

S B

187

Delivered To Senate Secretary

SEVENTEENTH LEGISLATURE
SENATE JUDICIARY COMMITTEE BILL FILE

BILL NUMBER: SB187 REAL ESTATE DISCLOSURE
ABBREVIATED TITLE:

SPONSER: Sen L & C ORIGINAL RECEIVED: 4-11-91
WRITTEN REQUEST TO SCHEDULE REC'D: _____ FROM: _____
SPONSER'S STATEMENT REC'D: _____ FROM: _____
SECTIONAL ANALYSIS RQST'D: _____ FROM: _____
SECTIONAL ANALYSIS RECEIVED: _____

FISCAL NOTE (ORIGINAL)
RQST'D OF: _____ REC'D FROM: OCC Lic. DATE: With File
RQST'D OF: _____ REC'D FROM: _____ DATE: _____
RQST'D OF: _____ REC'D FROM: _____ DATE: _____

FISCAL NOTE (C.S.)
RQST'D OF: _____ REC'D FROM: _____ DATE: _____
RQST'D OF: _____ REC'D FROM: _____ DATE: _____
RQST'D OF: _____ REC'D FROM: _____ DATE: _____

FIVE DAY NOTICE GIVEN: B. L & C NOTICE OF HEARINGS GIVEN: 4-18-91
COMMITTEES OF REFERRAL: FIRST: L & C SECOND: JUD THIRD: _____

COMMITTEE ACTION *Legislative Draftsman
Tom Bonister*

DATE: April 23, 91 Heard - B. Amendment to replace "AIDS" with
"Diseases prohibited by Fair Housing Act" adopted in
principal. Realtors "Kintan" to look at Death
penalty & evaluate risk under Alaska law.
CS filed November 1991
May 7

PERSONS TO BE NOTIFIED OF HEARING

- 1. SPONSOR
- 2. AGENCY
- 3. _____
- 4. _____
- 5. _____
- 6. _____
- 7. _____
- 8. _____
- 9. _____
- 10. _____

**SENATE BILL 187
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION**

**LETTER OF INTENT OF SENATE JUDICIARY
COMMITTEE**

It is the intent of this committee, by prohibiting liability for disclosures which would be contrary to the Federal Fair Housing Act of 1968 as amended, to protect real property owners and their agents from lawsuits regarding a failure to disclose the handicapped condition of any present or former owner or occupant of the real property.

It is this committee's intent to include in the meaning of "handicapped" those persons infected with or who have died from Human T-Lymphotropic Virus Type III - Lymphadenopathy Virus or Acquired Immune Deficiency Syndrome ["AIDS"]. This interpretation is consistent with federal law and is based in part on a recommendation of the General Counsel for the United States Department of Housing and Urban Development.

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. SB 187

Revision Date: _____ Department Affected: Commerce & Economic Dev.
 Title: An Act relating to the disclosure of certain facts in real property transactions BRU: Occupational Licensing
 Component: Administration
 Sponsor: Senate Labor & Commerce
 Requestor: Senate Labor & Commerce COMPONENT SERIAL NO.

0	3	5	6
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary.) The bill releases liability of an owner, the owner's agent, and the agent of the transferee with an interest in real property, from disclosing certain facts in real property transactions. Although the bill affects real estate licensees, the bill does not impact the licensing of real estate agents.

Prepared By: Jennifer Strickler, Administrative Officer Phone: 465-2144
 Division: Occupational Licensing Date: 3/22/91
 Approved by Commissioner: Glenn A. Olds *[Signature]* Asst. Comm.
 Agency: Department of Commerce & Economic Development Date: 3-22-91

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

Alaska State Legislature


Senator Drue Pearce, Chair
Senator Virginia Collins, Vice Chair
Senator Dick Eliason
Senator Rick Halford
Senator Jay Kerttula



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SENATE LABOR AND COMMERCE COMMITTEE

TO: Senator Halford
FROM: Senator Drue Pearce 
DATE: April 11, 1991
RE: Scheduling hearing of Psychologically Impacted
Properties Bill (SB-187) in Senate Judiciary.

Senate Bill 187 was requested by the Alaska Association of Realtors in an effort to bring state law into compliance with federal law.

Currently, under federal law, if a seller or his agent directly or inadvertently discloses that a previous inhabitant of a property had AIDS he is in violation of the Federal Fair Housing Act of 1968 Amendment. The federal law's intent is to protect handicapped individuals from unfair housing discrimination.

Under Alaska state tort law, if a seller or his agent does not disclose "material" facts that affect the value of the property under negotiation, he can be sued for the difference in perceived value. A "material" fact is broadly defined by state courts to mean anything that affects the price a reasonable consumer is willing to pay for a product or service.

Senate Bill 187 will make the following three facts "immaterial".

- 1) The fact that a death occurred on the property more than three years from the date the buyer offers to buy or rent the property.
- 2) The manner in which the death occurred.
- 3) The fact that a former occupant had AIDS or an AIDS related virus.

Would you please schedule this bill for a hearing as soon as possible.

SB 187 -

Fed law precludes mention of previous occupant
losing AFDS. Fair Housing Act of 1988 -

Adams -

Sec 804 F 2

? Add Hepatitis B ?

