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## ARTICLE

# TELL IT LIKE IT IS - SELLERS' DUTIES OF DISCLOSURE IN REAL ESTATE TRANSACTIONS UNDER CALIFORNIA LAW

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### I. INTRODUCTION

California has long been on the cutting edge of the law, often presaging national legal trends. It is no surprise, therefore, that California was among the first states to abandon the rule of *caveat emptor*<sup>1</sup> in real estate transactions, enacting numerous statutes that provide a buyer with sufficient information to make a reasoned judgment in buying property.<sup>2</sup>

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1. "Let the buyer beware." EUGENE EHRLICH, *AMO, AMAS, AMAT AND MORE* 77-78 (1985).

2. See generally, Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 *DEPAUL L. REV.* 381 (1995). As of last year, only sixteen other states had enacted similar legislation, with California's being the most stringent. *Id.* at 381; see also Ronald B. Brown, Joseph M. Grohman & Manuel R. Valcarcel, *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure*, 29

Sellers often run afoul of these laws, however, because they are unaware of the nature and extent of the duties imposed upon them.

California real estate practitioners know that their state law imposes stringent duties of disclosure on sellers of real property, particularly in the sale of residential property. However, as evidenced by the amount of litigation alleging inadequate disclosure, the satisfaction of those duties is often misunderstood.<sup>3</sup> This article examines those duties of disclosure. Part II addresses the statutorily-imposed duties, and Part III discusses the general common law duty of disclosure.<sup>4</sup> Part IV notes several actions of the buyer that may ameliorate the seller's liability.<sup>5</sup> Part V examines the exception created for trustee's sales.<sup>6</sup> The article concludes in Part VI with recommendations for the real estate practitioner.<sup>7</sup>

## II. THE STATUTORY DUTIES OF DISCLOSURE

The California Civil Code includes numerous duties to disclose particular facts to one or both of the parties to a real estate transaction.<sup>8</sup> The Code imposes these duties on the seller, the seller's agent, or both.<sup>9</sup>

Two primary sets of statutes contain disclosure duties relevant to nearly all sales of residential real property consisting of one to four dwelling units.<sup>10</sup> The first is entitled "Disclosures Upon Transfer of Residential Property."<sup>11</sup> The second

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CREIGHTON L. REV. 25, 52-72 (1995).

3. Sadly, sometimes disclosure duties are consciously ignored in order not to sour the deal; the seller fears that if he discloses, the deal will not go through. Accordingly, he conceals defects, hoping that problems will not arise later. This problem, however, needs be addressed at the level of the personal *ethos*.

4. See *infra* notes 8 - 123 and accompanying text.

5. See *infra* notes 124 - 129 and accompanying text.

6. See *infra* notes 130 - 135 and accompanying text.

7. See *infra* Part VI.

8. See generally, CAL. CIV. CODE § 1100 et seq. (West Supp. 1996).

9. See, e.g., CAL. CIV. CODE § 1102.12 (West Supp. 1996).

10. For the purposes of this article, "sale" also includes any transfer for valuable consideration.

11. CAL. CIV. CODE §§ 1102-1102.15 (West Supp. 1996).

("Duty to Prospective Purchaser of Residential Property")<sup>12</sup> applies only to sales and transfers involving a licensed real estate broker.<sup>13</sup>

Both sets of statutes are limited to residential property and do not apply to commercial real estate transactions.<sup>14</sup> The Legislature delineated between residential and commercial properties because the average home buyer's lack of sophistication created a need to protect them from sellers, who are (theoretically) armed with greater knowledge and bargaining power; this same disparity is not commonly found in commercial transactions.<sup>15</sup>

A third set of statutes includes portions of the Alquist Priolo Earthquake Fault Zoning Act<sup>16</sup> and the Seismic Hazards Mapping Act,<sup>17</sup> which provide for special disclosures where the real property in question, whether residential or commercial, is within a delineated earthquake fault or seismic hazard zone.<sup>18</sup>

#### A. TRANSFER DISCLOSURE STATEMENT

With few exceptions,<sup>19</sup> whenever there is a sale, ex-

12. CAL. CIV. CODE §§ 2079-2079.11 (West Supp. 1996).

13. CAL. CIV. CODE § 2079 (West Supp. 1996).

14. See *id.*; see also Stats 1985 Ch. 1574 § 2; *Smith v. Rickard*, 205 Cal. App. 3d 1354, 254 Cal.Rptr. 633 (1988) (refusing to apply Article 2 duties to the commercially-used portion of a property).

15. See *Rickard*, 205 Cal. App. 3d at 1360-61.

16. See CAL. PUB. RES. CODE § 2621 (West 1984 & Supp. 1996).

17. See CAL. PUB. RES. CODE § 2690 (West 1984 & Supp. 1996).

18. To determine if this disclosure must be made, prospective buyers and brokers are referred to maps which are commonly kept in the local offices of the California Department of Conservation, Division of Mines and Geology. These "Special Study Zones" are readily identified on maps published by the DMG. See, e.g., "Geology of the Southwestern Part of the Oat Mountain Quadrangle, Los Angeles County," Map Sheet 033, 1978; see generally P. Wong, "Index to Geologic Reports for Sites Within Special Study Zones, California (Alquist-Priolo Fault-Rupture Hazard Study Zones)," DMG OFR 84-31.

19. Those exceptions include, *inter alia*: (1) transfers pursuant to court order; (2) transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust; (3) transfers from one co-owner to one or more other co-owners; (4) transfers made to a spouse; and (5) transfers between spouses resulting from a judgment of dissolution of marriage. See CAL. CIV. CODE §§ 1102.1 (a)-(j) (West Supp. 1996). See *supra* notes 130-135 and accom-

change, lease with a purchase option, option to purchase, or a ground lease with improvements of residential property containing four units or less, or a residential stock cooperative, or a sale of such property by an installment land contract, the seller (or transferor) must deliver a written transfer disclosure statement to the prospective purchaser, optionee or lessee, in the form prescribed by statute.<sup>20</sup>

The timing of the disclosure depends on the type of transfer. In the case of a sale, the disclosure must be made as soon as practicable before transfer of title.<sup>21</sup> In the case of transfer by real property sales contract, by lease together with an option to purchase, or by a ground lease coupled with improvements, the disclosure must be made as soon as practicable before execution of the contract.<sup>22</sup>

The statutory form requires that the seller provide certain information regarding the physical condition of the property.<sup>23</sup> Although the form specifically provides that the disclosure statement does not constitute a warranty of the information provided, it also provides that prospective buyers may rely on that information in deciding whether and on what terms to purchase the property.<sup>24</sup>

Among other things, the form requires that the seller: (1) identify the specific fixtures, appliances, improvements and features of the property, and whether they are operable; (2) disclose any defects or malfunctions of the physical improvements; and (3) disclose (a) additions, structural modifications, or other alterations or repairs made without necessary permits or which are not in compliance with building codes, (b) any fill (compacted or otherwise) on the property; (c) any settling from

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panying text for a fuller examination of the duty of a transferor trustee, which is expletive of the duties imposed on each of the foregoing.

