

Real Estate Broker Malpractice

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Real Estate

- *"I am basically a full-time psychologist who shows houses every now and then."*
 - Dori Warner
 -
- *"He that thinks he can afford to be negligent is not far from being poor."*
 - Samuel Johnson



Interesting Facts

- **764,000 homes were sold nationwide in 2020**
- **That number is expected to be 886,000 for 2021**
- **73% of Sellers use a Real Estate Broker to sell their homes**
- **There are 22,000+ active Real Estate Brokers in WA**
- **20% of active Real Estate Brokers have had their license for a year or less**
- **The average Real Estate Broker closes 12 deals a year**
- **43% of Sellers were Baby Boomers (born 1946-1964)**



Interesting Facts

- **1/3 of homebuyers are first-time home buyers**
- **Millennials make up 37% of home buyers**
- **75% of Sellers hire the first Real Estate Broker they interview**
- **The most important quality a Seller looks for in Real Estate Broker is “professional reputation”**



Take Aways

- **Almost half of Sellers are older and inexperienced in real estate transactions (Baby Boomers who purchased their homes 30 years ago)**
- **Almost 40% of Buyers are younger and inexperienced in real estate transactions (Millennials and/or first time home buyers)**
- **Half of those selling and purchasing “rely greatly” on their Real Estate Broker**
- **20% of Real Estate Brokers are inexperienced, having worked less than a year**



Most Common Claims Against Real Estate Brokers

- **Breach of Duty**
- **Negligence**
- **Failing to Protect Client Information**
- **Giving Legal Advice**
- **Failing to Disclose a Known Property Defect**
- **Breach of Listing Contract, Buyer's Contract**



Broker Licensing & Discipline

- **RCW 18.235**
 - Uniform Regulation of Business and Professions Act
- **WAC 308-124, and 3080124(A-I)**
 - Real Estate Licensing, Training, Operations, Audits, Etc.



Types of Brokers

- **Broker**

acting on behalf of a real estate firm to perform real estate brokerage services under the supervision of a designated broker or managing broker.

- **Managing Broker**

acting on behalf of a real estate firm to perform real estate brokerage services under the supervision of the designated broker, and who may supervise other brokers or managing brokers licensed to the firm

- **Designated Broker**

(a) owns a sole proprietorship real estate firm; or

(b) owns a controlling interest in the firm who is designated by a legally recognized business entity such as a corporation, limited liability company, limited liability partnership, or partnership real estate firm, to act as a designated broker on behalf of the real estate firm, and whose managing broker's license receives an endorsement from the department of "designated broker



Broker Duties

- Statutory – RCW 18.86.030
- Applies to Brokers, Managing Brokers and Designated Brokers
- To all parties to whom the Broker *renders real estate brokerage services*:
 - To exercise reasonable skill and care
 - To deal honestly and in good faith
 - To present all written offers, written notices and other written communications to and from either party in a timely manner, regardless of whether the property is subject to an existing contract for sale or the buyer is already a party to an existing contract to purchase
 - To disclose all existing material facts known by the broker and not apparent or readily ascertainable to a party; provided this subsection shall not be construed to imply and duty to investigate matters that the broker has not agreed to investigate



Broker Duties continued

- To account in an timely manner for all money and property received from or on behalf of either party
- To provide a pamphlet on the law of real estate agency in the form approved in RCW 18.86.120 to all parties before the party signs an agency agreement, signs an offer, consents to dual agency or waives any rights
- To disclose in writing to all parties to whom the broker renders real estate brokerage services before a party signs an offer, whether the broker represents a buyer, seller or both parties
- Unless otherwise agreed, the Broker owes no duty to conduct an independent investigation of the property, no duty to investigate either party's financial condition, and no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the Broker to be reliable



To Whom Does a Broker Owe a Duty?

- If you represent the Buyer, to the Buyer only
- If you represent the Seller, to the Seller only
- If you are a dual agent, to both parties
- If you are a Managing Broker, and you supervise agents on both sides of the transaction, to both parties
- If you are a Designated Broker and have agents on both sides employed by your firm, to both parties



Specific Additional Duties - Buyer

- **If you are Buyer's Broker**
 - To be loyal to the Buyer by taking no action that is adverse or detrimental to the Buyer
 - To timely disclose any conflicts of interest
 - To advise the Buyer to seek expert advice on matters relating to the transaction that are beyond the Broker's expertise
 - Not to disclose any confidential from or about the Buyer, except under subpoena or court order, even after termination of the relationship
 - To make good faith and continuous effort to find a property for the Buyer, except
 - No duty to seek additional properties once Buyer is under contract
 - No duty to show Buyer properties where no agreement to pay Broker compensation
- **Not a breach of Broker's duty to Buyer to**
 - Show other Buyers property that Buyer is interested in
 - Represent more than one Buyer in competing transactions involving the same property



