

The Impact of Expanded Disclosure Duties upon California Brokers: Understanding Negligent Nondisclosure, Constructive Fraud, and Fiduciary Relationships under California Law

By Jody Burgess

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I. INTRODUCTION

Several years have passed since the 2007 publication of *Michel v. Palos Verdes Network Group, Inc.*, 156 Cal. App. 4th 756 (2007), which held that a real estate broker's duties of inspection and disclosure are not limited to those matters set forth under California statute but, rather, are framed by the much broader coordinates of a broker's fiduciary obligations. *Michel* is particularly important because it alters the landscape for real estate brokers by increasing the potential for damages under tort theories, such as negligent nondisclosure and constructive fraud. Although the decision was controversial when it was first published, it has now been enshrined in subsequent case law and is showing no signs of going away.

II. MICHEL: ITS FACTS, HOLDING, AND PROGENY

In *Michel*, the Court of Appeal analyzed a selling broker's common law fiduciary duty of disclosure, and concluded that duty exceeds the minimum inspection and disclosure obligations under California statute. Indeed, the satisfactory completion of standard inspection and disclosure requirements required by California's statutory scheme does not, in and of itself, prevent liability under tort theories of recovery. *Michel* demonstrates the expansive scope of the fiduciary obligations and attendant liabilities following a breach of those obligations.

A. Facts of the *Michel* Case

In *Michel*, neither the broker nor the broker's associate licensee had intimate knowledge of the alleged defects that were the subject of the dispute. Instead, this information was discovered by a colleague six months prior to the transaction at issue, while the colleague was attempting to obtain the listing. The Court imputed this information to the broker and held that it should have been disclosed.

Specifically, an associate licensee, Mike Kilpatrick, was working under the brokerage license of Larry Moore & Associates, Inc. when he learned that his friend's parents intended to list their house for sale. Hoping to obtain the listing, Kilpatrick traveled to the residence to speak with his friend's parents and conducted an inspection for defects. Kilpatrick kept notes of what he had discovered in the inspection, including potential water leaks, cracked walls, and damage to the pool. Kilpatrick intended to use the notes to complete the disclosure obligations if he obtained the listing. However, the opportunity never came.

The owners instead listed their home with Fred Sands, another broker of Moore & Associates. In the interim, Kilpatrick stopped working as a listing agent and took a position as the office "transaction coordinator," which required him to review file documents for completeness before escrow closings.¹

Several weeks after Sands obtained the listing, prospective buyers Carl and Sydney Michel retained broker Nicola Lagudis to assist in the transaction. Lagudis was a colleague of Kilpatrick's and also an associate licensee of Moore & Associates. Lagudis eventually located the property at issue.

An offer was prepared, submitted, and accepted; and escrow opened. Before closing, Lagudis conducted a visual inspection of the property and provided the standard "Transfer Disclosure Statement" to the Michels. The documentation eventually made it to Kilpatrick's desk, where he reviewed and approved the transaction.² The Michels thereafter closed escrow and gained possession of the home.

A few months later, the Michels began noticing cracks on the interior walls of the residence, which they continually patched under the assumption that the cracks were benign. As the weather warmed, they began remodeling their backyard with the assistance of various professionals, including a soils engineer, who discovered significant soil instability and ground movement that tilted the foundation of the residence beyond tolerable levels. The unstable soil and resulting tilting of the foundation was what caused the walls to crack in the home's interior.³

Thereafter, the Michels sued Moore & Associates alleging three separate causes of action, including violation of the statutory disclosure duties set forth in California Civil Code section 2079, fraudulent concealment, and negligent nondisclosure. At trial, Moore & Associates successfully moved for "non-suit" on the negligent nondisclosure cause of action,⁴ which left for the jury to decide whether Lagudis discharged her disclosure obligation by disclosing its defects and whether Moore & Associates fraudulently concealed information from the Michels.