20. CAL. CIV. CODE § 1102 (West Supp. 1996).

21. CAL. CIV. CODE § 1102.2(a) (West Supp. 1996).

22. CAL. CIV. CODE § 1102.2(b) (West Supp. 1996). In this instance, "execution of the contract" means the "making or acceptance of an offer." *Id.*

23. Amusingly, the form provides as much space for disclosure of type and condition of water heater as it does for earthquake damage. See CAL. CIV. CODE § 1102.6 (West Supp. 1996).

24. *Id.*; see 1 MILLER & STARR, CALIFORNIA REAL ESTATE 2D, § 1:123, at 425 (1989).

any cause, or slippage, sliding, or other soil problems; (d) any flooding, drainage or grading problems; or (e) any major damage to the property or any of the structures from fire, earthquake, floods, or landslides.<sup>25</sup>

The benefits of the disclosure requirement may *not* be waived; any purported waiver is void as against public policy.<sup>26</sup> Ironically, if a seller or the seller's agent fails to deliver the transfer disclosure statement to a prospective purchaser, it will not invalidate the transfer; however, the seller or agent will be liable for any actual damages suffered by the purchaser.<sup>27</sup> As such, sellers may be liable as guarantors if proper disclosures are not made.

### 1. "As Is" Provisions

Contracts for the sale of real property often contain a provision that the seller is selling the property "as is," "in its present state and condition," or words to that effect. Sellers insert this language intending that such provision will relieve them from liability for failing to disclose a material defect in the property which is not known to the buyer. In actuality, such clauses have a very limited effect.

By operation of law, any provision that, in word or effect, requires the buyer to accept the property as is merely means that the buyer accepts the property in the condition which is *visible or observable* by him.<sup>28</sup> Therefore, when the seller or

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25. CAL. CIV. CODE § 1102.6 (West Supp. 1996). Also, be aware that additional "local option" disclosures may be mandated. Check with your local City Attorney's office to see if your municipality has opted for these disclosures. *See generally*, CAL. CIV. CODE 1102.6a (West Supp. 1996).

26. CAL. CIV. CODE § 1102(b) (West Supp. 1996).

27. CAL. CIV. CODE § 1102.13 (West Supp. 1996).

28. *See* Lingsch v. Savage, 213 Cal. App. 2d 729, 742, 29 Cal. Rptr. 201 (1963) (stating that allowing as is provisions to negate concealment would be "to permit the seller to contract against his own fraud contrary to existing law"); *Katz v. Department of Real Estate*, 96 Cal. App. 3d 895, 901, 158 Cal. Rptr. 766 (1979) (*Katz* provides an example of an additional risk that brokers run for nondisclosure - revocation of their license). *Compare*, *Driver v. Melone*, 11 Cal. App. 3d 746, 753, 90 Cal. Rptr. 98 (1970) (declining to impose liability as all defects were readily visible to the buyer); *Shapiro v. Hu*, 188 Cal. App. 3d 324, 332-33, 233 Cal. Rptr. 470 (1986) (postulating that as is provisions serve to put the buyer on notice

the seller's agent fails to disclose material facts regarding the condition of the property which are unknown to the buyer, an "as is" provision is ineffective to relieve the seller of any fraud liability arising from the nondisclosure.<sup>29</sup>

In some circumstances, a seller owns property which needs rehabilitation, but has neither the talent nor the capital to complete the necessary repairs. He attempts to sell the property by discounting the price and selling the property as is in its dilapidated condition. Therein lies a trap for the unwary: even in such circumstances the seller has a duty to disclose all known material defects; the concept of "economic assumption of risk" is inapplicable to real estate transactions.<sup>30</sup>

There is some solace for sellers, however. While a contractual provision that the property is sold "as is" does not excuse the seller or the broker of their disclosure duties, such language may have some effect, in limited circumstances, on the reasonableness of the buyer's reliance on the disclosure which the seller *did* make. While "caveat emptor" is not the rule, such a clause is, at the least, a warning to the buyer.<sup>31</sup>

## 2. Errors, Inaccuracies, or Omissions

Civil Code Section 1102.6 provides that requests may be made on public agencies or experts such as licensed engineers, land surveyors, geologists, structural pest control operators, or contractors to deliver reports or opinions dealing with matters within the scope of their professional license or expertise with

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that deficiencies exist).

29. See *Herzog v. Capital Co.*, 27 Cal.2d 349, 353, 164 P.2d 8 (1945); *Katz*, 96 Cal. App. 3d at 901; *Driver*, 11 Cal. App. 3d at 753; *Orlando v. Berkeley*, 220 Cal. App. 2d 224, 228, 33 Cal. Rptr. 860 (1963); *Lingsch*, 213 Cal. App. 2d at 742; *Crawford v. Nastos*, 182 Cal. App. 2d 659, 665-66, 6 Cal. Rptr. 425 (1960).

30. 1 MILLER & STARR, *supra* note 24, § 1:127, at 448. See *Levy-Zentner Co. v. Southern Pacific Transp. Co.*, 74 Cal. App. 3d 762, 792, 142 Cal. Rptr. 1 (1977).

31. See *Driver*, 11 Cal. App. 3d at 752 (calling the as is provision "a factor to be considered with all other circumstances in determining whether the buyer has been misled"); *Carlson v. Brickman*, 110 Cal. App. 2d 237, 244, 242 P.2d 94 (1952) (stating that the clause "may be considered on the question of whether plaintiffs were relying on the [actual fraudulent misrepresentations] or on their own investigation"). See generally, Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 141-151 (1993).

regard to the subject property.<sup>32</sup> The delivery of any information required to be disclosed to a prospective transferee by any of these listed agencies or individuals constitutes compliance with the disclosure requirements of Article 1.5 and relieves the seller and seller's agent of any further duty with respect to that item of information.<sup>33</sup> Problems do arise, however, when the requested report contains errors, inaccuracies, or omissions of any information.

