

January 2005

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Recommended Citation

Dominic H. Porrino, *The Cold Decision of Coldwell Banker: A California Court Ends the Evolution of Broker Liability With One Decision*, 35 Golden Gate U. L. Rev. (2005).
<http://digitalcommons.law.ggu.edu/ggulrev/vol35/iss2/6>

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NOTE

THE COLD DECISION OF *COLDWELL BANKER*: A CALIFORNIA COURT ENDS THE EVOLUTION OF BROKER LIABILITY WITH ONE DECISION

INTRODUCTION

A woman planning to purchase a home speaks to the seller's broker to help her decide whether to purchase the house. The seller's broker tells her that the home is in excellent condition. Relying on the broker's representations, the woman buys the house. Some time later, the woman notices a moldy smell in the kitchen and downstairs bathroom. An environmental test shows a dangerous level of mycotoxins and mold spores. The mold exposure causes the woman to become extremely sick, developing a case of asthma. The broker failed to adequately inspect the home for possible defects and failed to disclose known or reasonably ascertainable defects in the property. Because a buyer relies on a broker's representations when purchasing a house, there is a duty of honesty and trust between the two. The broker's duty of care to the woman is readily apparent. Since the broker owes the woman a duty of care, if the other elements are proven, the broker is liable to the woman for misrepresentation, fraud, and negligence.¹

¹ See 6 B.E. Witkin, *SUMMARY OF CALIFORNIA LAW, TORTS* §§ 677, 732 at 60 (9th ed. 1990); see also *Easton v. Strassburger*, 199 Cal. Rptr. 383, 387 (1984) (discussing that the law requires a broker to disclose to a buyer material defects known to the

But what happens when the individual who becomes sick and develops asthma is the purchaser's minor son? Does the broker's duty of care extend to the minor child living with the mother/purchaser? According to a recent California decision, *Coldwell Banker Residential Brokerage Company, Inc. v. Superior Court*, the broker owes no duty to a purchaser's child.²

In *Coldwell Banker*, the buyer's son, Marcos, developed asthma and other illnesses from exposure to mold.³ The seller's broker failed to disclose the mold, which was either a known or a reasonably ascertainable defect.⁴ Marcos sued the brokerage company, Coldwell Banker, for negligence, nuisance, intentional infliction of emotional stress, fraud, and misrepresentation.⁵ The court found for Coldwell Banker on all counts, holding that since Marcos was not the actual buyer, the broker had no duty of care to him.⁶ The court opined that extending the duty to Marcos would create unlimited exposure to liability for a broker to anyone who could foreseeably be harmed in a buyer's house.⁷

California has been at the forefront of modern changes in the law, including the expansion of the duty of disclosure.⁸ However, this expansion stopped with *Coldwell Banker*. The holding in *Coldwell Banker*, that a broker's duty does not extend to the purchaser's minor child, may result in a domino effect of inequitable, cold-hearted decisions.⁹ The effect of these decisions will insulate brokers from future lawsuits, even when they are directly responsible for the injuries of others. In order to create more incentive for brokers to disclose all material facts, the court should have analyzed this case under a more relaxed standard.

Coldwell Banker may also have a detrimental effect on persons injured by mold. Mold litigation is already complex, and the medical results are often ambiguous as to illnesses

broker but unknown to and unobservable by the buyer, and if that broker fails to do so, they may be liable for misrepresentation, fraud, or negligence).

² *Coldwell Banker Residential Brokerage Company, Inc. v. Superior Court*, 11 Cal. Rptr. 3d. 564 (2004).

³ *Id.* at 567.

⁴ *Id.*

⁵ *Id.* at 567-68.

⁶ *Id.* at 570.

⁷ *Id.* at 571.

⁸ See *infra* Part (I)(B) California and Disclosure.

⁹ *Id.* at 570.

mold may cause.¹⁰ This case adds another hurdle for injured individuals. Depending on the circumstances, they might not have anyone to bring a claim against, even when a broker is clearly at fault for failing to disclose a known defect in the home. Expanding a broker's duty of care to minor children of a purchaser would ensure that at least a minor foreseeably living in a home will have a cause of action against a negligent broker.

Part I of this note focuses on the history of the broker's duty of disclosure and duties owed to third persons.¹¹ That part provides a historical framework of the evolving law in broker disclosure and the broker's duty to third persons, concentrating mainly on California law. Part II discusses the broker disclosure statute and the downfall of its narrow interpretation.¹² Part III discusses the common-law balancing test, and the benefits of its application to the *Coldwell Banker* case and other cases like it.¹³ Finally, Part IV concludes that the court in *Coldwell Banker* erred by taking a narrow interpretation of the statute to establish the broker's duty to third persons, and that it should instead have used the common-law balancing test to establish duty.¹⁴

I. BROKERS AND THIRD PERSONS

A. COMMON-LAW DISCLOSURE AND THE DOCTRINE OF *CAVEAT EMPTOR*

In a typical real estate transaction, a seller hires a broker who locates a prospective buyer to purchase the property. This transaction creates a fiduciary relationship between the seller and the seller's broker.¹⁵ A fiduciary relationship begins when "a special confidence [is] reposed in one who in equity and good conscience is bound to act in good faith, and with due regard to

¹⁰ See Thelma Jarman-Felstiner, Comment, *Mold Is Gold: But, Will It Be The Next Asbestos?*, 30 PEPP. L. REV. 529, 541 (2003).

¹¹ See *infra* notes 15-86 and accompanying text.

¹² See *infra* notes 87-96 and accompanying text.

¹³ See *infra* notes 97-153 and accompanying text.

¹⁴ See *infra* notes 154-55 and accompanying text.

¹⁵ CAL. CIV. CODE § 2079.16 (West 2005).

the interests of the one reposing the confidence.”¹⁶ The doctrine of *caveat emptor*, better known as “let the buyer beware” denied the existence of a fiduciary duty between the purchaser and the seller’s broker in a real property transaction.¹⁷ Therefore, when operating under the doctrine of *caveat emptor*, the seller and his or her agent has no affirmative duty to inspect or disclose defects in the property.¹⁸

The principle of *caveat emptor* assumes that each party has equal access to the underlying facts forming the basis of the transaction.¹⁹ Historically, a real property owner exchanged property with well-acquainted neighbors.²⁰ The sale of such property took place by simple face-to-face transactions; the parties were “familiar with the condition of property being exchanged, the competence of its builder, and the quality of its maintenance and renovation.”²¹ This is not the case in modern society. With the post-World War II population growth, a rapidly growing middle class began to move more and more.²² This created the need for the mass production of homes.²³ With modern mass development and people moving all across the country, the buyer has less bargaining power than the builder-vendor because the buyer does not have the same access to facts about the property.²⁴

The increase in vendor bargaining power increased the possibility of many unfair real estate transactions.²⁵ Sellers and their agents had the ability to sell defective property by simply not informing potential buyers about substantial defects on the property, and thereafter sellers and their agents would

¹⁶ *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746, 751 (Mo. Ct. App. 1990) (citations omitted).

