



**WHAT EVERY FLORIDA REAL ESTATE AGENT
NEEDS TO KNOW ABOUT AVOIDING PROFESSIONAL LIABILITY**

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Licensed Florida real estate agents should be aware of the various categories of professional liability that they face. Knowing the potential liability enables a Florida real estate agent to properly plan and implement proactive methods to avoid such liability.

As this article will identify, not only should Florida real estate agents identify areas to avoid as is relates to professional liability, this article will also provide Florida real estate agents information on creating a real estate entity under *FS. 475.161-- Licensing of broker associates and sales associates*. Creating an entity may protect associates as to certain liabilities that they face under Florida law. This approach should be considered, along with a review of the professional liability insurance that should be in place by the real estate agent's broker, to afford additional protection for the real estate agent. Additionally, a further review of the riders for such professional liability insurance policy, should be undertaken to provide further protection to the Florida real estate agent.

The following is a list of the potential causes of action against Florida real estate agents, a brief summary of each cause of action, and ideas on how to avoid liability followed by some suggestions for proactive measures that can be taken.

1. Fraud:

This is a cause of action based upon an intentional act of the real estate agent. The general elements of a cause of action for fraud are:

- (A) A false statement must be made by the real estate agent concerning a material fact;
- (B) The real estate agent had knowledge that the representation was false;
- (C) The real estate agent knew that representation would induce a part to the real estate activity to act on it; and



(D) There was damage suffered by the party acting on the false representation.

Fraud requires intent and action. The damages can include costs to repair defects that were misrepresented in a property, diminution in value to the property based upon the fraudulent statement, cost to repair or replace misrepresented items in the property, related closing costs and potentially attorney fees and costs.

Special damages are also damages that could be claimed in a real estate transaction. Special damages are damages that don't flow directly from the breach but which result from the breach under certain circumstances. The point here is that there is a significant amount of exposure for the real estate professional who is charged with, and found liable, under a theory of fraud.

In fact, based upon an evidentiary showing to the Court, the Plaintiff suing under a fraud theory may also recover punitive damages. Punitive damages are designed to punish the perpetrator. They are measured by the grievousness of the offense and the financial ability of the perpetrator to pay.

These damage claims are all the more reason for the Florida licensed real estate agent to have adequate professional liability coverage directly or through their real estate broker. It is highly recommended that the real estate agent review what coverage is afforded him/her by the professional liability policy provided by the broker. There is nothing to preclude the real estate agent from securing their own professional liability policy in conjunction with, or separate and apart, from a Florida entity formed by the Florida licensed real estate agent in compliance with FS 475.161 below in Section 11.

2. Negligent Misrepresentation - Violation of Duties Arising Under the Johnson v. Davis Case:

A second area of liability for real estate agents is negligent misrepresentation. Every Florida licensee should be aware of the liability arising under a Florida Supreme Court case Johnson v. Davis, 480 So. 2d 625 which established that a seller of a residential property has a duty to the buyer to disclose all known material defects in the residential property that is not readily available but would be important to the buyer in forming its decision to purchase the property.

This obligation has been extended by case law to include real estate agents and real estate brokers Rayner v. Wise Realty, 504 So. 2d 1361 (5DCA 1987). Florida law describes a residential unit in Florida as one that encompasses a one to four unit residential unit. Example: Because the buyer in the Rayner case purchased a four-plex for investment purposes, there is no escape for a real estate agent as to the duties under Johnson v Davis.



These Johnson v. Davis duties are recited in the FARBAR contract generally utilized throughout Florida and also in the NABOR contract, which is utilized generally in Collier County.

