First Commerce Title

Office: 318-752-8080 Fax: 318-752-8426
2708 Village Lane, Bossier City, LA 71112
www.firstcommercetitle.com

Title Notes Article April 2006

How to Avoid Malpractice

from the desk of David M. Touchstone

For a long time I have wanted to write an article about real estate agent and broker malpractice. I found this subject one difficult to get my arms around; there is no overarching or integrating theme. Fact is: there are a whole bunch of ways to commit malpractice and other than the general concepts of negligence and deceit, there is no single theory to tie all these areas together.

So I decided to present this subject like a box of mixed Valentine candies. A little explanation is in order. For the most part, lawyers are taught the law in law school and afterwards on our own by the case-law method. This means we read about actual cases that happened and attempt to extract principles from the cases that will have general application to similar fact situations that arise in the future. Who writes these cases? Judges do, specifically appellate judges. If parties go to trial and one or more of the parties believe that the trial court has made an error in the application of the law to that case, the aggrieved party can file an appeal. When the appellate court rules, a three judge panel issues a written opinion to explain why the court has ruled as it has. If the case reaches the Louisiana Supreme Court, then a seven judge panel hears the case and issues a written opinion. Sometimes these judges disagree; votes are counted and the majority issues the opinion that decides the case. In most instances the minority will issue a dissenting opinion; these dissenting opinions also have value because they can point to the direction of future holdings.

DAVID M. TOUCHSTONE
First Commerce Title, President

Now we are going to talk about some actual cases.

Piro v. Stan Weber and Associates, 638 So. 2d 463 (5th Cir. 1994). In this case, the purchasers of a property sued the listing agent, selling agent, and each of their brokers. The two agents had represented to the purchasers that the property was zoned for commercial use. After the purchase was consummated, the purchasers discovered that only a part of the property was zoned for commercial use. The back portion of the property which had a commercial type structure on it was zoned for residential use, resulting in a substantial impairment in the amount of rent which the purchasers could have otherwise earned from the rear structure. The court awarded a judgment in favor

of the purchasers and against the two agents as well as the two brokers in the sum of $30,000.00. Moral: before you make any representation to a buyer, do your homework and make sure of your facts.

Task v. Gates, 770 So. 2d 21 (3rd Cir. 2000). In this case the homeowner sued the listing agent. The homeowner went out of town and gave the listing agent instructions for arming the burglar alarm. After showing the house, the agent believed he had activated the alarm, but, in fact, he hadn't. The house was burglarized and the homeowner sued the agent under a theory of negligence. This was a very close case. Two appellate judges voted to exonerate the agent; the third judge on this panel would have held the agent liable. The two judges who voted against liability did so on the basis that the instructions from the homeowner were inadequate. The dissenting judge who wished to hold the agent liable took the tack that a real estate agent, by virtue of the agent's training and position, holds himself out to the public as being specially informed in the area of the agent's expertise. In the dissenting judge's opinion, a real estate agent *should know* how to arm a burglar alarm; and in this case, the agent's failure to do so fell below the standard of care the public is entitled to expect. Narrow moral: always be sure to secure any property you have shown and when alarm systems or other security systems are involved, have the property owner (not you) write down the directions to the systems and then be sure you meticulously follow the instructions. If you have any doubt as to whether you have secured the property, contact the owner as quickly as possible for additional instructions. Wider moral: you may be held liable for property left in your care, so take every precaution a prudent person would take.

