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BROKER LIABILITY AFTER *EASTON* v. STRASSBURGER: LET THE BUYER BE AWARE

I. INTRODUCTION

Several legal aspects involved in the sale of real property have undergone major changes in recent history. The purchaser now has remedies available for the sale of defective homes that were not available in the past. These new remedies include recoveries based on implied warranty¹ and negligence² theories. In addition, the duty of the real estate broker as the agent of the seller has changed.

In February 1984, a California court of appeal decided *Easton v. Strassburger*.³ *Easton* held that a real estate broker has a duty to conduct a competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the property that such an investigation would reveal.⁴ This decision contains several legal and practical uncertainties. *Easton* relied on fraud cases as a basis for holding a real estate broker liable for negligence for nondisclosure. Furthermore, the court promoted the interests of the home purchaser at the expense of forcing the broker into the position of a housing inspector, which is an obligation that extends beyond his traditional duties and training. Finally, the unclear guidelines set forth by the court created difficulties for the broker in determining the scope of his duties.

As a result of the uncertainties presented by *Easton*, the legislature approved Senate Bill No. 453 for enactment in January 1986.⁵ This legislation codifies, clarifies and limits the *Easton* decision. However, this legislative response to *Easton* primarily shifts the burdens associated with inspection back onto the home purchaser.

This comment analyzes the history of the seller's duty to the buyer of real property and the changes that have occurred in this area of the law. The focus of this analysis will be on the broker's

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1. See, e.g., *Conner v. Great Western Savings & Loan Ass'n*, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968); *Kriegler v. Eichler Homes Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

2. See, e.g., *Kavalaris v. Anthony Bros., Inc.*, 217 Cal. App. 2d 737, 32 Cal. Rptr. 205 (1963).

3. 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984).

4. *Id.* at 102, 199 Cal. Rptr. at 390.

5. S.B. 453, ch. 223, § 4 (1985).

changing role in the sales transaction and the problems that have arisen as a result of his new obligations. Furthermore, this comment proposes new legislation which will maximize buyer protection by requiring mandatory housing inspections for the sale of all residential property which is older than a designated age. All brokers will be required to inform prospective purchasers of the availability and benefits of housing inspection agencies for all residential property that is newer than the designated age. This legislation is designed to protect the unsuspecting home purchaser from latent defects without placing an unduly harsh burden upon the broker.

II. HISTORY OF VENDOR LIABILITY IN THE SALE OF REAL PROPERTY

A. *The Doctrine of Caveat Emptor*

Traditionally the seller's relationship to the buyer was one of *caveat emptor*: let the buyer beware.⁶ This English doctrine evolved in response to the dramatic decline in the power of the church during the seventeenth century. Correspondingly, rapid trade growth during this era created an attitude of self-fulfillment within merchants and tradespeople.⁷

In the United States, however, it was not until the industrial revolution that the doctrine of *caveat emptor* took full force. The frontier spirit during that era fostered industrial growth with minimal government interference. The court decisions also upheld the ideal that businesses should be allowed to run with little judicial interference.⁸ In *Barnard v. Kellog*,⁹ Justice Davis, speaking for the Supreme Court, declared that:

No principle of the common law has been better established, or more often affirmed, both in this country and in England than . . . the maxim of *caveat emptor*. Such a rule, requiring the purchaser to take care of his own interests, has been found best adapted to the wants of trade in the business transactions of life.¹⁰

6. *Barnard v. Kellog*, 77 U.S. 383 (1870); *Berger v. Burkoff*, 200 Md. 561, 92 A.2d 376 (1952); *Levy v. Young Construction Co.*, 46 N.J. Super. 293, 134 A.2d 717 (1957).

7. For a detailed discussion of the history and development of *caveat emptor*, see Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1133-86 (1931).

8. *Barnard v. Kellog*, 77 U.S. 383 (1870) (The sale of packed wool was not by sample and because the purchaser had the opportunity to inspect the commodity, the rule of *caveat emptor* applied).

9. *Id.*

10. *Id.* at 388.

