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You Can Sell But You Can't Hide

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ROGER BERNHARDT

You Can Sell But You Can't Hide

Purchasers of real property who discover that its condition is not as they had been led to believe tend to file lawsuits for fraud and negligent misrepresentation. Their attorneys generally include as defendants in such actions not only the sellers, but also any third parties involved such as brokers, escrow agents, and title officers. As a result of *Geernaert v Mitchell* (1995) 31 CA4th 601, 37 CR2d 483 (reported at 18 CEB RPLR 146 (Apr. 1995)), this list of candidates should now also include former owners of the property, in case they turn out to be responsible. Indeed, the failure to include them as potential defendants—absent advance evidence that they are not the source of the misinformation—might now be malpractice.

In *Geernaert,* homeowners sued former owners of the residence for allegedly misrepresenting the house's structural and foundation stability to plaintiffs' immediate seller who was not a party to the appeal. Following *Cohen v Citizens Nat'l Trust Bank* (1956) 143 CA2d 480, 300 P2d 14, the trial court dismissed their action on the ground that lack of privity was a defense, but the First District Court of Appeal reversed. It elected to follow the Restatement Second of Torts §533, making a false speaker liable to any third person whom "the maker intends or has reason to expect" will hear the message including, potentially, a remote successor property owner.

Allegations regarding such an expectation are easy enough to make in the complaint, but the appellate court asserts that they will not be that easy to prove. It observes that the "reason to expect" standard is a serious one, and a good deal narrower than forseeability, adding that liability under it will depend on the extent of the seller's knowledge of resale to a particular person or class of persons and also the likelihood that the misrepresentation will be passed on. "A seller's liability under this standard becomes more problematic and difficult to establish with each intervening resale and with each passing year between the occurrence of the original fraud and the lawsuit." 31 CA4th at 608. I wonder how restrictive a test that is?

In most fraud cases, what the present owners can prove most easily is that they have been misinformed, *i.e.,* that some condition exists that is different from what they claim they were told or not told. It is substantially harder to establish that the seller knew that the statement was false; in many cases, sellers will defend on the ground that they were only passing on information they were given when they purchased the property. Proof of that fact now may not only relieve this seller, but also implicate the former seller.

Intent to deceive or induce reliance are the elements least susceptible of direct proof; rarely can a cross-examiner wring admissions from sellers that they intended the buyers to rely on a statement that the seller is now denying having made. Thus these aspects of fraud and misrepresentation tend to be demonstrated more inferentially than directly. (See, for instance, *Continental Airlines, Inc. v McDonnell Douglas Corp*. (1989) 216 CA3d 388, 264 CR 779.) I suspect that whenever plaintiffs can prove a remote seller's fraudulent misrepresentation or concealment, they also will have proven (inferentially) a reason to expect its ultimate repetition to them.

Consider how a seller would have to wriggle to get through the following minefield of questions: Did you think that the persons who purchased the house from you would ever sell it to

someone else? Did you think that your buyers would not tell the next buyers the same things that you told them? It would be a rare case when a fraudulent seller was guilty of a one-hearer-only falsehood.

Accordingly, deceptive former owners should probably not take much comfort from the fact that the property has passed through several hands. A second sale does not function like a statute of limitations. (The plaintiffs in *Geernaert* discovered the condition nine years after the remote vendor-defendant had sold the property.)

Former owners remain subject to an odd mix of exposure. At one extreme, they may be strictly liable for toxic land conditions under federal and state environmental statutes or liable in tort to remote successors for having polluted. See *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 23 CR2d 377. At the other extreme, they are not liable for improvements that they negligently put on the property. *Preston v Goldman* (1986) 42 C3d 108, 227 CR 817. In the middle, we now know that at least one intermediate court thinks they will have continuing liability for any fraud they committed. Where will negligent misrepresentation be placed?

The measure of liability in these cases will also be interesting. Damages for fraud under CC §3343 are the difference between the price paid and the value of the property received. That is easy enough to work out in a straightforward two-party transaction, but how much is *A* liable for if, five years ago, *A* defrauded *B* into paying $100,000 for property worth only $95,000 at the time, but now *E* has just purchased it from *D* for $300,000 when it is only worth $200,000? Can *A* limit his or her liability by saying that he or she only intended to commit $5000 worth of fraud? It will be interesting to see how the courts deal with these issues in the future.