



Professional Practices

Lesson 16

Agency and Brokerage

45 Hour Louisiana Post-Licensing

Overview

This course will review the areas of mandate, agency, brokerage and representation under Louisiana law. There is a rich and often confusing history of these areas in Louisiana and these materials will navigate through that history arriving at the current modern usage but with discussions of current areas of conflict. This course will make extensive use of case studies using actual Louisiana cases as sources.

A general note about citations is in order. La. C.C. refers to the Louisiana Civil Code. La. R.S. (N)(N) will refer to the Louisiana Revised Statute (the first (N) being the Article number and the second (N) being the Section number. LA.R.S. 37:1430-1470, the Louisiana Real Estate Licensing Law, may be often referred to as the Licensing Law. Citations such as “227 LA. 537,79 So.2nd873 (1955)” refer to cases decided by Louisiana appellate courts.

The Concept

The concept of a broker or intermediary has been recognized through history and in all manner of commerce. Many languages had a name for broker activity (French – broceur or brocheor; middle English – Brokour or Brocour; Old Dutch – Brokere; Danish – Bruger; Swedish – Bruk; Old English – Broc). While the activities of these persons varied, they all involve an idea that a broker was an intermediary but also captures the idea that a broker had a larger role in setting customs and practices in a particular trade area.

Louisiana law, until 1977, recognized brokers specifically. La. C.C. Articles 3016-3020 of the Code of 1975 provided as follows:

“Art. 3016. The broker or intermediary is he who is employed to negotiate a matter between two parties, and who, for that reason, is considered as the mandatary of both.

Art. 3017. The obligations of a broker are similar to those of an ordinary mandatary, with this difference, that his engagement is double, and requires that he should observe the same fidelity towards all parties, and not favor one more than another.

Art. 3018. Brokers are not responsible for events which arise in the affairs in which they are employed; they are only, as other agents, answerable for fraud or faults.

Art. 3019. Brokers, except in case of fraud, are not answerable for the insolvency of those to whom they procure sales or loans, although they receive a reward for their agency and speak in favor of him who buys or borrows.

Art. 3020. Commercial and money brokers, besides the obligations which they incur in common with other agents, have their duties prescribed by the laws regulating commerce.”

These articles are revealing. Notice that a “broker” or “intermediary” is representing, and presumably being paid by, both parties to a transaction. La. C.C. Art. 3017 states that the “engagement is double” and puts the broker in a fiduciary relationship to both parties and the broker cannot favor one more than another. These Articles further demonstrate that the broker was not answerable to either party for the failure of one of them to perform nor for the solvency of the parties even if they receive a “reward” for their agency (i.e. are compensated) nor even if they speak “in favor of” one of the parties.

Viewing this from the commercial practices of the time, this relationship was workable. Let us take a cotton broker working in a port city, for example. Cotton is a fungible commodity. That is, with certain allowances for quality which the broker could judge, each bale is like any other bale. Next, prices were determined on site by a readily apparent market. Minimal knowledge of the law of supply and demand might be necessary but not often. In that scenario, the broker's main efforts would be directed to knowledge of who the sellers were and the quantity they had available and who the buyers were and the quantity they wished to purchase. A broker or intermediary in that circumstance would rarely encounter ethical questions that would pose issues. As long as the broker did not commit fraud that person would be relatively protected.

Mandate

Mandate is long recognized legal institution. It often goes under its common law name of "power of attorney." While technically incorrect, the use of the term power of attorney to describe mandate is widespread. Louisiana has very particular and expressed rules on mandate.

Mandate is defined as:

"Art. 2989. Mandate Defined: A mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal."

The interests served under a mandate may serve the exclusive or common interest of the principal, mandatary or third person (La. C.C. 2991). An example of exclusive interest would be a mandate authorizing a mandatary to sign a sale of the principal's property. An example of common interest would be a mandate authorizing the sale of property owned jointly by the principal and mandatary.

The mandate is presumed to be gratuitous, that is, the mandatary is not imposing an obligation on the principal such as payment of a fee. Also, the mandate can be onerous if that is agreed to, that is, by contract the principal is obligated for something to the mandatary such as payment of a fee (La. C.C. 2992).

Of real interest to real estate practitioners is La. C.C. Art. 2993. That Article provides:

"Art. 2993. Form.