While the doctrine traditionally protected the seller from liability for defective goods, it has never shielded him from all liability. In *Barnard*, Justice Davis indicated that the doctrine does not apply in the case of an express warranty.¹¹ Furthermore, the doctrine does not apply when the buyer has not had an opportunity to inspect the commodity.¹² Finally, the doctrine of *caveat emptor* does not apply if the seller is guilty of fraud.¹³

B. Seller's Duty to Disclose

Traditionally, the doctrine flourished as a result of the courts' limited definition of fraud.¹⁴ In *Vulcan Metals Co. v. Simmons MFG. Co.*,¹⁵ Judge Learned Hand stated that "puffing" or "dealers talk" does not constitute fraud if the buyer has had an opportunity to inspect the product.

At the time of *Vulcan Metals*, however, the use of the doctrine in the law of sales began to fade as the government began increasing regulation through the Uniform Sales Act in order to protect the vulnerable purchaser from defective goods.¹⁶ While these regulations nearly abolished *caveat emptor* as applied to personal property, it was not until later case law that similar protections were provided with respect to real estate.¹⁷

In California, the doctrine began to fade in regard to real estate mainly as a result of the court's interpretation as to what constitutes fraud.¹⁸ In *Dyke v. Zaiser*,¹⁹ the court held that "the present tendency . . . is to class concealment as actual fraud in those cases where the seller knows of facts which materially affect the desirabil-

11. *Id.*

12. *Id.*

13. *Id.*

14. *Vulcan Metals Co. v. Simmons MFG. Co.*, 248 F. 853 (2d Cir. 1918) (When buyer of vacuum cleaners had full opportunity to inspect the product, misrepresentations concerning their qualities should be deemed mere puffing).

15. *Id.*

16. The trend away from *caveat emptor* is discussed in Comment, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699 (1936); Comment, *Warranty of Quality: A Comparative Survey*, 14 TUL. L. REV. 327 (1940); Comment, *Caveat Vendor—A Trend in the Law of Real Property*, 5 DE PAUL L. REV. 263 (1956).

17. See, e.g., *Murphy v. Sheftel*, 121 Cal. App. 533, 9 P.2d 568 (1932). The court distinguished real property from personal property in the application of implied warranties. The purchaser of real property, in the absence of misrepresentation or fraud, takes the risk of quality.

18. See, e.g., *Dyke v. Zaiser*, 80 Cal. App. 2d 639, 182 P.2d 344 (1947); *Milmoe v. Dixon*, 101 Cal. App. 2d 257, 225 P.2d 273 (1950); *Curran v. Heslop*, 115 Cal. App. 2d 476, 252 P.2d 378 (1953).

19. 80 Cal. App. 2d 639, 182 P.2d 344 (1947).

ity of the property which he knows are unknown to the buyer."²⁰

C. *Broker's Duty to Disclose*

The California courts' "new" definition of fraud is not limited merely to the seller of real property. The duty of disclosure placed upon the seller has been extended by statute to the real estate broker²¹ as well. The rule of disclosure as applied to brokers was best articulated in *Lingsch v. Savage*.²²

It is the law of this state that where a real estate broker or agent, representing the seller, knows of facts materially affecting the value or desirability of property offered for sale and these facts are known or accessible only to him and his principal, and the broker or agent also knows that these facts are not known to or within the reach of the diligent attention and observation of the buyer, the broker or agent is under a duty to disclose these facts to the buyer.²³

California courts have consistently held the real estate broker liable for fraud based on nondisclosure of material facts.²⁴ In *Cooper v. Jevne*,²⁵ the court relied on *Lingsch* as a basis for holding a real

20. *Id.* at 653, 182 P.2d at 353.

21. In California, the requirements for possessing a real estate broker's license are set forth pursuant to CAL. BUS. & PROF. CODE § 10150.6 (West Supp. 1984). This provision provides in pertinent part:

The Real Estate Commissioner shall not grant an original real estate broker's license to any person who has not held a real estate salesman's license for at least two years and qualified for renewal real estate salesman status, within the five-year period immediately prior to the date of his application for the broker's license, and during such time was not actively engaged in the business of real estate salesman, except that an applicant for a real estate broker's license having at least the equivalent of two years' general real estate experience or graduation from a four-year college or university course, which course included specialization in real estate, files a written petition with the Department of Real Estate setting forth his qualifications and experience, and the commissioner approves, he may be issued a real estate broker's license immediately upon passing the examination and satisfying the other requirements of this article.

