

COLORADO BROWNFIELDS CONFERENCE 2003

Break-Out Session: Real Estate / Development Focus

Environmental Disclosures & Ethics for Real Estate Brokers

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I. Duties of real estate licensees to disclose material information

A. Liability under the Colorado Consumer Protection Act ("CCPA"), pursuant to which treble damages and attorneys' fees are available

§6-1-105 Deceptive trade practices. (1) A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person:

(e) Knowingly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods, food, services or property of a false representation as to the sponsorship, approval, status, affiliation, or connection of a person therewith;

.....

(g) Represents that goods, food, services, or property are of a particular standard, quality, or grade, or that goods are of a particular style or model, if he knows or should know that they are of another;

.....

(u) Fails to disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction;

- The Consumer Protection Act applies to the advertisement or sale of real property. *People ex rel. MacFarlane v. Alpert Corp.*, 660 P.2d 1296 (Colo.App. 1982)
- Expert testimony is not necessary in a case against a real estate broker where the alleged violation is based upon knowingly making false representations; expert testimony is required where the alleged violation is based upon something the broker knew or should have known. *Baumgarten v. Coppage*, 15 P.3d 304 (Colo.App. 2000)

- Under some circumstances, even non-consumers have standing to maintain private actions under the CCPA. *Walter v. Hall*, 940 P.2d 991 (Colo.App. 1996), affirmed, 969 P.2d 224 (Colo. 1998)

B. Civil liability and licensure censure under the statute governing real estate brokers, §12-61-101, et. seq.

§12-61-113. Investigation - revocation - actions against licensee. (1) The commission ... has the power to impose [\$2,500 fine for each offense, censure, place on probation, suspend or revoke the license of a licensee] guilty of:

- (a) Knowingly making any misrepresentation of knowingly making use of any false or misleading advertising;
- (c) Knowingly misrepresenting or making false promises through agents, salespersons, advertising or otherwise;
- (c.5) Violating any provision of the "Colorado Consumer Protection Act", article 1 or title 6, C.R.S.;
- (n) Having demonstrated unworthiness or incompetency to act as a real estate broker or salesperson by conducting business in such a manner as to endanger the interest of the public;
- (s) Fraud, misrepresentation, deceit, or conversion of trust funds which results in the payment of any claim for the real estate recovery fund, pursuant to part 3 or this article;
- (t) Any other conduct, whether of the same or a different character than specified in this subsection (1), which constitutes dishonest dealing;

12-61-804. Single agent engaged by seller or landlord.

(1) A broker engaged by a seller or landlord to act as a seller's agent or a landlord's agent is a limited agent with the following duties and obligations:

- (a) To perform the terms of the written agreement made with the seller or landlord;
- (b) To exercise reasonable skill and care for the seller or landlord;
- (c) To promote the interests of the seller or landlord with the utmost good faith, loyalty, and fidelity, including, but not limited to:
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 - (III) Disclosing to the seller or landlord adverse material facts actually known by the broker;
 - (IV) Counseling the seller or landlord as to any material benefits or risks of a transaction which are actually known by the broker;
 - (V) Advising the seller or landlord to obtain expert advice as to material matters about which the broker knows but the specifics of which are beyond the expertise of such broker;

.....

(d) To comply with all requirements of this article and any rules promulgated pursuant to this article; and

(e) To comply with any applicable federal, state, or local laws, rules, regulations, or ordinances including fair housing and civil rights statutes or regulations.

(2) The following information shall not be disclosed by a broker acting as a seller's or landlord's agent without the informed consent of the seller or landlord:

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(d) Any material information about the seller or landlord unless disclosure is required by law or failure to disclose such information would constitute fraud or dishonest dealing; or

(e) Any facts or suspicions regarding circumstances which may psychologically impact or stigmatize any real property pursuant to section 38-35.5-101, C.R.S.

(3) (a) A broker acting as a seller's or landlord's agent owes no duty or obligation to the buyer or tenant; except that a broker shall, subject to the limitations of section 38-35.5-101, C.R.S., concerning psychologically impacted property, disclose to any prospective buyer or tenant all adverse material facts actually known by such broker. Such adverse material facts may include but shall not be limited to adverse material facts pertaining to the title and the physical condition of the property, any material defects in the property, and any environmental hazards affecting the property which are required by law to be disclosed.

(b) A seller's or landlord's agent owes no duty to conduct an independent inspection of the property for the benefit of the buyer or tenant and owes no duty to independently verify the accuracy or completeness of any statement made by such seller or landlord or any independent inspector.

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C. Potential liability under 18 U.S.C. 1001

Under 18 U.S.C. 1001, whoever knowingly falsifies, conceals or covers up a material fact, or makes any false statements in a matter within the jurisdiction of the executive, legislative or judicial branch of the United States government, is subject to fine or imprisonment up to five years.

D. Common law tort liability

- 1. fraud based upon intentional misrepresentation**
- 2. fraud based upon intentional concealment**
- 3. negligent misrepresentation**

II. Relevant Colorado Real Estate Commission-approved forms

- A. Seller's Property Disclosure (Residential) [LC-18-1-03]
- B. Seller's Property Disclosure (Vacant Land) [LC-38-1-03]
- C. All Listing Contracts [See example of Exclusive-Right-to-Sell (Commercial) (Seller Agency) [LC 11-1-03]
- D. Lead-Based Paint Disclosures (Sales) [LP 45-1-97]
- E. Lead-Based Paint Disclosures (Rentals) [LP 46-1-97]
- F. Lead-Based Paint Obligations of Seller [LP 47-1-97]
- G. Lead-Based Paint Obligations of Landlord [LP 48-1-97]

III. Exposure of seller to liability based upon listing broker's misrepresentations

Under general principles of the common law of agency, sellers have been liable to buyers for misrepresentations made by sellers' brokers within the scope of their employment, and under Colorado's real estate brokerage law, brokers were required to advise their clients of this vicariously liability. However, effective January 1, 2003, amendments to the brokerage statute relieve sellers, landlords, buyers and tenants of liability for acts of their brokers unless they have approved, directed or ratified their brokers' acts. §12-61-803(7)

VI. Query: Do "killer" as-is clauses protect anyone?

- A. **The broker's duty to disclose information to third parties such as buyers is independent of the *seller's* duty to disclose material information to the buyer**

A provision in the contract between the seller and buyer which disclaims any representations about the property does not operate to exonerate the real estate broker from liability to the buyer for misrepresentations made by the broker about the property, as the broker is not a party to the contract. See *Stevenson v. Barwineck*, 99 N.W.2d 690 (Wis. 1959).

- B. **Query whether they protect the *seller* who fails to disclose a known material environmental condition.**