¹⁷ *Kellogg Bridge Co. v. Hamilton*, 110 U.S. 108, 112 (1884); Robert M. Zeit, *Real Estate--Broker Liability To Purchasers--Herbert V. Saffell*, 877 F.2d 267 (4th Cir. 1989), 63 TEMP. L. REV. 165, 165 (1990).

¹⁸ *Id.*

¹⁹ Ronald Basso, Note, *Reed v. King: Fraudulent Nondisclosure of a Multiple Murder in a Real Estate Transaction*, 45 U. PITT. L. REV. 877, 885-86 (1984).

²⁰ Alan M. Weinberger, *Let The Buyer Be Well Informed?--Doubting The Demise Of Caveat Emptor*, 55 MD. L. REV. 387, 392 (1996).

²¹ *Id.*

²² *Id.* at 395.

²³ *Id.*

²⁴ Megan Peterson, Note, *Seller Beware: Mandatory Disclosure Provisions in Iowa Put Sellers of Residential Real Estate on Alert*, 50 DRAKE L. REV. 569, 573 (2002).

²⁵ *Kirk v. Ridgway*, 373 N.W.2d 491, 493 (Iowa 1985).

have no liability to buyers.²⁶ Homebuyers became bound by uninformed decisions regarding the condition of their newly purchased homes.²⁷ Consequently, courts began to recognize special relationships of trust between the parties, including the real estate broker.²⁸ Thus, to circumvent the harsh doctrine of *caveat emptor*, the courts recognized that this special relationship imposed on the seller and broker an implied warranty of habitability.²⁹ Accordingly, a buyer now has a means of recourse when latent defects in a home interfere with the reasonable expectation that the home is fit for habitation.³⁰

B. CALIFORNIA AND DISCLOSURE

California has come a long way since the days of *caveat emptor*. Rather than conditioning disclosure on an implied warranty of habitability, California took a more aggressive approach by expanding the scope of the duty of a seller and broker to disclose material facts affecting the property to a prospective buyer.³¹ The California case of *Lingsch v. Savage* ignited California's movement toward this end.³² In *Lingsch*, a vendor and his broker failed to disclose to the purchasers that the building was in a state of disrepair, that units in the building were illegal, and that the building had been condemned by city officials.³³ The California court found that, "where the seller [or broker] knows of facts materially affecting the value or desirability of the property and also knows that such facts are not known to, or within the reach of the diligent attention

²⁶ *Id.*, see also Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381, 387 (1995) (reviewing obligations imposed on a seller at common law).

²⁷ Kirk, 373 N.W.2d. at 493-94.

²⁸ ARTHUR R. GAUDIO, REAL ESTATE BROKERAGE LAW § 293-4 at 346-52 (1987 & Supp. 1994) (discussing fiduciary duties the broker has toward buyers).

²⁹ See generally *Alaska Pacific Assurance Co. v. Collins*, 794 P.2d 936, 177 (Alaska 1990); *Richards v. Powercraft Homes, Inc.*, 678 P.2d 427, 430 (Ariz. 1984); *Coney v. Stewart*, 562 S.W.2d 619, 620 (Ark. 1978); *Pollard v. Saxe & Yolles Dev. Co.*, 525 P.2d 88, 91 (Cal. 1974); *Carpenter v. Donohoe*, 388 P.2d 399, 408 (Colo. 1964); *Vernali v. Centrella*, 266 A.2d 200, 201-02 (Conn. Super. Ct. 1970); *Smith v. Berwin Builders Inc.*, 287 A.2d 693, 695 (Del. Super. Ct. 1972).

³⁰ *Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc.*, 712 N.E.2d 330, 334 (Ill. 1999).

³¹ *Lingsch v. Savage*, 29 Cal. Rptr. 201, 205 (1963).

³² *Id.* at 201-10.

³³ *Id.* at 203.

and observation of the buyer, the seller is under a duty to disclose them to the buyer."³⁴ Thus, *Lingsch* opened the door to an extension of liability for fraud to a broker who *intentionally* failed to disclose a material defect of the property to the buyer.

California continued to expand the broker's duty of disclosure even further in the 1984 landmark case, *Easton v. Strassburger*.³⁵ In *Easton*, the court imposed an obligation upon brokers to diligently inspect properties offered for sale.³⁶ As in *Lingsch*, a broker must disclose to prospective purchasers all material facts determined from an inspection that affects the value or desirability of the property.³⁷ *Easton* differs from *Lingsch*, however, in that the plaintiff purchaser based his action on simple negligence, not intentional misrepresentation.³⁸

The important distinction between the two theories of liability, negligence and intentional misrepresentation, relates to the intent of the parties. Intentional misrepresentation requires one to "*willfully* deceive another with *intent* to induce him to alter his position to his injury or risk."³⁹ In contrast, the general negligence theory does not require proof that the defendant willfully caused harm or injury to the other.⁴⁰ "Negligence is either the failure to do something that an ordinarily prudent person would do under given circumstances or the doing of something that an ordinarily prudent person would not do under those circumstances."⁴¹ By making brokers liable for negligence involving nondisclosure, the *Easton* court exposed brokers to increased liability.

In response to *Easton*, the California legislature added two articles to the Civil Code: California Civil Code sections 1102-1102.15: Disclosures Upon Transfer of Residential Property, (hereinafter Transfer Article) and California Civil Code sections 2079-2079.10: Duty to Prospective Purchaser of Residen-

³⁴ *Id.* at 204.

³⁵ *Easton v. Strassburger*, 199 Cal. Rptr. 383 (1984).

³⁶ *Id.* at 388.

³⁷ *Id.*

³⁸ *Id.* at 387.

³⁹ CAL. CIV. CODE § 1709 (West 2005) [emphasis added]; see also *Maddux v. Philadelphia Life Ins. Co.*, 77 F. Supp. 2d 1123, 1127 (S.D. Cal. 1999) (discussing the elements of fraud).

⁴⁰ Nancy Hersh & Ward Smith, *Prima Facie Case of Negligence*, CAL. CIV. PRAC. TORTS § 1:1 (2004); see also B.E. Witkin, 6 SUMMARY OF CALIFORNIA L., TORTS § 729 (9th ed.) (discussing the meaning of negligence).

