

COPY

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

HIROSHI HORIIKE,

Plaintiff and Appellant,

v.

COLDWELL BANKER RESIDENTIAL
BROKERAGE COMPANY, a California
Corporation, and CHRIS CORTAZZO, an
individual,

Petitioners, Defendants and Respondents.

B246606

(Los Angeles County Super. Ct.
No. SC110477)

**PETITIONERS' REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF REPLY BRIEF ON THE MERITS;
MEMORANDUM OF POINTS AND AUTHORITIES;
DECLARATION OF DAVID E. HACKETT; [PROPOSED] ORDER**

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SUPREME COURT
FILED

FEB 19 2015

Frank A. McGuire Clerk

Deputy

Attorneys for Petitioners
Coldwell Banker Residential Brokerage Company
and Chris Cortazzo

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

HIROSHI HORIIKE,

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Attorneys for Petitioners
Coldwell Banker Residential Brokerage Company
and Chris Cortazzo

**PETITIONERS' REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF REPLY BRIEF ON THE MERITS**

In connection with their concurrently-filed Reply Brief on the Merits, Coldwell Banker Residential Brokerage Company and Chris Cortazzo (Petitioners) request that this Court take judicial notice of the concurrently-submitted legislative history materials for Senate Bill 1171 (SB 1171).

In his Answer Brief on the Merits, plaintiff Hiroshi Horiike claims that the Legislature “implicitly endorsed” the Court of Appeal’s interpretation of Civil Code section 2079.13 when it enacted SB 1171 in 2014 to extend the statutory disclosure requirements to commercial property. (See Answer Brief, pp. 2, 28-29.) The legislative history of SB 1171 is relevant to Petitioners’ showing in their Reply Brief that plaintiff’s argument violates settled limits on the legislative-acquiescence doctrine, including cases that refuse to presume legislative acquiescence where no legislative history acknowledges the prior judicial construction.

The legislative-history materials for SB 1171 are contained in Exhibit A to the attached Declaration of David E. Hackett; they were obtained from the California Legislative Counsel’s “California Legislative Information” website. (See Declaration of David E. Hackett, ¶ 2.) We consecutively Bates-stamped the materials with an “RRJN” number in the lower right corner for ease of reference. We have included all of the legislative history materials that the “California Legislative Information” website provides for SB 1171.

This Request is based on Evidence Code sections 452, 453, 455, and 459, rule 8.252 of the California Rules of Court, the accompanying Memorandum of Points and Authorities and Declaration of David E. Hackett, and all other materials filed in this Supreme Court appeal.

Dated: February 18, 2015 Respectfully submitted,

KLINEDINST PC
Neil Gunny

GREINES, MARTIN, STEIN & RICHLAND LLP
Kent L. Richland
Edward L. Xanders
David E. Hackett

By:



David E. Hackett

Attorneys for Petitioners
Coldwell Banker Residential Brokerage
Company and Chris Cortazzo

MEMORANDUM OF POINTS AND AUTHORITIES

THIS COURT MAY TAKE JUDICIAL NOTICE OF THESE LEGISLATIVE HISTORY MATERIALS

Under California Rules of Court, rule 8.252(a)(2), Petitioners request judicial notice of the legislative history materials submitted as Exhibit A to the attached Declaration of David E. Hackett.

The materials are the proper subject of judicial notice. It is well settled that appellate courts may take judicial notice of a statute's legislative history pursuant to Evidence Code sections 452, 453, 455 and 459. (*People v. Superior Court* (1996) 13 Cal.4th 497, 504, fn. 1 [Supreme Court granting request for judicial notice of bill's legislative history]; *Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, 72, fn. 3 [Court of Appeal, on own motion, taking judicial notice of legislative history]; Cal. Rules of Court, rule 8.252(a)(2)(C).) This includes legislative history materials on the official "California Legislative Information" website. (*Nguyen v. Western Digital Corporation* (2014) 229 Cal.App.4th 1522, 1550, fn. 11.) The concurrently-submitted legislative history materials were obtained from the "California Legislative Information" website. (See Declaration of David E. Hackett.)

The materials are relevant to this appeal. As explained in the attached Declaration of David E. Hackett, the concurrently-submitted legislative history materials are relevant to arguments in both the Answer Brief on the Merits and the Petitioners' Reply Brief on the Merits. (See

Cal. Rules of Court, rule 8.252(a)(2)(A), (D).) The materials comprise the entire legislative history for SB 1171, a bill that amended Civil Code section 2079.13. SB 1171 was initially introduced in February 2014 and approved by Governor Brown in August 2014.

This Court has granted review of the Court of Appeal's first-impression interpretation of Civil Code section 2079.13, subdivision (b), and both sides have submitted briefs regarding that interpretation. In his Answer Brief on the Merits, plaintiff Horiike argues that in passing SB 1171, the Legislature implicitly endorsed the Court of Appeal's interpretation. In their Reply Brief, Petitioners utilize the legislative history of SB 1171 to show that Horiike's arguments violate settled limits on the legislative-acquiescence doctrine. (See Reply Brief, § IV.)

Accordingly, Petitioners respectfully submit that these legislative-history materials will be of assistance to the Court as it considers the issues raised in the briefing on the merits.

These materials were not presented to the trial court. This is the first time these materials have been submitted to any court in this case.

(See Cal. Rules of Court, rule 8.252(a)(2)(B), (D).) The statutory amendment at issue did not occur until August 2014, and was raised for the very first time in plaintiff's Answer Brief on the Merits.

Dated: February 18, 2015 Respectfully submitted,

KLINEDINST PC
Neil Gunny

GREINES, MARTIN, STEIN & RICHLAND LLP
Kent L. Richland
David E. Hackett
Edward L. Xanders

By:


David E. Hackett

Attorneys for Petitioners
Coldwell Banker Residential Brokerage
Company and Chris Cortazzo

DECLARATION OF DAVID E. HACKETT

I, David E. Hackett, declare:

1. I am an attorney licensed to practice law in the state of California and an associate in the law firm of Greines, Martin, Stein & Richland LLP. The firm represents petitioners Coldwell Banker Residential Brokerage Company and Chris Cortazzo.

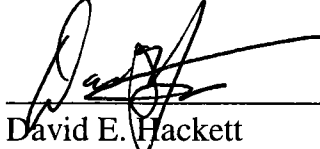
2. On January 26, 2015, and January 27, 2015, I accessed the California Legislative Counsel's "California Legislative Information" website, located at <http://leginfo.legislature.ca.gov>. I then obtained all of the materials at that Internet site that are related to Senate Bill No. 1171, a 2014 bill that amended Civil Code section 2079.13. Attached hereto as Exhibit A is a true and correct copy of all of the materials that I obtained. The materials comprise the entire legislative history for SB 1171, the 2014 bill that amended Civil Code section 2079.13.

3. The legislative history materials concurrently submitted as Exhibit A to this Declaration are relevant to the issues before this Court. This Court has granted review of the Court of Appeal's first-impression interpretation of Civil Code section 2079.13, subdivision (b), and both sides have submitted briefs regarding that interpretation. In his Answer Brief on the Merits, plaintiff Horiike argues that in passing SB 1171, the Legislature implicitly endorsed the Court of Appeal's interpretation. In their Reply Brief, Petitioners respond to this argument, cite SB 1171's legislative history, and explain the limits on the legislative-acquiescence doctrine,

including cases that refuse to presume legislative-acquiescence where no legislative history acknowledges a prior judicial construction.

4. This request for judicial notice is made in good faith.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct, and that this Declaration was executed on February 18, 2015, at Los Angeles, California.



David E. Hackett





California.
LEGISLATIVE INFORMATION

SB-1171 Real property transactions: agents: obligations. (2013-2014)

SECTION 1. *The heading of Article 2 (commencing with Section 2079) of Chapter 3 of Title 6 of Part 4 of Division 3 of the Civil Code is amended to read:*

Article 2. Duty to Prospective Purchaser of Real Property

SEC. 2. Section 2079.13 of the Civil Code is amended to read:

2079.13. As used in Sections 2079.14 to 2079.24, inclusive, the following terms have the following meanings:

(a) "Agent" means a person acting under provisions of Title 9 (commencing with Section 2295) in a real property transaction, and includes a person who is licensed as a real estate broker under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code, and under whose license a listing is executed or an offer to purchase is obtained.

(b) "Associate licensee" means a person who is licensed as a real estate broker or salesperson under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code and who is either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee.

The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent. When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions.

(c) "Buyer" means a transferee in a real property transaction, and includes a person who executes an offer to purchase real property from a seller through an agent, or who seeks the services of an agent in more than a casual, transitory, or preliminary manner, with the object of entering into a real property transaction. "Buyer" includes vendee or lessee.

(d) "Commercial real property" means all real property in the state, except single-family residential real property, dwelling units made subject to Chapter 2 (commencing with Section 1940) of Title 5, mobilehomes, as defined in Section 798.3, or recreational vehicles, as defined in Section 799.29.

(e) "Dual agent" means an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction.

(f) "Listing agreement" means a contract between an owner of real property and an agent, by which the agent has been authorized to sell the real property or to find or obtain a buyer.

(g) "Listing agent" means a person who has obtained a listing of real property to act as an agent for compensation.

(h) "Listing price" is the amount expressed in dollars specified in the listing for which the seller is willing to sell the real property through the listing agent.

(i) "Offering price" is the amount expressed in dollars specified in an offer to purchase for which the buyer is willing to buy the real property.

(j) "Offer to purchase" means a written contract executed by a buyer acting through a selling agent that becomes the contract for the sale of the real property upon acceptance by the seller.

(k) "Real property" means any estate specified by subdivision (1) or (2) of Section 761 in property that constitutes or is improved with one to four dwelling units, any commercial real property, any leasehold in these

types of property exceeding one year's duration, and mobilehomes, when offered for sale or sold through an agent pursuant to the authority contained in Section 10131.6 of the Business and Professions Code.

(l) "Real property transaction" means a transaction for the sale of real property in which an agent is employed by one or more of the principals to act in that transaction, and includes a listing or an offer to purchase.

