

**CALIFORNIA LAW ON DISCLOSURE DUTIES IN REAL ESTATE
SALES, AND LIABILITY AND DAMAGES FOR REAL ESTATE
FRAUD, MISREPRESENTATION or NON-DISCLOSURE of
MATERIAL FACTS AFFECTING THE VALUE OR DESIRABILITY
OF REAL ESTATE**

1. Sellers' Duties in Real Estate Transactions to Disclose Property Defects.

The common law has for decades imposed duties on sellers of real estate, particularly residential real estate such as homes, condominiums, etc., to disclose to the buyer “any material facts known to the seller affecting the value or desirability of the real estate” being sold.

In 1985 the California General Assembly added an article to the Civil Code, § 1102 et seq., entitled "Disclosures Upon Transfer of Residential Property." (Stats. 1985, ch. 1574, § 2, p. 5788.)

Real Estate contracts also usually require disclosures pursuant to this statute, as well as other disclosures.

Other statutes also impose other disclosure obligations in sales of this type.

Before execution of a residential sales contract, the seller or his or her broker is required to deliver the statutory real estate transfer disclosure statement to the buyer, which contains a checklist to give notice of problems or potential problems with the property. Civil Code §§ 1102.3, 1102.6.

The form Transfer Disclosure Statement (“TDS”) disclosure shall be filled out and made in "good faith," which is expressly defined to mean

"honesty in fact in the conduct of the transaction." Civ. Code § 1102.7
(emphasis added)

But the specification in the law and the TDS of particular matters to be disclosed was not intended to limit or abridge any obligation for disclosure by law which may exist to avoid fraud or deceit in the transfer transaction. Civ. Code, § 1102.8, 1572(3), 1710(3);

Shapiro v. Sutherland (1999) 64 Cal. App. 4th 1534, 1545.

In California, the seller of a residence has both a common law and statutory duty of disclosure to the buyer, and even full compliance with the statutory duty does not excuse the common law duty. 1 Miller & Starr, California Real Estate (3d ed. 2005) § 1:140.

Under the Common Law, "where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer." Lingsch v. Savage, supra, 213 Cal. App. 2d at 735.

"A breach of this duty of disclosure will give rise to a cause of action for both rescission and damages. [Citation.]". Shapiro v. Sutherland, supra, 64 Cal.App.4th at p.1544; Karoutas v. HomeFed Bank (1991) 232 Cal. App. 3d 767, 771.

"A duty to disclose may also arise in the so-called 'half-truth' context--that is, when a speaker makes a representation which, though not false, he knows will be misleading absent full disclosure of additional facts known to him which qualify the initial representation." San Diego Hospice v. County of San Diego (1995) 31 Cal.App.4th 1048, 1055, fn. 4.

Where one undertakes to speak to a matter, he must not only state the truth, he also must not suppress or conceal facts within his knowledge that materially affect those stated. Marketing West, Inc. v. Sanyo Fisher (USA) Corp. (1992) 6 Cal.App.4th 603, 613.(emphasis added)

In other words, when one speaks at all, he must make a full disclosure on the subject. Jacobs v. Freeman (1980) 104 Cal.App.3d 177, 192.

Thus, a duty to fully disclose may arise from a partial disclosure that is likely to mislead, if other material facts are not also disclosed. Marketing West, Inc. v. Sanyo Fisher (USA) Corp., supra, 6 Cal.App.4th at 613; Lacher v. Superior Court (1991) 230 Cal. App. 3d 1038, 1046-1047.

Neither an "as is" sale nor the buyer's independent inspection exonerates a seller or the seller's agent from fraudulent misrepresentations concerning known defects not otherwise visible or observable to the buyer. Loughrin v. Superior Court (1993) 15 Cal.App.4th 1188, 1195; Shapiro v. Hu (1986) 188 Cal. App. 3d 324, 333-334, 233 Cal. Rptr. 470; Lingsch v. Savage (1963) 213 Cal. App. 2d 729,740-742,29 Cal. Rptr. 201; Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions

(The Rutter Group 2005) § 4:3 52, p. 4-86.10; 1 Miller & Starr, California Real Estate supra, §1:154.

"[W]here the seller actively misrepresents the then condition of the property or fails to disclose the true facts of its condition not within the buyer's reach and affecting the value or desirability of the property, an 'as is' provision is ineffective to relieve the seller of liability arising from the concealed condition." Lingsch v. Savage, supra, 213 Cal. App. 2d at 742; Galen v. Mobil Oil Corp., 922 F. Supp. 318, 324 (C.D. Cal. 1996) (Emphasis added)

B. Real Estate Broker Liability

A supervising broker at a real estate firm is there to protect the public.

