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REAL ESTATE LAW

PURCHASE & SALE FOR RESIDENTIAL AND COMMERCIAL TRANSACTIONS
CONTRACT DISPUTES
LAND USE
LEASES/ ESCROWS
ZONING/ EASEMENTS
FORECLOSURE AND SHORT PAY
UNLAWFUL DETAINER
BROKER SUPERVISION

EMPLOYMENT LAW

EMPLOYMENT MANUALS
MANAGEMENT ISSUES
EMPLOYMENT CONTRACTS
LABOR BOARD PROCEEDINGS
UNEMPLOYMENT CLAIMS
HIRING/ FIRING/ DISCIPLINE
INVESTIGATIONS, DISCRIMINATION
TERMINATION

TRAINING / EDUCATION

BROKER SUPERVISION
CONTRACT FORMATION (RPA AND OTHERS)
PROPERTY MANAGEMENT
RISK MANAGEMENT

BUSINESS LAW

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CHURCHES & NON-PROFIT ORGANIZATIONS

FAMILY LAW

BANKRUPTCY

IMMIGRATION

ADVOCATES FOR FAITH & FREEDOM

TRADEMARK

RISK MANAGEMENT

Broker/Agent Exposure:

- **Property Owner's Failure to Disclose**
- **Broker/Agent's Failure to Disclose**
- **False Representations**
- **Omissions**

RISK MANAGEMENT

Seller's Common Law Disclosure Requirement

“[W]here 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. . . . Failure of the seller to fulfill such duty of disclosure constitutes actual fraud.” *Lingsch v. Savage* (1963) 213 Cal. App. 2d 729, 735.

RISK MANAGEMENT

Seller's Common Law Disclosure Requirement

- “In the sale of property a vendor [seller] may be held guilty of fraud where he knows of facts that materially affect the desirability of the property and which he knows will probably not be discovered by the vendee [buyer].” *Nece v. Bennett* (1963) 212 Cal. App. 2d 494, 496.
- While the statutory duty applies only to residential property, a common law duty to disclose applies to the sale of any type of property. *Stevenson v. Baum* (1998) 65 Cal. App. 4th 159, 165.

RISK MANAGEMENT

Seller's Common Law Disclosure Requirement

Ach v. Finkelstein (1968) 264 Cal. App. 2d 667

Holding that purchasers of an apartment building were entitled to damages because the sellers did not disclose rent concessions given to tenants but rather inflated rentals above their true market value.

RISK MANAGEMENT

Seller's Common Law Disclosure Requirement

Storage Servs. v. Oosterbaan (1989) 214 Cal. App. 3d 498 Holding that sellers of commercial property had duty to disclose that the state was interested in buying the property for future development after the seller's agent represented the state had no such interest.

RISK MANAGEMENT

Seller's Common Law Disclosure Requirement

De Spirito v. Andrews (1957) 151 Cal. App. 2d 126

Holding the seller of a nightclub liable for nondisclosure when the seller did not disclose that the property did not have the required government permits to operate a particular business on the premises that the buyer intended to operate.

RISK MANAGEMENT

Seller's Statutory Disclosures

- Civil Code Section 1103 Disclosures – NHD Form
 - Flood Hazard Areas, High Fire Hazard Areas, Earthquake Fault Zones, Seismic Hazard Zone
- Environmental hazards
- Common Interest Development Document
- Delivery of a DRE booklet regarding hazardous substances
- Death (In the Last 3 years)
- Groundwater Basin Comprehensive Notice

RISK MANAGEMENT

Seller's Statutory Disclosures

- Asbestos
- MethLabCleanUp Order
- Certification of strapping of hot water heaters
- Delivery of earthquake guide for commercial property
- Property's location within airport influence area
- Water Conserving Fixtures Disclosure
- FIRPTA and California Tax Withholding
- Building energy use and consumption information.

RISK MANAGEMENT

Professional Negligence by Real Estate Broker to Client Jury Instruction 600

- A real estate broker/agent is negligent if he/she fails to use the skill and care that a reasonably careful [prudent] broker/agent would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”
- You must determine the level of skill and care that a reasonably careful broker/agent would use in similar circumstances based only on the testimony of the expert witnesses.

RISK MANAGEMENT

Fiduciary Duty Jury Instruction 4100

A real estate agent/broker owes what is known as a fiduciary duty to his/her/its client. A fiduciary duty imposes on an agent broker a duty to act with the utmost good faith in the best interests of his/her/its client.

