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Going to the Source

Minimize your liability by providing attributions. **by Sean E. Ponist**

Real estate agents and brokers often make disclosures without attributing information sources. In so doing, they become the source of the information. When the information is accurate, there is no problem. When the information is inaccurate, however, the agent or broker, as the source of the inaccurate statement, bears responsibility for the statement.

As discussed below, by attributing the source of the information, an agent or broker can avoid, or at least attempt to avoid, liability for any unintentional errors in information passed along.

Identifying the Source

In a recent California appellate decision, *Saffie v. Schmeling* (2014) 224 Cal.App.4th

563, the court found that the listing broker was not liable even though he disclosed erroneous information upon which the buyer had relied. In that decision, the listing broker made the following statement on a multiple listing service in marketing his client's property: "This parcel is in an earthquake study zone but has had a Fault Hazard Investigation completed and has

been declared buildable by the investigating licensed geologist. Report available for serious buyers." Unfortunately, it turned out that the parcel was *not* buildable.

Between the time of the 1982 report referenced in the MLS and the time of the 2006 statement in the MLS, the 1994 Northridge earthquake had occurred. While pre-Northridge earthquake seismological regulations may have permitted the development of the parcel, post-Northridge earthquake seismological regulations did not. Unaware of this change in regulations and in reliance on the statement that the parcel was "buildable," the purchaser bought the property. The purchaser thereafter "began to try to develop the property," but "could not feasibly move forward with his plans for a commercial building on the property" and brought suit against, among others, the listing broker.

The court rejected the claims of the purchaser against the listing broker. It noted that, as the listing broker did not represent the purchaser, the listing broker did not owe the purchaser a fiduciary duty. Instead, the listing broker simply owed the purchaser the general duty of "honesty, fairness, and full disclosure toward all parties" owed by agents and brokers throughout the country absent a fiduciary relationship. The court then found that the listing broker's statements complied with this standard. Although the property was not buildable, "seller's broker never said that it was." The listing broker merely stated that the "parcel ... has been declared buildable by the investigating licensed geologist." That statement was, in fact, true.

Thus, by providing the source of the information, the listing broker was found not to be liable even though he had provided material information that turned out not to be true.

What If ...

To better appreciate the foregoing principle, as well as its limits, consider the following alternative scenarios.

What if the listing broker, in reliance on the report of the licensed geologist, simply stated that the "parcel was buildable" instead of stating it had been "declared buildable by the investigating licensed geologist." Would the listing broker be liable? Yes. The listing

broker would now be the source of the information and the statement that the parcel was buildable would be false.

What if the listing broker knew that seismic regulations had changed and that the report was no longer reliable, could he still disclose that the parcel had been “declared buildable by the investigating licensed geologist” without liability? No. While the statement would be technically true, it would be nonetheless misleading as the listing broker knew the true facts to be otherwise.

What if the listing broker had two reports in his possession, both by licensed geologists? One report indicates that the parcel is buildable and the other indicates that it is not. The listing broker genuinely believes the former to be more reliable and thus only discloses that report. If the property turned out not to be buildable, would the listing broker be liable for not turning over the other report? Yes. The listing broker has an obligation to

Say This	Not This
“Lot has been declared buildable by an investigating licensed geologist in a 1982 report”	“buildable lot”
“25,000-square-foot building per plans” or “25,000-square-foot building per assessor records”	“25,000-square-foot building”
“Per owner, property has river frontage” or “Per owner, property abuts the river”	“River frontage property”

disclose all known, material information concerning the value or desirability of the property. Both geological reports concerned value and desirability and therefore both needed to be disclosed.

Whether because perceived to have deep pockets, known to have insurance to cover losses, or genuinely believed to be responsible, real estate agents and brokers are almost always brought into lawsuits when deals go bad. While real estate agents and brokers cannot insulate themselves from liability,

attributing the source of information is an important measure that can be taken to limit exposure.

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