(h) As a broker licensee, failed to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required. Bus. & Prof.Code § 10177

The statute provides that the officer/broker designated by a corporate broker shall:

“ be responsible for the supervision and control of the activities conducted on behalf of the corporation, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is

required”

Cal. Bus. & Prof. Code § 10159.2(a)

Among the officer/broker's obligations for supervision is:

"the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage . . . familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination." Cal. Code Regs. Title X, § 2725.

For a corporate real estate broker to operate lawfully, it must "conduct[] its brokerage business if at all under the active aegis of its designated broker." *Milner v. Fox*, 102 Cal. App. 3d 567, 575, 162 Cal. Rptr. 584 (1980).

The designated officer/broker, not the corporate entity itself, is charged with the responsibility to assure corporate compliance with the real estate law. *Norman v. Dep't. of Real Estate*, 93 Cal. App. 3d 768, 776-77, 155 Cal. Rptr. 715 (1979) ("Such a real estate broker must reasonably be charged with responsibility for the corporate compliance with the Real Estate Law, for otherwise with no such fixed responsibility, the statutory purpose would be frustrated." (internal citation omitted)).

The conclusion that the designated officer/broker is personally responsible for supervising the salesperson's compliance with the law is supported by the legislative history of the Business and Professions Code §

10159.2. The staff analysis for the Senate Committee on Business and Professions for AB 985 in 1979 supports this conclusion.

The statutory provisions regulating the real estate profession, particularly after the 1979 amendment with its legislative history, places a direct, personal responsibility on the designated officer/broker of a real estate corporation to supervise the salespersons to assure compliance with the state and federal laws. This personal obligation is independent from that of the normal responsibilities of a corporate officer or of the corporation itself. This is a direct personal responsibility on the part of the officer/broker that is subject to disciplinary action affecting that officer/broker's personal broker's license. Holley v. Crank, 400 F.3d 667, 673 (9th Cir. 2004) (emphasis added) , reversed on other grounds Meyer v. Holley, 537 U.S. 280, 123 S. Ct. 824, 154 L. Ed. 2d 753, same decision on remand Holley v. Crank, 386 F.3d 1248, 1255 (9th Cir. Cal. 2004)

Holley holds . . . that a broker is liable for the acts of the salesperson, regardless of the broker's corporate position: The statutory provisions regulating the real estate profession . . . places a direct, personal responsibility on the designated officer/broker of a real estate corporation to supervise the salespersons to assure compliance with the state and federal laws. This personal obligation is independent from that of the normal responsibilities of a corporate officer or of the corporation itself. This is a direct personal responsibility on the part of the officer/broker that is subject to disciplinary action affecting that officer/broker's personal broker's license. Valdez v. Downey S&L Ass'n, 2007 U.S. Dist. LEXIS 31290 (N.D.

Cal. Apr. 16, 2007) (emphasis added)

Where a corporate owner or officer knows or has reason to know of the corporation's illegal and wrongful acts and allowed them to continue with a goal of monetary gain, he has personal liability for those actions. *PMC, Inc. v. Kadisha* (2000) 78 Cal. App. 4th 1368, 1386; *Michaelis v. Benavides* (1998) 61 Cal. App. 4th 681, 688.

Additionally, listing and selling brokers or agents (salespersons) representing both the buyer and the seller owe higher "fiduciary" duties to their clients, or to both buyer and seller if there is a dual or joint agency.

"A broker has a fiduciary duty to its client. (Civ. Code, § 2079.24; Field, supra, 63 Cal.App.4th at p. 25 ["a broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty".]) The fiduciary duty is greater than the negligence standard of due care under section 2079. (Civ. Code, § 2079.2 [standard of care is of a "reasonably prudent real estate licensee".]) Thus a broker can be professionally competent under section 2079 without satisfying the greater duty of a trusted fiduciary. As Field, explained, "the [***11] fiduciary duty owed by brokers to their own clients is substantially more extensive than the nonfiduciary duty codified in section 2079." (Field, at p. 25.)"