(m) "Sell," "sale," or "sold" refers to a transaction for the transfer of real property from the seller to the buyer, and includes exchanges of real property between the seller and buyer, transactions for the creation of a real property sales contract within the meaning of Section 2985, and transactions for the creation of a leasehold exceeding one year's duration.

(n) "Seller" means the transferor in a real property transaction, and includes an owner who lists real property with an agent, whether or not a transfer results, or who receives an offer to purchase real property of which he or she is the owner from an agent on behalf of another. "Seller" includes both a vendor and a lessor.

(o) "Selling agent" means a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtains a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer to purchase to the seller.

(p) "Subagent" means a person to whom an agent delegates agency powers as provided in Article 5 (commencing with Section 2349) of Chapter 1 of Title 9. However, "subagent" does not include an associate licensee who is acting under the supervision of an agent in a real property transaction.



California

LEGISLATIVE INFORMATION

SB-1171 Real property transactions: agents: obligations. (2013-2014)

Date	Action
08/15/14	Chaptered by Secretary of State. Chapter 200, Statutes of 2014.
08/15/14	Approved by the Governor.
08/07/14	Enrolled and presented to the Governor at 3 p.m.
08/04/14	Assembly amendments concurred in. (Ayes 36. Noes 0. Page 4297.) Ordered to engrossing and enrolling.
07/03/14	In Senate. Concurrence in Assembly amendments pending.
07/03/14	Read third time. Passed. (Ayes 62. Noes 8. Page 5811.) Ordered to the Senate.
06/25/14	Read second time. Ordered to third reading.
06/24/14	Read second time and amended. Ordered to second reading.
06/23/14	From committee: Do pass as amended. (Ayes 9. Noes 0.) (June 17).
06/10/14	From committee with author's amendments. Read second time and amended. Re-referred to Com. on JUD.
06/10/14	Set, first hearing. Hearing canceled at the request of author.
05/19/14	Referred to Com. on JUD.
05/13/14	In Assembly. Read first time. Held at Desk.
05/12/14	Read third time. Passed. (Ayes 29. Noes 1. Page 3438.) Ordered to the Assembly.
05/08/14	Read second time. Ordered to third reading.
05/07/14	From committee: Do pass. (Ayes 7. Noes 0. Page 3403.) (May 6).
04/25/14	Set for hearing May 6.
03/17/14	Referred to Com. on JUD.
02/21/14	From printer. May be acted upon on or after March 23.
02/20/14	Introduced. Read first time. To Com. on RLS. for assignment. To print.



California

LEGISLATIVE INFORMATION

SB-1171 Real property transactions: agents: obligations. (2013-2014)

Senate: 1st Cmt 2nd 3rd Pass Pass Chp
 Assembly: 1st Cmt 2nd 3rd Pass

Bill Status

Measure: SB-1171
Lead Authors: Hueso (S)
Principal Coauthors: -
Coauthors: -
Topic: Real property transactions: agents: obligations.
31st Day in Print: 03/23/14
Title: An act to amend Section 2079.13 of, and to amend the heading of Article 2 (commencing with Section 2079) of Chapter 3 of Title 6 of Part 4 of Division 3 of, the Civil Code, relating to real property transactions.
House Location: Secretary of State
Chaptered Date: 08/15/14
Last Amended Date: 06/24/14

Type of Measure

Inactive Bill - Chaptered
 Majority Vote Required
 Non-Appropriation
 Non-Fiscal Committee
 Non-State-Mandated Local Program
 Non-Urgency
 Non-Tax levy

Last 5 History Actions

Date	Action
08/15/14	Chaptered by Secretary of State. Chapter 200, Statutes of 2014.
08/15/14	Approved by the Governor.
08/07/14	Enrolled and presented to the Governor at 3 p.m.
08/04/14	Assembly amendments concurred in. (Ayes 36. Noes 0. Page 4297.) Ordered to engrossing and enrolling.
07/03/14	In Senate. Concurrence in Assembly amendments pending.



California

LEGISLATIVE INFORMATION

SB-1171 Real property transactions: agents: obligations. (2013-2014)

Date	Result	Location	Ayes	Noes	NVR	Motion
08/04/14	(PASS)	Senate Floor	36	0	4	Unfinished Business SB1171 Hueso Concurrence
<p>Ayes: Anderson, Beall, Berryhill, Block, Cannella, Corbett, Correa, De León, DeSaulnier, Evans, Fuller, Gaines, Galgiani, Hernandez, Hill, Hueso, Huff, Jackson, Knight, Lara, Leno, Lieu, Liu, Mitchell, Monning, Morrell, Nielsen, Padilla, Pavley, Roth, Steinberg, Torres, Vidak, Walters, Wolk, Wyland</p> <p>Noes:</p> <p>No Votes Recorded: Calderon, Hancock, Wright, Yee</p>						
07/03/14	(PASS)	Assembly Floor	62	8	9	SB 1171 Hueso Senate Third Reading By MAIENSCHIN
<p>Ayes: Achadjian, Alejo, Amliano, Bloom, Bocanegra, Bonilla, Bonta, Bradford, Brown, Buchanan, Ian Calderon, Campos, Chau, Chesbro, Cooley, Dababneh, Daly, Dickinson, Eggman, Fong, Frazier, Garcia, Gatto, Gomez, Gonzalez, Gordon, Gorell, Gray, Hagman, Hall, Roger Hernández, Holden, Jones-Sawyer, Levine, Linder, Lowenthal, Malenschein, Medina, Melendez, Mullin, Muratsuchi, Nazarian, Nestande, Olsen, Pan, Perea, John A. Pérez, Quirk, Quirk-Silva, Rendon, Ridley-Thomas, Rodriguez, Salas, Skinner, Stone, Ting, Weber, Wieckowski, Wilk, Williams, Yamada, Atkins</p> <p>Noes: Alien, Donnelly, Fox, Grove, Harkey, Jones, Logue, Patterson</p> <p>No Votes Recorded: Bigelow, Chávez, Conway, Dahle, Beth Gaines, Mansoor, V. Manuel Pérez, Wagner, Waldron</p>						
06/17/14	(PASS)	Asm Judiciary	9	0	1	Do pass as amended.
<p>Ayes: Alejo, Chau, Dickinson, Garcia, Gorell, Malenschein, Muratsuchi, Stone, Wieckowski</p> <p>Noes:</p> <p>No Votes Recorded: Wagner</p>						
05/12/14	(PASS)	Senate Floor	29	1	10	Senate 3rd Reading SB1171 Hueso
<p>Ayes: Anderson, Beall, Berryhill, Block, Cannella, Corbett, De León, DeSaulnier, Hancock, Hernandez, Hill, Hueso, Huff, Jackson, Lara, Leno, Lieu, Liu, Mitchell, Monning, Padilla, Pavley, Roth, Steinberg, Torres, Vidak, Walters, Wolk, Wyland</p> <p>Noes: Correa</p> <p>No Votes Recorded: Calderon, Evans, Fuller, Gaines, Galgiani, Knight, Morrell, Nielsen, Wright, Yee</p>						
05/06/14	(PASS)	Sen Judiciary	7	0	0	Do pass.
<p>Ayes: Anderson, Corbett, Jackson, Lara, Leno, Monning, Vidak</p> <p>Noes:</p> <p>No Votes Recorded:</p>						



California
LEGISLATIVE INFORMATION

SB-1171 Real property transactions: agents: obligations. (2013-2014)

CALIFORNIA LEGISLATURE— 2013–2014 REGULAR SESSION

SENATE BILL

No. 1171

Introduced by Senator Hueso

February 20, 2014

An act to amend Section 2079.13 of, and to amend the heading of Article 2 (commencing with Section 2079) of Chapter 3 of Title 6 of Part 4 of Division 3 of, the Civil Code, relating to real property transactions.

LEGISLATIVE COUNSEL'S DIGEST

SB 1171, as introduced, Hueso. Real property transactions: agents: obligations.

Existing law requires listing and selling agents, as defined, to provide the seller and buyer in a residential real property transaction with a disclosure form, as prescribed, containing general information on real estate agency relationships. Existing law also requires the listing or selling agent to disclose to the buyer and seller whether he or she is acting as the buyer's agent exclusively, the seller's agent exclusively, or as a dual agent representing both the buyer and the seller.

This bill would extend these disclosure requirements to include transactions involving commercial property, as defined.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The heading of Article 2 (commencing with Section 2079) of Chapter 3 of Title 6 of Part 4 of Division 3 of the Civil Code is amended to read:

Article 2. Duty to Prospective Purchaser of Residential Real Property

SEC. 2. Section 2079.13 of the Civil Code is amended to read:

2079.13. As used in Sections 2079.14 to 2079.24, inclusive, the following terms have the following meanings:

(a) "Agent" means a person acting under provisions of Title 9 (commencing with Section 2295) in a real property transaction, and includes a person who is licensed as a real estate broker under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code, and under whose license a listing is executed or an offer to purchase is obtained.

(b) "Associate licensee" means a person who is licensed as a real estate broker or salesperson under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code and who is either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee.

The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent. When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions.

(c) "Buyer" means a transferee in a real property transaction, and includes a person who executes an offer to purchase real property from a seller through an agent, or who seeks the services of an agent in more than a casual, transitory, or preliminary manner, with the object of entering into a real property transaction. "Buyer" includes vendee or lessee.

(d) "Dual agent" means an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction.

(e) "Listing agreement" means a contract between an owner of real property and an agent, by which the agent has been authorized to sell the real property or to find or obtain a buyer.

(f) "Listing agent" means a person who has obtained a listing of real property to act as an agent for compensation.

(g) "Listing price" is the amount expressed in dollars specified in the listing for which the seller is willing to sell the real property through the listing agent.

(h) "Offering price" is the amount expressed in dollars specified in an offer to purchase for which the buyer is willing to buy the real property.

(i) "Offer to purchase" means a written contract executed by a buyer acting through a selling agent which becomes the contract for the sale of the real property upon acceptance by the seller.

