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BULLETIN

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Disclosure, Disclosure, Disclosure.

A brief reflection regarding the trend towards heightened disclosure requirements in real property transactions including the recent case of *Wong v. Stoler* (2015 WL 3862525), where the seller's failure to disclose private sewer line resulted in rescission of the contract.

In a very recently published opinion in a real property disclosure case, the First District Court of Appeal in *Wayson Wong v. Ira Stoler* (2015 WL 3862525), held that the trial court declined to effectuate a rescission of the contract based on incorrect justifications and that its alternative remedy failed to provide the purchasers with the complete relief to which they were entitled.

In May of 2008, the Wongs purchased a hillside home in San Carlos from the Stolars for \$2.35 million. During the disclosure process the Stolars failed to inform the Wongs about (1) any specifics related to "CC&Rs or other deed restrictions or obligations"; (2) any "homeowners' Association [having] authority over" the property; (3) any "abatement or citations against" the property; (4) any "past or present blockage, backup, overflow or other failure" of the sewer lines or that they had ever been "snaked/rooted"; or (5) "any toxic or hazardous material leakages or spills within a half-mile" of the property. Mr. Stoler also specifically represented that no homeowners association existed. The Wongs learned of the private sewer lines and homeowners association after purchasing the property in or around November 2008.

The Wongs filed suit against the Stolars and real estate agents for various causes of action, including rescission. After settling with the real estate agents for \$200,000, the trial court held that although the Stolars made negligent misrepresentations with reckless disregard to the Wongs, no rescission was effectuated. Instead, the Stolars were ordered to indemnify the Wongs for sewer maintenance repair costs exceeding the \$200,000 they obtained in their settlement with the agents. The Wongs appealed and contended that rescission was effective as a matter of law because the Wongs were victims of misrepresentation by the Stolars. The Stolars contended that the California statute governing rescission, together with the principles of equity allowed the Court to rightly reject rescission and to award alternative equitable relief.

The Court of Appeal found that the trial court erred in declining to effectuate the Wongs' rescission and further erred in basing its decision with a focus on the prejudice to the Stolars. The Court further held that the trial court's alternative award was inadequate because it failed to satisfy the requirement of California Code of Civil Procedure Section 1692 that the relief be "complete." The Court reasoned that persons who attempt to secure profits by deceitful means may not confidently expect to receive special consideration from courts of equity. Moreover the trial court was overly concerned with the complications of unwinding a transaction especially when rescission involving real estate purchases require the seller to refund the payments

received, sometimes include consequential damages, and requires the buyer to restore possession to the seller. Lastly, the Court of Appeal directed the trial court to consider whether an award of attorneys' fees should be granted to the Wongs under the applicable law pursuant to Section 1692.

Here, the Court of Appeal ensured that a real property purchaser would obtain "complete" relief as entitled under the law based upon deceitful practices by a seller. The Court made clear that negligent misrepresentations in this real property transaction would not be rewarded or tolerated. As discussed in a previous 2014 **BULLETIN** prepared by **Chapman, Glucksman, Dean, Roeb, and Barger**, we commented that the Second District Court of Appeal held on April 9, 2014 in *Horiike v. Coldwell Banker Residential Brokerage Co.* 2014 WL 1384226 that when a "broker" is the dual agent of both the buyer and the seller in a real property transaction, the salespersons acting under the broker have the same fiduciary duty to the buyer and the seller as the broker. Interconnected in *Wong* and *Horiike* is the principal of disclosures and their effect on the outcomes of real property transactions.

In *Horiike*, the Second District Court of Appeal found that Coldwell Banker acted as the dual agent of the buyer and seller as was confirmed on the disclosure forms provided to Horiike. Under California Civil Code 2079.13, subdivision (b), the duty that the salesperson owed to any principal, or to any buyer who was not a principal, was equivalent to the duty owed to that party by Coldwell Banker. As a result, Coldwell Banker owed a fiduciary duty to Horiike, and therefore, the salesperson owed a fiduciary duty to Horiike. Clearly, both the First and Second District Court of Appeal are critical of non-disclosures and hold in high regard the duties that come with disclosures. As seen here in *Wong*, proper and full disclosures must be made in property transactions, otherwise the contract is potentially subject to rescission.

The legislative branch also appears to value disclosure as evidenced by the passing of SB 652 amending transfer disclosure statements for residential property. As discussed in a 2014 **BULLETIN** prepared by **Chapman, Glucksman, Dean, Roeb, and Barger**, effective July 1, 2014, California Civil Code Section 1102.6 requires the seller of residential property to disclose to potential purchasers all specified claims of damages related to construction defects, including all pre-litigation claims presented to the builder and the status of those claims. Prior to the amendment, no statute existed requiring a homeowner to notify a potential buyer of a construction defect within the home. Section 1102.6 gives potential buyers notice of whether or not a claim for defects was made with respect to a property and whether or not those defects were subsequently repaired. Potential buyers can now rely on the disclosures, with failure to disclose creating potential liability for the seller. The actions of both the legislative and judicial branches indicate a trend towards heightening disclosure requirements and protecting purchasers in real property transactions.