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2024 Real Property Law Retreat

Negotiating Non-Disclosure and Misrepresentation Claims in Purchase and Sale Contracts

**Saturday, March 9, 2024
2:15pm - 3:15pm**

Speakers: Deb Graceffa and Laura Campbell

Conference Reference Materials

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REAL PROPERTY LAW

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FAILURE TO DISCLOSE

How to take advantage of the opportunity to settle your case early and cost effectively



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THE ROADMAP

1. Why failure to disclose cases are rampant and hot, hot, hot.
2. How transactions (mis)happen and why buyers are so pissed when they do.
3. The standard for seller disclosures.
4. Common claims brought by buyers.
5. Defending the seller.
6. Real estate professionals counseling
7. Resolving a case in mediation/neutral
8. evaluation.
9. Getting the 1542 waiver—fast for a seller, slowly for a buyer.



WHY FAILURE TO DISCLOSE CASES ARE RAMPANT

UNDERSTANDING THE BUYER'S LAMENT

- California has the third lowest homeownership rate in America.
- Median sale price in Bay Area went from \$930K in 2018 to \$1.26M in 2022.
- Average price per square foot peaked at \$795 per square foot in 2022.
- In 2021, 76% of homes sold above the list price. In 2022, 63% sold above the list price. Even after the interest rates rose to nearly 6%, 49% have sold above the list price in 2023.
- Inventory has fallen from 74K homes sold in 2021 to approximately 35K forecasted to be sold in 2023.
- Interest rates rising (2018 – 4.5%); (2019 – 3.94%); (2020 – 3.11%); (2021 – 2.96%)(2022 – 4.09%) (2023 – low to mid 6% range)
- \$1M loan in 2018 = \$5,067 per month at 4.5%. \$1M loan in 2023 = \$6,321 per month at 6.5%.
- All cash buyers are increasing. Parents and grandparents are subsidizing their children/grandchildren's purchase.

HOW TRANSACTIONS TEND TO (MIS)HAPPEN



- Buyers find a home on-line (Redfin, Zillow, Realtor.com).
- Buyers go to one open house and sometimes see house with realtor outside of open house (but not always).
- On average buyers see a house for a total of 1-3 hours before writing an offer.
- Buyers/Realtor asks for disclosure packet that is often well over 100 pages of pre-printed disclosures—impossible to digest the meaning of them all.
- Buyers write a contingency—free offer. Buyers must sign off on disclosure packet and submit with offer. No loan, no appraisal and no inspection contingency. 3% earnest money deposit immediately at risk. No chance to bring their own inspector in. Very risky to ask questions pre-offer.
- Buyers rely on pest and home inspection procured by the Seller—this is a problem.
- Any RED FLAGS in the disclosures are often downplayed. Thin disclosures aren't questioned, even after something is discovered after the contract is entered into.
- Realtors are sometimes removing lockboxes after an offer is accepted.
- After the close of escrow, buyers often see that they missed red flags but it is too late. Some realtors immediately start ducking. Their fiduciary duty ends once escrow closes. Attorneys instruct realtors to back off. Costs of repair are sky-high. The saga begins....

BETRAYAL!!!

THE MOST COMMON BUYER REFRAIN AND WHY IT MATTERS

- The average aggrieved buyer states again and again in mediation how the seller, a perfect stranger to them, **has betrayed their trust.**
- The purchase and sale of a house is a business transaction. Buyers look at it from an **emotional standpoint.**
- Gambling with family money—it seriously clouds judgment.
- Buyers seriously **downplay their role** in not reading/understanding the disclosures, the reports, or the inherent risk in buying an old home.
- Buyers cite over and over again how much **pressure** they were in when trying to purchase a home.
- What about the seller? **Betrayal right back at ya'.**



THE STANDARD FOR SELLER DISCLOSURES

DISCLOSURE OBLIGATIONS: BY CONTRACT, STATUTE and CASE LAW

STANDARD FOR (MEANINGFUL) DISCLOSURE:

“ In general, a seller of real property has a duty to disclose: “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. ...” Reed v. King (1983) 145 Cal. App. 3d 261, 264. Nondisclosure is tantamount to a misrepresentation. Calemine v. Samuelson (2009) 171 Cal.App.4th 153, 161. “Failure of the seller to fulfill [the] duty of disclosure constitutes actual fraud.” Lingsch v. Savage (1963) 213 Cal. App. 2d 729, 736.