The jury ultimately found for Moore & Associates, apparently reasoning that Lagudis conducted a competent visual inspection of the property and disclosed those defects that were reasonably subject to discovery.⁵ The jury also found that Moore & Associates, through its agent, satisfied the section 2079 statutory duties to disclose all defects discovered through a reasonably diligent visual inspection. Finally, the jury rejected the allegation that Moore & Associates had willfully concealed material defects about the condition of the home. The Michels appealed.

B. The Court of Appeal's Decision

On appeal, the Court noted the difference between the statutory duties imposed by California Civil Code section 2079 and the common law fiduciary duties associated with the tort of negligent nondisclosure. Justice Rubin stated: "the court's dismissal of appellants' cause of action for negligent nondisclosure was error because it involved elements different from appellants' § 2079 and fraudulent concealment causes of action."⁶

The Court's holding explicitly recognized the Legislature's intent in section 2079 not to modify or restrict existing duties owed by real estate licensees,⁷ but rather to create a separate statutory duty. Thus, the broker was liable on the basis of common law principles without regard to the statutory duty. However, the *Michel* opinion does confirm the statutory proposition set forth in California Civil Code section 2079.13, subdivision (b), which provides that brokers in real property transactions are responsible for the acts of their agents.⁸

Among other things, *Michel* is significant not only because of the Court's willingness to look beyond the express duties set forth in statute and consider the common law fiduciary duties of loyalty, confidence, and trust, but because of the breadth of these duties under the particular facts of the case. These duties may be violated despite compliance with the statutory mandate.

C. Post-*Michel* Comments

The legacy of the *Michel* case is considerable. While there have been numerous citations to *Michel* since publication, many are not officially citable. However, this should not diminish *Michel's* impact and legacy, as all of these authorities stand for the basic premise that a licensee's fiduciary duty is broader than the scope of the duty of due care set forth in California Civil Code section 2079.⁹ Some cases have even touched upon the narrower issue of the expanded duty between the selling agent and the buyer.¹⁰

The impact of *Michel* could signal a trend to focus on the common law fiduciary duty to expand liability beyond the statute. *Michel* is a good example of just how far that duty can reach. More importantly, *Michel* reminds us that any material information that is known by the broker, the associate licensee, and, to some extent, the broker's staff must be disclosed, *whether they are involved in the transaction or not.*

With respect to the future, the principles articulated in *Michel* may surface with greater frequency as more unsophisticated buyers rely upon brokers for investigation, inspections, and disclosure of any problems. Additionally, today's market is saturated with "real estate-owned" (or "REO") properties that impose fewer statutory disclosure obligations on the lender when selling the home to a third party. Why? REO sales are generally exempt from transfer disclosure requirements if the property was acquired by the bank in foreclosure, by deed in lieu, at a trustee's sale, or transferred through bankruptcy.¹¹ In such cases, the bank is exempt from completing a Real Estate Transfer Disclosure Statement, Natural Hazard Disclosure Statement, a Mello-Roos District Lien Disclosure, an Improvement Bond Act of 1915 Notice, and other requirements.¹² Armed with less information from the seller, the broker's visual inspection may be limited and less likely to lead to recommendations for specialist inspections to address material concerns or otherwise be further studied. Although the sale of REO property arguably imposes fewer statutory obligations on the broker, the broker's fiduciary obligations could be expanded, as in *Michel*. In all events, as the market inventory shifts to fewer REO properties, the probability of liability for negligent nondisclosure increases. Where a broker has more information, whether about the subject transaction or a past transaction, potential liability under *Michel* is broadened.

III. THE *EASTON* DUTY OF INSPECTION AND DISCLOSURE CODIFIED BY CALIFORNIA CIVIL CODE SECTION 2079

Although it was undeniably controversial, *Michel* appears to rest on the firm footing of *Easton v. Strassburger*, 152 Cal. App. 3d 90 (1984). *Easton* is the seminal case in California regarding broker duties, which expressly expanded the broker's duty beyond disclosing defects which are actually known.¹³ California Civil Code section 2079 codified the holding of *Easton*. Section 2079 imposes a general duty on real estate brokers to conduct a reasonably competent and diligent visual inspection sufficient to disclose to a prospective purchaser all material facts affecting the value or desirability of the property.

