

**The Real Property Section of the
Bar Association of San Francisco**

presents

**BRINGING DOWN THE HOUSE:
ASSESSING DAMAGES IN REAL ESTATE CASES**

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BRINGING DOWN THE HOUSE: ASSESSING DAMAGES IN REAL ESTATE CASES

I. PRE-CLOSING ISSUES

A. BREACH OF CONTRACT

1. BUYER'S DAMAGES FOR SELLER'S FAILURE TO CONVEY

a. Monetary damages. Damages are the difference between purchase price and value of land, at time of breach, plus consequential damages and interest (Civ. Code § 3306)

- (1) Title and escrow expenses
- (2) Expenses in preparing to enter the property
- (3) Property inspection expenses
- (4) Interest

b. Specific Performance

2. SELLER'S DAMAGES FOR BUYER'S FAILURE TO PURCHASE

a. Monetary damages. Damages are the difference between purchase price and of value of property as of the date of the breach, plus consequential damages and interest (Civ. Code § 3307; *Kuish v. Smith* (2010) 181 Cal.App.4th 1419, 1426)

- (1) Seller's duty to mitigate.
- (2) Accelerating Market: If seller resells for a higher price, then no loss of bargain damages (*Askari v. R&R Land Co.* (1986) 179 Cal.App.3d 1101)
- (3) Seller Carryback notes: Must be discounted to present value (*Abrams v. Totter* (1970) 3 Cal.App.3d 828)
- (4) Seller may recover sale expenses, including broker's commission, where seller required to pay broker despite failed sale.

b. Specific Performance.

1. CC § 3307 allows seller to recover consequential damages and interest as well as excess above value that would have been covered in sales contract, therefore, sellers would have adequate remedy at law.

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2. However, Courts have allowed specific performance to seller (see *BD Inns v. Pooley* (1990) 218 Cal. App.3d 289)
- c. Seeking the Deposit Where No Liquidated Damage Clause, seller can utilize as a fund from which actual damages can be obtained (*Beason v. Griff* (1954) 127 Cal.App.2d 382)
 1. Restricted to actual damages regardless of whether innocent or willful breach (*Caplan v. Schroeder* (1961) 56 Cal.2d 515)
 2. “THE NONREFUNDABLE DEPOSITS—NOT!” (*Kuish v. Smith* (2010) 181 Cal.App.4th 1419 – “nonrefundable” deposit is not necessarily nonrefundable)
- d. Note: Liquidated Damages

1. Commercial liquidated damages provisions

Civ. Code § 1671(b) – a liquidated damages provision is valid unless an opposing party demonstrates that the provision was “unreasonable under the circumstances existing at the time the contract was made.”

2. Residential liquidated damages provisions

Civ. Code § 1675(e) provide that the “reasonableness” of the liquidated damages provisions shall be determined by taking into consideration both of the following:

- (1) The circumstances existing at the time the contract made, and
- (2) The price and other terms and circumstances of any subsequent sale or contract to sell and purchase the same property if the sale or contract is made within six months of the buyer’s default.

Note: Technical requirements:

- (1) separately signed or initialed by both buyer and seller,
- (2) if included in a printed contract, it must be set out in either minimum 10-point bold type or minimum 8-point bold contrasting red type. (Civ. Code § 1677(a) & (b).)

Generally, amount cannot exceed 3% of the purchase price.

(Civ. Code §1675 (c) & (d).)

3. LOST PROFITS

Greenwich S.F., LLC v. Wong (2010) 190 Cal.App.4th 739 [case provided with materials] – lost profits permitted as consequential damages, but too uncertain based on a “flipper’s” prospective profit.

Mammoth Lakes Land Acquisition LLC v. Town of Mammoth Lakes (2010) 191 Cal.App.4th 435 [case provided with materials] – lost profits permitted as consequential damages, but properly awarded based on developer’s plan.

B. MISREPRESENTATION DISCOVERED BEFORE CLOSING

1. General rule: To recover damages, must establish “reliance” on the misrepresentation (see CACI 1900/1907).
2. But “reliance” does not necessarily require purchaser to close escrow.

Jue v. Smiser (1994) 23 Cal.App.4th 312 – so long as purchaser relied on misrepresentations at time of purchase, even if truth discovered before COE, s/he can nonetheless still close and recover for misrepresentation (but see unpublished decisions *Hutchinson v. McCarty* (2003) 2003 WL 21083850 and *Securities and Exchange Commission v. American Capital Investments, Inc.* (1996) 1996 WL 608527)

Holmes v. Summer (2010) 188 Cal.App.4th 1510 – buyer entered into contract to purchase property unaware that the property was a short sale and required the agreement of two lenders. The sale did not close because the lenders would not consent to reduce their loans. Court held that plaintiff stated a claim for nondisclosure against the listing broker who failed to disclose information in the listing or other disclosure information.