The Contract of mandate is not required to be in any particular form. Nevertheless, when the law prescribed a certain form for an act, a mandate authorizing the act must be in that form."

This is sometimes called the "rule of equal dignity." If the act commissioned by the principal must be in a certain form to be valid, then the form of the mandate must be in that same form. As an example, if the act to be signed by the mandatary must (or is going) to be done in the presence of a Notary and two witnesses, that is, authentic form, then the mandate must also be in authentic form. We should note here modern closing practices. For example, a sale of immovable property (real estate) need not be in authentic form to be valid; it only needs to be in writing to be valid. However, in modern practice notaries require the transfer document to be in authentic form for many sound legal reasons. Therefore, they will require that the mandate be in authentic form. Other reasons exist for closing attorneys to require mandates to sell to be in authentic form. Authentic acts are "self-proving" that is, they require no testimony as to the authenticity of the principal's signature but may be directly introduced as evidence. Since principals will often reside in another state (or unfortunately, may die), if a dispute arises the mandate is self-proving.

The authority granted may be general (La. C. C. Art. 2994), that is a grant of general authority to whatever is appropriate under the circumstances. Further, under La. C.C. Art. 2995, the mandatary, even without a specific grant of authority may perform acts incidental to or necessary for the performance of a mandate.

In contrast however, certain acts must be specifically granted for the mandatary to have the authority to act. Under La. C.C. Art. 2996 the authority to transfer ownership, acquire, encumber (e.g. mortgage) or lease property must be expressly given.

Old La. C.C. Art. 3017, discussed above in brokerage, has been replaced with La. C.C. Art. 3000. It states:

“Art. 3000. Mandatary of both parties.

A person may be the mandatary of two or more parties, such as a buyer and a seller, for the purpose of transacting one or more affairs involving all of them. In such a case, the mandatary must disclose to each party that the also represents the other.”

While this appears at first glance to not be much of a change from the old Article 3017, of significance, the terms “broker” and “intermediary” have been dropped. The comments to Article 3000 state that the rules governing particular types of brokerage contracts are found in “special legislation.” A prime example of “special legislation” is the Licensing Law.

“SPECIAL LEGISLATION” THE HISTORY AND BACKGROUND OF THE REAL ESTATE LICENSING LAW.

The first Licensing Law was passed by the Louisiana legislature in 1920, to become effective after January 1, 2021. The 1920 Licensing Law was an attempt to regulate a commercial industry by defining the business of real estate brokerage and setting standards to become a broker and “salesman.” Broker was defined as: “A real estate broker within the meaning of this Act is any person, firm, partnership, association, co-partnership or corporation, who for a compensation or valuable consideration sells or offers for sale, buys or offers to buy, or negotiate the purchase or sale or exchange of real estate, or who leases or offers to lease or rents or offers for rent, any real estate or the improvements thereon for others, as a whole or partial vocation.”

A salesman was defined as: “A real estate salesman within the meaning of this Act is any person who for a compensation or valuable consideration is employed either directly or indirectly by a licensed real estate broker to sell or offer to sell, or buy or offer to buy, or to negotiate the purchase or sale or exchange of real estate, or lease or offer to lease, rent or offer for rent any real estate for others as a whole or partial vocation.” Exempted from the licensing requirement were: “persons holding a duly executed power of attorney from the owner for the sale, leasing or rental of real estate...”

At this point, the Licensing Law did not attempt to separate out the dual representation obligations under the Code. The only oblique reference was the exemptions of persons who were mandataries under the Civil Code that is those acting under a “power of attorney.”

The Licensing Law did clearly separate the role of broker and salesman. The salesman had to be working under a broker. The Licensing Law made it unlawful for a salesman to accept any commission from anyone other than his employer who was required to be a licensed broker.

The Real Estate Commission (also created by the 1920 act) was given the power to suspend or revoke a broker or salesmen's license for:

Section 17:

“(d) Acting for more than one party in a transaction without knowledge of all parties thereto...”