Tauzier v. Lewis, 562 So. 2d 924 (5th Cir. 1990). In this case, the listing agent incorrectly listed the lot size of this commercial property as 102 feet x 130 feet. The actual size was 102 feet x 60 feet. The prospective buyers sensed there was an error, went to the local courthouse, did their research and discovered the true size of the lot. They then shrewdly inserted into their offer a provision calling for a pro rata reduction in the sales price should the property be less than 102 feet x 130 feet. The sellers agreed to the offer as written. When the true dimensions were discovered, the sellers refused to complete the sale; the buyers sued the sellers, the listing agent *and the selling agent*. At trial the buyers won a money judgment against the sellers, but both real estate agents were dismissed from the suit. The Appellate Court overturned the judgment against the sellers, finding that there was "no meeting of the minds" at the time the buy/sell agreement was signed by the parties in that the respective beliefs of buyers and sellers as to what was being sold were substantially different. Moral: These sellers and both real estate agents were put through a grueling litigation because the listing agent was sloppy and neither agent did any research to determine the size of the property. All of this could have been avoided by a brief amount of court house research and attention to detail. Furthermore, the request of the buyers to insert the clause regarding pro rata reduction of price for fewer square feet should have been a red flag that alerted both agents to do additional research. Some additional observations: In 1997, the Louisiana legislature enacted a statutory scheme governing real estate agents and their clients. One part of this legislation that is pertinent to this issue is R.S. 9:3894(B) which states:

> "A licensee shall not be liable to a customer for providing false information to the customer if the false information was provided to the licensee by the licensee's client or client's agent and the licensee did not have actual knowledge that the information was false."

The court in Tauzier v. Lewis noted that the seller *had provided* the correct information regarding the size of the property to the listing agent. The listing agent, even though she had a survey of the property, proceeded to incorrectly list the property. Had the court found that the buyers were entitled to enforce the buy/sell agreement, undoubtedly, the sellers would have been entitled to recover their loss from the listing agent and listing broker. Although the court did not say so, the court probably felt the buyers were not dealing in good faith (due to their knowledge of the truth) and, in all probability, this was the court's unstated reason for holding that there was no "meeting of the minds" and, hence, no enforceable agreement. After enactment of R.S. 9:3894(B), real estate agents and brokers should deem the rules regarding imparting incorrect information as follows:

> Seller provides incorrect information to agent – agent will not be liable.
> Seller provides correct information to agent and agent provides incorrect information to buyer – agent will be held liable.
> Seller does not provide any information to agent concerning the issue, but agent provides incorrect information to buyer – agent will be held liable.

Naquin v. Robert, 559 So. 2d 18 (4th Cir. 1980). In this case, the purchaser sued the broker and the closing attorney because the buy/sell agreement which was in effect expired as a result of the defendants' alleged negligence to bring the prospective sale to a closing. The buy/sell was scheduled to expire Easter weekend. Four days prior to the expiration the purchaser requested the broker to have the parties sign an extension. The broker prepared an extension which the purchaser signed but then the broker failed to present the extension to the seller. The broker made the decision to rely on the sixty day title curative clause in the buy/sell agreement due to the fact that there remained on seller's title an un-canceled (but paid off) mortgage and a judgment which was not against the seller but a person of a similar name. The court refused to apply the title curative clause. Then the court released the closing attorney on a finding that he was ready to close and had not negligently impaired the buyer's position. However, the court awarded the buyer a $5000 judgment against the broker on this reasoning: had the broker timely presented the extension to the seller, the broker would have timely ascertained that the seller was not willing to extend the contract. As there would have still been time to close before the buy/sell agreement expired, buyer could have brought seller to the table. Moral: agents should communicate all offers of every type without any delay and should document the date and time those offers are transmitted. Further, the agent should in all possible cases obtain a written acceptance or rejection from the offeree. Additional Moral: When buy/sell agreements are about to expire, *get busy and get on it.*

Burdon v. Harvey, 385 So. 2d 514 (4th Cir. 1980). In this case, the buy/sell agreement contained a typical financing con-

tingency provision. It stated that unless the buyers could obtain a loan for $165,500 at 9% per annum, amortized over 25 years, then buyers would not be obligated to complete the purchase. Buyers made a good faith effort to obtain financing from various lending institutions but were unsuccessful. Four days before the expiration date of the buy/sell agreement, the sellers telephoned the listing agent who apparently was acting as a dual agent and who was then on vacation in Florida. The sellers informed the agent that the sellers were willing to owner finance on the same terms and conditions set forth in the buy/sell agreement. The agent did not inform the buyers prior to expiration of the buy/sell agreement. Thereafter, the sellers sued the agent because the agent's failure to inform the buyers before expiration of the buy/sell agreement prevented the sellers from enforcing the buy/sell agreement against the buyers. The sellers won a $5000 judgment against the agent; this was the same amount of money the sellers would have been entitled to recover against the buyers had the agent timely communicated this offer to the buyers and the buyers balked on performing. Moral: no matter where you are, vacation or not, you better have a system of communication worked out by which you (or someone who is standing in for you) can timely receive information and quickly pass that information to the appropriate persons. Further, you should be able to document (preferably on paper) that you did, in fact, transmit the information and to whom you transmitted it.

