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What the Heck Is Redhibition?

from the desk of David M. Touchstone

I promised in the last newsletter to talk about "redhibition". I probably get as many calls from real estate agents on this subject as any other. Lots of times they are really put off just by trying to say the word. Go on, you can do it: red-huh-bish-un. See it's not that hard. Where does this crazy word come from and what does it mean? Well, it's a French word; in French it's "redhibition", same as in English, only the French say it kind of funny. Before it was a French word, it was a Latin word. In fact, "redhibition" comes from the Latin word "redhibere" which is defined as "to have again". For those of you who are as perverse as I am about words and their origins, "redhibere" is a derivative of the Latin word "habere" which is Latin for "to have". There, that's about as far as I can go with the pedigree of "redhibition".

But this little definitional journey contains information. First, the law of redhibition, like most of the law of Louisiana goes back to French and Spanish sources which in turn were derived from the body of law developed by the Romans. Yep, that's right; redhibition goes all the way back to the Romans. And when a Roman filed an "Actio in Redhibere", he wasn't fooling around; this was a lawsuit to make the seller of a thing take it back, literally, "to have it again". Of course, when the Roman magistrate (praetor, for you history buffs) made the seller take it back, he also made the seller give the buyer back his money (denarii).

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Some things don't change much. The law of redhibition still pretty much works the old Roman way, but we'll get to that in just a minute.

First, let's talk about how redhibition fits into the field of warranty law in general. I often explain it this way. When a seller sells something, anything, whether it's a pencil or a palace, the act of selling the thing creates two warranty obligations. The first warranty is the warranty of title; this means that before a seller sells something, he's supposed to actually own it and his ownership should be free of undisclosed rights such as mortgages, liens, servitudes (easements), leases, etc. When the warranty of title fails, well that's a whole other story and a whole other lawsuit.

The second warranty implied by law in the contract of sale is that the thing is free of redhibitory defects.

So what the heck does that mean? Well, first, the defect has to be unknown to the buyer *and* it has to be hidden to the extent that a reasonably careful inspection by the buyer prior to sale would not reveal it *and* it has to already exist at the time of the sale. If the seller tells the buyer about the defect prior to or at sale, or if the buyer knows about the defect at the time of the sale, or if the buyer should have discovered the defect by making an inspection, he is not going to win a redhibition lawsuit. One of the things that I like about our law here in Louisiana is that it is so well written that most of the time lay people can understand it. This particular point of law is covered by Louisiana Civil Code Article 2521 which reads: "The seller owes no warranty for defects in the thing that were known to the buyer at the time of the sale, or for defects that should have been discovered by a reasonably prudent buyer of such things". That's pretty straightforward. And, kids, let me tell you, the courts aren't kidding around when that "should have been discovered" business comes up. Here's a recent case in point: Brandao v. McMahon, 857 So. 2d 1, (4th Cir. 2003); in this case the buyers bought a house from (as it so often happens in these cases) heirs to an estate. The buyers were given a property report from the sellers that the house had termite damage; they were given a termite certificate that apparently reported without any details that the house had been damaged by termites. After the buyers completed the purchase, they discovered that the house had extensive termite damage. The buyers had to tear out all the sheetrock and replace much of the structural components of the house. The court turned a deaf ear to the buyers in this case saying that the buyers "had a duty to perform additional inspections once the home inspections revealed damage. Their failure to do so indicates a tacit acceptance evidencing that they were willing to purchase the property as the inspections revealed without further investigation". So, here's the rule: whenever there is any information that would suggest that further investigation is in order, whether it is something that a buyer can see by investigation, or it is something revealed to him by a report or a statement, he better take the appropriate steps to inquire further.

If you, the reader, are a real estate agent or a mortgage broker (or originator), what does this mean for you? No schmoozing! No spinning! If a termite certificate comes back, "previous damage due to wood destroying insects", you better advise your buyer/borrower, "Let's check into this a little deeper". I can just hear some of the conversations now: "This is Louisiana; every house has had termites some time or other. You don't need to worry about that. If it were serious, 'Tom' (fill in the termite guy's name here) would have said something about it." This kind of tomfoolery to save a real estate commission or a loan origination fee is going to get you sued, and, guess what; you're going to lose if you engage in such practices. The courts of this state have already held that a real estate agent can be liable in negligence as to any matter for which he gives advice to a buyer or seller. I think, given the right set of facts, the courts will make the same ruling against loan originators and mortgage brokers. Let's do the math: a $2000-$5000 real estate commission or loan origination fee against a $150,000 judgment plus legal fees, expert witness fees, court costs and interest.