Note: At the time of publication of this article, a case was decided in the First District on September 19, 2016 which will go into effect within 30 days unless a motion for rehearing is sought or further appeal taken. The case is: Kjellander v. Abbott, Fla 1 DCA 2016 and reinforced the obligations of a real estate agent and broker as follows:

“The agents' statutory obligations include a duty of honesty and fair dealing, a duty to disclose all known facts that materially affect the value of the property and are not readily observable, and a duty not to make misleading, deceptive, or fraudulent representations in any transaction. *See* §§ 455.227(1)(a), 475.25(1)(b), 475.278(4)(a)1.-2., 475.42(1)(e), (1)(n), Fla. Stat. (2012); *see also* *Zichlin v. Dill*, 157 Fla. 96, 25 So. 2d 4 (Fla. 1946) (reversing dismissal of suit against real estate broker for defrauding buyer and rejecting argument that broker owed no duty to deal fairly with the buyer); Fla. Att'y Gen. Op. 96-20, 1996 Fla. AG LEXIS 30 (1996) (explaining that "Chapters 455 and 475, Florida Statutes, clearly make misrepresentation, concealment, and fraud by real estate brokers and salespersons contrary to the public policy of this state" and opining that any language in a real estate sales contract that purports to relieve the broker or salesperson of liability for fraud, misrepresentation.”

The Kjellander holding reinforces prior case rulings and also is consistent with Attorney General Opinion AGO 96-20 as above cited.

3. Statutory Duties Identified in FS 475 et seq Imposing Administrative Liability and Civil Causes of Action:

Florida Statue 475 et seq is the statute created for the regulation of Florida Real Estate Brokers and Real Estate Sales Associates and is supplemented by the Florida Administrative Code.

Throughout the statute and the administrative code are sub-sections which regulate the actions of licensed real estate agents providing both administrative sanctions as well as acts which can form the basis for a real estate agent to be exposed to a civil judgment.

Administratively, there are numerous obligations imposed on the real estate agent for compliance with the Florida Real Estate Commission's rules and regulations which are too detailed for this article. However, several of the more notable administrative areas that cause licensee issues are:

- (A) Immediate Deposit of escrow funds, which need to be deposited the next day following receipt and by no later than the third business day following receipt (FL Ad Code section 61 J2 14.008);



- (B) Verification of deposit with title company or closing agent –10 day written request to verify deposit (FL Ad Code section 61 J2 14.008);
- (C) Monthly reconciliations (FL Ad Code section 61J2 24.002);
- (D) Commingling Operating Funds with Escrow Deposits (FL Ad Code section 61 J2 14.010);
- (E) Escrow Disputes (FS 475.25 (1)(d)(1))

There are also provisions of FS 475 that establish a basis for a civil action. Florida Statute 475.278 identifies certain duties which can form the basis for a civil action by an aggrieved party to a real estate transaction. An example of this are the duties imposed upon a real estate licensee acting in a transactional brokerage state, which is generally the most common form of relationship with the Seller or Buyer:

“FS 475. 278 (2): TRANSACTION BROKER RELATIONSHIP: A transaction broker provides a limited form of representation to a buyer, a seller, or both in a real estate transaction but does not represent either in a fiduciary capacity or as a single agent. The duties of the real estate licensee in this limited form of representation include the following:

- (A) Dealing honestly and fairly;
- (B) Accounting for all funds;
- (C) Using skill, care, and diligence in the transaction;
- (D) Disclosing all known facts that materially affect the value of residential real property and are not readily observable to the buyer;
- (E) Presenting all offers and counteroffers in a timely manner, unless a party has previously directed the licensee otherwise in writing;
- (F) Limited confidentiality, unless waived in writing by a party. This limited confidentiality will prevent disclosure that the seller will accept a price less than the asking or listed price, that the buyer will pay a price greater than the price submitted in a written offer, of the motivation of any party for selling or buying property, that a seller or buyer will agree to financing terms other than those offered, or of any other information requested by a party to remain confidential; and



(G) Any additional duties that are mutually agreed to with a party.

