PROFESSIONAL LIABILITY IN THE RESIDENTIAL REAL ESTATE TRANSACTIONS: EXAMINING POTENTIAL CAUSES OF ACTION AGAINST ATTORNEYS, BROKERS AND LENDERS

by Harold I. Levine, Esq. and Peter J. Birnbaum, Esq.

I. INTRODUCTION

In the past few years, we have witnessed an explosion of activity in the residential real estate market. Such blessings do not, however, come without a price. Disgruntled home purchasers, assessing damages from flooded homes, lost earnest money and mortgage rates promised but not given are looking for pockets to recoup losses from and they are finding them with increasing frequency. The real estate practitioner is then left to pick up the pieces.

What follows is a compilation of works by the authors, which explores the increasing liability exposure for the three principal players in this market: lawyers, brokers, and lenders.

II. ATTORNEYS (HAROLD I. LEVINE)

This Section is going to upset a lot of real estate lawyers. They will undoubtedly feel that, at best, the author is mean-spirited, and, at worst, paranoid.

This will continue until one day, after having bled all over the floor for a real estate client and giving a chunk of your life to accomplish a good real estate result in a case, you are greeted by a malpractice claim, a complaint to the ARDC (pushing 7,000 this year), or a refusal to pay your bill. As the Sheriff hands you the summons, you may change your opinion of the author and his views.

My thought is that lawyers should treat every new client as a potential claimant. Horrible, you say, who can practice like that? What about the good old days swapping stories around the closing table? The answer, my friends, is that they are gone.

Consider the following:

1. There is probably more hostility in real estate transactions than there is in litigation. At least, in litigation, you know who the enemy is.

2. The now largest category of malpractice claims in number is real estate-related, making up 40% of all claims.

3. Consider this article in the Wall Street Journal, excerpts follow:

"The rules of the game are fast changing for lawyers. These days, then run a greater risk of being slapped with heavy fines by judges who deem their cases frivolous or their tactics offensive. They are being sued by clients for losing cases - or even for failing to win big enough victories. And they are being reprimanded and disbarred in record numbers as states move to crack down on the crooked and inept among them."

"Moreover, ethics specialists think these cases represent just a fraction of the actual number. To spare a lawyer complete humiliation, judges typically don't file formal sanction orders with the court. "You wouldn't believe the rudeness, the coercive pleadings, the ugly claims thrown at people just to force them into settlement," says Judge Pollack, who nevertheless concedes that professional sympathies sometimes make it hard for judges to take action against lawyers. However, he has no doubt that reprimands are effective: "The ignominy of sanctions makes lawyers think twice before they try that stuff again."

4. In a consumer society, clients are totally unforgiving. The old comfortable margins of error are gone. To treat a client as a potential claimant does not suggest you should be mean, hostile, difficult, or unfriendly; it means to be professional and businesslike. It includes some of the following:

> 1. Don't overpromise a client if he tells you that in four months he is going to close his sale at 2 P.M., and use the proceeds to purchase at 3 p.m. Tell him the chances, or that close co-ordination is difficult, and send him out for a gap loan.
>
> 2. Every case should be covered by a clear and concise engagement letter. I was once an expert witness for a lawyer who put in 38 hours on a nightmare closing. His agreement said that he would get paid extra if there were any unusual circumstances. The trial judge decided 38 hours wasn't unusual and gave him $550.00.
>
> 3. Charge enough money to do a professional job. You didn't go to college and professional school so that the broker could set your fees. If he sets your fees and you let him, maybe you should ask him to pay for your malpractice insurance.
>
> 4. Use checklists and have proper closing procedures.
>
> 5. Don't neglect post-closing details. Change the tax bill, file the release, clear up the loose ends.
>
> 6. Don't get into areas you don't know anything about. Real estate is a huge area. Just because you are great at closing deals, doesn't mean you know about every type of real estate case.
>
> 7. Avoid conflicts. Learn to recognize and deal with conflicts before they become full blown, as they are very frequent in real estate.

You may say, well, if I have to practice like this, the heck with it. I am just going to pack it in because I can't live like this. You may have to. Lawyers may become the farmers of the 1990s and in five years the attorney's involvement in the residential real estate process may vanish.