Specific Additional Duties - Seller

- **If you are Seller's Broker**
 - To be loyal to the Seller by taking no action that is adverse or detrimental to the Seller
 - To timely disclose any conflicts of interest
 - To advise the Seller to seek expert advice on matters relating to the transaction that are beyond the Broker's expertise
 - Not to disclose any confidential from or about the Seller, except under subpoena or court order, even after termination of the relationship
 - To make good faith and continuous effort to find a Buyer for the property, except
 - No duty to seek additional offers once property is under contract
- **Not a breach of Broker's duty to Seller to**
 - Show Buyers other properties
 - Represent more than one Seller in competing transactions involving the same Buyer



Specific Additional Duties – Dual Agent

- If you are Dual Agent (Broker)
 - May act as dual agent with consent of both parties
 - To take no action that is adverse or detrimental to the either party's interest
 - To timely disclose any conflicts of interest
 - To advise both parties to seek expert advice on matters relating to the transaction that are beyond the Broker's expertise
 - Not to disclose any confidential from or about either party, except under subpoena or court order, even after termination of the relationship
 - To make good faith and continuous effort to find a property for the Buyer, except
 - No duty to seek additional properties once Buyer is under contract
 - No duty to show Buyer properties where no agreement to pay Broker compensation
 - To make good faith and continuous effort to find a Buyer for the property, except
 - No duty to seek additional offers once property is under contract
- Not a breach of Broker's duty to
 - Show multiple properties to Buyer
 - List competing properties
 - Represent multiple Sellers in competing transactions involving same Buyer
 - Represent multiple Buyers in competing transactions involving the same property



When Duties Apply

- Commences at the time the Broker undertakes to provide real estate brokerage services, and ends upon the later of:
 - Completion of Performance by Broker
 - Expiration of the term agreed upon by the parties
 - Termination of the relationship by mutual agreement
 - Termination of the relationship by notice from either party to the other, provided such termination does not affect the contractual rights of either party
- Upon termination, Broker owes no duty, except to:
 - Account for all monies and property received during the relationship
 - Not disclose confidential information



Liability of Managing and Designated Brokers

- A principal (Managing Broker, Designated Broker) is not liable for an act, error or omission of a “subagent” arising out of a agency relationship
 - Unless the principal participated in the act, error or omission
 - Except to the extent that:
 - The principal benefitted from the act, error or omission, and
 - The Court determines it is highly probable that the claimant would be unable to enforce a judgment against the agent or sub agent



Imputing Knowledge

- A principal (a party) does not have knowledge or notice of any facts known by an agent or subagent of the principal that are not actually known by the principal
- A Broker (Managing Broker, Designated Broker) does not have knowledge or notice any facts known by a subagent that are not actually known by the Broker, *provided* this does not limit the knowledge imputed to the Managing Broker or Designated Broker responsible for supervision of the Broker of facts known by the Broker



Supersedes Common Law

- The statutory duties contained in RCW 18.86 supersede common law
- Statutory duties replace common law fiduciary duties
- Common law continues to apply in all other respects
- Does not affect the duties of a Broker while engaging in the unauthorized practice of law



Unauthorized Practice of Law

- **RCW 2.48.180**
- **Nonlawyer** - a person who is not an active member in good standing of the state bar
- **Unlawful practice of law**
 - Exercising legal discretion
 - Interpreting legal documents
 - Advising parties on the effect of legal documents
 - Advising parties on the effect of acts or omissions by the parties
 - Selecting documents
 - Preparing legal documents
- **Crime**
 - A single violation is a gross misdemeanor.
 - Each subsequent violation of this section, whether alleged in the same or in subsequent prosecutions, is a class C felony



Common Factual Scenarios

- Making misrepresentations regarding property condition
- Failing to actively market the property
- Knowledge of discrepancy in square footage or lot size, failing to disclose
- Knowledge of future negative impact from development, failing to disclose it
- Failing to ensure the property viewed was the property purchased
- Failing to advise client to get legal or tax advice, where required
- Failed to disclose known property dispute with neighbor who had already threatened lawsuit
- Missing dates and deadlines under contract
- Providing incorrect estimates for cost of repair of property



Common Factual Scenarios

- Providing incorrect statements regarding use of the property
- Error causing loss of earnest money
- Failing to disclose they had ownership interest in property being purchased
- Preparing, interpreting legal documents to detriment of party
- Failing to disclose relationship with party to transaction
- Advising clients to not disclose information, and is now client is being sued
- Forging signatures, altering documents