4. General Breach of Duty

In addition to the specific duties imposed on Florida real estate agents by the Florida Administrative Code, Florida Statute 475 et seq, as well as the rules promulgated by the Florida Real Estate Commission, Florida real estate agents also have general duties to act in the best interests of their real estate clients.

This is consistent with Florida law that imposes upon the licensed Florida real estate agent duties similar to what a person expects from their banker or lawyer – a fiduciary duty to act in the best interest of the real estate client.

A claim may be made, based upon facts and circumstances, that a real estate agent and its client were in a fiduciary relationship. A fiduciary obligation is created when one party reposes trust in another party. A fiduciary relationship is formed in a situation where a real estate agent represents a client who relies upon the real estate agent to exercise discretion or expertise while acting as a representative of the client. When a fiduciary relationship exists, the law forbids the fiduciary from acting in any manner adverse or contrary to the interests of the client, or from acting for his/her own benefit in relation to the subject matter.

Florida Statute 475.278 addresses a limitation on certain areas of this fiduciary relationship, but from the standpoint of the real estate client, and as importantly, based upon claims that could be made in litigation, the real estate client can argue that they are entitled to the best efforts of the real estate agent as their fiduciary, who needs to exercise: “skill, care, and diligence in the transaction”.

Florida Statute 475.278 states that a person acting in a fiduciary capacity is held to a high standard of honesty and full disclosure in regard to the client and must not obtain a personal benefit at the expense of the client.

Causes of action or claims against the real estate agent can be asserted, such as a basis for a breach of duty claim arising out of intentional acts or unintentional or negligent acts.

Examples:

- (A) Improper preparation of Multiple Listing Service (MLS) information;
- (B) Failing to disclose known material facts of defects in the prospective property of which the real estate agent was aware.



The list is only limited by the facts and the imagination of the attorney who is drafting the complaint against the real estate agent and the real estate brokerage firm.

5. Breach of Contract

A breach of contract claim can be asserted against the Florida real estate agent and/or its brokerage firm generally based upon the real estate listing agreement. However, there are other theories of a breach of contract that could arise as against the Florida real estate agent.

A cause of action for breach of contract in a real estate transaction could be based upon an allegation that the real estate agent failed to perform under the terms of the listing agreement or possibly under an oral agreement if properly formed.

In some circumstances, Florida real estate agents involve themselves directly in the contract for sale and purchase, which creates yet additional exposure from a breach of contract cause of action in addition to claims that may arise under a real estate listing agreement.

6. Negligence

This cause of action needs to be differentiated from the negligent misrepresentation cause of action that arises under the failure to disclose obligations imposed under Johnson v. Davis as set forth above.

Negligence, as it relates to a Florida real estate agent, can be summarized as a cause of action alleging the failure to exercise due care toward others which a reasonable or prudent person would do in the circumstances.

Under Florida law, four elements are necessary to sustain a negligence claim:

- (A) A duty, or obligation, recognized by the law, requiring the defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks;
- (B) A failure on the defendant's part to conform to the standard required: a breach of the duty;
- (C) A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact;
- (D) Actual loss or damage.

The Florida case site for a negligence claim is Curd v. Mosaic Fertilizer, LLC, 39 So. 3d 1216, 1218, (Fla 2010)



Some examples of negligent allegations as against a Florida real estate agent:

- (A) The real estate agent failed to properly evaluate and advise the Seller of the true market value of the property being listed for sale.
- (B) The real estate agent did not advise the prospective buyer that the home was not on city water and sewage but rather on well water and a septic system.
- (C) The real estate agent did not provide information to the Seller or Buyer as to specific timelines in the contract and call those timelines/deadlines to the attention of the Seller or Buyer.

7. Bodily Injury / Property Damage

The type of claims under this category can range from what could seem to be an innocuous fact pattern such as at an open house when the real estate agent does not recognize a hazardous condition that could result in a prospective customer tripping and falling. The same concept applies when escorting a client to visit a building under construction.