"A fiduciary must tell its principal of all information it possesses that is material to the principal's interests. (L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp. (1991) 1 Cal.App.4th 300, 304 [1 Cal. Rptr. 2d 680]; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 794, p. 1149;

2 Miller & Starr, Cal. Real Estate (3d ed. 2000) §§ 3:25, p. 120, 3:27, p. 149, 4:17, p. 41.) A fiduciary's failure to share material information with the principal is constructive fraud, a term of art obviating actual fraudulent intent. (Civ. Code, § 1573.) “

Michel v. Moore & Associates, Inc. (2007) 156 Cal. App. 4th 756, 762.

"Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person . . . knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act."

Saunders v. Superior Court (1994) 27 Cal.App.4th 832, 846; *Richard B.*

LeVine, Inc. v. Higashi (2005) 131 Cal.App.4th 566, 579.

"California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted."

Casey v. U.S. Bank Nat. Assn. (2005) 127 Cal.App.4th 1138, 1145.

Aiding and abetting liability may:

““be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.’ ”

Richard B. LeVine, Inc. v. Higashi, supra 131 Cal. App. 4th at 579.

A real estate broker or agent representing the seller must also complete his or her portion of the TDS disclosure form, stating his or her observations based on an independent inspection of the property. Civil Code § 1102.6 (form, Part III). *Robinson v. Grossman* (1997) 57 Cal. App. 4th 634, 642; Civil Code §2079.

The disclosures and acts required by the statutes "shall be made in good faith," which means "honesty in fact in the conduct of the transaction." Civil Code § 1102.7. See, *Robinson v. Grossman* supra 57 Cal. App. 4th at 641-642.

"[T]he duty of a real estate broker, representing the seller, to disclose facts . . . includes the affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal."

Robinson v. Grossman, supra, 57 Cal. App. 4th at 640.

"[T]he dual nature of this duty does not sound exclusively in negligence. While the first prong of the obligation (inspection) embodies traditional negligence concepts, breach of the second prong (disclosure of material facts) encompasses actionable conduct associated with both negligence and negligent misrepresentation."

Loken v. Century 21-Award Properties (1995) 36 Cal. App. 4th 263, 271.

“Real estate agents hold themselves out to the public as professionals, and, as such, are required to make reasonable use of their superior knowledge, skills and experience within the area of their expertise. [Citation.] Because such agents are expected to make use of their superior knowledge and skills, which is the reason they are engaged”

Robinson v. Grossman, supra, 57 Cal. App. 4th at 640, quoting *Easton v. Strasburger*.

"One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others . . . , when his acts are wrongful in their nature." Cal Civ Code § 2343.

'An agent or employee is always liable for his own torts, whether his employer is liable or not.' " (Holt v. Booth (1991) 1 Cal.App.4th 1074, 1080, fn. 5 [2 Cal. Rptr. 2d 727]; accord, Michaelis v. Benavides (1998) 61 Cal.App.4th 681, 686 [71 Cal. Rptr. 2d 776].)

"In other words, when the agent commits a tort, such as ... fraud..., then ... the agent [is] subject to liability in a civil suit for such wrongful conduct." (Mottola v. R.L. Kautz & Co. (1988) 199 Cal. App. 3d 98, 108 [244 Cal. Rptr. 737]; accord, Crawford v. Nastos (1960) 182 Cal. App. 2d 659, 664-665 [6 Cal. Rptr. 425]; see generally 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 149, p. 144.)" "[I]f a tortious act has been omitted by an agent acting under authority of his principal, the fact that the principal thus becomes liable does not, of course, exonerate

the agent from liability.' ... The fact that the tortious act arises during the performance of a duty created by contract does not negate the agents liability." (Bayuk v. Edson (1965) 230 Cal. App. 2d 309, 320 [46 Cal. Rptr. 49].) Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal. App. 4th 4, 68-69. And "a principal who puts an agent in a position that enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is [also] subject to liability to such third persons for the fraud." Bayuk v. Edson (1965) 236 Cal. App. 2d 309, 315. Conversely, "[if] a tortious act has been committed by an agent acting under authority of his principal, the fact that the principal thus becomes liable does not of course exonerate the agent from liability." (Perkins v. Blauth (1912) 163 Cal. 782, 787 [127 P. 50]; Rest. 2d Agency, §§ 343, 344 et seq; Rest. 2d Agency, Appendix, Rep. Notes, pp. 561,562; 20 A.L.R. 97; 99 A.L.R. 408.)

The fact that the tortious act arises during the performance of a duty created by contract does not negate the agent's liability. (Mechem, Outlines of the Law of Agency (4th ed.) §§ 343, 346, pp. 232, 234.) Bayuk v. Edson, supra, 236 Cal. App. 2d at 320.