What about death before 3 years -

Ans - 3 years is arbitrary. Unreasonable to
research long longer period.

HUD Gen Counsel think Aids Discrimination
is prohibited by Fair Housing.

Dr — Dir of Div of Public Health -

Rodley suggests - Blocks liability for compliance with
"Fair Housing Act" Dr — agrees with this.

I'd like to research the "Death" part as
well.

Rodley - mth - Use "Fed Housing Act" language -

Sen Franks - Moves to Drop 3 year provision -

Works w Rodley - on CL re Death - See Calif
case - See Alaska cases -

(Exemption from
liability of seller
Purpose to protect sellers

Kam Erickson
Sen. Planning Office

SENATE BILL NO. 187

IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Introduced: 3/11/91
Referred: L.&C and Judiciary

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the disclosure of certain facts in real property transactions."

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 * Section 1. AS 09.45 is amended by adding a new section to article 9 to read:

4 Sec. 09.45.797. DISCLOSURE OF CERTAIN FACTS. (a) An owner of an interest in
5 real property, the owner's agent, and the agent of the transferee of the interest are not liable to
6 the transferee for the owner or agent's failure to disclose to the transferee that

7 ① a person died upon the real property or that the person died in a particular
8 manner, if the death occurred more than three years before the date the transferee offers to
9 purchase, lease, or rent the interest in real property; or

10 ~~② an occupant of the real property was or is infected with or died from human~~
11 ~~T lymphotropic virus type III lymphadenopathy virus or acquired immune deficiency syndrome.~~

12 (b) In this section, "transferee" includes a purchaser, lessee, and easement holder.

13 * Sec. 2. This Act does not apply to a failure to disclose information regarding an interest in real
14 property unless the failure to disclose occurs on or after the effective date of this Act.



REALTOR[®]

Southeast Board of REALTORS[®]

P.O. Box 32646
Juneau, Alaska 99803-2646

April 29, 1991

Senator Rick Halford, Chairman
Senate Judiciary Committee
Alaska State Legislature

Dear Senator Halford,

On behalf of the ALASKA ASSOCIATION of REALTORS, this letter will serve as notice that our association does not object to the removal of subsection (1), lines 7, 8, & 9 of Senate Bill No. 187.

Best regards,

Konrad B. Reinke, President
Southeast Board of REALTORS

Conrad Reinke

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Hand Deliver

January 30, 1990

Ms. Dea Turner
Alaska Association of Realtors
741 Sesame Street, Suite 100
Anchorage, Alaska 99503

Dear Dea:

Re: Proposed Legislation Regarding
Psychologically-Impacted Properties
Our File No. 90-7152.003

The following are three different drafts of proposed legislation regarding psychologically-impacted properties. I found three logical places for its insertion into the existing statutes: in the Real Estate Brokers and Salesmen Chapter (A.S. 08.88); in the Miscellaneous Chapter of the Code of Civil Procedure A.S. 09.65); and in the Real Property Chapter of the Code of Civil Procedure (A.S. 09.45). I doubt that insertion in all three places is necessary. I drafted each one a bit differently, to illustrate to you the various possibilities. The versions are generally interchangeable. I have highlighted "disposable portions." In no version did I include language that I consider to be unwise or overly ambiguous.

An Act Relating To Businesses and Professions --
Real Estate Brokers and Salesmen

IT IS ENACTED that:

Section 1, Title 8, Chapter 88 is amended to include Section .992:

.992 Duty to Disclose Certain Facts Regarding Real Property.

(a) Nothing in this chapter should be construed to impose a duty upon a real estate broker, agent, or salesperson to investigate or disclose the existence of the following facts or suspicions;

Ms. Dea Turner
January 30, 1990
Page 2

(1) that an occupant of real property is or was infected with Human Immunodeficiency Virus or diagnosed with Acquired Immune Deficiency Syndrome ("AIDS"), [or any other disease which has been determined by medical evidence to be highly unlikely to be transmitted by occupying a building or dwelling]; or

(2) [that the real property was the site of a felony or suicide];

(b) no cause of action shall arise against the owner of real property or his or her agent for failure to disclose the facts or suspicions described in this section.

*** *** ***

IT IS ENACTED that:

Section 1, Title 9, Chapter 45, Article 9 is amended to include Section .796:

.796 Civil Liability for Failure to Disclose Certain Facts in Real Property Transactions.

(a) No cause of action shall arise against an owner of real property or the agent of such owner, or any agent for the transferee of real property, for the failure to disclose in any real property transaction the fact or suspicion that the property;

(1) was or is occupied by a person infected with [Human Immunodeficiency Virus or diagnosed with Acquired Immune Deficiency Syndrome ("AIDS")] [or any other disease which has been determined by medical evidence to be highly unlikely to be transmitted by occupying a building or dwelling presently or previously occupied by an infected person], provided that;

(2) [an owner and his or her agent shall answer truthfully to the best of his or her knowledge any questions concerning the provisions of this section.]

*** *** ***

Ms. Dea Turner
January 30, 1990
Page 3

IT IS ENACTED that:

Section 1, Title 9, Chapter 65 is amended to include Section .112:

.112 Civil Liability for Failure to Disclose Certain Facts in a Real Property Transaction.