Another situation is where water intrusion has occurred causing serious property damage and the growth of toxic mold as a result of the failure of the real estate agent to inquire about the condition or notify the buyer to obtain proper inspections.

Bodily injury or property damage claims can result while it is being shown or managed by the insured and include claims for personal injury due to an illness sickness or disease resulting undisclosed mold or radon problem.

There are, of course, situations in which the buyer, after purchase, suffers an injury from a latent defect at the property which may be claimed should have been discovered by the real estate agent using skill, care and diligence.

8. Misrepresentation or Conduct of the Real Estate Agent Triggering a Claim Under Florida's Unfair and Deceptive Trade Practice Act "FDUTPA": Florida Statute 501.201 et seq

There is expanded liability under Florida's Unfair and Deceptive Trade Practice statute, FS 501.201 et seq (FDUTPA) to includes real estate services even in the event such action involved a single isolated incident: The Florida Supreme Court in the case of *PNR, Inc. v. Beacon Prop. Mgmt.*, 842 So. 2d 773 (Fla 2003)

"...Fla. Stat. ch. 501.204(1) prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. The Florida Legislature's intent to protect against misdeeds directed to a single party, as well as behavior directed to multiple

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parties, is clear. Although ch. 501.204(1) utilizes the word “acts,” when considered with the other provisions of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. ch. 501.201-.213 (2002) it is clear that the prohibition is broad enough to protect against instances of unfair or deceptive conduct as to a single party or under a single transaction or contract...”

Therefore, it is possible that a Florida real estate agent may be sued under FDUTPA and face a claim for damages as well as payment of the consumer’s attorney fees as provided for under the statute. Absent the ability to deflect the claim to the broker or to the Florida real estate agent’s LLC, the Florida real estate agent may be personally liable for such action.

9. Earnest / Escrow Money Dispute

Florida real estate agents may also be exposed to liability based upon failure of the real estate agent to pay, collect or return insurance premiums, escrow monies, earnest money deposits, security deposits, tax money or commissions.

A classic example is if the real estate agent or the broker fails to secure or ascertain that the original deposit is to be placed under a contract for sale and purchase of real estate was actually made by the Buyer or in fact resulted in collected funds by the Buyer.

There are numerous other examples of the requirement of the Florida real estate agent to not only properly handle but also to account for monies paid as part of a real estate transaction. The Florida real estate agent is advised to be aware of these duties and the specific requirements, inclusive of time periods for reporting, imposed in the handling of such funds.

10. Proactive ways for a Florida Real Estate Agent to avoid professional liability

As set forth above there are numerous areas of liability that can expose the Florida Real Estate agent to liability.

Here are some fundamental concepts for a Florida Real Estate Agent to consider:

- (A) Keep current with your continuing education requirements;
- (B) Take advantage of seminars and presentations that are offered by local real estate associations and real estate groups;
- (C) Seek out general advice from qualified real estate attorneys, many of whom will provide general advice to give you guidance;
- (D) Be aware of the practices and standards set by your real estate broker and the general standards and practices of real estate agents;

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(E) Inspections:

1. Recommend that your clients obtain a home inspection from not only a licensed and bonded home inspector but also a licensed and bonded home inspector who also holds a general contractor's license and is a qualified expert to testify in court. Generally, the cost of securing that inspection from a licensed and bonded home inspector with a general contractor's license would be approximately the same as an inspection from an inspector who doesn't hold a general contractor's license and who has never testified as an expert in a court of law.
2. In addition to a thorough home inspection, recommend to your clients that they have a roof inspection which, as many of you should be aware, is a critical component in Florida given our tropical climate and heavy seasonal rains.
3. Suggest to your clients that they also should obtain a mold assessment/report when purchasing a home. This can be significant especially, again, given our climate in Florida.
4. Based upon the fact that radon is the second-leading cause of lung cancer in the United States, just behind cigarette smoking, it seems axiomatic that a radon test would also be a fundamental test that you should ask your buyer/client to consider.

