

REAL ESTATE BROKER/AGENT LIABILITY REVIEW **2005**

A Survey of California Law

Prepared by:

Andrea Lynn Rice, Esq.
Law Offices of Andrea Lynn Rice
A Professional Corporation
12100 Wilshire Boulevard, Suite 780
Los Angeles, California 90025
Telephone: (310) 207-3717
Facsimile: (310) 207-6785
e-mail: ALRicesq@aol.com

Provided by:

The Herbert H. Landy Insurance
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75 Second Ave, Suite 410
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Providing Errors & Omissions for Real Estate Professionals

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This publication is intended to present an overview of current legal trends; no article or reproduction or essay should be construed as representing advice on specific, individual legal matters, but rather as general commentary on the subject discussed. This publication is not intended to define any standard of care, but to identify areas of exposure and measures to minimize those risks. The measures to be taken may depend more on the risk and exposure than on the applicable standard of care. Application of suggestions in any article will necessarily depend on the nature of the matter or claim in which you are involved.

REAL ESTATE BROKER/AGENT LIABILITY

I. REAL ESTATE PROFESSIONAL MALPRACTICE: A BRIEF SUMMARY

A. COMMISSION AND CONFLICT: THE REAL ESTATE PROFESSIONAL'S QUANDARY

One of the best brief essays on the source of much of the litigation involving real estate brokers and agents is found in Miller & Starr's Treatise, California Real Estate 3d Edition, Section 3:25, as follows:

In some cases the broker's breach is the result of intentional wrongdoings that he knew were wrong; in other cases, the breach results from ignorance, carelessness, or merely an eagerness to consummate a transaction. In many cases the broker is simply unaware that he is an agent for a particular principal or, as is commonly believed in the industry, he believes he is merely a middleman or facilitator whose duty is merely to bring the parties to a meeting of the minds. Regardless of the reasons for the broker's misconduct, there is one basic flaw in the manner in which the industry does business which is the fundamental cause of the unusually high incidence of real estate broker's breach of duty.

The theme that is constantly found beneath the surface of almost every breach of duty by a broker is the compensation system which is generally accepted in the industry. Brokers work on a contingency basis; no matter how hard they work and how honest and forthright they act in the transaction, they are not paid if the transaction is not concluded. The average person is not willing to work hard, diligently, and honestly when he is not going to be paid for his efforts. Everyone wants to be paid for his efforts; in some cases, the broker's financial circumstances require that compensation be earned in order to meet financial needs.

In such a system, it is no wonder that brokers are overzealous. It is not difficult to explain a failure to investigate, or a careless failure to disclose, when the broker's primary motivation is to conclude the transaction if he is to receive compensation. This conflict of interest can deter the most dedicated agent. If there is an anxiety to conclude the transaction, there is a temptation not to conduct as thorough an investigation as should be done. Also, how can the broker be expected to disclose matters that would "kill the deal" and at the same time defeat payment of his own compensation? Even the most conscientious broker's exuberance to conclude the transaction leads him into oversights in his quest to "close the deal."

The compensation system is the heart of the broker's dilemma and the public's exposure to a fiduciary's omissions. This conflict of interest, inherent in the real estate industry, will not be removed until the industry changes the system. On the other hand, those brokers who have sought to change the system by working on a non-contingent basis have been, by and large, unsuccessful. Part of the blame, therefore, must be laid on the doorstep of the public who are not willing to pay for a broker's services unless a transaction is concluded. If the public does not recognize the conflict which the present system creates, the individual brokers are in no position to change the system even if they had an inclination to do so. Although the legislature and courts have evidenced a concern over the potential harm to the consumer, it is not likely that either will dictate a change to the compensation system. Therefore, the present system will continue, the brokers will continue to deal with the conflict of interest, consumers will continue to be harmed by errant fiduciaries, and attorneys will continue to earn their fees chasing errant fiduciaries eagerly chasing their commissions.

B. COMMON LAW DUTIES

1. Duty of Care

Until the middle of the 1980's, California law on real estate broker liability evolved almost exclusively from judicial decisions. These opinions established that, as with other professionals, real estate professionals who undertake to represent others in property transactions are required to have, and exercise on behalf of their clients, the knowledge, skill, and diligence ordinarily possessed and used by other professional real estate agents. (Easton v. Strassburger (1984) 152 Cal.App.3d 90, 98-102, 199 Cal.Rptr. 383; Stiefel v. McKee (1969) 1 Cal.App.3d 263, 265-266, 81 Cal.Rptr. 565; Wilson v. Hisey (1957) 147 Cal.App.2d 433, 438, 305 P.2d 686.) This standard of care has been codified in Civil Code Section 2079.2.

It has been held that actionable negligence may be found in the failure of real estate agents (1) to exercise reasonable skill and care in setting an asking price and in recommending the acceptance of an offer (Jorgensen v. Beach'n' Bay Realty, Inc. (1981) 125 Cal.App.3d 155, 164-165, 177 Cal.Rptr. 882), (2) to adequately recommend a title search (Schoenburg v. Romike Properties (1967) 251 Cal.App.2d 154, 162, 59 Cal.Rptr. 359), (3) to secure or recommend a title search (Wilson v. Hisey (1957) 147 Cal.App.2d 433, 438, 305 P.2d 686), or (4) to make component transactions contingent upon one another in arranging an exchange (Stiefel v. McKee (1969) 1 Cal.App.3d 263, 265-266, 81 Cal.Rptr. 565).

An agent acting on behalf of a seller in a real estate transaction (the listing agent) owes special duties to the purchasers when selling a property that the agent knows to have unrecorded liens. The agent has a duty either to disclose to the purchasers any known unrecorded lien interests in the property, or to notify promptly the persons holding unrecorded liens of the impending sale of the property, so that recording of the liens may take place prior to sale. (Norman I. Krug Real Estate Investments, Inc. v. Praszker (1990) 220 Cal.App.3d 35, 42-43, 269 Cal.Rptr. 228.)

A real estate broker may also be liable for the intentional tort of fraudulent concealment for failing to disclose known material defects. (Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal.3d 285, 293-294, 85 Cal.Rptr. 444, 466 P.2d 996; Cooper v. Jevne (1976) 56 Cal.App.3d 860, 866, 128 Cal.Rptr. 724.)