⁴¹ *Id.*

tial Property (hereinafter Broker Article).⁴² Both articles apply to sales and value-related transfers of residential real property or residential stock cooperatives containing fewer than four dwelling units.⁴³ The Transfer Article requires the seller, or other transferor subject to the statute, as well as any broker involved in the transaction, to obtain and timely deliver a disclosure statement in the prescribed form.⁴⁴ The Broker Article, on the other hand, applies only to sales and transfers involving a licensed real estate broker.⁴⁵ The Broker Article imposes upon brokers a duty “to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that such an inspection would reveal.”⁴⁶

Twenty two years after the groundbreaking case of *Lingsch v. Savage*, the enactment of the above statutes showed the evolution of California’s law and its imposition of the most stringent duty of disclosure upon brokers. California took the first step to make sure brokers satisfy these duties by codifying the common-law doctrine that mandates broker disclosure to the buyer.⁴⁷ A few years after the enactment of the California statutes, sixteen other states passed their own legislation to require more disclosure in real estate transactions.⁴⁸ In contrast to California law, the laws of most of these states applied to the

⁴² CAL. CIV. CODE §§ 1102-1102.15 and CAL. CIV. CODE §§ 2079-2079.10. See legislative history at Section 4 of Stats. 1985, c. 223 (“It is the intent of the Legislature that this act codify and make precise the holding in *Easton v. Strassburger* (152 Cal. App. 3d 90)”).

⁴³ §§ 1102-1102.15; §§ 2079-2079.10.

⁴⁴ See CAL. CIV. CODE §§ 1102.2, 1102.6, and 1102.12.

⁴⁵ CAL. CIV. CODE § 2079. For the full text of this statute, see *infra* note 79.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ For a detailed discussion, see Washburn at 381. These states include Maine (Me. Rev. Stat. Ann. tit. 32, §§ 13001-13251 (West 1988 & Supp 1993)), Virginia (Va. Code Ann. §§ 55-517-55-525 (Michie Supp. 1994)), New Hampshire (N.H. Rev. Stat. Ann. § 477:4-c (Supp. 1993)), Wisconsin (Wis. Stat. Ann. §§ 709.01-709.08 (West Supp. 1994)), Kentucky (Ky. Rev. Stat. Ann. § 324.360 (Michie 1994)), Alaska (Alaska Stat. §§ 34.70.010-.70.200 (Supp. 1993)), Delaware (Del. Code Ann. tit. 6, §§ 2570-2578 (1993)), Illinois (S.H.A. 765 ILCS 77/1-77/99 (Supp. 1994)), Indiana (Ind. Code Ann. §§ 24-4.6-2 - 24-4.6-2-13 (West 1994)), Iowa (Iowa Code Ann. §§ 558A.1-558A.8 (1992 and Supp. 1994)), Maryland (MD. Code Ann., Real Prop. § 10-702 (Supp. 1993)), Michigan (Mich. Stat. Ann. § 26.1286(51)-(66) (Callaghan Supp 1994)), Mississippi (Miss. Code. Ann. §§ 89-1-501 - 89-1-523 (Supp. 1993)), Ohio (Ohio Rev. Code Ann. § 5302.30 (Anderson Supp. 1993)), Rhode Island (R.I. Gen. Laws. §§ 5-20.8-1 - 5-20.8-10 (Supp. 1993)), and South Dakota (S.D. Codified Laws Ann. §§ 43-4-37 - 43-4-44 (Supp. 1994)).

seller and not the broker.⁴⁹ Despite variation in these provisions, the legislatures of these sixteen states enacted statutes that were narrow versions of the California Disclosure Act.⁵⁰ Although these states followed the trend of California's Transfer Article, most of them refrained from enacting anything similar to California's Broker Article.⁵¹

California pioneered the expansion of a broker's duties of disclosure to the buyer by way of case law and statute. California has recognized a special relationship of trust between the seller's broker and the future purchaser.⁵² Based on this relationship, California imposed a duty to inspect and disclose any material defect to the property.⁵³ Although California has taken a stance to protect the buyer, the state has failed to extend that protection to third persons in a real estate transaction.⁵⁴

C. DUTY OWED TO THIRD PERSONS

"As a general rule, any person who performs professional services owes a duty of care to all third persons within the area

⁴⁹ For example, in Virginia, the legislature mandated disclosure for all sales and related transfers for value of residential real property of four or fewer units whether or not a real estate broker is involved. Va. Code Ann. §§ 55-517-55-525 (Michie Supp. 1994). The difference is that the disclosure falls solely on the owner. *Id.* § 55-519(1). Moreover, the Virginia statute specifically stated, "The disclosure form shall also contain a notice to purchasers that the information contained in the disclosure is the representations of the owner and is not the representations of the broker or salesperson, if any." *Id.* § 55-519(2) In Alaska, the legislature came up with a similar Act to that of California, mandating that the seller, instead of the broker, complete and deliver to any prospective purchaser a disclosure statement in a form to be established by the state's real estate commission. Alaska Stat. §§ 34.70.010-70.200 (1993). The remedy provided by this statute offers actual damages to the purchaser for negligent violation of the statute. *Id.* § 34.70.090(b). If the violation is willful, the purchaser may recover up to three times the actual damages. *Id.* § 34.70.090(c). Both of these statutes remain unchanged as of 2005.

⁵⁰ Washburn at 431.

⁵¹ See *supra* notes 50 and 51. Although most of these are narrow versions of the CAL. CIV. CODE section 2079, Maine has enacted a statute that is very similar to California's. There, the broker must disclose material defects on the property that they know of, or reasonably should know of. 32 M.R.S.A. § 13273(2)(a) (West 2005).

⁵² GAUDIO, *supra* note 30, at 356-62.

⁵³ CAL. CIV. CODE § 2079 (West 2005).

⁵⁴ See *Coldwell Banker Residential Brokerage Company, Inc. v. Superior Court*, 11 Cal. Rptr. 3d 564 (2004).

of foreseeable risk.”⁵⁵ In a real estate transaction, the seller's agent owes a duty of care to the buyer to act reasonably to prevent a risk of injury to the buyer.⁵⁶ The agent's duty owed to third persons, however, depends on which liability theory is used; a broker may be subject to liability on the basis of either negligence or negligent misrepresentation.⁵⁷ To determine the extent of the broker's duty of care, California courts use a two-pronged analysis.⁵⁸ First, courts examine “whether a reasonable person would have foreseen an unreasonable risk of harm to the third person.”⁵⁹ Secondly, in view of such risk, the courts analyze whether “the broker exercised ordinary care under the circumstances.”⁶⁰

Norman I. Krug Real Estate Investments, Inc. v. Praszker demonstrates one criterion for establishing a duty of care.⁶¹ In *Norman I. Krug*, the court found a broker negligent for failing to disclose the existence of an unrecorded interest to a prospective buyer or to inform the interest holder of impending sale, even though the interest holder had been informed of a previous potential sale.⁶² The court examined the broker's duty of care to a third person by weighing a number of factors.⁶³ These factors included (1) the foreseeability of harm, (2) the degree of certainty that the third party was injured, (3) “the closeness of the connection between the broker's conduct and the injury suffered,” (4) “the moral blame attached to the broker's conduct,”

⁵⁵ Harry D. Miller & Marvin B. Starr, 2 MILLER & STARR, CALIFORNIA REAL ESTATE § 3:45 (3d ed. 2004); see also *Norman I. Krug Real Estate Investments, Inc. v. Praszker*, 269 Cal. Rptr. 228 (1990) (citing text).

