

What Every Real Estate Agent Should Know about Condominiums & Townhouses

from the desk of David M. Touchstone

In 1983, the State of Louisiana enacted the statutes that control the development, sale, and resale of condominiums. Under this law, “condominium” is defined as “the property regime under which portions of immovable property are subject to individual ownership and the remainder is owned in indivision by such unit owners.” While the average person might picture a condominium as a high-rise with space being divided and sold horizontally as well as vertically, a careful reading of the above definition will reflect that a “condominium” can be not only a high-rise, but also a townhouse development. And, as a matter of fact, one Louisiana appellate court has specifically held that a townhouse is a condominium.

Thus, even though this area has seen only a sprinkling of traditional style condominiums (buildings having more than one story with horizontally separated ownerships), townhouse developments are already ubiquitous and still springing up like mushrooms.

How does this affect the real estate agent? It creates a whole new set of potential claims against the real estate agent. All practicing real estate agents and brokers should make a serious commitment to mastering the disclosure obligations under the statute.

But first, some discussion is in order to explain the standard to which agents and brokers will be held accountable. The obvious cases of theft of the client’s money, and



DAVID M. TOUCHSTONE
First Commerce Title, President

intentional failure to disclose adverse information about a property will surely result in a money judgment against an agent (and very likely will cause the agent to have his license removed). But what about acts that do not rise to the level of fraud? As the pace of negligence cases against agents quickens, the Courts of Louisiana are holding agents to an ever-tightening standard of negligence. One of the most recent cases (in 2002) defined the standard as follows:

“A real estate broker is a professional who holds himself out as trained and experienced to render a specialized service in real estate transactions. The broker stands in a fiduciary relationship to his client and is bound to exercise reasonable care, skill, and diligence in the performance of his duties. 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.”

Furthermore, the courts have begun holding real estate brokers liable along with their agents for the negligent acts of the broker’s agents.

With the above stated standard before us, the question becomes: What are the responsibilities of a listing agent and selling agent as to a townhouse or traditional condominium unit? While no appellate court has rendered any published opinion in this area, it is probable that an agent who assists either the buyer or seller in a townhouse or condo purchase and who fails to see that all disclosure requirements are followed will be liable in a money judgment for any damages suffered by either buyer or seller as a result of nondisclosure.

Disclosure under the Condominium Act is two tiered: one tier for the developer and a second (and less demanding) tier for resales.

A developer of a condominium or townhouse complex is required to deliver a very substantial packet of information to a prospective purchaser of a unit. This packet of information is referred to in the law as a “Public Offering Statement.” The Public Offering Statement must contain a copy of each of the following: (1) the condominium declaration; (2) the articles of incorporation creating the condominium association; (3) the by-laws of the condominium association; (4) any ground lease affecting the condominium; (5) a written statement by the developer as to whether a third party will be contracted to manage the property and what the management plan will be; (6) a projected annual op-

erating budget for the condo association including information about maintenance, management, reserves for repairs and replacements, monthly fees for recreational facilities, and insurance coverage; (7) a summary of the significant features of the condominium declaration; (8) a floor plan illustration of the unit; (9) a written statement as to what obligations unsold units will bear for association expenses; (10) a statement that a prospective purchaser has 15 days from receipt of the Public Offering Statement to withdraw from any buy/sell agreement; (11) a statement of all warranties expressly made or limited by the developer; (12) a statement pertaining to any unsatisfied judgments against the condo association or lawsuits pending against the condo association or development; and (13) a written statement as to any insurance coverage provided for the benefit of the unit owners.

If the development is a conversion of a building occupied by persons other than the purchaser and contains more than 10 units, the developer is required to provide the following additional information: (1) a written report issued by an architect or engineer describing the present condition of all structural components, the roof, and all the mechanical and electrical components; (2) a statement by the architect or engineer as to the estimated useful life of each of the above items; and (3) a statement by the developer as to any outstanding violations of building codes or municipal regulations and the estimated costs for curing same.

While some of you will be assisting buyers and sellers with newly developed condos and townhouses, more of you will be affected by that portion of the law, which pertains to resales of the units – the second tier of disclosure. As to resales, the seller is obligated to disclose the following to the pro-

spective purchasers: (1) the condominium declaration; (2) the articles of incorporation creating the condominium association; (3) the bylaws of the condominium association; (4) a written statement setting forth any current common expense assessments; (5) a written statement setting forth any capital improvements planned in the next two years; (6) a statement regarding the capital reserves of the association and portions reserved for projects; (7) the most recent balance sheet and income and expense statement of the association; (8) a current operating budget of the association; (9) a written statement setting forth any money judgments or pending suits against the association; (10) a written statement describing any insurance coverage provided by the association; (11) a written statement pertaining to the terms and conditions of any ground lease affecting the unit or common elements.

What are the most likely scenarios for your liability? **Scenario One:** If the required documents are not supplied to a prospective buyer prior to closing, and the buyer balks for any reason prior to closing, he will have an irresistible exit strategy. Let us suppose there were no problems with the condo or

townhouse, but that the purchaser had used the nondisclosure “technicality” to withdraw from the Buy/Sell, in all likelihood, the listing agent will be liable in damages to the seller for failing to advise the seller of the necessity to disclose. **Scenario Two:** Purchaser does close but never received the required disclosures. After the sale, serious financial problems with the association come to light. Purchaser has a whopping good lawsuit against the Seller, the listing agent, and the selling agent (as well as both agents’ brokers).

Bottom line: Take some time when listing or selling condominium units or townhouse units to collect all disclosure documents required by the law. Make sure that the prospective purchaser receives these documents prior to signing the Buy/Sell agreement and have the purchaser sign a receipt that he has received each of the required documents. Further, if you hear any hint of a problem with the association, investigate carefully so as to protect the prospective purchaser and be sure to disclose everything you know to the purchaser. Remember – No commission is ever worth a lawsuit.