A TALE OF TWO TERMITES

It was the best of houses, it was the worst of houses.
It was the age of disclosure, it was the age of seller diversion.
It was the epoch of belief, it was the epoch of inspection incredulity
it was the spring of a good market, coming from the winter of despair,
the sellers had everything before them, but the buyers had nothing.

Such is the tale of two termite letters (with all due respect to Charles Dickens).

Frequently I am asked what to do in the following situation: the seller has a termite inspection done, which notes substantial problems (or as often, minor but irritating problems). The seller is incredulous for whatever reason, does not believe there is a problem, and believes the inspection company is simply trying to make money by inventing things to fix or treat. He asks you, the listing agent, to choose a different company and get a second opinion. You do so. That second opinion is as clear as day and says there is no problem. Since this confirms exactly what the seller believes, the seller instructs you to use the second letter instead of the first for the clear letter required under the contract. You personally also believe the first letter is invalid (you wonder if they even went to the right house) and so you are inclined to use the second letter.

Must you disclose the first letter under those circumstances?

Of course you must.

Va. Code § 54.1-2131 outlines a listing agent's duties to a buyer and it provides in relevant part as follows:

> "Licensees shall treat all prospective buyers honestly and shall not knowingly give them false information. A licensee engaged by a seller

> shall disclose to prospective buyers all material adverse facts pertaining to the physical condition of the property which are actually known by the licensee. A licensee shall not be liable to a buyer for providing false information to the buyer if the false information was provided to the licensee by the seller and the licensee did not (i) have actual knowledge that the information was false or (ii) act in reckless disregard of the truth."

One might reasonably question whether the "material adverse fact" part is whether damage exists, or whether the "material adverse fact" is that at least one company is of the opinion that there is damage. I honestly do not know the answer to that question since the law isn't clear, but I feel pretty certain that in a hearing before VREB or in a jury trial, you will lose. Imagine yourself sitting in front of a DPOR panel or in front of a jury and you are asked the question why did you not disclose the first letter? What would your response be? Would you say that *you thought* that everything was okay despite a professional opinion to the contary? It seems to me that is all you can say, but understand that the follow-up question would be that if you thought everything was okay why not disclose the first report, as it is surely material and adverse, and then persuade the buyer that the second report is the correct one and invite the buyer to obtain a third opinion if necessary?

And this isn't just about you as your seller is being exposed to liability as well. I just do not see that you have any believable answer to those questions and neither did the court think there was any other alternative in the case of *Horner v. Ahern*, 207 Va. 860 (1967) (although the facts were a little different than I pose, and at a procedural level, the court entertained fraud).

And so, I will leave the balance of the literary references, including the lawyer role, to the literati among you. As always, if you have any questions or comments about this article, or suggestions for future articles, please e-mail me at bdlytle@lytlelaw.com, where I am busy reading Moby Dick again (okay, really reading for the first time) for my next article.