

HB

398

(7)  
Date Referred: March 16, 1992

**JUDICIARY COMMITTEE REPORT**  
FURTHER REFERRALS:

Date of Committee Action: 3-27-92

The JUDICIARY Committee considered:

HB 398

HOUSE BILL NO. 398

DISCLOSURE IN REAL PROPERTY SALES

"An Act requiring certain disclosures in real property sales; and providing for an effective date."

RECOMMENDATIONS:

be replaced with CS HB 398 (JUDICIARY)  the same title  a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

zero fiscal note \_\_\_\_\_

zero fiscal note(s) Commerce/Occup. Lic. 3-16-92

| SIGNING <u>DO</u> PASS | DP | OTHER RECOMMENDATIONS | DNP | NR | AM |
|------------------------|----|-----------------------|-----|----|----|
|                        |    | <i>Dave Donley</i>    |     | X  |    |
| <i>J. Ellis</i>        | •  | <i>Terry Martin</i>   |     | +  |    |
|                        |    | <i>Mark Stanley</i>   |     | X  |    |
|                        |    |                       |     |    |    |
|                        |    |                       |     |    |    |
|                        |    |                       |     |    |    |
|                        |    |                       |     |    |    |
|                        |    |                       |     |    |    |
|                        |    |                       |     |    |    |
|                        |    |                       |     |    |    |
|                        |    |                       |     |    |    |

*Dave Donley*  
CHAIRMAN'S SIGNATURE

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

FISCAL NOTE

Bill Version: CSHB 398 (L&C)  
(H) Publish Date: 3-16-92

Revision Date: \_\_\_\_\_ Department Affected: Commerce & Economic Development  
 Title: An Act requiring certain disclosures in BRU: Occupational Licensing  
real property sales; and providing for an effective date. Component: Administration  
 Sponsor: Reps. Pamell and Gruenberg  
 Requestor: House Labor & Commerce COMPONENT SERIAL NO. 

|   |   |   |   |
|---|---|---|---|
| 0 | 3 | 5 | 6 |
|---|---|---|---|

Expenditures/Revenues: (Thousands of Dollars)

| OPERATING         | FY 93 | FY 94 | FY 95 | FY 96 | FY 97 | FY 98 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| TRAVEL            | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| CONTRACTUAL       | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| SUPPLIES          | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| EQUIPMENT         | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| LAND & STRUCTURES | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| GRANTS, CLAIMS    | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| MISCELLANEOUS     | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| TOTAL OPERATING   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |

|         |     |     |     |     |     |     |
|---------|-----|-----|-----|-----|-----|-----|
| CAPITAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
|---------|-----|-----|-----|-----|-----|-----|

|         |     |     |     |     |     |     |
|---------|-----|-----|-----|-----|-----|-----|
| REVENUE | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
|---------|-----|-----|-----|-----|-----|-----|

FUNDING: (Thousands of Dollars)

|               |     |     |     |     |     |     |
|---------------|-----|-----|-----|-----|-----|-----|
| GENERAL FUND  | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| FEDERAL FUNDS | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| OTHER         | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| TOTAL         | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

POSITIONS:

|           |     |     |     |     |     |     |
|-----------|-----|-----|-----|-----|-----|-----|
| FULL-TIME | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| PART-TIME | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| TEMPORARY | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Jennifer Strickler *Jennifer Strickler* Phone: 465-2144  
 Division: Occupational Licensing Date: 02/03/92  
 Approved by Commissioner: Glenn A. Olds *Glenn A. Olds* 2/3/92  
 Agency: Department of Commerce & Economic Development Date: \_\_\_\_\_

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

STATE OF ALASKA  
1992 LEGISLATIVE SESSION

BILL NO. HB 398

Revision Date: \_\_\_\_\_ Department Affected: Department of Environmental Conservation  
 Title: Real Estate Disclosures BRU: Spill Prevention & Response  
 Component: Contaminated Sites  
 Sponsor: Representative Parnell  
 Requestor: (H) L&C COMPONENT SERIAL NO. 

|   |   |   |   |
|---|---|---|---|
| 1 | 4 | 3 | 1 |
|---|---|---|---|

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING         | FY 93 | FY 94 | FY 95 | FY 96 | FY 97 | FY 98 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| TRAVEL            |       |       |       |       |       |       |
| CONTRACTUAL       |       |       |       |       |       |       |
| SUPPLIES          |       |       |       |       |       |       |
| EQUIPMENT         |       |       |       |       |       |       |
| LAND & STRUCTURES |       |       |       |       |       |       |
| GRANTS, CLAIMS    |       |       |       |       |       |       |
| MISCELLANEOUS     |       |       |       |       |       |       |
| TOTAL OPERATING   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |

|         |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|
| CAPITAL |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|

|              |  |  |  |  |  |  |
|--------------|--|--|--|--|--|--|
| REVENUE      |  |  |  |  |  |  |
| FUND SOURCE: |  |  |  |  |  |  |

FUNDING: (Thousands of Dollars)

|               |     |     |     |     |     |     |
|---------------|-----|-----|-----|-----|-----|-----|
| GENERAL FUND  | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| FEDERAL FUNDS |     |     |     |     |     |     |
| OTHER         |     |     |     |     |     |     |
| FUND SOURCE:  |     |     |     |     |     |     |
| TOTAL         |     |     |     |     |     |     |

POSITIONS:

|           |     |     |     |     |     |     |
|-----------|-----|-----|-----|-----|-----|-----|
| FULL-TIME | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| PART-TIME |     |     |     |     |     |     |
| TEMPORARY |     |     |     |     |     |     |

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Richard Cormack Phone: 465-5200  
 Division: Spill Prevention and Response Date: 2/3/92  
 Approved by Commissioner: *Janet Torgelson*  
 Agency: Department of Environmental Conservation Date: 2/4/92

Revision Date: \_\_\_\_\_ Department Affected: Commerce & Economic Development  
 Title: An Act requiring certain disclosures in BRU: Occupational Licensing  
real property sales; and providing for an effective date. Component: Administration  
 Sponsor: Reps. Parnell and Gruenberg  
 Requestor: House Labor & Commerce COMPONENT SERIAL NO. 

|   |   |   |   |
|---|---|---|---|
| 0 | 3 | 5 | 6 |
|---|---|---|---|

Expenditures/Revenues: (Thousands of Dollars)

| OPERATING         | FY 93 | FY 94 | FY 95 | FY 96 | FY 97 | FY 98 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| TRAVEL            | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| CONTRACTUAL       | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| SUPPLIES          | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| EQUIPMENT         | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| LAND & STRUCTURES | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| GRANTS, CLAIMS    | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| MISCELLANEOUS     | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |
| TOTAL OPERATING   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |

|         |     |     |     |     |     |     |
|---------|-----|-----|-----|-----|-----|-----|
| CAPITAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
|---------|-----|-----|-----|-----|-----|-----|

|         |     |     |     |     |     |     |
|---------|-----|-----|-----|-----|-----|-----|
| REVENUE | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
|---------|-----|-----|-----|-----|-----|-----|

FUNDING: (Thousands of Dollars)

|               |     |     |     |     |     |     |
|---------------|-----|-----|-----|-----|-----|-----|
| GENERAL FUND  | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| FEDERAL FUNDS | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| OTHER         | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| TOTAL         | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

POSITIONS:

|           |     |     |     |     |     |     |
|-----------|-----|-----|-----|-----|-----|-----|
| FULL-TIME | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| PART-TIME | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| TEMPORARY | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Jennifer Strickler *Jennifer Strickler* Phone: 465-2144  
 Division: Occupational Licensing Date: 02/03/92  
 Approved by Commissioner: Glenn A. Olds *Glenn A. Olds* 2.3.92  
 Agency: Department of Commerce & Economic Development Date: \_\_\_\_\_

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).



Official Business

# Alaska State Legislature

## HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

Room 128

State Capitol  
Juneau, AK 99801-1182

### SPONSOR LIST OF MATERIALS FOR CSHB398 (L & C)

#### HOUSE JUDICIARY HEARING

- I. Sponsor Statement
- II. Sectional Analysis of CSHB398 (L & C)
- III. Fiscal notes.
  - a. Department of Environmental Conservation, Spill Prevention & Response.
  - b. Department of Environmental Conservation, Occupational Licensing.
- IV. California Statute (1991)
- V. Bevins v. Ballard, AK, 655 P.2d 757.
- VI. Cousineau v. Walker, AK 613 P.2d 608.

Committees: Judiciary, Labor & Commerce, Military & Veterans Affairs  
Finance Subcommittee, Administration



Official Business

# Alaska State Legislature

## HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

Room 123

State Capitol  
Juneau, AK 99801-1552

### SPONSOR STATEMENT

I have submitted House Bill 398, "An Act requiring certain disclosures in residential real property transfers," to help eliminate a problem. This stemmed from a constituent complaint last summer in Anchorage.

The constituent bought into a condominium complex built in the late 1970's. It was built on inferior ground, allowing for sagging of supports, etc. Once the property was examined by engineers, it was found to be in dire need of repair. As in many residential properties built during the oil boom years, attention to detail was lacking. Because the constituent was not made aware of the faults, he shouldered the financial responsibility of repairs.

HB 398 is to help guard against this in the future. It would not provide for a specific avenue of legal recourse, but provides the transferee (buyer) and transferor (seller) the knowledge in transacting a transfer of residential real property beforehand.

This disclosure statement allows both parties to understand the general condition of the property, thus allowing no surprises.

HB 398 would not change a realtor's existing liability. It would only affect the realtor if they negligently or wilfully knew of, and then withheld information. In those particular cases, they would be subject to damages allowed in this Act.

This act's effective date would be January 1, 1993, allowing the industry and future transferors and transferees the time needed to implement the disclosure statement form.

Committees: Judiciary, Labor & Commerce, Military & Veterans Affairs  
Finance Subcommittee, Administration



# Alaska State Legislature

## HOUSE OF REPRESENTATIVES

Official Business

Kevin "Pat" Parnell

Room 128

State Capitol  
Juneau, AK 99801-1182

### SECTIONAL ANALYSIS FOR CSHB 398 (L & C)

Section 1. A new chapter is added.

CHAPTER 70. DISCLOSURES IN RESIDENTIAL REAL PROPERTY TRANSFERS.

Sec. 34.70.010. DISCLOSURES REQUIRED.

A transferor of real property (their interest in) must complete and deliver a disclosure statement to the transferee (buyer) before the transferee (buyer) makes a written offer on the real property. Delivery to one's spouse is considered to be a delivery.

Sec. 34.70.020. TERMINATION OF OFFER

The transferee (buyer) may terminate the offer if a disclosure statement, or an amended one, is delivered to the transferee (buyer) after the written offer is made. This is done by written notice, made within three (3) days after personal delivery of the statement, or five (5) days if mailed.

Sec. 34.70.030. DISCLOSURE LIABILITY.

(a) Transferor (Seller) is not liable for a defect if they disclose the existence of that defect.

(b) Agent of transferor (seller) is not liable for error, inaccuracy, or omission in the information provided, if they did not have personal knowledge of it, and they exercised due diligence in obtaining their information.

Sec. 34.70.040. SUBSEQUENT EVENTS AND APPROXIMATIONS.

(a) If information in the statement become inaccurate after the statement is delivered to the transferee (buyer), the transferor (seller) must deliver the amendment to the disclosure statement to the transferee (buyer).

(b) If an item is unknown, the transferor (seller) may make an approximation, if they have exercised a reasonable effort, and must clearly mark it as an approximation.

Committees: Judiciary, Labor & Commerce, Military & Veterans Affairs  
Finance Subcommittee, Administration

Sec. 34.70.050. FORM OF DISCLOSURE STATEMENT.

Describes this statement as not a warranty of any kind, and is not a substitute for any inspections or warranties they may wish to have otherwise.

Part I, TRANSFEROR (Seller) INFORMATION, is made for variety of objects, and with a space available for any defects known in the home itself, i.e., foundation, ceilings, driveways, etc.

Part II, allows for the parties involved to know that they can obtain professional advice, make inspections, etc. Followed by the signed statement of acknowledgment of the statement.

Sec. 34.70.060. GOOD FAITH.

Sec. 34.70.070. EFFECT ON OTHER REQUIRED DISCLOSURES.

This statement does not affect other obligations for disclosures as provided by law.

Sec. 34.70.080. WRITTEN AMENDMENT.

Sec. 34.70.100. DUTIES OF BROKER.

(a) If a broker has obtained the offer, they must be the one to deliver the statement to the transferee (buyer), unless instructed otherwise.

(b) The broker must advise the transferee (buyer) in writing that the transferee (buyer) has the right to receive the disclosure statement, if the disclosure statement has not received from the transferor (seller).

(c) The broker must maintain written record of action taken.

(d) "Listing agent" is included in this section.

34.70.120. FAILURE TO COMPLY.

(a) A transfer is not invalidated solely because a person fails to comply with this chapter.

Page 3 of 3  
March 25, 1992  
Sectional Analysis of CSHB 398 (L & C)

(b) A person must negligently violate this chapter, and then is liable for the actual amount of damages suffered by the transferee (buyer), plus cost and attorney fees allowed under the law.

(c) If they wilfully violate this chapter, they are liable for treble the actual damages, plus cost and attorney fees allowed under the law.

34.70.200. DEFINITIONS.

(1) "Disclosure statement" defined.

(2) "real property" defined as including those under AS 34.07 "Horizontal Property Regimes Act," and AS 34.08 "Common Interest Ownership."

(3) "Residential Real Property" defined as single-family dwelling unit.

(4) "Transfers" defined as including those done by sale, exchange, installment land sale contract, lease with an option to purchase, other option to purchase, or a ground lease coupled with improvements.

Section 2. AS 08.88.071(a) is amended.

Allows the Real Estate Commission, under the authority of the Department of Occupational Licensing, to suspend or revoke a real estate license of an agent who violates this chapter.

Section 3 & 4. Effective date(s) of January 1, 1993



Official Business

# Alaska State Legislature

## HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

Room 128

State Capitol  
Juneau, AK 99801-1182

TO: All House Judiciary Committee Members  
FR: Kevin "Pat" Parnell, Prime Sponsor  
CSHB 398 (L & C)  
DT: March 25, 1992  
RE: Response to AK Association Realtors Letter

### CSHB 398 (L & C)

1. Concerning signature line, Page 6, Line 17, "Agent Representing the Seller."

This line acknowledges the receipt of a copy of this statement (See Line 14). Page 2, Line 30 states, "IT IS NOT A WARRANTY OF ANY KIND BY THE TRANSFEROR(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S)..."

A "guarantee," as quoted from the Webster's New World Dictionary is that of "a pledge or security for another's debt or obligation." A "warranty" is listed as a "guarantee." As stated, "this is not a warranty of any kind," (Page 2, Line 30).

2. Regarding placing "ESCROW AGENTS" back into the bill.

By eliminating "Escrow Agents," the liability factor is eliminated. If it is the wish of the committee, the wording can be added; the sponsor will defer to the wishes of the Judiciary Committee.

