

Coming up short

What are the damages when the actual square footage doesn't measure up?

by J. Kent Newsom

Texas real estate brokers should take note of a recent opinion in the case *Matheus vs. Sasser, et al.* In this lawsuit, the listing agents and broker were sued for misrepresenting the number of square feet in the listed house. The agents incorrectly interpreted the information presented by the Tarrant County Appraisal District through the MLS. The MLS information reported the total number of square feet in the house separately from the number of square feet in the second floor. The agents mistakenly added these two numbers, which caused an overstated size of the house by 625 square feet.

At trial, the purchaser contended his offer was \$81.37 per square foot and, therefore, his damages were \$50,856.25 (625 square feet x \$81.37). Representing the agents and broker, I argued that the purchaser failed to show damage, because the mere calculation of price per square foot times the number of "missing" square feet is not a proper measure of damage. The appraisal correctly stated the true size of the house; however, the purchaser did not read the appraisal until after closing. The appraisal also reported a fair market value that exceeded what the purchaser actually paid for the house. The agents and broker argued there was no evidence to support the purchaser's damages. The trial court agreed.

The Second Court of Appeals at Fort Worth agreed with the broker and the trial court that the purchaser had failed to show evidence of damage. The Texas Deceptive Trade Practices Act requires that the purchaser could recover damages under either of two measures: "out of pocket" or "benefit of the bargain." The out-of-pocket determination measures the difference in the value the purchaser paid versus the value he actually received. The benefit-of-the-bargain method measures the difference between the value as represented and the value as received. The purchaser in this lawsuit offered no proof as to the value of the property as received or as represented by the agents and broker. The only evidence of value was the appraisal, which showed the house was actually worth more than the purchase price.



The appeals court stated that the purchaser's calculation of damage by simply making a multiplication calculation was insufficient to prove damage.

It is important to note that a different scenario could support an award of damages based upon mere mathematical calculation. For example, if a contract provides that a purchaser will pay \$1,000 per acre for a 500-acre ranch and the property has only 450 acres, damages could easily be calculated. This would be a contract with a "per unit" contract price. In *Matheus*, the purchaser did not enter into a contract requiring him to pay \$81.37 per square foot. Rather, the final offer was simply "in gross" at a contract price of \$343,225.

This case is significant in that purchasers can no longer assume they have recoverable damage if the size of the house is less than represented by the real estate broker. Purchasers will have to prove damage, which may not always be easy. ★

J. Kent Newsom is a partner in the Dallas law firm of Newsom, Terry & Newsom LLP. You can e-mail him at kentnewsom@ntnlaw.com.

The TAR Legal Department recommends that if you list the square footage of a property, you should always quote the source of the information. Also, consider using TAR form 2506, *Notice of Information From Other Sources*.