Josephs v. Austin, 520 So. 2d 1181 (5th Cir. 1982). In this case, a real estate broker, Tommy Austin, helped his mother buy a house from HUD for $11,500. Three months later his mother, with Tommy Austin's assistance as a broker, sold the house to the Josephs for $30,000. After the Josephs purchased the house, they discovered that not only did the house have a cracked slab, but that HUD had advertised that the house had a cracked slab at the time HUD was offering it for sale. Tommy Austin acted as a dual agent, representing the Josephs as well as his mother. This case was a no-brainer. The court granted the buyers a $9000 judgment against Tommy Austin, stating that he "failed to disclose this vital piece of information". Moral: Do I have to say it? Be honest and always disclose all that you know about every property.

Hughes v. Goodreau, 836 So. 2d 649 (1st Cir. 2002). This is another failure to disclose case; but if you read carefully, you'll notice that the court has expanded the duty such that either agent who knows anything negative about a piece of property had better *make sure* the buyer knows it too. In this case, the *sellers (not buyers)* sued the broker for the alleged negligence of the broker's agents; there were two agents but both of them worked at the same brokerage. The buyers purchased the sellers' home and immediately began having chronic significant flooding problems. The buyers filed a redhibition suit against the sellers. The sellers repurchased the house from the buyers and filed a lawsuit against their broker for the negligence of the broker's agents. During the negotiation of the sale, the sellers had filled out a disclosure form on which they answered questions about flooding and various potential problems the house might have with "See attached documents." The sellers attached six letters from various persons regarding flooding problems with their house in particular and with the subdivision in general. The listing agent admitted in testimony that all six letters were attached to the disclosure. The listing agent testified that she put

the six letters in the agency file at the office and that she placed copies of all six letters on a kitchen countertop in the house that was purchased. The selling agent testified she couldn't remember if she provided all six letters to the buyers. However, the buyers testified that they received only two of the letters when the buyers received the disclosure and these two left the impression that the flooding problems had been corrected whereas the four missing letters demonstrated a much more pervasive and unresolved drainage problem. Though the court never accused anyone of bad faith, the reader was left with the impression that bad faith was in the back of the judges' minds. Apparently, the court felt the sellers had made a full disclosure, but the agents had short circuited that disclosure. Had the agents properly communicated this information to the buyers, the buyers would never have sued the sellers. The sellers won a $55,000 judgment against the broker. Moral: not only should you never hide, downplay, or "spin", you should make every effort to provide the buyer every snippet of information known to you. Further, you should document what was delivered to the buyer and when it was delivered. If part of the disclosure consists of attachments, have the buyer sign a receipt for each and every attachment.

Cousins v. Realty Ventures, Inc., 844 So. 2d 860 (5th Cir. 2003). In this case, the plaintiff businessman approached a real estate broker about locating a commercial building for the businessman to purchase as an investment. The broker brought to the businessman's attention a property which was owned by a national corporation. The businessman made a written offer which was rejected because the owner was still bound to a management contract which affected the property. Later, when the owner was free to sell the property (because the management contract had terminated), the broker made an offer which resulted in a contract for the broker, not the businessman, to purchase the property. Meantime, the businessman had continued to ask the broker about the property, and the broker mislead the businessman. After the broker purchased the property for himself, the businessman sued the broker and won a judgment of $790,000. Moral: always disclose everything to your client. Never take advantage of information you learn while representing a client unless you have fully disclosed your intention to the client and the client has released you in writing from going forward.