⁵⁶ Harry D. Miller & Marvin B. Starr, 2 MILLER & STARR, CALIFORNIA REAL ESTATE §§ 3:43, 3:45 (3d ed. 2004).

⁵⁷ Harry D. Miller & Marvin B. Starr, 2 MILLER & STARR, CALIFORNIA REAL ESTATE § 3:45 (3d ed. 2004).

⁵⁸ *Norman I. Krug Real Estate Investments, Inc. v. Praszker*, 269 Cal. Rptr. 228, 231 (1990); see Harry D. Miller & Marvin B. Starr, 2 MILLER & STARR, CALIFORNIA REAL ESTATE § 3:45 (3d ed. 2004); B. E. WITKIN, 6 SUMMARY OF CALIFORNIA LAW, TORTS §§ 750-760 (9th ed. 1990).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Norman I. Krug Real Estate Investments, Inc. v. Praszker*, 269 Cal. Rptr. 228, (1990).

⁶² *Id.* at 229-30 and 232.

⁶³ *Id.* at 231.

(5) the prevention of future harm, and (6) the extent to which the transaction is intended to affect the third party.⁶⁴

This method of analysis has been utilized in many different contexts.⁶⁵ *Ann M. v. Pacific Plaza Shopping Center*, a premises liability case, represents one example of how the balancing test has been utilized in a wide variety of liability claims.⁶⁶ Premises liability cases use a similar balancing method to establish duty.⁶⁷ In *Ann M.*, the court used a balancing test to establish whether a business proprietor has a duty to protect customers from the criminal acts of others.⁶⁸ This balancing test weighs the burden of imposing a duty to protect against the criminal acts of third persons against the foreseeability of harm.⁶⁹ Many courts have chosen to follow the same rule and rationale set forth in *Ann M.* to establish duty.⁷⁰

In the context of analyzing a broker's duty to third persons, however, the California courts have neglected to use a balancing test similar to those applied in *Ann M.* and *Norman I. Krug*.⁷¹ For example, the court in *Easton* found that a real estate broker who represented the vendor had an affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale.⁷² From that search, the broker then needed to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal.⁷³ In this ruling, the court limited its decision to prospective purchasers and did

⁶⁴ *Norman I. Krug Real Estate Investments, Inc. v. Praszker*, 269 Cal. Rptr. 228, 231 (1990); see also Harry D. Miller & Marvin B. Starr, 2 MILLER & STARR, CALIFORNIA REAL ESTATE § 3:45 (3d ed. 2004).

⁶⁵ Contexts in which the balancing test has been applied include third-party liability claims dealing with lessees and contractors, *J'Aire Corp. v. Gregory*, 598 P.2d 60 (1979), beneficiaries of a will and lawyers, *Lucas v. Hamm*, 364 P.2d 685 (1961), and manufacturers and carriers, *North American Chemical Co. v. Superior Court*, 69 Cal. Rptr. 2d 466 (1997).

⁶⁶ *Ann M. v. Pacific Plaza Shopping Center*, 863 P.2d 207 (1993).

⁶⁷ *Id.* at 215.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *Pamela W. v. Millsom*, 30 Cal. Rptr. 2d 690, 695-96 (1994); *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 126 (1999).

⁷¹ *Easton v. Strassburger*, 199 Cal. Rptr. 383 (1984); *Coldwell Banker Residential Brokerage Company, Inc. v. Superior Court*, 11 Cal. Rptr. 3d. 564 (2004).

⁷² *Easton*, 199 Cal. Rptr. at 390.

⁷³ *Id.*, (emphasis added).

not include third party liability in its analysis.⁷⁴ A year later, that rule was codified in California Civil Code section 2079.⁷⁵

In 2004, the court applied section 2079 in *Coldwell Banker*.⁷⁶ In that case, after a minor's mother purchased a house, the child developed asthma caused by toxic mold in the house.⁷⁷ The minor brought many causes of action against the real estate broker.⁷⁸ The court concluded that the statutory inspection and disclosure duties of residential real estate brokers did not impose on the broker a duty of care toward the minor child.⁷⁹ The court reasoned that from "the clear and unambiguous language of section 2079, the inspection and disclosure duties of residential real estate brokers and their agents apply exclusively to prospective buyers, and not to other persons who are not parties to the real estate transaction."⁸⁰ Although the mold caused harm to a minor child who was an occupant of the purchased home, and this harm was a likely result of the broker's lack of disclosure, that child has no cause of action against the broker.⁸¹

The court in *Coldwell Banker* refused to impose liability on brokers for failure to disclose material defects to third persons.⁸² The court rejected the traditional rule that a broker owes a duty to all foreseeable third persons, believing that "foreseeability is not a substitute for legal duty."⁸³ Moreover, the court has ignored the many other possible bases to establish duty on a broker, in particular, the balancing test utilized

⁷⁴ *Id.*

⁷⁵ CAL. CIV. CODE § 2079 (West 2005). Section (a) of the California Civil Code section 2079 provides: "(a) It is the duty of a real estate broker or salesperson, licensed under Division 4 (commencing with Section 10000) of the Business and Professions Code, to a prospective purchaser of residential real property comprising one to four dwelling units, or a manufactured home as defined in Section 18007 of the Health and Safety Code, to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer or is a broker who acts in cooperation with that broker to find and obtain a buyer."

⁷⁶ *Coldwell Banker Residential Brokerage Co., Inc. v. Superior Court*, 11 Cal. Rptr. 3d. 564, 569-70 (2004).

⁷⁷ *Id.* at 567.

⁷⁸ *Id.*

⁷⁹ *Id.* at 570.

⁸⁰ *Id.* at 569.

⁸¹ *Id.* at 564-73.

⁸² *Id.*

⁸³ *Id.* at 571.

in *Norman I. Krug* or *Ann M.*⁸⁴ By utilizing a strict statutory framework to establish a broker's duty, the court narrowed a broker's liability only to prospective purchasers.⁸⁵ Consequently, *Coldwell Banker* found that this duty extends merely to the actual buyer, and not the buyer's minor child living in the purchased home.⁸⁶

II. THE ROLE OF THE STATUTE AND DEFINING THE DUTY OF CARE

The *Coldwell Banker* court should have used a common-law balancing test to establish the broker's duty to third persons, thereby possibly extending the broker's duty to a purchaser's minor child. Instead, the court followed a narrow reading of the statute and thereby rejected the idea of extending the broker's duty of inspection and disclosure to the purchaser's minor child.⁸⁷ The court concluded that the broker owed a duty only to the actual purchaser.⁸⁸ Although this is in accord with the statutory language, the court ignored the reason for the steady increase in the need for disclosure.⁸⁹ The reason for the increase in broker disclosure can be drawn from an analysis of the legislative intent of California Civil Code section 2079. The purpose of the statute was to codify the holding in the *Easton* case.⁹⁰ Further, the provisions of the act are to be interpreted as "a definition of the duty of care found to exist by *Easton v. Strassburger*, and the manner of its discharge."⁹¹ It can be logically inferred that the reasoning behind the *Easton* court's decision is part of the reason that the Legislature codified the holding in the first place. The *Easton* court

⁸⁴ *Norman I. Krug Real Estate Investments, Inc. v. Praszker*, 269 Cal. Rptr. 228, 231 (1990); *Ann M. v. Pacific Plaza Shopping Center*, 863 P.2d 207 (1993).