(j) "Real property" means any estate specified by subdivision (1) or (2) of Section 761 in property which constitutes or is improved with one to four dwelling units, *any commercial property specified in subdivision (a) or (b) of Section 1101.3*, any leasehold in this type of property exceeding one year's duration, and mobilehomes, when offered for sale or sold through an agent pursuant to the authority contained in Section 10131.6 of the Business and Professions Code.

(k) "Real property transaction" means a transaction for the sale of real property in which an agent is employed by one or more of the principals to act in that transaction, and includes a listing or an offer to purchase.

(l) "Sell," "sale," or "sold" refers to a transaction for the transfer of real property from the seller to the buyer, and includes exchanges of real property between the seller and buyer, transactions for the creation of a real property sales contract within the meaning of Section 2985, and transactions for the creation of a leasehold exceeding one year's duration.

(m) "Seller" means the transferor in a real property transaction, and includes an owner who lists real property with an agent, whether or not a transfer results, or who receives an offer to purchase real property of which he or she is the owner from an agent on behalf of another. "Seller" includes both a vendor and a lessor.

(n) "Selling agent" means a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtains a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer to purchase to the seller.

(o) "Subagent" means a person to whom an agent delegates agency powers as provided in Article 5 (commencing with Section 2349) of Chapter 1 of Title 9. However, "subagent" does not include an associate licensee who is acting under the supervision of an agent in a real property transaction.



California
LEGISLATIVE INFORMATION

SB-1171 Real property transactions: agents: obligations. (2013-2014)

AMENDED IN ASSEMBLY JUNE 10, 2014

CALIFORNIA LEGISLATURE— 2013-2014 REGULAR SESSION

SENATE BILL

No. 1171

Introduced by Senator Hueso

February 20, 2014

An act to amend Section 2079.13 of, and to amend the heading of Article 2 (commencing with Section 2079) of Chapter 3 of Title 6 of Part 4 of Division 3 of, the Civil Code, relating to real property transactions.

LEGISLATIVE COUNSEL'S DIGEST

SB 1171, as amended, Hueso. Real property transactions: agents: obligations.

Existing law requires listing and selling agents, as defined, to provide the seller and buyer in a residential real property transaction, *including a leasehold interest*, with a disclosure form, as prescribed, containing general information on real estate agency relationships. Existing law also requires the listing or selling agent to disclose to the buyer and seller whether he or she is acting as the buyer's agent exclusively, the seller's agent exclusively, or as a dual agent representing both the buyer and the seller.

This bill would extend these disclosure requirements to include transactions involving commercial property, as defined, *including a leasehold interest*.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The heading of Article 2 (commencing with Section 2079) of Chapter 3 of Title 6 of Part 4 of Division 3 of the Civil Code is amended to read:

Article 2. Duty to Prospective Purchaser of Real Property

SEC. 2. Section 2079.13 of the Civil Code is amended to read:

2079.13. As used in Sections 2079.14 to 2079.24, inclusive, the following terms have the following meanings:

(a) "Agent" means a person acting under provisions of Title 9 (commencing with Section 2295) in a real property transaction, and includes a person who is licensed as a real estate broker under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code, and under

whose license a listing is executed or an offer to purchase is obtained.

(b) "Associate licensee" means a person who is licensed as a real estate broker or salesperson under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code and who is either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee.

The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent. When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions.

(c) "Buyer" means a transferee in a real property transaction, and includes a person who executes an offer to purchase real property from a seller through an agent, or who seeks the services of an agent in more than a casual, transitory, or preliminary manner, with the object of entering into a real property transaction. "Buyer" includes vendee or lessee.

(d) "Dual agent" means an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction.

(e) "Listing agreement" means a contract between an owner of real property and an agent, by which the agent has been authorized to sell the real property or to find or obtain a buyer.

(f) "Listing agent" means a person who has obtained a listing of real property to act as an agent for compensation.

(g) "Listing price" is the amount expressed in dollars specified in the listing for which the seller is willing to sell the real property through the listing agent.

(h) "Offering price" is the amount expressed in dollars specified in an offer to purchase for which the buyer is willing to buy the real property.

(i) "Offer to purchase" means a written contract executed by a buyer acting through a selling agent ~~which~~ that becomes the contract for the sale of the real property upon acceptance by the seller.

(j) "Real property" means any estate specified by subdivision (1) or (2) of Section 761 in property ~~which~~ that constitutes or is improved with one to four dwelling units, any commercial property specified in subdivision (a) or (b) of Section 1101.3, any leasehold ~~in this type~~ these types of property exceeding one year's duration, and mobilehomes, when offered for sale or sold through an agent pursuant to the authority contained in Section 10131.6 of the Business and Professions Code.

(k) "Real property transaction" means a transaction for the sale of real property in which an agent is employed by one or more of the principals to act in that transaction, and includes a listing or an offer to purchase.

(l) "Sell," "sale," or "sold" refers to a transaction for the transfer of real property from the seller to the buyer, and includes exchanges of real property between the seller and buyer, transactions for the creation of a real property sales contract within the meaning of Section 2985, and transactions for the creation of a leasehold exceeding one year's duration.

(m) "Seller" means the transferor in a real property transaction, and includes an owner who lists real property with an agent, whether or not a transfer results, or who receives an offer to purchase real property of which he or she is the owner from an agent on behalf of another. "Seller" includes both a vendor and a lessor.

(n) "Selling agent" means a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtains a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer to purchase to the seller.

(o) "Subagent" means a person to whom an agent delegates agency powers as provided in Article 5 (commencing with Section 2349) of Chapter 1 of Title 9. However, "subagent" does not include an associate licensee who is acting under the supervision of an agent in a real property transaction.



California
LEGISLATIVE INFORMATION

SB-1171 Real property transactions: agents: obligations. (2013-2014)

AMENDED IN ASSEMBLY JUNE 24, 2014

AMENDED IN ASSEMBLY JUNE 10, 2014

CALIFORNIA LEGISLATURE— 2013–2014 REGULAR SESSION

SENATE BILL

No. 1171

Introduced by Senator Hueso

February 20, 2014

An act to amend Section 2079.13 of, and to amend the heading of Article 2 (commencing with Section 2079) of Chapter 3 of Title 6 of Part 4 of Division 3 of, the Civil Code, relating to real property transactions.

LEGISLATIVE COUNSEL'S DIGEST

SB 1171, as amended, Hueso. Real property transactions: agents: obligations.

Existing law requires listing and selling agents, as defined, to provide the seller and buyer in a residential real property transaction, including a leasehold interest, with a disclosure form, as prescribed, containing general information on real estate agency relationships. Existing law also requires the listing or selling agent to disclose to the buyer and seller whether he or she is acting as the buyer's agent exclusively, the seller's agent exclusively, or as a dual agent representing both the buyer and the seller.

This bill would extend these disclosure requirements to include transactions involving commercial *real* property, as defined, including a leasehold interest.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The heading of Article 2 (commencing with Section 2079) of Chapter 3 of Title 6 of Part 4 of Division 3 of the Civil Code is amended to read:

Article 2. Duty to Prospective Purchaser of Real Property

SEC. 2. Section 2079.13 of the Civil Code is amended to read:

2079.13. As used in Sections 2079.14 to 2079.24, inclusive, the following terms have the following meanings:

(a) "Agent" means a person acting under provisions of Title 9 (commencing with Section 2295) in a real property transaction, and includes a person who is licensed as a real estate broker under Chapter 3

(commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code, and under whose license a listing is executed or an offer to purchase is obtained.

(b) "Associate licensee" means a person who is licensed as a real estate broker or salesperson under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code and who is either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee.

The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent. When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions.

(c) "Buyer" means a transferee in a real property transaction, and includes a person who executes an offer to purchase real property from a seller through an agent, or who seeks the services of an agent in more than a casual, transitory, or preliminary manner, with the object of entering into a real property transaction. "Buyer" includes vendee or lessee.

(d) "Commercial real property" means all real property in the state, except single-family residential real property, dwelling units made subject to Chapter 2 (commencing with Section 1940) of Title 5, mobilehomes, as defined in Section 798.3, or recreational vehicles, as defined in Section 799.29.

~~(d)~~

(e) "Dual agent" means an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction.

~~(e)~~

(f) "Listing agreement" means a contract between an owner of real property and an agent, by which the agent has been authorized to sell the real property or to find or obtain a buyer.

~~(f)~~

(g) "Listing agent" means a person who has obtained a listing of real property to act as an agent for compensation.

~~(g)~~

(h) "Listing price" is the amount expressed in dollars specified in the listing for which the seller is willing to sell the real property through the listing agent.

~~(h)~~

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(l) "Real property transaction" means a transaction for the sale of real property in which an agent is employed by one or more of the principals to act in that transaction, and includes a listing or an offer to purchase.

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(m) "Sell," "sale," or "sold" refers to a transaction for the transfer of real property from the seller to the buyer, and includes exchanges of real property between the seller and buyer, transactions for the creation of a real property sales contract within the meaning of Section 2985, and transactions for the creation of a leasehold exceeding one year's duration.

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(o) "Selling agent" means a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtains a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer to purchase to the seller.

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California
LEGISLATIVE INFORMATION

SB-1171 Real property transactions: agents: obligations. (2013-2014)

ENROLLED AUGUST 05, 2014
PASSED IN SENATE AUGUST 04, 2014
PASSED IN ASSEMBLY JULY 03, 2014
AMENDED IN ASSEMBLY JUNE 24, 2014
AMENDED IN ASSEMBLY JUNE 10, 2014

CALIFORNIA LEGISLATURE— 2013–2014 REGULAR SESSION

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SB 1171, Hueso. Real property transactions: agents: obligations.

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Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

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California
LEGISLATIVE INFORMATION

SB-1171 Real property transactions: agents: obligations. (2013-2014)

Senate Bill No. 1171

CHAPTER 200

An act to amend Section 2079.13 of, and to amend the heading of Article 2 (commencing with Section 2079) of Chapter 3 of Title 6 of Part 4 of Division 3 of, the Civil Code, relating to real property transactions.