Id.

22. *Cooper v. Jevne*, 56 Cal. App. 3d 860, 866 (1976) (modifying a quotation from *Lingsch v. Savage*, 213 Cal. App. 2d 729, 735, 29 Cal. Rptr. 201 (1963)) (The real estate broker was held liable for fraud based on his knowledge that building units were in a state of disrepair and that the units had been placed for condemnation, and for his failure to inform prospective purchasers of such facts).

23. *Id.*

24. *See, e.g., Cooper v. Jevne*, 56 Cal. App. 3d 860, 128 Cal. Rptr. 724 (1976).

25. *Id.* at 866, 128 Cal. Rptr. at 727 (1976) (Liability for fraud was based upon real estate agent's knowledge of substandard construction of condominiums coupled with factual misrepresentations concerning the luxurious characteristics of the units and their excellent investment potential).

estate broker liable for fraud based on affirmative factual misrepresentation as to the quality and condition of certain condominiums. The court held that a real estate broker may not escape liability for fraud merely by claiming that his job is finished once a buyer and seller are brought together. The rationale for holding the broker liable has been based upon his role in the residential sales transaction. In *Lingsch*, the court indicated that in most instances, the broker has a personal interest in the business transaction and derives a profit from it. Therefore, the broker should be under the same duty of disclosure as the seller.²⁶

III. EASTON V. STRASSBURGER

Until recently, the duty of disclosure for brokers was limited to disclosure of known material facts in order to avoid fraud. In February 1984, a California court of appeal extended the real estate broker's duties to the prospective purchaser in the case of *Easton v. Strassburger*.²⁷ In *Easton*, the court held that a real estate broker has a duty to diligently inspect a listed property and to disclose to prospective purchasers of that property all facts materially affecting the property that such an inspection would reveal.²⁸

A. *Facts of Easton*

In May 1976, the Eastons purchased residential property located in the City of Danville, California, a community in the foothills of Mount Diablo.²⁹ The property consisted of a three thousand square foot house, a swimming pool and a guest house, which were all located on a one acre parcel. Appellant, Valley Realty, was the listing broker in the sales transaction.

Shortly after the home was purchased, earth movements and subsequent slides caused substantial structural damage to the house. Expert testimony was produced which indicated that the earth movements were caused because the house was built on land that had not been properly filled.³⁰

Two slides occurred on the property during the period the sell-

26. 213 Cal. App. 2d at 736, 29 Cal. Rptr. at 205.

27. 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984). The California Supreme Court denied hearing of *Easton v. Strassburger* on May 31, 1984.

28. *Id.* at 102, 199 Cal. Rptr. at 390.

29. Respondent's Brief at 2, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984) (The opinion erroneously refers to the city as the City of Diablo).

30. 152 Cal. App. 3d at 96, 199 Cal. Rptr. at 385. The house was valued at \$20,000 as damaged and at \$170,000 prior to the damage.

ers owned it; a minor slide occurred in 1973 and a major slide occurred in 1975.³¹ Upon selling the property in 1976, defendant sellers, Mr. and Mrs. Strassburger, failed to inform the representative real estate brokers of the past slide activity or of the corrective measures they had taken.³² Evidence presented at trial indicated that there were certain "red flags" which should have alerted the listing brokers to these soil problems.³³ These "red flags" included netting on the filled slope, uneven floors in the guest house and a retaining wall under construction near the guest house.³⁴

B. *Broker Liability Based on Negligence*

The *Easton* decision presents a dramatic shift away from prior case law in the area of broker liability for nondisclosure. In *Easton*, the court found the broker liable for simple negligence for failure to further investigate the soil conditions of the property.³⁵

The court supported its holding by looking to the existing law of broker liability based on fraud. The court concluded that "such a duty [to inspect and disclose] is implicit in the rule articulated in *Cooper* and *Lingsch*, which speaks not only to facts known by the broker, but also and independently to facts that are accessible only to him and his principle."³⁶

