

## ***HOUSE PRICE DOWN? SUE THE REALTOR?***



***A CASE GOING TO TRIAL IN CARLSBAD, CALIFORNIA WILL TEST THE LIMITS OF THE DUTY A BUYER'S BROKER MAY HAVE IN ADVISING HIS/HER CLIENTS AS TO THE VALUE OF A HOME BEING PURCHASED. HERE, WHERE IT IS ALLGED THE BROKER MISLED THE CLIENTS ABOUT THE TRUE VALUE OF A NOW DEPRECIATED HOME, DAMAGES ARE SOUGHT FOR THE DIFFERENCE IN VALUE. MOST EXPERTS CONSIDER THIS THE BEGINNING OF A WEALTH OF SUITS ABOUT TO COMMENCE.***

***JUSTIFIED? THE FIRST CASE, UMMEL vs. REMAX, HAS SOME UNIQUE FACTS THAT MAY MAKE IT MORE DANGEROUS FOR THE BROKER. READ ON..***

### **THE FACTS:**

Mr. and Mrs. Ummel, people in their early 60's and 70's decided to move to the San Diego area from San Francisco to be near their grown children. Since the move was not predicated on a job, they took their time selecting the locale. They hired Mike Little, a veteran agent with ReMax Associates after dismissing an earlier agent they did not like. They canceled deals on two houses before they found a home in a five year old luxury development and purchased the home for \$1.2 million.

Mike Little was also a mortgage broker and the Ummels claim he encouraged them to get their loan through him. Little ordered an appraisal of the house but, according to the Ummels, did not let them see it though they asked. Ms. Ummel testified that Mike Little had told them, "...many times that it was a very good buy."

A few days after moving in in August 2005 they found a flier on their door from another agent. It showed a house up the street had sold for over one hundred thousand dollars less than theirs, even though it was the same size. When they finally reviewed the appraisal, they found to their shock that the home not only was less expensive than theirs, but had a pool which theirs did not. Another home up the street which closed the same day as theirs sold for \$175,000.00 less.

Furious, the Ummels have sued, accusing Mr. Little of withholding vital information and exaggerating the value of the home to push the deal to get his thirty thousand dollar commission.

Mike Little replies that they are merely trying to shift the blame for their own errors to him. As one of his experts testified, "They simply didn't do what is expected of a knowledgeable sophisticated buyer and are now looking for someone other than themselves to take responsibility."

The case goes to trial on January 22, 2008. The whole world may not be watching...but the whole real estate world in California is.

### THE FACTS AND THE LAW:

The reader should read our article on **Real Estate Transactions** and **The Fiduciary Duty**. Read carefully the section on the role of the broker in real estate transactions and the inherent conflict of interest in hiring an "expert" who only gets paid if the deal goes through. As one wag put it, "Trusting a broker to tell you whether to buy is like asking the waiter if the food is any good in his restaurant. What on earth do you expect to hear from them? Their pocket is lined only if you buy the food...or the home."

There is no question that the broker had a **fiduciary duty** to his clients but the real question was the extent of that fiduciary duty. Did he have to advise them as to the value of the home which they could, and perhaps should, have developed on their own, or merely assist them in locating homes which they could chose to buy? That will be the question before the Court and this case may be unusual.

First, Little had an appraisal which he did not show his clients.

Second, he was a mortgage broker, perhaps in a conflict of interest in trying to land the loan.

Third, the facts of lower value are obvious. The fact that a home sold the same day down the street for nearly 20% less is compelling evidence the home was overvalued.

Fourth, the buyers are relatively elderly thus subject to more sympathy from the Trier of fact.

To help the Broker, we are dealing with a sophisticated intelligent couple who had investigated the market on their own, rejected a past realtor and withdrew from two other deals. This was a luxury home bought by relatively wealthy people.

It will be a question of fact if they reasonably relied on Mr. Little and whether, by withholding information, he violated his duty. See our article on **American Litigation** for the role of the jury as to questions of fact.

But the issues will go much further.

### THOUGHTS:

Until the recent massive appreciation of home values, most brokers represented only sellers, not buyers. During the last real estate boom of the 1980's, few buyers bothered with a broker. Thus, the broker represented only the Seller.

The recent boom, however, saw brokers assuming representation of buyers as well as sellers and suddenly the issue of advice as to whether a home is a good buy comes to the fore.



The National Association of Realtors estimates that brokers representing buyers are now involved in two thirds of all residential purchases.

Thus, this is the first housing downturn in which brokers face the question of their fiduciary duty in warning a client not to purchase an inflated home. As the New York Times, put it, "In a relationship built on trust, where promises are rarely written down and where-as in this case-there is no signed contract, what are the exact obligations of these representatives in guiding their clients through a sizzling market?"

This writer thinks the broker in this particular case faces very real liability simply because he withheld the appraisal and the prices were clearly out of line. In most real estate transactions, the facts will not so favor the client. Most brokers are honest people trying to make a living...and while they have an inherent interest in making a deal go through, few would withhold vital information or advise a client to bid on a home twenty percent above the fair market value.

But what we are also seeing is a 'wake up' call for anyone buying an asset, be it stock or a home. Markets, historically, appreciate at ten percent or less a year over time, usually 8%. If a market has appreciated faster than that, sooner or later, come what may, it is likely to "adjust" back down.

Or, as the saying goes, "If it is too good to be true...it is."

If you are one of those who expected your home to appreciate at double digits a year forever, then you were bound to be disappointed sooner or later and most experts predicated the down turn in real estate over five years ago.

It is a good investment, yes...but a good investment is one that is not gyrating up and down, but steadily rising over the long term. Real estate does that...if one evens out the years and examines it over a ten or twenty year period.

And when one visits a broker, one should keep that fact of life in mind...AND the fact that the money goes to the broker only if you complete the deal...

Remember: the waiter always says the food is pretty good...and the broker will always find a deal that he or she can recommend...

