Real Estate Developments 2011

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Government Code §12920

The practice of discrimination based on race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability in relation to housing accommodations is declared to be against public policy.

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- California Bus. & Prof. Code §10176:
  - A license may be temporarily suspended or revoked should a licensee be found guilty of any of the following:
  - Making a substantial misrepresentation; …
  - Generating an inaccurate opinion of the value of residential real property, requested in connection with a debt forgiveness sale, in order to do either of both of the following:
    - 1. Manipulate the lien holder to reject the proposed debt forgiveness sale, or
    - 2. Acquire a financial or business advantage, including a listing agreement, that directly results from an inaccurate opinion of value.

      A verified complaint containing such accusations (above) shall be investigated by the California Real Estate Commissioner.

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UNDERSTANDING THE FIDUCIARY DUTY:

- CAL. CIV. CODE § 2079.24; *Field*, 63 Cal. App. 4th at 25 **("[A] broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty."); *see also*** *Barry v. Raskov*, 232 Cal. App. 3d 447, 455-56 (1991) ***(Broker owes a fiduciary the "duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision.").***

- *Montoya v. McCleod*, 176 Cal. App. 3d 57, 62-65 (1985) is a useful starting point in determining the scope of a broker's fiduciary duty.

Real Estate Law – Fiduciary Duty

- In Montoya, the Court examined the scope of the duty as it relates to a real estate broker defined under Section 10131(d) of the Bus. & Prof. Code, and found that the law imposes on a real estate agent the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary.

- Imposed on the licensee is a duty of full disclosure of all material facts concerning the transaction that might affect the principal's decision, which applies in all facets of real estate, including lending.

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(Fiduciary Duty, Cont.)

- The fiduciary duty is broad and often defined in case authority. Such case law includes the following:

1. The duty is non-delegable;

2. The duty extends beyond the negligence standard of care under Cal. Civil Code Section 2079 by requiring disclosure of all material information, **obtained either through the broker or the broker's agents, regardless of how it was learned**. *Michel v. Palos Verdes Network Group, Inc.*, 156 Cal. App. 4th 756 (2007).

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(Fiduciary Duty, Cont.)

- In *Berger v. Seyfarth Shaw, LLP*, Jeffrey S. White, District Judge of the United States District Court for the Northern District of California expressly outlined this same sentiment in *Michel* stating:
  - "… Just as in Michel, Plaintiffs' cause of action for negligent nondisclosure rests, in contrast, on respondent's **fiduciary duty** to disclose material information within its possession. **It was immaterial how the fiduciary obtained the information**; it has the duty to disclose the information to its principal."

Real Estate Developments – 2011 (Fiduciary Duty Cont.)

3. The duty requires a higher degree of skill and diligence than that held by the general public, **and a broker's lack of knowledge of these duties will not insulate the broker from liability.**

A real estate licensee is expected to know and practice within the regulations governing its profession, and upon his or her failure to do so, the broker is likely liable for any loss.

Real Estate Developments – 2011 (Fiduciary Duty Cont.)

Example: Barry v. Raskov

Here, a mortgage broker was found liable to his principal for presenting false information about property values obtained from a licensed real estate appraiser.

Broker hired the appraiser who acted as an independent contractor to the broker. Broker conveyed the appraiser's opinion to the principal, and unfortunately, it was factually wrong. In discuss the case the court explained:

- "It is clear from this statute that the duty to provide an estimate of the fair market value of the property rests exclusively with the broker."
- "Although the broker may use an appraisal by an independent appraiser in determining the estimated value of the property, *nothing in the statute suggests the broker may delegate its statutory duty to the appraiser*."

Real Estate Developments – 2011 (Fiduciary Duty Cont.)

5. The nature of the relationship is such as to cause the plaintiff to rely on the fiduciary, and awareness of facts which would ordinarily call for investigation will not excite suspicion under these special circumstances." *Alliance Mortgage Company v. Rothwell* 10 Cal.4th 1226, 1239 (1995).