II. POST-CLOSING CONSIDERATIONS

A. CONTRACT DAMAGES

1. In general – the purpose of compensatory damages for breach of contract is to put plaintiff in as good a position as s/he would have been if defendant had performed as promised (CACI 350)

2. Special contract damages – to recover special damages for breach of contract, plaintiff must prove that when the parties made the contract, defendant knew or reasonably should have known of the special circumstances leading to such harm (CACI 351); see also,

Wallis v. Farmers Group, Inc. (1990) 220 Cal.App.3d 718, 737 (this is essentially the harm “which is foreseeable to the breaching party at the time the contract is entered into”)

B. TORT DAMAGES

1. NEGLIGENCE

Civ. Code § 3333. The amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. Generally, diminution in value.

2. FRAUD

a. CC 3343. Damages are difference between amount paid and value actually received, plus consequential damages including expenses, loss of use and enjoyment, lost profits, as of the date of the fraud.

b. Compensatory Damages

Benefit-of-the-Bargain Rule – The difference between the value of what plaintiff *expected to receive* the value of what plaintiff actually received (*Stout v. Turney* (1978) 22 Cal.3d 718 (see attached))

Out of Pocket” Rule – The difference between what plaintiff paid (purchase price) and what plaintiff received (market value) (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226 (Buyer ordinarily limited to ‘out-of-pocket’ loss)

c. Lost Profits

Seller: CC 3343(a)(3)

Seller induced to sell is entitled to be compensated for profits or other gains which might have reasonably have been earned by use of property had seller retained ownership.

Buyer: CC 3343(a)(4)

Buyer is entitled to be compensated for lost profits where property acquired for purpose of using or reselling for a profit and the buyer reasonably relied on representation to purchase and to anticipate profits from subsequent use or sale, and loss was proximately caused by fraud.

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Note: Buyer must acquire property to claim lost profits for fraud - whereas in a breach of contract case buyer can potentially obtain lost profits even where the seller was aware of buyer's intent to resell at a profit.

Kenley v. Ukegawa (1993) 16 Cal.App.4th 49, 53-56.

d. Timing: Damages are determined as of the date of the fraudulent transaction.

Gagne v. Bertran (1954) 43 Cal.2d 481, 490-492

A buyer who is induced to purchase property in reliance on the fraudulent representations of seller and his agent cannot recover damages when the value of the property on the date of the sale is equal to or greater than the price paid for the property, even though he would not have purchased the property if he had known of the fraud.

McCue v. Bruce Enterprises Inc. (1964) 228 Cal.App.2d 21

As a general rule, damages for fraud are assessed as of the date of the fraud and are not reduced by subsequent events.

e. Effect of Foreclosure.

Burkhouse v. Phillips (1971) 18 Cal.App.3d 661

Buyer was induced to purchase a walnut farm based on misrepresentations as to the profitability and yield of the walnut crop. Seller carried back a loan. Buyer eventually defaulted on the loan due to the lack of sufficient income from the crop to make the payments. Seller foreclosed and a third party purchased the property at the foreclosure sale, so rescission was no longer an option. Buyer sued for misrepresentation. At trial, seller's appraiser testified that the property was worth the purchase price.

Nevertheless, the appellate concluded that the buyer was damaged. "*Damages need not invariably be the difference in value between market price and purchase price at the time of the purchase. The section [Civ. 3343] must be applied realistically so as to give the defrauded person his actual out-of-pocket loss, and, where necessary to reach that result, the court must consider subsequent circumstances ... Sale under foreclosure is a circumstance subsequent to the original sale which may be considered under Garrett. In view of their total loss of the property, appellants received nothing, and had paid the down payment and some installments. They should be allowed to recover in this amount if liability is found.*"

Garrett v. Perry (1959) 53 Cal.2d 178

Buyer was defrauded in the sale of a cattle ranch. The purchase price was \$700,000 and buyer paid \$100,000 down and had a \$600,000 seller carry-back loan. Buyer was

unable to make the payments because of seller's misrepresentations and seller foreclosed. The actual value of the property at the time of the sale was \$530,000. The trial court computed damages of \$170,000 based on the difference between the value and the purchase price. The Supreme Court reduced the damages by \$11,000 based on the subsequent foreclosure because buyer didn't really pay the full purchase price since he was not liable for a deficiency judgment on the purchase money loan. Damages were based on the \$100,000 down and \$59,000 in payments.

