Disclosure Duties to Visitors of Marketed Property

By David Hamerslough

June 10, 2013

When the duty of disclosure is discussed, it is usually in the context of the duties owed to a prospective purchaser of property. A recent California Court of Appeal decision will now cause us to include visitors to marketed properties within those individuals to whom a duty of disclosure is owed.

The holding in the decision of Hall v. Aurora Loan Services, LLC, is that both the owner of a property and the listing agent have a duty to notify visitors to marketed properties of concealed dangerous conditions of which there is actual or constructive knowledge. Agents marketing property must exercise reasonable care to discover dangerous conditions, warn visitors of them, or make them safe.

In Hall, Aurora foreclosed on a property and then listed it for resale as an REO. The attic had been converted to a bonus room, accessed via a pull-down stairway ladder. The listing agent ordered a home inspection report, and a copy was provided to Aurora. The report identified a number of health and safety repairs, one of which was that the attic stairs needed to be removed and replaced. No details were provided as to why removal and replacement of the stairs was necessary, and neither the seller nor the listing agent received any complaints about a potential defect in the attic stairs. The listing agent had in fact used the ladder previously without any incident.

The home inspection report was left on the counter in the kitchen of the residence for review by any prospective purchaser. No other disclosures were made of the potential need to repair and replace the attic stairs. Neither the listing agent nor the seller had followed up with the home inspector to determine why the inspector was recommending replacement of those stairs or whether the stairway was in fact safe to use.

During a showing, prospective purchasers and their agent used the stairway. The hinge broke, and the agent for the potential buyers sustained a significant leg injury. The agent filed a lawsuit, which was rejected by the trial court on the grounds that neither the seller nor the listing agent had any notice or knowledge of a defect in the stairway. The Court of Appeal reversed the trial court, ruling that it was up to a jury to determine whether the listing agent and seller had exercised reasonable care to discover dangerous conditions and warn visitors of them or make those conditions safe. Other factual issues for a jury to decide were whether there was a concealed dangerous condition of which the agent had either actual or construction knowledge.

The Court of Appeal also noted that this was not the first time that this issue had been discussed by California courts. The State Supreme Court identified a duty on the part of real estate agents to warn visitors to a marketed property of known but concealed conditions under the rationale that one who undertakes to show the property in the regular course of business for a commission assumes the duty to warn of any concealed danger of which they are aware. Another prior Court of Appeal decision established the general doctrine that real estate agents are bound to exercise reasonable care to discover dangerous conditions of property they are marketing and to warn visitors of them or to take measures to make them safe.

The Hall decision was the first time this issue was addressed by any California court for over 50 years.

What is instruction about the decision is the fact that constructive knowledge was found to exist based upon the contents of the home inspection report. The Court was also influenced by the fact that there was no follow-up by the agents with the home inspector to determine why the inspector was recommending replacement or whether the stairway was safe to use.

Here are some things to consider in light of the Hall decision. First, what is a dangerous condition? Is any "health and safety" repair or condition identified in any inspection report? Under what circumstances is the dangerous condition a concealed one? The Court's decision suggests that if the dangerous condition is open and obvious, then there would not be a duty to disclose.

Further, how is either actual or constructive knowledge of a concealed dangerous condition acquired? In Hall, knowledge was established based upon findings in a home inspection report. Presumably, information acquired through discussions with neighbors or at open houses or contained in TDS and SSC forms would provide the requisite knowledge.

What duty of follow-up, if any, exists to determine the nature/extent of any condition and whether it is dangerous?

For those listing REO properties, it will be important to review your master listing agreement to determine the nature and scope of any express indemnity clause contained in that agreement. Whether the indemnity clause is sufficient to protect the owner and requires that the listing brokerage defend and indemnify the owner will need to be evaluated.

Finally, the Hall decision is a good reminder for all of us to contact our insurance brokers and determine if we have adequate insurance coverage for any personal injury claims that may arise as a result of an open house. Most errors-and-omissions policies exclude any claim for personal injuries. It is important to confirm that your general liability or business policy will cover this type of claim and, if not, determine what coverage is available to do so.

Most insurance policies exclude coverage for any contractually assumed liability, which is the type of liability that arises from an express indemnity clause. Therefore, if you are selling REOs and are subject to an express indemnity clause, make sure you notify your carrier, in advance, so that the indemnification requirement can be part of your coverage.

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.

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