Unfortunately, it is not uncommon to find negligence on the part of these experts.<sup>34</sup> To avoid penalizing a seller who has "clean hands," liability is not imposed on the seller or his agent, provided that the erroneous information was not within their personal knowledge, the information was based on the report or opinion of the agency or expert, and ordinary care was exercised by the seller and seller's agent in obtaining and transmitting that information.<sup>35</sup>

### 3. Information Unknown or Not Available

While "no appellate decision has explicitly declared that a broker has a duty to disclose material facts which he *should have known*,"<sup>36</sup> the question of whether the seller has an affirmative duty to investigate and determine material facts that may affect the value or desirability of the property in order to disclose such facts to the buyer remains unresolved.<sup>37</sup> According to noted authority Harry D. Miller:

It is submitted that a seller does *not* have an obligation to make extensive investigations with third parties to discover potential problems with the property. Thus, for example, a seller of property does *not* have a duty to investigate with the city whether or not a prior owner has

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32. See CAL. CIV. CODE §§ 1102.4(a) & (c) (West Supp. 1996).

33. CAL. CIV. CODE § 1102.4(b) (West Supp. 1996).

34. See *Korbel v. Chou*, 27 Cal. App. 4th 1427, 33 Cal. Rptr. 2d 190 (1994) (concerning settlement of a negligence suit against a consulting engineer).

35. CAL. CIV. CODE § 1102.4(a) (West Supp. 1996).

36. *Easton v. Strassburger*, 152 Cal. App. 3d 90, 99, 199 Cal. Rptr. 383 (1984) (emphasis added).

37. 1 MILLER & STARR, *supra* note 24, § 1:121, at 411.

constructed improvements without a permit. . . .

On the other hand, the physical attributes of the property where a person lives, which he reasonably would be expected to know should be within the framework of those matters that a seller should investigate and discover. For example, the fact that there is flooding in the area is a matter that an owner should know. The fact that there have been prior leaks in the roof is a matter that an owner of property should know because there would be some physical indications.

In other words, where there are "red flags" that a seller living on the property reasonably should have noticed, then there is a duty to disclose those "red flags," or a duty to make further investigations or inspection to determine whether or not there are problems.<sup>38</sup>

While Mr. Miller's reasoning is sound, given the potential for confusion due to the dearth of precedent, the California legislature attempted to clarify its position with the enactment of Civil Code Section 1102.5. This section provides that if an item of information which is required to be disclosed is unknown or not available to the seller, the seller and the seller's agent must make a reasonable effort to ascertain it.<sup>39</sup> Thus, a duty to investigate is imposed solely for the purposes of satisfying the statutory disclosure requirements.

If, at the time the disclosures are required, that information is still unknown or not available, the seller may use an approximation of the information, provided that the approximation is (1) clearly identified as such, (2) reasonable, (3) based on the best information available to the seller or his agent, and (4) not used for the purpose of circumventing or evading the requirement of disclosure.<sup>40</sup>

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38. *Id.* § 1:121, at 412 (emphasis added).

39. CAL. CIV. CODE § 1102.5 (West Supp. 1996).

40. *Id.*

### 3. Good Faith Disclosure Requirements

In satisfying these duties of disclosure and common law obligations of good faith, the California legislature included a specific requirement of good faith.<sup>41</sup> In order to satisfy this obligation of good faith, both the seller and the seller's agent have an affirmative duty to disclose to the buyer facts which materially affect the value or desirability of the property that are known to them and which they know are not known to, or within the reach of the diligent attention and observation of, the buyer.<sup>42</sup> For the agent, this same duty exists whether he obtains this knowledge from or independently of his principal.<sup>43</sup>

#### B. THE BROKER'S DUTY TO A PROSPECTIVE PURCHASER

The second statute, "Duty to Prospective Purchaser of Residential Property,"<sup>44</sup> specifically addresses the disclosure obligations of licensed real estate brokers, salespersons who list property for sale (the "listing broker"), or those who act in cooperation with listing brokers by finding a buyer (the "selling broker").<sup>45</sup>

The 1985 enactment of Civil Code Section 2079, *et seq.* was a response to outcries from real estate brokers reacting to the California Appellate Court opinion in *Easton v. Strassburger*, which expanded a broker's duty to inspect and disclose.<sup>46</sup>

41. CAL. CIV. CODE § 1102.7 (West Supp. 1996). In this instance, "good faith" is defined as "honesty in fact in the conduct of the transaction." *Id.* See generally, Palmieri, *supra* note 31.

42. See, e.g., *Godfrey v. Steinpress*, 128 Cal. App. 3d 154, 177, 180 Cal. Rptr. 95 (1982) (stating that the broker's duty exists even in the absence of an agency relationship); *Cooper v. Jevne*, 56 Cal. App. 3d 860, 866, 128 Cal. Rptr. 724 (1976) (imposing liability for both affirmative and negative fraud); *Saporta v. Barbagelata*, 220 Cal. App. 2d 463, 474, 33 Cal. Rptr. 661 (1963) (involving misrepresentation as to a termite infestation in a house); *Lingsch*, 213 Cal. App. 2d at 736-37 (stating that a broker and seller are "jointly and severally liable" for fraud).

43. See CAL. CIV. CODE § 1102.4(a) (West Supp. 1996).

44. CAL. CIV. CODE §§ 2079 - 2079.11 (West Supp. 1996).

45. CAL. CIV. CODE § 2079(a) (West Supp. 1996). See CAL. CIV. CODE § 1086(f)-(g) (defining listing agent and selling agent).

46. *Washburn*, *supra* note 2, at 409 (detailing common law duties of brokers); see *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984).