(a) No cause of action arises against an owner of real property or his or her agent, or any agent of a transferee of real property, for the failure to disclose to the transferee the occurrence of a person's death upon the real property or the manner of death [where the death occurred more than three years prior to the date the transferee offers to purchase, lease, or rent the real property]; or

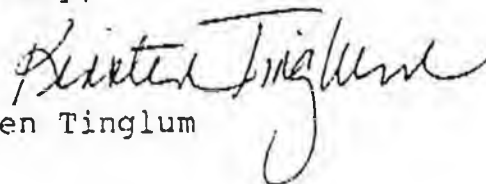
(b) that an occupant of the property was or is affected with, or died from, Human T-lymphotropic Virus Type III-Lymphadenopathy Virus or Acquired Immune Deficiency Syndrome ("AIDS");

(c) as used in this section, "transferee" includes a purchaser, lessee, renter, or easement holder of or on real property;

(d) [nothing in this section shall be construed to immunize an owner or his or her agent from making an intentional misrepresentation in response to a direct inquiry from a transferee or prospective transferee of real property, concerning the conditions or events, facts or suspicions described in this section.]

I will be happy to discuss with you these alternatives at your earliest convenience.

Sincerely,


Kirsten Tinglum

jpv

Proposed

SENATE OF MARYLAND

11r0727
SB 668/90 - JPR

No. 131

NI

By: Senator Dorman
Introduced and read first time: January 9, 1991
Assigned to: Judicial Proceedings

A BILL ENTITLED

1 AN ACT concerning

2 Real Estate Brokers - Disclosures - History of Property

3 FOR the purpose of specifying that, for purposes relating to disciplinary actions against
4 licensed real estate brokers, licensed real estate salespersons and applicants of
5 certain licenses, certain facts are not material facts relating to property for sale or
6 lease; providing immunity for a licensed real estate broker or licensed real estate
7 salesperson and an owner or seller of real property for failure to disclose a fact that
8 an owner or occupant of property is, was, or is suspected to be infected with a
9 certain virus, diagnosed with a certain disease, or that certain acts occurred on the
10 property; and generally relating to the disclosure of material facts relating to
11 property for sale or lease.

12 BY adding to

13 Article - Business Occupations and Professions

14 Section 16-322.1

15 Annotated Code of Maryland

16 (1989 Volume and 1990 Supplement)

17 BY adding to

18 Article - Real Property

19 Section 2-120

20 Annotated Code of Maryland

21 (1988 Replacement Volume and 1990 Supplement)

22 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY C
23 MARYLAND, That the Laws of Maryland read as follows:

24 Article - Business Occupations and Professions

25 16-322.1.

26 (A) FOR PURPOSES OF § 16-322(A) OF THIS SUBTITLE, IT IS NOT
27 MATERIAL FACT RELATING TO PROPERTY OFFERED FOR SALE OR LEA
28 THAT:

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
(Brackets) indicate matter deleted from existing law.

2

SENATE BILL No. 131

1 (1) AN OWNER OR OCCUPANT OF THE PROPERTY IS, WAS, OR IS
2 SUSPECTED TO BE:

3 (I) INFECTED WITH HUMAN IMMUNODEFICIENCY VIRUS;
4 OR

5 (II) DIAGNOSED WITH ACQUIRED IMMUNODEFICIENCY
6 SYNDROME; OR

7 (2) A HOMICIDE, SUICIDE, NATURAL DEATH, OR FELONY
8 OCCURRED ON THE PROPERTY.

9 (B) (1) IT IS NOT GROUNDS FOR A DISCIPLINARY ACTION AGAINST
10 A LICENSEE UNDER THIS SUBTITLE, THAT A LICENSEE DID NOT DISCLOSE
11 TO A PROSPECTIVE PURCHASER OR LESSEE, A FACT CONTAINED IN
12 SUBSECTION (A) OF THIS SECTION.

13 (2) A LICENSEE MAY NOT BE HELD PERSONALLY LIABLE FOR
14 FAILURE TO DISCLOSE A FACT CONTAINED IN SUBSECTION (A) OF THIS
15 SECTION.

Article - Real Property

16
17 2-120.

18 (A) UNDER THIS TITLE, IT IS NOT A MATERIAL FACT OR A LATENT
19 DEFECT RELATING TO PROPERTY OFFERED FOR SALE OR LEASE THAT:

20 (1) AN OWNER OR OCCUPANT OF THE PROPERTY IS, WAS, OR IS
21 SUSPECTED TO BE:

22 (I) INFECTED WITH HUMAN IMMUNODEFICIENCY VIRUS;
23 OR

24 (II) DIAGNOSED WITH ACQUIRED IMMUNODEFICIENCY
25 SYNDROME; OR

26 (2) A HOMICIDE, SUICIDE, NATURAL DEATH, OR FELONY
27 OCCURRED ON THE PROPERTY.

28 (B) AN OWNER OR SELLER OF REAL PROPERTY OR THE OWNER'S
29 OR SELLER'S AGENT SHALL BE IMMUNE FROM CIVIL LIABILITY OR
30 CRIMINAL PENALTY FOR FAILURE TO DISCLOSE A FACT CONTAINED IN
31 SUBSECTION (A) OF THIS SECTION.

32 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
33 July 1, 1991.

