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MARK COHEN, J.D., LL.M.

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Residential Warranty Services, Inc.

RE: Real Estate Agent's Liability for Referring Client to a Home Inspector That Does Not Offer a Warranty

This letter is my legal opinion on the potential liability of a real estate agent (or broker) that refers a client to a home inspector that does not offer a warranty product. As explained below, there are circumstances in which the law would hold an agent liable for damages the client suffers in such circumstances.

Introduction

Before summarizing the law, I will briefly describe a common scenario that might give rise to such circumstances. As you know, agents often (wisely) refer clients to home inspectors. Some inspectors offer warranty products such as SewerGard protection, which is the focus of this opinion, while other inspectors do not. If an agent's client buys a home and later has a claim that would have been covered had the inspector offered a warranty, the issue becomes whether the agent can be held liable for the client's out of pocket expenses. The answer is yes.

Sources of a Real Estate Agent's Duties to a Client

To be liable to a client for damages resulting from an act or omission, an agent must breach a duty owed to that client. There are four sources that might give rise to such a duty: (1) the contract between the agent and the client; (2) statutes and regulations governing agents; (3) the ethical codes established by associations the agent belongs to; and (4) common law principles of negligence. Let me briefly discuss each.

Contracts

Listing and buyer representation contracts vary from state to state and agent to agent. Some might include language broad enough to impose a duty. For instance, the standard buyer's

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agent contract in Colorado provides that the agent has a duty to promote “the interests of Buyer with the utmost good faith, loyalty and fidelity.” I can easily envision a situation where an agent refers a client to an inspector that does not offer SewerGard because the agent has a referral relationship with the inspector. In that instance, the agent may be ripe for a claim that the agent breached the contractual duties. An agent’s contractual duty to represent the best interests of the client includes a duty to use reasonable care in investigating a home inspector recommended to a client. *Marx v. McLaughlin*, 2001 WL 837921 (Conn. 2001) (unpublished opinion); *Schoembs v. Schena*, 2015 WL 1012065 (Superior Court of Massachusetts) (court denied real estate agent’s motion for summary judgment and allowed homeowner’s lawsuit to move forward on their allegations that agent breached contractual duty of loyalty and was negligent in failing to adequately check the qualifications, reputation, experience, or reliability of the inspector).

Statutes and Rules

Statutes and rules governing agents will vary from state to state, but they generally focus on licensing, discipline, continuing education, and so forth. Still, there could be language in some broad enough to establish a duty that would apply in the situation I have described.

Ethical Codes of Associations

Article 1 of the Code of Ethics of the National Association of Realtors® states, “When representing a buyer, seller, landlord, tenant, or other client as an agent, Realtors® pledge themselves to protect and promote the interests of their client.” Article 11 provides members must demonstrate “competence” in real estate matters include “real estate counseling.” It is reasonable to assert such competence includes knowledge of the services inspectors offer and that referring a client to an inspector who offers SewerGard (with coverage for underground water and sewer line issues that regularly cost thousands of dollars to fix) demonstrates competence and knowledge of the subject matter.

Common Law Negligence

For argument’s sake, let’s assume an agent has no duty to recommend a home inspection. If an agent voluntarily assumes that duty, the agent has an obligation to exercise reasonable care in exercising that duty. For instance, in *Lester v. Marshall*, 352 P.2d 786, 791 (Colo. 1960), the court held: “Where a person represents by word or act that he has done or will do something upon the performance of which he should realize that others will rely, he is liable for expectable harm caused by the reliance of others and his failure of performance, if his representation was negligently or intentionally false, or if without excuse he fails to perform.” You can find similar decisions in every state. See also, *Schoembs v. Schena*, discussed above. Given this well-established legal principle, I can see a judge or jury finding that an agent was negligent for not being aware of SewerGard protection and ensuring their client received it, especially when the price difference was as minimal as it is.

Additionally, if the agent knew about SewerGard but nevertheless referred the client to inspector that did not offer SewerGard protection because of a relationship with another inspector, that might not only support a finding of negligence, but might also give rise to an

inference that the agent breached the agent's other duties by putting the agent's relationship with an inspector ahead of the client's interests.

Damages

If a judge or jury holds an agent liable for referring a client to an inspector that does not offer a warranty product, the law will require the agent to pay damages to the client in an amount equal to the damages the client suffered because of the agent's breach of the applicable duty. For instance, if a court or jury finds an agent liable for failing to recommend an inspector that offers SewerGard protection, and the client ends up having to pay \$4,000.00 to remedy a problem that the SewerGard protection would have covered, the agent would have to pay the client damages of \$4,000.00. Additionally, if the client prevailed on a breach of contract claim that included an attorney's fees clause, the agent in that such situation would also have to pay the client's attorney's fees and costs.

Closing

Ideally, agents should make their clients aware of warranty products such as SewerGard and other Inspection Warranties including the 90 Day Structural and Mechanical Coverage, MoldSafe, and the 5 Year Roof Leak Protection Plan. Ensuring such knowledge would drastically reduce an agent's potential liability in the scenario we are considering. One way an agent could accomplish this would be to refer the client to an inspector that offers the warranties. Alternatively, an agent could disclose the availability of such coverage in writing and document the disclosure by having the client sign a disclosure form like the one available at www.ZeroDeductibleforBrokers.com.

Sincerely,

Mark Cohen

MARK COHEN

MSC:wth