In *Easton*, the seller's agent noticed "red flags" of possible soil problems during his visual inspection of the property.<sup>47</sup> Despite the agent's knowledge of what these red flags could indicate, he made no further inquiry or investigation regarding past soils problems.<sup>48</sup> Shortly after the property was sold, it suffered extensive earth movement, prompting the buyer to sue the listing broker for negligence.<sup>49</sup>

In this watershed case, the California Supreme Court, for the first time, ruled that a real estate broker acting for a seller of residential real property has an "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."<sup>50</sup>

In reviewing the lower court proceedings, the Court determined that the jury was "well within the bounds of reason when it concluded that a reasonably diligent and competent inspection of the property would have included *something more than a casual visual inspection* and a general inquiry of the owners," and that the judgment for negligence against the broker was amply supported by the evidence.<sup>51</sup>

While the California legislature largely embraced the expanded property condition disclosure requirements laid down by the *Easton* court, the legislative enactment of Civil Code Sections 1102, *et seq.*, and 2079, *et seq.* has been interpreted conversely as limiting the impact of the opinion.<sup>52</sup>

While the statute *does* create a duty of inspection on brokers, that duty is limited to conducting a "reasonably competent and diligent *visual* inspection of the property offered for sale" and disclosing to the prospective purchaser "all facts materially affecting the value or desirability of the property

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47. *Easton*, 152 Cal. App. 3d at 96.

48. *Id.*

49. *Id.*

50. *Id.* at 102.

51. *Id.* at 105 (emphasis added).

52. Washburn, *supra* note 2, at 409-10.

that such an inspection would reveal.”<sup>53</sup> This disclosure is made by the broker’s completion of the Agent’s Inspection Disclosure, Sections III and IV of the Transfer Disclosure Statement mandated by Article 1.5.<sup>54</sup>

In addition, Article 1.5 defines the real estate broker’s standard of care owed by the real estate broker as “the degree of care that a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience, and examination, required to obtain a license.”<sup>55</sup> This standard, which is higher than the reasonably prudent person standard applicable to most common law tort claims (including misrepresentation), was adopted by the California legislature because equity seemed to demand that a broker who holds himself out to the public as an experienced, licensed professional in the field of residential real property transactions, and who financially benefits as a result of so doing, should be held to a standard of care commensurate with that position.<sup>56</sup>

In order to further clarify the broker’s duties of inspection and disclosure, and, perhaps, to place limits on the potential liability of real estate brokers to purchasers, the statute restricts the scope of the inspection to those areas that are reasonably and normally accessible to inspection, disavowing any duty of inspection of areas off the site of the property, public records or permits concerning the title or use of the property.<sup>57</sup>

While most disclosure laws are decidedly pro-consumer, the two-year statute of limitations contained in California Civil Code Section 2079.4 applies to actions for breach of a broker’s duties to prospective purchasers to investigate and disclose.<sup>58</sup> This two-year period was seemingly offered to further ameliorate the statute’s impact on brokers, who otherwise would have

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53. CAL. CIV. CODE § 2079.

54. See CAL. CIV. CODE §§ 2079-2079.11 (West Supp. 1996).

55. Id. § 2079.2.

56. Washburn, *supra* note 2, at 412-13.

57. CAL. CIV. CODE § 2079 (West Supp. 1996).

58. See CAL. CIV. CODE § 2079.4.

been (at least potentially) on the hook for the three-year period applicable to fraud.<sup>59</sup> It is important to note that the two years begins to run not at the date of discovery of a breach, but from the date of possession, meaning the date of recordation, the date of close of escrow, or the date of occupancy, whichever occurs first.<sup>60</sup>

### C. EARTHQUAKE HAZARD DISCLOSURES

Special duties are imposed regarding earthquake hazards. Under existing law, a seller or seller's agent must disclose to prospective purchasers whether the property is located within a delineated earthquake fault zone.<sup>61</sup> The State Geologist compiles maps delineating the earthquake fault zones,<sup>62</sup> and copies of these maps are given to each city or county having jurisdiction over lands lying within that zone.<sup>63</sup> In order to inform sellers of real property and their agents, notices of the maps' receipt and their location are posted at the offices of the county recorder, county assessor, and county planning commission.<sup>64</sup>

The seller's (and agent's) duty arises only when these maps are "reasonably available;" they are deemed to be available after notice has been posted at the aforementioned offices.<sup>65</sup> Disclosure pursuant to this section may be provided in the Transfer Disclosure Statement or in the Real Estate Purchase Contract and Receipt for Deposit.<sup>66</sup>

Similarly, a seller or seller's agent must disclose to prospective purchasers whether the property is located within a delineated seismic hazard zone.<sup>67</sup> These zones include areas subject to strong ground shaking, liquefaction, landslides, or

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59. See CAL. CODE CIV. PROC. § 338(d) (West 1982 & Supp. 1996).

60. CAL. CIV. CODE § 2079.4.

61. CAL. PUB. RES. CODE § 2621.9(a) (West 1984 & Supp. 1996).

62. *Id.* at § 2622(a).

63. *Id.* at § 2622(b).

64. *Id.* at § 2622(d).

65. *Id.* at §§ 2621.9(a) & (c)(1).

66. CAL. PUB. RES. CODE §§ 2621.9(b)(1), (3).

67. *Id.* at § 2694(a).

other ground failure that occur during an earthquake.<sup>68</sup> Maps identifying seismic hazard zones are compiled by the State Geologist, and copies of the official maps are given to each city or county having jurisdiction over lands containing an area of seismic hazard.<sup>69</sup> Notices are posted as above.<sup>70</sup>

The seller's (and agent's) duty arises in the same manner as above.<sup>71</sup>

As a result of the Loma Prieta earthquake of October 17, 1989, the legislature declared that the disclosure of earthquake deficiencies should be provided to a prospective purchaser along with information on the possible vulnerabilities of the dwelling being purchased.<sup>72</sup> The transferor of real property containing a residential dwelling<sup>73</sup> built prior to January 1, 1960, is required to give the transferee a copy of the "Homeowner's Guide to Earthquake Safety" and complete the earthquake hazards disclosure regarding the property as soon as practicable before the transfer.<sup>74</sup>

There is a bill currently before the Assembly, AB No. 1455 introduced by Assembly Member Cortese on February 24, 1995, which seeks to extend these requirements to transfers of mobilehomes and manufactured homes initially installed prior to September 2, 1994.

The "Homeowner's Guide to Earthquake Safety," which is published by the Seismic Safety Commission, is distributed to real estate brokers and, upon request, to members of the public.<sup>75</sup> The Guide includes maps and information on geological

68. *Id.* at §§ 2692(a), (b).