IV. UNCERTAINTIES SURROUNDING *Easton v. Strassburger*

The policy of providing the unsuspecting home purchaser increased protection through disclosure is very desirable. In promoting such a policy, however, the *Easton* decision falls short of an equitable balance between the consumer's needs and the real estate broker's duties. Problems within the decision and the uncertain implications resulting therefrom cast doubt as to the soundness of the court's reasoning, as well as to the limits of the holding. First, the court improperly applied prior case law in an effort to support its new interpretation of the duties of the real estate broker. The holding in *Easton* was justified by claiming that the broker's duty to inspect and to disclose was implicit within existing case law. Additionally, the court called upon the broker to discover and to disclose defects

31. *Id.*, 199 Cal. Rptr. at 386.

32. *Id.*

33. *Id.*

34. 152 Cal. App. 3d 90, 96, 199 Cal. Rptr. 383, 386 (1984).

35. *Id.* at 102, 199 Cal. Rptr. at 390.

36. *Id.* at 99, 199 Cal. Rptr. at 388.

regardless of his lack of training as a housing inspector. Finally, the ambiguous wording of the decision posed practical obstacles in determining the scope of the broker's duties.

A. *Misapplication of Prior Case Law*

Easton relied on cases dealing with fraud as a basis for imposing a duty upon the broker to disclose facts which would be revealed through a reasonable inspection of the property.³⁷ The court examined the case of *Lingsch v. Savage* in its discussion of the broker's duty to disclose.³⁸ In *Lingsch*, the broker was held liable for fraud based on his knowledge that listed property was in the process of being condemned and for his failure to reveal such information to the purchasers.³⁹ The rule articulated in *Lingsch* as applied to a cause of action for fraud based on nondisclosure included five elements. These elements are:

- (1) Nondisclosure by the defendant of facts materially affecting the value or desirability of the property;
- (2) Defendant's knowledge of such facts and of their being unknown to or beyond the reach of the plaintiff;
- (3) Defendant's intention to induce action by the plaintiff;
- (4) Inducement of the plaintiff to act by reason of the nondisclosure; and
- (5) Resulting damages.⁴⁰

The *Easton* court interpreted the language of *Lingsch* to include an independent duty of the broker to disclose facts accessible only to him and his principal, regardless of the broker's actual knowledge of such facts.⁴¹ However, in reading the second element for a cause of action for fraud based on nondisclosure, it appears that the duty to disclose is wholly *dependent* upon the broker's actual knowledge of material facts.

The *Easton* court also relied on another fraud case as a basis for establishing a new duty upon the broker.⁴² In *Brady v. Carman*,⁴³ a real estate broker was held liable for fraud for telling pur-

37. *Id.* at 102, 199 Cal. Rptr. at 390. See also *Cooper v. Jevne*, 56 Cal. App. 3d 860, 128 Cal. Rptr. 724 (1976); *Lingsch v. Savage*, 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1963); *Brady v. Carman*, 179 Cal. App. 2d 63, 3 Cal. Rptr. 612 (1960).

38. *Easton*, 152 Cal. App. 3d at 99, 199 Cal. Rptr. at 387-88.

39. 213 Cal. App. 2d at 733, 29 Cal. Rptr. at 203.

40. *Id.* at 738, 29 Cal. Rptr. at 206. See also 3 WITKIN, CALIFORNIA PROCEDURE §§ 348, 352-56.

41. 152 Cal. App. 3d at 99, 199 Cal. Rptr. at 388. See *supra* text accompanying note 36.

42. 152 Cal. App. 3d at 102, 199 Cal. Rptr. at 390 (1984) (citing *Brady v. Carman*, 179 Cal. App. 2d 63, 3 Cal. Rptr. 612 (1960)).