Recent Case Law

- **Falcon v. Bowfits 16 Wash.App.2d 1 (2020)**
 - Seller, Falcon, is a property management company, Broker is the managing member of Seller
 - Bowfits purchased 13-unit apartment
 - Falcon misrepresented rents and the financial history of property
 - Bowfits sued
- **Trial Court**
 - Judgment in favor of Bowfits
 - \$13,400 in damages, disgorge Broker's commission of \$75,000
- **COA:**
 - Affirmed damages of \$13,400
 - Reversed disgorging commission
 - Broker represented Falcon, not Bowfits
 - Broker Duty is owed only to party to whom Broker renders real estate brokerage services
 - Because no privity, disgorgement was improper



Case Law

- **Brantley v. Lin Han (No. 80874-5-1; Unpublished) (Feb 2021)**
 - Seller remodeled duplex into town homes
 - Sold units separately
 - Party wall was not sound proof or fire proof
 - Buyer sued Seller, Broker
- **Trial Court:**
 - Dismissed Seller on SJ, to trial on claims against Broker
 - Form 17 is not part of REPSA
 - Broker does not complete Form 17, not liable for contents
 - Disclaimer in REPSA regarding property condition: statements are from parties, not Broker
 - Broker not make any representation he knew to be false
 - Buyer failed to reasonably investigate history of property
- **COA:**
 - Affirmed



Case Law

- **Hosmer v Tong (No. 79597-0-1) (Feb 2020)**
 - Hosmer purchased commercial building for \$16M, (\$470 sq ft)
 - Property advertised as 34,000 square feet, “per KCAO”
 - Property was actually only 28,000 square feet
 - Hosmer sued for \$2,6M in damages, loss of value
- **Trial Court:**
 - **Negligent misrepresentation = 6 elements**
 - Defendant provided material information that was false
 - Defendant knew or should have known information was to guide Plaintiff in the transaction
 - Defendant was negligent in communicating false information
 - Plaintiff relied on the false information
 - Plaintiff’s reliance was reasonable
 - Defendant’s false information was proximate cause of Plaintiff’s damages
 - **Damages**
 - Difference in value of what was received and what was paid
 - Pecuniary loss suffered as a consequence of Plaintiff’s reliance upon false information



Case Law

- **Hosmer v Tong continued**
- **Trial Court:**
 - Dismissed all claims on SJ
 - Hosmer failed to establish damages' element – failed to establish property was worth less than he paid for it
 - Fact that Hosmer paid \$470 per sq ft for 34,000 sq ft (and only received 28,000 sq ft) was unpersuasive to Court
- **COA:**
 - Affirmed



Case Law

- **Woodcock v. Conover (Unpublished; No. 78166-9-1)(Sep 2019)**
 - Home was very old and had multiple, obvious issues
 - In REPSA, Buyer insisted on structural and sewer inspections
 - Obtained structural inspection, which Buyer largely ignored
 - Buyer ultimately chose to forego sewer inspection, even though Broker had scheduled and had offered to pay for
 - Evidence Seller had prior sewer inspection that disclosed defects significant defects, which Seller failed to disclose
 - Buyer sued Seller for fraudulent concealment, fraudulent misrepresentation and civil conspiracy with Broker, sued Broker for violating duties in RCW 18.86
- **Trial Court:**
 - Dismissed all claims on SJ
 - **Fraudulent Concealment = 5 elements**
 - Property had a concealed defect
 - Seller knew of defect
 - Defect presented a danger to property, health of life
 - Buyer not know of defect
 - A “careful, reasonable inspection” by Buyer would not have disclosed defect
 - Structural inspection referenced obvious issues with plumbing and sewer
 - A sewer inspection would have disclosed defects in sewer system



Case Law

- **Woodcock v. Conover continued**
- **Trial Court:**
 - **Fraudulent Misrepresentation**
 - Buyer did not rely upon Seller statement re: plumbing and sewer, instead insisted on a sewer inspection, but then never obtained
 - **TC rejected Seller's request for fees**
 - **Broker Violation of RCW 18.86**
 - Buyer claimed Broker failed to advise her to get sewer inspection – all evidence was to the contrary, including deposition testimony, e-mails re: scheduling sewer inspection, offering to pay for it
 - Buyer's attorney narrowly escaped CR11 sanctions re: claims against Broker
- **COA:**
 - **Affirmed**
 - **Awarded Seller her fees**
 - **Affirmed rejecting CR11 sanctions (would likely have upheld, if TC had accepted)**



