

BROKERS: BE AWARE OF YOUR DUTIES IN A REAL ESTATE TRANSACTION

Author(s): David W. Creeggan

Last month, a California Court of Appeal issued a decision confirming liability against a buyer's broker for breach of fiduciary duty and absolving the seller's broker from liability arising from his disclosures in the transaction. This case, titled *Saffie v. Schmeling*, serves as a good reminder to brokers of the duties they owe not only to their own clients, but also to adverse parties in a real estate transaction. A broker who is not aware of these duties may face significant liability for problems which arise after the transaction closes.

In June 2006, seller's broker submitted an MLS listing for undeveloped commercial parcel listing in Hemet. Included in the listing, was the following: "This parcel is in an earthquake study zone but has had a Fault Hazard Investigation completed and has been declared buildable by the investigating licensed geologist. Report available for serious buyers." The report was done in 1982, and the date, May 20, 1982, appeared prominently on the cover of the report. In July 1982, the Riverside County Planning Department issued a letter granting "final approval of the report."

Buyer, through his broker, made an offer to purchase the property which was accepted. During escrow seller's agent gave buyer's broker a copy of the report and of the letter. Buyer's broker provided these documents to buyer, but later testified that he did so without reading the report or even understanding what a fault hazard investigation was. Neither buyer nor buyer's broker performed any further investigation in relation to the geological issues on the property prior to closing.

After the transaction closed, buyer discovered that the County of Riverside did not agree that the property was ready to build. The standards had changed since the 1994 Northridge earthquake, and the 1982 report was not up to those standards. A subsequent investigation by

buyer, performed to current standards, showed that the property required so much excavation and such setbacks that it was no longer feasible for development. The buyer sued both buyer's broker and seller's broker.

At trial, buyer's broker was found liable for breach of fiduciary duty and negligence. Though buyer's broker testified that when he gave the report and the letter to buyer, he told buyer to "check out" the report, the court found that buyer's broker "led buyer to believe that the report was current and could be relied on as an indication that the property was 'ready to build'." The trial court also found that seller's broker, on the other hand, was not liable to buyer. Buyer appealed.

In pursuing liability against seller's broker, buyer claimed that seller's broker's statement in the MLS was false or inaccurate because it failed to specify that the report was done in 1982, giving a false impression that the report was current. The Court of Appeal upheld the trial court's finding of no liability on the part of seller's broker, citing the rule that "[w]hile real estate brokers owe their own clients fiduciary duties, they owe third parties who are not their clients, including the adverse party in a real estate transaction, only those duties imposed by regulatory statutes...[which] include a general obligation of 'honesty, fairness and full disclosure toward all parties'."

The court noted that the report was given to buyer and buyer's broker and that the date "appeared prominently on the cover". Moreover, "seller's broker did not affirm that the geologist performed his investigation in accord with current County of Riverside requirements, nor did he state that all necessary approvals for building had been obtained." In concluding that seller's broker did not breach his duty of honesty, fairness and full disclosure, the court stated, "It was incumbent on buyer – and on buyer's broker, in his role as a fiduciary for buyer – to determine whether the Fault Hazard Investigation report was something buyer should rely on for his particular purposes. Seller's broker had no obligation to perform that research for buyer and buyer's broker."

What lessons should brokers take away from this decision? First, it serves as a good reminder to brokers that not only do you owe a fiduciary duty to your client, but also a duty of honesty, fairness and full disclosure toward all parties in a transaction. Second, if you receive a report that you do not understand and which might impact your client's potential use of the property,

you cannot satisfy your fiduciary obligations by simply passing it on to the client and telling the client to “check it out”. At the very least, you should advise your client to seek the advice of other qualified professionals to review and comment on the report prior to closing, and ideally during the due diligence period.