III. BROKERS (PETER J. BIRNBAUM)

(Portions reprinted from the *Illinois State Bar Association Young Lawyers Publication* by permission of the author and the Illinois State Bar Association. Overview and Introduction regarding listings by Harold I. Levine, Esq. and Peter J. Birnbaum, Esq.)

The historical impediments to maintaining a cause of action against a real estate broker for errors or omissions arising from a real estate transaction have sent more than one barrister groping for the Maalox. However, in recent years, the courts have begun loosening the restrictions to maintaining such actions and that is the subject of this article.

LISTING AGREEMENTS

Broker: The Principal-Agent Relationship

To understand listing agreements you must first understand the relationship between the broker and the listing party. The broker's relationship with the seller of real estate is one of principal agent, based on normal contract law. The principal must possess legal capacity to contract. The agent, in turn, must have the capacity to contract, which, in most jurisdictions, means that he must be a licensed broker.

The relationship of a real estate broker to the owner of property is usually established by procuring a "listing" of the real estate, which becomes the agency contract. In this agreement, the owner of the property appoints the agent to act in a fiduciary capacity. While in the vast majority of cases it is the property owner who employs the broker to act in an agency capacity, occasionally a prospective buyer of real estate will employ a broker for the purpose of finding real estate that meets his requirements. In this instance, the broker would be the agent for the buyer with all the usual implications of a principal agency relationship.

Although the buyer employing the broker is not common in the field of residential brokerage, it is not uncommon in the area of commercial or industrial real estate. A buyer engaging a broker via a listing agreement, however, is often a good idea to preserve a cause of action because of dual agency issues, a subject we'll get into later.

Appointment

The broker may, in general, be hired by any one of the three methods; (a) implication; (b) oral contract; or (c) written contract (usually in the form of a listing agreement). Quite obviously, anything less than a written agreement formalizing the agency relationship creates vast areas of controversy and should be avoided.

Open Listing

There are several types of listing agreements. The open listing is a listing wherein the owner lists the property for sale of one broker but reserves the right to list the property concurrently with as many brokers as he may desire.

The open listing usually contains no provisions forbidding the landowner to sell the land himself. Most informal or verbal brokerage agreements are classified as open listings.

The listing need not contain a definite termination date and may generally be terminated by either party's giving notice to the other of his desire to terminate prior to an actual sale of the property. It may also terminate by expiration of reasonable period of time. In the event of sale, only the broker who actually produced a buyer who is ready, willing and able to buy will receive any commission. In view of the strong possibility of another broker's receiving a commission by producing a sale first, most brokers will not obligate themselves for any considerable advertising or other expense under an open listing. Most metropolitan brokers will not accept such listings and they are obviously not desirable for brokers.

Exclusive Agency

This type of listing employs one broker as the agent for the property for a definite period of time but leaves the owner the right to sell by his own efforts without the obligation to pay a commission to the broker. If the property owner sells the property through his own efforts, the exclusive agency automatically comes to an end without any liability on the landowner's part for a commission and regardless of the employment period specified in the listing agreement.

Exclusive Right to Sell

The exclusive right to sell appoints one broker as sole agent for the stipulated period of time and entitles him to a commission if the property is sold within that time by any party, including the owner.

It is well established that under this listing if the owner makes a sale through this own effort, he must pay a commission to the listing broker.

An exclusive right to sell listing must be carefully drafted in unequivocal language, clearly spelling out the terms and conditions of such exclusive right to order for the broker to be entitled to a commission under all circumstances in event of a sale.

Multiple Listing

A multiple listing is an arrangement whereby a group of brokers pool their listings in order to give maximum exposure to possible prospects. Any broker member or salesman employed by a

broker member may show any current listing and, if a sale results, the commission is divided according to a predetermined arrangement between the listing and selling brokers.

According to recent case law, in a multiple-listing residential transaction, the procuring broker or salesperson, absent an agreement to the contrary, is an agent of the listing broker and as such is within a chain of agency to the seller.

In *Stortroen v. Beneficial Finance Co., of Colorado* 86SC106, the question before the Colorado Supreme Court was whether a real estate broker was the agent of the purchasers or the sellers of a residential property. The court found that the selling or cooperating broker in a multiple listing transaction to be the agent of a listing broker, and as such would stand in a subagency relationship to the seller.

Cooperating Broker

A cooperating broker is one who works with the broker who has the contractual relation with the principal. He is bound by the terms and conditions of the agreement between the vendor and the listing broker.