Vermont

S/P

BILL AS INTRODUCED
1991 (0051B)

H.51
Page 1

1 H.51
 2 Introduced by Representative O'Brien of Stowe
 3 Referred to Committee on
 4 Date:
 5 Subject: Professions and occupations; real estate; disclosure
 6 Statement of purpose: This bill proposes that real estate brokers
 7 and salespersons and sellers shall not be responsible for disclosing
 8 the fact that property has been occupied by a person with a disease
 9 which is unlikely to be transmitted through occupancy of the
 10 dwelling or that the property was the site of a felony or a suicide.

11 AN ACT RELATING TO DISCLOSURE OF INFORMATION IN A REAL ESTATE
 12 TRANSACTION

13 It is hereby enacted by the General Assembly of the State of Vermont:
 14 Sec. 1. 26 V.S.A. § 2302 is added to read:
 15 § 2302. FACTS NOT MATERIAL TO A REAL ESTATE TRANSACTION
 16 (a) The following facts are not material to a real estate
 17 transaction, and failure to disclose such facts shall not be a
 18 violation of this chapter:

1 (1) The property is or was inhabited by a person infected with
2 human immunodeficiency virus or diagnosed as having acquired immune
3 deficiency syndrome, or any other disease which has been determined
4 by medical evidence to be highly unlikely to be transmitted through
5 the occupancy of a dwelling place.

6 (2) The property was the site of a felony or a suicide.

7 (b) No cause of action shall arise against an owner of real
8 estate or his or her agent for the failure to disclose to the
9 transferee the facts referred to in subsection (a) of this section.

MAR 18 1991



REALTOR

ALASKA ASSOCIATION OF REALTORS, INC.

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

March 13, 1991

Senator Drue Pearce
Alaska State Legislature
P.O. Box V
Juneau, AK 99811
Telefax 463-5352

Re: S.B. 187

Dear Senator Pearce:

The Alaska Association of REALTORS® is writing in support of S.B. 187, "an act relating to the disclosure of certain facts in real property transactions."

This short bill, if enacted, would serve to clarify the duties and responsibilities of real property owners and real estate agents with regard to disclosure of certain facts surrounding so-called "psychologically impacted" properties.

Currently, fourteen other states have this type of legislation in place. The Alaska Association of REALTORS® supports S.B. 187 and urges the legislature to act on passage of this bill.

Sincerely,

Dea Turner —

Dea Turner
Executive Vice President





ALASKA ASSOCIATION OF REALTORS, INC.
741 Sesame Street, Suite 100 • Anchorage, Alaska 99503
Telephone 907-563-7133

DATE: March 18, 1991
TO: Senator Drue Pearce
FROM: Dea Turner *D.*
Executive Vice President
SUBJECT: S.B. 187

In response to your request for an analysis of the proposed legislation, the Alaska Association of REALTORS® offers the following.

Enactment of S.B. 187 serves several important functions. First, it provides protection to an owner's interest in real property in that it limits the stigma that may be attached to a particular property through the acts of the former owner, or by events that may have occurred on the property. Acts or occurrences are not "material facts" that should have any bearing on establishing the value of a property. Likewise, the value of a property should not be indefinitely affected by an act or occurrence that may have taken place years previously. In short, this bill protects an owner's ability to receive fair market value for the property at time of sale or rental.

Secondly, S.B. 187 protects both an owner and his agent or representative from inadvertent violation of the Fair Housing Act of 1968 amendment, which establishes certain groups of people that are protected from discrimination. One of these groups is handicapped individuals, which includes victims of AIDS.

On May 9, 1990, HUD's General Counsel, Frank Keating, made the following statement in a letter to the National Association of REALTORS®: "We agree that unsolicited statements made by a real estate broker or agent that a current or previous occupant of the property has AIDS would violate



Senator Drue Pearce

March 18, 1991

Page 2

the (Federal Fair Housing Act). A broker's unsolicited statements to a prospective buyer or renter would indicate a discriminatory preference or limitation based on handicap." In this same letter, Mr. Keating went on to say that if asked whether an occupant has AIDS, a broker should decline to respond.

Finally, this bill reiterates for real estate agents as seller's/owner's representatives their fiduciary obligation to protect the client's confidences and not to disclose anything that would harm the client.

At the present time the following states have adopted similar legislation: Nevada, Connecticut, California, Rhode Island, Georgia, Oklahoma, Oregon, South Carolina, North Carolina, Florida, Hawaii, Texas, Illinois, and New Jersey.

We hope this clarifies for you the positive effect this legislation would have.

PSYCHOLOGICALLY IMPACTED PROPERTY

ISSUE

~~Disclosure of psychological impacts (stigmas) remains an important issue for real estate practitioners. The issue involves disclosure of facts about the owner or occupant of the property and not facts solely associated with the real estate itself.~~

The AIDS Crisis has ~~been the driving force behind this complex~~ issue causing the real estate practitioner to be placed in the difficult position between a seller's privacy and civil rights under Fair Housing, and the buyer's desire to know about an owner or occupant of the property being sold. In addition to AIDS, psychological impacts include: murder, suicide, criminal activity such as drug trafficking or prostitution which have, or are alleged to have, occurred on the property.