C. ESTABLISHING DAMAGES

1. TESTIMONY RE MARKET VALUE

Evid. Code § 813 – value of property may be shown by: (1) Qualified expert appraiser, (2) Owner or spouse of owner, or (3) Officer, employer or partner of corporation or partnership if knowledgeable about property. (“Owner” also includes persons entitled to possession of the property.)

2. IMPORTANCE OF APPRAISER

Owner's right to testify to value limited – “While Evidence Code section 813 permits opinion testimony from the owner on the value of property, the opinion ‘is limited to such an opinion as is based on matter perceived by or personally known to the witness... that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property’” – affirming trial court's refusal to allow owner to testify to “market value of the code violations and structural defects.” (*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229.)

Nonsuit where market value not established – In an action for deceit in the sale of real property, a buyer must offer evidence that the price paid for the property was greater than its actual value. While plaintiffs testified that they paid \$87,500 for the house, they offered no evidence of what the market value of the house would have been had the true facts been known regarding the lack of permits and the lack of compliance with building codes. Accordingly, they failed to show that they had suffered any actual damages. (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538.)

3. DAMAGES TOO SPECULATIVE OR REMOTE

“Uncertainty as to the fact of damage, that is, as to the nature, existence, or cause of damage, is fatal to a recovery.” (23 Damages (Cal.Jur.3d 2011) §31, citing, *inter alia*, *Griffith Co. v. San Diego College for Women* (1955) 45 Cal.2d 501.)

D. OTHER RECOVERABLE DAMAGES

1. “APPRECIATION” DAMAGES

Strebel v. Brenlar Investments, Inc. (2006) 135 Cal.App.4th 740 – “appreciation” damages recoverable where buyer relied on misrepresentations in selling home and lost out on appreciation in rising real estate market.

2. STIGMA DAMAGES

“Stigma damage” is the residual loss of market value of property remaining even after repairs have been made. (Miller, California Construction Defect Litigation: Residential and Commercial (2d ed. 1993) § 10.7, p. 384)

No right to stigma damages where the injury can be abated. (*Gehr v. Baker Hughes Oil Field Operations, Inc.* (2008) 165 Cal.App.4th 660, 667; *Santa Fe Partnership v. ARCO Products Co.* (1996) 46 Cal.App.4th 967, 980)

Civil Code Section 1710.2(a) - “[n]o cause of action arises against an owner of real property or his or her agent ... for the failure to disclose to the transferee the occurrence of an occupant's death upon the real property or the manner of death where the death has occurred more than three years prior to the date the transferee offers to purchase, lease or rent the property, or that an occupant was afflicted with, or died from, [HIV/AIDS].” (Enacted 1986.)

3. STEARMAN COSTS

Stearman v. Centex Homes (2000) 78 Cal.App.4th 611, 624

4. PUNITIVE DAMAGES

a. Not Recoverable for Breach of an Obligation Arising from Contract (Civ. Code § 3294; see e.g., *City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375; *Brewer v. Premier Golf Properties* (2008) 168 Cal.App.4th 1243)

b. Also Not Recoverable for “Simple” Negligence, including Negligent Misrepresentation, or for “Simple” Breach of Fiduciary Duty (*Davis v. Hearst* (1911) 160 Cal. 143, *Lackner v. North* (2006) 135 Cal.App.4th 1188, *Tri-Delta Engineering, Inc. Ins. Co. of North America* (1978) 80 Cal.App.3d 752)

c. Recoverable only where defendant is found “guilty of oppression, fraud, or malice” by “clear and convincing evidence” (Civ. Code §3294)

5. EMOTIONAL DISTRESS DAMAGES

Difficult to Recover in Real Estate Cases

Erllich v. Menezes (1999) 21 Cal.4th 543 – no emotional distress damages where claims directly related to economic injury (even though finding of “intolerable living conditions and a constant, justifiable fear about the safety of their home”)

But see: *Lewis v. Upton* (1984) 151 Cal.app.3d 232

Emotional distress damages permitted in real estate fraud case against broker who breached his fiduciary duty.

E. ATTORNEY FEES

1. By contract or statute (Code of Civ. Proc. § 1021; see also, *McKinsey v. Kaiser-Aetna* (1976) 55 Cal.App.3d 84, 89)
2. As damages under “tort of another” theory: A person who, through the tort of another, has been required to protect his interests by bringing or defending an action against a third person may recovery attorney fees and costs incurred (*Prentice v. North Amer. Title Guaranty Corp. Alameda Div.* (1963) 59 Cal.2d 618; see also, *Gray v. D. Miller* (1984) 35 Cal.3d 498)
3. Prevailing Party

Code of Civ. Proc. §1032(b) – (1) party with a net monetary recovery, (2) defendant dismissed from action, (3) defendant where neither plaintiff nor defendant recovers anything, or (4) a defendant as against those plaintiffs who do not recover any relief against that defendant

Childers v. Edward (1996) 48 Cal.App.4th 1544 (Where buyer established misrepresentation but did not establish damages, defendant is the prevailing party entitled to recover attorney fees)

III. EQUITABLE REMEDIES

A. SPECIFIC PERFORMANCE

1. Underlying cause of action is breach of contract
2. Must prove inadequacy of legal remedy (damages). Land is presumed to be unique (*Remmers v. Ciciliot* (1943) 59 Cal.App.2d 113, 120)

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3. Must prove plaintiff's performance or tender or excuse for performance.
4. Can be used not only to compel sale, but also to partition, exchange, assign lease, renew a lease, create an easement, perform environmental cleanup.