Since a broker, at that time under the Civil Code, was an ‘intermediary,’ that is representing both parties, trying to reconcile the Licensing Law with the Civil Code was difficult. On one hand the Civil Code defined brokers as representatives of both parties. On the other hand, the Licensing Law, by requiring disclosure of such representation, implied that a licensed real estate broker is expected to represent its client; if it is representing anyone else this fact must be disclosed. Said another way, by requiring disclosure of dual representation the Licensing Law implies that the broker is normally representing one party to the transaction.

This dichotomy was confusing. It came to fruition in a Louisiana Supreme Court Case. (79 So.2d873).

In that case the broker was the listing broker. The party suing was a potential buyer. This buyer had made several offers, all rejected. However, broker did indicate a price he thought would be acceptable. Buyer then made an offer for that price. Buyer alleged that broker never presented the offer to the Seller and falsely represented to the Seller that another, lower, offer was the highest obtained. Seller accepted the lower offer and sold the property. That person then put the property on the market for 2-1/2 times his purchase price. Potential buyer sues, alleging that he needed the property for expansion of his business and he wants as damages the difference between his offer and the correct asking price.

Now, things get interesting. Noteworthy here is that the Seller, who accepted the lower offer, did not sue. Broker defended the suit with a classic defense: “I owe no duty to the potential buyer. I have no contract with him. I never became his mandatary. I owe him no duty.”

The Louisiana Supreme Court found otherwise. First, the Supreme Court noted the broker's defense was true in most cases, but in this case they were governed by special laws, i.e., the Licensing Law. The Court noted that for the broker to act at all, he had to be licensed under the Licensing Law. The Court noted that under (then) the Licensing Law Section 1447 that:

“Anyone who is injured or damaged by the agent or broker by any wrongful act done in the furtherance of s business or by any fraud or misrepresentation by the agent or broker may sue for the recovery of the damage before any court of competent jurisdiction.”

The Court found that an object and purpose of the Licensing Law was to protect the general public interest and welfare. It stated that the Licensing Law put real estate brokerage in the status of a public business and that brokers owed a duty to the public whether they had a contract with them, were their mandatary, or otherwise.

At this point the Supreme Court is bringing into play duties brokers owe to those with whom they have no contract. The Court did not use Civil Code Article 3017, but rather relied on the essence of the Licensing Law, that is, a body of regulations made to protect the public at large. Brokers now knew that their duties went beyond these to their client but also to all parties to the transaction.

However, the question now became: What are the limits of the duty to third persons? Would, for example, a broker violate its duty in accepting an offer from a buyer when the broker knew the Seller would accept less? The case law had opened up a broad vista of duties but the boundaries remained unclear.

In 1972, the Licensing Law was amended; however, the 1972 changes made no attempt to resolve the areas where the duties of brokers to third parties lay. (The 1972 amendments added the education requirements for broker's and salesman's license and the Fair Housing declaration.)

In 1978, major revisions were made to the Licensing Law. For our purposes those revisions carried forward the concept of representation of a single party without clarifying the range of duties owed to third parties by brokers and agents.

The 1978 revisions did a number of things. In Section 1431(2), under the definition of "Real Estate Broker," added that a person was acting as a broker "whether pursuant to a power of attorney or otherwise" when acting for another for compensation in performing the defined real estate acts. This was a clear departure from the 1920 act. The 1978 revisions also touched on the broker relationship in the section on causes for suspension or revocation of a license.

Section 1454: Causes for suspension or revocation of license set out in part that a license may be suspended or revoked for:

- "(8) Acting in the dual capacity of agent and undisclosed principal in any transaction;*
- (13) Negotiating a sale, exchange, or lease of real estate directly with an owner or lessor if he knows that such owner has a written outstanding contract in connection with such property granting an exclusive agency or exclusive right to sell to another broker;*
- (19) Acting for more than one party in a transaction without the knowledge of all parties for whom he acts;*
- (25) Failure of a licensee to make clear for which party he is acting and if being compensated by more than one party, failure to divulge this fact to all parties; ..."*

These rules operate under the presumption that a broker is representing only one party to the exclusion of all others. The above rules require that if that is not the case, that fact must be divulged.