BACKGROUND

Much of the concern with the question of disclosure of psychologically impacted property began with a California court case that did not involve AIDS, but a home which was the site of a multiple murder. Reed v. King, 145 Cal. App. 3rd 261, 193 Cal Rptr. 130 (1983) involved a sale of a residence in which a woman and her four children had been murdered 10 years prior to the sale. Neither the seller nor his agent informed the buyer that the murders had taken place. Both the seller and agent represented that the house was in good condition and fit for an elderly lady living alone. After the buyer moved in, she was informed by the neighbors that no one had been interested in purchasing the property because of the stigma resulting from the murders. The buyer sued alleging the property was worthless because of the murders. The trial court dismissed the case. But on appeal, the court held that a vendor of real property has a duty to disclose to the buyer facts materially affecting the value of the property when the facts are known only to the vendor and are not readily detectable by the buyer.

In response to the problem, California, Florida and Hawaii enacted legislation which provided that no cause of action shall arise against a seller of real property, or his agent, for a failure to disclose a prior occupant had, or was suspected to have, AIDS. The California statute further extended the immunity from suit to failure to disclose deaths which occurred on the property more than 3 years prior to sale.

NATIONAL ASSOCIATION OF REALTORS® POLICY

The NATIONAL ASSOCIATION OF REALTORS® encourages states to adopt legislation to declare that all psychological impacts or stigmas which are associated with real property are not material facts and need not be disclosed to a potential purchaser or lessee. (1989 Statement of Policy, page 14)

NATIONAL ASSOCIATION OF REALTORS® ACTIVITY

In addition to the policy statement, the NATIONAL ASSOCIATION OF REALTORS® has provided each state REALTOR® Association with the following model legislative language on Psychologically Impacted Property. The following language is proposed to be drafted into bill form appropriate to the legislative style of the state to amend the real estate license law.

Sections _____ of Chapter _____ of the laws of the State of _____, the Real Estate Licensure Act of (19__), are hereby amended to read as follows:

- (1) Section ____: The fact or suspicion that a property might be or is psychologically impacted, such impact being the result of facts or suspicions, including but not limited to :
 - (a) that an occupant of real property is, or was at any time suspected to be, infected or

has been infected with Human Immuno-deficiency Virus or diagnosed with Acquired Immune Deficiency Syndrome, or any other disease which has been determined by medical evidence to be highly unlikely to be transmitted through the occupancy of a dwelling place; or,

(b) that the property was, or was at any time suspected to have been, the site of a homicide, or other felony or a suicide;

is not a material fact that must be disclosed in a real estate transaction.

(2) Section ____: No cause of action shall arise against an owner of real estate or his or her agent for the failure to disclose to the transferee that the transferred property was psychologically impacted as defined in Section ____ of this Chapter.

FEDERAL UPDATE

The Federal Fair Housing Act of 1968 amendments, effective March 12, 1989, include the handicapped, including persons with AIDS, as a new protected class. This means that real estate agents and brokers are prohibited from discriminating against this class of individual in the sale or rental of real property. Although the legislation does not directly address the issue of whether a real estate licensee can, without being specifically questioned by a potential buyer, disclose that an occupant of a property for sale had or was suspected to have AIDS, such a disclosure could be considered a discriminatory action which is clearly prohibited by the Federal Fair Housing Act. However, neither the Act nor the regulations issued by the Department of Housing and Urban Development (HUD), make clear a licensee's course of action if directly asked by a potential buyer whether the property has been the home of an AIDS victim.

NAR's Office of the General Counsel requested clarification of the regulations; however, the resulting correspondence has failed to specify when disclosure of a psychological impacts would be considered discriminatory.

CURRENT ACTIVITY ANALYSIS

14 States have passed legislation based on the NAR Model or relating to the issue of stigmatized property.

Florida, Hawaii, Illinois and Texas have enacted AIDS-only legislation; and California, Connecticut, Georgia, Nevada, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina and Utah have enacted legislation dealing with disclosure of all psychological impacts. The New Jersey real estate commission has also issued an advisory opinion on this issue.

Legislation on psychologically-impacted property disclosure is being considered in Alaska, Maryland, New Mexico and Vermont.

In late 1990, the Georgia Attorney General issued an opinion on the question of disclosure of stigmas associated with the sale of real property and the Georgia Legislature is considering legislation codifying his opinion. The Attorney General, in a response to a request from the Georgia Real Estate Commission, stated that "[s]ince the Fair Housing Act applies to persons with AIDS as handicapped individuals, a broker cannot disclose that the occupant of a dwelling has AIDS without running afoul of the Fair Housing Act."

In correspondence with NAR on this issue, HUD has suggested that disclosing that an owner or occupant has AIDS may violate the Fair Housing Act in some situations, but they have failed to delineate what circumstances would constitute a violation. As a result, NAR's Office of the General Counsel has suggested that Georgia's Attorney General's opinion would be in doubt in federal court because HUD has not gone as far in determining discrimination against persons with AIDS in real estate transactions. Therefore, while removing the section in Georgia's law that require a seller or a seller's agent to respond truthfully does not violate federal law, stating that such disclosure is a violation of the FHA is not supported by HUD's public statements.

For The Record . . .



