

S B

187

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 3/11/91

FURTHER: Judiciary

Date of 5-Day Notice: 4-4-91
(in accordance with Uniform Rule 23)

DATE TURNED
INTO OFFICE: _____

L&C Committee considered SB 187

Disclosure of certain facts in real property transactions.

and recommended:

- replace with _____ CS _____ same title
- attached amendment(s) new title
- _____ letter of intent adopted
- do pass
- do not pass
- no recommendation
- individual recommendations
- further referral to _____

ATTACHES NEW FISCAL NOTE(S):

Department(s)/Date:

Department(s)/Date:

- fiscal note(s) _____ zero fiscal note(s) _____
- _____
- _____

- appropriation-no fiscal note
- Governor's bill w/fiscal note

SIGNING DO PASS:

[Signature]

OTHER RECOMMENDATIONS:

[Signature]

[Signature]
 Chair: Signature and Recommendation

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: Members of the Labor & Commerce Committee

FROM: Senator Drue Pearce

DATE: April 8, 1994

RE: Introduction of Psychologically Impacted Properties
Bill (SB-187).

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.

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
Executive Vice President





ALASKA ASSOCIATION OF REALTORS, INC.
741 Sesame Street, Suite 100 • Anchorage, Alaska 99503
Telephone 907-583-7133

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.

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 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. Heramb*, 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 go 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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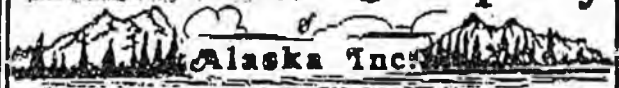
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For The Record . . .



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

Court Affirms Unconstitutionality Of Village Anti-Solicitation Ordinance

Board Discipline Upheld

FTC Criticizes Proposed New York Regulations

Missouri Independent MLS Seeks Justice Department Antitrust Lawsuit

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. Thank!

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 regulation 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. ■