⁸⁵ *Coldwell Banker*, 11 Cal. Rptr. 3d. at 569-70. See CAL. CIV. CODE § 2079 (West 2005).

⁸⁶ *Id.* at 570.

⁸⁷ *Id.* at 564-73.

⁸⁸ *Id.*

⁸⁹ § 2079. The statute reads: a broker must "conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal." (emphasis added).

⁹⁰ CAL. CIV. CODE § 2709 (West 2005); Section 4 of Stats. 1985, c. 223 ("It is the intent of the Legislature that this act codify and make precise the holding in *Easton v. Strassburger*.").

⁹¹ *Id.*

came to its decision in order to protect buyers from unscrupulous brokers deceiving them into believing they are obtaining habitable properties when in fact they are tainted with defects.⁹² Because brokers similar to the one in *Coldwell Banker* are shielded from liability, allowing minor children of the purchaser to remain remediless does not achieve the legislative intent.

As said in *Easton*, “[t]he primary purposes of the [*Lingsch*] rule are to protect the buyer from the unethical broker and seller and to insure that the buyer is provided sufficient accurate information to make an informed decision whether to purchase.”⁹³ Although the court’s reasoning is to make sure the buyer is well informed in making the purchase, it is reasonably apparent that the court also intended to protect buyers from unethical brokers. Protecting the buyer from an unethical broker not only includes protection from financial hazards, but from health hazards as well. It is a hard-hearted thought to believe the courts are only concerned with a buyer’s economic injuries and not with their health injuries. A minor child living in the purchaser’s home is exposed to all the same dangers as the purchaser in that home. Therefore, it is reasonable to protect that child from the same health injuries that may occur from defects in that home.

Furthermore, the Legislature included section 2079.24 of the California Civil Code, which proclaims “nothing in this article shall be construed . . . to relieve agents . . . from liability for their conduct in connection with acts governed by this article or for any breach of a fiduciary duty or a duty of disclosure.”⁹⁴ Here, the statute is keeping with the evolution of broker liability by adding protection to purchasers from unscrupulous brokers without relieving brokers from any other liability. In other words, the Legislature is making sure that the effect of the article is to expand the broker’s duty to purchaser, not to shield them from the kind of liability that brokers have been exposed to in the past. Since brokers have been liable for fail-

⁹² *Easton*, 199 Cal. Rptr. at 388.

⁹³ *Easton*, 199 Cal. Rptr. at 388; Original wording in the brackets was “*Cooper-Lingsch*.” *Cooper* refers to a case in 1974 that followed the ruling in *Lingsch* to find a sales agent had a duty to the purchaser. *Cooper v. Jevne*, 128 Cal. Rptr. 724, 727 (1976).

⁹⁴ CAL. CIV. CODE § 2709.24 (West 2005)

ure to disclose to third persons before this statute, liability to third persons should survive this statute.⁹⁵ Thus, the common-law balancing test should have been used to establish the broker's duty to Marcos.

Unfortunately, instead of utilizing the common-law balancing test to establish duty, the court in *Coldwell Banker* saw the narrow wording of the statute as the only basis for finding duty.⁹⁶ This result rejected the notion of extending the disclosure and inspection duties to any third person. Thereby, the court closed off any opportunity in the future for any minor child of a home purchaser to make a reasonable claim against a broker. For example, a minor child foreseeably living in a house would have a reasonable claim against a broker under a balancing test, but if the court follows the narrow reading of the statute, the child is left without a cause of action. By following the statute, the court leaves injured children with no recourse in the law against the broker who is responsible for the injury. By using the common-law balancing test to establish duty for third persons, the court might have come to a more equitable result.

III. THE BALANCING TEST AND ESTABLISHING A BROKER'S DUTY

According to *Coldwell Banker*, a broker's duty of care only extends to a purchaser.⁹⁷ The *Coldwell Banker* Court based its decision on a strict reading of California Civil Code section 2079 and case law.⁹⁸ The court, however, did not have to restrict itself to the narrow wording of the statute. The court may have opted to take a broader approach. It could have included the purchaser's minor children in the broker's duty of care analysis. It is a logical extension of the duty, especially since a minor child is dependant on the parent for shelter, and

⁹⁵ Norman I. Krug Real Estate Investments, Inc. v. Praszker, 269 Cal. Rptr. 228, 231 (1990); see Harry D. Miller & Marvin B. Starr, 2 MILLER & STARR, CALIFORNIA REAL ESTATE § 3:45 (3d ed. 2004); B. E. WITKIN, 6 SUMMARY OF CALIFORNIA LAW, TORTS §§ 750-760 (9th ed. 1990). Discussed *supra* at notes 56-65.

⁹⁶ *Coldwell Banker*, 11 Cal. Rptr. 3d. at 564-73.

⁹⁷ *Id.*

⁹⁸ One of these cases is FSR Brokerage, Inc. v. Superior Court, 41 Cal. Rptr. 2d 404 (1995). In that case, the liability did not extend to social guests because they were not intended beneficiaries. This case and the other cases used in *Coldwell Banker* are discussed *infra* in notes 135-153 and accompanying text.

therefore suffers the same consequences if a home is inhabitable. Instead, the court established a bright-line rule of whom the broker is liable. But the legislative intent was not to minimize the broker's liability to the buyer only. It was to codify the holding in *Easton*, which established negligence as a viable cause of action against a broker, thereby expanding the duty of disclosure to buyers.⁹⁹ The *Easton* decision continued the evolution of broker liability. The court in *Coldwell Banker* ended that evolution abruptly with its decision to shield brokers from third party liability.

The court missed its chance to continue in the progression of broker liability and the opportunity to protect buyers and their children from unscrupulous brokers. Instead, they concentrated more on the policy to protect brokers from overexposure to lawsuits.¹⁰⁰ Due to the extreme circumstances of the case, the court should have gone through a balancing analysis to see if a buyer's child, who lives in the home, deserves a duty of care from the broker.

The *Coldwell Banker* court took a narrow view of the statute to identify the persons to whom the duty is owed.¹⁰¹ However, there are many factors that establish a duty that the court failed to consider. Whether a broker owes a duty of care to third persons in any specific situation is a question of law determined by weighing many factors.¹⁰² These factors include (1) the foreseeability of harm, (2) the degree of certainty that the third party was injured, (3) "the closeness of the connection between the broker's conduct and the injury suffered," (4) "the moral blame attached to the broker's conduct," (5) the prevention of future harm, and (6) the extent to which the transaction is intended to affect the third party.¹⁰³ With an analysis of these criteria, the court would have found that the broker had a duty to the child.