69. *Id.* at §§ 2696(a), (b).

70. *Id.* at § 2696(c).

71. CAL. PUB. RES. CODE §§ 2694(a), (b)(1), (c)(1) and (3).

72. CAL. GOVNT. CODE §§ 8897(a)(1) and (c).

73. For purposes of this statute, "residential dwelling" refers only to those properties with one to four living units of conventional light frame construction. See CAL. GOVNT. CODE § 8897.1(a) (West 1992 & Supp. 1996). For the truly curious, "conventional light frame construction" is defined in Ch. 25 of the 1991 Edition of the Uniform Building Code of the International Conference of Building Officials. See *id.*

74. *Id.* at § 8897.1(a).

75. CAL. BUS. & PROF. CODE § 10149(a) (West Supp. 1996).

and seismic hazard conditions for all areas of the state, explanations of the related structural and nonstructural hazards, and recommendations for mitigating the hazards of an earthquake.<sup>76</sup> This Guide has been deemed to be adequate to inform the transferee of geologic and seismic hazards that may affect real property and mitigating measures. The seller or broker is not required to provide additional information concerning such hazards.<sup>77</sup> Note, however, that delivery of this Guide does not increase or decrease the seller's and agent's duties to otherwise disclose the existence of any known hazards on or affecting the property.<sup>78</sup>

The earthquake hazards disclosure must clearly indicate whether the transferor has actual knowledge that the dwelling has any of the following deficiencies that are material to the transaction and that may increase a dwelling's vulnerability to earthquake damage:

- (1) the absence of anchor bolts securing the sill plate to the foundation;
- (2) the existence of perimeter cripple walls that are not braced with plywood, blocking, or diagonal metal or wood braces;
- (3) the existence of a first-story wall or walls that are not braced with plywood or diagonal metal or wood braces;
- (4) the existence of a perimeter foundation composed of unreinforced masonry;
- (5) the existence of unreinforced masonry dwelling walls;
- (6) the existence of a habitable room or rooms above a garage; and
- (7) the existence of a water heater that is not anchored, strapped, or braced.<sup>79</sup>

Transferors are also required to disclose any material information within their actual knowledge regarding corrective mea-

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76. *Id.* at §§ 10149(d)(1) - (3).

77. CAL. CIV. CODE § 2079.8(a) (West 1995).

78. *Id.* at § 2079.8(b).

79. *Id.* at §§ 8897.1(a), 8897.2(a)(1) - (7).

asures or improvements taken to address those listed deficiencies.<sup>80</sup>

Further, the transferor or his agent of a building constructed of precast ("tilt-up") concrete wall construction or reinforced masonry buildings with inadequate wall anchorage to wood frame floors or roofs, built before January 1, 1975, must deliver to the purchaser a copy of the "Commercial Property Owner's Guide to Earthquake Safety" as soon as practicable before the sale, transfer, or exchange.<sup>81</sup>

The Commercial Property Owner's Guide to Earthquake Safety is also published by the Seismic Safety Commission,<sup>82</sup> and includes similar information.<sup>83</sup> As above, furnishing this guide is deemed sufficient information to satisfy this statute,<sup>84</sup> but does not affect the duty to disclose the existence of known hazards.<sup>85</sup>

### III. THE COMMON LAW DUTIES

The second major source of law requiring disclosure is found in the common law. As California Civil Code Section 1102.8 states, the "specification of items for disclosure in this article does not limit or abridge any obligation for disclosure created by any other provision of law or which may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction."<sup>86</sup> By including this specific language, the legislature deliberately broadened the duty of disclosure to include the common-law paradigm. Thus, filling out the statutory disclosure statement does not relieve the seller or the seller's agent of the common-law duty of disclosure if the common-law duty extends beyond the matter specified in the statutory form.<sup>87</sup>

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80. *Id.* at § 8897.2(b).

81. *Id.* at § 8893.2.

82. CAL. BUS. & PROF. CODE § 10147(a) (West Supp. 1996).

83. *Id.* at §§ 10147(d)(1) - (3).

84. *See* CAL. CIV. CODE § 2079.9(a) (West Supp. 1996).

85. *Id.* at § 2079.9(b) (West Supp. 1996).

86. CAL. CIV. CODE § 1102.8 (West 1995).

87. 1 MILLER & STARR, *supra* note 24, § 1:123, at 427. *See, e.g.* CAL. CIV. CODE § 1710.2(d) (imposing liability for intentional misrepresentation of AIDS

Under the traditional common law, sellers of real property owe a duty to prospective purchasers not to make any false representations or to actively conceal any defects or material facts.<sup>88</sup>

This common law misrepresentation by concealment is not limited to actual concealment of defects, however. In *Gilbert v. Corlett*,<sup>89</sup> the court found that a seller who showed prospective purchasers an engineer's report stating that the house was in excellent condition, but concealed an earlier engineer's report that stated that the house would eventually become "uninhabitable and valueless [sic]," was guilty of fraud by the misrepresentation or concealment of a material fact.<sup>90</sup> The court stated that the seller is "duty bound" to divulge such divergent reports in order to make a truly full and fair disclosure.<sup>91</sup>

The seller's agent is under the same affirmative duty as his principal; this duty is the same whether he obtains his knowledge from or independently of his principal.<sup>92</sup> The agent's duty is, in fact, independent of the seller's duty, and includes a duty to deal fairly with all parties, including a duty to be well informed on market conditions.<sup>93</sup>

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status of former tenant).

88. Washburn, *supra* note 2, at 386.

89. 171 Cal. App. 2d 116, 339 P.2d 960 (1959).

90. *Id.* at 118.

91. *Id.*; see also *Godfrey v. Steinpress*, 128 Cal. App. 3d 154, 180 Cal. Rptr. 95 (1982) (finding that a broker who had two termite reports but only showed one to the prospective purchasers was liable for fraudulent concealment, intentional infliction of emotional distress, and punitive damages).