Vol. 1

Fall 1990

HUD Says AIDS Disclosure Can Violate Title VIII

by Robert D. Butters, Deputy General Counsel

One of the most perplexing issues confronting real estate brokers and their legal counsel is the relationship between the recent changes to Title VIII contained in the Federal Fair Housing Act Amendments of 1988 and state tort law. Nowhere is this ambiguity more acute than over the question of when, if ever, a real estate broker may disclose that an owner or occupant of a dwelling has, or recently died from, AIDS or an AIDS related illness. The issue arises from a direct confrontation between two well established public policies. The first is the policy of non-discrimination against persons with handicaps reflected in the recent Title VIII amendments. A second, and arguably conflicting, public policy is reflected in the evolving common law of misrepresentation, and the broad consumer protection statutes adopted by many states prohibiting acts or omissions that are, or can be, misleading or deceptive. The key issue in most misrepresentation or consumer fraud cases is whether the alleged statement or omission was "material." A "material" fact in turn is broadly defined to mean anything that bears upon the price a reasonable consumer is willing to pay for a product or service.

Broadly construing the "materiality" concept, a creditable argument can be made that a property owner's AIDS condition is material given the fear, albeit irrational, held by some persons that AIDS can be transmitted by casual contact notwithstanding the overwhelming scientific evidence to the contrary, and also the social stigma attached to homosexuality and intravenous drug use through which AIDS is known to be communicated. The argument that an owner's AIDS condition is a material fact is also bolstered by decisions such as *Reed v. King*, 145 Cal. App. 3d 261, 193 Cal. Rptr. 130 (1983), which held that a murder occurring on the premises

several years earlier could be a material fact if the plaintiff could prove a loss of market value attributed to the property's stigma.

Given the conflict between the competing public policies of non-discrimination against AIDS victims in the provision of real estate related services, and prohibiting the withholding of material facts from consumers about products and services for sale, the National Association sought an opinion in January of 1990 from the General Counsel of the Department of Housing and Urban Development concerning whether, and under what circumstances, the federal fair housing laws prohibit a real estate broker from disclosing

In This Issue:

Feature

HUD Says AIDS Disclosure Can Violate Title VIII

Issues In Focus

DRS Mediation: Answers To Liability Questions

Property Seizures Linked To "War On Drugs"

Federal Court Confirms Board's Right To Restrict MLS to REALTORS®

In Brief

Buyers' Agent Fails To Prove Conspiracy

Circuit Holds Plaintiff Must Prove Intent In Racial Steering Case

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that a homeowner, or someone in the owner's household has, or died from, AIDS. On May 9, 1990, HUD's General Counsel, Frank Keating, responded to the National Association's inquiry. In that response, Mr. Keating made the following unambiguous statement:

"... we agree that unsolicited statements made by a real estate broker or agent that a current or previous occupant of the property has AIDS would violate the [Federal Fair Housing Act]. A broker's unsolicited statements to a prospective buyer or renter would indicate a discriminatory preference or limitation based on handicap."

This portion of Mr. Keating's response is consistent with the position the National Association took in its January, 1990 inquiry letter. In the National Association's view, an unsolicited reference by a real estate broker to the handicapped status of an occupant of a dwelling could be construed as a notice or statement that the property should be avoided because of the occupant's handicap and, therefore, violate Section 804(c) of Title VIII. It is also possible that such a reference could be construed as an attempt to steer a prospect away from a dwelling based upon handicap in violation of Section 804(a).

HUD's position that unsolicited disclosure of an occupant's AIDS condition violates the federal fair housing laws is strong persuasive authority for the proposition that the federal fair housing laws preempt any interpretation of state statutory or common law that might impose an affirmative duty upon a real estate broker to investi-

gate and disclose whether an occupant of a dwelling has AIDS on the ground that AIDS is a "material" fact in a real estate transaction.

"... if a broker is asked whether an occupant has AIDS they should decline to respond."

Consequently, real estate brokers should be counseled that they do not have any duty to investigate whether an occupant has AIDS and, indeed, should scrupulously avoid making any inquiries that are likely to elicit this information. Likewise, if a real estate broker unavoidably learns that an occupant has AIDS, the broker does not have any affirmative duty to disclose that information while marketing the property. Hence, the obligations regarding an occupant's AIDS condition are no different than obligations regarding an occupant's race or religion. Clearly a broker does not have any duty to discover an occupant's religion, or disclose that fact, if known, to prospective buyers.

Uncertainty still remains, however, concerning the broker's liability under the federal fair housing laws for responding truthfully and objectively to a buyer's direct inquiry concerning whether a dwelling occupant has AIDS. In his letter, Mr. Keating offers his advice that if a broker is asked whether an occupant has AIDS they should decline to respond.

This is sound advice for a variety of reasons not directly related to liability under the fair housing laws. Brokers who list property for sale or rent owe

fiduciary duties to owners under the common law of agency. These fiduciary duties include a duty to safeguard a client's confidences and secrets. An occupant's AIDS condition certainly could be reasonably construed to be information protected from disclosure without the client's prior consent. A person's private medical history also could be construed as information sufficiently personal to justify an invasion of privacy claim if disclosed without prior consent. For these reasons, the National Association agrees that brokers should not disclose a seller's AIDS condition, even if asked by a potential buyer. The National Association's advice to brokers who unavoidably learn of an occupant's AIDS condition, and who are subsequently asked an unsolicited question by a prospective buyer about that condition, is to respond by advising the buyer that the broker's company has a policy of not addressing that subject one way or the other. If the buyer believes this information is relevant to their purchasing decision they must pursue that investigation on their own.