However, a third party with whom there is no broker-customer relationship may not sue a real-estate broker for failing to warn the purchaser of structural defects, at least when the third party is not an intended beneficiary of the information. For example, in FSR Brokerage, Inc. v. Superior Court (1995) 35 Cal.App.4th 69, 73, 41 Cal.Rptr.2d 404, the court held that brokers owed no duty to partygoers at a newly-purchased property who were injured or killed when the balcony collapsed. In Coldwell Banker Residential Brokerage Co. v. Superior Court (2004) 117 Cal.App.4th 158, 161-162, the court held that, because the purchaser's minor son was not a party to the real estate transaction, he could not state a claim against the listing broker for failure to advise of the presence of toxic mold.

A realtor sued for negligent nondisclosure of defects in real property may obtain equitable indemnity from a home inspection company that allegedly breached its duty to the purchaser to discover and disclose the same defects. (Leko v. Cornerstone Home Inspection (2000) 86 Cal.App.4th 1109, 1119-1120.) Equitable indemnity is available even where the home inspection company prepared its report for a different prospective purchaser, in connection with a previous transaction involving the same property, so long as the home inspection company intended or knew with substantial certainty that its report would be used in subsequent transactions involving the property. (86 Cal.App.4th at pp. 1120-1122.)

A real estate agent owes a duty of care to other parties to a real estate transaction, even if he or she has not undertaken to act as their agent. Easton v. Strassburger, supra, held that a seller's agent has a duty to exercise care to discover and disclose to a prospective buyer of residential property any physical conditions and defects that might materially affect the value or desirability of residential real property. Subsequently, the Legislature enacted Civil Code Sections 2079 through 2079.5, expressing an intent to "codify and make precise the holding in Easton v. Strassburger."

Easton was a landmark case which established a selling broker's duty of inspection and disclosure to prospective purchasers. But the court in Easton limited its holding to residential property, expressing "no opinion" whether a broker's obligation to conduct an inspection for defects for the buyer's benefit applies to the sale of commercial real estate. (Easton v. Strassburger, supra, 152 CA3d at 102, 199 CR at 390, fn. 8.)

Even so, dictum in Easton suggested that a comparable duty of inspection and disclosure does not exist in the commercial property arena and that any common law negligence or fraud liability will be limited to the failure to disclose defects of which the broker had actual knowledge: "Unlike the residential home buyer who is often unrepresented by a broker, or is effectively unrepresented because of the problems of dual agency . . . , a purchaser of commercial real estate is likely to be more

experienced and sophisticated in his dealings in real estate and is usually represented by an agent who represents only the buyer's interests . . ." (Easton v. Strassburger, supra, 152 CA3d at 102, 199 CR at 390, fn. 8.)

Cases since Easton, construing the now statutory duty of inspection and disclosure, have declined to extend the Easton obligation to the sale of commercial properties. (Smith v. Rickard (1988) 205 C.A.3d 1354, 1360, 254 CR 633, 636.) In sum, Easton and its successor statute focus on affording protection to the average consumer that is not accorded to commercial transactions which are presumed to be conducted at arm's length.

2. Fiduciary Duties

As set forth in Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal.App.4th 18, 25:

Under the common law, unchanged by Easton and section 2079, a broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. (Stiefel v. McKee (1969) 1 Cal.App.3d 263, 266 [81 Cal.Rptr. 565]; Timmsen v. Forest E. Olson, Inc. (1970) 6 Cal.App.3d 860, 871 [86 Cal.Rptr. 359]; Ford v. Courmale (1973) 36 Cal.App.3d 172, 180 [111 Cal.Rptr. 334, 81 A.L.R.3d 704].) "The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The agent's duty to disclose material information to the principal includes the duty to disclose reasonable obtainable material information. [¶] . . . [¶] The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of each transaction, the knowledge and the experience of the principal, the questions asked by the principal, and the nature of the property and the terms of sale. The broker must place himself in the position of the principal and ask himself the type of information required for the principal to make a well-informed decision. This obligation requires investigation of facts not known to the agent and disclosure of all material facts that might reasonably be limitations for breaches of those duties imposed by section 2079 of two years from the date of possession.

A dual agent has fiduciary duties to both the buyer and seller. (Assilzadeh v. California Federal Bank (2000) 82 Cal.App.4th 399, 414, 418.)

C. STATUTORY DUTIES

1. Statutory Duty of Inspection of Residential Real Property: The Legislative Response to Easton v. Strassburger

a. Standard of Care

Easton v. Strassburger, supra, was the subject of much criticism because of its vagueness in defining the scope of inspection required of a broker. The California legislature addressed this criticism by passing what became Civil Code Section 2079, et seq.

In a statement of legislative intent, the Legislature explained that sections 2079 to 2079.6 were enacted to define the duty of care and its manner of discharge, found to exist in Easton, noting the imprecision of terms in Easton and the absence of a comprehensive declaration of duties, standards and exceptions had caused insurers to modify professional liability coverage and confusion among real estate licensees as to the manner of performing their duty. (Section 2079.12; Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal.App.4th 18, 24, n. 10.)

The statute defines the standard of care owed by a broker in exercising the duty to inspect 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 real estate license." (Civil Code Section 2079.2)

Under Section 2079, a licensed real estate broker or salesperson owes a duty to a prospective purchaser of either 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 1) conduct a reasonable competent and diligent visual inspection of the property offered for sale and to 2) disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal.

b. Scope of the Duty of Inspection

Section 2079 statutorily limits the duty of inspection recognized in Easton to one requiring only a visual inspection. (Wilson v. Century 21 Great Western Realty (1993) 15 Cal.App.4th 298, 308; Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal.App.4th 18, 24.) Further, the inspection to be performed need not include an inspection of areas that are reasonably and normally inaccessible to such an inspection, nor an affirmative inspection of areas off the site of the subject property or of public records or permits concerning the title or use of the property. (Civil Code Section 2079.3.)

Further, where the property in question is either non-residential or exceeds four units, the statute does not apply.

If the property is a unit in either a planned development, a condominium, or a stock cooperative, the inspection need not include an inspection of more than the unit offered for sale if the seller or broker complies with the provisions of Civil Code Section 1368 by providing the governing and financial documents of the homeowners association. (Civil Code Section 2079.3.)