Further, any person - regardless of whether they own any interest in the subject property - is liable in fraud for a false statement, misstatement, failure to disclose, or incomplete disclosure. 1 Miller & Starr, California Real Estate (3rd Ed. 2005) § 1:146, p. 578; Civ. Code, §~ 1572, 1710; CACI § § 1900, 1901.

Deceit under Civil Code § 1572 does not even require a contractual

relationship or privity.

The TDS disclosures in residential sales are required to be delivered “as soon as practicable before transfer of title”. Civil Code § 1102.3(a). The listing broker has the responsibility for the timely transmittal of the TDS form to the buyer. Civil Code § 1102.12(b).

Upon receipt of the TDS, the buyer has 3 days to cancel the transaction. Civil Code § 1102.3(b)(last paragraph)

Real estate contracts often also contain inspection and other disclosure provisions which would allow the buyer to cancel the transaction before close of escrow.

3. DAMAGES

In a real estate fraud case, Civil Code § 3343(a) would apply and asks the Court or Jury to determine this difference between the price paid and the actual value of the property with the undisclosed defects, which is, in effect, the amount the buyers overpaid for the property, taking into account the true or “actual value” of the property with the undisclosed defects.

"One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received"

Civil Code § 3343(a).(emphasis added) See also, *Saunders v. Taylor* (1996) 42 Cal. App. 4th 1538, 1542

This statute thus “limits recovery to the difference between the actual values, intrinsic and economic, of that which the defrauded person gave up and that which he or she received in return, plus sums expended in reliance on the fraud”. *Small v. Fritz Companies, Inc.* (2003) 30 Cal. 4th 167, 195; *Auerbach v. Great W. Bank* (1999) 74 Cal. App. 4th 1172, 1185.

"The unqualified language of section 3343 indicates that the plaintiff should receive as damages the difference in value between everything with which he parted and everything he received”

Buist v. C. Dudley De Velbiss Corp. (1960) 182 Cal. App. 2d 325, 334

The “actual value” of property may be determined by the trial court from evidence of the reasonable market value or of actual or intrinsic value. See, *Herzog v. Capital Co.* (1945) 27 Cal.2d 349, 354; *Zinn v. Ex-Cell-O Corp.* (1944) 24 Cal.2d 290, 297; *Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744,753-754; *Martin v. Tully* (1941) 44 Cal.App.2d 226, 234.

The “actual [market] value” of the property they received - with the undisclosed defects - for use in this calculation or formula may be proven - as it was here - by the testimony of an expert such as an appraiser, and the owner may testify as to the value of his property without qualifying as an expert. See generally, *Sanders v. Park Beverly Corp.* (1952) 109 Cal.App.2d

698, 702-703.

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Defrauded buyers sometimes may be able to cancel or “rescind” the purchase contract even after the close of escrow when known and undisclosed defects are discovered ([See related article](#)), or may be able to recover punitive damages and attorneys fees if provided by the contract or law.

Most modern form real estate contracts require the parties to first attempt mediation of the dispute before commencing legal proceedings, and the parties may also have agreed in the contract or thereafter to submit their dispute to binding arbitration before a neutral arbitrator or panel of arbitrators instead of having their case tried in Court. .

In any case, Statutes of Limitations in the contract or in the law may cut short your right to any remedy if your claim or lawsuit is not promptly initiated after the discovery of undisclosed defects in or problems with the property.

Suit often must be brought withing two or three years, depending on who is being sued, and usually at the outset must be brought within three

years of when the defect

In all cases, it is advisable that both buyer and seller promptly consult with their own legal counsel in connection with an important real estate transaction before closing, or **immediately** when defects are discovered or claims made, assuming there are no shorter limitations periods in the contract.

The best advice for buyers is to get a thorough inspection of the property by a certified home inspector, licensed contractor, or architect - or several inspections - before releasing any inspection contingencies in the purchase contract, and proceeding to buy the property.

N.B. This article DOES NOT constitute legal advice or create an attorney/client relationship with the reader, and YOU MAY NOT rely on it without retaining a competent real estate lawyer to consult regarding your particular situation.

Facts and contracts vary greatly and the law is constantly changing and evolving.

For further information on the subject of this article or for legal questions on Real Contracts, Transactions, or Real Estate Non-Disclosure or Fraud actions please call us at (415)788-1881, x 222, or

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