COMMON ISSUE IS FAILURE TO PROVIDE **MEANINGFUL** DISCLOSURES—**THOROUGH & ACCURATE**

ELEMENTS OF NON-DISCLOSURE: (1) Purchase occurred; (2) Seller **knew** xyz; (3) Seller did not disclose xyz; (4) Buyer did not know xyz AND could not have reasonably discovered xyz; (5) Seller knew Buyer did not know xyz; (6) xyz significantly affected value or desirability of property; (7) Buyer was harmed; (8) Seller’s failure to disclose was a substantial factor in causing harm

MOST IMPORTANT DISCLOSURES FOR A BUYER TO REVIEW IN DETAIL... and for a seller to complete thoroughly and accurately

Transfer Disclosure Statement (TDS)

- Substituted Reports
- C4. & C.5 - Permits and Code Compliance
- Past and Present Problems—repaired or otherwise
- If “Yes” then must give details

Seller Property Questionnaire (SPQ)

- Known Material Defects/Facts
- Seller’s Disclosures Not A Substitute For Buyer Investigation (not possible in this market)
- Past and Present Problems & Estimates/ Reports/Invoices
- Settlements and Mediations (Stigma Issue)

Inspection Reports

- Pest, home inspection, roof inspection, sewer lateral, pool, foundation, engineering, Natural Hazards report, title report (preliminary and final)
- Red Flags



COMMON CAUSES OF ACTION BROUGHT BY BUYERS

- Negligent misrepresentation/
negligence by seller for failure
to disclose
- Breach of contract by Seller
(prevailing party attorney's fees)
- Fraud by seller or listing agent
- Construction defects claims (couched
as failure to disclose claims)
- Buyer claims against their own agent
for breach of fiduciary duty

MOST COMMON DAMAGE CALCULATIONS

- Cost of repair of undisclosed defects
- Diminution in value by appraisal
- Lost profits where the property
was knowingly purchased for
rental income
- Attorney's fees and costs

MEASURE OF DAMAGES FOR FAILURE TO DISCLOSE

CALIFORNIA CIVIL CODE SECTION 3343: EXCLUSIVE REMEDY BETWEEN BUYER AND SELLER; **OUT OF POCKET RULE**

Civil Code Section **3343** governs damages for fraud in the purchase, sale or exchange of real property and is measured by the difference between the actual value received and the actual value conveyed. *Salahutdin v. Valley of Ca* (1994) 24 Cal. App. 4th 555, 564-65. Under the “out of pocket” measure, damages are usually calculated at the time of the transaction. (Id at 568.) If liability is established, a plaintiff will be entitled to his “out of pocket” loss at the time of sale, which is measured by the lesser of either the cost of repair or the diminution in value, whichever is less. *Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1543-1544; *Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 810; *Safeco Insurance Co., v. J&D Painting* (1993) 17 Cal.App.4th 1199, 1202; *Ferraro v. Southern California Gas Co.* (1980) 102 Cal.App.3d 33, 49.

CALIFORNIA CIVIL CODE SECTIONS 1709 & 3333: AVAILABLE WHERE INTENTIONAL FRAUD BY FIDUCIARY; **BENEFIT OF THE BARGAIN RULE**

1709: One who willfully deceived another with the intent to induce him/her to alter their position to their injury or risk is liable for any damage he or she suffers.

3333: For the breach of an obligation not arising from contract, the measure of damages is... the amount which will compensate for all the detriment proximately caused thereby, whether it can be anticipated or not.

SELLER DEFENSES

- Open and obvious conditions
- **The (ignored) red flags** →
- COST OF REPAIR vs. Appraisal
- Betterment
- Waivers, warnings and exculpatory clauses
- Realtor prepped the house for sale and is liable for not disclosing/shoddy work
- Buyer cannot show that a seller had actual knowledge of an issue
- First time homebuyers often cannot afford to bring the action far
- Overblown cost of repair
- Dual track issue of the arbitration clause



COUNSELING REAL ESTATE PROFESSIONALS

- A client's right to their file pre-litigation
- Texts, emails and texts – not protected
- Fiduciary duty ends when escrow does unless you start to aid and do so negligently.



RESOLVING CASES **EARLY** THROUGH MEDIATION



- Match the buyer claims word for word with the record of the transaction.
- Offer / ask for a site inspection. Bring a consultant and your client. It is worth the time and money.
- Your brief: Make it **fact and visual-heavy**, not law heavy. Your audience is the **buyer** not the attorney.
- The VISUAL BRIEF: Advertising, MLS, Disclosures, Reports, Site Visit - RED FLAGS and recommendations not followed.
- Construction consultant available by phone/video. No written report needed at this stage(?)
- Know the value of settling a case against an **unskilled lawyer**.
- The **educated buyer** and why that works against them.
- Don't inflame the buyer - they are already overly emotional.
- Don't overspend on your case. They settle for far less than you think.
- Mention the STIGMA DAMAGE if the case goes forward.
- Have the settlement agreement drafted; sign that day



GET THE 1542 WAIVER— FAST FOR A SELLER, SLOWLY FOR A BUYER



True story

- The broken sewer line
- Bathroom #1 leak
- Bathroom #2 leak
- The FIRE

REAL PROPERTY LAW

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Thank you

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