3. Removing "DUTIES OF BROKERS."

Brokers have existing duties. There is not a proposed change. The courts have ruled that people have a cause of action against a broker for their representations. This is a "disclosure statement;" a statement is "to set forth in words, (Webster's New World Dictionary). According to Bevins v. Ballard, 18 AK 655 P.2d 757, 763 (1982), "Accordingly, we hold that a purchaser who relies on a material misrepresentation, even though innocently made, has a cause of action against the broker originating or communicating the misrepresentation."

Page 2 of 2  
March 25, 1992  
Response to AK Association of Realtors

Since the broker is giving this disclosure statement to the transferee, he or she is communicating the information concerning the unit. The courts have determined that purchasers should be entitled to rely on a broker's representations. As quoted in Bevins v. Ballard (763) "Real estate brokers and their agents hold themselves out to the public as having specialized knowledge with regard to housing, housing conditions and related matters." Lyons v. Christ Episcopal Church, 71 Ill. App.3d 257, 27 Ill.Dec.559, 389 N.E.2d 623, 628 (1979) (dissenting opinion).

4. "DEFINITIONS" regarding (2) "residential real property."

The current listing of definitions is more clear, and definite. They are to be applied in any listing of residential real property, whether a freestanding home or a unit in a large complex.

5. Referring to the Alaska Real Estate Commission, the language allows for the Real Estate Commission to have flexibility in determining the punishment. A real estate broker who violates this act does so either "negligently" or "wilfully." A suggestion may be that the committee consider amending this section by placing a (.) after "AS 34.70.100," Page 8, Line 29.



REALTOR®

ALASKA ASSOCIATION OF REALTORS, INC.®

741 Sesame Street, Suite 100 • Anchorage, Alaska 99503  
Telephone 907-563-7133

---

March 25, 1992

Representative Dave Donley, Chairman  
House Judiciary Committee  
Alaska State Legislature  
Room 120, Capitol  
Juneau, AK 99801

Dear Representative Donley:

The Alaska Association of REALTORS® (AAR) is actively supporting the passage of legislation requiring mandatory residential property disclosure.

However, AAR would like to bring to the attention of the House Judiciary Committee the following sections of CSHB 398 that are of concern, and asks for your careful consideration of these sections:

Page 6, line 17 - The signature line for the "Agent Representing the Seller." This implies that the Agent is guaranteeing information supplied by the Seller (Transferor). To place a third party in the position of liability for another's statements is unfair; this line should be deleted.

Page 6 - Section 34.70.090 Escrow Agents. This section has been deleted from the original bill. An escrow agent who acts merely as a facilitator for closing a transaction should not be responsible and subject under this chapter for disclosure or considered as having an agency relationship with either Buyer or Seller (Transferee or Transferor). This section should be included in the legislation.

Pages 6 and 7 - Section 34.70.100 Duties of Broker. This entire section should be deleted. Again, the responsibility for property disclosure should lie with the Transferor, not with the real estate broker or agent.



MAR 25 '92 11:12

ANCH BD OF REALTORS

751 P02

Representative Kevin "Pat" Parnell  
March 25, 1992  
Page 2 of 2

Page 7, lines 20 through 22 - Definitions - (3) "residential real property." In the interest of clarifying real estate transfers covered by this act, the section could read: "Transfers of one to four residential dwelling units transferred, by sale, exchange, installment land sale contract, lease with option to purchase, or ground lease coupled with improvements."

Page 7, beginning on line 28 - Sec. 2. AS 08.88.071. This section amends Alaska Statutes covering actions of the Alaska Real Estate Commission regarding real estate licensees. Beginning on page 8, lines 29 through 31 define penalties for real estate licensees for a failure to comply with property disclosure under AS 34.70.100. Again, this section should be deleted. To make real estate licensees liable for the failure of a Transferor to disclose is not protecting the public. The Transferor who wilfully or negligently violates this chapter or fails to perform a duty required by this chapter should be liable to the Transferee for the amount of the actual damages suffered as a result of the violation or failure.

The Alaska Association of REALTORS® appreciates the opportunity to comment on this important consumer protection legislation, and thanks the members of the Committee for their consideration of these suggested amendments to CSHB 398.

Sincerely,

A handwritten signature in cursive script that reads "Dale A. Price".

Dale A. Price  
President

In the usual employers, the aid a particular parties' compensa- liberal purposes ion act, to bene- presumption the provisions

mitted).

board's decision applied an incor- parties' agree- ve a bearing on ent relationship coverage,<sup>2</sup> the decision on the ality of all the controls. To ig- e and rely agreement mon lawabili- s' compensation able at common ployment status compensation is t established by

## EMPLOYER

of whether Don- der the *Searfus*-reshold determi- s an "employer" orkers' Compem- hether Kroll was h as a precondi- the Act<sup>4</sup> and as

cord of this case to pted to hold Kroll - common law tort theories. Nor is er party attempted oll's liability insurer injury was initially ion as to the viabil- claims.

oyee' means an employer as

an element of the relative nature of the work test. Thus, only if it is determined that Kroll acted as an employer in the course of his construction activities may Donald reasonably be said to have been engaged in work which was "a regular part of the employer's regular work." *Ostrem v. Alaska Workmen's Compensation Board*, 511 P.2d at 1063.<sup>5</sup>

[5] For purposes of the Act, an employ- er is defined as "a person employing one or more persons in connection with a business or industry coming within the scope of this chapter." AS 23.30.265(12). The Board stated in this regard:

The definition of subsection (12) 'in connection with a business or industry coming within the scope of this chapter' is interpreted to mean *all business or industry is to be considered as covered by the Act* and that interpretation would follow Larson's which includes every person in the service of another under contract. [Emphasis added.]

The Board's broad construction of AS 23.- 30.265(12) fails to give proper weight to the statutory limitation to employment relationships "in connection with a business or industry." In Larson's terms,<sup>6</sup> the policy question is whether Kroll's construction activity, either by itself or as an element of his rental activities,<sup>7</sup> was a profit-making enterprise which ought to bear the costs of injuries incurred in the business, or was the construction activity simply a cost-cutting shortcut in what was basically a *consump- tive* and not a *productive* roll played by Kroll.<sup>8</sup>

We conclude that the Board's statement with respect to the parameters of the statu-

5. The concept of "regular work" as used in *Ostrem* as part of the test for differentiating between employees and independent contractors is a subclass of "business" as used in AS 23.30.265(12). Whether a person engages in a "business" within the meaning of AS 23.30.- 265(12), is relevant for purposes of determining the "extent to which claimant's work is a regular part of the employer's regular work." *Ostrem*, 511 P.2d at 1063. The Board's first obligation is to ascertain the nature of the particu- lar business enterprise in which the injury al- legedly occurred, and then to determine wheth-

tory definition of an employer reflects an erroneous standard of law. As a result, the threshold issue of whether Kroll's construction activity was sufficient to establish his status as an employer must also be remanded to the Board for further consid- eration.<sup>9</sup>

REVERSED and REMANDED.



Max BEVINS and Johnson-Bevins Inc.,  
d/b/a Star Realty, Appellants,

v.

David L. BALLARD and Linda K.  
Ballard, Appellees.

No. 4571.

Supreme Court of Alaska.

Nov. 19, 1982.

Purchasers brought action against ven- dors and real estate broker alleging, in part, intentional and negligent misrepresentation in describing condition of well on property. The Superior Court, Third Judicial District, Anchorage, Eben H. Lewis, J., rendered judgment in favor of purchasers, and broker appealed. The Supreme Court, Burke, J., held that: (1) trial court's dismissal of purchasers' negligence claim against real estate broker precluded broker's liability from resting on a negligent representation

er the work being done by the claimant is a regular part of that business.

6. See IC A. Larson, *supra* note 2, § 50.21.

7. *Id.* at § 50.24.

8. *Id.* at § 50.21, at 9-70 to 9-71 & nn. 4 and 5. *But see Donald v. Whatley*, 346 So.2d 898 (Miss.1977).

9. *Burgess Constr. Co. v. Smallwood*, 623 P.2d 312, 317 (Alaska 1981).

theory, even though postjudgment amendments are allowed to conform issues tried to evidence, where, subsequent to dismissal, neither party argued negligent misrepresentation in trial briefs, court and parties treated case as one involving innocent misrepresentations, and broker neither expressly nor impliedly consented to trying negligence claim, but (2) real estate broker who made material misrepresentation to purchasers as to condition of well on unimproved property was liable to purchasers, even though representation was innocently made.

Affirmed.

Connor, J., dissented in part and filed an opinion in which Rabinowitz, J., joined.

#### 1. Negligence ⇐2

In determining whether duty exists to provide accurate information once speaker undertakes to speak, factors to consider are whether speaker had knowledge, or its equivalent, that information was desired for serious purpose and that listener intended to rely upon it, foreseeability of harm, degree of certainty that listener would suffer harm, directness of causation, and policy of preventing future harm.

#### 2. Brokers ⇐102

In land sales context, duty to provide accurate information when real estate broker undertakes to speak can arise when broker becomes aware of suspicious facts regarding his or her representations, or when purchaser makes affirmative inquiry and broker fails to check accuracy of subsequent responding representation, or when court determines that public policy requires brokers to undertake certain functions.

#### 3. Pretrial Procedure ⇐693

Trial court's dismissal of purchasers' negligence claim against real estate broker precluded broker's liability for misrepresentations from resting on a negligent representation theory, even though postjudgment amendments are allowed to conform issues tried to evidence, where, subsequent

to dismissal, neither party argued negligent misrepresentation in trial briefs, court and parties treated case as one involving innocent misrepresentations, and broker neither expressly nor impliedly consented to trying negligence claim.

#### 4. Vendor and Purchaser ⇐37(1)

Vendors guilty of even innocent misrepresentation cannot hide behind doctrine of caveat emptor because vendors are presumed to know character and attributes of land conveyed and purchasers are consequently entitled to rely on vendors' reasonable representations.

#### 5. Fraud ⇐13(2)

Owner of land must be both truthful and informed in making any representations, for fraud includes pretense of knowledge where there is none.

#### 6. Brokers ⇐102

Policy favoring liability of real estate brokers for innocent misrepresentation is founded on recognition that purchasers should be entitled to rely on a broker's representations.

#### 7. Brokers ⇐106

Purchaser who relies on a material misrepresentation of real estate broker, even though innocently made, has a cause of action against broker.

#### 8. Brokers ⇐102

Real estate broker who made material misrepresentation to purchasers as to condition of well on unimproved property was liable to purchasers, even though representation was innocently made.

Fredrick P. Pettyjohn, Anchorage, for appellants.

Saul R. Friedman, Hedland, Fleischer & Friedman, Anchorage, for appellees.

Before RABINOWITZ, C.J., CONNOR, BURKE, and MATTHEWS, JJ., and DIMOND, Senior Justice.\*

\* Dimond, Senior Justice, sitting by assignment made pursuant to article IV, section 11 of the

Constitution of Alaska, and Alaska R.Admin.P. 23(a).

## OPINION

BURKE, Justice.

This is an appeal from a judgment holding a real estate broker liable for certain misrepresentations made in the course of a real estate transaction.

## A. Facts

On February 3, 1975, David and Linda Ballard purchased a lot with an unfinished dwelling from Josephine, Patricia, and William Ferris. Prior to their purchase, certain representations were allegedly made to the Ballards regarding the adequacy of a well on the property. The purchaser, David Ballard, who had previous experience as a general contractor, attempted to complete the existing well on the property. He installed a pump and piping from the well to the house. The well, however, failed to provide sufficient water. As a result, the Ballards were forced to haul water to their property. They subsequently incurred expenses of \$6,935.00 in deepening the well to an adequate level.

Believing themselves the victims of fraudulent misrepresentations, the Ballards sued the sellers, the broker (Bevins), and an employee of the broker (Lucas). Their complaint alleged, in part, intentional and negligent misrepresentation.<sup>1</sup> In addition, it alleged that Bevins and Lucas had a duty to check the well's condition, that Lucas knew there was no functional well, that Bevins

was vicariously liable for Lucas's acts, and that the Ferrises were vicariously liable for the actions of their agents, Bevins and Lucas. The complaint did not explicitly allege innocent misrepresentation.

After the close of plaintiffs' evidence, the trial court dismissed certain counts of the complaint. First, the court ruled that the broker did *not* have a general duty to inspect the premises. Second, it held that the broker was *not* vicariously liable for the acts of his employee, Lucas. In a subsequent written decision, the court further ruled that Lucas was not liable. It then held that Bevins and the sellers were jointly and severally liable, each with a right of contribution from the other for any payment in excess of a pro rata share. While both the sellers and the broker filed timely notice of appeal, only Bevins, the broker, pursues his appeal.

The basis of the broker's liability is not clear. The court found that the sellers were the source of the representation that the well was "good," i.e., capable of supplying the reasonable water needs of the residents. It ruled that the broker had a right to rely on the representations, and thus the sellers were liable (as principals) for the act of Bevins (their broker and thus their agent) who passed on the misrepresentation. The court also found that Lucas passed on the representation intending that

1. The complaint made the following factual allegations:

- (a) Bevins personally inspected the property;
- (b) sellers told Bevins that there was a well drilled on the property;
- (c) sellers failed to disclose to Bevins the incomplete nature of the well, with the knowledge and intent that Bevins would tell potential buyers there was a well;
- (d) sellers represented to the broker's employee that the well was finished, held 36 feet of standing water, and was capable of supporting the reasonable water needs of residents of the house;
- (e) sellers made those representations with the intent that Lucas would tell the buyers;
- (f) Lucas did so represent to the Ballards;
- (g) the representations were false;
- (h) Lucas made the representations with the knowledge they were false;

(i) sellers made the representations knowing they were false, for the purpose of deceiving plaintiffs and inducing them to buy;

(j) plaintiffs did rely and were induced; and,

(k) plaintiffs were unable to discover the defect until after purchase.

In addition, the following legal allegations were made:

(1) Bevins owed plaintiffs a duty to investigate the accuracy of the sellers' representations, and breached that duty (this count was dismissed at the close of plaintiffs' evidence);

(2) Lucas (broker's employee) owed plaintiffs a duty to investigate, and breached that duty;

(3) Bevins was vicariously liable for acts of his employee Lucas (this count was dismissed at the close of plaintiffs' evidence); and,

(4) sellers were vicariously liable for the acts of their agents, Bevins, the broker, and his employee, Lucas.

argued negligent  
grievs, court and  
involving inno-  
l broker neither  
sented to trying

⇒37(1)

1 innocent mis-  
behind doctrine  
endors are pre-  
nd attributes of  
sers are conse-  
endors' reasona-

e both truthful  
any representa-  
tense of knowl-

y of real estate  
representation is  
hat purchasers  
on a broker's

a material mis-  
te broker, even  
has a cause of

made material  
sers as to condi-  
d property was  
ough represen-

chorage, for ap-

nd, Fleischer &  
ppellees.

