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The MLS, The Words We Choose, And The Transmission Of Information Regarding A Property

By David Hamerslough

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A recent Court of Appeal decision, *Saffie v. Schmeling*, has discussed the potential liability that a listing agent has under Civil Code § 1088. This Code section states, in part, that a licensee "shall be responsible for the truth of all representations and statements made by the licensee [in an MLS] ... of which that agent ... had knowledge or reasonably should have had knowledge" and provides a statutory negligence claim for "anyone injured" by the "falseness or inaccuracy" of such representations and statements.

The language used by the listing agent in the MLS in the *Saffie* decision was as follows:

"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."

What the listing agent did not state was that the report was from 1982, was out of date relative to the transaction date (2006), and/or that current standards for building were not met.

The buyer received a copy of the report, and the transaction closed without the buyer or buyer's broker performing any further investigation in relation to geological issues on the property generally or with respect to the Fault Hazard Investigation report in particular.

After escrow closed, the buyer began to try to develop the property. It was then that he discovered that the County of Riverside did not agree that the property was "ready to build." The County's understanding of

the "state of the art" regarding investigation of fault hazards had changed after the 1994 Northridge earthquake, and it no longer accepted Fault Hazard Investigation reports performed under earlier standards. The additional geological investigation the County required in 2006 and the impact of other County requirements for the development of the property rendered the property unsuitable for the buyer's intended use.

The claim against the listing agent was that the above statement in the MLS was false or inaccurate because it failed to specify that the report dated back to 1982, thereby giving a false impression that the report was current as of the MLS listing and remained valid in terms of assessing the property's suitability for development.

The Court of Appeal rejected this claim in this instance because the factual statements made by the listing agent were true and there was nothing false, inaccurate, or misleading about them taken in conjunction with the fact that the report was provided to the buyer's broker.

As with any case, the outcome often turns on the facts and circumstances of a particular dispute. The Court noted in this case that there was no dispute about the existence of the Fault Hazard Investigation report, nor was there anything inaccurate about the summary description of the conclusions from that report. The Court also noted that there was no evidence of the omission of any information that would otherwise have rendered the statements false or inaccurate. The statements made by the listing broker also did not indicate that the property had been cleared to be built upon by the County (as opposed to being "declared buildable" by the investigating geologist). The factual statement in the MLS did not assert that there was an actual ability to build on the site at the time of the transaction. In addition, the listing broker did not in any way affirm that the geologist who performed the investigation had done so in accordance with current County requirements, nor was there any statement that all necessary approvals for building had been obtained. A different outcome might have been reached if any of the foregoing facts or circumstances had existed with regard to the MLS statements.

The outcome of any dispute against a listing agent over factual statements in the MLS often turns on, among other factors, the actual words used in the MLS, the facts and circumstances of the transaction, whether the listing agent had knowledge or reasonably should have had knowledge of any information that made the factual statements false or misleading, and whether there is any causal connection between the factual statements and the alleged injuries claimed as a result of reliance on them.

The outcome of the *Saffie* case is a good reminder to make sure that our statements and remarks in the MLS are accurate and qualified if the circumstances require it, and, if the statements are based upon a third-party report, agents should make sure that report actually exists and any statements included in the MLS taken from that report accurately reflect the language and other content of that report. Given the emphasis placed by the Court of Appeal on the delivery of the report to the buyer's agent in the *Saffie* case, it would be good practice to do so in similar situations and to confirm its receipt by potential buyers. Another good practice is to have sellers review and approve what is going to be disseminated on their

behalf via the MLS before the information is actually placed in the MLS.

The *Saffie* decision also addressed the conduct of the buyer and buyer's agent after they received the Fault Hazard Investigation report. Although the buyer's broker provided the buyer with the report, his testimony was that he did so without reading the report or even understanding what a Fault Hazard Investigation report was. He also testified that he told the buyer to "check out" the report, but apparently the transaction closed without the buyer or buyer's broker performing any further investigation in relation to geological issues on the property in general or with respect to the Fault Hazard Investigation report in particular.

Based on this testimony, the trial court found that the buyer's broker led the buyer to believe that the report was current and could be relied on as an indication that the property was "ready to build." There was no appeal of this outcome by the buyer's broker, and there is no indication from the appellate decision whether the outcome would have been different if any of the following factors, among others, were or had been taken into consideration: (1) the sophistication and experience of the buyer, (2) any questions asked by the buyer, and/or (3) what additional information or documentation was provided to the buyer addressing geological issues, fault hazards, or the development of the property.

The appellate decision also does not indicate whether the buyer's agent qualified the delivery of the Fault Hazard Investigation report to the buyer in any way. The outcome might have been different if the buyer's agent (1) had read the report, (2) identified who had provided the report to the agent, (3) disclosed to the buyer whether the information in the report either had been verified by or was not going to be verified by the buyer's agent, (4) recommended that a current report be obtained and that the buyer consult with the Planning Department and qualified professionals to determine what development the lot would support and whether that development met the buyer's needs, and (5) clarified who would be investigating these issues and that, if the buyer's agent was not going to do so, ensuring that the buyer understood that that was the case. Confirming these discussions in writing rather than relying solely on recollections of oral conversations is a better practice, as that eliminates the potential for parties having different recollection of what was discussed with regard to these subjects.

The foregoing discussion is a general one highlighting some of the issues that exist regarding dissemination of information on the MLS and what the buyer and buyer's agent do once they receive that information. Following the guidelines set by the court or discussed in this article should go a long way toward eliminating any potential liability. There were a number of other factual and legal issues identified by the *Saffie* court, which may also impact the outcome of any dispute involving these same issues.



Laurie and I had two very challenging real estate rights issues that we were advised were going to be difficult to prevail on. The RHRC team engaged with us and helped us understand our rights and prevailing position. RHRC were thoughtful advocates for us from the beginning to conclusion of our cases. We feel fortunate to know we will always be able to call on the firm in the future and that they are our legal counsel.

Albert "Rocky" and Laurie Pimental, President of Global Markets and Customers, Seagate Technology

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