Attention EOs!

Please help us keep our State and Board Legal Counsel records accurate and ensure timely delivery of NAR correspondence to your legal counsel. If your board or state association is presently retaining legal counsel, please complete the enclosed form giving us your counsel's name, firm name, mailing address, telephone number and board represented to Kim Johnson, Office of the General Counsel, NATIONAL ASSOCIATION OF REALTORS®, 430 N. Michigan Avenue, Chicago, IL 60611. Thanks!

AIDS Legislation

Several states have passed legislation on disclosure of AIDS and other stigmas such as murders, suicides and ghosts. Most of the statutes provide that the particular stigmas are not material facts, and there is no cause of action against the owner or real estate agent for failing to disclose this information.

STATE RECAP

NV - AIDS and other stigmas
 CT - AIDS and other stigmas
 CA - AIDS and other stigmas
 RI - AIDS and other stigmas
 GA - AIDS and other stigmas
 OK - AIDS and other stigmas
 OR - AIDS and other stigmas
 SC - AIDS and other stigmas
 NC - AIDS and other stigmas
 FL - AIDS only
 HI - AIDS only
 TX - AIDS only
 IL - AIDS only
 NJ - AIDS only (Real Estate Commission Advisory Opinion)

Note: Consult statute or regulat on for specific information on the real estate agent's duties and obligations.

Please direct questions and information to Holly Heckathorne, Associate Counsel, Office of the General Counsel, NATIONAL ASSOCIATION OF REALTORS®, 430 North Michigan Avenue, Chicago, Illinois 60611.

The National Association's concern, therefore, is not with the substance of HUD's advice regarding the proper response to a buyer's direct question about an occupant's AIDS condition, but rather HUD's rationale for its advice. In his May letter, Mr. Keating stated that a real estate broker "may run afoul of the Act by aiding a buyer or renter in steering clear of properties owned or occupied by people with AIDS." Mr. Keating further stated that once a broker is aware that a buyer harbors a preference not to live in or around a home occupied by an AIDS victim, the broker may not cooperate with the buyer by identifying properties to pursue or avoid.

This rationale implicitly adopts the view that any reference to the protected status of a person living in or around a dwelling violates Title VIII, even if the information is truthful and provided only in response to a direct unsolicited question from a buyer. This construction of Title VIII reflects an assumption that Title VIII limits a broker's ability to cooperate with a buyer who is exercising his or her own freedom of choice in housing — a right supposedly guaranteed by Title VIII.

One will not find any provision in Title VIII, or its legislative history, that suggests that the Act contains any limitation upon a homeseeker's freedom to choose where he or she will live. To be sure, an owner's freedom to sell or rent to whomever they choose is directly restrained by Title VIII, and any broker who cooperates with an owner to discriminate against a homeseeker unquestionably violates Title VIII. But cooperation with a homeseeker is not equally constrained. So

long as a homeseeker's freedom of choice is not limited by an owner, broker, property manager or any other person providing real estate related services, a homeseeker is free to choose where to live, even if that choice is based upon criteria an owner is expressly forbidden to employ in choosing to whom to sell or rent. Therefore, if a homeseeker is free to make a housing choice based upon criteria otherwise foreclosed to an owner, a real estate broker who provides truthful information, upon request, to a homeseeker to allow him or her to exercise their freedom of choice cannot violate the Act. By analogy, one cannot commit a crime by aiding and abetting an otherwise lawful act. "Aiding and abetting" is a crime only if the underlying act is also a crime.

In conclusion, the weight of authority supports the view that an occupant's AIDS condition, is a fact that a real estate broker does not have any duty to discover, or if known, to disclose to any prospective buyer. These are also facts that need not, and should not, be disclosed even if the broker is asked a direct question by a homeseeker. What still remains unclear is whether this course of conduct is dictated by concerns about protecting the occupant's right to privacy in areas not material to a real estate transaction, or by an interpretation of Title VIII that imposes liability upon a broker for assisting a homeseeker who has freely and unilaterally chosen to take racial, ethnic, or handicap considerations into account in selecting a dwelling. ■

Director's Report

Between a Rock and a Hard Place

by Mary Bettis, The Bettis Co.

A new area of disclosure issues is emerging — psychologically impacted (or stigmatized) property — which involves disclosure of facts not associated with the real estate itself, but rather facts about the owner or occupant of the property.

REALTORS FIND THEMSELVES BETWEEN A ROCK . . .

Would you as a REALTOR disclose to a potential buyer or tenant that occupants of a residence have or had AIDS? Would you disclose the fact that the property was the site of a homicide, other felony, or a suicide? What is your responsibility to seek such personal information about the seller or previous tenant? Might it be considered a material factor?

. . . AND A HARD PLACE

If you were to disclose such psychological factors, would you be guilty of discrimination, or of invasion of privacy? By merely bringing up the matter in your disclosure, would you create or keep alive a stigmatized — feelings that adversely affect the value of the property? Would you violate your responsibility to your owner/client?