A real estate agent participating in a buy-sell transaction for a residence located within a planned unit development has no statutory or common law duty to inquire of the subject homeowners association whether (1) there are construction defects at the common areas of the property or (2) there is pending or proposed litigation concerning those defects. (Civil Code, Section 2079, et seq.) Padgett v. Phariss (1997) 54 Cal.App.4th 1270, 1275-1276.

Further, a real estate broker has no duty to advise how disclosed facts affect the value of the property. (Pagano v. Krohn (1997) 60 Cal.App.4th 1, 7, 12.) The court in Pagano went on to state at 60 Cal.App.4th 12:

Conclusions as to how the real or practical ramifications of disclosed facts adversely impact value are not "facts" subject to an agent's duty of disclosure. . . . Lawson fulfilled his disclosure duty to the Paganos by informing them of the existence of the lawsuit and the fact that there were water intrusion problems . . . "The legal and practical effects of this state of affairs do not rise to the status of a fact -- they are the conclusions as to value resulting from [the disclosed facts]. . . ." Lawson had no duty to tell the Paganos that the Association's lawsuit might adversely affect the value of their unit.

Assilzadeh v. California Federal Bank (2000) 82 Cal.App.4th 399 held that a seller's and an agent's duty to disclose material facts is met when the buyer is informed of the existence of construction defect litigation and of the settlement of that lawsuit; there is no duty to investigate the contents of the pleadings or other off-site matters.

The statute also requires the agent to disclose in writing whether he/she is acting as the exclusive agent for one of the parties, or as a dual agent of both, and to obtain a signed acknowledgment of receipt of the disclosure form. (Civil Code Sections 2079.14, 2079.16 and 2079.17) A dual agent may not disclose to the buyer that the seller is willing to sell the property at a price less than the listing price without the express written consent of the seller. Similarly, a dual agent may not disclose to the seller that the buyer is willing to pay more than the offering price without the buyer's express written consent. (Civil Code Section 2079.21.)

Contracts for the sale of residential property comprising one to four dwelling units must contain a statutory notice, in at least 8-point type, disclosing the availability of a statewide database of information about the location of registered sex offenders. No further information is required from the seller regarding the proximity in the neighborhood of registered sex offenders. (Civil Code Section 2079.10a(b),(c).) Registered sex offenders have no cause of action against the disclosing party based on information contained in a Section 2079.10a notice.

Mirroring the common law defenses of comparative negligence and assumption of the risk, Section 2079 cautions that it in no way relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself, including those facts that are known to, or are within the diligent attention and observation of, the buyer or prospective buyer. Buyers cannot turn a blind eye to known facts within their diligent attention and observation. (Civil Code Section 2079.5)

2. Statutory Duty of Disclosure: Transfer Disclosure Statements for Residential Real Property (Civil Code Section 1102, et seq)

a. Duty of Disclosure

With certain exceptions set forth in Civil Code Section 1102.2, sellers of one-to-four unit residential property must deliver to the prospective transferee a written disclosure statement set forth in Civil Code Section 1102.6 relating to the subject property. The current form of the statement is found at Appendix "A."

Further, pursuant to Civil Code Section 1102.6a(a), any city or county may elect to require disclosures in addition to those disclosures required by Section 1102.2.

A seller still has a common-law duty to disclose undiscoverable material facts in commercial transactions, as well as in other transactions to which the statutory disclosure form is not applicable. In transfers not subject to Civil Code Section 1102, the agent may make required disclosures in a separate writing. (Stevenson v. Baum (1988) 65 Cal.App.4th 159, 165.)

The disclosure statement set forth in Civil Code Section 1102.6 was intended by the Legislature to be used by transferors and by agents making the disclosures required by Section 2079 on the agent's portion of the real estate disclosure statement. (Civil Code Section 1102.1.)

Transfers made pursuant to foreclosure and probate sales; transfers between co-owners; spouses; and those in lineal consanguinity are among those excepted from this requirement. (Civil Code Section 1102.2.)

The disclosures on the form are to be based on the personal knowledge of the seller and the seller's agent, as well as on the visual inspection by the agent obtaining the offer. In lieu of or in addition to those sources, the disclosure may be based on information provided by public agencies or experts such as engineers, geologists, and contractors. (Civil Code Section 1102.3(c).)

This statutory scheme was not intended to narrow either common law or other statutory duties of sellers and brokers. Therefore, the statute specifically cautions that the specification of items for disclosure does not limit or abridge any obligation of disclosure created by any other provision of law or which may exist in order to avoid fraud, misrepresentation or deceit in the transfer transaction. (Civil Code Section 1102.8.) In other words, the Section 1102, et seq. obligations operate in addition to – and not in lieu of – the parties' and agents' obligations to disclose any fact "materially affecting the value and desirability of the property including . . . the physical conditions of the property and previously received reports of physical inspection . . ." (Civil Code Section 1102.1.)

Further, Civil Code Section 1102 does not supplant a broker salesperson's inspection and disclosure obligations pursuant to Civil Code Section 2079. Thus, a seller's agent is not shielded from liability for material non-disclosure by delivering the seller's Civil Code Section 1102.6 disclosure statement to the buyer. The agent's obligations under Civil Code Section 2079 exist independently of Civil Code Section 1102, et seq.

The real estate transfer disclosure statement required by Civil Code Section 1102.6, is not a part of any contract between the buyer and seller. Thus, in an action by the buyers of residential real property for breach of contract, the disclosure statement may not be relied on as part of the purchase contract between the parties. (Braiser v. Sparks (1993) 17 Cal.App.4th 1756.)

A seller is obligated to disclose to potential buyers that there may be problems in the neighborhood; e.g., a neighbor's activities which constitute a nuisance such as operation of a tree trimming business (Alexander v. McKnight (1992) 7 Cal.App.4th 973), or a noise problem with the neighbors (Shapiro v. Sutherland (1998) 64 Cal.App.4th 1534, 1544).