C.J. CONNOR,  
S ), and DI-

Alaska R.Admin.P.

it be relied upon; Bevins admitted to the same intent. The court further found that the Ballards did so rely, and that their reliance was justified.

Although the court earlier concluded that Bevins had no general duty to inspect, it subsequently held that a duty of inquiry arose when Lucas asked Bevins, on behalf of the Ballards, about the adequacy of the well. The court concluded that Bevins acted unreasonably by simply assuring Lucas that it was a "good well" rather than by investigating. Thus Bevins' liability appears to rest on a negligence theory.

Certain facts are not contested:

1. The listing mentioned a 100 foot well.
2. The well proved to be incomplete, i.e., inadequate to support reasonable water needs.
3. Bevins, the broker, testified that the listing of a well would reasonably lead buyers to assume the well was "good," i.e., adequate.
4. The Ballards relied on the listing and representations that the well was "good."
5. Both Lucas and Bevins intended that the Ballards so rely.

As to the source of the misrepresentation, Bevins testified that he would not have written it on the listing unless it came from the sellers. The sellers, however, denied telling him about it; they testified that Bevins must have misunderstood. The court believed Bevins, concluding that the sellers were the original source of the representation.

#### B. The Broker's Liability

There are three types of misrepresentations: intentional, negligent, and innocent. While the Ballards did assert an intentional misrepresentation claim against the sellers, they did not do so against Bevins or Lucas.

2. Bevins' liability could be based on a vicarious liability for the acts of his employee Lucas. As we noted in *Black v. Dahl*, 625 P.2d 876, 879 n. 3 (Alaska 1981), a real estate broker can be liable under the doctrine of respondeat superior for the acts of his or her sales-people. However, two of the rulings below preclude resting liability on such a basis. First, at the close of

Thus, we need address only the negligent and innocent misrepresentation claims in this appeal. Bevins' liability to be sustained, must rest on one of these two theories.<sup>2</sup>

#### 1. Negligent Misrepresentation

The Ballards' third claim for relief stated a cause of action for negligence against Bevins. That claim alleged that Bevins had a duty to "take reasonable steps to determine whether or not the well . . . was a completed well" and had sufficient capacity to support a purchaser's reasonable water needs, that Bevins breached that duty, and that as a direct and proximate result of Bevins' breach the Ballards purchased the property believing the well was completed. As noted, the trial court subsequently dismissed that claim, and the Ballards did not appeal. In its final opinion, however, the trial court imposed liability on grounds that Bevins had a "duty to inquire of the sellers whether the well was, in fact, 'a good well.'" Bevins argues that the court thus held him negligent even though negligence was dismissed from the case and, further, that he was prejudiced thereby because dismissal of the third claim led him to forego a negligence defense.

[1, 2] We recognized the tort of negligent misrepresentation in *Transamerica Title Insurance Co. v. Ramsey*, 507 P.2d 492 (Alaska 1973), and *Howarth v. Pfeifer*, 443 P.2d 39 (Alaska 1968). Under this theory, Bevins could have been liable for breaching his duty to provide accurate information once he undertook to speak. In determining whether such a duty exists, one must consider: (a) whether the defendant had knowledge, or its equivalent, that the information was desired for a serious purpose and that the plaintiff intended to rely upon it; (b) the foreseeability of harm; (c) the degree of certainty that plaintiff would suf-

the Ballards' evidence, the trial court dismissed the eighth claim for relief, which had asserted that Bevins was vicariously liable. Second, in its written opinion, the trial court found in favor of Lucas, the salesman. Thus there is no underlying liability for which Bevins could be held vicariously responsible. The Ballards have not appealed these rulings.

y the negligent  
ation claims in  
lity to be sus-  
these two theo-

resentation

for relief stated  
gligence against  
that Bevins had  
steps to deter-  
well . . . was a  
fficient capacity  
easonable water  
d that duty, and  
imate result of  
is purchased the  
l was completed.  
ubsequently dis-  
Ballards did not  
on. however, the  
grounds that  
ne of the sellers  
n fact, 'a good  
at the court thus  
ough negligence  
ase and, further,  
reby because dis-  
d him to forego a

he tort of negli-  
Transamerica Ti-  
sey, 507 P.2d 492  
th v. Pfeifer, 443  
nder this theory,  
ble for breaching  
rate information  
ak. In determin-  
exists, one must  
e defendant had  
nt, that the infor-  
a serious purpose  
ned to rely upon  
of harm; (c) the  
aintiff would suf-

trial court dismissed  
which had asserted  
y "able. Second, in  
ourt found in  
... Thus there is no  
ich Bevins could be  
ble. The Ballards  
ilings.

fer harm; (d) the directness of causation; and (e) the policy of preventing future harm. *Howarth v. Pfeifer*, 443 P.2d at 42; see *Transamerica Title Insurance Co. v. Ramsey*, 507 P.2d at 494-95.<sup>3</sup> In the land sales context, such a duty can arise when a broker becomes aware of suspicious facts regarding his or her representations, or when a buyer makes an affirmative inquiry and the broker fails to check the accuracy of his subsequent responding representation, or when a court determines that public policy requires brokers to undertake certain functions. See, e.g., *First Church of the Open Bible v. Cline J. Dunton Realty, Inc.*, 19 Wash.App. 275, 574 P.2d 1211 (1978).

[3] We believe, however, that the trial court's dismissal of Ballards' third claim for relief, which was their only negligence claim against Bevins, precludes the broker's liability from resting on a negligent misrepresentation theory.<sup>4</sup> While Alaska Rule of Civil Procedure 15(b) allows post-judgment amendments to conform the issues tried to

3. In *Transamerica Title*, we upheld submitting the negligence issue to the jury where a title insurance company failed to inform a client that a power of attorney, upon which she was relying in asserting her authority to sell the property, had been revoked. Although the title company was unaware of the revocation, that information was readily available to it. We concluded that the title insurer knew that the seller, its client, desired information about her legal capacity to sell the land, that she intended to rely on that information, and that there was foreseeable harm to her should she be poorly advised. We concluded that the jury could find that the title company had a "duty to speak carefully." We rejected any distinction between the nonfeasance of the title company and the misfeasance in the *Howarth* case. 507 P.2d at 494-95.

In *Howarth*, a vendor sought damages for the alleged negligent misrepresentation by the defendant insurer that a purchaser of vendor's property had obtained fire insurance on the property. We held that assuming the presence of the essential factors establishing a duty of care, those engaged in the insurance business are required to speak with reasonable care.

4. That the court intended to dismiss negligence claims from the case is further evidenced by the following colloquy:

THE COURT: . . . I feel that it's the third claim for relief that you seek thereby to impose upon realtors a burden that does not exist except in extraordinary circumstances.

the evidence, and further provides that the failure to so amend "does not affect the result of the trial" on those issues, the rule sets as a threshold the requirement that such issues be "tried by express or implied consent of the parties." We do not believe that this condition was met in the case at bar. Subsequent to the dismissal neither party argued negligent misrepresentation in their trial briefs. The court and parties treated the case as one involving innocent misrepresentations. Bevins neither expressly nor impliedly consented to trying a negligence claim. Accordingly, Bevins' liability cannot rest on a negligent misrepresentation theory.

## 2. Innocent Misrepresentation

The case went forward against Bevins on an apparent theory of innocent misrepresentation, evidenced by the colloquy quoted in note 4 and the arguments advanced in the trial briefs.<sup>5</sup> The tort of innocent mis-

That is when there's been—when there has been evidence adduced as to the duty of a realtor to inquire arising from some circumstances directing the attention of a reasonable prudent realtor to some—some—something unusual. In this case it seems to me that this was just an ordinary transaction. That it's rural property, most of which does require that it be serviced by a well. It is incomplete, and if I accept the evidence as it now stands, that it was represented that there was a good well, that that's the end of the matter, that there's no duty on the realtors to go further and inquire whether that is the actual fact. You know, there's nothing unusual about that well that would alert the ordinary prudent realtor of the need to do something about it. To check it out.

MR. FRIEDMAN: Well, if the court finds that there was no duty, then they can't obviously be negligent. But I still ask the court

THE COURT: They—well, they still can be—the defendants still could be—they made the representation, which is—facts show was not true.

MR. FRIEDMAN: Correct.

THE COURT: So that they can be—they can be held liable for having made the same. But not on—not on—(indiscernible) negligence—or negligence theory.

5. The *elements* of innocent misrepresentation were alleged to a sufficient degree. Paragraph 8 of the Ballards' first claim for relief makes

representation is defined by section 552C(1) of the Restatement (Second) of Torts (1977) as follows:

One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

*Id.* The Restatement leaves open the question of whether such a cause of action lies against real estate brokers. *Id.* § 552C, Comment g.

[4, 5] We have recognized a cause of action against the *owner* of realty who innocently misrepresents its condition to the purchaser. *Cousineau v. Walker*, 613 P.2d 608 (Alaska 1980). In *Cousineau*, we granted rescission and restitution to a purchaser where the seller made false statements concerning the highway frontage and gravel content of the purchased land. In so doing, we held that an owner guilty of even innocent misrepresentation could not hide behind the doctrine of caveat emptor. *Id.* at 614-16. This is so because owners are presumed to know the character and attributes of the land conveyed and buyers are consequently entitled to rely on the seller's reasonable representations. See *Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 769, 776 (1977), *quoted in Cousineau v. Walker*, 613 P.2d 608, 615 n. 14 (Alaska 1980). The owner of land must therefore be both truthful and informed in making any representations, for fraud includes the pretense of knowledge where there is none. *Spargna-*

the necessary allegation concerning Bevins' scienter. Paragraph 2 of the fifth claim for relief alleged that Bevins' agent passed on the representation with the intent to cause action in reliance thereon. Finally, paragraph 15 of the first claim for relief alleged actual reliance. In light of this, plus the court's and the parties' arguments concerning Section 552 of the Restatement, we conclude that Bevins was "adequately notified" that the Ballards were asserting a cause of action based on innocent misrepresentations. See *Clary Ins. Agency v. Doyle*, 620 P.2d 194, 201 (Alaska 1980).

*pani v. Wright*, 110 A.2d 82, 84 (D.C.App. 1954).

The question presented in this case is whether or not liability for innocent misrepresentation should extend to the owner's agent, the real estate broker, where that party serves as a conduit for the owner's misinformation. Most courts addressing this issue recognize a cause of action by the purchasers of property against the broker for the latter's innocent misrepresentation.<sup>6</sup>

An illustrative case is *Spargnapani v. Wright*, 110 A.2d 82 (D.C.App.1954). There, both the seller and broker were held liable for representing that a house could be heated for a little more than \$100.00 per year, when a defect in the boiler made it impossible to heat the house at all. *Id.* at 85. The broker had merely passed on the seller's information, and neither defendant had knowledge of a defect. Nevertheless, the court sustained liability:

If the broker innocently represented that the heating plant was in workable condition and was mistaken in that representation, or made the representation without knowing whether it was true or false, the injured party may recover in an action for fraud.

... We may assume that the broker was guilty of no deliberate deception and had no actual knowledge of the concealed defect. But on defendants' own evidence their selling agent did not disclaim such knowledge . . . . The representation . . . was flagrantly inaccurate, since the defect . . . made it impossible to heat the house at all . . . . "Fraud includes the

6. *Sodal v. French*, 35 Colo.App. 16, 531 P.2d 972, 973 (1974); *Spargnapani v. Wright*, 110 A.2d 82, 85 (D.C.App.1954); *Pumphrey v. Quillen*, 165 Ohio St. 343, 135 N.E.2d 328, 331 (1956); *Berryman v. Riegert*, 286 Minn. 270, 175 N.W.2d 438, 442 (1970); *Lawlor v. Schepher*, 232 S.C. 94, 101 S.E.2d 269, 271 (1957); *Polk Terrace, Inc. v. Harper*, 386 S.W.2d 588, 593 (Tex.App.1965). *Contra Lyons v. Christ Episcopal Church*, 71 Ill.App.3d 257, 27 Ill.Dec. 559, 389 N.E.2d 623, 625 (1979).

2, 84 (D.C.App.

in this case is innocent misrepresentation to the owner's broker, where that for the owner's interests addressing of action by the against the broker misrepresentation.<sup>6</sup>

*Spargnapani v. [unclear]* (1954). There were held liable as could be heated 100.00 per year, made it impossible. *Id.* at 85. The on the seller's defendant had nevertheless, the

represented that workable conditions that representation without true or false, the error in an action

the broker was deception and had he concealed defects' own evidence of disclaim such representation . . . e, since the defendant includes the

App. 16, 531 P.2d *ni v. Wright*, 110 *Pumphrey v. Quill*, N.E.2d 328, 331 t, 286 Minn. 270, *Lawlor v. Schep*, 269, 271 (1957); 1986 S.W.2d 588, *Bevins v. Christ*, 257, 27 Ill.Dec. 79).

pretense of knowledge when knowledge there is none."

*Id.* at 83-84 (citations omitted).

[6] The policy favoring liability for innocent misrepresentation is found on a recognition that purchasers should be entitled to rely on a broker's representations. As one opinion notes:

Real estate brokers and their agents hold themselves out to the public as having specialized knowledge with regard to housing, housing conditions and related matters. The public is entitled to and does rely on the expertise of real estate brokers in the purchase and sale of its homes. Therefore there is a duty on the part of real estate brokers to be accurate and knowledgeable concerning the product they are in the business of selling—that is, homes and other types of real estate. Courts have held in many cases that purchasers are entitled to rely on real estate brokers' statements.

*Lyons v. Christ Episcopal Church*, 71 Ill. App.3d 257, 27 Ill.Dec. 559, 389 N.E.2d 623, 628 (1979) (dissenting opinion).

[7] We find this reasoning persuasive. Parties to real estate transactions frequently do not deal on equal terms. Real estate brokers are licensed professionals, possessing superior knowledge of the realty they sell and the real estate market generally. Prospective purchasers recognize this expertise and tend to rely on a broker's representations. Just as purchasers are entitled to rely on an owner's representations, *Cousineau v. Walker*, 613 P.2d 608 (Alaska 1980), purchasers should be entitled to rely on the broker's representations. Any other rule would permit brokers to use misleading statements in selling the property, yet remain immune from liability by simply remaining ignorant of the property's true characteristics. Accordingly, we hold that a purchaser who relies on a material misrepresentation, even though innocently

7. Some listing agreements contain indemnification provisions, entitling the broker to indemnity from the owner should the broker's communication of the owner's representations engen-

made, has a cause of action against the broker originating or communicating the misrepresentation. See Restatement (Second) of Torts § 552C(1) (1977).

In our view, the consequences of recognizing a cause of action in this situation are entirely beneficial. The presence of a cause of action against the broker would tend to lessen the likelihood of transactions tainted by misinformation and confusion. Additionally, recognizing a cause of action against the broker would provide another source of recovery to the purchaser of defective property. Frequently, the owners may move away, leaving the broker as the only reachable defendant. As between the broker who communicated the misrepresentation, and the purchaser whose only fault was to rely on the broker, we think it preferable that the broker bear any loss caused by misrepresentation. Brokers, in turn, can protect themselves from liability by investigating the owner's statements, or by disclaiming knowledge, by requiring the seller to sign at the time of listing a statement setting forth representations which will be made, certifying that they are true and providing for indemnification if they are not.<sup>7</sup> See *Goldman v. Hart*, 134 Ga. App. 422, 214 S.E.2d 670 (1975).