⁹⁹ CAL. CIV. CODE § 2709 (West 2005); Section 4 of Stats. 1985, c. 223 ("It is the intent of the Legislature that this act codify and make precise the holding in *Easton v. Strassburger*."); *Easton v. Strassburger*, 199 Cal. Rptr. 383, 387 (1984).

¹⁰⁰ *Coldwell Banker*, 11 Cal. Rptr. 3d. at 571.

¹⁰¹ *Id.* at 569-70.

¹⁰² *Krug*, 269 Cal. Rptr. at 230-31, discussed *supra* at notes 62-65.

¹⁰³ *Id.*

A. THE FORESEEABILITY OF HARM

As the court mentioned in *Norman I. Krug*, “[t]he most important step in determining if a broker owes a duty of care to a third party is to examine ‘whether a reasonable person would have foreseen an unreasonable risk of harm to the third person and whether in view of such risk the broker exercised ordinary care under the circumstances.’”¹⁰⁴ In *Coldwell Banker*, the court rejected the foreseeability argument.¹⁰⁵ It did not find that harm to Marcos was not foreseeable.¹⁰⁶ The court instead devalued the foreseeability argument in this context and made it inapplicable.¹⁰⁷

The court mentioned that “foreseeability is not a substitute for legal duty. Rather, foreseeability of harm is merely one factor to be considered in imposing negligence liability.”¹⁰⁸ Therefore, the court seemed to suggest that foreseeability, by itself, is not enough to impose a duty.¹⁰⁹ Here, the court only looked at two of the six factors: the foreseeability of the harm and the extent that the transaction was intended to affect the third party.¹¹⁰ Although the Court mentioned that foreseeability alone cannot establish duty, it failed to analyze the other factors that are used to establish duty.¹¹¹ By weighing the rest of the factors, the court might have come to a more equitable result.

After discussing only these two elements, the court disposed of the foreseeability argument on public policy grounds.¹¹² The court feared that expanding the duty to nonparties to the transaction would expose the broker to infinite liability.¹¹³ In a footnote, the court stated it was afraid that a decision expanding the duty to nonparties to the transaction would place professional liability on a slippery slope.¹¹⁴ “Although the court

¹⁰⁴ *Krug*, 269 Cal. Rptr. at 231, (quoting Harry D. Miller & Marvin B. Starr, 2 MILLER & STARR, CAL. REAL ESTATE § 3.27 at 158 (2d ed. 1989)).

¹⁰⁵ *Coldwell Banker*, 11 Cal. Rptr. 3d. at 571.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Coldwell Banker*, 11 Cal. Rptr. 3d. at 570-1.

¹¹¹ *Id.* at 564-73.

¹¹² *Id.* at 571.

¹¹³ *Id.* at 571 n.5.

¹¹⁴ *Id.*

makes credible policy arguments in favor of limiting the broker's exposure to claims, the court draws the line in the wrong place."¹¹⁵ The court did not have to restrict liability solely to the parties involved in the transaction. "Foreseeability' and 'policy considerations' are not determined in a vacuum, but rather depend upon the particular circumstances in which the purported wrongful conduct occurred."¹¹⁶ Instead, the court could "have drawn a limited duty on these facts, to protect the minor children of buyers who suffer foreseeable harm when a broker fails to disclose or inspect for defective conditions in a home."¹¹⁷ Extending a broker's duty to minor children would not put professional liability on a slippery slope.¹¹⁸ It would concentrate the liability on buyers and their minor children, and not nannies, neighbors, or any other foreseeable third party.¹¹⁹

Furthermore, imposing "a duty to minor children would not by itself lead to liability in all cases."¹²⁰ The plaintiff would still need to go through the process of proving the other elements of negligence, like establishing the causal link between the broker's failure to disclose and the harm the child suffered.¹²¹ This approach would at least let the claim get to a jury. Taking this approach would not only limit the scope of liability, it would encourage brokers to be more diligent in their inspection and their disclosure.¹²² There is no harm in creating more incentive for the broker to do exactly what his or her job is in the first place. Instead, the *Coldwell Banker* court protected the broker, while leaving the foreseeably injured child without a cause of action.¹²³

The *Coldwell Banker* court circumvented the well-established foreseeability test by declaring that it had to follow the "clear and unambiguous language of section 2079."¹²⁴ By doing this, the court extinguished the foreseeability rule, which is the most important step to determine if the broker owes a

¹¹⁵ Markita Cooper, *Brokers and Salespersons*, 27 CEB REAL PROP L REP 107 (2004).

¹¹⁶ *Burger v. Pond*, 273 Cal. Rptr. 709, 714 (1990).

¹¹⁷ Cooper, *supra* note 114 at 108.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Coldwell Banker*, 11 Cal. Rptr. 3d. at 569.

duty of liability to a third person.¹²⁵ With this ruling, no third person can ever make a claim against a broker. The result is that brokers, who previously were responsible for third persons' injuries caused by their misrepresentations, will not be held accountable for their actions. The *Coldwell Banker* court erred in destroying one of the most important factors in determining duty. The court also failed to analyze the other important factors of the balancing test. Application of the balancing test would have brought the court to a more justifiable outcome. The following sections outline that possible result.

B. THE DEGREE OF CERTAINTY THAT THE THIRD PARTY SUFFERED INJURY

The degree of certainty that Marcos suffered injury can be easily measured. An environmental test of the house showed a dangerous level of mold spores and mycotoxins.¹²⁶ The mold exposure not only caused Marcos's illness, but also the development of his asthma.¹²⁷ Although becoming ill is temporary, it is still an injury. Further, asthma may be a lifelong affliction. Therefore, there is an extremely high degree of certainty that Marcos suffered injury.

C. THE CLOSENESS OF THE CONNECTION BETWEEN THE BROKER'S CONDUCT AND THE INJURY SUFFERED

While the mold itself literally caused Marcos to become ill and develop asthma, the broker arguably was the proximate cause of the harm Marcos suffered. Had the broker disclosed to the family the presence of dangerous mold inside the house, the family most likely would not have purchased and thereafter lived in the home, and Marcos would not have been injured. Alternatively, if the mother was aware of the mold, she may have cured the defect. Thus, if the broker disclosed the mold, Marcos would not have suffered any injuries. The broker's failure to disclose the harmful mold in the home has a direct

¹²⁵ *Krug*, 269 Cal. Rptr. at 231, (quoting 2 MILLER & STARR, CALIFORNIA REAL ESTATE § 3.27 at 158 (2d ed. 1989)).

¹²⁶ *Coldwell Banker*, 11 Cal. Rptr. 3d. at 567.

¹²⁷ *Id.*

connection to the injury suffered. Had the court applied the balancing test, this would all have been provable at trial.