A. *Easton v. Strassburger*

Before *Easton*, no appellate decision had imposed upon brokers a duty to conduct a competent and diligent visual inspection.¹⁴ *Easton* recognized the implied standards associated with the real estate profession by imposing an affirmative duty to promote the trust and reliance a residential purchaser is entitled to expect from a broker. *Easton's* holding prompted the Legislature to codify this general duty of inspection and disclosure, which occurred despite strong opposition from the listing broker.

The facts of *Easton* are important to understand the nature and extent of the codified duty under section 2079. In 1976, Leticia Easton purchased a residential property consisting of roughly one-acre with a 3,000 square foot home for \$170,000.¹⁵ Shortly after moving into the home, the property experienced significant ground movement and shifting, which caused extensive cracking and damage to the home.¹⁶ In 1978, after the earth movement and resulting damage, the home's value plummeted to \$20,000. Easton sued Valley Realty (the listing broker) for fraud and negligence based on the broker's failure to inspect the property adequately and disclose defects pertaining to the property's soil condition and stability.¹⁷

Easton argued that Valley Realty acted negligently by failing to disclose previous land movement associated with the property despite the agents admittedly knowing of "red flags" regarding the soil issue. Easton prevailed at trial.

Valley Realty appealed the decision, arguing the superior court committed reversible error by instructing the jury that Valley Realty owed a duty to investigate and disclose defects in the property it lists for sale.¹⁸ Valley Realty argued that a broker's duty was limited to disclosing defects actually known as opposed to what the broker should have known through the exercise of reasonable diligence.¹⁹

The Court of Appeal disagreed. In so doing, the Court held that the duty of inspection and disclosure, embraced by the National Association of REALTORS® Code of Ethics, was warranted given the nature of the relationship and the trust and confidence our society places in real estate agents and brokers in performing such duties.²⁰

The Court stated that a "real estate broker owes a duty to the homebuyer of residential real property of one to four units to conduct a reasonably competent and diligent visual inspection of the property offered for sale, and to disclose to said buyer all facts materially affecting the value or desirability of

the property that such an investigation would reveal"²¹ This standard is now accepted and universal among California brokers.

B. Standard of Care under *Easton*

The standard of care imposed under *Easton* and codified by section 2079 is the degree, care, and skill that a reasonably prudent real estate licensee would exercise, which is measured by the degree of knowledge through education, experience, and examination required to obtain a real estate license under the California Business and Professions Code.²²

The duty is not unlimited, however. The court in *Easton* held that the duty to inspect does not include areas that are reasonably and normally inaccessible to such an inspection, which could include a roof, attic, basement, crawl space, and areas under the flooring surface or behind interior or exterior walls.²³ Similarly, the inspection obligation does not involve areas offsite, public records, or permits concerning the property's title or use.²⁴

This duty imposes, however, some knowledge by the broker of all property defects that *could* have been discovered had the broker conducted a reasonable and diligent visual inspection of the property.²⁵ The broker must therefore visually inspect the property and its improvements. Thereafter, the broker must disclose those material facts learned from the inspection or otherwise known.

C. Application to the *Michel* Case

As a legal matter, *Michel* takes *Easton* one step further by applying basic fiduciary law in circumstances which *Easton* did not address. By imposing a disclosure obligation of all material facts to the transaction, even those obtained on an imputed basis through a broker's associate licensee, the *Michel* case reinforces the holding in *Easton* by recognizing potential liability against the buyer's broker for matters completely unrelated to the associate licensee's inspection of the property and completion of the "Agent's Inspection" portion of the obligatory transfer disclosure statement.