In 1997, the legislature addressed this conflict. In that year the legislature enacted a revision to the Civil Code (not the Licensing Law) by adding Chapter 4, Sections 3891-3899. This chapter is titled "Agency Relations in Real Estate Transactions," our so called dual agency rules. In this Act, the legislature recognized "dual agency" and laid the ground work for a licensee's duties in that circumstance. The Act is reproduced in whole as follows:

§ 3891. Definitions:

- (1) "Agency" means a relationship in which a real estate broker or licensee represents a client by the client's consent, whether express or implied, in an immovable property transaction.
- (2) "Broker" means any person licensed by the Louisiana Real Estate Commission as a real estate broker.
- (3) "Brokerage agreement" means an agreement for brokerage services to be provided to a person in return for compensation or the right to receive compensation from another.
- (4) "Client" means one who engages the professional advice and services of a licensee as his agent.
- (5) "Commission" means the Louisiana Real Estate Commission.

(6) (a) "Confidential information" means information obtained by a licensee from a client during the term of a brokerage agreement that was made confidential by the written request or written instruction of the client or is information the disclosure of which could materially harm the position of the client, unless at any time any of the following occurs:

- (i) The client permits the disclosure by word or conduct.
- (ii) The disclosure is required by law or would reveal serious defect.
- (iii) The information becomes public from a source other than the licensee.

(b) Confidential information shall not be considered to include material information about the physical condition of the property.

(c) Confidential information can be disclosed by a designated agent to his broker for the purpose of seeking advice or assistance for the benefit of the client.

(7) "Customer" means a person who is not being represented by a licensee but for whom the licensee is performing ministerial acts.

(8) "Designated Agency" means the agency relationship that shall be presumed to exist when a licensee engaged in any real estate transaction, except as otherwise provided in this Chapter, is working with a client, unless there is a written agreement providing for a different relationship.

(9) "Designated agent" means a licensee who is the agent of a client.

(10) "Dual agency" means any agency relationship in which a licensee is working with both buyer and seller or other landlord and tenant in the same transaction. However, such a relationship shall not constitute dual agency if the licensee is the seller of the property that he owns or if the property is owned by a real estate business of which the licensee is the sole proprietor or agent. A dual agency relationship shall not be construed to exist in a circumstance in which the licensee is working with both landlord and tenant as to a lease which does not exceed a term of three years and the licensee is the landlord.

(11) "Licensee" means any person who has been issued a license by the commission as a real estate salesperson or a real estate broker.

(12) "Ministerial acts" means those acts that a licensee may perform for people that are informative in nature. Examples of these acts include but are not limited to:

- (a) Responding to phone inquiries by persons as to the availability and pricing of brokerage services.
- (b) Responding to phone inquiries from a person concerning the price or location of property.
- (c) Conducting an open house and responding to questions about the property from a person.
- (d) Setting an appointment to view property.
- (e) Responding to questions from persons walking into a licensee's office concerning brokerage services offered or particular properties.

- (f) Accompanying an appraiser, inspector, contractor or similar third party on a visit to a property.
 - (g) Describing a property or the property's condition in response to a person's inquiry.
 - (h) Completing business or factual information for a person represented by another licensee on an offer or contract to purchase.
 - (i) Showing a person through a property being sold by an owner on his or her own behalf.
 - (j) Referral to another broker or service provider.
- (13) "Person" means and includes individuals and any and all business entities, including but not limited to corporations, partnership, trusts and limited liability companies, foreign or domestic.
- (14) "Substantive contact" means that point in any conversation where confidential information is solicited or received. This includes any specific financial qualifications of the consumer or the motives or objectives in which the consumer may divulge any confidential, personal, or financial information, which, if disclosed to the other party to the transaction could harm the party's bargaining position. This includes any electronic contact, electronic mail, or any other form of electronic transmission.

*Added by Acts 1997, No. 31, § 1, eff. March 1, 1998.
Amended by Acts 199, No. 452, § 1; Acts 2010, No. 247.*

§ 3892. Relationships between licensee and persons

Notwithstanding the provisions of Civil Code Articles 2985 through 3032 or any other provisions of law, a licensee engaged in any real estate transaction shall be considered to be representing the person with whom he is working as a designated agent unless there is written agreement between the broker and the person providing that there is a different relationship or the licensee is performing only ministerial acts on behalf of the person.

Added by acts 1997, No. 31, § 1, eff. March 1, 1998.