Mallet v. Maggio, 503 So. 2d 37 (1st Cir. 1986). In this case, the real estate broker represented a seller in an owner financed sale. On the broker's advice, the seller sold the property with owner financing at a rate of 18% per annum. At that time (as now), the maximum rate the seller was permitted to charge was 12% per annum. The buyer sued the seller for usury and was awarded a judgment refunding *all the interest buyer had paid*. The seller then sued the broker to recover all the seller's lost interest. The court held the broker liable for all the seller's lost interest stating: "A real estate broker is a trained professional who holds himself out as trained and experienced to render a specialized service in real estate transactions." The broker testified that he was ignorant of the 12% legal limit, but the court held him responsible since he had suggested the structure of the transaction. The court found that this was knowledge that the broker *should* have had in light of his recommendations. Moral: whatsoever you choose to advise your clients, be sure you know your stuff. If you are not sure, seek the advice of an expert in

that field before you cause your client to commit to a faulty choice.

Egudin v. Carriage Court Condominium, Dehrvill Group, Inc., 528 So. 2d 1043 (5th Cir. 1988). In this case, the buyer attempted to purchase a $33,000 condominium unit. The principal shareholder in the condo development was also the incorporator and a shareholder in the real estate brokerage firm that represented the buyer. Through a series of steps, the buyer was induced to deposit the *entire* purchase price with the *developer* (as opposed to depositing these funds into the real estate broker's account). The buyer was given a purchase agreement for his money, but not a deed. After the passage of a year and many broken promises, the buyer sued the developer, the real estate broker and the real estate agent who had represented him in the transaction. The court awarded the buyer a judgment against all three of these persons in the amount of $260,000. As to the real estate broker and real estate agent, the court stated that they breached their fiduciary duty and that they failed to act with the degree of care and skill ordinarily exercised by brokers and agents. This finding was due to the fact that the agent and broker should have advised the buyer against depositing his money directly with the seller. In particular, the court held that the broker and agent "had a duty to explain the potential consequences of the arrangement" to the buyer. One presumes that the fact that the brokerage had a listing agreement to sell the whole condo development must have impaired the broker's and agent's judgment. Moral: protect the innocent. Don't let greed sway you from your duty.

Mintz & Mintz Realty Co. v. Sturm, 419 So. 2d 981 (4th Cir. 1982). In this case, the buyer of the house sued the seller after the buyer discovered the house had a rotten sill that had to be replaced. The seller, in turn, sued the listing agent for failing to disclose to the buyer the rotten sill. The listing agent admitted that the seller had advised him of the rotten sill and no evidence was ever given the court that the listing agent had communicated this information to the buyer. Therefore, when the court awarded a judgment to the buyer against the seller for the cost of replacing the sill, the seller was granted a like judgment against the listing agent. Moral: Just as in Hughes v. Goudreau and Josephs v. Austin, you must be careful to disclose to the buyer all the information you know.

The above case-notes are just a sampling of all of the appellate decisions pertaining to broker and agent liability. In writing about these cases, I sought to find models of everyday real life situations in which others got into trouble. My goal in this is to help you to learn from others' mistakes, so that you will not repeat them. As I researched the cases, one of the things I wanted to know was the scope of duty a broker or agent owes to his client. The best case that I found to elucidate this principle was the Mallet v. Maggio case cited above. In Mallet, the court announced the broker's scope of duty thusly:

> "Ultimately the precise duties of a real estate broker must be determined by an examination of the nature of the task the real estate agent undertakes to perform and the agreements he makes with the involved parties."

Let me put this in layman's terms. There are so many kinds of advice that brokers give clients and so many different kinds of acts that brokers perform on behalf of their clients

that it isn't possible to make a single rule that covers them all. But this is what you should know – if you give advice in any area, there is a presumption that you are knowledgeable in that area; if your advice is wrong, you will be held accountable. For every act you undertake for your client, you will be presumed to have the knowledge to perform that act correctly; if you fail to perform it correctly, you will be held accountable.

As a broker or an agent, you are first and foremost a *salesperson.* That's a good thing; sales make the world go round. But sometimes salespersons get a little carried away in their enthusiasm. Remember: the law also expects you to be a technician. The law requires you to consistently provide competent advice about a wide range of matters. Take your time, be meticulous, be careful, and, above all, be honest.