As a practical matter, *Michel* clearly expands the broker's liability by imposing a duty to solicit information from all associate licensees working under his or her brokerage license, whether involved in the transaction or not, to gain information about potential defects in the property before completing the disclosure obligations associated with the transaction.

In a subsequent matter entitled *Berger v. Seyfarth Shaw, LLP*, the United States District Court for the Northern District of California expressly outlined this same expansive sentiment, stating:

Just as in *Michel*, Plaintiffs' cause of action for negligent nondisclosure rests, in contrast, on respondent's fiduciary duty to disclose material information within its possession. It was immaterial how the fiduciary obtained the information; it has the duty to disclose the information to its principal.²⁶

Significantly, the foundation for this higher standard of care and imposed duty, arguably, was first established in 1946 by the California Supreme Court in *Rattray v. Scudder*, 28 Cal. 2d. 214 (1946). In *Rattray*, the court held that "the law of

California imposes on . . . the real estate agent the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary. Violation of his trust is subject to the same punitive consequences that are provided for a disloyal or recreant trustee."²⁷

While the *Michel* opinion embraces the section 2079 inspection duties, it was not concerned with whether the broker's associate licensee had met the minimum statutory mandate. Rather, the Court focused on the fiduciary duty of disclosure as a means to expand the disclosure requirements to include all defects reasonably discoverable by the broker and everyone working with or for the broker, regardless of how the information was obtained. The recognition of the Supreme Court's attitude toward the fiduciary duty and the liability commensurate with its breach is what separates *Michel* from previous cases.

IV. THE FIDUCIARY DUTY REQUIREMENT

While the Court in *Michel* applied basic fiduciary law to reach an unexpected outcome, it does not purport to set the limit of liability for the brokerage community. Although it is well-settled that a broker owes a fiduciary duty to his or her clients, after *Michel*, the scope of that duty is less clear.²⁸

Montoya v. McCleod, 176 Cal. App. 3d 57, 62-65 (1985), is a useful starting point. There, the Court examined the scope of the fiduciary duty as it relates to a real estate broker defined under section 10131(d) of the Business and Professions Code. The *Montoya* court stated:

The law imposes on a real estate agent the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary. In particular, a real estate licensee is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision; referring to the agency as fiduciary in nature and imposes high standards of good faith.²⁹

Many cases give additional specificity to the metes and bounds of the broker's duties. For example, the duty is non-delegable,³⁰ and extends beyond the negligence standard of care under section 2079 by requiring disclosure of all material information, obtained either through the broker or through the broker's agents. The duty requires a higher degree of skill and diligence than that held by the general public, and a broker's lack of knowledge of these duties will not insulate liability. In short, ignorance is no excuse.³¹

This is exemplified in *Barry v. Raskov*, where a mortgage broker was found liable to his principal for presenting false information about property values obtained from a licensed real estate appraiser acting as an independent contractor to the broker.³² The court in *Barry* explained its reasoning for imputing liability to the broker, despite his lack of knowledge of the false nature of the appraisal, stating:

[A] non-delegable duty operates, not as a substitute for liability based on negligence, but to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused

the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or an independent contractor.³³

Similar to the real estate broker in *Michel*, the loan broker in *Barry* was held liable for matters entirely unknown to the broker. In fact, the *Barry* court held: "It is clear from this statute the duty to provide an estimate of the fair market value of the property rests exclusively with the broker. Although the broker may use an appraisal by an independent appraiser in determining the estimated value of the property, *nothing in the statute suggests the broker may delegate its statutory duty to the appraiser.*"³⁴

Essentially, *Barry* holds that liability rests with the person owing the affirmative duty to his or her principal, and if a mistake occurs in the performance of that duty, whether by the broker or the associate licensee, the broker is ultimately liable.