§ 3893. Duties of licensees representing clients

A. A licensee representing a client shall:

- (1) Perform the terms of the brokerage agreement between a broker and the client.
- (2) Promote the best interests of the client by:
 - (a) Seeking a transaction at the price and terms stated in the brokerage agreement or at a price and upon terms otherwise acceptable to the client.
 - (b) Timely presenting all offers to and from the client, unless the client has waived this duty.
 - (c) Timely accounting for all money and property received in which the client has, may have, or should have had any interest.

- (3) Exercise reasonable skill and care in the performance of brokerage services.
- B. A Licensee representing a client does not breach a duty or obligation to the client by showing alternative properties to prospective buyers or tenants or by showing properties in which the client is interested to other prospective buyers or tenants.
- C. A licensee representing a buyer or tenant client does not breach a duty or obligation to that client by working on the basis that the licensee shall receive a higher fee or compensation based on a higher selling price.
- D. A licensee shall not be liable to a client for providing false information to the client if the false information was provided to the licensee by a customer unless the licensee knew or should have known the information was false.
- E. Nothing in this Section shall be construed as changing licensee's legal duty as to negligent or fraudulent misrepresentation of material information.
- F. Nothing in this Chapter or in Chapter 17 of Title 37 of the Louisiana Revised Statutes of 1950 shall be construed as to require agency disclosure with regard to a lease that does not exceed a term of three years and under which no sale of subject property to the lessee is contemplated.

*Added by Acts 1997, No. 31, § 1, eff. March 1, 1998
Amended by Acts 1999, No. 452, § 1.*

§ 3894. Licensee's relationship with customers

- A. Licensees shall treat all customers honestly and fairly and when representing a client in a real estate transaction may provide assistance to a customer by performing ministerial acts. Performing those ministerial acts shall not be construed in a manner that would violate the brokerage agreement with the client, and performing those ministerial acts for the customer shall not be construed in a manner as to form a brokerage agreement with the customer.
- B. A licensee shall not be liable to a customer for providing false information to the customer if the false information was provided to the licensee by the licensee's client or client's agent and the licensee did not have actual knowledge that the information was false.

Added by Acts 1997, No. 31, § 1, eff. March 1, 1998.

§ 3895. Termination of agency relationship

Except as may be provided in a written agreement between the broker and the client, neither a broker nor any licensee affiliated with the broker owes any further duties to the client after termination, expiration, or completion of performance of the brokerage agreement, except to account for all monies and property relating to the transaction and to keep confidential all confidential information received during the course of the brokerage agreement.

Added by Acts 1997, No. 31, § 1, eff. March 1, 1998.

§ 3896. Compensation; agency relationship

The payment or promise of payment of compensation to a broker is not determinative of whether an agency relationship has been created.

Added by Acts 1997, No. 31, § 1, eff. March 1, 1998.

§ 3897. Dual agency

A. A licensee may act as a dual agent only with the informed written consent of all clients. Informed consent shall be presumed to have been given by any client who signs a dual agency disclosure form prepared by the commission pursuant to its rules and regulations. The form prepared by the commission shall include the following language:

“What a licensee shall do for clients when acting as a dual agent:

- (1) Treat all clients honestly.
- (2) Provide information about the property to the buyer or tenant.
- (3) Disclose all latent material defects in the property that are known to the licensee.
- (4) Disclose financial qualification of the buyer or tenant to the seller or landlord.
- (5) Explain real estate terms.
- (6) Help the buyer or tenant to arrange for property inspections.
- (7) Explain closing costs and procedures.
- (8) Help the buyer compare financing alternatives.
- (9) Provide information about comparable properties that have sold so both clients may make educated decisions on what price to accept or offer.”

B. A licensee shall not disclose to clients when acting as a dual agent:

- (1) Confidential information that the licensee may know about either of the clients, without that client's permission.
- (2) The price the seller or landlord will take other than the listing price without the permission of the seller or landlord.
- (3) The price the buyer or tenant is willing to pay without the permission of the buyer or tenant.

