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Negligent Termite Inspector Can be Liable to Foreseeable Subsequent Home Purchasers

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making objective was the type of referral sales program the Iowa legislature wanted to prohibit.

Santa Rosa's Misrepresentations

The court then turned to the issue of misrepresentation of potential earnings and the program's legality. Santa Rosa admitted that certain brokers misrepresented the dollar amounts purchasers could earn. However, Santa Rosa argued that it was not responsible, because "renegade brokers" made the misrepresentations. The supreme court disagreed for two reasons. First, broker training materials contained assurances of quick and easy money. Second, Santa Rosa failed to develop a system to monitor either the new brokers or their training. Therefore, the supreme court held that Santa Rosa could not disclaim responsibility for the misrepresentations of its brokers.

Santa Rosa also admitted that its brokers misrepresented the program's legality, but again denied responsibility for renegade brokers. The supreme court rejected Santa Rosa's claim as meritless and found the misrepresentations traceable directly to Santa Rosa's broker training materials. For example, in a document entitled "Questions Most Frequently Asked About The Santa Rosa Plan," the first question on the document was "1. Q. Is this plan legal? A. Yes!" However, Santa Rosa made no attempt to determine whether its program was in compliance with Iowa law until four months after Santa Rosa sales began. As a result of these misrepresentations, the Iowa Supreme Court found Santa Rosa liable for violating the state's Consumer Fraud Act.

Remaining Issues

The supreme court partially reversed the trial court and held that violations of the Door-to-Door Sales Act and lottery statute were not unfair practices as defined by the Iowa consumer fraud statute. The court reasoned that the legislature's failure to include violations of the Act or lottery statute as unfair practices revealed an intent to exclude them.

Next, Santa Rosa argued that

since the restitution fund was designed solely to reimburse Iowa residents who made purchases from Santa Rosa, the trial court erred when it awarded the unclaimed balance to the Iowa Consumer Education and Litigation Fund. The supreme court agreed and directed the trial court on remand to return any undistributed portion of the restitution fund to Santa Rosa.

The court then turned to the imposition of the civil penalty. Santa Rosa contended that no penalty should have been awarded because renegade brokers violated the law without Santa Rosa's consent or encouragement. The supreme court concluded that Santa Rosa impliedly authorized and encouraged the ideas and sales techniques used by the brokers and therefore, the civil penalty was appropriate.

Next, the court examined the personal liability of Santa Rosa's owner, Groeschel. The supreme court upheld the trial court finding that Groeschel's liability arose as a consequence of his complete control of Santa Rosa and his own personal acts in perpetrating consumer fraud.

Lastly, the supreme court held that the award of prejudgment interest was improper because the state legislature intended to exclude prejudgment interest from the definition of restitution in the consumer fraud statute.

Judy Koehler

Negligent Termite Inspector Can Be Liable To Forseeable Subsequent Home Purchasers

In *Hosford v. State Termite and Pest Control, Inc.*, 589 So. 2d 108 (Miss. 1991), the Supreme Court of Mississippi held that a pest control operator, who negligently inspected residential property in the process of being sold, may be liable to foreseeable subsequent purchasers of the house.

Background

In 1986, Jim and Judy Hosford

("the Hosfords") hired McCrary Real Estate, Inc. in an effort to buy a home in Columbus, Mississippi. On July 11, 1986, the Hosfords, through the services of McCrary Real Estate, agreed to purchase a house and received the corresponding warranty deed. For procedural purposes, title first was transferred to Johnny Mack McCrary ("McCrary"), principal in McCrary Real Estate, who then transferred the property to the Hosfords.

Before the closing, McCrary contacted State Termite and Pest Control, Inc. ("State Termite") and requested an inspection of the property for possible termite damage. Steve McKissack ("the Inspector"), a pest control specialist employed by State Termite, performed an inspection of the premises and prepared a report stating the results. The report listed Charles Smith as the current owner of the property and McCrary, individually, as the purchaser. The report was one of the documents submitted at the closing of the property purchase in July, 1986.

The Inspector's report stated that there was no infestation or damage from wood-destroying insects on the property. The inspection covered the readily accessible areas of the property, but did not include areas that were obstructed or inaccessible at the time of inspection. The report also stated that it was not a structural damage report nor a warranty as to the absence of wood-destroying insects.