[8] Having determined that a cause of action in innocent misrepresentation exists, it is apparent that the judgment below must be affirmed. Bevins does not contest that the listing he prepared mentioned a 100 foot well, that this listing would reasonably lead buyers to assume the well was good, that the Ballards so relied, and that the well was, in actuality, inadequate. These facts establish liability under an innocent misrepresentation theory. See Restatement (Second) of Torts § 552C(1) (1977). The decision below is therefore AFFIRMED.<sup>8</sup>

COMPTON, J., not participating.

der liability. See, e.g., *Barnes v. Lopez*, 25 Ariz.App. 477, 544 P.2d 694, 698-99 (1976).

8. This case is distinguishable from *Stepanov v. Gavrilovich*, 594 P.2d 30 (Alaska 1979), where-

CONNOR, Justice, with whom RABINOWITZ, Justice, joins, dissenting in part.

I dissent from the holding that an action for innocent misrepresentation should be permitted against the real estate broker.

When a realtor acts as a mere conduit for passing on information supplied by the seller, he should be under no duty independently to verify that information unless he has reason to believe the information to be false. See *Lyons v. Christ Episcopal Church*, 71 Ill.App.3d 257, 27 Ill.Dec. 559, 389 N.E.2d 623, 625 (1979). Allowing an innocent misrepresentation action against the broker in such circumstances is quite close to imposing strict liability. There is no reason to make the broker the "insurer" of the seller's representation.

Although we recognized a claim based on innocent misrepresentation in *Cousineau v. Walker*, 61? P.2d 608 (Alaska 1980), that case is distinguishable from a case between a buyer and a broker. Sellers who make representations about their property should be held to the accuracy of the representations, as they are normally in the best position to know the facts. But a broker often has little personal knowledge of the property which he offers for sale. I see no reason to make the broker the guarantor of representations emanating from the seller. I would hold that innocent misrepresentation is not available as a cause of action by the buyer against the broker. Thus, I would reverse the judgment of the superior court. I agree with the balance of the majority opinion.



in we affirmed a judgment in favor of a small "subdivider," in a damage action founded upon the subdivider's innocent failure to disclose undetected permafrost conditions in lots sold to the plaintiffs.

Subdividers are subject to, and protected by, the Alaska Land Sales Practices Act, AS 34.55. Under the act, a subdivider is liable for material misrepresentations or omissions affecting the land, "unless in the case of an untruth or omis-

Laureen BAILEY, Appellant and  
Cross-Appellee,

v.

Dennis J. HAAS, Appellee and  
Cross-Appellant.

Nos. 6177, 6688.

Supreme Court of Alaska.

Dec. 3, 1982.

Cross appeals were taken from a decision of the Superior Court, Third Judicial District, Kenai, James A. Hanson, J., which was entered in an action brought pursuant to the Uniform Reciprocal Enforcement of Support Act. The Supreme Court, Connor, J., held that: (1) failure of petition to include a prayer for arrearages did not justify dismissal of the claim where respondent had notice of the claim for arrearages at the very latest by time motion for an order of support was filed, and (2) request for arrearages in child support need not be reduced to judgment by petitioning state prior to recovering such arrearages in an Uniform Reciprocal Enforcement of Support Act action.

Reversed and remanded.

#### 1. Parent and Child ⇔ 3.4(2)

Failure of petition to initiate support proceedings under Uniform Reciprocal Enforcement of Support Act to include a prayer for arrearages did not justify dismissal of the claim where respondent had notice of the claim for arrearages at the very latest by time motion for an order of support was filed. AS 25.25.010-25.25.270.

sion it is proved that . . . the person offering or disposing of subdivided land did not know and in the exercise of reasonable care could not have known of the untruth or omission." AS 34.55.030(a). Thus, a "subdivider" is not liable for innocent misrepresentations. Such liability is barred by the statute. This protection, however, is not available to the defendants in the case at bar, since they are not "subdividers."

Loren R. COUSINEAU and Marilyn J. Cousineau, Wayne F. Cousineau and Diane B. Cousineau, Curtis E. Dahl and Bonnie L. Dahl, Appellants,

v.

Devon A. WALKER and Joan Walker, Appellees.

No. 4551.

Supreme Court of Alaska.

June 27, 1980.

Action was brought by purchasers seeking rescission of land sale contract because of alleged false statements by vendors. The Superior Court, Third Judicial District, J. Justin Ripley, J., denied restitution, and purchasers appealed. The Supreme Court, Boochever, J., held that: (1) purchaser of land may rely on material representations made by seller and is not obligated to ascertain whether such representations are truthful; and (2) although purchasers' actions may have exhibited poor judgment for an experienced businessman, they were not so unreasonable or preposterous in view of vendors' description of property that recovery should be denied.

Reversed and remanded.

1. Vendor and Purchaser ⇐33

False statements, which concerned highway frontage and gravel content and which were made by vendors and real estate agent in listing agreements, could not be characterized as "puffing" since they were positive statements susceptible of exact knowledge at time they were made.

2. Vendor and Purchaser ⇐33

To determine whether purchasers were entitled to rescission of land sale contract and restitution of amount paid for property on basis of misrepresentations, it had to be determined whether purchasers in fact relied on vendors' statements, whether statements were material to transaction, that is, whether reasonable person would have considered statements important in deciding

whether to purchase property, and whether reliance of purchasers was justified.

3. Appeal and Error ⇐1008.1(5)

When finding leaves court with definite and firm conviction on the entire record that mistake has been made, such a finding is clearly erroneous. Rules of Civil Procedure, Rule 52(a).

4. Vendor and Purchaser ⇐33

In action by purchasers seeking rescission of land sale contract because of false statements by vendors, trial court erred in finding that purchasers, who were in gravel extraction business, who first became aware of property through multiple listing that said "1 MILLION IN GRAVEL" and whose first act upon acquiring property was to contract for gravel removal and to purchase gravel scales, did not rely on vendors' statement that there was gravel on property.

5. Vendor and Purchaser ⇐44

In action by purchasers seeking rescission of land sale contract because of false statements by vendors, trial court's finding that purchasers, who were experienced and knowledgeable in real estate matters and who in determining whether to purchase property would certainly have considered amount of highway frontage to be of importance, did not rely on vendors' statements regarding highway frontage was clearly erroneous.

6. Contracts ⇐94(2)

A "material fact" is a fact which could reasonably be expected to influence someone's judgment or conduct concerning a transaction.

See publication Words and Phrases for other judicial constructions and definitions.

7. Contracts ⇐94(2)

Reasons behind rule requiring proof of materiality in an action seeking rescission and restitution is to encourage stability in contractual relations; rule prevents parties who later become disappointed at outcome of their bargain from capitalizing on any insignificant discrepancy to avoid contract.

property, and whether  
was justified.

1008.1(5)

es court with defi-  
n on the entire rec-  
been made, such a  
eous. Rules of Civil

ser 33

asers seeking rescis-  
tract because of false  
trial court erred in  
s, who were in gravel  
who first became  
ough multiple listing  
N IN GRAVEL" and  
cquiring property was  
removal and to pur-  
not rely on vendors'  
gravel on proper-

aser 44

chasers seeking rescis-  
tract because of false  
s, trial court's finding  
were experienced and  
al estate matters and  
whether. to purchase  
ainly have considered  
frontage to be of im-  
ely on vendors' state-  
highway frontage was

2)

" is a fact which could  
ted to influence some-  
conduct concerning a

Words and Phrases  
d constructions and

2)

rule requiring proof of  
action seeking rescission  
courage stability in  
s, rule prevents parties  
disappointed at outcome  
om capitalizing on any  
pancy to avoid contract.

### 8. Vendor and Purchaser 33

Since a reasonable person would be likely to consider existence of gravel deposits and important consideration in developing a piece of property, and since purchasers received less than three-fourths of highway frontage described in listings, vendors' statements regarding highway frontage and gravel content were material for purposes of determining whether purchasers were entitled to rescission and restitution of amount paid for property under land sale contract.

### 9. Vendor and Purchaser 33

A purchaser of land may rely on material representations made by seller and is not obligated to ascertain whether such representations are truthful; a buyer, relying on an innocent misrepresentation, is barred from recovery only if buyer's acts in failing to discover defects were wholly irrational, preposterous, or in bad faith.

### 10. Vendor and Purchaser 33

Although purchasers' actions in failing to obtain and review engineer's report on property, in failing to obtain survey or examine available plat, and in failing to make calculations that would have revealed true highway frontage of lot may well have exhibited poor judgment for experienced businessman, they were not so unreasonable or preposterous in view of vendors' descriptions of property that recovery had to be denied in purchasers' action seeking rescission of land sale contract because of false statements by vendors.

### 11. Vendor and Purchaser 196, 203

Where purchasers apparently caused extensive damage to one building on property and removed 6,000 cubic yards of gravel, vendors were entitled to some recoupment for these items plus amount for fair rental value of property and reasonable costs of rental before amount that purchasers were entitled to recover was determined in their suit seeking rescission of land sale contract because of false statements by vendors.

Dennis M. Mestas, Mestas & Schneider, Anchorage, for appellants.

John W. Sivertsen, Jr., and Terry C. Aglietti, Aglietti, Offret & Pennington, Anchorage, for appellees.

Before RABINOWITZ, C. J., and CONNOR, BOOCHEVER, BURKE and MATTHEWS, JJ.

### OPINION

BOOCHEVER, Justice.

The question in this case is whether the appellants are entitled to rescission of a land sale contract because of false statements made by the sellers. The superior court concluded that the buyers did not rely on any misrepresentations made by the sellers, that the misrepresentations were not material to the transaction, and that reliance by the buyers was not justified. Restitution of money paid under the contract was denied. We reverse and remand the case to the superior court to determine the amount of damages owed the appellants.

In 1975, Devon Walker and his wife purchased 9.1 acres of land in Eagle River, Alaska, known as Lot 1, Cross Estates. They paid \$140,000.00 for it. A little over a year later, in October, 1976, they signed a multiple listing agreement with Pat Davis, an Anchorage realtor. The listing stated that the property had 580 feet of highway frontage on the Old Glenn Highway and that "ENGINEER REPORT SAYS OVER 1 MILLION IN GRAVEL ON PROP." The asking price was \$245,000.00.

When the multiple listing expired, Walker signed a new agreement to retain Davis as an exclusive agent. In the broker's contract, the property was again described as having 580 feet of highway frontage, but the gravel content was listed as "minimum 80,000 cubic yds of gravel." The agreement also stated that 2.6 acres on the front of the parcel had been proposed for B-3 zoning (a commercial use), and the asking price was raised to \$470,000.00.

An appraisal was prepared to determine the property's value as of December 31,

1976. Walker specifically instructed the appraiser not to include the value of gravel in the appraisal. A rough draft of the appraisal and the appraiser's notes were introduced at trial. Under the heading, "Assumptions and Limiting Conditions," the report stated the appraisal "does not take into account any gravel . . . ." But later in the report the ground was described as "all good gravel base . . . covered with birch and spruce trees." The report did not mention the highway footage of the lot.

Wayne Cousineau, a contractor who was also in the gravel extraction business, became aware of the property when he saw the multiple listing. He consulted Camille Davis, another Anchorage realtor, to see if the property was available. In January, Cousineau and Camille Davis visited the property and discussed gravel extraction with Walker, although according to Walker's testimony commercial extraction was not considered. About this time Cousineau offered Walker \$360,000.00 for the property. Cousineau tendered a proposed sales agreement which stated that all gravel rights would be granted to the purchaser at closing.

Sometime after his first offer, Cousineau attempted to determine the lot's road frontage. The property was covered with snow, and he found only one boundary marker. At trial the appraiser testified he could not find any markers. Cousineau testified that he went to the borough office to determine if any regulations prevented gravel extraction.

Despite Walker's reference to an "Engineer Report" allegedly showing "over 1 million in gravel," Walker admitted at trial that he had never seen a copy of the report. According to Walker's agent, Pat Davis, Camille Davis was told that if either she or Cousineau wanted the report they would have to pay for it themselves. It was undisputed that Cousineau never obtained the report.

1. Paragraph IX of the judge's factual findings states that there was no mention of the amount of gravel or road frontage in the purchase agreement. This statement is correct insofar

In February, 1977, the parties agreed on a purchase price of \$385,000.00 and signed an earnest money agreement. The sale was contingent upon approval of the zoning change of the front portion of the lot to commercial use. The amount of highway frontage was not included in the agreement. Paragraph 4(e) of the agreement conditionally granted gravel rights to Cousineau.<sup>1</sup> According to the agreement, Cousineau would be entitled to remove only so much gravel as was necessary to establish a construction grade on the commercial portion of the property. To remove additional gravel, Cousineau would be required to pay releases on those portions of ground where gravel was removed. This language was used to prevent Walker's security interest in the property from being impaired before he was fully paid.

Soon after the earnest money agreement was signed, the front portion of the property was rezoned and a month later the parties closed the sale.

There is no reference to the amount of highway frontage in the final purchase agreement. An addendum to a third deed of trust incorporates essentially the same language as the earnest money agreement with regard to the release of gravel rights.

After closing, Cousineau and his partners began developing the commercial portion of the property. They bought a gravel scale for \$12,000.00 and used two of Cousineau's trucks and a loader. The partners contracted with South Construction to remove the gravel. According to Cousineau's testimony, he first learned of discrepancies in the real estate listing which described the lot when a neighbor threatened to sue Cousineau because he was removing gravel from the neighbor's adjacent lot. A recent survey shows that there is 415 feet of highway frontage on the property—not 580 feet, as advertised.

as the agreement did not mention specific amounts of gravel or frontage, but the agreement plainly does provide for the transfer of gravel rights.

At the same time Cousineau discovered the shortage in highway frontage, South Construction ran out of gravel. They had removed 6,000 cubic yards. To determine if there was any more gravel on the property, a South Construction employee bulldozed a trench about fifty feet long and twenty feet deep. There was no gravel. A soils report prepared in 1978 confirmed that there were no gravel deposits on the property.

After December, 1977, Cousineau and his partners stopped making monthly payments. At that time they had paid a total of \$99,000.00 for the property, including a down payment and monthly installments. In March, 1978, they informed Walker of their intention to rescind the contract. A deed of trust foreclosure sale was held in the fall of 1978, and Walker reacquired the property. At a bench trial in December, Cousineau and his partners were denied rescission and restitution.

Among his written findings of fact, the trial judge found:

At some point in time, between October 24, 1976, and January 11, 1977, there existed a multiple listing advertisement which included information relating to gravel as well as road frontage, said information subsequently determined to be incorrect.

