Buyer's agent liability is clearly an evolving area of law. Michigan appellate courts certainly have not yet defined the duties and responsibilities of buyer's agents. Therefore, opinions from other states may be used to provide guidance to Michigan courts in the future. As illustrated by the survey of cases above, there are many opportunities for buyer's agents to make mistakes in a transaction, and find themselves in court as a result. However, adherence to basic principles, such as making certain that buyer-clients receive all statutory disclosure forms, recommending that buyer-clients consult with third-party experts where necessary, and warning buyer-clients wherever the agent sees a "red flag" requiring further attention, will help avoid costly litigation.

But perhaps the best protection is for buyers' agents to ALWAYS use buyer's agency contracts that specifically delineate what the buyer's agent is and is not going to do for her client. For example, MAR's form provides:

Client has employed the services of Broker to assist Client in purchasing real estate, as more particularly described in Paragraph \_\_\_\_\_. Broker's services shall include, but not be limited to, consulting with Client regarding the desirability of particular properties and the availability of financing; formulating acquisition strategies; and negotiating purchase agreements. Client acknowledges that Brokers is not acting as an attorney, tax advisor, surveyor, appraiser, environmental expert or structural or mechanical engineer, and that Client should contact professionals on these matters.

Too often buyers' agents rely upon the agency disclosure form and the offer of compensation through a multiple listing service. This practice, while in compliance with the law, does not provide any protection for the buyer's agent. At a minimum, buyers' agents should use a contract similar to the "short form" attached hereto.