Recent Cases

- Buyer's Broker
- Failure to exercise reasonable skill and care
- Failure to communicate/respond timely
- Providing legal advice to Buyer
- Facts:
 - Buyer client made offer
 - Sellers countered, making closing contingent upon Sellers purchasing another property via a short sale
 - Client agreed
 - Contract also contained a termination date
 - Termination date was approaching, Client requested Broker prepare extension – Broker advised was not necessary
 - Sellers signed-around a REPSA for short sale property
 - Client prepared to close
 - Sellers advised Client they were out of contract, Sellers would relist the property
 - Broker advised Client he would have to submit new offer
 - Sellers increased the price by \$30,000
 - Client purchased the property and then sued Broker
- Settled:
 - Broker paid Client the difference in purchase price



Recent Cases

- Dual Agent
- Failure to exercise reasonable skill and care
- Breach of Duties to Buyer
- Practicing Law
- Facts:
 - Buyer clients were young farm kids, \$10,000 in cash, but no credit
 - Broker represented both parties
 - Broker was long-time friends with Seller
 - Broker prepared REPSA, lease, and option agreement
 - Broker made \$10,000 earnest money immediately non-refundable
 - Buyers moved in, it rained and the basement flooded, could not remedy
 - Buyers wanted out of transaction
 - Seller and Broker refused
- Settled:
 - Recovered the \$10,000



Recent Cases

- Dual Agent
- Failure to exercise reasonable skill and care
- Breach of Duties to Buyer
- Practicing Law
- Facts:
 - Buyer clients purchased unimproved secondary lake property
 - Broker was Seller's daughter
 - Broker prepared REPSA, lease, and option agreement
 - Broker made the \$10,000 earnest money immediately non-refundable (half to Seller, half to Broker)
 - Broker had Buyers sign, not date, then revised forms to make the \$10,000 an option payment (not earnest money deposit), then had Seller sign and dated
 - Seller removed 1/3 of the trees and constructed a road through the middle of the property
 - Buyers requested to rescind and recover earnest money, Seller refused
 - Sued Seller and Broker
- Settled:
 - Recovered the \$10,000 earnest money from Broker



Recent Cases

- **Buyer's Agent**
- **Failure to exercise reasonable skill and care;**
- **Interpreting (misinterpreting) Legal Documents**
- **Advising clients as to effect of acts or omissions of parties**
- **Facts:**
 - Prior to home inspection, Buyers changed their mind and wanted out of transaction
 - Buyers received Inspection Report, short list of defects indicated
 - Broker advised Buyers to request Seller make all repairs contained in Inspection Report, expecting Seller would not agree and terminate
 - Broker sent Seller Form 35, requesting Seller make all repairs
 - Within those 3 days and before Seller responded, Broker decides it would be safer for Buyers to send revised Form 35
 - Broker sent revised Form 35, rejecting Inspection Report, terminating transaction and requesting earnest money
 - Seller objected
- **Result:**
 - Buyer not permitted to send revised Form 35; Seller has 3 days to accept, reject or counter
 - Buyer lost earnest money, paid Seller's attorney fees



Recent Cases

- Dual Agent
- Failure to exercise reasonable skill and care
- Breach of Duties to Seller
- Practicing Law
- Facts:
 - Clients listed home with Broker for \$1.85M
 - A week later and prior to MLS, Broker advised Clients to reduce price to \$1.65
 - Broker presented offer for \$1.4M – Buyer was Broker’s nephew
 - Broker drafted multiple addendums adverse to Clients
 - Broker drafted addendum including *exclusive* easement over Clients’ neighboring 10 acres
 - Net to Clients after all adverse provisions Broker prepared was <\$1M
 - Buyers demanded Clients close, or sue for performance
- Result:
 - Settled
 - Buyers paid original price, \$1.85M
 - No expenses paid by Seller
 - Broker commission reduced to 2%



Take Aways

- Myriad of ways a Real Estate Broker can get into trouble
- Exacerbated by inexperienced Buyers and Sellers
- Exacerbated by inexperienced Brokers
- Exacerbated by a current “volcanic” real estate market
- Key is in educating Brokers
 - Knowing duties
 - Communication
 - Documentation
 - Knowing when to say “I don’t know” – and send to an attorney



Practice Tips

If you represent or assist Brokers

- Don't get sucked into the volcano trying to advise a Broker who has a client with a real estate issue
 - Get the documents – all of them – and review them before you speak.
 - If you do not have time to advise within the time permitted, then say so
 - After you fully review the issue, involve the Designated Broker if appropriate
- **Form relationships with Brokers and Brokerages**
 - Teach a class
 - Encourage them to call you and take their phone calls



Questions?



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