RISK MANAGEMENT

Fiduciary Duty Jury Instruction 4101

The plaintiff claims that he/she/it was harmed by the broker/agent's breach of the fiduciary duty to use reasonable care. To establish this claim, the plaintiff must prove all of the following

- That the broker/agent failed to act as a reasonably careful agent/broker would have acted under the same or similar circumstances

RISK MANAGEMENT

Fiduciary Duty

- **Duty of loyalty and good faith** (Burch v. Argus Properties, Inc. (1979) 92 Cal.App.3d 128, 131)
- **Duty to be honest and truthful** (Ward v. Taggart (1959) 51 Cal.2d 736, 741)
- **Duty to disclose all material facts** that might affect the principal's decision (Roberts v. Lomanto (2003) 112 Cal.App.4th 1553, 1567)

RISK MANAGEMENT

Fiduciary Duty

- **Duty to disclose relationship with other party** (Smith v. Zak (1971) 20 CA3d 785, 794– 795)
- **Duty of care and diligence** (Wilson v. Hisey (1957) 147 Cal.App.2d 433, 438)
- **Duty to disclose profits** (Roberts v. Lomanto (2003) 112 Cal.App.4th 1553, 1569–1570)
- **Same obligation owed by trustees to their beneficiaries** (Warren v. Merrill (2006) 143 Cal.App.4th 96, 109-111)

RISK MANAGEMENT

Duty of Disclosure by Real Estate Broker to Buyer Jury Instruction 4109

A real estate broker for the seller of property must disclose to the buyer all facts known to the broker regarding the property or relating to the transaction that materially affect the value or desirability of the property. A broker must disclose these facts if he or she knows or should know that the buyer is not aware of them and cannot reasonably be expected to discover them through diligent attention and observation. The broker does not, however, have to disclose facts that the buyer already knows or could have learned with diligent attention and observation.

RISK MANAGEMENT

Duty of Disclosure by Real Estate Broker to Client Jury Instruction 4107

As a fiduciary, a real estate broker must disclose to his or her client all material information that the broker knows or could reasonably obtain regarding the property or relating to the transaction.

RISK MANAGEMENT

Duty of Disclosure by Real Estate Broker to Client Jury Instruction 4107

The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of the transaction, the knowledge and experience of the client, the questions asked by the client, the nature of the property, and the terms of sale. The broker must place himself or herself in the position of the client and consider the type of information required for the client to make a well-informed decision.

RISK MANAGEMENT

Duty of Disclosure by Real Estate Broker to Client Jury Instruction 4107

A real estate broker cannot accept information received from another person, such as the seller, as being true, and transmit it to his or her client without either verifying the information or disclosing to the client that the information has not been verified.

RISK MANAGEMENT

Duty of Disclosure by Real Estate Broker to Client Jury Instruction 4110

A real estate agent or appraiser has a duty to a buyer of real estate to post only accurate information on a multiple listing service (MLS). The buyer has a right of action against an agent or appraiser for harm caused by inaccurate information on an MLS if the agent or broker knew or should have known that the information was false or inaccurate. (Civ. Code, § 1088; see Furla v. Jon Douglas Co. (1998) 65 Cal.App.4th 1069, 1077 [76 Cal.Rptr.2d 911].)

RISK MANAGEMENT

Does a Broker/Agent Have a Duty to INSPECT the Property?

Smith v. Rickard (1988) 205 Cal.App.3d 1354, 1360

- Sale of a 25 acre lemon and avocado grove – some in poor condition
- Property also included a residence
- Root rot existed but unknown to the agents
- Seller told agent Rickard there was no root rot
- Agent represented both buyer Smith and the seller
- Hundreds of trees died after closing
- Sued for Negligence and Breach of Fiduciary Duty

RISK MANAGEMENT

Lessons from *Smith v. Rickard*

CC 2079: The agent is under a duty to a buyer to conduct a reasonably competent and diligent inspection of the property and to disclose to a buyer all facts that materially affect the value or desirability of the property that such an investigation would reveal.

BUT....The duty to inspect only applies to SFR 1-4 and does not apply to commercial property.

RISK MANAGEMENT

Cautions from *Smith v. Rickard*

- The agent would likely be responsible to inspect the residence under CC 2079
- Notwithstanding CC 2079, an agent must exercise reasonable skill and care for the benefit of the principal in the performance of agency duties, and will be liable for the agent's negligence and possibly breach of fiduciary duty.
- Those duties may include inspecting the property and disclosing any material defects to the principal – it's circumstantial.

RISK MANAGEMENT

Duty to Investigate and/or Validate

"Though one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure. . ." (*Sullivan v. Helbing*, 66 Cal.App. 478, 483)

RISK MANAGEMENT

NEW LEGISLATION

- AB 802 Energy Disclosure
- SB 745 Water Conserving Plumbing Fixture Replacement
- SB 1194 Lodging Disclosure of Personal Information
- Split-Roll Tax
- AB 1919 Price Gouging
- AB 2847 Commercial Property Abandonment
- AB 2173 Commercial Property – Disposal of Tenant’s Personal Property
- SB 1343 Sexual Harassment Prevention Training and Education

RISK MANAGEMENT

NEW LEGISLATION

- AB 2219 Third Party Payments
- AB 2343 Calculations of 3-Day Notices and Summons (eff. 9-1-19)
- SB 721 Balcony Inspections
- Proposition 65
- AB 2164 Violation of local codes resulting from illegal marijuana cultivation – safe harbor for landlords from fines
- SB 224 Civil Liability for Sexual Harassment – extends beyond employment relationships to 3rd parties like prospective clients

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