- C. The written consent required in Subsection A of this Section shall be obtained by a licensee from the client at the time the brokerage agreement is entered into or at any time before the licensee acts as a dual agent.
- D. No cause of action shall arise on behalf of any person against a dual agent for making disclosures allowed or required by this Section, and the dual agent does not terminate any agency relationship by making the allowed or required disclosures.
- E. In the case of dual agency, each client and licensee possess only actual knowledge and information. There shall be no imputation of knowledge or information among or between the clients, brokers, or their affiliated licensees.
- F. In any transaction, a licensee may without liability withdraw from representing a client who has not consented to a disclosed dual agency. The withdrawal shall not prejudice the ability of the licensee to continue to represent the other client in the transaction or limit the licensee from representing the client in other transactions. When a withdrawal occurs, the licensee shall not receive a referral fee for referring a client to another licensee unless written disclosure is made to both the withdrawing client and the client that continues to be represented by the licensee.
- G. A licensee shall not be considered as acting as a dual agent if the licensee is working with both buyer and seller, if the licensee is the seller of property he owns, or if the property is owned by a real estate business of which the licensee is the sole proprietor and agent. A dual agency shall not be construed to exist in a circumstance in which the licensee is working with both landlord and tenant as to a lease which does not exceed a term of three years and the licensee is the landlord.

Added by Acts 1997, No. 31, § 1, eff. March 1, 1998. Amended by Acts 1999, No. 452, § 1.

§ 3898. Subagency

Subagency can only be created by a written agreement. A licensee is not considered to be a subagent of a client or another broker solely by reason of membership or other affiliation by the broker in a multiple listing service or other similar information source.

Added by Acts 1997, No. 31, § 1, eff. March 1, 1998.

§ 3899. Vicarious liability

A client shall not be liable for the acts or omissions of a licensee in providing brokerage services for or on behalf of the client.

Added by Acts 1997, No. 31, § 1, eff. March 1, 1998.

In sum, what this Act did was redefine the old broker notion of “intermediary.” It clearly sets out duties to the client, including limitations, and through the definition of “ministerial acts,” seeks to provide guidance on dealing with third parties. Last, and importantly, this relationship can exist only if there is informed written consent of all parties. Informed consent is presumed when the dual agency disclosure form prepared by the Real Estate Commission is used.

Case Studies

The following are a series of actual Louisiana cases to illustrate the principles in the preceding materials.

CASE 1

Facts:

On June 2, 1978, O purchased a house from HUD without warranty for \$11,500. O then sold the property to X on September 8, 1978 for \$30,000. O's son, a licensed real estate broker, acted as the agent in both transactions. X discovered the house had foundation problems in the form of a cracked slab after they purchased the house.

O purchased the house as a result of a HUD advertisement that stated the foundation failure. After she purchased the house and up until the time that the X bought it, O and her son renovated the property. X made several visits to the home during this time, but did not notice the foundation failure due to the constant clutter and debris.

Issue:

Whether defendant, O's son, as broker, can be held liable as an "owner in fact" for a redhibitory defect

Held:

He cannot be held liable under a redhibitory defect claim, but could be liable under other theories.

Discussion:

Redhibitory actions can only exist between a buyer and a seller. A person must have some legal ownership that can be attributable to him in order to be considered a seller. Son acted only as the broker and agent in both sales of the property. O was the record owner of the property at the times of the sales, and she signed the sale agreements. Son was neither a seller nor an owner and could not be liable under a redhibitory action.

Other theories that X tried to find the son liable under were joint venture, fraud, liability, and negligent misrepresentation. The law of partnership governs joint ventures in LA. "In order to form a valid joint venture in Louisiana, the following elements are required:

- (A) All parties must consent to formation of a partnership. LSA-C.C. art. 2805.
- (B) There must be a sharing of losses of the venture as well as the profits, LSA-C.C. arts. 2811, 2813, 2814.
- (C) Each party must have some proprietary interest in, and be allowed to exercise some right of control over, the business¹. The facts in the present case do not show any of the elements exist, and thus son cannot be held under joint venture.

¹ *Josephs v. Austin*, 420 So. 2d 1181, 1184 (La. Ct. App. 1982) writ denied, 427 So. 2d 870 (La. 1983).

Legal fraud requires two elements: intent to defraud and actual or probable damage, which must be proved by clear and convincing evidence. Son is not liable for fraud because the X failed to show that an intentional misrepresentation occurred.