A recent Wisconsin appellate court case suggests that no matter how well a listing agreement is drafted the listing seller may well be precluded from maintaining any action against the broker under that agreement, at least any action sounding in tort.

In *McDonalds v. Century 21*, the McDonalds, entered into a listing contract with Century 21 Blackman Realty, Inc. The contract provided that the real estate agency, Century 21, would "prequalify" all prospective buyers.

Century 21's agent received an offer from prospective purchasers. After negotiations, a purchase contract was executed. Sometime there after, the McDonald's began construction of a new home. After committing substantial expense for their new home, the McDonald's learned that their buyers on their existing home were "Tapioca" a fact that could have been easily learned by the brokers through a credit check.

The McDonald's sued Century 21 claiming, Century 21 had negligently pre-screened" the buyers. The McDonald's won a nice little verdict at the trial court level, but got clobbered by the court of appeals. There the court held and I quote:

> "In most situations, where a party to a bargaining transaction renders a service..., there would have been no duty to render that service-except for the voluntary undertaking to do so. That being so, the contract or bargaining transaction normally defines the scope of the obligation..." sec. 92 at 657 "[Therefore], there is no tort liability for nonfeasance, i.e, for failing to do what one has promised to do in the absence of a duty to act apart from the promise made."

This, of course, is a troublesome decision. But it is one that could have possibly been avoided by this McDonald's Counsel by pleading in the alternative: i.e., tort or contract, an option may have been available to McDonald's counsel and apparently was not pursued.

In spite of this decision, brokers cannot, stick sellers with unreasonably favorable deals for the brokers. The courts in recent years have begun to frown upon the goal of the realtor system to standardize form listing contracts which ensure that the brokers have the most favored position under the listing contract. In fact, the New Jersey Supreme Court in *Ellsworth Dobbs v. Johnson*, 236 A2d 843 1967, held that the use of standardized listing agreements which consumers are compelled to enter into even though they do not understand the language, may be found unconscionable.

1. Who does the broker represent?

A controversial issue that has arisen relative to the relations between real estate brokers and consumers, is to whom the broker owes a fiduciary obligation. **1983 Federal Trade Commission Staff Report, Residential Real Estate Brokerage Industry (Government print, December 1983) (Stock Number 018-000-00305-8).**

A major area of concern to the public exposed by the FTC report is the fact that the home purchaser, in his heart of hearts, believes that the broker is acting in some way on his behalf and that fiduciary obligations of the broker will enure to his benefit. Historically, the courts have rejected this concept and held that the broker is the sole agent of the seller since the seller is paying the brokerage commission, and thus the broker's only obligation as fiduciary is to the party coming up with the money. **The Real Estate Broker's Fiduciary Standards: Industry Standards and Practices Examination. Pepperdine Law Review, Vol. 12:145,1984.**

In the United States, people dressed in gold sport coats with plastic name tags run rampant. The real estate broker is the lynch pin to effecting transfers of property in this society and your average mom and pop consumers do not appreciate the complexity of this relationship. It is, therefore, incumbent upon our profession to advise our clients of the legal obligations and duties the broker owes to home sellers and purchasers.

Some jurisdictions, the FTC and commentators, have recently grappled with the dilemma presented by the conflict that exists between reasonable expectations and the harsh effect of applying general agency principles to this complex issue.

For example, the commentator noted above, utilizing the FTC study, suggested a pragmatic approach to finding that the purchaser does in fact pay at least a portion of the broker's commission, and therefore, fiduciary obligations should o the benefit of the purchaser on this basis. They suggest that since the FTC study demonstrated that homes for sale by owners were generally priced lower than homes sold through the use of a broker, the higher cost of broker sales results in the purchaser paying a portion of the commission. They also cite data compiled by the FTC which revealed that when the majority of buyers elect to purchase homes listed by a

broker they are aware of the seller's inherent costs in using a broker and are willing to pay the attendant costs because of this. **ID. at pages 149-151.**

The commentators argue that since the buyer pays a portion, if not the whole, of the purchase price, he is involved in the compensation of the broker and as such is buying some fiduciary responsibility. **ID. at page 155.**

The Illinois courts have supported this logic. In 1982, the Illinois Supreme Court overturned a rule standing from 1928 saying in absence of an agency relationship that there is no duty to disclose material facts. The broker can no longer operate under the assumption that because he is getting paid by the seller, he can ignore the needs of the purchaser. *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 89 Ill. 2d 379, 432 N.E.2d 849 (1982).