In *Barry*, however, the mortgage broker had a statutory duty to provide the hard money lender an estimated fair market value of the property at issue, which he failed to do. In contrast, the broker in *Michel* satisfied the statutory disclosure duty, but failed to disclose a material fact about the property that was known by an associate licensee not directly involved in the transaction. The fact at issue was material to the value or desirability of the property, and was imputed to the broker through his agent. The failure of the broker to disclose this information to the buyer resulted in liability despite the broker's satisfaction of the statutory duty of inspection and disclosure.

V. NEGLIGENT NONDISCLOSURE BY A FIDUCIARY (BAJI 12.37.1)

In 2008, the Committee on California Civil Jury Instructions created an instruction based upon language from *Michel*. BAJI entitled the instruction "Negligent Nondisclosure by Fiduciary," which is equally applicable to the tort of constructive fraud and breach of fiduciary duty.³⁵ The instruction provides:

Plaintiff [also] seeks to recover damages based upon a claim of negligent nondisclosure by a fiduciary. The essential elements of this claim are:

1. A fiduciary relationship existed between plaintiff and defendant;
2. Defendant possessed information material to plaintiff's interest;
3. Defendant knew or should have known that this information was material to plaintiff's interest;
4. Defendant failed to disclose this material information to plaintiff; and
5. The nondisclosure caused plaintiff to suffer injury, damage, loss or harm.

Arguably, the *Michel* case extends beyond the scope of this BAJI instruction by adding the obligation to disclose all material information, regardless of how it was received, obtained, or learned.

VI. MICHEL'S IMPLICATIONS WITH RESPECT TO DAMAGES

Beyond the scope of liability, *Michel* also has implications for the amount of damages resulting from nondisclosure of a material defect.

There are two measures of damages to consider when dealing with a broker's failure to disclose: (1) "out-of-pocket" loss and (2) "benefit-of-the-bargain."³⁶ The "out-of-pocket" measure of damages restores the plaintiff to the financial position enjoyed prior to the transaction by awarding the difference between what was provided and what was received. The "benefit-of-the-bargain" measure of damages places the plaintiff in the position he or she would have been in if the false representation relied upon had not occurred by awarding the difference in value between what was actually received and what would have been received.³⁷

In typical real estate cases, the measure of damages is limited to the plaintiff's "out-of-pocket" loss.³⁸ However, in cases where there is a misrepresentation (even an innocent one), or in cases where there is a breach of fiduciary duty, a broader "benefit-of-the-bargain" measure of damages could apply.³⁹ In the latter situation, Civil Code section 3333 is the applicable statute to compensate for "all detriment proximately caused . . . , whether it could have been anticipated or not."⁴⁰

That measure of damages differs from the "out-of-pocket" measure because it provides the difference between the actual value of what the plaintiff has received and that which he expected to receive.⁴¹ The difference can be considerable. For example, in *Salahuddin v. Valley of California, Inc.*,⁴² the Court of Appeal affirmed a lower court's decision by applying the "benefit-of-the-bargain" measure of damages to a cause of action for negligent misrepresentation, a tort akin to negligent nondisclosure. There, the plaintiff filed an action for "negligent misrepresentation" against a broker for misrepresentations regarding the physical size of the property and its ability to be split.⁴³ The trial court found for the plaintiff, awarding "benefit-of-the-bargain" damages on the negligent misrepresentation claim, because the plaintiff demonstrated constructive fraud. The Court explained: "In addition to the traditional liability for intentional or actual fraud, a fiduciary is liable to his principal for constructive fraud even though his conduct is not actually fraudulent."⁴⁴ Constructive fraud is comprised of any act, omission, or concealment involving breach of a legal or equitable duty, which results in damage to another even though the act at issue is not otherwise fraudulent.⁴⁵