He further found:

The plaintiffs did not rely on any misinformation or misrepresentations of de-

2. In the context of land sale contracts, see *Osborne v. Cal-Am Financial Corp.*, 80 Cal. App.3d 259, 145 Cal.Rptr. 584, 588 (1978), and *Halpert v. Rosenthal*, 267 A.2d 730, 733 (R.I. 1970). See Restatement of Contracts § 476, Comment b (1932); Restatement of Restitution § 9(2) (1937); Restatement (Second) of Torts § 552C (1977).

3. We decline to consider whether Walker's statements amounted to fraudulent or negligent misrepresentations. The trial judge made no findings on the question and our resolution makes it unnecessary to consider it. It is apparent, however, that Walker had little basis for making statements regarding gravel content. For example, the basis for the statement in the first listing, "over 1 million in gravel," was Walker's neighbor, Riley Curtis, not the "Engineer Report." Walker claimed that Curtis told him an engineering firm had dug core

samples on the property and had prepared a report which estimated the amount of gravel. At trial, Curtis denied telling Walker that there was gravel on the property. He testified that he told Walker there was over one million in material, not gravel. As discussed in the text, Walker never actually saw the report. Moreover, Pat Davis, Walker's real estate agent, was aware of these facts, but included the statement on the listing anyway.

4. The statements made regarding highway frontage and gravel content in the two listing agreements cannot be characterized as "puffing." They were positive statements "susceptible of exact knowledge" at the time they were made. *Young & Cooper, Inc. v. Vestring*, 214 Kan. 311, 521 P.2d 281, 290 (1974). Although not applicable to real property sales, it is revealing that under the Uniform Commercial Code, where it is frequently necessary to distin-

pendants. The claimed misinformation about gravel on the property and the road frontage was not a material element of the parties' negotiations, and these pieces of information did not appear in the February 16, 1977 purchase agreement document prepared by attorney Harland Davis, attorney for the plaintiffs and signed by the parties.

In part, based on these findings, the court adopted the following conclusions of law: The plaintiffs are not entitled to rescission of the contract of sale or restitution as they were not entitled to rely on the alleged misrepresentation. The information which allegedly formed the basis of the misrepresentation was not material in the instant transaction, the agreement reached by the parties was valid and does not suffer any taint or defect of misrepresentation.

#### I. RESCISSION OF THE CONTRACT

[1,2] Numerous cases hold and the Restatement provides that an innocent misrepresentation<sup>2</sup> may be the basis for rescinding a contract.<sup>3</sup> There is no question, as the trial judge's findings of fact state, that the statements made by Walker and his real estate agent in the multiple listing were false.<sup>4</sup> Three questions must be resolved,

1. The plaintiffs are not entitled to rescission of the contract of sale or restitution as they were not entitled to rely on the alleged misrepresentation.

2. The information which allegedly formed the basis of the misrepresentation was not material in the instant transaction, the agreement reached by the parties was valid and does not suffer any taint or defect of misrepresentation.

however, to determine whether Cousineau is entitled to rescission and restitution of the amount paid for the property on the basis of the misrepresentations. First, it must be determined whether Cousineau in fact relied on the statements. Second, it must be determined whether the statements were material to the transaction—that is, objectively, whether a reasonable person would have considered the statements important in deciding whether to purchase the property. Finally, assuming that Cousineau relied on the statements and that they were material, it must be determined whether his reliance was justified.<sup>5</sup>

#### A. Reliance on the False Statements

[3] As quoted above, in his findings of fact, the trial judge stated, "The plaintiffs did not rely on any misinformation or misrepresentations of defendants." Because this case was decided by a judge without a jury, our standard of review of factual findings is the "clearly erroneous" standard. Alaska R.Civ.P. 52(a). When a finding leaves the court with the definite and firm conviction on the entire record that a mistake has been made, it is clearly erroneous. *Lewis v. Anchorage Asphalt Paving Co.*, 579 P.2d 532, 534 (Alaska 1978). In our opinion, the trial judge's finding that Cousineau and his partners did not rely on the statements made by Walker is clearly erroneous.

guish "sales talk" from those statements which create express warranties, such definite statements as those made in the listing agreements would most probably be construed as creating an express warranty. See Annot., 94 A.L.R.3d 729 (1979).

#### 5. Restatement (Second) of Contracts § 306, comment (a), (Tent. Draft no. 11, 1976) states:

A misrepresentation may make a contract voidable under the rule stated in this Section, even though it does not prevent the formation of a contract under the rule stated in the previous section. Three requirements must be met in addition to the requirement that there must have been a misrepresentation. First, the misrepresentation must have been either fraudulent or material. . . . Second, the misrepresentation must have induced the recipient to make the contract.

[4] Regardless of the credibility of some witnesses,<sup>6</sup> the uncontroverted facts are that Wayne Cousineau was in the gravel extraction business. He first became aware of the property through a multiple listing that said "1 MILLION IN GRAVEL." The subsequent listing stated that there were 80,000 cubic yards of gravel. Even if Walker might have taken the position that the sale was based on the appraisal, rather than the listings, the appraisal does not disclaim the earlier statements regarding the amount of highway frontage and the existence of gravel. In fact, the appraisal might well reaffirm a buyer's belief that gravel existed, since it stated there was a good gravel base. All the documents prepared regarding the sale from the first offer through the final deed of trust make provisions for the transfer of gravel rights. Cousineau's first act upon acquiring the property was to contract with South Construction for gravel removal, and to purchase gravel scales for \$12,000.00. We conclude that the court erred in finding that Cousineau did not rely on Walker's statement that there was gravel on the property.

[5] We are also convinced that the trial court's finding that Cousineau did not rely on Walker's statement regarding the amount of highway frontage was clearly erroneous. The Cousineaus were experienced and knowledgeable in real estate matters. In determining whether to purchase the property, they would certainly

. . . Third, the recipient must have been justified in relying on the misrepresentation.

6. The judge's findings state that the testimony of Camille Davis was "not credible on those key issues wherein it conflicted with evidence produced by the defendants." There are discrepancies in the record as to whether Camille received a copy of the appraisal, whether she or Pat Davis was to obtain a copy of the "Engineer Report," or whether she saw the discrepancies between the first and second listing regarding the amount of gravel. Camille stated at numerous points in her testimony that Cousineau was primarily interested in the property because of its gravel content, while the defendants, as might be expected, took the position that gravel was an insignificant part of the transaction. In view of the trial court's findings, we have resolved any conflicts in Camille's testimony in favor of Walker.

have considered the amount of highway frontage to be of importance. Despite Walker's insistence that Cousineau knew the location of the boundary markers, neither Cousineau nor the appraiser ever found them. It is improbable that Cousineau would have started removing gravel from a neighbor's property had he known the correct location of his boundary line.

#### B. Materiality of the Statements

[6, 7] Materiality is a mixed question of law and fact. A material fact is one "to which a reasonable man might be expected to attach importance in making his choice of action." W. Prosser, Law of Torts § 108, at 719 (4th ed. 1971). It is a fact which could reasonably be expected to influence someone's judgment or conduct concerning a transaction. *HomeLite v. Trywilk Realty Co.*, 272 F.2d 688, 691 (4th Cir. 1959); *Nader v. Allegheny Airlines, Inc.*, 445 F.Supp. 168, 174 (D.D.C.1978); Restatement of Restitution § 8(2) (1937). Under § 306 of the tentative draft of the Restatement (Second) of Contracts, a misrepresentation may be grounds for voiding a contract if it is either fraudulent or material. Restatement (Second) of Contracts § 306 (Tent. Draft No. 11, 1976). The reason behind the rule requiring proof of materiality is to encourage stability in contractual relations. The rule prevents parties who later become disappointed at the outcome of their bargain from capitalizing on any insignificant discrepancy to void the contract.

[8] We conclude as a matter of law that the statements regarding highway frontage and gravel content were material. A reasonable person would be likely to consider the existence of gravel deposits an impor-

7. Walker testified that gravel was not a "selling point." This testimony obviously conflicts with the testimony of his real estate agent, who thought the information was of some importance. A person experienced in real estate sales would seem to be in a better position to evaluate what a buyer would be likely to consider important.

8. *Piazzini v. Jessup*, 152 Cal.App. 58, 314 P.2d 196 (1957) (misrepresentation as to boundary line and existence of termites); *Richard v. Baker*, 141 Cal.App.2d 857, 297 P.2d 674 (1956)

tant consideration in developing a piece of property. Even if not valuable for commercial extraction, a gravel base would save the cost of obtaining suitable fill from other sources. Walker's real estate agent testified that the statements regarding gravel were placed in the listings because gravel would be among the property's "best points" and a "selling point."<sup>7</sup> It seems obvious that the sellers themselves thought a buyer would consider gravel content important.

The buyers received less than three-fourths of the highway frontage described in the listings. Certainly the amount of highway frontage on a commercial tract would be considered important. Numerous cases from other jurisdictions have held discrepancies to be material which were similar in magnitude to those here.<sup>8</sup>

#### C. Justifiable Reliance

The trial judge concluded as a matter of law that the plaintiffs "were not entitled to rely on the alleged misrepresentation."

The bulk of the appellee's brief is devoted to the argument that Cousineau's unquestioning reliance on Walker and his real estate agent was imprudent and unreasonable. Cousineau failed to obtain and review the engineer's report. He failed to obtain a survey or examine the plat available at the recorder's office. He failed to make calculations that would have revealed the true frontage of the lot. Although the property was covered with snow, the plaintiffs, according to Walker, had ample time to inspect it. The plaintiffs were experienced businessmen who frequently bought and sold real estate. Discrepancies existed in

(misrepresentation as to boundary location); *Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 769 (1977) (discrepancy as to amount of tillable acreage); *Bennett v. Finley*, 54 N.M. 139, 215 P.2d 1013 (1950) (misrepresentation as to amount of farmland); *Heverly v. Kirkendall*, 257 Or. 232, 478 P.2d 381 (1970) (existence of encroachment); *Dreifus Lumber Co. v. Werner*, 221 Or. 467, 351 P.2d 684 (1960) (misrepresentation as to boundary line and amount of timber); Annot., 33 A.L.R. 853 § 48-51 (1924).

credibility of some asserted facts are in the gravel it became aware of multiple listing "RAVEL." The that there were Even if Walker position that the isal, rather than does not disclaim regarding the ge and the exist- appraisal might belief that gravel ere was a good uments prepared the first offer trust make provi- of gravel rights. or requiring the v South Con- oval, and to pur- 2,000.00. We con- d in finding that n Walker's state- el on the property. nced that the trial neau did not rely regarding the ntage was clearly asus were experie- le in real estate ; whether to pur- y would certainly sient must have been e misrepresentation. te that the testimony ot credible on those flicted with evidence nts." There are dis- is to whether Camille appraisal, whether she a copy of the "Engi- she saw the discrep- and second listing re- gravel. Camille stated testimony that Cous- rested in the property e. hile the defend- te. k the position nificant part of the the trial court's find- any conflicts in Ca- r of Walker.

the various property descriptions which should have alerted Cousineau and his partners to potential problems. In short, the appellees urge that the doctrine of caveat emptor precludes recovery.

In fashioning an appropriate rule for land sale contracts, we note initially that, in the area of commercial and consumer goods, the doctrine of caveat emptor has been nearly abolished by the Uniform Commercial Code and imposition of strict products liability. In real property transactions, the doctrine is also rapidly receding. Alaska has passed the Uniform Land Sales Practices Act, AS 34.55.004-.046, which imposes numerous restrictions on vendors of subdivided property. Criminal penalties may be imposed for violations. The Uniform Residential Landlord and Tenant Act, AS 34.03.010-.380, has greatly altered the common law of landlord and tenant in favor of tenants. Many states now imply warranties of merchantability in new home sales.<sup>9</sup> Wyoming has recently extended this warranty beyond the initial purchaser to subsequent buyers. *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735-36 (Wyo.1979).<sup>10</sup>

There is a split of authority regarding a buyer's duty to investigate a vendor's fraudulent statements, but the prevailing trend is toward placing a minimal duty on a buyer. Recently, a Florida appellate court reversed long-standing precedent which held that a buyer must use due diligence to protect his interest, regardless of fraud, if the means for acquiring knowledge concerning the transaction were open and available. In the context of a building sale the court concluded:

9. See, e. g., *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399, 402 (1964); *Theis v. Heuer*, 280 N.E.2d 300, 303-06 (Ind.1972); *Humber v. Morton*, 426 S.W.2d 554, 557-62 (Tex.1968).

10. Accord, *Barnes v. MacBrown & Co., Inc.*, 342 N.E.2d 611 (Ind.1976). See Note, *Builders Liability for Latent Defects in Used Homes*, 32 Stan.L.Rev. 607 (1980).

11. *Piazzini v. Jessup*, 152 Cal.App.58, 314 P.2d 196, 198 (1957); *Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 769, 776 (1977); *Fox v. Wilson*, 211 Kan. 563, 507 P.2d 252, 266 (1973); *Kannavos v. Annino*, 356 Mass. 42, 247 N.E.2d 708,

A person guilty of fraudulent misrepresentation should not be permitted to hide behind the doctrine of *caveat emptor*. *Upledger v. Vilanor, Inc.*, 369 So.2d 427, 430 (Fla.App.), cert. denied, 378 So.2d 350 (Fla. 1979).

The Supreme Court of Maine has also recently reversed a line of its prior cases, concluding that a defense based upon lack of due care should not be allowed in land sales contracts where a reckless or knowing misrepresentation has been made. *Letellier v. Small*, 400 A.2d 371, 375 (Me.1979). This is also the prevailing view in California, Idaho, Kansas, Massachusetts, and Oregon.<sup>11</sup> On the other hand, some jurisdictions have reaffirmed the doctrine of caveat emptor,<sup>12</sup> but as noted in *Williston on Contracts*,

[t]he growing trend and tendency of the courts will continue to move toward the doctrine of negligence in trusting in a representation will not excuse positive fraud or deprive the defrauded person of his remedy.

W. Jaeger, *Williston on Contracts* § 1515B at 487 (3d ed. 1970).

There is also authority for not applying the doctrine of caveat emptor even though the misrepresentation is innocent. The Restatements, case law, and a ready analogy to express warranties in the sale of goods support this view.

The recent draft of the Restatement of Contracts allows rescission for an innocent material misrepresentation unless a buyer's fault was so negligent as to amount to "a failure to act in good faith and in accord-

712 (1969); *Heverly v. Kirkendall*, 257 Or. 232, 478 P.2d 381, 383 (1970).

12. Recent decisions in Georgia, Illinois and North Carolina are illustrative. *P.B.R. Enterprises, Inc. v. Perren*, 243 Ga. 280, 253 S.E.2d 765, 767 (1979); *Bezin v. Ginsberg*, 59 Ill. App.3d 429, 16 Ill.Dec. 595, 603, 375 N.E.2d 468, 476 (1978) ("Nowhere in the law is the rule of *caveat emptor* more strictly followed than in the arms length transaction involving an interest in real property"); *Odom v. Little Rock & I-85 Corp.*, 40 N.C.App. 242, 252 S.E.2d 217, 219 (1979).

ducent misrepresentation permitted to hide *caveat emptor*. 69 So.2d 427, 430 8 So.2d 350 (Fla.