Son is liable under the theory of negligent misrepresentation based on his knowledge of the house, its history and his subsequent failure to inform X of this knowledge. Realtors have the specific duty to communicate accurate information to the seller or purchaser, or both when the circumstances justify it. Because the nature of real estate usually involves significant expenditures and purchasers in a competitive marketplace are forced to move quickly, it is especially important to convey accurate information when realtors represent both the buyer and the seller. Both parties are relying on his honesty, access to information, knowledge, and expertise. By failing to disclose the vital piece of information, Son caused X to suffer losses. Son is liable in damages to X. X was entitled to \$6,500, the difference between the sale price and the fair market value of the house at the time of the sale, as well as \$2,500 for repairs to other parts of the house that were damaged due to the cracked foundation.

Moral:

A Broker can be liable to a third party by negligent misrepresentation.

CASE 2

Facts:

Seller employed Broker as real estate brokers to find a purchaser for his bar and restaurant. Broker secured and a Purchaser, who signed an agreement to purchase the business for \$12,000. The agreement stated that the sale would be consummated two days later and subject to the bulk sales law. Purchaser gave the Broker a deposit of \$3500. With Purchaser present, the Broker gave Seller a \$1000 check as representation of the merchandise currently in the business establishment. Purchaser neither objected nor protested this payment. Purchaser occupied and began operating the business even though the act of sale was not authentically executed pursuant to the bulk sales law. A creditor of Seller seized the entire business. Purchaser negotiated with the creditor and took three truckloads of merchandise from the premises.

Issue:

Whether Purchaser is entitled to a refund of the \$1,000 given to Seller, and, if so, the party or parties liable therefore.

Analysis:

Because Broker brought Seller and Purchaser together into a transfer of business agreement, Broker became their joint agent. As such, they were bound and obligated to treat both parties with equal fairness, trust, and fidelity. Purchaser was present and did not object when Broker issued a check to Seller. Furthermore, he went into possession and operated the business. Purchaser's actions resulted in a ratification of Broker's act of paying Seller \$1,000. When an agent is unauthorized to act, the client can ratify the contract by accepting the benefits that arise from the contract and not immediately rejecting the contract upon learning of its existence.

Moral:

A Broker can become a joint agent by its actions.

CASE 3

Facts:

Real estate Broker is trying to recover a 6% commission and attorney's fees as a result of the Purchaser defaulting in a contract for the sale of real estate for which he was a Broker. The agreement was conditioned upon Purchaser being able to obtain a mortgage through a lending agency. If he was unable to do so, the Seller would grant Purchaser a loan if he had good credit. Purchaser was unable to get a loan. When he told Broker, Broker insisted that he pay the 10% deposit that was a part of the purchase agreement or he would be considered in default. The Seller did not put Purchaser in default; he sold the property to someone else and used Broker as the agent, who received his normal commission for making the sale.

Analysis:

Where terms were conditioned upon the ability of Purchaser to obtain a mortgage through a lending agency or vendor financing the mortgage if Purchaser's credit rating was good, the only way Broker could receive his commission from Purchaser would be if Purchaser "had failed, in bad faith, to obtain a loan from any lending agency, or had refused to take title from the vendor with a vendor's lien and mortgage securing the unpaid part of the purchase price²." A purchase of an immovable contingent on the ability of the purchaser to secure a loan to finance the purchase is a contract subject to a suspensive condition. If the purchaser is unable to receive a loan through no fault of his own, he is released from the agreement and entitled to return of his deposit. When a vendor hires a real estate broker to sell his property, the legal relationship between the two is that of principal and agent. The broker also becomes agent or mandatory of the potential purchaser that he finds. Based on the terms in the purchasing agreement, Broker was under fiduciary duty to request the vendor to finance the purchase when he had failed to find a loan through an agency. Broker was not entitled to commission from Purchaser where Broker did not inform vendor of Purchaser's un-success in obtaining a loan through an agency and failing to make Purchaser's request of the vendor supplying the loan.

Moral:

Broker owes a fiduciary duty to a third party Buyer.

² *Treadaway v. Piazza*, 156 So. 2d 328, 330 (La. Ct. App. 1963).

CASE 4

Facts:

In 2001, Seller decided to sale their tract of land in Tangipahoa Parish. They found a prospective purchaser, who offered to purchase the land for \$52,000. This offer was reduced to an "Agreement To Purchase or Sale," which was signed immediately by the Buyer. The offer stipulated that it had to be accepted by December 11 at 3:00 p.m. and that any changes in this deadline should be reduced to writing and signed by both parties.