D. THE MORAL BLAME ATTACHED TO THE BROKER'S CONDUCT

Moral blame attaches to someone when that person's failure to conform to standards of what is right and just causes someone harm.¹²⁸ A high degree of moral blame attaches to the broker, since the broker was helping in the sale of a dangerous home. But inducing someone to buy a home that has defects and hiding them from the purchaser constitutes an even greater amount of moral blame. By deceiving the buyer and her minor son that the home was without defects, the broker caused Marcos to contract asthma, an affliction that may be with him for the rest of his life.¹²⁹ Morally, it was not right to induce someone to buy a house that would be dangerous for her family to live in.

E. THE POLICY OF PREVENTING FUTURE HARM

Imposing a duty of care on the broker to the buyer's minor children provides an excellent way to prevent future harm. Since the broker's only concern regards injuries to the actual buyer, the incentive to disclose latent defects is extremely low. The incentive to disclose would be higher if the court used a balancing test that includes children in the broker's duty. Therefore, the broker would be likely to be more careful with disclosure because the probability of being liable for someone's injury is higher. In the context of defects that endanger health, the probability is further increased by involving children because they have immature immune systems, rendering them

¹²⁸ See PROSSER AND KEETON, *THE LAW OF TORTS*, 21-23 (5th ed. 1984).

¹²⁹ It is extremely interesting that at no point in its opinion does the court mention the actual age of Marcos. When analyzing this case in the CEB Real Property Law Reporter, my mentor Markita Cooper wrote, "I must also mention that at no point in the opinion does the court tell us how old Marcos is, deeming only to describe him as his mother's 'minor child.' I would imagine that if we knew Marcos' age, we would find this decision all the more disturbing. By depersonalizing Marcos and focusing on outlying cases of potential exposure, the court uses the concept of 'no duty' to deflect attention from an unjust result." Markita Cooper, *Brokers and Salespersons*, 27 CEB REAL PROP L REP 107 (2004). If Marcos happened to be extremely young, the amount of moral blame seemingly would be even greater.

more vulnerable to infection.¹³⁰ If the broker owes a duty to the children in the house, the broker is more likely to adequately disclose defects. The more incentive a broker has to disclose defects, the more likely dangerous homes will not be sold. This will result in fewer injuries to innocent people living in these defective homes. Essentially, the harm will be prevented by sheer fear of being sued.

Furthermore, creating more incentives to provide proper disclosure is a small price to pay to protect children like Marcos, if it is a price at all. The *Coldwell Banker* court opined that expanding broker liability to all foreseeable third persons, like Marcos, would be far out of proportion to the broker's fault.¹³¹ In the present case, the broker clearly failed to disclose mold in the home.¹³² Because of the mold, the buyer and her minor son were injured.¹³³ Thus, expanding broker liability to third persons in this case seems to be directly in proportion to the broker's fault. More importantly, the main focus of this case should be the prevention of future harm and providing an incentive to brokers to help prevent that harm. If this case extended a broker's duty to minor children living in the home, it would only create more incentive for brokers to disclose.¹³⁴ Making a broker actually do his or her job, and prevent future harm at the same time, does not lead to a harsh result.

F. THE EXTENT THAT THE TRANSACTION WAS INTENDED TO AFFECT THE THIRD PARTY

The extent that the transaction was intended to affect the third party was an argument analyzed by the *Coldwell Banker* court and one that weighed heavily in the case.¹³⁵ The court analyzed this element with respect to the broker-client relationship and who the intended beneficiary was.¹³⁶ The court

¹³⁰ Joel Schwartz, PhD, *Air Pollution and Children's Health*, 113 PEDIATRICS 1037, 1037-1043 (2004), available at <http://pediatrics.aappublications.org/cgi/content/abstract/113/4/S1/1037> (last visited Mar. 25, 2005).

¹³¹ *Coldwell Banker*, 11 Cal. Rptr. 3d. at 571.

¹³² *Coldwell Banker*, 11 Cal. Rptr. 3d. at 567.

¹³³ *Id.*

¹³⁴ Cooper, *supra* note 116 at 108.

¹³⁵ *Coldwell Banker*, 11 Cal. Rptr. 3d. at 570-71. (Note the above four standards were not mentioned at all in the case).

¹³⁶ *Id.*

mentioned that “[a]s suppliers of information in a commercial context, the brokers’ duty only extended to intended beneficiaries of the brokers’ advice.”¹³⁷ The court reasoned that Marcos was not an intended beneficiary of factual disclosures regarding the value and desirability of the house purchased by his mother, and therefore no duty extended to him.¹³⁸

The circumstances in this case differ from every other case the court used to interpret the law regarding broker disclosure and intended beneficiaries.¹³⁹ The court should not have analyzed this case in a vacuum. The court seemed to disregard the fact that Marcos was the buyer’s minor son, and instead treated him as they would any third person. Instead, the court should have analyzed the case under its own specific circumstances. Three cases were cited in the court’s analysis of the lack of broker-third party relationship in *Coldwell Banker*.¹⁴⁰

The first case used as persuasive authority by the *Coldwell Banker* court was *FSR Brokerage, Inc. v. Superior Court*.¹⁴¹ There, the court found that a broker was not liable to partygoers injured by a defective deck on the property.¹⁴² In *Coldwell Banker*, the court was dealing with the injury of a minor child living in the purchaser’s home, not with social guests.

In *FSR*, the benefit intended from the transaction was not extended to social guests because they were outside the transaction.¹⁴³ This factor weighs very heavily in this context because guests are so far attenuated from the transaction, that it would be unconscionable to extend a duty them. In contrast, *Coldwell Banker* involved a minor child living in the home with the mother/purchaser who was the prime beneficiary of the transaction.¹⁴⁴ The diversity of the factual scenarios means they can hardly be compared. The child is living in the home, whereas social guests are only in the home temporarily to have a good time. Furthermore, the child is under the care of the

¹³⁷ *Id.* at 570, (citing *FSR Brokerage, Inc. v. Superior Court*, 41 Cal. Rptr. 2d 404 (1995)).

¹³⁸ *Id.*

¹³⁹ See *FSR Brokerage, Inc. v. Superior Court*, 41 Cal. Rptr. 2d 404 (1995), *Burger v. Pond*, 273 Cal.Rptr. 709 (1990), *Bily v. Arthur Young & Co.*, 834 P.2d 745, (1992).

¹⁴⁰ *Id.*

¹⁴¹ *Coldwell Banker*, 11 Cal. Rptr. 3d at 570.

¹⁴² *FSR Brokerage, Inc. v. Superior Court*, 41 Cal. Rptr. 2d 404, 406 (1995).

¹⁴³ *Id.* at 406-07.

¹⁴⁴ *Coldwell Banker*, 11 Cal. Rptr. 3d at 567.

mother and dependent on her for health and well-being. Since the child is so directly involved with the mother, it is reasonable for the minor child to be treated as a beneficiary of the transaction as well. In contrast, social guests are most likely adults who can care for themselves. They have no real connection to the purchaser at all. Minor children and social guests are so distinguishable, the court should not have compared the two.