Maine has also of its prior cases, based upon lack allowed in land less or knowing made. *Letellier* (Me.1979). This w in California, ssets, and Ore- d, some jurisdic- doctrine of *caveat Williston on Con-*

tendency of the toward the trusting in a ot excuse positive e the defrauded

contracts § 1515B

for not applying ptor even though innocent. The Re- a ready analogy the sale of goods

e Restatement of n for an innocent n unless a buyer's to amount to "a th and in accord- sendall, 257 Or. 232.

Georgia, Illinois and tive. *P.B.R. Enter-* Ga. 280, 253 S.E.2d A. *Ginsberg*, 59 Ill. 15, 603, 375 N.E.2d e in the law is the re strictly followed tion involving y .. *Odom v. Little* App. 242, 252 S.E.2d

ance with reasonable standards of fair dealing." 13 Restatement (Second) of Contracts § 314, Comment b (Tent. Draft. no. 11, 1976).

In *Van Meter v. Bent Construction Co.*, 46 Cal.2d 588, 297 P.2d 644 (1956), the city of San Diego failed to properly mark the area of a reservoir that needed to be cleared of brush. A lower court concluded that the city's failure to mark the area properly was an innocent mistake, and that a bidder's actions in failing to discover the true area to be cleared was negligent. Recovery was denied because the city's misrepresentation was not willful. The California Supreme Court reversed, first noting that a party's negligence does not bar rescission for mutual mistake, and then concluding:

There is even more reason for not barring a plaintiff from equitable relief where his negligence is due in part to his reliance in good faith upon the false rep-

13. As an illustration of "fair dealing," the proposed Restatement suggests the following example:

A, seeking to induce B to make a contract to buy land, tells B that the land is free from encumbrances. Unknown to either A or B, C holds a recorded and unsatisfied mortgage on the land. B could easily learn this by walking across the street to the register of deeds in the courthouse but does not do so. B is induced by A's statement to make the contract. B's reliance is justified since his fault does not amount to a failure to act in good faith and in accordance with reasonable standards of fair dealing, and the contract is voidable by B.

Restatement (Second) of Contracts § 314, Comment b, Illustration 2 (Tent. Draft no. 11, 1976).

14. See also *Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 769, 776 (1977), in which the tillable acreage sold was misrepresented by reference to an erroneous form prepared by the Department of Agriculture. The buyers sought damages for the shortage, and the Supreme Court of Idaho reversed a judgment of nonsuit, stating:

In short, the general rule is that "a vendor may be liable in tort for misrepresentations as to the area of land conveyed, notwithstanding such misrepresentations were made without actual knowledge of their falsity." The reason, of course, is that the parties to a real estate transaction do not deal on equal terms. An owner is presumed to know the boundaries of his own land, the quantity of

representations of a defendant, although the statements were not made with intent to deceive. A defendant who misrepresents the facts and induces the plaintiff to rely on his statements should not be heard in an equitable action to assert that the reliance was negligent unless plaintiff's conduct, in the light of his intelligence and information, is preposterous or irrational.

*Id.* 297 P.2d at 648 (citations omitted). The Massachusetts Supreme Judicial Court has expressed a similar view in *Yorke v. Taylor*, 332 Mass. 368, 124 N.E.2d 912, 916 (1955).<sup>14</sup>

We do not contend that real property transactions are the same as those involving sales of goods. Nevertheless, an analogy to the applicability of the doctrine of *caveat emptor* under the Uniform Commercial Code is helpful.<sup>15</sup> Under the Code, factual statements regarding the sale of goods constitute an express warranty. AS 45.05.094.

his acreage, and the amount of water available. If he does not know the correct information, he must find out or refrain from making representations to unsuspecting strangers. "Even honesty in making a mistake is no defense as it is incumbent upon the vendor to know the facts."

*Id.* 571 P.2d at 776 (citations omitted). In addition, the sellers argued that the buyers had no right to rely on the A.S.C. figures, since they could have checked the figures themselves or conducted their own survey. In rejecting this argument, the court stated:

"False statements found . . . to have been made and relied on cannot be avoided by the appellants by the contention that the respondents could have, by independent investigation, ascertained the truth

"The appellants having stated what was untrue cannot now complain because respondents believed what they were told. Lack of caution on the part of respondents because they so believed, and the contention that respondents could have made an independent investigation and determined the true facts, is no defense to the action." *Weitzel v. Jukich*, 73 Idaho 301, 305, 251 P.2d 542, 544 (1953). And see, *Lanning v. Sprague*, [71 Idaho. 138, 227 P.2d 347] *supra*.

*Id.*

15. We also looked to the Uniform Commercial Code in *Rego v. Decker*, 482 P.2d 834, 838 (Alaska 1971), to decide analogous questions in the law of the land sale contracts.

The official comment to section 2-316 of the Code (codified as AS 45.05.100), dealing with disclaimers of warranties, states:

Application of the doctrine of "caveat emptor" in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this Article. Thus, if the offer of examination is accompanied by words as to their merchantability or specific attributes and the buyer indicates clearly that he is relying on those words rather than on his examination, they give rise to an "express" warranty.

Numerous cases have concluded that a buyer is entitled to rely on an express warranty, regardless of an inadequate examination of the goods.<sup>16</sup>

[9] Furthermore, the protections of the Code extend to highly sophisticated buyers in arms length transactions as well as to household consumers. Other than tradition, no reason exists for treating land sales differently from the sale of commercial goods insofar as application of the doctrine of caveat emptor is involved. We conclude that a purchaser of land may rely on material representations made by the seller and is not obligated to ascertain whether such representations are truthful.

A buyer of land, relying on an innocent misrepresentation, is barred from recovery only if the buyer's acts in failing to discover defects were wholly irrational, preposterous, or in bad faith.

[10] Although Cousineau's actions may well have exhibited poor judgment for an experienced businessman, they were not so unreasonable or preposterous in view of Walker's description of the property that recovery should be denied. Consequently, we reverse the judgment of the superior court.

## II. RESTITUTION

[11] Walker received a total of \$99,000.00 from Cousineau and his partners, but

the appellants are not entitled to restitution of this amount. Cousineau apparently caused extensive damage to one building on the property, and he removed 6,000 cubic yards of gravel. Walker should be allowed some recoupment for these items, plus an amount for the fair rental value of the property less reasonable costs of rental.

It is necessary to remand this case to the trial court to determine the correct amount of damages.

REVERSED and REMANDED.



B-C CABLE COMPANY, INC.,  
Appellant,

v.

CITY AND BOROUGH OF  
JUNEAU, Appellee.

No. 4587

Supreme Court of Alaska.

June 27, 1980.

Cable television company appealed from summary judgment granted by the Superior Court, First Judicial District, Allen T. Compton, J., in favor of municipality in its action to collect unpaid franchise fees allegedly owed by company. The Supreme Court, Connor, J., held that neither the municipal code, nor the Public Utilities Commission Act, either expressly or by implication nullified the rights and liabilities of company and municipality under the franchise agreement between them, and thus, the general savings statute precluded a finding that the municipal franchises were superseded, and operated to keep the agreements in force.

Affirmed.

16. See, e. g., *United States v. Aerodox, Inc.*, 469 F.2d 1003 (5th Cir. 1972); *General Electric Co. v. U. S. Dynamics, Inc.*, 403 F.2d 933 (1st Cir.

1968); *City of Paragould v. Int'l Power Machinery Co.*, 233 Ark. 872, 349 S.W.2d 332 (1961).

- 10. Any zoning violations, nonconforming uses, violations of "setback" requirements ..... — Yes — No
- 11. Neighborhood noise problems or other nuisances .... — Yes — No
- 12. CC&R's or other deed restrictions or obligations ..... — Yes — No
- 13. Homeowners' Association which has any authority over the subject property ..... — Yes — No
- 14. Any "common area" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others) ..... — Yes — No
- 15. Any notices of abatement or citations against the property ..... — Yes — No
- 16. Any lawsuits against the seller threatening to or affecting this real property ..... — Yes — No

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

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

Seller \_\_\_\_\_ Date \_\_\_\_\_

Seller \_\_\_\_\_ Date \_\_\_\_\_

III

AGENTS INSPECTION DISCLOSURE

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

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

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

IV

AGENTS INSPECTION DISCLOSURE

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

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

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

V

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

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

Seller \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_

Seller \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_

Agent (Broker Representing Seller) \_\_\_\_\_ By \_\_\_\_\_ Date \_\_\_\_\_

(Associate Licensee or Broker-Signature)

Agent (Broker obtaining the Offer) \_\_\_\_\_ By \_\_\_\_\_ Date \_\_\_\_\_

(Associate Licensee or Broker-Signature)

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

Amended Stats 1989 ch 171 § 1.

§ 1102.6. (Second of two; Operative July 1, 1991) Form of disclosure statement

The disclosures required by this article pertaining to the property proposed to be transferred are set forth in, and shall be made on a copy of, the following disclosure form:

REAL ESTATE TRANSFER DISCLOSURE STATEMENT

THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY SITUATED IN THE CITY OF \_\_\_\_\_, COUNTY OF \_\_\_\_\_, STATE OF CALIFORNIA, DESCRIBED AS \_\_\_\_\_

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

I

COORDINATION WITH OTHER DISCLOSURE FORMS

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

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

\_\_\_\_\_

(list all substituted disclosure forms to be used in connection with this transaction)

II

SELLERS INFORMATION

The Seller discloses the following information with the knowledge that even though this is not a warranty, prospective Buyers may rely on this information in deciding whether and on what terms to purchase the subject property.

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

Seller \_\_\_ is \_\_\_ is not occupying the property.

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

- Range, Dishwasher, Washer/Dryer Hookups, Burglar Alarms, T.V. Antenna, Central Heating, Wall/Window Air Cndng., Septic Tank, Patio/Decking, Sauna, Security Gate(s), Oven, Trash Compactor, Window Screens, Smoke Detector(s), Satellite Dish, Central Air Cndng., Sprinklers, Sump Pump, Built-in Barbeque, Pool, Automatic Garage Door Opener(s)\*, Not Attached, Solar, Well, Bottled, 220 Volt Wiring in, Microwave, Garbage Disposal, Rain Gutters, Fire Alarm, Intercom, Evaporator Cooler(s), Public Sewer System, Water Softener, Gazebo, Spa, Hot Tub, Number Remote Controls, Carport, Electric, Private Utility or Other, Garage: Attached, Pool/Spa Heater: Gas, Water Heater: Gas, Water Supply: City, Gas Supply: Utility, Exhaust Fan(s) in, Gas Starter, Roof(s): Type, Age, Fireplace(s) in

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

B. Are you (Seller) aware of any significant defects/malfunctions in any of the following? Yes No. If yes, check appropriate space(s) below. Interior Walls, Ceilings, Floors, Exterior Walls, Insulation, Roof(s), Windows, Doors, Foundation, Slab(s)

\_\_\_ Driveways \_\_\_ Sidewalks \_\_\_ Walls/Fences \_\_\_ Electrical Systems \_\_\_ Plumbing/Sewers/Septics \_\_\_ Other

Structural Components (Describe: \_\_\_\_\_)

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

\*This garage door opener may not be in compliance with the safety standards relating to automatic reversing devices as set forth in Chapter 12.5 (commencing with Section 19890) of Part 3 of Division 13 of the Health and Safety Code.

C. Are you (Seller) aware of any of the following:

- 1. Substances, materials, or products which may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, fuel or chemical storage tanks, and contaminated soil or water on the subject property. Yes No
2. Features of the property shared in common with adjoining landowners, such as walls, fences, and driveways, whose use or responsibility for maintenance may have an effect on the subject property. Yes No
3. Any encroachments, easements or similar matters that may affect your interest in the subject property. Yes No
4. Room additions, structural modifications, or other alterations or repairs made without necessary permits. Yes No
5. Room additions, structural modifications, or other alterations or repairs not in compliance with building codes. Yes No
6. Landfill (compacted or otherwise) on the property or any portion thereof. Yes No
7. Any settling from any cause, or heave, sliding, or other soil problems. Yes No
8. Flooding, drainage or grading problems. Yes No
9. Major damage to the property or any of the structures from fire, earthquake, floods, or landslides. Yes No
10. Any zoning violations, nonconforming uses, violations of "setback" requirements. Yes No
11. Neighborhood noise problems or other nuisances. Yes No
12. CC&R's or other deed restrictions or obligations. Yes No
13. Homeowners' Association which has any authority over the subject property. Yes No
14. Any "common area" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others). Yes No
15. Any notices of abatement or citations against the property. Yes No
16. Any lawsuits against the seller threatening to or affecting this real property. Yes No

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

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

Seller \_\_\_\_\_ Date \_\_\_\_\_

Seller \_\_\_\_\_ Date \_\_\_\_\_

III

AGENTS INSPECTION DISCLOSURE

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

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

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

IV

AGENTS INSPECTION DISCLOSURE

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

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

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

V

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

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

Seller \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_  
 Seller \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_

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

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

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

Amended Stats 1990 ch 1336 § 2 (AB 3600), operative July 1, 1991.

Amendments:

1990 Amendment: Amended the SELLERS INFORMATION disclosure form by (a) substituting "Automatic Garage Door Opener(s)" for "Garage Door Opener(s)" in subd A; and (2) added the footnote referring to a garage door opener.

Note—Stats 1990 ch 1336 provides:

SECTION 1. The Legislature finds and declares all of the following:

(a) The garage door is the largest and heaviest piece of moving equipment in most homes, and in order to avoid injury, it should be designed, manufactured, equipped, and maintained with due care. For this reason, garage door springs are currently regulated under California law.

(b) There are over 20 million automatic garage door openers in the nation today, a large portion of them in California.

(c) New residential automatic garage door openers should possess an automatic reversing safety device in compliance with current voluntary standards.

(d) There is no current California state regulation of these devices. Voluntary standards were established in 1973; however, prior to that date, there were no applicable industry safety standards requiring automatic reversing safety devices. Although automatic garage door openers have a life expectancy of approximately eight years, it is possible for individual openers to last as long as 40 years.

(e) Therefore, many automatic garage door openers currently installed do not have automatic safety reversing devices, and for many of the doors that do have these devices, the door and operator systems may not be properly adjusted and maintained. This condition is worsened by the fact that many persons are not aware of this problem and may have a false sense of security because they possess a door which purports to have an automatic safety device, yet the door and operator system may not have been tested or properly maintained and, therefore, may not be able to protect small children living in, or visiting, the home from serious injury or death.

(f) Since 1982, nationally, at least 44 children under 14 years of age have died in accidents involving automatic garage door openers. In November of 1989, a five-year-old girl died in Sacramento in an accident involving a garage door.

(g) It is, therefore, necessary that mandatory safety standards be established with respect to residential garage door opener systems.

Section 2 of this act shall be operative on July 1, 1991.