The *Salahuddin* court expressly found that acts in breach of a broker's fiduciary duties, including a careless misstatement, constitute constructive fraud.⁴⁶ Notably, the *Salahuddins* never pled constructive fraud, yet the court extrapolated liability under such a theory to award benefit-of-the-bargain damages. This occurred despite the fact that the complaint alleged negligent misrepresentation and not intentional fraud.⁴⁷ A court logically could reach the same result when dealing with the tort of negligent nondisclosure as addressed in *Michel*. Negligent nondisclosure is properly classified as an omission that results in damage to the principal, which like the tort of negligent misrepresentation fits the definition of constructive fraud. This conceivably exposes a *Michel*-type case to a greater measure of damages. *Salahuddin* implicitly reinforces this concept in stating, "most acts by an agent in breach of his fiduciary duties constitute constructive fraud."⁴⁸

The trial court determined damages according to Civil Code section 3333, by comparing the value of the property plaintiffs received and the value of the property they would have received had the broker's representations been true. The court accepted the testimony of the Salahutdins' appraiser that as of November 1991 (the date nearest trial), the fair market value of a comparable property that could be subdivided would be \$1.1 million, and the value of the subject property with only a remote possibility of subdividing was only \$925,000.⁴⁹

The court awarded the difference between the appraiser's value of \$1.1 million and \$925,000, which was based on the Salahutdins' expectations as derived from their broker's representations. Had the Court awarded the out-of-pocket damages, the damages would have been reduced by taking the difference between the value received versus the value conveyed, regardless of the parcel's inability to be split.

Not only is the potential measure of damages elevated when dealing with a breach of fiduciary duty, but the fiduciary's ability to argue comparative fault is potentially lessened. The fiduciary relationship fosters legal reliance on the fiduciary to perform according to legal standards, and the ability of a principal to rely on such performance means that facts which ordinarily call for investigation will not excite suspicion on the principal's part.

The California Supreme Court addressed this concept in *Alliance Mortgage Company v. Rothwell*, 10 Cal. 4th 1226 (1995), stating "the nature of the relationship is such as to cause the plaintiff to rely on the fiduciary, and awareness of facts which would ordinarily call for investigation does not excite suspicion under these special circumstances."⁵⁰ For this reason, common law breach of fiduciary duty and constructive fraud causes of action provide a more expansive damages remedy than the disclosure requirements of California Civil Code section 2079.

VII. CONCLUSION

The *Michel* case demonstrates how the tort of negligent non-disclosure, a fiduciary-based tort, heightens a broker's responsibilities beyond the statutory minimum imposed under section 2079. *Michel* imposed a duty on the broker to disclose all facts to a prospective buyer that relate to the value, desirability, or intended use of the property, whether learned through the statutory inspection process or otherwise made known to the broker through an associate licensee.

Equally important, the failure to meet the common law fiduciary duty can impose upon the broker a greater measure of damages whereby the plaintiff will be compensated "for all detriment proximately caused thereby."⁵¹

With case law protecting the first-time or otherwise unsophisticated home purchaser who relies heavily on a broker's performance, brokers are faced with a broader scope of fiduciary obligations and potentially greater liability arising as a result.