Right about now, you should be telling yourself that you will never minimize the need for a buyer to thoroughly check out a prospective purchase. Like the old saying goes: err on the side of caution. If you find yourself in a situation in which you feel that there is extra risk (you know, when that sixth sense is whispering in your ear), put your advice to the buyer *in writing*.

Sometimes, redhibition issues first come to your attention after the sale. Two months after the sale you get a call from the buyer that he has discovered a defect and he wants to know what he should do about it. Well, the answer to this depends a lot on what the defect is. If it's a closet door that won't shut properly because the hinges are unbalanced (and not because the foundation is cracked), tell him to get his screwdriver out and fix it. In other words, in order to qualify as a redhibitory defect, the problem not only has to be one unknown to the buyer and not discoverable by a reasonable inspection, it must also be of such nature that the buyer would not have bought the thing (house) had he known of the problem. To put the point more precisely, let's look at the language of Article 2521 of the Louisiana Civil Code: "A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect". So, to qualify for redhibition, the problem needs to be pretty serious. However, there is a lesser remedy than rescission of the sale, should the buyer choose this alternative remedy or should a court determine that the problem is serious enough to give a buyer relief but not serious enough to rescind the sale. In these latter instances, a judge can reduce the purchase price by an amount equivalent to the amount of discount on value that the defect has created. The effect of a reduction in the purchase price is that a money judgment is rendered against the seller (and maybe you too if you were part of the problem) in the amount of the discounted value. Let's use the termite scenario again. Let us suppose a hypothetical set of facts. The house has termite damage. The listing agent said something to you about it, but since the seller agreed to sell the house only on an "as is" basis, the boilerplate language in the buy/sell agreement regarding the seller's obligation to provide a termite certificate was stricken. You, the selling agent, conveniently forgot to tell the buyer what you heard about the termite problem. The seller of the house in question is a mortgage company that took the property back in a sheriff sale. It filled out the property disclosure form as "has no knowledge". After purchase, the buyer discovers termite damage that results in a $10,000 tear-out, stud replacement, re-sheetrock, and repaint job. In this case, the buyer will have no claim against the seller unless the buyer can show that the seller was aware of the problem prior to sale. The buyer will have a good lawsuit against you, the selling agent, and will probably have a good lawsuit against the listing agent. If you, the reader, are a real estate broker, then the lawsuit is against you too. If your agent screws up, Mr. Broker, well, in this case, "you know what" does roll uphill. So in between teaching your agents to "sell, sell, sell", you might also want to teach them to "disclose, disclose, disclose". Going back to the phone call with which I started this paragraph, if the problem even sounds close to being serious, here's what you say: "You know, Mr. Buyer, that does sound like something you may want to look into. My recommendation to you is that you seek legal advice immediately. Let me give you names of

some lawyers who can advise you as to what you should do".