43. 179 Cal. App. 2d 63, 3 Cal. Rptr. 612 (1960).

chasers they "had nothing . . . to worry about," when they questioned the broker about an easement across the property. *Easton* focused on specific language in *Brady* which indicates that a broker is obligated to act professionally by investigating the easement in order to make a full disclosure of the burdens.⁴⁴ *Easton*, however, failed to cite the language within *Brady* which states that the broker's duty to inspect does not arise unless inquiry has been made and the broker has undertaken to answer.⁴⁵ The court in *Brady* held the broker liable for fraud based on the purchasers' lack of knowledge concerning easements, coupled with the broker's evasive answers to their questions.⁴⁶

A close examination of these prior cases relating to fraud reveal that these decisions did not impose an independent duty of inspection and disclosure upon the real estate broker. Until the *Easton* decision, broker liability for nondisclosure was limited to actual knowledge of material facts or affirmative representations as to unknown facts.

B. *Broker as the Inspector for Defects*

Easton further supported its new duty for real estate brokers by explaining that brokers are the best situated to obtain and disclose accurate information regarding the listed property.⁴⁷ It is true that the broker may be better situated to obtain reliable information than the inexperienced purchaser. However, he is not best situated to discover *all* the potential defects in a listed property.

A broker is trained in the areas of real estate conveyancing, mortgage financing and business ethics.⁴⁸ None of this required

44. 152 Cal. App. 3d at 102, 199 Cal. Rptr. at 390.

45. 179 Cal. App. 2d at 68, 3 Cal. Rptr. at 616.

46. *Id.*

47. 152 Cal. App. 3d at 102, 199 Cal. Rptr. at 389. (The court felt that buyers justifiably rely on the expertise of the selling broker to provide reliable information concerning the property).

48. CAL. BUS. & PROF. CODE § 10153 (West 1964 & Supp. 1984). This provision provides in pertinent part:

In addition to the proof of honesty, truthfulness and good reputation required of any applicant for a real estate license, the commissioner shall ascertain by written examination that the applicant . . . has:

(a) Appropriate knowledge of the English language . . .

(b) A fair understanding of the rudimentary principles of real estate conveyancing, the general purposes and general legal effect of deeds, mortgages, land contracts of sale and leases, and of the elementary principles of land economics and appraisals.

(c) A general and fair understanding of the obligations between principal and agent, of the principles of real estate practice and the canons of business ethics pertaining thereto . . .

training involves discovering potential structural defects in real property. The broker's expertise in the area of home inspections is limited to practical experience with actual material defects. This practical experience often does not surpass that of the purchaser who has experienced structural defects in his own home.

C. *Broker's Duty to Inspect and Disclose is Broad and Uncertain*

In addition to the unsound foundation of the *Easton* decision, several problems arise relative to the practical application of the holding. The court-imposed duty of inspection and disclosure was devoid of specific guidelines for the broker to follow in order to avoid liability for negligence. Furthermore, *Easton* is unclear as to the application of the holding to both the buyer's broker and the seller's broker.

1. *Insufficient Guidelines*

In analyzing the holding of *Easton*, it is difficult to determine the limits of the broker's duties. The court referred to a broker's "duty to conduct a reasonably competent and diligent inspection"⁴⁹ of the listed property. The court failed to set forth specific limits as to what a reasonably competent and diligent inspection entailed. For example, did the broker have a duty to inspect underneath a listed property for structural and soil problems? Would the broker be held negligent for failure to notice cracked shingles on a roof? Under a broad interpretation of *Easton*, the answers to both questions could potentially have been in the affirmative.

2. *Liability of the Buyer's Broker?*

The potential for misinterpretation of *Easton* is also present when the holding is narrowly applied. The court held that "the duty of a real estate broker, *representing the seller*,"⁵⁰ includes a duty to inspect and to disclose. The holding could be interpreted as imposing duties of inspection *only* on the seller's broker. The court did not address the duties of the buyer's broker in the sales transaction.⁵¹

A strict application of the *Easton* decision was most likely not the intention of the court, however. Imposition of inspection duties

Id.

49. 152 Cal. App. 3d at 102, 199 Cal. Rptr. at 390.

50. *Id.* (emphasis added).

51. *Id.* & n.8. In *Easton*, the seller's agent was the only party to appeal the trial court decision.

upon only the seller's broker would not advance the policy of purchaser protection in an equitable manner.⁵²

V. LEGISLATIVE RESPONSE TO *Easton*

The problems in interpreting and applying *Easton* prompted the California Legislature to address the issue.⁵³ In July 1985, Sen-

52. An agency between the real estate broker and his principal creates a fiduciary relationship. This relationship imposes upon the broker the duty to act toward his principal in the highest good faith. A broker is ordinarily the agent of the party who first employs him. However, he must deal honestly with all parties to any transaction and must act in a careful and non-negligent manner.

