

## EXEMPT SELLERS AND THEIR AGENT'S DUTY TO DISCLOSE

In law school, students are taught that "*Caveat emptor*" can be loosely translated as "*Let the Buyer Beware.*" It used to be case that the Seller's real estate Agent did not have a duty to prospective Buyers. The pendulum of this principle has been swinging in the opposite direction to increase the duty of the Seller and/or the Seller's Agent to the Buyer.

Under California law (*Civil Code* §1102.2) certain Sellers of one-to-four unit residential properties are exempt from providing the Buyer with a Transfer Disclosure Statement (TDS). Exempt Sellers include:

- (d) Sales or transfers by a fiduciary in the course of the administration of a trust, guardianship, conservatorship, or decedent's estate. This exemption shall not apply to a sale if the trustee is a natural person who is a trustee of a revocable trust and he or she is a former owner of the property or was an occupant in possession of the property within the preceding year.

Exempt Sellers have to provide an Exempt Seller Disclosure (see ESD attached). Question 4.J. on the ESD requires Exempt Seller to disclose "Material facts or defects affecting the Property not otherwise disclosed to Buyer." Question 4.A. of the ESD asks if a death within 3 years has occurred on the Property. California Courts have held that if a murder or other gruesome death occurred on the property dating back 10 years, the Seller has a duty to disclose that fact as it is a material fact having a negative impact on the price. Further, Exempt Sellers are not free from the duties to disclose established by common law (caselaw), as discussed below.

In *Lingsch v. Savage*, 213 Cal.App 2d 729 (1963), the Seller and their agent failed to disclose to the buyers that building was in poor physical condition, having illegal units that had been condemned. Sellers and their Agents are required to comply with **both** statutory disclosure requirements AND common law requirements. The common law holding of *Lingsch* (Id.) provides disclosure of 1) any known defects that materially decrease the market value of a property; and 2) defects not apparent or within the reach of the diligent attention of the buyer. An "as is" clause may not go far enough to immunize the Seller from a lawsuit. It is good practice to include statements in the sales process indicating the Buyer is relying on their own inspection or experts.

In *Easton v. Strassburger* 152 Cal.App 3d 90 (1984), the Court expanded the real estate agent's duty of disclosure to a Buyer. In *Easton* (Id.) the Seller's agent was sued by the Buyer for failure to disclose certain "red flag" conditions on the property which were equally visible to the Buyer and their agent. A visual inspection of the property revealed uneven floors and a net installed over soil on the property designed to prevent erosion, landslides and mudslides. The Seller was aware of the soil conditions and did not disclose the past history of soil issues on the property. The *Easton* court took a protectionist approach reasoning that real estate agents were professionals and despite the fact that the Seller's

Agent did not represent the Buyer, they had a duty to that Buyer: “[T]he duty of a real estate broker, representing the seller, to disclose facts...includes the 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.” (*Id.* At p. 102).

The holding of *Strassburger* was later codified in *Civil Code §2079(a)*. Your Agent has a statutory duty to the Buyer “to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective buyer all facts materially affecting the value or desirability of that property that an investigation would reveal.” As such, a Seller’s agent now has both a common law and statutory duty to an independently represented Buyer.

The cloak of protection provided to Exempt Sellers may be thin. Consideration must be given as to what facts should be disclosed. The Seller and their Agent must take care to review documents in their possession which may reveal material facts. The Seller and their Agent must also conduct thorough visual inspections to ensure no further investigation is merited. It is critical that your Agent possess the requisite experience to understand the nuisances a “visual inspection” may reveal. Ruben Martinez has decades of experience in construction working for large corporations in their real estate departments. He can lend a keen eye to ensure you disclose seemingly latent physical issues presented at the property.

In summary, when in doubt disclose. A Fiduciary should not expose themselves to potential lawsuits from Buyers for fraudulent or negligent misrepresentation. A lawsuit from a Buyer may come long after the Estate has been distributed, requiring the Fiduciary to personally pay costs of defense.