A seller may be liable to a subsequent buyer under the so-called "indirect deception doctrine" if the seller makes a fraudulent representation while intending or having reason to expect that it will be relied upon by a third party (subsequent buyer). Thus, in Shapiro v. Sutherland, *supra*, when a seller sold a house to a relocation company which the seller knew would immediately resell the property, the seller's failure to disclose the known noise problems in the Section 1102.6 disclosure statement supported a fraud cause of action by the subsequent buyer against the seller.

b. Limitations on Duty of Disclosure

The duty to disclose found in Civil Code Sections 1102-1102.15 only encompasses factual matters not readily discoverable by the buyers. Further, the duty does not extend to disclosure of the legal ramifications of those facts. (Sweat v. Hollister (1995) 37 Cal.App.4th 603, 608-609, 43 Cal.Rptr.2d 399.)

A real estate professional has no duty to advise a client of possible tax consequences of a transaction. (Carleton v. Tortosa (1993) 14 Cal.App.4th 745.)

There is no duty to disclose either the fact or manner of a former occupant's death upon the property as long as the death occurred more than three years before the purchase offer. (Civil Code Section 1710.2) This statute thus modifies Reed v. King (1983) 145 Cal.App.3d 261, which held that the real estate agent had a duty to advise a prospective purchaser that a woman and her four children had been murdered at the residence ten years earlier. Further, Section 1710.2 eliminates any obligation to reveal that any occupant of the property was infected with the HIV virus or died of AIDS. However, the statute does not preclude liability for failure to disclose that occupants suffered from any physical or mental condition other than HIV/AIDS. Further, the statute does not immunize an owner or the agent from liability if he or she makes an intentional misrepresentation to a buyer concerning deaths on the real property.

Civil Code Section 1102(c) was added in 1994 to expressly prohibit any waiver of the statute's disclosure requirements. (Overruling Loughrin v. Superior Court (1993) 15 Cal.App.4th 1188.) Further, specific statutory language added in 1995 provides that delivery of the disclosure form required by Civil Code Section 1102.6 may not be waived through an "as is" sale.

Under the common law, an "as is" provision in a sales contract generally "means . . . that the buyer takes the property in the condition visible to or observable by him and with no implied warranties as to quality or condition whatsoever." (Lingsch v. Savage (1963) 213 Cal.App.2d 727, 735-6.) This exception does not apply where the sale is made through some form of fraudulent misrepresentation or concealment. (Shapiro v. Hu (1986) 188 Cal.App.3d 324, 334.)

The validity of a sale subject to Section 1102.6, et seq. is not affected by the seller's failure to provide the statutory disclosure statement. However, willful or negligent non-compliance render the seller liable for the buyer's actual (i.e., compensatory) damages. (Civil Code Section 1023; Shapiro v. Sutherland, *supra*, 64 Cal.App.4th 1534 at page 1545.)

Neither the transferor, nor any listing or selling agent, is liable for any inaccuracy or omission of any information in the transfer statement if the information was not within the personal knowledge of the transferor or agent; was based on information timely provided by public agencies or in a report by a licensed engineer, land surveyor, geologist, structural pest control officer, contractor or any other expert dealing with matters within the scope of that professional's license or expertise; and ordinary care was exercised in obtaining and transmitting the information (Section 1102.4).

Effective January 1, 2000, under certain circumstances, a transferor must also provide a Natural Hazard Disclosure Statement (Appendix "B") for properties in special flood, fire, or earthquake fault zones. (Civil Code Sections 1103, et seq.) As with the Real Estate Transfer Disclosure Statement (Civil Code Section 1102.6), neither the transferor, nor any listing or selling agent, is liable for any inaccuracy or omission of any information in the Natural Hazard Disclosure statement if the information was not within the personal knowledge of the transferor or agent; was based on information timely provided by public agencies or other persons providing information as specified in subdivision (c) that is required to be disclosed pursuant to this article; and ordinary care was exercised in obtaining and transmitting the information (Section 1102.4).

Civil Code Section 1103.4, entitled "Liability and Compliance," provides the following limitations with respect to the Natural Hazard Disclosure Statement:

"(a) Neither the transferor nor any listing or selling agent shall be liable for any error, inaccuracy, or omission of any information delivered pursuant to this article if the error, inaccuracy, or omission was not within the personal knowledge of the transferor or the listing or selling agent, and was based on information timely provided by public agencies or by other persons providing information as specified in subdivision (c) that is required to be disclosed pursuant to this article, and ordinary care was exercised in obtaining and transmitting the information.

"(b) The delivery of any information required to be disclosed by this article to a prospective transferee by a public agency or other person providing information required to be disclosed pursuant to this article shall be deemed to comply with the requirements of this article and shall relieve the transferor or any listing or selling agent of any further duty under this article with respect to that item of information.

"(c) The delivery of a report or opinion prepared by a licensed engineer, land surveyor, geologist, or expert in natural hazard discovery dealing with matters within the scope of the professional's license or expertise, shall be sufficient compliance for application of the exemption provided by subdivision (a) if the information is provided to the prospective transferee pursuant to a request therefor, whether written or oral. In responding to that request, an expert may indicate, in writing, an understanding that the information provided will be used in fulfilling the requirements of Section 1103.2 and, if so, shall indicate the required disclosures, or parts thereof, to which the information being furnished is applicable. Where that statement is furnished, the expert shall not be responsible for any items of information, or parts thereof, other than those expressly set forth in the statement. In responding to the request, the expert shall determine whether the property is within an airport influence area as defined in subdivision (b) of Section 11010 of the Business and Professions Code. If the property is within an airport influence area, the report shall contain the following statement:

NOTICE OF AIRPORT IN VICINITY

The property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you.

(a) After a transferor and his or her agent comply with Section 1103.2, they shall be relieved of further duty under this article with respect to those items of information. The transferor and his or her agent shall not be required to provide notice to the transferee if the information provided subsequently becomes inaccurate as a result of any governmental action, map revision, changed information, or other act or occurrence, unless the transferor or agent has actual knowledge that the information has become inaccurate."

c. Duties of Disclosure Regarding the Presence of Mold

California's Health and Safety Code Sections 26140, et seq., address the obligations of disclosure by sellers, transferors and lessors of commercial or industrial real property to disclose the presence of mold. However, none of these sections has come into effect, and it is anyone's guess when they will.