Furthermore, in *Duhl v. Nash Realty Inc.,* 429 N.E.2d 1267 (1982), the court held a defendant broker liable to the buyers for misappraising the seller's home by over $20,000. Here, the mere absence of an employment contract between the broker and purchasers at the time the misrepresentations were made did not relieve the broker from the "normal rules of negligence." **ID. at 1275.**

Many other jurisdictions have attempted to circumvent the harsh result of leaving the purchaser without remedies or at least at a great disadvantage.

Wyoming, for example, has indicated recognition of "dual agency" practices. *In Walter v. Moore*, 700 P. 2d 1219, the court found that the real estate broker owes a duty to both the vendor who employs him and to the purchaser to whom the real estate is sold.

The Court of Appeals for the Ninth Circuit has also recognized a fiduciary relationship between a broker and purchaser. In *Funk v. Tifft*, 515 F.2d 23 (1975), the court held that where a broker acts as an intermediary between buyer and seller he owes a duty to the buyer to act fairly. There, that duty was breached when the broker failed to disclose to the prospective buyer and he was also bidding on the same property.

By refusing to apply strict agency principles, these courts have elected to allow the purchaser to recover against the broker under dual agency, implied agency principles and the reasonable expectation theory. In the final analysis, the courts have bee ' singly sympathetic. These findings are further extrapolated in Section 11.

2. Broker Liability for Misrepresentation

Injured home purchasers throughout the country have been reaping the awards of a recent trend of liberalism applied by courts relative to finding liability on the part of brokers for misrepresentations.

Punitive damage awards for reckless or malicious conduct are now being handed down with some degree to regularity.

In order to maintain a cause of action for fraudulent misrepresentation, the plaintiff in most jurisdictions must show four necessary elements.

1. That the broker made a misrepresentation of fact with the purpose of the plaintiff relying upon the information;

2. That the plaintiff purchaser relied on the information to his detriment;

3. That the misrepresentation was of a material nature;

4. That broker knew or reasonably should have known that the statement was false. *Salisbury v. Chapman Realty*, 465 N.E.2d 127 (1984).

It is also important to note that in cases alleging fraud, an intent to deceive need not be shown. An allegation for fraud can stand without intent if it is shown that the statements were made in reckless disregard of their truth. *Duhl v. Nash Realty, Inc.*, 429 N.E.2d 1267,1274 (1982).

Because fraud is a quasi-criminal action, the buyer does not have to establish the existence of an agency relationship between himself and the defendant broker. *Salisbury v. Chapman Realty*, 4655 N.E.2d 127 (1984). Brokers are, however, still entitled to be salespeople and therefore, mere puffing of statements of opinion which are understood as opinions are not actionable. *Scott v. Willson*, 115 Ill. App. 2d 456, 146 N.E. 2d 397 (1958).

But, where a broker makes a statement as one of fact rather than opinion for purposes of inducing the listener's reliance, then that statement is viewed by the courts as one of fact to which the broker is held liable. *Duhl v. Nash Realty*, 429 N.E.2d 1267,1272 (1982).

The consumer protection statutes, which have been created by the majority of the states in recent years, are excellent devices for pleading a cause of action against brokers (see e.g., Tex. Bus. & Corn. Code Ann. Sec. 27.01 (A)). They generally afford much broader protection than the common law action of fraud. Although the consumer protection statute in Illinois originally embraced personal property only, the court in *Beard v. Gress*, 413 N.E.2d 488 (1980), extended the act's coverage to include purchases of real estate. In order to recover under the act, the purchaser had to show that the broker engaged in a deceptive practice, made a misrepresentation, or failed to disclose a material fact. Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat, Ch, 121½, par. 270(b)(4). In response to this ruling, the strong Illinois Realtor Lobby in 1982 had the consumer fraud statute amended to raise the threshold standard of care by which brokers could be held liable under the act. Hence, the bold advance by the Beard court was decisively crushed by the brokers just two years later.

Presently, for a deceived buyer to win his case under the statute, he must show that the broker had actual knowledge of the misrepresentations he made to the purchaser.