Example – Loan broker securing hard money loan failed to disclose facts about borrower's financial status that were known to broker, but documents (not necessarily self-explanatory) containing this information were provided to lender. Loan broker still liable for resulting loss.

Real Estate Developments – 2011 (Fiduciary Duty Cont.)

6. Fiduciary Duty, its Breach Potentially Increases the Measure of Damages:

In typical real estate cases, the measure of damages is limited to the plaintiff's "out-of-pocket" loss

- Where a broker commits a misrepresentation, even an innocent one, or in cases where there is a breach of fiduciary duty, a broader "benefit-of-the-bargain" measure of damages whereby compensation is given for "all detriment proximately caused …by the breach, whether it could have been anticipated or not ."

Most authority on fiduciary duty is found in case law; however, some are codified in statute.

Cal. Civil Code §2923.1, which states in part, "A mortgage broker providing mortgage brokerage services to a borrower is the fiduciary to the borrower, and any violation of this duty shall be a violation of the mortgage broker's license law."

The mortgage broker must always place the economic interests of the borrower ahead of his or her own.

Real Estate Developments – 2011 (Fiduciary Duty Cont.)

Why the discussion on fiduciary duty?

- REO sales are generally exempt from transfer disclosure requirements if the property was acquired by the bank in foreclosure, by deed in lieu, at a trustee's sale, or transferred through bankruptcy.
- In such cases, the bank is exempt from completing a Real Estate Transfer Disclosure Statement, Natural Hazard Disclosure Statement, a Mello-Roos District Lien Disclosure, an Improvement Bond Act of 1915 Notice, and other requirements. CEB CALIFORNIA REAL PROPERTY SALES TRANSACTIONS § 6.110 (4th ed. 2007); *see also* CAL. CIV. CODE § 1102.2. CEB CALIFORNIA REAL PROPERTY SALES TRANSACTIONS § 6.110 (4th ed. 2007).
- With less disclosures to a prospective buyer, the possibility for increased liability under fiduciary principles can arise.
  - Is a generalist inspection enough?
  - Also remain mindful of third party duties and the obligation of inspection versus investigation.

Can you convey real property to God?

Lou Gottlieb tried and failed. *(Press Democrat, Gayle LeBron – February 12, 2011).*

Unpublished opinion.

"Plans to sell Morningstar Ranch stir memories, prompt dismay"

Superior Court Judge Kenneth Eymann found the conveyance a failure, stating, "God is neither a natural nor artificial person, and therefore cannot take title to land."

The concept of transferring land to a non-existent entity (defined under California law) was revisited in 2010 in the case of ***Luna v. Brownell* (2010) 185 CA.4th 668.**

- **A deed does not transfer title to the grantee until it has been legally delivered."** (*3 Miller & Starr, Cal. Real Estate (3d ed. 2000) Deeds, § 8:36, p. 66, fn. omitted; see also Civ. Code, § 1054*).

- **"Delivery is a question of intent."** (*Osborn v. Osborn (1954) 42 Cal.2d 358, 363*), **and "[a] valid delivery of a deed depends upon whether the grantor intended that it should be presently operative, and a manual transfer is not conclusive evidence of such intention."** (*Huth v. Katz (1947) 30 Cal. 2d. 605, 608*) **Although physical delivery of a deed raises an inference that the grantor intended to immediately transfer title, that inference may be overcome by evidence showing a contrary intent.** (*Citations omitted*).

Luna Point of Law:

- A quitclaim deed transferring property to the trustee of a trust is not void as between the grantor and grantee merely because the trust had not been created at the time the deed was executed if **(1)** the deed was executed in anticipation of the creation of the trust and **(2)** the trust was in fact created thereafter.

- Such a deed was valid between the grantor and grantee on the date the trust was actually formed, which legally completed delivery.

  - The California Court looked to Washington law for guidance in a similar, but more expansive setting.

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