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ENDNOTES

- 1 *Michel v. Palos Verdes Network Group, Inc.*, 156 Cal. App. 4th 756, 759 (2007).
- 2 *Id.*
- 3 *Id.* at 760.
- 4 A non-suit operates as a demurrer to the plaintiff's evidence. It is made only after the plaintiff has presented his or her opening statement, or after the presentation of his or her evidence in a trial by jury. CAL. CIV. PROC. CODE § 581c(1).
- 5 *Michel*, 156 Cal. App. 4th at 761.
- 6 *Id.* at 801 (citations omitted).
- 7 CAL. CIV. PROC. CODE § 2079.12(b).
- 8 *Id.* § 2079.13(b).
- 9 2 MILLER AND STARR, CALIFORNIA REAL ESTATE § 3:30 (3d ed. 2011).
- 10 CAL. CIV. PROC.: REAL PROPERTY LITIGATION § 2:24; see also 2 MILLER AND STARR, *supra* note 9, § 4:27.
- 11 CEB CALIFORNIA REAL PROPERTY SALES TRANSACTIONS § 6.110 (4th ed. 2007); see also CAL. CIV. PROC. CODE § 1102.2.
- 12 CEB CALIFORNIA REAL PROPERTY SALES TRANSACTIONS § 6.110.
- 13 CAL. CIV. PROC. CODE § 2079.12(b); see also *Field v. Century 21 Klowden-Forness Realty*, 63 Cal. App. 4th 18, 24 (1998).
- 14 *Easton v. Strassburger*, 152 Cal. App. 3d 90, 99 (1984).
- 15 *Id.* at 95.
- 16 *Id.*
- 17 *Id.* at 96; see also *id.* at 97 ("[T]he judge instructed the jury only as to negligent misrepresentation and simple negligence, since the actions for fraudulent concealment and intentional misrepresentation had been dismissed.").
- 18 *Id.* at 97.
- 19 *Id.* at 98.
- 20 *Id.* at 100-01.
- 21 *Id.* at 102.
- 22 CAL. CIV. PROC. CODE § 2079.2.
- 23 *Id.* § 2079.3.
- 24 *Id.*
- 25 *Easton*, 152 Cal. App. 3d at 99.
- 26 *Berger v. Seyfarth Shaw, LLP*, 2008 WL 683425 (N.D. Cal. Mar. 7, 2008).
- 27 *Ratray v. Scudder*, 28 Cal. 2d 214, 222-23 (1946) (quoting *Langford v. Thomas*, 200 Cal. 192, 196 (1926)).
- 28 CAL. CIV. PROC. CODE § 2079.24; *Field*, 63 Cal. App. 4th at 25 ("[A] broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty."); see also *Barry v. Raskov*, 232 Cal. App. 3d 447, 455-56 (1991) (Broker owes a fiduciary the "duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision.").
- 29 *Montoya*, 176 Cal. App. 3d at 64-65; see also CAL. PROB. CODE §§ 16000, 16015.
- 30 *Barry*, 232 Cal. App. 3d at 445.
- 31 *Rhoades v. Savage*, 219 Cal. App. 2d 294, 299 (1963).
- 32 *Barry*, 232 Cal. App. 3d at 455-57.
- 33 *Id.* at 455 (citing *Maloney v. Rath*, 69 Cal. 2d 442, 446 (1968)).
- 34 *Id.* at 456 (emphasis added).
- 35 Cal. BAJI 12.37.1.
- 36 *Id.* at 1240; see also *Stout v. Turney*, 22 Cal. 3d 718, 725 (1978).

The trial court determined damages according to Civil Code section 3333, by comparing the value of the property plaintiffs received and the value of the property they would have received had the broker's representations been true. The court accepted the testimony of the Salahutdins' appraiser that as of November 1991 (the date nearest trial), the fair market value of a comparable property that could be subdivided would be \$1.1 million, and the value of the subject property with only a remote possibility of subdividing was only \$925,000.⁴⁹

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Not only is the potential measure of damages elevated when dealing with a breach of fiduciary duty, but the fiduciary's ability to argue comparative fault is potentially lessened. The fiduciary relationship fosters legal reliance on the fiduciary to perform according to legal standards, and the ability of a principal to rely on such performance means that facts which ordinarily call for investigation will not excite suspicion on the principal's part.