Lis Pendens recommended.

B. RESCISSION

1. Rescission is extinguishment of contract. CC § 1688.
2. Relates back to formation and negates existence.
3. CC §§ 1688-1693 control; See CC§ 1691 setting forth requirement for notice of rescission and tender of consideration received.

C. REFORMATION

1. Common law and statutory right. See, CC § 3399 – 3402.
2. Usually used to correct mistakes in instruments to reflect the parties' intent.
3. May be used as defense to specific performance or damage action.

D. CANCELLATION

1. CC §§ 3412 – 3413 allow a person to bring an action to cancel an instrument.
2. Only a Court can order an instrument cancelled.
3. Whereas rescission restores the parties to their pre-contract position, cancellation leaves the parties as they are at the time of cancellation.

E. CONSTRUCTIVE TRUST

1. Purpose is to prevent unjust enrichment.
2. Authorized by CC §§ 2223 and 2224.

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3. Requires existence of property, right of plaintiff to property, and wrongful acquisition or detention of property.
4. Fraud often involved in constructive trust cases, but may be obtained where there is accident, mistake or undue influence.
5. Tracing: Plaintiff may be required to trace property if defendant took \$ and converted into real property.
6. Courts have reached contradictory results on allowing lis pendens in constructive trust tracing cases. See, *Coppinger v. Superior Court* (1982) 134 Cal.App.3d 883, 890 [lis pendens allowed]; *Campbell v. Superior Court* (2005) 132 Cal.App.4th 904, 918.

If the purpose of suit to obtain monetary damages -- lis pendens is inappropriate. -- Consider temporary restraining order and preliminary injunction instead.

F. QUIET TITLE

1. CCP §§ 760.010 – 765-060.
2. Purpose is to resolve an adverse claim to property
3. Complaint must be verified and lis pendens filed.
4. Allows plaintiff to secure judgment in rem, i.e., against both known and unknown persons.
5. Cause may contain both equitable and legal considerations. An action to establish only title is equitable. An action to establish title, and gain possession, is an action at law.
6. Note: Jury trial may be unnecessary if the Court first decides the equitable issues and thus disposes of the legal issues. *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229.

IV. BROKER COMMISSIONS

A. STATUTE OF FRAUDS

1. Compensation agreement must be in writing

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“An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where the lease is for a longer period than one year, for compensation or a commission” is invalid unless it, or some note or memorandum thereof, is in writing, subscribed by the party to be charged (Civ. Code § 1624(a)(4))

2. Absolute, complete affirmative defense where not in writing
3. Limited exceptions to writing
 - a. Subsequent ratification – consummating written purchase agreement, which includes separate provision for broker commission, purchasers ratify broker's fee provision (*Friddle v. Epstein* (1993) 16 Cal.App.4th 1649, 1655–1656)
 - b. Actual fraud – (promise to pay commission or promise to sign commission agreement insufficient (*Phillippe v. Shapell Industries, Inc.* (1987) 43 Cal.3d 1247, 1270); but representation that written commission agreement signed suffices. (*Owens v. Foundation for Ocean Research* (1980) 107 CA3d 179, 183–184.)
 - c. Finder's fee – unlicensed finder's able to enforce oral agreement to recover commission (*Phillippe* at 1260)

B. LISTING AGENT

1. In general – the parties are free to make the duty to pay broker compensation dependent on the satisfaction of any lawful conditions. *Blank v. Borden* (1974) 11 Cal.3d 963, 969.
2. “Ready, willing and able” buyer – most listing agreements condition the payment of compensation upon (1) the broker's procurement of a “ready, willing and able” buyer or consummation of the purchase and sale transaction.

C. SELLING AGENT

1. Seller (lack of) obligation to pay – generally, seller has no duty to pay and third-party beneficiary claims fail.
2. Buyer's obligation to pay – obligated to pay pursuant to any express written agreement.

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3. Listing broker's obligation to share commission with cooperating agent – absent an agreement, seller has no obligation to do so (even if broker agrees to “cooperate,” still not obligated to share commission).