Section 26140(b) provides that "[t]he requirements of this section shall not apply until the first January 1 or July 1 that occurs at least six months after the department adopts standards pursuant to Section 26103 and 26105 and develops guidelines pursuant to Section 26130." In other words, these requirements have been placed in abeyance until appropriate guidelines are developed by the State of California. Further, the California State Department of Health Services is not mandated by statute to report to the California Legislature on its progress in developing mold identification guidelines until July 1, 2003.

The uncertainty in this entire area is also manifested in California Health and Safety Code Section 26150, which provides that "(a) nothing in this article shall affect the existing obligations of the parties or transferors to a real estate contract, or their agents, to disclose any facts materially affecting the value and desirability of the property, including, but not limited to, the physical conditions of the property and previously received reports of physical inspections noted on the disclosure form set forth in Section 1102.6 or 1102.6(a) of the Civil Code." Further, "[n]othing in this article shall be construed to change the existing inspection and disclosure duties of a real estate broker or sales persons including, but limited to, those duties imposed by Section 2079 of the Civil Code (Health and Safety Code Section 26150(b))." In other words, this statute, which is not yet really in effect, changes nothing.

A limitation on potential liability is found in Health and Safety Code Section 26153, as follows:

"Neither the transferor nor any listing or selling agent shall be held liable for any error, inaccuracy, or omission of any information delivered pursuant to this article if the error, inaccuracy or omission was not within the personal knowledge of the transferor, or the listing or selling agent, or was based on information timely provided by public agencies, or by other persons providing relevant information by delivery of a report or opinion prepared by an expert dealing with matters within the relevant scope of the professional's license or expertise, and ordinary care was exercised in obtaining and transmitting it."

Further, "(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 transaction" (Health and Safety Code Section 26157).

3. Termination of Duties of Brokers

The duties of real estate agents, even to their own clients, terminate "when the subject matter of the agency is sold or otherwise disposed of . . ." (Menzel v. Salka (1960) 179 Cal.App.2d 612, 623-624.) Consequently, real estate professionals owe no post-escrow duty to make any disclosures to the buyers of real property. (Robinson v. Grossman (1997) 57 Cal.App.4th 634, 646.)

4. Duties of Buyer

5. Section 2079.5 specifically provides that nothing in the section relieves a buyer or prospective buyer of the duty to exercise reasonable care of protecting himself or herself, including those facts which are known to or within the diligent attention and observation of the buyer or prospective buyer.

As the court in Robinson v. Grossman (1997) 57 Cal.App.4th 634, 643-644 stated:

Moreover, section 2079.5 makes it clear that “[n]othing in this article relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself, including those facts which are known to or within the diligent attention and observation of the buyer or prospective buyer.” It is thus clear that under this statutory scheme, “once the sellers and their agent make the required disclosures, it is incumbent upon the potential purchasers to investigate and make an informed decision based thereon.”

(See also Furla v. Jon Douglas Co. (1988) 65 Cal.App.4th 1069; Assilzadeh v. California Federal Bank (2000) 82 Cal.App.4th 399, 413, 418.)

D. MEASURE OF DAMAGES

a. Fraud and Negligent Misrepresentation

Fragale v. Faulkner (2003) 110 Cal.App.4th 229, held that the measure of damages for a real estate broker’s intentional misrepresentation to a buyer for whom he acts as agent is not limited to the out-of-pocket losses suffered by the buyer. Rather, “[b]ecause the broker is a fiduciary, damages for intentional fraud may be measured by the broader benefit-of-the-bargain rule.”

The court in Fragale first described the general principles applicable to fraud damages as follows:

1) There are two measures of damages for fraud: out-of-pocket and benefit-of-the bargain. The out-of-pocket measure restores a plaintiff to the financial position he enjoyed prior to the fraudulent transaction, awarding the difference in actual value between what the plaintiff gave and what he received. The benefit-of-the-bargain measure places a defrauded plaintiff in the position he would have enjoyed had the false representation been true, awarding him the difference in value between what he actually received and what he was fraudulently led to believe he would receive. (Alliance Mortgage Co. v. Rothwell (1995) 10 Cal.4th 1226, 1240 (Alliance Mortgage).)

2) “In fraud cases involving the ‘purchase, sale or exchange of property,’ the Legislature has expressly provided that the ‘out-of-pocket’ rather than the ‘benefit-of-the-bargain’ measure of damages should apply.” (Alliance Mortgage, supra, 10 Cal.4th at p. 1240.) Civil Code Section 3343 provides the exclusive measure of damages for fraud in such cases. “One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received.” (Civil Code Section 3343, subd. (a).)

3) Section 3343 does not apply, however, “when a victim is defrauded by its fiduciaries.” (Alliance Mortgage, supra, 10 Cal.4th at p. 1241.) Instead, in the case of fraud by a fiduciary, “the ‘broader’ measure of damages provided by Sections 1709 and 3333 applies.” (Ibid. [footnotes omitted].) Section 3333 is the general tort damage measure, permitting compensation “for all the detriment proximately caused” by the breach of an obligation not arising from contract; section 1709 provides that “[O]ne who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.” (Civil Code Section 1709.)

4) In the case of a negligent misrepresentation by a fiduciary, “a plaintiff is only entitled to its actual or ‘out-of-pocket’ losses suffered because of [the] fiduciary’s negligent misrepresentation under section 3333.” (Alliance Mortgage, supra, 10 Cal.4th at pp. 1249-1250.) The Supreme Court has not decided whether “the measure of damages under section 3333 might be greater for a fiduciary’s intentional misrepresentation. . . .” (Id. at p. 1250.)

Plaintiffs in Fragale purchased a home in Long Beach, California and several months later filed a lawsuit against the seller. The real estate broker, Vince Messing, who represented both parties in the transaction, was subsequently added as a defendant. The Fragales’ complaint alleged that defendants falsely represented that no structural defects or safety problems existed with respect to a laundry room and bonus room addition to the house which had been constructed without permits from the city. The Fragales discovered the defects almost immediately after the purchase.