Seller did not meet with their agent to sign the papers as planned on December 11. Still wanting to go through with the deal, their agent created an "addendum" that stipulated that the purchase agreement must be signed by December 13 at 3:00 p.m. The Purchaser signed at 11:00 and gave the documents to his agent. The Seller's agent picked them up after 3:00 p.m. The Seller received the documents at 4:48 p.m. on December 13, and the wife refused to give the agreement back to the agent after receiving it. It was received after the deadline and apparently the Seller had changed their mind about selling the property.

Analysis:

The purchaser sued the Seller in hopes of enforcing the purchase agreement. The court determined that it was the purchaser who made the original offer to buy the property. The Seller, who did not sign the purchase agreement by the initial deadline, then made a counteroffer when they had their agent draw up the addendum. The addendum required the papers to be signed and delivered to the Seller by 3:00 p.m. on December 13. The court ruled that since they were received at 4:48 p.m., which was after the 3:00 p.m. deadline, there was no valid transaction and that the purchase agreement could not be enforced. *2003-2424 (La. App. 1 Cir. 10/29/04), 897 So. 2d 68*

Moral:

Brokers should follow the rules of offer and acceptance.

CASE 5

Facts:

A business specialized in buying, remodeling, and reselling houses. This business contacted a local real estate agent, who showed them the local properties available in the Multiple Listing Services (MLS) list. The business picked out a house in a local subdivision, and the house was listed as 2,132 square feet of living area. The business executed a purchase agreement for the home, which contained a clause relieving any liability from the agent and seller for any inadvertent inconsistencies or omissions. The purchase agreement also allowed the buyer ten days to inspect the house before executing the sale. The business, electing not to have the house inspected or appraised, purchased the home for \$148,000. They hoped to renovate and resell it for \$181,220, or \$85 per square foot of living area.

After purchasing the house, the business came to find that the MLS square footage listing was incorrect. The house actually had 1,861 square feet of living area. The business renovated the house for \$14,000 and sold it for \$155,000.

Analysis:

Since the transaction resulted in a net loss, the business filed suit against the real estate agent and her agency for negligently misrepresenting the house in order to sell it. The court realized that the agent did have a fiduciary duty to the purchasers. If the agent made any intentional misrepresentations, she would be liable to the business. However, the court found that it was common practice for agents to rely on the MLS listings for things like measurements. The agent did not intentionally deceive the purchasing business. Also, the business had a ten day window to have the house measured and appraised but elected not to do so. Upon these findings, the agent and agency were not liable to the purchasing business for its losses. *2007-1373 (La. App. 1 Cir. 7/17/08), 993 So. 2d 228*

Moral:

A Broker's fiduciary duty means that an intentional act violates that duty.

CASE 6

Facts:

S sold a house to M, which was listed with Broker for \$112,000. The property was to be sold in an “as is” condition. The act of sale did not include any reference to the “as is” provision that was in the purchase agreement. After the sale, M sent a carpenter to the property; the carpenter informed them that problems may exist with the foundation of the house. A foundation expert inspected the house and the foundation and informed M that the house needed a new foundation, replacement of the sills, and leveling of the house. M had this work completed and then sued S for a reduction in the purchase price. S had knowledge of the rotted sill and informed Broker of this defect. Broker confirmed this and stated he informed the president of M about the sill; however, M denied that he received this information.

Analysis:

“A real estate broker or salesman (agent) is not considered to be an agent within the purview of the mandate provisions contained in Article 2985 *et seq.* of the Louisiana Civil Code.” As a result, knowledge cannot be imputed to M on the sole basis that its real estate agent was aware of the problem. Broker owed a duty to disclose to M any material defects about which he knew. Because the agent failed to do this thus leaving M unaware of the defect, S should be allowed to recover from Broker the amount paid to M for the sill replacement. Prior to the act of sale, M could have discerned from simple inspection that a problem existed with the foundation of the house based on the several apparent defects in the structure of the property. Because it failed to do so, M cannot recover from S the cost of the foundation replacement. 419 So. 2d 981, 983 (La. Ct. App. 1982)

Moral:

A broker is not a mandatary.