Taking a closer look: Significant new California legislation enacted in 1989. 13 CEB Real Prop L Rep No. 2 p 37.

**§ 1099. Structural pest control inspection report prior to transfer of title or execution of sales contract**

(a) As soon as practical before transfer of title of any real property or the execution of a real property sales contract as defined in Section 2985, the transferor, fee owner, or his agent, shall deliver to the transferee a copy of a structural pest control inspection report prepared pursuant to Section 8516 of the Business and Professions Code upon which any certification in accordance with Section 8519 of the Business and Professions Code may be made, provided that certification or preparation of a report is a condition of the contract effecting that transfer, or is a requirement imposed as a condition of financing such transfer.

(b) If a notice of work completed as contemplated by Section 8518 of the Business and Professions Code, indicating action by a structural pest control licensee in response to an inspection report delivered or to be delivered under provisions of subdivision (a), or a certification pursuant to Section 8519 of the Business and Professions Code, has been received by a transferor or his agent before transfer of title or execution of a real property sales contract as defined in Section 2985, it shall be furnished to the transferee as soon as practical before transfer of title or the execution of such real property sales contract.

(c) Delivery to a transferee as used in this section means delivery in person or by mail to the transferee himself or any person authorized to act for him in the transaction or to such additional transferees who have requested such delivery from the transferor or his agent in writing. For the purposes of this section, delivery to either husband or wife shall be deemed delivery to a transferee, unless the contract affecting the transfer states otherwise.

(d) No transfer of title of real property shall be invalidated solely because of the failure of any person to comply with the provisions of this section unless such failure is an act or omission which would be a valid ground for rescission of such transfer in the absence of this section.

Added Stats 1974 ch 649 § 2, operative July 1, 1975.

**Collateral References:**

Witkin Summary (9th ed) Contracts § 725.  
Miller & Starr, Cal Real Estate 2d §§ 1:123, 25:32.

**ARTICLE 1.5**

**Disclosures Upon Transfer of Residential Property**

[Division 2, Property—Part 4, Acquisition of Property—Title 4, Transfer—Chapter 2, Transfer of Real Property—Article 1.5, Disclosures Upon Transfer of Residential Property; Article added Stats 1985 ch 1574 § 2, operative January 1, 1987.]

- § 1102. Transactions to which article applies
- § 1102.1. Transactions to which article does not apply
- § 1102.2. Delivery of disclosure statement; Amendments; Termination of offer
- § 1102.3. [No section of this number]
- § 1102.4. Liability for errors or omissions
- § 1102.5. Information rendered inaccurate due to subsequent events; Use of approximations
- § 1102.6. Form of disclosure statement
- § 1102.6a. Additional disclosures
- § 1102.7. Disclosures to be made in good faith; "Good faith"
- § 1102.8. Effect of article on other required disclosures
- § 1102.9. Amendment of disclosure statement
- § 1102.10. Means of delivering statement
- § 1102.11. Escrow agents
- § 1102.12. Broker's duties
- § 1102.13. Failure to comply with article; Liability for damages
- § 1102.14. "Listing agent;" "Selling agent"
- § 1102.15. Disclosure of former ordinance locations within neighborhood area

Historical Derivation: Former § 1134.5, as added by Stats 1984 ch 1183 § 1, amended by Stats 1985 ch 982 § 1.

**Law Revision Commission Comments:**

1985 Revision—Paragraph (4) of subdivision (b) of Section 1134.5 is amended to make clear that the section does not apply to transfers by a fiduciary in the course of administration of a probate estate. This amendment is consistent with the purpose of that paragraph. Other disclosures on transfer of residence: §§ 1102, et seq.

**Cross References:**

Recording transfers of real property: CC §§ 1158 et seq.

**Collateral References:**

Witkin Summary (9th ed) Agency and Employment § 269, Real Property § 26, Torts §§ 700, 959.  
Cal Condominium Handbook (2d ed) §§ 11.8, 16.53.

Miller & Starr, Cal Real Estate 2d §§ 3:27, 4:24.  
 Cal Digest of Official Reports 3d Series, Deeds §§ 1 et seq., Real Estate Sales §§ 1 et seq.  
 Am Jur 2d (Rev) Property §§ 43 et seq.

**Forms:**

Am Jur Legal Forms 2d, Real Estate Sales §§ 219:1 et seq.

**Law Review Articles:**

Seller's attorney has no duty to disclose to buyer property's defects. CEB Real Prop L Rep (1986) Vol. 9 No. 6 p 129.

Down to earth practice tips for the real property lawyer in California: Transfer disclosure statements. (1987) 10 CEB Real Prop L Rep No. 8, p 165.

A legislative response to Easton v. Strassburger. 4 Cal Real Property J No. 1 p 18.  
 Review of Selected 1984 Legislation. 16 Pacific LJ 699.

**Annotations:**

Validity, construction, and application of statutes requiring assessment of environmental information prior to grants of entitlements for private land use. 76 ALR3d 388.

Conveyance of land as including mature but unharvested crops. 51 ALR4th 1263.

Specificity of description of premises as affecting enforceability of contract to convey real property—modern cases. 73 ALR4th 135.

**§ 1102. Transactions to which article applies**

Except as provided in Section 1102.1, this article applies to any transfer by sale, exchange, installment land sale contract, as defined in Section 2985, lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements, of real property, or residential stock cooperative, improved with or consisting of not less than one nor more than four dwelling units.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987. Amended Stats 1986 ch 460 § 1.

**Amendments:**

1986 Amendment: Added (1) "exchange," before "installment"; (2) "any other option to purchase," before "or ground"; (3) ", or residential stock cooperative," after "property"; and (4) "or consisting of" before "not less".

**Collateral References:**

Witkin Summary (9th ed) Agency and Employment § 269.  
 Miller & Starr, Cal Real Estate 2d § 1:123.

**Law Review Articles:**

Review of 1985 legislation. 17 Pacific LJ 784.

**§ 1102.1. Transactions to which article does not apply**

The provisions of this article do not apply to the following:

(a) Transfers which are required to be preceded by the furnishing to a prospective transferee of a copy of a public report pursuant to Section 11018.1 of the Business and Professions Code and transfers which can be made without a public report pursuant to Section 11010.4 of the Business and Professions Code.

b) Transfers pursuant to court order, including, but not limited to,

transfers ordered by a probate court in administration of an estate, transfers pursuant to a writ of execution, transfers by any foreclosure sale, transfers by a trustee in bankruptcy, transfers by eminent domain, and transfers resulting from a decree for specific performance.

(c) Transfers to a mortgagee by a mortgagor or successor in interest who is in default, transfers to a beneficiary of a deed of trust by a trustor or successor in interest who is in default, transfers by any foreclosure sale after default, transfers by any foreclosure sale after default in an obligation secured by a mortgage, transfers by a sale under a power of sale or any foreclosure sale under a decree of foreclosure after default in an obligation secured by a deed of trust or secured by any other instrument containing a power of sale, or transfers by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a mortgage or deed of trust or a sale pursuant to a decree of foreclosure or has acquired the real property by a deed in lieu of foreclosure.

(d) Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.

(e) Transfers from one co-owner to one or more other co-owners.

(f) Transfers made to a spouse, or to a person or persons in the lineal line of consanguinity of one or more of the transferors.

(g) Transfers between spouses resulting from a decree of dissolution of marriage or a decree of legal separation or from a property settlement agreement incidental to such a decree.

(h) Transfers by the Controller in the course of administering Chapter 7 (commencing with Section 1500) of Title 10 of Part 3 of the Code of Civil Procedure.

(i) Transfers under Chapter 7 (commencing with Section 3691) or Chapter 8 (commencing with Section 3771) of Part 6 of Division 1 of the Revenue and Taxation Code.

(j) Transfers or exchanges to or from any governmental entity.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987. Amended Stats 1986 ch 460 § 2.

**Amendments:**

1986 Amendment: (1) Added "transfers by any foreclosure sale," after "execution," in subd (b); (2) amended subd (c) by adding (a) "or successor in interest who is" after "mortgagor" and after "trustor"; (b) ", transfers by any foreclosure sale after default" before "in an obligation"; (c) "or any foreclosure sale under a decree of foreclosure" after "under a power of sale" and (d) "or a sale pursuant to a decree of foreclosure" after "deed of trust"; and (3) added "or exchanges" in subd (j).

**Collateral References:**

Witkin Summary (9th ed) Agency and Employment § 269.  
 Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27, 28:8.

*Law Review Articles:*

Review of 1985 legislation. 17 Pacific LJ 784.

**§ 1102.2. Delivery of disclosure statement; Amendments; Termination of offer**

The transferor of any real property subject to this article shall deliver to the prospective transferee the written statement required by this article, as follows:

(a) In the case of a sale, as soon as practicable before transfer of title.

(b) In the case of transfer by a real property sales contract, as defined in Section 2985, or by a lease together with an option to purchase, or a ground lease coupled with improvements, as soon as practicable before execution of the contract. For the purpose of this subdivision, "execution" means the making or acceptance of an offer.

With respect to any transfer subject to subdivision (a) or (b), the transferor shall indicate compliance with this article either on the receipt for deposit, the real property sales contract, the lease, or any addendum attached thereto or on a separate document.

If any disclosure, or any material amendment of any disclosure, required to be made by this article, is delivered after the execution of an offer to purchase, the transferee shall have three days after delivery in person or five days after delivery by deposit in the mail, to terminate his or her offer by delivery of a written notice of termination to the transferor or the transferor's agent.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987. Amended Stats 1986 ch 460 § 3.

*Amendments:*

1986 Amendment: (1) Amended subd (b) by adding (a) "as soon as practicable" after "improvements,"; and (b) the second sentence; and (2) substituted "the transferor's" for "his or her" near the end of the last paragraph.

*Collateral References:*

Witkin Summary (9th ed) Agency and Employment § 269.  
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

*Law Review Articles:*

Review of 1985 legislation. 17 Pacific LJ 784.

**§ 1102.3. [No section of this number]****§ 1102.4. Liability for errors or omissions**

a) Neither the transferor nor any listing or selling agent shall be liable for any error, inaccuracy, or omission of any information delivered pursuant to this article if the error, inaccuracy, or omission was not within the personal knowledge of the transferor or that listing or selling agent, was based on information timely provided by public agencies or by other persons providing information as specified in

subdivision (c) that is required to be disclosed pursuant to this article, and ordinary care was exercised in obtaining and transmitting it.

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

(c) The delivery of a report or opinion prepared by a licensed engineer, land surveyor, geologist, structural pest control operator, contractor, or other expert, dealing with matters within the scope of the professional's license or expertise, shall be sufficient compliance for application of the exemption provided by subdivision (a) if the information is provided to the prospective transferee pursuant to a request therefor, whether written or oral. In responding to such a request, an expert may indicate, in writing, an understanding that the information provided will be used in fulfilling the requirements of Section 1102.6 and, if so, shall indicate the required disclosures, or parts thereof, to which the information being furnished is applicable. Where such a statement is furnished, the expert shall not be responsible for any items of information, or parts thereof, other than those expressly set forth in the statement.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987. Amended Stats 1986 ch 460 § 4.

*Amendments:*

1986 Amendment: (1) Substituted "any listing or selling" and "that listing or selling" for "his or her" wherever such words appear; and (2) deleted ", by the transferor or his or her agent" at the end of the first sentence in subd (c).

*Collateral References:*

Witkin Summary (9th ed) Agency and Employment § 269.  
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

*Law Review Articles:*

Review of 1985 legislation. 17 Pacific LJ 784.

**§ 1102.5. Information rendered inaccurate due to subsequent even Use of approximations**

If information disclosed in accordance with this article is subsequently rendered inaccurate as a result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this article. If at the time the disclosures are required to be made, an item of information required to be disclosed is unknown or not available to the transferor, and the transferor or his or her agent has made a reasonable effort to ascertain it, the transferor may use an approximation of the information, provided the approximation is clearly identi-

fied as such, is reasonable, is based on the best information available to the transferor or his or her agent, and is not used for the purpose of circumventing or evading this article.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987.

Collateral References:

Witkin Summary (9th ed) Agency and Employment § 269.

Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27, 29:51.

Law Review Articles:

Review of 1985 legislation. 17 Pacific LJ 784.

→ See 1991 Supplement, attached

§ 1102.6. Form of disclosure statement

The disclosures required by this article pertaining to the property proposed to be transferred are set forth in, and shall be made on a copy of, the following disclosure form:

REAL ESTATE TRANSFER DISCLOSURE STATEMENT

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

I

COORDINATION WITH OTHER DISCLOSURE FORMS

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

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

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(list all substituted disclosure forms to be used in connection with this transaction)

II

SELLERS INFORMATION

The Seller discloses the following information with the knowledge

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

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

Seller \_\_\_ is \_\_\_ is not occupying the property.

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

- |   |  |   |
|---|--|---|
| <input type="checkbox"/> Range                  | <input type="checkbox"/> Oven                  | <input type="checkbox"/> Microwave                      |
| <input type="checkbox"/> Dishwasher             | <input type="checkbox"/> Trash Compactor       | <input type="checkbox"/> Garbage Disposal               |
| <input type="checkbox"/> Washer/Dryer Hookups   | <input type="checkbox"/> Window Screens        | <input type="checkbox"/> Rain Gutters                   |
| <input type="checkbox"/> Burglar Alarms         | <input type="checkbox"/> Smoke Detector(s)     | <input type="checkbox"/> Fire Alarm                     |
| <input type="checkbox"/> T.V. Antenna           | <input type="checkbox"/> Satellite Dish        | <input type="checkbox"/> Intercom                       |
| <input type="checkbox"/> Central Heating        | <input type="checkbox"/> Central Air Cndng.    | <input type="checkbox"/> Evaporator Cooler(s)           |
| <input type="checkbox"/> Wall/Window Air Cndng. | <input type="checkbox"/> Sprinklers            | <input type="checkbox"/> Public Sewer System            |
| <input type="checkbox"/> Septic Tank            | <input type="checkbox"/> Sump Pump             | <input type="checkbox"/> Water Softener                 |
| <input type="checkbox"/> Patio/Decking          | <input type="checkbox"/> Built-in Barbeque     | <input type="checkbox"/> Gazebo                         |
| <input type="checkbox"/> Sauna                  | <input type="checkbox"/> Pool                  | <input type="checkbox"/> Spa ___ Hot Tub                |
| <input type="checkbox"/> Security Gate(s)       | <input type="checkbox"/> Garage Door Opener(s) | <input type="checkbox"/> Number Remote Controls         |
| Garage: <input type="checkbox"/> Attached       | <input type="checkbox"/> Not Attached          | <input type="checkbox"/> Carport                        |
| Pool/Spa Heater: <input type="checkbox"/> Gas   | <input type="checkbox"/> Solar                 | <input type="checkbox"/> Electric                       |
| Water Heater: <input type="checkbox"/> Gas      |  | <input type="checkbox"/> Private Utility or Other _____ |

- |  |                                  |                       |
|--|----------------------------------|-----------------------|
| Water Supply: <input type="checkbox"/> City  | <input type="checkbox"/> Well    |                       |
| Gas Supply: <input type="checkbox"/> Utility | <input type="checkbox"/> Bottled |                       |
| Exhaust Fan(s) in _____                      | 220 Volt Wiring in _____         | Fireplace(s) in _____ |
| Gas Starter _____                            | Roof(s): Type: _____             | Age: _____ (approx.)  |
| Other: _____                                 |                                  |                       |

Are there, to the best of your (Seller's) knowledge, any of the above that are not in operating condition? \_\_\_ Yes \_\_\_ No. If yes, then describe.