The matter eventually proceeded to a jury trial. Before trial began, the broker, Messing, filed, and the court granted, a motion in limine to preclude the Fragales from presenting any evidence not relevant to the fraud claims pled in the complaint, and specifically, any evidence of breach of fiduciary duty by Messing. At the close of the Fragales' case-in-chief, the broker moved for nonsuit, on the ground that the Fragales offered no admissible evidence of diminution in the value of the property, as required under Civil Code Section 3343. The court denied the Fragales' (buyers') motions 1) to reopen their case to allow Tim Fragale to testify as to the value of the property, and 2) to amend the pleadings to state a cause of action for breach of fiduciary duty, based on evidence already presented. The latter motion was denied on the grounds it was untimely and prejudicial to the defense. The jury found the broker liable for intentional misrepresentation and negligent misrepresentation, and awarded damages on both causes of action. The broker filed a successful motion for judgment notwithstanding the verdict on the ground that the plaintiff had failed to establish any damages on an out-of-pocket theory. The Fragales appealed from the judgment, and the Court of Appeal reversed as to the fraud cause of action, only.

The Fragales' (buyers') principal contention on appeal was the trial court erred in relying on Civil Code Section 3343 to find they failed to show any damages resulting from Messing's intentional misrepresentation. The court observed that the damages for fraud by a fiduciary are measured under Civil Code Section 3333, rather than Section 3343. "While there is a split of authority on the point, we conclude the measure of damages for a fiduciary's intentional misrepresentation is not confined to actual or out-of-pocket losses."

Applying the four principles detailed above, the court affirmed judgment against the Fragales on their claim of negligent misrepresentation against Messing. "As the Supreme Court stated in Alliance Mortgage, supra, 10 Cal.4th at pp. 1249-1250, a plaintiff is entitled only to its out-of-pocket losses suffered because of a fiduciary's negligent misrepresentation." However,

[t]he result is different on the Fragales' claim against Messing for intentional misrepresentation. Joining those courts that have adopted the broader measure of damages for fiduciary fraud, we conclude that damages are not limited to out-of-pocket losses. The result is consonant with the principle that "the faithless fiduciary shall make good the full amount of the loss of which his breach of faith is a cause." (Salahutdin v. Valley of California, Inc. (1994) 24 Cal.App.4th 555, 567 (Salahutdin) [citation, emphasis and internal quotations omitted] [discussing cases].)

The court acknowledged that authorities are not uniform on whether a measure of damages other than out-of-pocket losses may be applied in the case of an intentional misrepresentation by a fiduciary. "Since Alliance Mortgage, one court has concluded that out-of-pocket loss is the appropriate measure of damages for intentional fraud by a fiduciary. (Hensley v. McSweeney (2001) 90 Cal.App.4th 1081, 1086 (Hensley)). . . [However,] 'Hensley did not discuss the propriety of distinguishing between intentional and negligent misrepresentations by a fiduciary.'"

The appellate court concluded that the preferable view is that damages for fraud by a fiduciary should not be limited to out-of-pocket losses. ". . . [T]he remedy afforded by sections 1709 and 3333 aims at compensation for any and all the detriment proximately caused by the breach."

E. STATUTE OF LIMITATIONS

1. Negligence and Negligent Misrepresentation

The statute of limitations for breach of the statutory duty to inspect and disclose under Civil Code Section 2079.4 runs two years from "the date of possession," which means the earlier of the date of recordation, the date of close of escrow, or the date of occupancy. (Civil Code Section 2079.4)

This two-year statute of limitations is applicable to claims stemming from violations of the duties to inspect and disclose imposed by Civil Code Section 2079, even where those claims might be described more generally as claims of negligent misrepresentation. Loken v. Century 21-Award Properties (1995) 36 Cal.App.4th 263, 273. In Loken, the court rejected plaintiff's claim that the three-year limitations period of Code of Civil Procedure Section 338(d) applied to an action for "negligent misrepresentation" based on failure of a real estate broker to reveal structural defects.

2. Intentional Fraud

The two-year statute of limitations for breach of the statutory duty to inspect and disclose (section 2079.4) does not apply in cases of intentional fraud. (Williams v. Wells & Bennett Realtors (1997) 52 Cal.App.4th 857, 861-862.)

3. Breach of Fiduciary Duty

Section 2079.4's two-year statute of limitations does not apply to suits for breach of fiduciary duties against brokers by purchasers whom they exclusively represent. (Field v. Century 21 Klowlowden-Forness Realty (1998) 63 Cal.App.4th 18, 20-21.)

Instead, suits involving fiduciaries are governed by a more flexible statute of limitations. Accrual is measured by the date plaintiff discovers, or should have discovered, the wrongful act, rather than by the fixed two-years-from possession rule of Section 2079.4.

To apply Section 2079.4 to fiduciary duties of a buyer's broker would, contrary to the Legislature's express statement of intent, restrict the ability of buyers to obtain redress for duties owed by their own real estate licensees which existed before Section 2079.4 was enacted. (Field v. Century 21 Klowlowden-Forness Realty, *supra*, 63 Cal.App.4th at p. 25.)

APPENDIX A
REAL ESTATE TRANSFER DISCLOSURE STATEMENT

REAL ESTATE TRANSFER DISCLOSURE STATEMENT

THE DISCLOSURES REQUIRED BY SECTION 1102.6 PERTAINING TO THE PROPERTY PROPOSED TO BE TRANSFERRED ARE SET FORTH IN, AND SHALL BE MADE ON A COPY OF, THE FOLLOWING DISCLOSURE FORM:

THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY SITUATED IN THE CITY OF _____, COUNTY OF _____, STATE OF CALIFORNIA, DESCRIBED AS _____ . THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE DESCRIBED PROPERTY IN COMPLIANCE WITH SECTION 1102 OF THE CIVIL CODE AS OF _____, 19__ . IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS TRANSACTION, AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN.

COORDINATION WITH OTHER DISCLOSURE FORMS

This Real Estate Transfer Disclosure Statement is made pursuant to Section 1102 of the Civil Code. Other statutes require disclosures, depending upon the details of the particular real estate transaction (for example: special study zone and purchase-money liens on residential property).

Substituted Disclosures: The following disclosures have or will be made in connection with this real estate transfer, and are intended to satisfy the disclosure obligations on this form, where the subject matter is the same:

- Inspection reports completed pursuant to the contract of sale or receipt for deposit.
- Additional inspection reports or disclosures:

SELLER'S INFORMATION

The Seller discloses the following information with the knowledge that even though this is not a warranty, prospective Buyers may rely on this information in deciding whether and on what terms to purchase the subject property. Seller hereby authorizes any agent(s) representing any principal(s) in this transaction to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER(S) AND ARE NOT THE REPRESENTATIONS OF THE AGENT(S), IF ANY. THIS INFORMATION IS A DISCLOSURE AND IS NOT INTENDED TO BE PART OF ANY CONTRACT BETWEEN THE BUYER AND SELLER.