[Approved by Governor August 15, 2014. Filed with Secretary of State August 15, 2014.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1171, Hueso. Real property transactions: agents: obligations.

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SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2013-2014 Regular Session

SB 1171 (Hueso)
As Introduced
Hearing Date: May 6, 2014
Fiscal: No
Urgency: No
TMW

SUBJECT

Real Property Transactions: Agents: Obligations

DESCRIPTION

Existing law requires residential real estate listing and selling agents to provide the seller and buyer with a real estate agency relationship disclosure form, and requires the listing or selling agent to disclose to the buyer and seller whether he or she is acting as the buyer's agent exclusively, the seller's agent exclusively, or as a dual agent representing both the buyer and seller. This bill would expand those disclosure requirements to include commercial real estate listing and selling agents.

BACKGROUND

Prior to 1984, existing law required a real estate broker to disclose to a buyer material defects known to the broker but unknown to and unobservable by the buyer. In 1984, case law provided that the broker also owed a duty to disclose defects which the broker should have discovered through reasonable diligence. In *Easton v. Strassburger* (1984) 152 Cal.App.3d 90, the court held that real estate licensees owed certain duties of care to the property buyers, including while representing the sellers in a residential home transaction. That court refrained from extending these duties to commercial property transactions, stating in dictum: "[u]nlike 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 . . ." (*Id.* at p. 102, fn. 8.)

After the *Easton* decision, there was extensive discussion in the real estate industry on how those duties were to be interpreted. SB 453 (Robbins, Ch. 223, Stats. 1985) clarified the duties of real estate brokers and buyers in real property transactions. However, the law was still unclear as to whether real estate brokers had disclosure duties to buyers. In *Smith v. Rickard* (1988) 205 Cal.App.3d 1354, 1360, the court, after examining statutory

(more)

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construction and the *Easton* case dictum, held that real property brokers had a duty to inspect the property and to disclose to the plaintiff any material defects affecting the value or desirability of the property.

In 1995, the *Easton* decision was further clarified and codified in SB 467 (Leonard, Ch. 428, Stats. 1995) to require real estate listing and selling agents of residential property to provide specified disclosures to buyers and sellers. Those disclosures require the real estate listing and selling agents to disclose whether the agent represents the buyer, the seller, or both the buyer and seller (known as dual agency). This bill would extend the existing real estate disclosure requirements to commercial property transactions.

CHANGES TO EXISTING LAW

Existing law requires specified disclosures by listing and selling agents to be provided to a buyer and seller of residential real property and defines the duties owed by the agents to the buyer and seller. (Civ. Code Sec. 2079.12 et seq.)

Existing law requires those listing and selling agents to provide the seller and buyer with a copy of a specified disclosure form and to obtain a signed acknowledgment of receipt from that seller or buyer as follows:

- the listing agent, if any, shall provide the disclosure form to the seller prior to entering into the listing agreement;
- the selling agent shall provide the disclosure form to the seller as soon as practicable prior to presenting the seller with an offer to purchase, unless the selling agent previously provided the seller with a copy of the disclosure form;
- where the selling agent does not deal on a face-to-face basis with the seller, the disclosure form prepared by the selling agent may be furnished to the seller by the listing agent, or the selling agent may deliver the disclosure form by certified mail addressed to the seller at his or her last known address, in which case no signed acknowledgment of receipt is required; and
- the selling agent shall provide the disclosure form to the buyer as soon as practicable prior to execution of the buyer's offer to purchase, except that if the offer to purchase is not prepared by the selling agent, the selling agent shall present the disclosure form to the buyer not later than the next business day after the selling agent receives the offer to purchase from the buyer. (Civ. Code Sec. 2079.14.)

Existing law provides that in any circumstance in which the seller or buyer refuses to sign an acknowledgment of receipt of the disclosure form, the agent, or an associate licensee acting for an agent, shall set forth, sign, and date a written declaration of the facts of the refusal. (Civ. Code Sec. 2079.15.)

Existing law provides a specified form detailing the fiduciary duties of care owed by the listing or selling agent and the agent's conflict of interest disclosures that the agent is required to give to the seller or buyer. (Civ. Code Sec. 2079.16.)

Existing law requires the listing or selling agent to disclose to the buyer and seller whether the selling agent is acting in the real property transaction exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both the buyer and the seller. This relationship is required to be confirmed, as specified, in the contract to purchase and sell real property or in a separate writing executed or acknowledged by the seller, the buyer, and the selling agent prior to or coincident with execution of that contract by the buyer and the seller, respectively. (Civ. Code Sec. 2079.17.)

Existing law prohibits a selling agent in a real property transaction from acting as an agent for the buyer only, when the selling agent is also acting as the listing agent in the transaction. (Civ. Code Sec. 2079.18.)

Existing law provides that the payment of compensation or the obligation to pay compensation to an agent by the seller or buyer is not necessarily determinative of a particular agency relationship between an agent and the seller or buyer. A listing agent and a selling agent may agree to share any compensation or commission paid, or any right to any compensation or commission for which an obligation arises as the result of a real estate transaction, and the terms of any such agreement shall not necessarily be determinative of a particular relationship. (Civ. Code Sec. 2079.19.)

Existing law prohibits a dual agent from disclosing 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. Existing law also prohibits the dual agent from disclosing to the seller that the buyer is willing to pay a price greater than the offering price, without the express written consent of the buyer. (Civ. Code Sec. 2079.21.)

Existing law provides that a listing agent is not prohibited from also being a selling agent, and the combination of these functions in one agent does not, of itself, make that agent a dual agent. (Civ. Code Sec. 2079.22.)

Existing law defines real estate listing and selling agent, buyer, seller, and specifies that "real property" means any estate in property which constitutes or is improved with one to four dwelling units, any leasehold in this type of property exceeding one year's duration, and mobilehomes, when offered for sale or sole through an agent. (Civ. Code Sec. 2079.13.)

This bill would add "commercial property" to that definition of "real property," thus applying all of the above disclosure requirements to commercial property sale and leasehold transactions.

COMMENT

1. Stated need for the bill

The author writes:

As written, the protections outlined in Civil Code Sections 2079.14 to 2079.24 cover only residential real estate transactions and do not extend to commercial real estate transactions.

There is a common misconception that parties involved in commercial real estate transactions are 1) sophisticated; 2) of equal bargaining power; or 3) equally knowledgeable and experienced in real estate as the other party or the brokers involved. This is not always the case. For example, a small business owner whose only real estate transaction over the next five years will be his or her office lease is not going to be as sophisticated as a landlord whose primary business is real estate and who is negotiating multiple leases a year with the help of a team of sophisticated professionals. That business owner is at a severe disadvantage at the bargaining table and should be educated on the duties or limited duties the licensed real estate professionals involved in the transaction owe to all parties.

The objective of SB 1171 is clear and simple: to educate the parties to all real estate transactions as to the duties and responsibility of a listing agent, selling agent, landlord agent, tenant agent or dual agent.

2. Providing transparency of conflicts of interest in commercial real estate transactions

Existing law requires residential real estate listing and selling agents to provide to the seller and buyer a real estate agency relationship disclosure form, and requires the listing or selling agent to disclose to the buyer and seller whether he or she is acting as the buyer's agent exclusively, the seller's agent exclusively, or as a dual agent representing both the buyer and seller. (Civ. Code Sec. 2079 et seq.) This bill would expand those disclosure requirements to apply to commercial property sale and leasehold transactions.

The author argues that this bill would increase real estate transaction transparency by making the buyer and seller of commercial property aware of potential conflicts of interest of the real estate listing or selling agent. The National Federation of Independent Business, in support, states that "[s]mall business owners, the majority of which rent or lease property in California, believe in making real estate transactions and other information more open and transparent, but in many cases[,] this 'sunlight' is simply not taking place. . . . Several large commercial brokerage firms have already adopted dual agency disclosure policies, but unfortunately, the majority have not. Therefore, a simple change in statute, as directed by SB 1171, is needed to ensure tenants are aware of the potential conflict of interest. This is simply [a] fair and

reasonable policy that will increase protections for buyers and renters in real estate transactions, and will bring conformity into existing law.”

Case law demonstrates a problem with statutory disclosure requirements in property transactions that contain both residential and commercial property (mixed-use property). In *Richman v. Hartley* (2014) 224 Cal.App.4th 1182, the plaintiff buyer declined to close escrow on the sale of a property that was a mixed-use single parcel improved with both a commercial building and a residential duplex. The buyer claimed that the defendant seller breached the contract because he failed to make all applicable disclosures required by law, which was a term of the contract. (*Id.* at 1186.) The defendant seller did not provide the statutory transfer disclosure statement (TDS) to the buyer claiming that the disclosures required under the Transfer Disclosure Law (TDL) only applied to residential property, not mixed-use property. (*Id.*) The court held that the Transfer Disclosure Law does not enumerate mixed-use property in the list of property excluded from the TDL, nor does it refer only to “residential real property.” (*Id.* at pp. 1188-1189.) Rather, the TDL applies to any transfer of real property improved with or consisting of not less than one nor more than four dwelling units. (*Id.* at 1189.) Accordingly, the court held that even though the property was mixed-use and included a commercial property along with a duplex, the seller was not relieved of the duty to provide the TDS. (*Id.*)

Although this bill does not alter seller disclosure requirements as discussed in *Richman*, but instead would expand existing real estate listing and selling agent disclosures to apply to commercial real property transactions, the *Richman* case demonstrates how a real estate listing or selling agent could attempt to avoid conflict of interest disclosures in mixed use property transactions. Further, the TDL was enacted to provide inexperienced home buyers, who at that time, often were either not represented by a real estate broker or effectively unrepresented because of the problems of dual agency, with information about the residential property they are interested in purchasing. (*Smith v. Rickard* (1988) 205 Cal.App.3d 1354, 1359; citing *Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 102, fn. 8.) While historically, the TDL did not require sellers of commercial real property to provide those disclosures because commercial buyers were assumed to be knowledgeable about such transactions, the author notes that assumption is not necessarily correct. From a policy standpoint, both residential and commercial real property sellers and buyers, who may be operating small businesses and otherwise inexperienced in commercial property transactions, arguably, would benefit from conflict of interest disclosures from the real estate listing and selling agents. This bill, by adding commercial real estate listing and selling agents to the existing residential conflict of interest disclosure requirements, would provide better transparency of those listing and selling agents’ financial interests in those transactions.