My partners and I discovered first hand the adverse effect of keeping a stigma alive. Three years ago, a woman and her two children were murdered in an apartment building which we own. Everyone, tenants and neighbors as well as ourselves, were determined to cooperate with the police investigation in any way possible. The apartment was sealed and the area cordoned off.

There was a prolonged investigation and notoriety. Tenants moved and were difficult to replace. Finally, when a relative of the victims was apprehended, tried, and convicted for the crime, and the victims' apartment was made new from the wallboard out, we thought we could put the matter behind us.

But soon after the conviction, the victims' husband and father called the new tenants living in the apartment. He told them his wife and children had been murdered there, and wondered if he could come over and look around one last time before leaving town. The tenants gave their moving notice that day.

On advice of council, we have since disclosed the matter to every prospective tenant. In doing so, we feel we needlessly keep alive the psychologically chilling effect, sabotage our efforts to create a pleasant environment, and adversely affect the value of our property.

IS DISCLOSURE REQUIRED . . . ?

Much of the concern with the question of disclosure began with *Reed v. King*, 145 Cal. App. 3rd 261 Rprt. 130 (1983), a California court case, regarding the sale of a home in which a woman and her four children had been murdered 10 years prior to the sale. Neither the

seller or nor his agent informed the purchaser that the murder had taken place. Both the seller and agent represented that the house was in good condition and fit for an elderly lady living alone. After the purchaser moved in, she was informed by the neighbors that no one had been interested in purchasing the property because of the stigma following the murders. The buyer sued alleging the property was worth less because of the murders. The trial court dismissed the case. But on appeal, the court held that a vendor of real property has a duty to disclose to the purchaser facts materially affecting the value of the property when the facts are known only to the vendor and are not readily detectable by the purchaser.

This case was the first to find a cause of action for the failure to disclose a stigma attached to a residential property. The same line of reasoning could be used for failure to disclose the stigma that might attach to a residence as a result of habitation by an AIDS victim.

The *Reed v. King* case was cited in a civil action involving the sale of a home in California. In *Roberts v. Heramis*, slip op. no. 5943942, the purchaser sued to rescind a purchase agreement and recover a \$10,000 escrow deposit when she learned of the death of one of the sellers of hepatitis and the illness of the other seller with pneumonia. The purchaser suspected that at least one of the sellers had AIDS. The case was settled out of court. It has no value as precedent. But it did show that a complaint could be filed based on an allegation that the seller failed to disclose the habitation of an AIDS victim in a residence for sale.

OR IS DISCLOSURE PROHIBITED . . . ?

In response to the problem, California enacted legislation which provides that no cause of action shall arise against a seller of real property, or his agent, for a failure to disclose deaths which occurred on the property more than 3 years prior to sale. The California statute also provides immunity for failure to disclose that a prior occupant had, or was suspected to have, AIDS.

The Federal Fair Housing Act of 1968 amendments, effective March 12, 1989, include the handicapped as a new protected class. Real estate agents and brokers are prohibited from discriminating against the handicapped (which can include persons with AIDS) in the sale or rental of real property. Although the legislation does not directly address the issue of whether a real estate licensee can, without being specifically questioned by a potential buyer, disclose that an occupant of a property for sale had or was suspected to have AIDS, such a disclosure could be considered a discriminatory action which is clearly prohibited by the Federal Fair Housing

Act. However, neither the Act nor the regulations, makes clear a licensee's course of action if directly asked by a potential buyer whether the property has been the home of an AIDS victim.

In response to the problem, The National Association of Realtors adopted a policy and model legislation. Anita Bates and her committee got to work seeing a sponsor to introduce a bill in Juneau this session. The text of the policy and model legislation follows:

NATIONAL ASSOCIATION OF REALTORS® POLICY

Psychologically Impacted Properties

The NATIONAL ASSOCIATION OF REALTORS® encourages states to adopt legislation to declare that all psychological impacts or stigmas which are associated with real property are not material facts and need not be disclosed to a potential purchaser or lessee. (1989 Statement of Policy, page 14)

NATIONAL ASSOCIATION OF REALTORS® ACTIVITY

In addition to the policy statement, the NATIONAL ASSOCIATION OF REALTORS® has provided each state REALTOR® Association with the following model legislative language on Psychologically Impacted Property:

The following language is proposed to be drafted into bill form appropriate to the legislative style of the state to amend the real estate license law.


Sections _____ of Chapter _____ of the laws of the State of _____ the Real Estate Licensure Act of (19____), are hereby amended to read as follows:

- (1) Section _____: The fact or suspicion that a property might be or is psychologically impacted, such impact being the result of facts or suspicious, including but not limited to:
 - (a) that an occupant of real property is, or was at any time suspected to be, infected or has been infected with Human Immuno-deficiency Virus or diagnosed with Acquired Immune Deficiency Syndrome, or any other disease which has been determined by medical evidence to be highly-unlikely to be transmitted through the occupancy of a dwelling place; or
 - (b) that the property was, or was at any time suspected to have been, the site of a homicide, or other felony or a suicide; is not a material fact that must be disclosed in a real estate transaction.

- (2) Section _____: No cause of action shall arise against an owner of real estate or his or her agent for the failure to disclose to the transferee that the transferred property was psychologically impacted as defined in Section _____ of this Chapter.

(The National Association of Realtors provided the background information for this article.)

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