92. 1 MILLER & STARR, *supra* note 24, § 3:26, at 153. In *Herzog v. Capital Co.*, 27 Cal.2d 349, 164 P.2d 8 (1945), the seller and his agent were both aware that the property suffered from a leaky roof. *Id.* The seller's agent had the roof patched, painted over the water stains, and represented to the buyer that the house was in "sound condition" and "perfectly intact." *Id.* at 351. The Court held that the seller and his agent had a duty to reveal the hidden and material facts concealed and of which they had knowledge, and their failure to disclose them constituted fraud. *Id.* at 353. In this case, the plaintiff was granted damages pursuant to Civil Code § 3343, the difference between what they paid for the property and its actual value, together with any additional damages arising from the particular transaction. *Id.* at 354.

93. *Id.* Additionally, the agent, as a licensed professional, may also have liability imposed on a theory of negligence for failure to verify information which he transmits to the buyer. In *Gardner v. Murphy*, 54 Cal. App. 3d 164, 126 Cal. Rptr. 302 (1975), a broker was found negligent for failing to either verify information or disclaim knowledge of its accuracy before transmitting it from the seller to

In *Hale v. Wolfsen*,<sup>94</sup> the broker presented the seller with a two-year-old written appraisal of the property which gave a fair market value of the property of \$206,000.<sup>95</sup> Despite the fact that the broker knew that the value of the property on the date of the transaction was only \$80,000, he persuaded the buyer that the value of the property had actually appreciated "quite a bit."<sup>96</sup> The court held that the trial court's finding of constructive fraud (a theory resulting from the fiduciary relationship) was amply supported by the evidence.<sup>97</sup>

In the absence of a fiduciary duty or confidential relationship, a duty to disclose arises at common law if material facts are known only to the seller and the seller knows that the buyer does not know or cannot reasonably discover the undisclosed facts.<sup>98</sup> A breach of the duty to disclose gives rise to a cause of action for rescission or damages.<sup>99</sup>

A 1994 case, *Jue v. Smiser*,<sup>100</sup> has caused some alarm among real estate professionals. In *Jue*, the buyers of a home which had been advertised as having been designed by a famous architect learned facts casting doubts on that representation before the close of escrow.<sup>101</sup> Despite this, the buyers went through with the purchase.<sup>102</sup> Soon thereafter, they filed a complaint seeking damages against the seller and their agent for fraud.<sup>103</sup> The court held that in order to recover in an action for fraud in the sale of real property, fraud at the inception of the transaction (e.g., the signing of the contract for

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the buyer; the court found that the broker effectively served as the source (or, at least, conduit) of intentional misrepresentations. *Id.*

94. 276 Cal. App. 2d 285, 292, 81 Cal. Rptr. 63 (1969).

95. *Id.*

96. *Id.* at 289.

97. *Id.* at 292.

98. See *Buist v. C. Dudley DeVelbiss Corp.*, 182 Cal. App. 2d 325, 331-32, 6 Cal. Rptr. 259 (1960) (finding fault for concealing a soil report which "did not come up to standard").

99. See *Rothstein v. Janss Investment Corp.*, 45 Cal. App. 2d 64, 69, 113 P.2d 465 (1941).

100. 23 Cal. App. 4th 312, 28 Cal. Rptr. 2d 242 (1994).

101. *Id.* at 315. There were no records to support the sellers' contention that Julia Morgan, the designer of Hearst Castle, had designed the home in question. *Id.*

102. *Id.*

103. *Id.*

sale) was sufficient.<sup>104</sup> The court stated that “[i]t is not necessary that a claimant establish *continuing* reliance until the contract is fully executed in order to maintain an action for damages.<sup>105</sup>

This decision has been termed inequitable by many in the field because it allows an action for fraud where there has been no reliance. In *Jue*, the court allowed the buyers to maintain an action despite the fact that the buyer had knowledge that refuted the seller’s assertions. So there was clearly no reliance, a necessary element for fraud.<sup>106</sup> There is, however, a simple reason for allowing the action in this case: the signing of the sales contract is, like the close of escrow, an event of independent legal significance. It is the fraud committed appurtenant to *this* transaction which is being litigated.

Given this disagreement, there is a growing feeling that the *Jue* decision is ambiguous enough that it will not survive review by the California Supreme Court. In the interim, however, the holding in *Jue* has caused the California Association of Realtors to draft a new real estate purchase contract and receipt for deposit containing language which essentially contracts out of the ambit of the decision.

#### A. MATERIALITY

The nature and type of matters for which common law mandates disclosure are varied and unspecified; the issue in each case is whether the fact is so material that it affects the value or desirability of the property. No definitive standard for determines which facts are material in any particular case.<sup>107</sup>

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104. *Id.* at 317.

105. *Id.*

106. See *Smith v. Brown*, 59 Cal. App. 2d 836, 140 P.2d 86 (1943) (“It is a fundamental principal of the law of fraud, regardless of the form of relief sought, that in order to secure redress, the representee must have relied upon the statement or representation as an inducement to his action or injurious change of position.”).

107. 1 MILLER & STARR, *supra* note 24, § 1:122, at 415.

Materiality of facts regarding the property or the transaction is a question of fact for the trier of fact to determine in each case.<sup>108</sup>

As a general rule, however, a matter is considered material if the other party would not have entered into the contract had he known the true facts.<sup>109</sup> However, this criteria is probably too subjective to provide a workable standard.

Where the action is based solely on the grounds of nondisclosure, and not an intentional misrepresentation, an objective standard is required to avoid an impossible burden on sellers to reveal every fact that they are aware may be considered objectionable or even just of interest to a buyer.<sup>110</sup> The sound policy reasons to hold a seller responsible for any affirmative statements he makes do not apply to mere nondisclosure.<sup>111</sup>

In the absence of a party's expression of a unique, subjective matter as being important, the *objective test of materiality* that measures the effect of the undisclosed fact by its effect on market value does, on the other hand, establish a workable standard.<sup>112</sup> Under this test, undisclosed facts are considered material if they have a "significant" and "measurable" effect on the market value.<sup>113</sup> In most cases, the seller and the agent should be able to realize what facts will affect the value and desirability of the property to a reasonable buyer.<sup>114</sup>

108. *Lingsch*, 213 Cal. App. 2d at 737 (stating that "whether the matter not disclosed by the seller or his agent is of sufficient materiality to affect the value or desirability of the property . . . depends on the facts of the particular case); CAL. CIV. CODE § 1574 ("Actual fraud is always a question of fact.").

109. See *Wood v. Kalbaugh*, 39 Cal. App. 3d 926, 932, 114 Cal. Rptr. 673 (1974) (finding that a break in underground pipelines caused by rust or erosion are common in houses over five years old and was thus not a material defect allowing for rescission of a contract for sale of the property).