Support: Anametrix, Inc.; Atessa Benefits, Inc.; BIS²; Breeze IT, Inc.; Browning Hocker; California Asian Pacific Chamber of Commerce; California Grocers Association; California Retailers Association; Coast Appraisal Services; E3 Advisors; Hughes

Marino; Huntington Capital; Law Offices of Timothy E. Fields; McAteer & McAteer; MPC; National Federation of Independent Business; Trovogene; Walk San Diego/Move San Diego; Yunker & Schneider

Opposition: California Association of Realtors

HISTORY

Source: Author

Related Pending Legislation: None Known

Prior Legislation:

SB 467 (Leonard, Ch. 428, Stats. 1995) *See* Background.

SB 453 (Robbins, Ch. 223, Stats. 1985) *See* Background.

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 651-1520 Fax: (916) 327-4478

SB 1171

THIRD READING

Bill No: SB 1171
Author: Hueso (D)
Amended: As introduced
Vote: 21

SENATE JUDICIARY COMMITTEE: 7-0, 5/6/14
AYES: Jackson, Anderson, Corbett, Lara, Leno, Monning, Vidak

SUBJECT: Real property transactions: agents: obligations

SOURCE: Author

DIGEST: This bill extends disclosure requirements made to the seller and buyer in a residential real property transaction, to transactions involving commercial property.

ANALYSIS:

Existing law:

1. Requires specified disclosures by listing and selling agents to be provided to a buyer and seller of residential real property and defines the duties owed by the agents to the buyer and seller.
2. Requires those listing and selling agents to provide the seller and buyer with a copy of a specified disclosure form and to obtain a signed acknowledgment of receipt from that seller or buyer as follows:
 - A. The listing agent, if any, shall provide the disclosure form to the seller prior to entering into the listing agreement;

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RRJN24

- B. The selling agent shall provide the disclosure form to the seller as soon as practicable prior to presenting the seller with an offer to purchase, unless the selling agent previously provided the seller with a copy of the disclosure form;
 - C. Where the selling agent does not deal on a face-to-face basis with the seller, the disclosure form prepared by the selling agent may be furnished to the seller by the listing agent, or the selling agent may deliver the disclosure form by certified mail addressed to the seller at his/her last known address, in which case no signed acknowledgment of receipt is required; and
 - D. The selling agent shall provide the disclosure form to the buyer as soon as practicable prior to execution of the buyer's offer to purchase, except that if the offer to purchase is not prepared by the selling agent, the selling agent shall present the disclosure form to the buyer not later than the next business day after the selling agent receives the offer to purchase from the buyer.
3. Provides that in any circumstance in which the seller or buyer refuses to sign an acknowledgment of receipt of the disclosure form, the agent, or an associate licensee acting for an agent, shall set forth, sign, and date a written declaration of the facts of the refusal.
 4. Provides a specified form detailing the fiduciary duties of care owed by the listing or selling agent and the agent's conflict of interest disclosures that the agent is required to give to the seller or buyer.
 5. Requires the listing or selling agent to disclose to the buyer and seller whether the selling agent is acting in the real property transaction exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both the buyer and the seller. This relationship is required to be confirmed, as specified, in the contract to purchase and sell real property or in a separate writing executed or acknowledged by the seller, the buyer, and the selling agent prior to or coincident with execution of that contract by the buyer and the seller, respectively.
 6. Prohibits a selling agent in a real property transaction from acting as an agent for the buyer only, when the selling agent is also acting as the listing agent in the transaction.
 7. Provides that the payment of compensation or the obligation to pay compensation to an agent by the seller or buyer is not necessarily determinative

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RRJN25

of a particular agency relationship between an agent and the seller or buyer. A listing agent and a selling agent may agree to share any compensation or commission paid, or any right to any compensation or commission for which an obligation arises as the result of a real estate transaction, and the terms of any such agreement shall not necessarily be determinative of a particular relationship.

8. Prohibits a dual agent from disclosing 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. Prohibits the dual agent from disclosing to the seller that the buyer is willing to pay a price greater than the offering price, without the express written consent of the buyer.
9. Provides that a listing agent is not prohibited from also being a selling agent, and the combination of these functions in one agent does not, of itself, make that agent a dual agent.
10. Defines real estate listing and selling agent, buyer, seller, and specifies that “real property” means any estate in property which constitutes or is improved with one to four dwelling units, any leasehold in this type of property exceeding one year’s duration, and mobilehomes, when offered for sale or sold through an agent.

This bill adds “commercial property” to that definition of “real property,” thus applying all of the above disclosure requirements to commercial property sale and leasehold transactions.

Background

Prior to 1984, the law required a real estate broker to disclose to a buyer, material defects known to the broker but unknown to and unobservable by the buyer. In 1984, case law provided that the broker also owed a duty to disclose defects which the broker should have discovered through reasonable diligence. In *Easton v. Strassburger* (1984) 152 Cal.App.3d 90, the court held that real estate licensees owed certain duties of care to the property buyers, including while representing the sellers in a residential home transaction. That court refrained from extending these duties to commercial property transactions, stating in dictum: “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

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RRJN26

estate and is usually represented by an agent who represents only the buyer's interests. " (*Id.* at p. 102, fn. 8.)

After the *Easton* decision, there was extensive discussion in the real estate industry on how those duties were to be interpreted. SB 453 (Robbins, Chapter 223, Statutes of 1985) clarified the duties of real estate brokers and buyers in real property transactions. However, the law was still unclear as to whether real estate brokers had disclosure duties to buyers. In *Smith v. Rickard* (1988) 205 Cal.App.3d 1354, 1360, the court, after examining statutory construction and the *Easton* case dictum, held that real property brokers had a duty to inspect the property and to disclose to the plaintiff any material defects affecting the value or desirability of the property.

In 1995, the *Easton* decision was further clarified and codified in SB 467 (Leonard, Chapter 428, Statutes of 1995) to require real estate listing and selling agents of residential property to provide specified disclosures to buyers and sellers. Those disclosures require the real estate listing and selling agents to disclose whether the agent represents the buyer, the seller, or both the buyer and seller (known as dual agency).

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 5/7/14)

Anamatrix, Inc.
Atessa Benefits, Inc.
BIS2
Breeze IT, Inc.
Browning Hocker
California Asian Pacific Chamber of Commerce
California Grocers Association
California Hispanic Chambers of Commerce
California Retailers Association
Coast Appraisal Services
E3 Advisors
Hughes Marino
Huntington Capital
Law Offices of Timothy E. Fields
McAteer & McAteer
MPC
National Federation of Independent Business

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Trovagene
Walk San Diego/Move San Diego
Yunker & Schneider

OPPOSITION: (Verified 5/7/14)

California Association of Realtors

ARGUMENTS IN SUPPORT: According to the author:

“As written, the protections outlined in Civil Code Sections 2079.14 to 2079.24 cover only residential real estate transactions and do not extend to commercial real estate transactions.”

“There is a common misconception that parties involved in commercial real estate transactions are (1) sophisticated; (2) of equal bargaining power; or (3) equally knowledgeable and experienced in real estate as the other party or the brokers involved. This is not always the case. For example, a small business owner whose only real estate transaction over the next five years will be his/her office lease is not going to be as sophisticated as a landlord whose primary business is real estate and who is negotiating multiple leases a year with the help of a team of sophisticated professionals. That business owner is at a severe disadvantage at the bargaining table and should be educated on the duties or limited duties the licensed real estate professionals involved in the transaction owe to all parties.”

“The objective of SB 1171 is clear and simple: to educate the parties to all real estate transactions as to the duties and responsibility of a listing agent, selling agent, landlord agent, tenant agent or dual agent.”

ARGUMENTS IN OPPOSITION: The California Association of Realtors writes, “When our association sponsored the original agency disclosure legislation, including the written form requirement that now applies to residential agency, and commercial transactions were deliberately not required to use the same forms as residential transactions. The reason for the different rule is the different level of sophistication and complexity that exist in non-residential transactions. We believed, and experience seems to bear it out, that simply requiring disclosure of multiple agency relationships and allowing commercial practitioners to utilize their own contracts and forms is sufficient to protect the parties.”

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RRJN28

AL:e 5/8/14 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** **END** ****

Date of Hearing: June 17, 2014

ASSEMBLY COMMITTEE ON JUDICIARY
Bob Wieckowski, Chair
SB 1171 (Hueso) – As Amended: June 10, 2014

As Proposed to be Amended

SENATE VOTE: 29-1

SUBJECT: REAL PROPERTY TRANSACTIONS: DUAL AGENCY

KEY ISSUE: SHOULD THE EXISTING REQUIREMENT THAT A REAL ESTATE AGENT DISCLOSE TO THE SELLER AND BUYER IN A REAL ESTATE TRANSACTION WHETHER THE AGENT IS ACTING AS THE BUYER'S AGENT EXCLUSIVELY, AS THE SELLER'S AGENT EXCLUSIVELY, OR AS A DUAL AGENT REPRESENTING BOTH THE BUYER AND SELLER ALSO BE MADE TO EXPRESSLY APPLY TO TRANSACTIONS INVOLVING COMMERCIAL REAL PROPERTY?