(Attach additional sheets if necessary.): \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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

- |   |                                   |                                     |   |
|---|-----------------------------------|-------------------------------------|---|
| <input type="checkbox"/> Interior Walls | <input type="checkbox"/> Ceilings | <input type="checkbox"/> Floors     | <input type="checkbox"/> Exterior Walls |
| <input type="checkbox"/> Insulation     | <input type="checkbox"/> Roof(s)  | <input type="checkbox"/> Windows    | <input type="checkbox"/> Doors          |
|   |                                   | <input type="checkbox"/> Foundation |   |

ACQUISITION OF PROPERTY

— Slab(s) — Driveways — Sidewalks — Walls/Fences
— Electrical Systems — Plumbing/Sewers/Septics — Other
Structural Components (Describe: \_\_\_\_\_)

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

C. Are you (Seller) aware of any of the following:

- 1. Substances, materials, or products which may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, fuel or chemical storage tanks, and contaminated soil or water on the subject property .... — Yes — No
2. Features of the property shared in common with adjoining landowners, such as walls, fences, and driveways, whose use or responsibility for maintenance may have an effect on the subject property ..... — Yes — No
3. Any encroachments, easements or similar matters that may affect your interest in the subject property ..... — Yes — No
4. Room additions, structural modifications, or other alterations or repairs made without necessary permits ..... — Yes — No
5. Room additions, structural modifications, or other alterations or repairs not in compliance with building codes ..... — Yes — No
6. Landfill (compacted or otherwise) on the property or any portion thereof ..... — Yes — No
7. Any settling from any cause, or slippage, sliding, or other soil problems ..... — Yes — No

REAL PROPERTY TRANSFERS

- 8. Flooding, drainage or grading problems ..... — Yes — No
9. Major damage to the property or any of the structures from fire, earthquake, floods, or landslides ..... — Yes — No
10. Any zoning violations, nonconforming uses, violation of "setback" requirements ..... — Yes — No
11. Neighborhood noise problems or other nuisances ..... — Yes — No
12. CC&R's or other deed restrictions or obligations ..... — Yes — No
13. Homeowners' Association which has any authority over the subject property ..... — Yes — No
14. Any "common area" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others) ..... — Yes — No
15. Any notices of abatement or citations against the property ..... — Yes — No
16. Any lawsuits against the seller threatening to or affecting this real property ..... — Yes — No
If the answer to any of these is yes explain. (Attach additional sheets if necessary.): \_\_\_\_\_

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

III AGENTS INSPECTION DISCLOSURE

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

THE UNDERSIGNED, BASED ON THE ABOVE INQUIRY OF THE SELLER(S) AS TO THE CONDITION OF THE PROPERTY

AND BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY IN CONJUNCTION WITH THAT INQUIRY, STATES THE FOLLOWING:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

IV AGENTS INSPECTION DISCLOSURE

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

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

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

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

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

Seller \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_  
Seller \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_

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

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

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

Added Stats 1985 ch 1574 § 2, operative January 1, 1987. Amended Stats 1986 ch 460 § 5; Stats 1989 ch 171 sec 1.

Amendments:

1986 Amendment: Revised the required disclosure form.  
1989 Amendment: Amended subd C of the SELLERS INFORMATION disclosure form by (1) adding subd 1; (2) redesignating former subds 1-15 to be subds 2-16; and (3) substituting "this" for "his" in subd 16.

Collateral References:

Within Summary (9th ed) Agency and Employment § 269.  
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

Law Review Articles:

Review of 1985 legislation. 17 Pacific LJ 784.  
Review of 1989 legislation. 21 Pacific LJ 537.

§ 1102.6a. Additional disclosures

(a) On and after July 1, 1990, any city or county may elect to require disclosures on the form set forth in subdivision (b) in addition to those disclosures required by Section 1102.6. However, this section does not affect or limit the authority of a city or county to require disclosures on a different disclosure form in connection with transactions subject to this article pursuant to an ordinance adopted prior to July 1, 1990. Such an ordinance adopted prior to July 1, 1990, may be amended thereafter to revise the disclosure requirements of the ordinance, in the discretion of the city council or county board of supervisors.

(b) Disclosures required pursuant to this section pertaining to the property proposed to be transferred, shall be set forth in, and shall be made on a copy of, the following disclosure form:

LOCAL OPTION

REAL ESTATE TRANSFER DISCLOSURE STATEMENT

THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY SITUATED IN THE CITY OF \_\_\_\_\_, COUNTY OF \_\_\_\_\_, STATE OF CALIFORNIA, DESCRIBED AS \_\_\_\_\_. THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE DESCRIBED PROPERTY IN COMPLIANCE WITH ORDINANCE NO. \_\_\_\_\_ OF THE \_\_\_\_\_ CITY OR COUNTY CODE AS OF \_\_\_\_\_, 19\_\_\_\_. IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS TRANSACTION, AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN.

I  
SELLERS INFORMATION

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

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

- 1. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- 2. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Example: Adjacent land is zoned for timber production which may be subject to harvest.)

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

Seller \_\_\_\_\_ Date \_\_\_\_\_  
Seller \_\_\_\_\_ Date \_\_\_\_\_

II

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

I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT

Seller \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_  
Seller \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_

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

Agent (Broker Obtaining the Offer) \_\_\_\_\_ By \_\_\_\_\_ Date \_\_\_\_\_  
(Associate Licensee or Broker-Signature)

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

(c) This section does not preclude the use of addenda to the form specified in subdivision (b) to facilitate the required disclosures. This section does not preclude a city or county from using the disclosure form specified in subdivision (b) for a purpose other than that specified in this section.

Added Stats 1989 ch 171 sec 2.

Collateral References:

Law Review Articles:

Review of 1989 legislation. 21 Pacific LJ 537.

§ 1102.7. Disclosures to be made in good faith; "Good faith"

Each disclosure required by this article and each act which may be performed in making the disclosure, shall be made in good faith. For purposes of this article, "good faith" means honesty in fact in the conduct of the transaction.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987.

Collateral References:

Witkin Summary (9th ed) Agency and Employment § 269.  
Miller & Starr, Cal Real Estate 2d § 1:123.

Law Review Articles:

Review of 1985 legislation. 17 Pacific LJ 784.

§ 1102.8. Effect of article on other required disclosures

The specification of items for disclosure in this article does not limit or abridge any obligation for disclosure created by any other provision of law or which may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987.

Collateral References:

Witkin Summary (9th ed) Agency and Employment § 269.  
Miller & Starr, Cal Real Estate 2d § 1:123.

Law Review Articles:

Review of 1985 legislation. 17 Pacific LJ 784.

**§ 1102.9. Amendment of disclosure statement**

Any disclosure made pursuant to this article may be amended in writing by the transferor or his or her agent, but the amendment shall be subject to the provisions of Section 1102.2.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987.

**Collateral References:**

Witkin Summary (9th ed) Agency and Employment § 269.  
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

**Law Review Articles:**

Review of 1985 legislation. 17 Pacific LJ 784.

**§ 1102.10. Means of delivering statement**

Delivery of disclosures required by this article shall be by personal delivery to the transferee or by mail to the prospective transferee. For the purposes of this article, delivery to the spouse of a transferee shall be deemed delivery to the transferee, unless provided otherwise by contract.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987.

**Collateral References:**

Witkin Summary (9th ed) Agency and Employment § 269.  
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

**Law Review Articles:**

Review of 1985 legislation. 17 Pacific LJ 784.

**§ 1102.11. Escrow agents**

Any person or entity, other than a real estate licensee licensed pursuant to Part I (commencing with Section 10000) of Division 4 of the Business and Professions Code, acting in the capacity of an escrow agent for the transfer of real property subject to this article shall not be deemed the agent of the transferor or transferee for purposes of the disclosure requirements of this article, unless the person or entity is empowered to so act by an express written agreement to that effect. The extent of such an agency shall be governed by the written agreement.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987.

**Collateral References:**

Witkin Summary (9th ed) Agency and Employment § 269.  
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

**Law Review Articles:**

Review of 1985 legislation. 17 Pacific LJ 784.

**§ 1102.12. Broker's duties**

(a) If more than one licensed real estate broker is acting as an agent in a transaction subject to this article, the broker who has obtained the offer made by the transferee shall, except as otherwise provided in this article, deliver the disclosure required by this article to the

transferee, unless the transferor has given other written instructions for delivery.

(b) If a licensed real estate broker responsible for delivering the disclosures under this section cannot obtain the disclosure document required and does not have written assurance from the transferee that the disclosure has been received, the broker shall advise the transferee in writing of his or her rights to the disclosure. A licensed real estate broker responsible for delivering disclosures under this section shall maintain a record of the action taken to effect compliance in accordance with Section 10148 of the Business and Professions Code.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987; Amended Stats 1986 ch 460 § 6.

**Amendments:**

1986 Amendment: Substituted "delivering" for "making" in the first and second sentence of subd (b).

**Collateral References:**

Witkin Summary (9th ed) Agency and Employment § 269.  
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

**Law Review Articles:**

Review of 1985 legislation. 17 Pacific LJ 784.

**§ 1102.13. Failure to comply with article; Liability for damages**

No transfer subject to this article shall be invalidated solely because of the failure of any person to comply with any provision of this article. However, any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of this article shall be liable in the amount of actual damages suffered by a transferee.

Added Stats 1985 ch 1574 § 2, operative January 1, 1987.

**Collateral References:**

Witkin Summary (9th ed) Agency and Employment § 269.  
Miller & Starr, Cal Real Estate 2d §§ 1:123, 3:27.

**Law Review Articles:**

Review of 1985 legislation. 17 Pacific LJ 784.

**§ 1102.14. "Listing agent;" "Selling agent"**

(a) As used in this article, "listing agent" means listing agent as defined in subdivision (f) of Section 1086.

(b) As used in this article, "selling agent" means selling agent, as defined in subdivision (g) of Section 1086, exclusive of the requirement that the agent be a participant in a multiple listing service, as defined in Section 1087.

Added Stats 1986 ch 460 § 7.

**§ 1102.15. Disclosure of former ordnance locations within neighborhood area**

The seller of residential real property subject to this article who has

actual knowledge of any former federal or state ordnance locations within the neighborhood area shall give written notice of that knowledge as soon as practicable before transfer of title.

For purposes of this section, "former federal or state ordnance locations" means an area identified by an agency or instrumentality of the federal or state government as an area once used for military training purposes which may contain potentially explosive munitions. "Neighborhood area" means within one mile of the residential real property.

The disclosure required by this section does not limit or abridge any obligation for disclosure created by any other law or that may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction.

Added Stats 1989 ch 294 sec 1.

**Cross References:**

Disclosure of former ordnance location by landlord: CC § 1940.7.

**Collateral References:**

**Law Review Articles:**

Review of 1989 legislation. 21 Pacific LJ 542.

## ARTICLE 2

### Effect of Transfer

[Division 2, Property—Part 4, Acquisition of Property—Title 4, Transfer—Chapter 2, Transfer of Real Property—Article 2, Effect of Transfer; Enacted 1872.]

- § 1104. What easements pass with property
- § 1105. When fee simple title is presumed to pass
- § 1106. Subsequently acquired title passes by operation of law
- § 1107. Grant, how far conclusive on purchasers
- § 1108. Conveyances by owner for life or for years
- § 1109. Grant made on condition subsequent
- § 1110. Grant to take effect upon condition precedent
- § 1111. Grant of rents, reversions, and remainders
- § 1112. Transfer of land bounded by highway
- § 1113. Implied covenants
- § 1114. "Incumbrances"
- § 1115. Lineal and collateral warranties abolished
- § 1133. Sale or lease of subdivision lot subject to blanket encumbrance; Required notice to buyer or lessee
- § 1134. Disclosures required in condominium transfer
- § 1134.5. [Repealed]

**Cross References:**

Recording transfers of real property: CC §§ 1158 et seq.

**Collateral References:**

Witkin Evidence (3d ed) § 223.

Witkin Summary (9th ed) Real Property §§ 452 et seq.

Cal Jur 3d Deeds §§ 276 et seq.

Cal Digest of Official Reports 3d Series, Deeds §§ 1 et seq., Real Estate Sales §§ 1 et seq.

Am Jur 2d (Rev) Property §§ 43 et seq.

**Forms:**

Am Jur Legal Forms 2d, Real Estate Sales §§ 219:1 et seq.

**Annotations:**

Validity, construction, and application of statutes requiring assessment of environmental information prior to grants of entitlements for private land use. 76 ALR3d 388. Conveyance of land as including mature but unharvested crops. 51 ALR4th 1263.

Specificity of description of premises as affecting enforceability of contract to convey real property—modern cases. 73 ALR4th 135.

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

240 Main Street, Suite 500  
Juneau, Alaska 99801-2101

### MEMORANDUM

March 27, 1992

**SUBJECT:** Agent liability in CSHB 398 (L&C)

**TO:** Representative Pat Parnell  
Attn: Dan

**FROM:** Theresa L. Bannister *TB*  
Legislative Counsel

You have asked for an opinion relating to a real estate agent's liability under CSHB 398 (L&C). Specifically you have asked whether the inclusion of the acknowledgment-of-receipt line for the agent in the disclosure statement increases the agent's liability in the transfer of the real property. In my opinion, it does not. As the bill is presently drafted, an agent's signature on the line indicates only that the agent has received a copy of the disclosure statement. It does not imply that the agent warrants or approves the information in the disclosure statement. The disclosure statement clearly states that the representations made in the disclosure statement are not the representations of the agent (see p. 3, ll. 10 - 11 of the bill). The disclosure statement also clearly states that it is not a warranty by the agent (see p. 2, ll. 30 - 31 of the bill). Finally, the liability of the agent for the information in the disclosure statement is addressed by AS 34.70.030(b),<sup>1/</sup> and the criteria in that subsection will govern whether the agent is liable, not whether the agent signs an acknowledgement of receipt. In this bill as it is presently drafted, I would characterize the acknowledgment-of-receipt line as just that, an indication that the agent has received a copy of the document.

If I may be of further assistance, please advise.

TLB:pl  
92-214.plm

---

<sup>1/</sup>AS 34.70.030(b) reads as follows:

(b) The agent of a transferor is not liable for an error, inaccuracy, or omission in the information provided in the disclosure statement if the agent did not have personal knowledge of the error, inaccuracy, or omission, and the agent exercised due diligence in obtaining and transmitting the information.