110. See *Wood*, 39 Cal. App. 3d at 930 (discussion of the same issue in reference to "innocent" misrepresentation).

111. 1 MILLER & STARR, *supra* note 24, at § 1:122, p. 418.

112. *Id.* at p. 420.

113. *Karoutas v. Homefed Bank*, 232 Cal. App. 3d 767, 771, 283 Cal. Rptr. 809 (1991) (citing *Reed v. King*, 145 Cal. App. 3d 261, 267, 193 Cal. Rptr. 130 (1983)).

114. *Karoutas*, 232 Cal. App. 3d at 771. One of the more interesting cases involving materiality is *Coburn v. Perez*, Docket No. C8904725 (5/11/92)(Contra Costa County Superior Court, J. Dolgin). In *Coburn*, the buyer sued the seller and his real estate agents for fraud for selling him a house with numerous defects. *Id.* In

Some matters are so obviously material that there is no cognizable issue as to materiality. The existence of unstable soil or fill<sup>115</sup> (even in small quantities),<sup>116</sup> or the fact that there has been a prior slide and water seepage<sup>117</sup> would be an important consideration to any buyer. Likewise, structural defects<sup>118</sup> or building code violations<sup>119</sup> would be factors that

addition to failing to disclose numerous defects in the home, including the fact that the seller had performed electrical and other work without permits and in violation of applicable building codes, the security gate was improperly wired, and the driveway had been painted over to conceal defects, the defendant had failed to disclose that a main line of the Santa Fe Railroad was located on a hillside across the street from the property. *Id.* To make matters worse, the train passed 14 times a day. *Id.* Finding all of these material, a jury awarded the buyer approximately \$35,000 in diminution in value, plus attorney's fees. *Id.*

115. There is a plethora of cases involving soil problems. *See, e.g.* Snelson v. Ondulando Highlands Corp., 5 Cal. App. 3d 243, 251, 84 Cal. Rptr. 800 (1970); Oakes v. McCarthy Co. 267 Cal. App. 2d 231, 249-50, 73 Cal. Rptr. 127 (1968); Massei v. Lettunich, 248 Cal. App. 2d 68, 73, 56 Cal. Rptr. 232 (1967); *Buist*, 182 Cal. App. 2d at 331; *Gilbert*, 171 Cal. App. 2d at 118; *Asburn v. Miller*, 161 Cal. App. 2d 71, 79, 326 P.2d 229 (1958); *Central Mutual Ins. Co. v. Schmidt*, 152 Cal. App. 2d 671, 673, 313 P.2d 132 (1957); *Burkett v. J.A. Thompson & Son*, 150 Cal. App. 2d 523, 526, 310 P.2d 56 (1957); *Worthen*, 139 Cal. App. 2d at 619; *Blackman v. Howes*, 82 Cal. App. 2d 275, 281, 185 P.2d 1019 (1947); *Rothstein*, 45 Cal. App. 2d at 68, 72; *Clauser v. Taylor*, 44 Cal. App. 2d 453, 454, 112 P.2d 661 (1941); *Benner v. Hooper*, 112 Cal. App. 53, 59, 296 P. 660 (1931).

116. *Tatham v. Pattison*, 112 Cal. App. 2d 18, 21, 245 P.2d 668 (1952) (fill under back porch and in back yard).

117. *Barnhouse v. City of Pinole*, 133 Cal. App. 3d 171, 189-90, 192, 183 Cal. Rptr. 881 (1982) (imposing liability where a slide had been filled, leading to further problems).

118. In *Day v. Maragakis*, Docket No. BC 042731 (5/24/94) (Los Angeles County Superior Court, J. Kalustian), the seller, a general and foundation contractor, and his real estate agent were sued for fraud for failing to disclose known foundation defects, including the fact that foundation work performed on the house was inadequate to remedy the known defects. *Id.* Despite the defendants contention that they had disclosed a soil creep problem, the plaintiff was awarded \$168,000. *Id.*; *see also Herzog*, 27 Cal.2d at 352 (finding liability on agent when, despite ten years of leakage, he stated that a wall was in "perfect condition"); *Hodgeson v. Brant*, 156 Cal. App. 2d 610, 616-17, 319 P.2d 684 (1958) (stating that defendants were liable for misrepresentations about poorly-constructed swimming pool, retaining wall and parking lot at hotel property).

119. While seemingly minor, nondisclosure of zoning violations can be quite expensive for Defendants. For example, in *Mara v. Pascucci*, Docket No. BC 013724 (1/23/93) (Los Angeles Superior Court, J. Jean), home buyers sued the sellers and their real estate agents for fraud for failing to disclose that there were two bootleg bathrooms that required demolition and replacement. *Id.* Judgment was for the plaintiffs in the amount of \$108,887 in general damages, \$34,900 in punitive damages, \$12,290 in prejudgment interest, \$44,000 in attorney fees, and \$2,000 in costs. *Id.*; *see also Pearson v. Norton*, 230 Cal. App. 2d 1, 8-11, 40 Cal. Rptr. 634 (1964) (commercial property); *Birch v. Ciria*, 205 Cal. App. 2d 1, 5-6, 22 Cal. Rptr. 789 (1962) (basement apartment in advertised "multiple dwelling" constructed with-

any reasonable seller would know are of concern to a buyer and difficult (or even impossible) to discover by inspection.

The materiality of each of these types of matters is objectively determinable; in each case the undisclosed fact had a measurable economic effect on the market value of the property or the value of the buyer's use of the property.

#### B. "CORRECTED" DEFECTS

Whether the seller must disclose a prior defect which the seller believes has been corrected is not clear. In *Alexander v. McKnight*,<sup>120</sup> the court found that a seller must disclose neighborhood noise problems, but indicated that if the problem is resolved by injunction, the buyer has not been damaged.<sup>121</sup> This suggests that if there is no permanent or currently recurring damage from the corrected problem, it need not be disclosed. While this conclusion is consistent with *Wood*,<sup>122</sup> it seems to inject an unwelcome element of subjectivity: is the seller, himself, to decide that there is no danger of recurrence?