SYNOPSIS

Existing law requires a real estate agent to provide the seller and buyer in a real estate transaction with a statutorily prescribed disclosure as to whether the agent is acting as the buyer's agent exclusively, as the seller's agent exclusively, or as a dual agent representing both the buyer and seller. The required disclosure form must also generally explain the duties of different agency relationships and must contain relevant provisions of the Civil Code relating to these relationships on the back of the form. While there may be certain circumstances in which it is appropriate for the same agent to represent both buyer and seller, dual agency creates a potential conflict of interest, about which, both buyer and seller should be cognizant. Statutory language, legislative history, and case law all seem to reinforce the view that the existing statutory disclosure requirement applies only to residential property transactions, not commercial property transactions. This bill would extend the existing statutory disclosure requirements to transactions involving "commercial real property," as defined. The bill is premised on the assumption that buyers and sellers of commercial property and commercial property interests should, like those involved in a residential property transaction, be aware of the potential conflicts of interest created by dual agency. The author rejects the assumptions of the bill's opponents who maintain that parties to a commercial transaction are generally more "sophisticated" than typical home buyers and negotiate at arm's length, and therefore do not need the same protections. The author will take amendments in this Committee to clarify the definition of "commercial real property." The analysis and bill summary reflect that amendment. The California Association of Realtors opposes this bill as unnecessary, claiming that parties to a commercial transaction are generally more sophisticated and, at any rate, are already required to disclose dual agency – even if they are not required to do it through a statutorily prescribed form. The bill is supported by several small business and retail groups who often buy commercial property or enter into long-term leases for commercial space.

SUMMARY: Extends disclosure requirements that currently only apply to residential property transactions to commercial property transactions. Specifically, this bill:

- 1) Redefines "real property," for purposes of a statute that requires a real estate agent to make certain disclosures about the nature of the agent's representation, to include commercial real property.
- 2) Defines "commercial real property" to mean all real property in this state except single-family residential real property, dwelling units made subject to Chapter 2 (commencing with Section 1940) of Title 5 of Part 4 of Division 3 of the Civil Code, mobilehomes as defined in Section 798.3 of the Civil Code, or recreational vehicles as defined in Section 799.24 of the Civil Code.

EXISTING LAW:

- 1) Requires listing agents and selling agents to provide the seller and buyer in a real property transaction with a copy of a prescribed disclosure form and to obtain a signed acknowledgement of receipt from that seller or buyer, except as specified. Specifies the information that must appear on the front of the form and requires that the back of the form contain specified provisions of the Civil Code that set forth the duties of the real estate agent, including, most notably, those relating to dual agency. (Civil Code Sections 2079.14-2079.17.)
- 2) Defines "real property," for purposes of the above only, to include real property which constitutes or is improved with one to four dwelling units, any leasehold in this type of property exceeding one year's duration, and mobile homes, when offered for sale or sold through a real estate agent, as specified. (Civil Code Section 2079.13 (j).)
- 3) Requires, subject to certain exceptions, the transferor of any real property that is improved with or consisting of not less than one or more than four dwelling units to deliver to the prospective transferee a prescribed "Real Estate Transfer Disclosure Statement" that sets forth general safety, structural, and material conditions of the property. (Civil Code Sections 1102 and 1102.6.)
- 4) Provides that the Real Estate Commissioner may, upon his or her own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he or she may temporarily suspend or permanently revoke a real estate license at any time where, among other things, the licensee acts for more than one party in a transaction without the knowledge or consent of all parties thereto. (Business & Professions Code Section 10176(d).)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: Existing law requires a real estate agent to provide the seller and buyer with a statutorily prescribed disclosure form that tells both buyer and seller whether the agent is acting as the buyer's agent exclusively, as the seller's agent exclusively, or as a dual agent representing both the buyer and seller. The required disclosure form must also generally explain the duties of different agent relationships, and it must contain relevant provisions of the Civil Code relating to these relationships on the back of the form. The rationale for this provision is straightforward: while there may be certain circumstances in which it is appropriate for the same agent to represent both buyer and seller, dual agency creates a potential conflict of interest, as the agent

attempts to serve the best interest of both buyer and seller simultaneously. This bill would extend the existing statutory disclosure requirements that now apply in transactions involving the sale of a residential property with four or fewer dwelling units, to transactions involving "commercial real property," as defined. The bill is premised on the assumption that buyers and sellers of commercial property should also be aware of potential conflicts of interest inherent in dual agency. The author rejects the assumptions of some of the opponents – and possibly the Legislature that enacted the original legislation – that parties to a commercial transaction are somehow more "sophisticated" than the average home buyer and negotiate from more or less equal bargaining positions. But not all parties to a commercial property transaction, the author maintains, are equally sophisticated or equally situated. At any rate, parties to a commercial property transaction should know if the agent is representing both parties to the transaction.

It is important to note that the Civil Code section that this bill would amend defines "seller" and "buyer" to include a "lessor" and "lessee," respectively, and it defines a "sale" to include a leasehold exceeding one year's duration. In other words, this bill would apply to real estate agents that arrange long-term commercial leases as well as agents that arrange commercial property sales. Indeed, the supporters of this bill are primarily associations representing small businesses, such as single-store grocers, who are more likely to lease commercial property than they are to purchase it. As proposed to be amended, however, the bill will specify that the disclosure requirement, both under this bill and existing law, does not apply to *residential* leases (though it will apply, as in existing law, to the *sale* of residential property.)

Existing Disclosure Requirements in Commercial Property Transactions: Statutory language, legislative history, and case law all seem to reinforce the view that the existing provisions in the Civil Code requiring real estate agents to disclose the exact nature of the agency relationship to buyers and sellers applies only to *residential* property transactions, and not *commercial* property transactions. For example, in *Smith v. Rickard* (1988) 205 Cal. App. 3d 1134, the court held that "section 2079 *et seq.* is one of those statutory schemes where the Legislature distinguishes between residential and commercial properties in order to protect unsophisticated buyers and owners of residential properties from those with greater knowledge and bargaining power." [*Richman v. Hartley* (2014) 224 Cal. App. 4th 1182 (quoting, explaining, and affirming *Smith v. Rickard*); *see also Easton v. Strassburger* (1984) 152 Cal. App. 3d 90 (observing that unlike a "residential home buyer . . . a purchaser of commercial real estate is likely to be more experienced and sophisticated in his [or her] dealings in real estate.")]

However, just because Civil Code Section 2079 *et seq.* does not apply to commercial property transactions, it does not mean that agents selling commercial real property are not required, as part of a general duty and professional standard of care, to disclose dual agency relationship to buyers and sellers. For example, Business & Professions (B&P) Code Section 10176(d) presumes this duty, even if it does not create it. Specifically, that section empowers the Commissioner of the Department of Real Estate (DRE) to investigate and, if necessary, suspend or revoke a real estate license if the licensee has, among other things, acted "for more than one party in a transaction without the knowledge or consent of all parties thereto." However, unlike Section 2079 *et seq.*, B&P Section 10176(d) is reactive; that is, it does not impose an affirmative statutory duty on the real estate agent. Rather, the agent is presumed to have a preexisting duty; B&P Section 10176(d) only requires the DRE, upon its own motion or upon the filing of a complaint against the licensee, to take action. If a relatively unsophisticated buyer of commercial real property did not already know about the disclosure requirement, he or she would have no reason to file a complaint with the DRE. As noted below, the California

Association of Realtors (CAR) cites B&P Section 10176(d) to argue that this bill is unnecessary because agents selling commercial property are already required to make such disclosures. While this appears to be the case, existing statutory law is relatively silent on just how this disclosure is to be presented to the buyer and seller. For the sake of clarity and uniformity, this bill would require a real estate agent involved in a commercial property transaction to provide the same statement (as spelled out in Section 2079.16) that he or she would provide in a residential property transaction. In short, CAR's opposition appears to be based not so much on whether the agent in a commercial real estate transaction must make a disclosure, but whether or not that agent must make a written disclosure that includes the language set forth in the statute.

CAR contends not only that the statutory form requirement is unnecessary, but that the form prescribed by Section 2079.16 is "the wrong form . . . and is not appropriately worded to address commercial leasing or even commercial sales." However, there is no language within Section 2079.16 that restricts its application to residential properties. To be sure, the Article within which Section 2079.16 appears is titled "Duty to Prospective Purchaser of Residential Property," but this bill would delete the word "Residential" from that title. The word "residential" does not appear anywhere in the prescribed language. The signature line on the form refers to "sellers" and "buyers," and therefore might appear to exclude a lease agreement; but as noted above, the legislation defines "seller" to include a "lessor" and the buyer is defined to include a "lessee."

Proposed Amendment Seeks to Address Apartment Owner Concerns: Although the California Apartment Association (CAA) does not formally oppose this bill, it did raise concerns to both the author and the Committee about potential unintended consequences for apartment owners. Because existing law, for purposes of disclosure duties, defines a "seller" to include a "lessor" and a "sale" to include a leasehold exceeding one year's duration (Civil Code Section 2079.13), CAA feared that the definition of "commercial" in an earlier version of this bill might unintentionally require disclosures in all apartment units within an apartment building, since a lease conveys an interest in real property. (CAR raises a similar point in its letter opposition.) Requiring disclosure in residential leases was not, however, the author's intent. However it is not at all clear that this bill, even without the proposed amendment, would have applied to apartment rentals. To begin with, the disclosure requirement extended by this bill only applies to a lease in excess of one year's duration that is offered by an agent, which is not typical of apartment leases. Moreover, the disclosure requirement required by existing law (and this bill) only applies to a licensed "agent" involved in the selling or long-term leasing of real property that may contain one or more residential buildings; neither existing law nor this bill impose any duty on landlords renting units within a residential building upon that property.

The author has indicated to the Committee that he only intends to extend the requirement to the sale and long-term leasing of commercial properties, not to rental units within an apartment building. As proposed to amended, therefore, the bill will define "commercial real property" to exclude the renting of residential property units by expressly exempting dwelling units subject to the landlord and tenant provisions in the Civil Code. (See proposed author amendment below.)

It is not entirely clear if exempting the leasing of apartment units will entirely address CAA's concerns, if CAA prefers – as it appears it might – to exempt transactions involving the sale of entire apartment buildings as well. Such an exemption, it seems, is not consistent with the author's intent. If the purpose of this bill is to extend the disclosure requirement to commercial properties, and existing law already requires disclosure for the sale of a building with four or fewer residential units, it is not clear why the sale of an apartment building – alone among all

forms of real property – should not also be subject to the disclosure. Whether an apartment building is more like a four-unit residential building, or more like a commercial property, does not matter, for both those types of property will be subject to the disclosure requirement under this bill. It is not clear why the sale of an apartment building should be treated any differently.