Let's change our focus. Remember, at the beginning of this article I said that there are two warranties (title and redhibition) implied by law into every act of sale. The warranty of redhibition that I have been discussing with you in this article is the warranty that the law automatically gives the parties *when they have not stipulated otherwise*. The parties to an act of sale are free to expand or contract the warranty of redhibition. While parties are free to expand the warranty regarding the usefulness of the thing, this just about never happens. The law cases involving contractual modification of the warranty against redhibitory defects almost always arise in the context of the seller attempting to *reduce* his exposure, you know, the "as is" provision. The judges in this state hate "as is" clauses; the way judges see things is that sellers should be willing to stand behind the things they sell. If you are a listing agent, you need to really perk up your attention at this point. When a redhibition case hits the courts, all the stars have to align just right in order for the seller to exculpate himself by an "as is" waiver clause. Here's a real life example: In the case of Tarifa v. Riess, 856 So. 2d 21 (4th Cir. 2003), the seller wrote into the buy/sell agreement "This house is sold in 'as is' condition". The notary who passed the act of sale (deed) failed to include the "as is" language in the deed. When the buyer sued the sellers (heirs to their mother's house, what else) on grounds of extensive hidden termite damage (what else again), the sellers sued the closing notary, claiming that they, the sellers, should recover damages from the notary in an amount equivalent to that recovered by the buyer against the sellers. The sellers's theory in their claim against the notary was that if he had included the "as is" language in the deed, then the sellers would have had an effective defense against the suit brought by the buyer. The Court of Appeals rebuffed this argument as follows: "'…as is' …general language …does not waive the warranty against redhibitory defects…Even if the 'as is' clause in the purchase agreement were included in the act of sale, it would not have been sufficient to waive [the buyer's] warranty against redhibitory defects". Wow, there's a whole bunch of information in this statement. First, the notary was let off the hook, but that's not the main thing. Let's review the chain that is necessary to be sure that you effectively exclude a seller's warranty of redhibition. (1) You must incorporate waiver language in the buy/sell agreement. If you fail to do so, the closing agent will not incorporate it into the deed, because that would be an inappropriate thing for him to do and might subject him to liability. (2) From the Tarifa case, we know that simple "as is" language being incorporated into the deed is probably going to be insufficient (without something more) to waive seller redhibition exposure. What is the "something more"? My advice to you is to attach to the buy/sell agreement (and have all parties initial it) one of those big, sexy clauses in which there's a whole bunch of waiver language. If you don't have such a clause, we will be happy to supply one to you. By the way, many closing agents will not expand a simple "as is" clause in the buy/sell agreement into the big, sexy clause in the deed. (3) Make sure the closing agent includes the big, sexy clause in the deed. If the waiver language is incorporated into the buy/sell but not in the deed, a court will treat this scenario as if the parties changed their minds and decided not to waive redhibition. (4) Finally, you should request that the closing

agent put an initial blank at the end of the waiver of redhibition clause and have the buyer place his initials there. Article 2548 of the Louisiana Civil Code states that unless a waiver clause has been "brought to the attention of the buyer", he will be deemed to be unaware of it and, thus, legally unaffected by it. (5) Even if steps 1-4 are followed to the last jot and tittle, in some cases, the buyer may, nevertheless, be able to bring a successful redhibition suit against the seller. If a seller knows of a redhibitory defect, fails to disclose it, and then tries to erase his exposure by a waiver clause, it is probable that a court will treat this as fraud and choose to ignore the waiver of redhibition. There are several court of appeals decisions to this effect.

Some of the calls I get from real estate agents are along these lines: "Dave, I represented the seller in that deal we closed last month and now the buyer is claiming xyz is wrong with house. If the seller didn't know about xyz, he's not liable for it, is he?" Well, I'm sorry to tell you that he is. If a seller is knowledgeable of a redhibitory defect and he fails to disclose it, his knowledge often has important consequences, such as: extending the length of time available to a buyer in which he may bring a lawsuit, increasing the measure of the buyer's damages, allowing the buyer to recover his attorney fees, and as we have seen above, allowing a buyer to overcome a waiver clause. But the core theory of redhibition is not dependent on the seller having knowledge of the defect. The seller can be totally innocent and still be found liable in redhibition. The underlying rationale in a successful redhibition case is that the buyer doesn't get what he pays for. When redhibition occurs, a seller (even though he is not aware of the defect) is unjustly enriched. If, for example, a house sells for $100,000, and, then, due to a cracked foundation (which existed at the time of the sale and which the buyer was unable to detect by a reasonable inspection), the buyer is forced to spend $50,000 to correct the problem, then the true value of the house at the time of sale was not $100,000, but $50,000. When the buyer paid the seller $100,000 for a house that was worth only $50,000, the seller was unjustly enriched at the buyer's expense to the tune of $50,000. The law will set this injustice right – to the tune of $50,000. If the seller knew about the cracked slab and did not disclose, well then, he is going to owe a *whole lot more* than $50,000. And maybe you will too, if you knew about it or should have known about it and failed to disclose to the buyer.

When your buyer calls you with the disturbing news of a defect, in addition to telling him to get in touch with a lawyer right away, you might also want to tell him of his duty to allow the seller to repair the defect. If the problem is of a nature that left untreated it presents an immediate danger to life, health or property or will rapidly cause further deterioration to the building, you should advise the buyer to take immediate steps to remedy the defect in the most minimal way possible that obviates the danger or halts further deterioration. Otherwise, you should advise the buyer to take no steps to address the defect until he has first allowed the seller an opportunity to remedy the defect. The buyer who fails to allow a good faith seller the opportunity to repair the defective item is in grave danger of wiping out or seriously diminishing his case against the seller. This right of repair is available to good faith sellers only; bad faith (i.e. knowledgeable) sellers are not entitled to the right of repair. However, in

the early stages of redhibition claims, it is often difficult to determine whether the seller was or was not in bad faith. Thus, I admonish you once again to advise your clients to take the problem to a lawyer just as fast as their legs will carry them.