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ENDNOTES

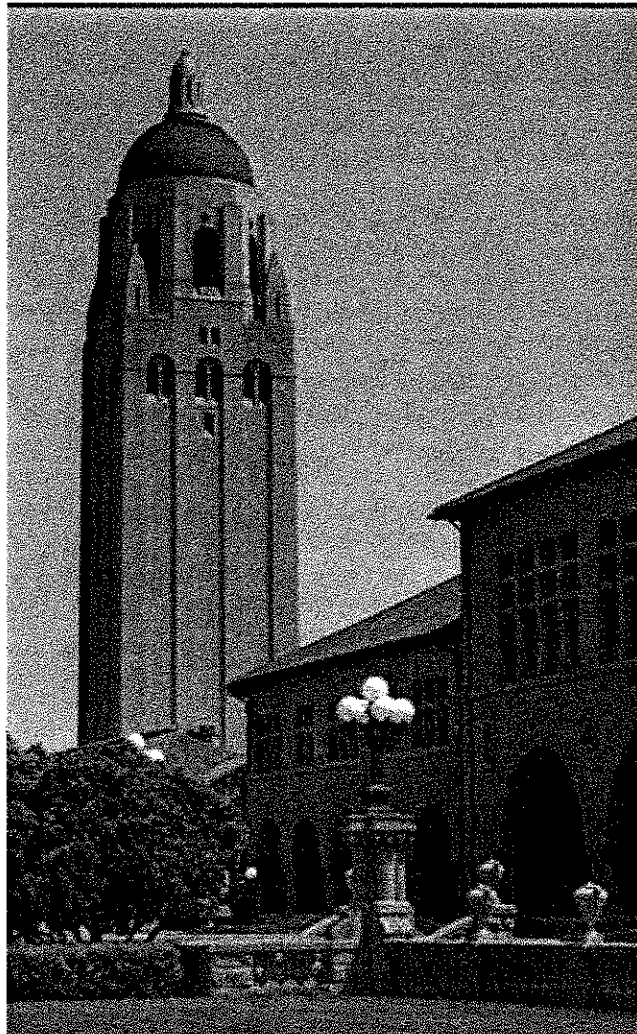
- 1 *Michel v. Palos Verdes Network Group, Inc.*, 156 Cal. App. 4th 756, 759 (2007).
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- 26 *Berger v. Seyfarth Shaw, LLP*, 2008 WL 683425 (N.D. Cal. Mar. 7, 2008).
- 27 *Rattray v. Scudder*, 28 Cal. 2d 214, 222-23 (1946) (quoting *Langford v. Thomas*, 200 Cal. 192, 196 (1926)).
- 28 CAL. CIV. CODE § 2079.24; *Field*, 63 Cal. App. 4th at 25 ("[A] broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty."); see also *Barry v. Raskov*, 232 Cal. App. 3d 447, 455-56 (1991) (Broker owes a fiduciary the "duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision.").
- 29 *Montoya*, 176 Cal. App. 3d at 64-65; see also CAL. PROB. CODE §§ 16000, 16015.
- 30 *Barry*, 232 Cal. App. 3d at 445.
- 31 *Rhoades v. Savage*, 219 Cal. App. 2d 294, 299 (1963).
- 32 *Barry*, 232 Cal. App. 3d at 455-57.
- 33 *Id.* at 455 (citing *Maloney v. Rath*, 69 Cal. 2d 442, 446 (1968)).
- 34 *Id.* at 456 (emphasis added).
- 35 Cal. BAJI 12.37.1.
- 36 *Id.* at 1240; see also *Stout v. Turney*, 22 Cal. 3d 718, 725 (1978).

- 37 *Salahudin v. Valley of California, Inc.*, 24 Cal. App. 4th 555, 564 (1994).
- 38 RUTTER, CAL. PRACTICE GUIDE: REAL PROP. TRANSACTIONS § 11:361 (2011); see also *Fragale v. Faulkner*, 110 Cal. App. 4th 229, 236 (2003).
- 39 *Salahudin*, 24 Cal. App. 4th at 565.
- 40 CAL. CIV. CODE § 3333.
- 41 *Salahudin*, 24 Cal. App. 4th at 564.
- 42 24 Cal. App. 4th 555 (1994).
- 43 *Id.* at 560.
- 44 *Id.* at 562.
- 45 *Id.*

- 46 *Id.*
- 47 *Id.* at 560.
- 48 *Id.* at 562.
- 49 *Id.* at 561.
- 50 *Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1239 (1995).
- 51 *Id.*

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