ARGUMENTS IN SUPPORT: According to the author the dual agency protections outlined in existing law only cover residential real estate transactions, even though the logic justifying those protections should apply with equal force to commercial real estate transactions. Presumably, the exclusion of commercial property transactions from existing law was based on the assumption that commercial buyers and sellers are more "sophisticated" than the average home buyer and will have the knowledge and wherewithal to require such disclosures contractually. The typical buyer of a family home, on the other hand, was presumed to have less experience in business matters and needed more protection. The author and supporters of this bill, however, reject those assumptions. The author writes: "There is a common misconception that parties involved in commercial real estate transactions are 1) sophisticated; 2) of equal bargaining power; or 3) equally knowledgeable and experienced in real estate as the other party or the brokers involved. This is not always the case. For example, a small business owner whose only real estate transaction over the next five years will be his or her office lease is not going to be as sophisticated as a landlord whose primary business is real estate and who is negotiating multiple leases a year with the help of a team of sophisticated professionals. That business owner is at a severe disadvantage at the bargaining table and should be educated on the duties or limited duties the licensed real estate professionals involved in the transaction owe to all parties. . . The objective of SB 1171 is clear and simple: to educate the parties to all real estate transactions as to the duties and responsibility of a listing agent, selling agent, landlord agent, tenant agent or dual agent."

The California Grocers Association (CGA) contends that under existing law "a real estate broker is permitted to represent both the landlord and the tenant in a leasing transaction, without providing written disclosure to both parties." CGA contends that this is not a problem for its larger members, since both sides in those transactions generally have representation. However, independent, single-store operators "must depend upon their leasing agent to act in their best interest." CGA believes that "SB 1171 simply aligns the [disclosure] rules already in statute with those already prevalent in residential real estate transactions."

ARGUMENTS IN OPPOSITION: The California Association of Realtors (CAR) opposes this bill for three reasons. First, CAR claims that this bill is not needed because B&P Code Section 10176(d) already prohibits undisclosed dual agency. Second, "the agency disclosure form that is required under this bill is one tailored to the re-sale of 1-4 properties [i.e. residential properties with four or fewer units], and is not appropriately worded to address commercial leasing or even commercial sales." Third, CAR contends that the definition of "commercial" in the bill is so broad that it will "require every apartment lease and every residential hotel lease to contain the listing agents' disclosure form for a single family home."

[NOTE: As proposed to be amended, the bill appears to address CAR's third objection by amending the definition of "commercial real property" to exclude apartment leases, or any other lease for a residential unit. Moreover, even without such a change, this bill would not change lease requirements; rather, it only imposes the duty of disclosure on licensed real estate *agents*, not on landlords or hotel owners who offer apartments for lease.]

PROPOSED AUTHOR AMENDMENTS: In order to clarify the meaning of "commercial real property," the author will take the following amendments in this Committee:

- On page 3 line 19 delete "specified in subdivision (a) or (b) of section 1101.3"
- On page 2 after line 35 insert:

(d) "Commercial real property" as used in this section, means all real property in this state except single-family residential real property, dwelling units made subject to Chapter 2 (commencing with Section 1940) of Title 5 of Part 4 of Division 3 of the Civil Code, mobilehomes as defined in Section 798.3 of the Civil Code, or recreational vehicles as defined in Section 799.24 of the Civil Code.

- On page 2 line 36 change (d) to (e), and change remaining subdivision letters accordingly.

REGISTERED SUPPORT / OPPOSITION:

Support

Anamatrix, Inc.
Atessa Benefits, Inc.
BIS2
Breeze IT, Inc.
Browning Hocker
California Asian Pacific Chamber of Commerce
California Grocers Association
California Hispanic Chambers of Commerce
California Retailers Association
Coast Appraisal Services
E3 Advisors
Hispanic Chamber of Commerce
Hughes Marino
Huntington Capital
Law Offices of Timothy E. Fields
McAteer & McAteer
MPC
National Federation of Independent Business
Trovagene
Walk San Diego/Move San Diego
Yunker & Schneider

Opposition

California Association of Realtors

Analysis Prepared by: Thomas Clark / JUD. / (916) 319-2334

SENATE THIRD READING

SB 1171 (Hueso)

As Amended June 24, 2014

Majority vote

SENATE VOTE: 29-1

JUDICIARY 9-0

Ayes: Wieckowski, Alejo, Chau, Dickinson,
Garcia, Gorell, Maienschein,
Muratsuchi, Stone

SUMMARY: Extends disclosure requirements that currently only apply to residential property transactions to commercial property transactions. Specifically, this bill:

- 1) Redefines "real property," for purposes of a statute that requires a real estate agent to make certain disclosures about the nature of the agent's representation, to include commercial real property.
- 2) Defines "commercial real property" to mean all real property in this state except single-family residential real property, dwelling units made subject to Chapter 2 (commencing with Section 1940) of Title 5 of Part 4 of Division 3 of the Civil Code, mobilehomes as defined in Civil Code Section 798.3, or recreational vehicles as defined in Civil Code Section 799.24.

EXISTING LAW:

- 1) Requires listing agents and selling agents to provide the seller and buyer in a real property transaction with a copy of a prescribed disclosure form and to obtain a signed acknowledgement of receipt from that seller or buyer, except as specified. Specifies the information that must appear on the front of the form and requires that the back of the form contain specified provisions of the Civil Code relating to an agent's duties.
- 2) Defines "real property," for purposes of the above only, to include real property which constitutes or is improved with one to four dwelling units, any leasehold in this type of property exceeding one year's duration, and mobile homes, when offered for sale or sold through a real estate agent, as specified.
- 3) Requires, subject to certain exceptions, the transferor of any real property that is improved with or consisting of not less than one or more than four dwelling units to deliver to the prospective transferee a prescribed "Real Estate Transfer Disclosure Statement" that sets forth general safety, structural, and material conditions of the property.
- 4) Provides that the Real Estate Commissioner may, upon his or her own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he or she may temporarily suspend or permanently revoke a real estate license at any time where, among other things, the licensee acts for more than one party in a transaction without the knowledge or consent of all parties thereto.

FISCAL EFFECT: None

COMMENTS: Existing law requires a real estate agent to provide the seller and buyer with a statutorily prescribed disclosure form that tells both buyer and seller whether the agent is acting as the buyer's agent exclusively, as the seller's agent exclusively, or as a dual agent representing both the buyer and seller. The required disclosure form must also generally explain the duties of different agent relationships, and it must contain relevant provisions of the Civil Code relating to these relationships on the back of the form. The rationale for this provision is straightforward: while there may be certain circumstances in which it is appropriate for the same agent to represent buyer and seller, dual agency creates a potential conflict of interest, as the agent attempts to serve the best interest of both buyer and seller simultaneously. This bill would extend the existing statutory disclosure requirements that now apply in transactions involving the sale of a residential property with four or fewer dwelling units, to transactions involving "commercial real property," as defined. The bill is premised on the assumption that buyers and sellers of commercial property should also be aware of potential conflicts of interest inherent in dual agency.

It is important to note that the Civil Code section that this bill would amend defines "seller" and "buyer" to include a "lessor" and "lessee," respectively, and it defines a "sale" to include a leasehold exceeding one year's duration. In other words, this bill would apply to real estate agents that arrange long-term commercial leases as well as agents that arrange commercial property sales. Indeed, the supporters of this bill are primarily associations representing small businesses, such as single-store grocers, who are more likely to lease commercial property than they are to purchase it. However, the bill will specify that the disclosure requirement, both under this bill and existing law, does not apply to residential leases (though it will apply, as in existing law, to the sale of residential property.)

Statutory language, legislative history, and case law all seem to reinforce the view that the existing provisions in the Civil Code requiring real estate agents to disclose the nature of the agency relationship to buyers and sellers applies only to residential property transactions, and not commercial property transactions. For example, in *Smith v. Rickard* (1988) 205 Cal. App. 3d 1134, the court held that "[Civil Code] Section 2079 *et seq.* is one of those statutory schemes where the Legislature distinguishes between residential and commercial properties in order to protect unsophisticated buyers and owners of residential properties from those with greater knowledge and bargaining power." (*Richman v. Hartley* (2014) 224 Cal. App. 4th 1182.)

However, that Civil Code Section 2079 *et seq.* does not apply to commercial property transactions does not mean that agents selling commercial real property do not have a legal and professional duty to disclose dual agency relationship to buyers and sellers. Business & Professions (B&P) Code Section 10176(d) presumes this duty, even if it does not create it. Specifically, that section empowers the Commissioner of the Department of Real Estate (DRE) to investigate and, if necessary, suspend or revoke a real estate license if the licensee has acted "for more than one party in a transaction without the knowledge or consent of all parties thereto." However, unlike Section Civil Code Section 2079 *et seq.*, B&P Section 10176(d) does not impose an affirmative duty on the real estate agent. Rather, the agent is presumed to have a preexisting duty; B&P Section 10176(d) only requires the DRE, upon the filing of a complaint against the licensee, to take action. If a relatively unsophisticated buyer of commercial real property did not already know about the disclosure requirement, he or she would have no reason to file a complaint with the DRE.

SENATE RULES COMMITTEE

SB 1171

Office of Senate Floor Analyses

1020 N Street, Suite 524

(916) 651-1520 Fax: (916) 327-4478

UNFINISHED BUSINESS

Bill No: SB 1171
Author: Hueso (D)
Amended: 6/24/14
Vote: 21

SENATE JUDICIARY COMMITTEE: 7-0, 5/6/14

AYES: Jackson, Anderson, Corbett, Lara, Leno, Monning, Vidak

SENATE FLOOR: 29-1, 5/12/14

AYES: Anderson, Beall, Berryhill, Block, Cannella, Corbett, De León,
DeSaulnier, Hancock, Hernandez, Hill, Hueso, Huff, Jackson, Lara, Leno, Lieu,
Liu, Mitchell, Monning, Padilla, Pavley, Roth, Steinberg, Torres, Vidak,
Walters, Wolk, Wyland

NOES: Correa

NO VOTE RECORDED: Calderon, Evans, Fuller, Gaines, Galgiani, Knight,
Morrell, Nielsen, Wright, Yee

ASSEMBLY FLOOR: 62-8, 7/3/14 - See last page for vote

SUBJECT: Real property transactions: agents: obligations

SOURCE: Author

DIGEST: This bill extends disclosure requirements made to the seller and buyer in a residential real property transaction, to transactions involving commercial real property.