A second case that was cited in the *Coldwell Banker* court's analysis was *Burger v. Pond*.¹⁴⁵ In *Burger*, the court held that a lawyer's duty did not extend to a new wife in a divorce proceeding with an ex-wife.¹⁴⁶ There, plaintiff and her husband filed an action against the husband's lawyer based upon his alleged negligent handling of the husband's divorce from his first wife.¹⁴⁷ As in *FSR*, the third party's relationship to the professional was too far attenuated for the court to extend a duty toward the third party. The facts of *Burger* are easily distinguishable from those of *Coldwell Banker*. In *Burger*, the new wife had no involvement in the divorce proceeding with her husband's ex-wife.¹⁴⁸ Although the proceeding may have affected her, it did so only indirectly. In contrast, Marcos was *directly* affected by the transaction between his mother and the broker. Marcos's asthma and other injuries were most likely sustained as a direct result of the broker's failure to disclose the dangers of mold in the home and the broker's representations that the home was in excellent condition.¹⁴⁹ The facts of *Burger* and *Coldwell Banker* are so different, the court should not have used *Burger* in its analysis.

A third case to be used in *Coldwell Banker* was *Bily v. Arthur Young & Co.*¹⁵⁰ That case involved investors who sought to base a claim on an accountant's individual audit of a company in which they were investing.¹⁵¹ Even though the plaintiffs in *Bily* had allegedly made investments in reliance on the audit reports, the Court held that an auditor can be held liable in general negligence only to the person or entity contracting for

¹⁴⁵ *Coldwell Banker*, 11 Cal. Rptr. 3d at 570.

¹⁴⁶ *Burger v. Pond*, 273 Cal.Rptr. 709, 717 (1990).

¹⁴⁷ *Burger*, 273 Cal.Rptr. 709 at 712-13.

¹⁴⁸ *Burger*, 273 Cal.Rptr. 709 at 714, 717.

¹⁴⁹ *Coldwell Banker*, 11 Cal. Rptr. 3d at 567.

¹⁵⁰ *Coldwell Banker*, 11 Cal. Rptr. 3d at 570.

¹⁵¹ *Bily v. Arthur Young & Co.*, 834 P.2d 745, 747-9 (1992).

the auditing services.¹⁵² The plaintiffs in *Bily* sought recovery for damages allegedly resulting from economic loss.¹⁵³ In contrast, Marcos suffered physical injury as opposed to mere economic loss. Further, the auditor in *Bily* had no duty to the investors because they were not an integral part of the transaction. On the other hand, Marcos was directly involved in the outcome of the transaction because he lived in the house being purchased. The policy of protecting investors from economic loss differs greatly from the policy of protecting minor children from physical harm. Comparing the two puts the priorities on an equal plane, which leads to cold results like those espoused in *Coldwell Banker*. The health of children should be more important than the financial woes of an investor and therefore should not be analyzed under the same standard.

Marcos may not have been the intended beneficiary of the transaction, but he did benefit from the transaction. Marcos benefited from the broker convincing his mother that the property was desirable, of course, only if the property were desirable. His benefit from the transaction was his mother's knowledge of the habitability of the home. If his mother knew of the defect, she might not have purchased the home, and Marcos probably would not have asthma now. Without knowledge of the true condition of the property, Marcos unwittingly fell victim to living in a dangerous home.

The court seemed so concerned about a broker's exposure to liability, that it ignored the policy behind protecting human health. It is understandable that the court did not want a broker to be liable to any foreseeable nonparty, because that might include everyone connected to the buyer. However, minor children of the purchaser living in the home are vulnerable and cannot fend for themselves in the real world. They rely on their parents for food, clothes, shelter, and protection. They are as much part of the parent as anything else in the world. This is especially true in the case of minor children. Therefore, they should be owed the same duty of care by the broker that extends to the purchaser. This would not open up the floodgates of liability infinitely. Instead, this expansion is necessary to further the protective purpose of the California statutes.

¹⁵² *Id.* at 767-8.

¹⁵³ *Id.* at 748.

IV. CONCLUSION

California has been the pioneer in eradicating and amending the archaic laws of real estate disclosure that have no place in today's society.¹⁵⁴ California's method of picking away at the *caveat emptor* rule is an example of this. The ruling of this case moves backward with respect to broker disclosure. Considering the influence California has on other states, this ruling will have a detrimental effect on the way courts will rule across the country. As a result, children like Marcos will be left with no recourse for their injuries.

In *Coldwell Banker*, instead of making an equitable decision, the court followed the strict wording of a statute and a creative interpretation of case law to come to its ruling. Rather than following what was right, the court turned its back on Marcos in order to create a bright-line rule. Taking this limited approach was not the only option in this case. The court has the power to make equitable decisions, and expand the duty to minor children, but it chose not to in this case.

Instead of looking solely at the statute, the court should have used the common-law balancing test to establish duty. By following the statute, the court ruled that no duty was owed to Marcos, and it threw the case out on summary judgment.¹⁵⁵ The court prevented a jury from ever being able to examine whether the broker owed a duty to a minor child. Letting the case go to a jury would at least have allowed the child his day in court. It would not necessarily expose brokers to unwarranted liability because all the other elements of negligence still need to be established, particularly the causal link between the broker's failure to disclose and the harm suffered.

The balancing test is an equitable approach that considers many factors before duty is established. It has been used in many contexts and withstood the test of time. Instead of applying the balancing test in *Coldwell Banker*, the court chose a restrictive interpretation of the statute. This restriction allowed the court to ignore the fact that the health of a minor child had been seriously jeopardized by the negligence of a bro-

¹⁵⁴ See *Lingsch v. Savage*, 29 Cal. Rptr. 201 (1963), *Easton v. Strassburger*, 199 Cal. Rptr. 383 (1984); see also CAL. CIV. CODE §§ 1102-1102.15, 2079-2079.10 (West 2005).

¹⁵⁵ *Coldwell Banker*, 11 Cal. Rptr. 3d at 573.

ker. It made an unfair application of the statute which resulted in an injured boy without a cause of action. Since the courts are not clear on the intention of the statute, it may be time for the Legislature to take this issue under review in order to clarify the statutory meaning of section 2079. Failure to do so will result in many more children like Marcos being injured without redress and brokers laughing all the way to the bank.

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* J.D. Candidate, Golden Gate University School of Law, December 2005; Bachelor of Arts in Psychology from University of California at Santa Barbara. I would like to thank the Law Review staff at Golden Gate University for their hard work and support, notably Geoff Piper, Deborah Dyson, and Joshua Watts. I would also like to thank some of the faculty at Golden Gate University, including Roger Bernhardt, Michael Daw, and my insightful mentor, Markita Cooper. I especially want to thank Maryanne Gerber for giving me the help and strength needed to complete this article. Finally, I would like to thank my future wife, Annie-Laurie McCarthy, for all her love and support during this difficult, yet enriching experience.