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Seeking someone to blame

As real estate deals fail, more losers sue lawyers

By Carol Lundberg

Emerging trends

As real estate deals turn disastrous, investors on the losing side are trying to take down their lawyers in the wreckage.

Such legal malpractice suits are becoming common as the real estate market has shattered return-on-investment expectations, and has bankrupted investors. Buyers walk away from deals, leaving sellers in the lurch. Or the transaction goes through, but months later investors lose their shirts as property values plummet.

"There are two types of legal malpractice cases," said Steven Susser, commercial litigator with Southfield-based Young & Susser PC: the "obvious mistake" and the "sore loser" scenarios.

In the first scenario, said Susser, a lawyer might miss a filing deadline and get sued because his client's case got thrown out of court.

Lawsuits that arise under the second scenario, however, tend to be more situational in nature, he said.

In economically hard-hit areas such as commercial real estate, "the losing party tries to recoup from the lawyer what he failed to get from the defendant," Susser said. "You're left with few options when deals fall apart."

So went the case of Southfield attorney Jennifer Grieco's client. Grieco, of Maddin, Hauser, Wartell, Roth & Heller, P.C.'s defense practice and insurance coverage group, said her client, a lawyer, had successfully been working real estate deals for years.

Back in 2004, when the housing bubble had not yet burst, he worked on a deal for a partnership of investors who wanted to develop a residential subdivision in Michigan. The lawyer also was a financial stakeholder, an investor in the deal.

He performed the due diligence and drew up the paperwork the transaction would require. Everyone made money on the deal, and everyone was happy, Grieco said.

But, in 2006, when the same group of investors reunited for another residential real estate deal, the outcome was completely different.

Just as the deal was coming together, the housing market fell apart.

Everyone, including Grieco's client, lost money. And no one was happy. The other partners sued him, claiming conflict of interest, even though he had lost as much money as they had.

"We were able to get the lawyer a good result, but he still wound up in a situation of being sued by the partners who really did believe he should have structured the deal differently," Grieco said.

Real estate lawyers increasingly are vulnerable to malpractice suits, said Michael J. Sullivan, of Southfield-based Collins, Einhorn, Farrell & Ulanoff, PC, adding that he has seen a rise in the number of claims in most practice areas.

Fifteen years ago, he said, the specialty most susceptible to a malpractice suit was personal injury.

"But that's changing," Sullivan said. "We're all over the board. Besides real estate, there are also a lot of complaints in divorce, business, probate, estate planning."

According to American Bar Association surveys of malpractice lawsuits, claims against real estate practitioners have surged since 2003.

For years, claims against personal injury lawyers held the top spot, making up 21.56 percent of all legal malpractice claims. But lawsuits against real estate lawyers are closing in quickly, jumping 3.59 percent since 2003; they now account for 20.05 percent of all legal-malpractice claims.

Not only are suits against real estate lawyers becoming more common; they also can be difficult to defend against because they often stem from a conflict-of-interest complaint.

Such complaints arise because the lawyers are often partners in the transactions that spawn the malpractice suits, said Mark A. Bush, of Fraser Trebilcock Davis & Dunlap, P.C. in Lansing. Bush works as coverage counsel for a major Michigan professional malpractice insurer, he said.

"The biggest problem, I believe, is lawyers wearing more than one hat and serving as co-investor in a business venture," Bush said. "Often you're dealing with folks with relationships that started 20 or 30 years ago. They become friends and confidants. The problem is that it's difficult to unscramble that egg once you get into multiple roles, as counsel and investor."

Results in those cases, if they go to trial, are unpredictable, said Michael P. Ashcraft Jr., a professional malpractice defense attorney at Plunkett Cooney in Bloomfield Hills.

"Conflicts of interest call into question the motives of the lawyer, whereas other cases focus only on the applicable standard of care," Ashcraft said. "It requires the jurors to try to get into the mind of the lawyer and answer the question: What was he thinking?"

One of the elements that probably saved Grieco's client is Michigan's "case within a case" standard.

The standard requires a plaintiff to prove not only that the defendant-lawyer didn't meet the standard of care, but also that if the lawyer had met the standard, the plaintiff would have prevailed in the underlying case, or would not have suffered harm.

"The economy had shifted dramatically" when the deal went sour, Greico said, "and it was not very likely that any development could have been successful at that time."

Sullivan said he expects an even larger increase in that type of legal malpractice case. Last year, he represented a lawyer who had worked on a business transaction that included some real estate.

Sullivan's client had represented a buyer who purchased a gas station. Two years after the purchase, the buyer concluded that the business was not doing as well as the seller had indicated it would.

"It was a buyer's remorse case," Sullivan said. "They said this isn't what they bargained for."

The buyer wanted to sue the seller.

"But the seller, well, he wasn't collectible. He was just kind of gone," Sullivan said. "So they went after their attorney."

The jury found the buyers hadn't been damaged, and Sullivan's client won. To prevent being sued in the first place, Sullivan said, his client could have made certain that the buyers more clearly understood the attorney's role in the transaction (See "Save yourself" at top of page.)

"If a property was worth \$1 million three years ago, and today it's worth less than \$500,000, someone is not going to be happy, and they're going to be looking for someone to blame," Sullivan said. "The client has to understand that you're a lawyer and can't make business decisions for them. I can paper up a transaction all day long, but I can't tell you if it's a good transaction or not."

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