Seller ___ is ___ is not occupying the property.

A. The subject property has the items checked below (read across):

Range Oven Microwave
 Dishwasher Trash Compactor Garbage Disposal
 Washer/Dryer Hookups Rain Gutters
 Burglar Alarms Smoke Detector(s) Fire Alarm
 TV Antenna Satellite Dish Intercom
 Central Heating Central Air Cndtng. Evaporator Cooler(s)
 Wall/Window Air Cndtng. Sprinklers Public Sewer System
 Septic Tank Sump Pump Water Softener
 Patio/Decking Built-in Barbecue Gazebo
 Sauna
 Hot Tub Locking Pool Child Resistant Spa Locking Safety
Safety Cover [FN*] Barrier [FN*] Cover [FN*]
 Security Gate(s) Automatic Garage Door Number Remote
Opener(s) [FN*] Controls
Garage: Attached Not Attached Carport
Pool/Spa Heater: Gas Solar Electric
Water Heater: Gas Water Heater Anchored, Private Utility or
Braced, or Strapped [FN*] Other _____

Water Supply: City Well
 Gas Supply: Utility Bottled
 Window Screens Window Security Bars
 Quick Release Mechanism
 on Bedroom Windows [FN*]

Exhaust Fan(s) in _____ 220 Volt Wiring in _____ Fireplace(s) in _____
 Gas Starter _____ Roof(s): Type: _____ Age: _____ (approx.)
 Other: _____

Are there, to the best of your (Seller's) knowledge, any of the above that are not in operating condition? Yes No. If yes, then describe.
 (Attach additional sheets if necessary): _____

B. Are you (Seller) aware of any significant defects/malfunctions in any of the following? Yes No. If yes, check appropriate space(s) below.

Interior Walls Ceilings Floors Exterior Walls Insulation Roof(s)
 Windows Doors Foundation Slab(s) Driveways Sidewalks
 Walls/Fences Electrical Systems Plumbing/Sewers/Sceptics Other
 Structural Components (Describe: _____)

If any of the above is checked, explain. (Attach additional sheets if necessary):

[FN*] This garage door opener or child resistant pool barrier may not be in compliance with the safety standards relating to automatic reversing devices as set forth in Chapter 12.5 (commencing with Section 19890) of Part 3 of Division 13 of, or with the pool safety standards of Article 2.5 (commencing with Section 115920) of Chapter 5 of Part 10 of Division 104 of, the Health and Safety Code. The water heater may not be anchored, braced, or strapped in accordance with Section 19211 of the Health and Safety Code. Window security bars may not have quick-release mechanisms in compliance with the 1995 Edition of the California Building Standards Code.

- C. Are you (Seller) aware of any of the following:
1. Substances, materials, or products which may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, fuel or chemical storage tanks, and contaminated soil or water on the subject property Yes No
 2. Features of the property shared in common with adjoining landowners, such as walls, fences, and driveways, whose use or responsibility for maintenance may have an effect on the subject property Yes No
 3. Any encroachments, easements or similar matters that may affect your interest in the subject property Yes No
 4. Room additions, structural modifications, or other alterations or repairs made without necessary permits . Yes No
 5. Room additions, structural modifications, or other alterations or repairs not in compliance with building codes Yes No
 6. Fill (compacted or otherwise) on the property or any portion thereof Yes No
 7. Any settling from any cause, or slippage, sliding, or other soil problems Yes No
 8. Flooding, drainage or grading problems Yes No
 9. Major damage to the property or any of the structures from fire, earthquake, floods, or landslides Yes No
 10. Any zoning violations, nonconforming uses, violations of "setback" requirements Yes No
 11. Neighborhood noise problems or other nuisances Yes No

- 12. CC&R's or other deed restrictions or obligations Yes No
- 13. Homeowners' Association which has any authority over the subject property Yes No
- 14. Any "common area" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others) Yes No
- 15. Any notices of abatement or citations against the property ... Yes No

- 16. Any lawsuits by or against the seller threatening to or affecting this real property, including any lawsuits alleging a defect or deficiency in this real property .
"common areas" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others) Yes No

If the answer to any of these is yes, explain. (Attach additional sheets if necessary.):

Seller certifies that the information herein is true and correct to the best of the Seller's knowledge as of the date signed by the Seller.

Seller _____ Date _____

Seller _____ Date _____

AGENT'S INSPECTION DISCLOSURE

(To be completed only if the Seller is represented by an agent in this transaction.)

THE UNDERSIGNED, BASED ON THE ABOVE INQUIRY OF THE SELLER(S) AS TO THE CONDITION OF THE PROPERTY AND BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY IN CONJUNCTION WITH THAT INQUIRY, STATES THE FOLLOWING:

- Agent notes no items for disclosure.
- Agent notes the following items:

Agent (Broker
Representing Seller) _____ By _____ Date _____
(Please Print) (Associate Licensee
or Broker-Signature)

AGENT'S INSPECTION DISCLOSURE

(To be completed only if the agent who has obtained the offer is other than the agent above.)

THE UNDERSIGNED, BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY, STATES THE FOLLOWING:

Agent notes no items for disclosure.

Agent notes the following items:

Four horizontal lines for listing items.

Agent (Broker obtaining the Offer) _____ By _____ Date _____
(Please Print)
(Associate Licensee or Broker-Signature)

BUYER(S) AND SELLER(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE AND/OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN BUYER AND SELLER(S) WITH RESPECT TO ANY ADVICE/INSPECTIONS/DEFECTS.

I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT.