In January, 1988, nineteen months after the inspection, Jim Hosford noticed conditions suggesting termite infestation and damage. He had the property inspected by a carpenter and, later, by two employees of the Pest Control Section of the United States Department of Agriculture. These parties reported substantial termite infestation and damage that had existed for more than two years and possibly as long as fifteen years. The parties also agreed that the damage should have been discovered if the recent, June, 1986 inspection by State Termite had been performed competently.

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Negligent Inspector

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The Hosfords consequently sued State Termite and the Inspector alleging negligence and several other theories of recovery.

Circuit Court Proceedings

In the Circuit Court of Lowndes County, Mississippi, State Termite did not deny that a pest control operator is held to a duty of reasonable care similar to that imposed upon anyone providing expert or specialized services to the public. Rather, State Termite claimed there was no contract between State Termite and the Hosfords, and therefore, the Hosfords had no basis for their suit. The circuit court agreed. State Termite had contracted with McCrary and therefore the Hosfords lacked privity of contract. Further, the court ruled that State Termite could not have foreseen that the Hosfords would rely on the inspection report. The circuit court granted summary judgment for State Termite and the Inspector and dismissed the complaint. The Hosfords appealed to the Supreme Court of Mississippi.

Privity of Contract

The Supreme Court of Mississippi rejected State Termite's lack of privity of contract argument. The court looked to a state statute in which the Mississippi Legislature had declared that privity of contract would not be a prerequisite to any suit for personal injury, property damage, or economic loss brought under negligence, strict liability, or breach of warranty. Miss. Code Ann. 11-7-20 (1991). Because the Hosford's action against State Termite alleged negligence, there was no legal consequence to the fact that the Hosfords did not have a contract with State Termite. Thus, State Termite could not assert lack of privity of contract as a defense.

Foreseeability

The Mississippi Supreme Court also rejected State Termite's defense of lack of foreseeability. The court looked to the Restatement (Second) of Torts 552 (1977) which

states that one who, in the course of business, supplies false information due to a failure to exercise reasonable care or competence in obtaining or communicating the information is liable to those who justifiably rely upon the information in their business transactions. However, under the Restatement, the supplier of false information is only liable to those whom he knows will use the information. The court also cited an analogous case that extended liability to those whom the supplier knows or reasonably should know will use the information. Therefore, the fact that McCrary, and not the Hos-

fords, requested the termite inspection was not decisive.

Because the record clearly reflected that McCrary bought and sold houses professionally, the court charged State Termite with inferential knowledge that McCrary was not planning to live in the house but would probably use the termite inspection report in connection with the sale of the house to another. Thus, the court found that both State Termite and the Inspector reasonably should have foreseen that McCrary's immediate purchaser would obtain and rely on the inspection report. In fact, the Hosfords did receive the report shortly after it was issued and did rely on its accuracy in purchasing the house.

Therefore, the Mississippi Supreme Court reversed the circuit court's decision and remanded the case for further proceedings.

Daniel Hynes

ANNOUNCEMENT

The *Loyola Consumer Law Reporter* is currently accepting lead articles and feature columns for publication in upcoming issues. The *Reporter* publishes articles by practitioners, scholars and consumer experts that explore in depth legal developments affecting consumers. Upcoming articles will address insurance issues for CERCLA claims and steps consumers can take to avoid environmental liability when purchasing real estate.

If you are interested in submitting an article to the *Reporter* please contact the Chief Lead Articles Editor, *Loyola Consumer Law Reporter*, Loyola University Chicago School of Law, One East Pearson Street, Chicago, Illinois 60611, (312) 915-7181.

Consumer Reliance On Statements About Pre-Existing Condition Coverage Creates Potential Liability For Insurance Company

In *Peek v. Reserve National Insurance Company*, 585 So. 2d 1303 (Ala. 1991), the Supreme Court of Alabama held that an insurance company could be liable for breach of contract and fraudulent misrepresentation when consumers relied on an insurance agent's statements about pre-existing condition coverage and the company later refused to pay the claim. The court also held, however, that the insurance company did not act in bad faith.

Background

On September 3, 1985, Rayburn and Eve Peek ("the Peeks") met with Lee Porter, Jr. ("Porter"), an agent of Reserve National Insurance Company ("Reserve National"), to purchase major medical health insurance for their family. At that time, the Peeks disclosed to Porter that their daughter had previously suffered menstrual difficul-