Indeed, circumstances do exist where a seller must disclose a prior problem even though he believes it has been corrected. In *Barnhouse*, the court held that a seller had to disclose prior slides and seepage even though he believed the cause of the condition had been corrected.<sup>123</sup> Additionally, in the case of a nuisance, as in *Alexander*, if the injunction has been repeatedly violated, it is at least arguable that the seller is not in good faith in he does not disclose the prior problems.

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out permit); *Sanfran Co. v. Rees Blow Pipe Mfg. Co.*, 168 Cal. App. 2d 191, 202, 335 P.2d 995 (1959) (missing sidewalls and other codal violations); *Doran v. Milland Development Co.*, 159 Cal. App. 2d 322, 325, 323 P.2d 792 (1958) (improper vents); *Hodgeson*, 156 Cal. App. 2d at 616 (weak retaining wall); *Unger v. Campau*, 142 Cal. App. 2d 722, 725, 298 P.2d 891 (1956) (defective plumbing and electrical work); *Curran*, 115 Cal. App. 2d at 481 (illegal porch enclosure).

120. 7 Cal. App. 4th 973, 9 Cal. Rptr. 2d 453 (1992).

121. *Id.* at 977-78.

122. *Wood v. Kalbaugh*, 39 Cal. App. 3d at 929 (no need to disclose corrected gas leak).

123. *Barnhouse v. City of Pinole*, 133 Cal. App. 3d at 189-90.

IV. EFFECTS OF BUYERS' INVESTIGATION IN LIGHT OF  
*JUE v. SMISER*

Given that fraud is the most commonly plead cause of action, sellers must realize that certain actions of the buyer can ameliorate or even eradicate their tort liability. The most important action involves situations when the buyer has the subject property examined by his own experts.<sup>124</sup>

It is a well-settled rule that where a party relies on his own investigation and inspection of property, regardless of the vendor's representations, he cannot claim to have been misled by such statements.<sup>125</sup>

This principle still stands in light of the *Jue* decision, although the case has been misinterpreted as foreclosing this defense. In fact, the *Jue* Court merely defined the time when this inspection has to be done in order to avoid liability for fraud.<sup>126</sup>

California Civil Code section 3343(a)(4)(ii) states that the defrauded party must have "reasonably relied on the fraud in entering into the transaction."<sup>127</sup> Therefore, if the buyer is relying solely on the representations of the seller at the time the purchase agreement is signed, the element of reliance has been established for an action for fraud. Discovering the true facts at a later time, even before escrow has closed, does not negate that reliance element of fraud that was established at the time the contract was struck. If, however, the buyers did their independent investigation *before* they entered into the contract for the sale of the property, reliance cannot be established.<sup>128</sup>

Similarly, misrepresentations made *after* the agreement is

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124. Additionally, the buyer has the duty to exercise "reasonable care" to protect himself. See CAL. CIV. CODE § 2079.5 (West Supp. 1996). Thus, they buyer cannot rely on the premise that "ignorance is bliss."

125. *Heifetz v. Bell*, 101 Cal. App. 2d 275, 277, 225 P.2d 231 (1950).

126. *Jue v. Smiser*, 23 Cal. App. 4th 312, 28 Cal. Rptr. 2d 242 (1994).

127. CAL. CIV. CODE § 3343(a)(4)(ii) (West 1970 & Supp. 1996).

128. *Jue*, 23 Cal. App. 4th at 317 n.5.

struck do not serve as the basis for a fraud claim because the buyer could not have relied on those misrepresentations when the agreement was struck; thus, examination of timing becomes critical.<sup>129</sup>

## V. STATUTORY EXEMPTION FOR TRUSTEES

As noted above,<sup>130</sup> there are several exceptions to the statutory duty of disclosure. One of the most important to legal practitioners California Civil Code Section 1102.1(d), which states that Article 1.5 (dealing with disclosures upon transfer of residential property) does not apply to "[t]ransfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust."<sup>131</sup> Therefore, the administrator is not required to complete the disclosure form as directed by California Civil Code Section 1102.6. This was done primarily because the trustee is generally not in a position of superior knowledge regarding the subject property; thus, it would not be fair to hold him to the same standard as the seller himself.

Despite some relaxation in regards trustees the common law duty of disclosure remains intact.<sup>132</sup> As Section 1102.8 declares, "[t]he specification of items for disclosure in this article does not limit or abridge any obligation for disclosure created by any other provision of law or which may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction."<sup>133</sup> A breach of this duty to disclose gives rise, as above, to a cause of action for rescission or damages.<sup>134</sup>

Additionally, this exemption applies only to transactions which fall under the coverage of Article 1.5; in so doing, it does not purport to eliminate any duties imposed in connection with transfers which are outside the ambit of the statute.<sup>135</sup>

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129. *Id.* (citing *Roland v. Hubenka*, 12 Cal. App. 3d 215, 223-25, 90 Cal. Rptr. 490 (1970)).

130. *See supra* Part II.

131. CAL. CIV. CODE § 1102.1(d) (West Supp. 1996).

132. *See Buist, supra* note 98, at 331-32.

133. CAL. CIV. CODE § 1102.8 (West Supp. 1996).

134. *Rothstein, supra* note 99, at 69.

135. *Karoutas, supra* note 113, at 774.

## VI. CONCLUSION

While no one can be made “lawsuit proof,” there are steps that brokers, agents, or sellers can take which will at least limit their exposure.

The surest defense can be summed up in one word: DISCLOSE! While many wrestle with how much disclosure is enough, full and complete disclosure in the statutory transfer disclosure statement is a start. Many real estate brokers have also developed their own earthquake disclosure statements in order to observe the various disclosure requirements.

Next, disclose any “red flags” of possible defects in the property. No statutory or case law has specifically stated that the seller has an affirmative obligation to obtain an expert’s report regarding the possible defect. However, many have found causes of action for fraudulent concealment when the red flag itself was not disclosed.

Also, it is imperative that the agent confirm any information received from the seller to be sure it is accurate before transmitting such information to the potential buyer.

Disclosure of all expert reports, *especially* conflicting ones, is essential to prevent charges of fraudulent concealment. It is also imperative to determine if there was, indeed, reliance on the part of the buyer. Additionally, the timing of any alleged misrepresentations should be gleaned from the pleadings or it may well lead to a successful Motion for Summary Judgment.

In summation, while a seller may lose a sale in the short run, the seller of real estate in California will save many headaches in the long run if he just “tells it like it is.”