Again, the ideas in regard to the inspector and the inspections are at least considerations that you should suggest to your client and let the client decide if there is any issue with regard to the cost of same. But, by making these suggestions, you would have clearly fulfilled your obligation as a professional to use all skill, care and diligence in representing your client in the transaction.

- (F) Perform only those duties that are within your scope of real estate activity. Example: do not provide your "legal opinion" on documents or provide opinions outside your capacity ("the roof appears water tight").
- (G) Don't advise your seller or buyer to avoid using an attorney in a real estate transaction since "*a title company can handle all issues and legal problems that arise*" That is a fundamental misstatement of the law and, in fact, can be a basis for a claim against the real estate agent for itself giving legal advice and is not in keeping with the agent's duty to provide full and adequate information to the client using skill, care and diligence;



- (H) Be active in both the local and national real estate associations;
- (I) Join professional real estate organizations that offer weekly or monthly luncheon or dinner meetings with an educational component. An example in our area: Southwest Florida Real Estate Investment Association: www.swflreia.com for more information;
- (J) Document all of your activities not only via email but a specific log of activities for each particular file so that you create a personal chronology of all of your activities for that particular real estate transaction and your relationship with your customer. Save the data;
- (K) Be aware of all of the contract forms and ancillary documents that are in use, generally the FARBAR (Florida Association of Realtors and Florida Bar) forms and addendum and riders but also the NABOR (Naples Area Board of Realtors) forms as well as the FAR (Florida Association of Realtors) forms;
- (L) Search the Florida Association of Realtors website which contains great information relating to real estate industry specific issues, problems and solutions:
www.FloridaRealtors.org
- (M) Be aware of cyber security: Hackers have penetrated real estate activities and want your client's information as it relates to real estate transactions for a variety of nefarious reasons. Take steps to protect your customer's from cyber criminals by installing security software and ensuring that cyber criminals cannot penetrate your real estate transaction. Do not be the test case for a lawsuit indicating that you were negligent in failing to recognize this danger and allowing your client to be the victim of fraud. Take appropriate action.

11. Setting up a Florida Entity to Act as the Entity Which Conducts the Real Estate Activities of the Florida Real Estate Agent.

Florida has enacted a statute that allows a licensed real estate agent to conduct activities under the protection of a Florida entity:

Florida Statue 475.161: Licensing of broker associates and sales associates: The commission shall license a broker associate or sales associate as an individual or, upon the licensee providing the commission with authorization from the Department of State, as a professional corporation, limited liability company, or professional limited liability company. A license shall be issued in the licensee's legal name only and, when appropriate, shall include the entity designation. This section shall not operate to permit a broker associate or sales associate to register or be licensed as a general partner, member, manager, officer, or director of a brokerage firm under FS. 475.15.



As a result of the passage of FS. 475.161, a Florida real estate agent may incorporate as a PA (Professional Corporation), an LLC (Limited Liability Company) or a PL (Professional Limited Liability Company) for the purpose of having commission paid to the appropriate entity. The PA, LLC or PL may be incorporated only under the sales associate's legal name as registered with the Department of Business and Professional Regulation. Example: Jane Jones, LLC or Jane Jones PA.

There are advantages to setting up the Florida real estate agent's practice in the form of a Florida entity. Claims made by the customer would be as to the entity and not to the Florida real estate agent, absent actions which would allow a court to declare that the conduct of the activities of the Florida real estate agent was outside of the protection of the Florida entity set up to conduct the real estate activities.

12. Summary

It is crucial that licensed Florida real estate agents be aware of potential professional liability that is an inherent risk with their profession. Knowing the various types of potential liability will help agents put in place a proactive plan to avoid such liability.

DISCLAIMER: This Article is not written for legal advice and is published for informational purposes only. The Article is intended to address observations as to certain elements currently in existence with Florida's law regarding real estate agents and professional liability.