Sometimes the issue of time limits to bring redhibition claims comes up. Don't try to be the hero here and figure this out; if there is even the slightest possibility that your client's rights are about to expire, tell him that you aren't sure what the deadlines are, but that he should contact a lawyer without delay. While there are other deadlines for other types of property, when it comes to "commercial" or "residential" real property, Article 2534 of the Louisiana Civil Code limits redhibition claims to a term of one year from delivery of the property if the seller was a good faith seller. There are several points here that require explication. The time does not begin to run until "delivery" of the property. Arguably, if a seller has retained possession under an occupancy agreement, the one year won't commence until he moves out and makes the property available to the buyer. If the seller is a bad faith seller (i.e. knew of the defect but did not disclose it), the one year does not begin to run until the buyer discovers the defect, but in no case will the seller's exposure be greater than ten years from the date of the sale. The period of time that the buyer has to bring the law suit may be extended if the seller has, after the sale, attempted and failed to repair the defect.

The law of redhibition will be applicable to almost every type of sale of real property. New homes (residential properties) are covered by the New Home Warranty Act. I have discussed this act at some length in a previous article; if you have a case involving a new home, you should refer to my previous article which may be found on our website at www.firstcommercetitle.com. Another little wrinkle on the general rule is the case of mobile homes and manufactured housing. There are some specific statutes dealing with mobile homes and manufactured homes. Finally, in the case of newly constructed structures which are not covered under the New Home Warranty Act, there is often a question of whether the litigation comes under the law of sale or the law of construction contracts. If a builder has contracted to build a structure for an owner, defects in the structure will probably not be dealt with under the law of redhibition. Once again, let a lawyer sort this out if it comes up.

Last, but not least, I want to take a quick stab at how disclosure statements may play into all this. The Residential Property Disclosure Act went into effect on July 1, 2004. Because only two and a half years have transpired since the effective date of this act, no cases whatsoever, much less cases explicating the interplay of the disclosure law with the law of redhibition have percolated up to the appellate level (where we lawyers get the written opinions from which we derive our notions of the state of the law). But you can bet your bottom dollar that there are already cases at the trial court level in which these matters are under litigation. So I want to make some educated guesses as to how this law glosses the law of redhibition. Louisiana Revised Statute 9:3198 D (1) states: "A property disclosure document shall not be considered as a warranty by the seller. The information contained within the property disclosure document is for disclosure purposes only and is not intended to be any part of any contract between the purchaser and seller". But contrast the previous provision against

Louisiana Revised Statute 9:3200 (also part of the Residential Property Disclosure Act) which reads: "This Chapter shall not limit or modify any obligation between buyers and sellers created by any other statute or that may exist in law". What I think all this means is that the Residential Property Disclosure Act does not create any new warranty obligations for sellers, but neither does it diminish any warranty obligations already owed by sellers under existing redhibition law. What the Disclosure Act does add to the mix is the requirement that sellers make detailed disclosures as to residential properties going under contract. The penalty for nondisclosure is the right of the buyer to withdraw from the buy/sell contract. While there is a relatively benign risk to the seller from nondisclosure, it is my opinion that the seller's liability from dishonest disclosure will be significant. I am of a strong opinion that false statements made by sellers on disclosure forms will be used against them in redhibition cases. If you are an agent and you help a seller fill out a disclosure form, be very, very careful. Louisiana Revised Statute 9:3199 A states: "A real estate licensee representing a seller of residential property shall inform the seller of the duties and rights under this Chapter. A real estate licensee representing a buyer of residential property shall inform the buyer of the duties and rights under this Chapter". It's not much of a stretch for me to imagine this section coming back to haunt the lackadaisical or morally casual agent. If you get even a hint that a seller is thinking there is an issue that may need to be disclosed, err on the side of caution. Tell him to disclose. Otherwise, when the seller gets named as a defendant in a redhibition suit, he will be filing a third party claim against you and your broker.

Well, I could say a whole lot more about redhibition, but I figure by now there aren't too many more tears in you for me to bore out of you.