With this avenue of remedy blockaded by the legislature, the courts found new ways for an injured home purchaser to successfully bring a cause of action against disreputable brokers. In 1982, the Illinois Supreme Court ruled that there is an implied private right to action for damages against a broker for a violation of the Real Estate Brokers and Salesmen License Act. *Sawyer Realty Group, Inc. v. Jarvis Corporation*, 89 Ill. 2d 379, 432 N.W. 2d 849 (1982).

Under the language of the act, a broker is required to disclose all interested parties all material knowledge he has of the property. Failure to do so can result in the revocation of the broker's license, Ill. Rev. Stat., ch. 111, Sec. 5801-35 (1983). Although the statute provides no relief for the plaintiff, other than from the Illinois real estate recovery fund, the Sawyer court nevertheless held that the prospective buyer is one whom the statute was meant to protect and therefore he could recover under a private right of action for a violation of that statute.

Another interesting device to maintain a cause of action against the broker where fraud is being alleged could quite possibly be **Civil RICO, 18 US.C. 1961-1968,** provided you can demonstrate a violation of one of the predicate offenses. Example: Your client is persuaded to get involved in a "no money down" acquisition scam that a small, small minority of unethical brokers have been recently advocating.

This transaction is effectuated by having a contract calling for an inflated purchase price which has a rider attached allowing the seller to five the buyer "credit" allowances, which in fact lowers the purchase price to its actual value. By the time the lender receives a copy of the contract, the rider has been conveniently omitted from the contract and the lender lends the personal funds equal to the actual sales price. If the broker utilized the U.S. mails in that case, the predicate offense of mail fraud could be established.

Actions sounding in negligent misrepresentations are, for the most part, predicated upon the broker's negligence in carrying out his duties as a fiduciary or failure to exercises the proper care and skill of a competent broker situated. Some jurisdictions, like the District of Columbia, lower the threshold even further by stating that a broker can be liable for innocent mispresentation, where a statement is uttered without knowledge of its truth of falsity. *Spargnapani v. Wright*, 10 A.2s 82 (1954). In Alaska, a broker can be held liable even where he exercises due diligence in verifying information and turns out to be wrong, which creates an almost strict liability standard, *Bevins v. Ballard*, 656 P.2d 757 (1982). However, I feel that the better view is that which was established by the Washington state and California courts, which imposes a duty on the broker to exercise due diligence by independently confirming representation of the seller before relaying the information to potential purchasers. *Tenant v. Lawton*, 615 P.2d 1305 and *Easton v. Strassburger*, 152 Cal.App.3d (1984). Illinois, by distinction, holds that a broker does not have a duty to independently corroborate a seller's representations unless the broker could have discovered the falsity by exercising ordinary care. *Lyons v. Christ Episcopal Church*, 71 Ill. App. 3d 257, 259, 389 N.E.2d 623, 625 (1975).

In conclusion, counsel for real estate brokers and sales persons should reexamine their clients' business practices. The recent liberal trends by the courts and the legislature require thoughtful steps in mitigating exposure.

IV. LENDERS: (HAROLD I. LEVINE)

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The response of lawyers to the recent mortgage crisis has been something less than overwhelming.

While lenders fail to fund, raise rates after issuing firm commitments, engage in sophisticated forms of bait and switch, and threaten the entire residential closing process, most lawyers have settled for wringing their hands and calling the Attorney General. Very few lawyers in this situation have acted like lawyers and taken decisive action on behalf of their clients. One should consider the activities of the mortgage companies as a mass toxic tort, which affects thousands of people by increasing rates or frustrating their closings.

It is true that the closing framework is tight. The seller must sell and the buyer must close within a very short time. This may foreclose many of the traditional remedies. But his should not render the lawyer impotent. The following is a list of approaches to the problem:

1. Injunction, Specific Performance and Declaratory Judgment

A mortgage commitment is a legal instrument on which buyers rely. It is an agreement to deliver a fixed amount of money for a certain period at an agreed rate on the performance of certain conditions on behalf of the borrower. There is a whole body of law on breach of commitments.

The time frame may be very tight, but injunction is designed to deal with emergency situations. A declaratory judgment, coupled with an injunction count, or a specific performance suit combined with an injunction count, to prevent the increase in interest over the commitment, would be an effective remedy and could certainly get the attention of the lender. It is easier to file a lawsuit than to make thirty calls to the lender, thirty to your client and thirty to the other lawyer and get nowhere. There is ample basis to extend the existing case law to mortgage commitments and mortgage lenders.