Assembly Amendments clarify the meaning of “commercial real property.”

CONTINUED

RRJN38

ANALYSIS:

Existing law:

1. Requires specified disclosures by listing and selling agents to be provided to a buyer and seller of residential real property and defines the duties owed by the agents to the buyer and seller.
2. Requires those listing and selling agents to provide the seller and buyer with a copy of a specified disclosure form and to obtain a signed acknowledgment of receipt from that seller or buyer as follows:
 - A. The listing agent, if any, shall provide the disclosure form to the seller prior to entering into the listing agreement;
 - B. The selling agent shall provide the disclosure form to the seller as soon as practicable prior to presenting the seller with an offer to purchase, unless the selling agent previously provided the seller with a copy of the disclosure form;
 - C. Where the selling agent does not deal on a face-to-face basis with the seller, the disclosure form prepared by the selling agent may be furnished to the seller by the listing agent, or the selling agent may deliver the disclosure form by certified mail addressed to the seller at his/her last known address, in which case no signed acknowledgment of receipt is required; and
 - D. The selling agent shall provide the disclosure form to the buyer as soon as practicable prior to execution of the buyer's offer to purchase, except that if the offer to purchase is not prepared by the selling agent, the selling agent shall present the disclosure form to the buyer not later than the next business day after the selling agent receives the offer to purchase from the buyer.
3. Provides that in any circumstance in which the seller or buyer refuses to sign an acknowledgment of receipt of the disclosure form, the agent, or an associate licensee acting for an agent, shall set forth, sign, and date a written declaration of the facts of the refusal.
4. Provides a specified form detailing the fiduciary duties of care owed by the listing or selling agent and the agent's conflict of interest disclosures that the agent is required to give to the seller or buyer.

CONTINUED

RRJN39

5. Requires the listing or selling agent to disclose to the buyer and seller whether the selling agent is acting in the real property transaction exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both the buyer and the seller. This relationship is required to be confirmed, as specified, in the contract to purchase and sell real property or in a separate writing executed or acknowledged by the seller, the buyer, and the selling agent prior to or coincident with execution of that contract by the buyer and the seller, respectively.
6. Prohibits a selling agent in a real property transaction from acting as an agent for the buyer only, when the selling agent is also acting as the listing agent in the transaction.
7. Provides that the payment of compensation or the obligation to pay compensation to an agent by the seller or buyer is not necessarily determinative of a particular agency relationship between an agent and the seller or buyer. A listing agent and a selling agent may agree to share any compensation or commission paid, or any right to any compensation or commission for which an obligation arises as the result of a real estate transaction, and the terms of any such agreement shall not necessarily be determinative of a particular relationship.
8. Prohibits a dual agent from disclosing 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. Prohibits the dual agent from disclosing to the seller that the buyer is willing to pay a price greater than the offering price, without the express written consent of the buyer.
9. Provides that a listing agent is not prohibited from also being a selling agent, and the combination of these functions in one agent does not, of itself, make that agent a dual agent.
10. Defines real estate listing and selling agent, buyer, seller, and specifies that "real property" means any estate in property which constitutes or is improved with one to four dwelling units, any leasehold in this type of property exceeding one year's duration, and mobilehomes, when offered for sale or sold through an agent.

CONTINUED

RRJN40

This bill:

1. Adds “commercial real property” to that definition of “real property,” thus applying all of the above disclosure requirements to commercial property sales.
2. Defines "commercial real property" to mean all real property in this state except single-family residential real property, residential rental units, mobilehomes, or recreational vehicles.

Background

Prior to 1984, the law required a real estate broker to disclose to a buyer, material defects known to the broker but unknown to and unobservable by the buyer. In 1984, case law provided that the broker also owed a duty to disclose defects which the broker should have discovered through reasonable diligence. In *Easton v. Strassburger* (1984) 152 Cal.App.3d 90, the court held that real estate licensees owed certain duties of care to the property buyers, including while representing the sellers in a residential home transaction. That court refrained from extending these duties to commercial property transactions, stating in dictum: “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.”

After the *Easton* decision, there was extensive discussion in the real estate industry on how those duties were to be interpreted. SB 453 (Robbins, Chapter 223, Statutes of 1985) clarified the duties of real estate brokers and buyers in real property transactions. However, the law was still unclear as to whether real estate brokers had disclosure duties to buyers. In *Smith v. Rickard* (1988) 205 Cal.App.3d 1354, 1360, the court, after examining statutory construction and the *Easton* case dictum, held that real property brokers had a duty to inspect the property and to disclose to the plaintiff any material defects affecting the value or desirability of the property.

In 1995, the *Easton* decision was further clarified and codified in SB 467 (Leonard, Chapter 428, Statutes of 1995) to require real estate listing and selling agents of residential property to provide specified disclosures to buyers and sellers. Those disclosures require the real estate listing and selling agents to disclose whether the agent represents the buyer, the seller, or both the buyer and seller (known as dual agency).

CONTINUED

RRJN41

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 7/24/14)

Anametrix, Inc.
Atessa Benefits, Inc.
BIS2
Breeze IT, Inc.
Browning Hocker
California Asian Pacific Chamber of Commerce
California Grocers Association
California Hispanic Chambers of Commerce
California Retailers Association
Coast Appraisal Services
E3 Advisors
Hughes Marino
Huntington Capital
Law Offices of Timothy E. Fields
Marketing Pro Consulting, Inc.
McAteer & McAteer
National Federation of Independent Business
Trovagene
Walk San Diego/Move San Diego
Yunker & Schneider

OPPOSITION: (Verified 7/24/14)

California Association of Realtors

ARGUMENTS IN SUPPORT: According to the author:

“As written, the protections outlined in Civil Code Sections 2079.14 to 2079.24 cover only residential real estate transactions and do not extend to commercial real estate transactions.”

“There is a common misconception that parties involved in commercial real estate transactions are (1) sophisticated; (2) of equal bargaining power; or (3) equally knowledgeable and experienced in real estate as the other party or the brokers involved. This is not always the case. For example, a small business owner whose only real estate transaction over the next five years will be his/her office lease is

CONTINUED

RRJN42

not going to be as sophisticated as a landlord whose primary business is real estate and who is negotiating multiple leases a year with the help of a team of sophisticated professionals. That business owner is at a severe disadvantage at the bargaining table and should be educated on the duties or limited duties the licensed real estate professionals involved in the transaction owe to all parties.”

“The objective of SB 1171 is clear and simple: to educate the parties to all real estate transactions as to the duties and responsibility of a listing agent, selling agent, landlord agent, tenant agent or dual agent.”

ARGUMENTS IN OPPOSITION: The California Association of Realtors writes, “When our association sponsored the original agency disclosure legislation, including the written form requirement that now applies to residential agency, and commercial transactions were deliberately not required to use the same forms as residential transactions. The reason for the different rule is the different level of sophistication and complexity that exist in non-residential transactions. We believed, and experience seems to bear it out, that simply requiring disclosure of multiple agency relationships and allowing commercial practitioners to utilize their own contracts and forms is sufficient to protect the parties.”

ASSEMBLY FLOOR: 62-8, 7/3/14

AYES: Achadjian, Alejo, Ammiano, Bloom, Bocanegra, Bonilla, Bonta, Bradford, Brown, Buchanan, Ian Calderon, Campos, Chau, Chesbro, Cooley, Dababneh, Daly, Dickinson, Eggman, Fong, Frazier, Garcia, Gatto, Gomez, Gonzalez, Gordon, Gorell, Gray, Hagman, Hall, Roger Hernández, Holden, Jones-Sawyer, Levine, Linder, Lowenthal, Maienschein, Medina, Melendez, Mullin, Muratsuchi, Nazarian, Nestande, Olsen, Pan, Perea, John A. Pérez, Quirk, Quirk-Silva, Rendon, Ridley-Thomas, Rodriguez, Salas, Skinner, Stone, Ting, Weber, Wieckowski, Wilk, Williams, Yamada, Atkins

NOES: Allen, Donnelly, Fox, Grove, Harkey, Jones, Logue, Patterson

NO VOTE RECORDED: Bigelow, Chávez, Conway, Dahle, Beth Gaines, Mansoor, V. Manuel Pérez, Wagner, Waldron, Vacancy

AL:e 7/30/14 Senate Floor Analyses

SUPPORT/OPPPOSITION: SEE ABOVE

**** END ****

No. S218734

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

HIROSHI HORIIKE,

Plaintiff and Appellant,

v.

COLDWELL BANKER RESIDENTIAL
BROKERAGE COMPANY, a California
Corporation, and CHRIS CORTAZZO,
an individual,

Petitioners, Defendants and
Respondents.

B246606

(Los Angeles County Super.
Ct. No. SC110477)

California Court of Appeal, Second Appellate District, Division Five
Case No. B246606
Los Angeles Superior Court Case No. SC110477
Honorable John H. Reid

[PROPOSED] ORDER

Good cause appearing, the Petitioners' Request for Judicial Notice in support of their Reply Brief on the Merits is granted.

DATED: _____

_____, Justice

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On February 18, 2015, I served the foregoing document described as:
PETITIONERS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF REPLY BRIEF ON THE MERITS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID E. HACKETT; [PROPOSED] ORDER on the parties in this action by serving:

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Counsel for Amicus Curiae

Clerk of the Court
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Second Appellate District
Division Five
300 South Spring Street
Los Angeles, California 90013
[Case No. B246606]

Los Angeles County Superior Court
1725 Main Street
Santa Monica, California 90401-3299
[LASC Case No. SC110477]

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on February 18, 2015, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


Joyce McGilbert