Seller _____ Date _____ Buyer _____ Date _____
Seller _____ Date _____ Buyer _____ Date _____

Agent (Broker Representing Seller) _____ By _____ Date _____
(Associate Licensee or Broker-Signature)

Agent (Broker obtaining the Offer) _____ By _____ Date _____
(Associate Licensee or Broker-Signature)

SECTION 1102.3 OF THE CIVIL CODE PROVIDES A BUYER WITH THE RIGHT TO RESCIND A PURCHASE CONTRACT FOR AT LEAST THREE DAYS AFTER THE DELIVERY OF THIS DISCLOSURE IF DELIVERY OCCURS AFTER THE SIGNING OF AN OFFER TO PURCHASE. IF YOU WISH TO RESCIND THE CONTRACT, YOU MUST ACT WITHIN THE PRESCRIBED PERIOD.

A REAL ESTATE BROKER IS QUALIFIED TO ADVISE ON REAL ESTATE. IF YOU DESIRE LEGAL ADVICE, CONSULT YOUR ATTORNEY.

APPENDIX B
NATURAL HAZARD DISCLOSURE STATEMENT

NATURAL HAZARD DISCLOSURE STATEMENT

This statement applies to the following property: _____

The transferor and his or her agent(s) disclose the following information with the knowledge that even though this is not a warranty, prospective transferees may rely on this information in deciding whether and on what terms to purchase the subject property. Transferor hereby authorizes any agent(s) representing any principal(s) in this action to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

The following are representations made by the transferor and his or her agent(s) based on their knowledge and maps drawn by the state and federal governments. This information is a disclosure and is not intended to be part of any contract between the transferee and transferor.

THIS REAL PROPERTY LIES WITHIN THE FOLLOWING HAZARDOUS AREA(S):

A SPECIAL FLOOD HAZARD AREA (Any type Zone "A" or "V") designated by the Federal Emergency Management Agency.

Yes _____ No _____ Do not know and information not available from local jurisdiction _____

AN AREA OF POTENTIAL FLOODING shown on a dam failure inundation map pursuant to Section 8589.5 of the Government Code.

Yes _____ No _____ Do not know and information not available from local jurisdiction _____

A VERY HIGH FIRE HAZARD SEVERITY ZONE pursuant to Section 51178 or 51179 of the Government Code. The owner of this property is subject to the maintenance requirements of Section 51182 of the Government Code.

Yes _____ No _____

A WILDLAND AREA THAT MAY CONTAIN SUBSTANTIAL FOREST FIRE RISKS AND HAZARDS pursuant to Section 4125 of the Public Resources Code. The owner of this property is subject to the maintenance requirements of Section 4291 of the Public Resources Code. Additionally, it is not the state's responsibility to provide fire protection services to any building or structure located within the wildlands unless the Department of Forestry and Fire Protection has entered into a cooperative agreement with a local agency for those purposes pursuant to Section 4142 of the Public Resources Code.

Yes _____ No _____

AN EARTHQUAKE FAULT ZONE pursuant to Section 2622 of the Public Resources Code.

Yes _____ No _____

A SEISMIC HAZARD ZONE pursuant to Section 2696 of the Public Resources Code.

Yes (Landslide Zone) _____ Yes (Liquefaction Zone) _____

No _____ Map not yet released by state _____

THESE HAZARDS MAY LIMIT YOUR ABILITY TO DEVELOP THE REAL PROPERTY, TO OBTAIN INSURANCE, OR TO RECEIVE ASSISTANCE AFTER A DISASTER.

THE MAPS ON WHICH THESE DISCLOSURES ARE BASED ESTIMATE WHERE NATURAL HAZARDS EXIST. THEY ARE NOT DEFINITIVE INDICATORS OF WHETHER OR NOT A PROPERTY WILL BE AFFECTED BY A NATURAL DISASTER. TRANSFEREE(S) AND TRANSFEROR(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE REGARDING THOSE HAZARDS AND OTHER HAZARDS THAT MAY AFFECT THE PROPERTY.

Transferor represents that the information herein is true and correct to the best of the transferor's knowledge as of the date signed by the transferor.

Signature of Transferor _____ Date _____

Agent represents that the information herein is true and correct to the best of the agent's knowledge as of the date signed by the agent.

Signature of Agent _____ Date _____

Signature of Agent _____ Date _____

Transferee represents that he or she has read and understands this document.

Signature of Transferee _____ Date _____

(b) If an earthquake fault zone, seismic hazard zone, very high fire hazard severity zone, or wildland fire area map or accompanying information is not of sufficient accuracy or scale that a reasonable person can determine if the subject real property is included in a natural hazard area, the transferor or transferor's agent shall mark "Yes" on the Natural Hazard Disclosure Statement. The transferor or transferor's agent may mark "No" on the Natural Hazard Disclosure Statement if he or she attaches a report prepared pursuant to subdivision (c) of Section 1103.4 that verifies the property is not in the hazard zone. Nothing in this subdivision is intended to limit or abridge any existing duty of the transferor or the transferor's agents to exercise reasonable care in making a determination under this subdivision.

(c) If the Federal Emergency Management Agency has issued a Letter of Map Revision confirming that a property is no longer within a special flood hazard area, then the transferor or transferor's agent may mark "No" on the Natural Hazard Disclosure Statement, even if the map has not yet been updated. The transferor or transferor's agent shall attach a copy of the Letter of Map Revision to the disclosure statement.

(d) If the Federal Emergency Management Agency has issued a Letter of Map Revision confirming that a property is within a special flood hazard area and the location of the letter has been posted pursuant to subdivision (g) of Section 8589.3 of the Government Code, then the transferor or transferor's agent shall mark "Yes" on the Natural Hazard Disclosure Statement, even if the map has not yet been updated. The transferor or transferor's agent shall attach a copy of the Letter of Map Revision to the disclosure statement.

(e) The disclosure required pursuant to this article may be provided by the transferor and the transferor's agent in the Local Option Real Estate Disclosure Statement described in Section 1102.6a, provided that the Local Option Real Estate Disclosure Statement includes substantially the same information and substantially the same warnings that are required by this section.

(f) The disclosure required by this article is only a disclosure between the transferor, the transferor's agents, and the transferee, and shall not be used by any other party, including, but not limited to, insurance companies, lenders, or governmental agencies, for any purpose.

(g) In any transaction in which a transferor has accepted, prior to June 1, 1998, an offer to purchase, the transferor, or his or her agent, shall be deemed to have complied with the requirement of subdivision (a) if the transferor or agent delivers to the prospective transferee a statement that includes substantially the same information and warning as the Natural Hazard Disclosure Statement.