2. Breach of Contract

Assuming that there is a firm commitment with performance by borrower, whether the transaction closes or not, the legal remedy of breach of contract is always available.

This is an area where the out-of-pocket damage may be small, consisting of such items as the costs of survey, credit report and title report; however, the consequential damages are enormous. A raise of even a small percentage in the mortgage rate over the life of the mortgage is enormous. The loss of earnest money, or the loss of the sale itself are frequent consequences. A suggested remedial statute would take away the right to sue for consequential damages and limit the claim of any borrower to $2,000.00 which could actually reduce the existing rights of borrowers.

3. Tortious Misrepresentation

Two actions in tort available. There are based on Richard M. Guerard's analysis of suits in tort against brokers. There is ample basis to extend the existing case law to mortgage commitment and mortgage lenders. They are:

A. INTENTIONAL MISREPRESENTATION

Elements: The misrepresentation must be:

1. Of a material nature;

2. Untrue;

3. Known by the person making it to be untrue, believe by him to be untrue or made in culpable ignorance of its truth or falsity;

4. Relied upon by the defendant to his detriment;

5. Made for the purpose of inducing the reliance; and

6. Such that the defendant's reliance led to his injury.

Cases: *Oltmer v. Zamora*
Mother Earth, Ltd. v. Strawberry Camel, Ltd.
Broberg v. Mann
Duhl v. Nash Realty, Inc.

B. NEGLIGENT MISREPRESENTATION

Elements:

1. A duty owed by defendant to plaintiff;

2. Breach of such duty; and

3. An injury proximately resulting from such breach (damages).

Cases: *Lyons v. Christ Episcopal Church*
Duhl v. Nash Realty, Inc., Supra
Sawyer Realty Group, Inc.

It is suggested that negligent misrepresentation can be employed in tort actions against lenders.

Negligent misrepresentation is a tort applied to those in the business of supplying information on the expectation and intention that prospective parties will act on that information. This clearly involves the lender borrower situation. To quote from the Guerard article, which described the tort as applied to real estate brokers:

> A broker often by circumstances, design or otherwise insulates a prospective purchaser from the seller and the buyer has no opportunity to receive any information or answers to his questions other than through the broker and must rely on the broker's representations. There can be no question that a real estate broker is in the business of supplying information that they are receiving from the broker.

Since the mortgage lender or mortgage broker is clearly in the business of supplying information on which the buyer relies, this would be an appropriate cause of action.

4. Consumer Fraud Act

Instead of running to the Attorney General, the lawyer should consider a private right of action under your states Consumer Fraud Act. For example, there is no question that the Illinois Consumer Fraud Act applies.

Elements:

1. Deception, fraud, misrepresentation, or the concealment suppression or admission of any material fact;

2. In the conduct of any trade or commerce.

Cases: *Beard v. Gress*
Duhl v. Nash Realty, Inc.

The Illinois Consumer Fraud Act states in part:

"The use or employment of any practice described in Section 2 of the Uniform Deceptive Trade Practices Act, Ill. Rev. Stat, 1979,121-1/2, par. 311, *et seq.*, in the conduct of any trade or commerce, are hereby declared unlawful-" The court in Beard Pointed out that Section 1(f) of the Consumer Fraud Act states that:

"(f) The terms, 'trade' and 'commerce' means the advertising, offering for sale, sale or distribution of any services of any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce, directly or indirectly, affecting the people of the state." (Ch. 121-1/2, par. 261 (f)).

Section 12 of the Uniform Deceptive Trade Practices Act states that a person commits a "deceptive practice" when he "engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding." The court in Beard then held that the misrepresentation in the advertising of the interest rate attributable to the defendant would be "conduct" which created "a likelihood-of misunderstanding."

Section 2 of the Consumer Fraud Act also states in part:

> "Section 2. Unfair methods of competition and unfair deceptive acts and practices, including but no limited to the use of employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or admission of any material fact, or the use or employment of any practice described in Section 2 of the Uniform Deceptive Trade Practices Act, approved August 5,1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled or damaged thereby. In construing this section, consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act."

Thus, misrepresentation by a lender as to material fact would be a violation of the Consumer Fraud Act. The Consumer Fraud and Deceptive Business Practices Act greatly expand the liability of a lender. In such cases, a misrepresentation by a lender, no matter how innocent, would be actionable. It has been held that reliance is not a necessary element of the violation of the Act and an innocent motive is not a defense. Neither the mental state of the person making the misrepresentation nor the diligence of the party injured to check as to the accuracy of the misrepresentation is material to the existence of a cause of action for that misrepresentation under Section 2 of the Consumer Fraud Act. *Grimes v. Adlesperger.*

While the Act was amended to provide that the communication of any false, misleading or deceptive information, provided by the seller of real estate located in Illinois, by a real estate salesman or broker knowing of the false, misleading or deceptive character of such information is a violation of the Act, the requirement of "knowing of the false, misleading or deceptive character of the information" exists only for real estate brokers or salesmen, and not to any other group, including mortgage lenders.

Further, under the Consumer Fraud Act, the court is authorized to awarded the injured party any relief it deems proper, including reasonable attorneys' fees and costs to the prevailing party. The fees are discretionary under the Act. *Grimes v. Adlesperger,* supra.

5. Revocation of License

Lawyers for injured borrowers should be familiar with the Illinois statute pertaining to Mortgage Banking.

The statute establishes a mortgage banking board (Section 2304) which is charged with the following obligations:

> "23. Duties of Board
>
> 4. The Mortgage Banking Board shall aid the Commissioner by:
>
> (1) Suggesting rules to govern hearings for any suspensions or revocations of licenses of for the assessing of fines as provided in this Act.
>
> (2) Holding hearings for the purpose of investigating complaints made by any person in connection with any mortgage banker in this State.
>
> (3) Holding hearings concerning, and making recommendations to the Commissioner regarding the suspension and revocation of license and the assessment of fines.
>
> (4) Submitting recommendations to the Commissioner for efficient administration of this Act.
>
> (5) Performing such other duties as are prescribed by the Commissioner."

A Lawyer should consider filing with the commissioner of Savings and Loan Associations a complaint under Sec. 2304(2) and ask to have the mortgage banker's license revoked.

In respect to mortgage delays, Section 2308 should be considered:

> "Each licensee shall maintain, within the State of Illinois, a full service office and staff reasonably adequate to handle efficiently all communications, questions, and all other matters relating to any home mortgage with respect to which such licensee is collecting payments or performing other services regardless of kind, for any borrower or lender or note owner or holder for himself while engaged in the mortgage banking business."

6. Other Administrative Remedies

The following administrative remedies might also be considered. The Federal Home Loan Bank Board is the regulatory arm of the savings and loan industry. They have been most responsive to perceived abuses of their member institutions.

Therefore, counsel might consider looking to the Bank Board as a potential administrative remedy. Prior to addressing any issues with the Bank Board, however, I would caution that the borrowers' attorney should consult Chapter 12 of the Code of Federal Regulations to indemnify statutory authority which would form the basis of the complaint. For example, federally chartered savings and loan associations are prohibited from dictating title insurance companies

pursuant to 12 CFR 563.35. This can be used on occasions where savings and loan associations have tried to dictate title insurance companies other than those selected by the consumer.

The Bank Board has very broad powers if a member institution is engaged in a prohibited practice. For example, the Bank Board has the power to issue an administrative cease and desist order. If the member institution fails to respond to that order, the Bank Board can then seek enforcement of the order in Federal Court.

Initial inquiries concerning abuses by savings and loan associations should be directed to the Office of the General Counsel, Federal Home Loan Bank Board, 1700 G. Street, N.W. Washington D.C., 20552.

Similarly, the U.S. Department of Housing and Urban Development has broad authority to govern mortgage bankers and other lenders who deal in federally insured loans.

Dealing with HUD can sometimes be difficult. However, some success can be obtained in identifying and resolving lending abuses through the Director of the Mortgage Monitoring Division of the U.S. Department of Housing and Urban Development. That division is located at 415 Seventh Street, N.W, Washington, D.C. 20410.

So the next time the loan processor hangs up after your tenth call, sit down and write a letter to the president of the loan company or lender. In that letter advise him, on behalf of your client, you are going to file suit for injunction and specific performance, or if that is not possible, you will sue for damages in tort and contract and in addition will include a count under the Consumer Fraud Act. The letter will also advise him that you are about to notify the commissioner of Savings of the State of Illinois, The Federal Home Loan Bank and HUD. You may find that you do not have to make any further phone calls after that.

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