H. MILLER & M. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE §§ 4:2, 4:6, 4:23 (1975). Therefore, the imposition of a duty to inspect on the seller's broker would most likely be interpreted as applying to the buyer's broker as well.

53. S.B. 453, ch. 223, § 4 (West Supp. 1985). This bill adds an act to the CAL. CIVIL CODE commencing with § 2079. This section will provide in pertinent part:

2079. It is the duty of a real estate broker, licensed under the provisions of Division 4 (commencing with Section 10000) of the Business and Professions Code, to a prospective purchaser of residential real property comprising one to four dwelling units, including a manufactured home as defined in Section 18007 of the Health and Safety Code, to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that such an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer or is broker who acts in cooperation with such a broker to find or obtain a buyer.

2079.1. The provisions of this article relating sale transactions of residential real property comprising one to four dwelling units apply with equal force to leases of that property that include an option to purchase, ground leases of land on which one to four dwelling units have been constructed, or real property sales contracts, as defined in Section 2985, for that property.

2079.2. The standard of care owed by a broker under this article is the degree of care that a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience, and examination, required to obtain a license under Division 4 (commencing with Section 10000) of the Business and Professions Code.

2079.3. The inspection to be performed pursuant to this article does not include or involve an inspection of areas that are reasonably and normally inaccessible to such an inspection, and, if the property comprises a unit in a planned development as defined in Section 11003.1 of the Business and Professions Code, condominium as defined in Section 783, or a stock cooperative as defined in Section 11003.2 of the Business and Professions Code, does not include an inspection of more than the unit offered for sale, if the seller or the broker complies with the provisions of Section 1360.

2079.4. In no event shall the time for commencement of legal action for breach of duty imposed by this article exceed two years from the date of possession, which means the date of recordation, the date of close of escrow, or the date of occupancy, whichever occurs first.

2079.5. Nothing in this article relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself, including those facts which are known to or within the diligent attention and observation of the

ate Bill No. 453 was signed into law which attempts to "codify and make precise"⁵⁴ the holding of *Easton v. Strassburger*.

A. *Clarification of Ambiguities Within Easton*

The bill precisely sets forth a broker's duties. The new legislation requires that a real estate broker conduct a reasonably competent and diligent *visual* inspection of a property listed for sale and disclose to prospective purchasers all facts materially affecting the value or desirability of such property that such an investigation would reveal.⁵⁵ The duty of inspection and disclosure is imposed upon both the seller's broker and the buyer's broker acting in cooperation in the sales transaction.⁵⁶

The legislation also provides for limits as to the scope of the broker's inspection. The broker's duty "does not include or involve an inspection of areas that are reasonably and normally inaccessible to such an inspection."⁵⁷

Finally, the legislation establishes the standard of care for which the broker will be held responsible. The broker is held "to the degree of care that a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience, and examination, required to obtain a license under California law."⁵⁸

B. *Inadequate Purchaser Protection*

Although the new legislation succeeds in clarifying the *Easton* decision, it fails to codify the fundamental policy of purchaser protection. The foundation of *Easton* was to insure that the home buyer receives competent information in order to make an informed deci-

buyer or prospective buyer.

Id.

54. S.B. 453, ch. 223, § 4 (1985).

55. CAL. CIV. CODE § 2079 (West Supp. 1985).

56. *Id.*

57. CAL. CIV. CODE § 2079.3 (West Supp. 1985).

58. CAL. CIV. CODE § 2079.2 (West Supp. 1985). The legislation also requires the buyer to exercise reasonable care to protect himself. Furthermore, the legislation establishes that professional liability insurers may not exclude coverage for damages arising out of breach of the duties prescribed by this bill. Finally, a two year statute of limitations is now established which runs from the date of recordation, the date of the close of escrow, or the date of occupancy, whichever occurs first. See CAL. CIV. CODE §§ 2079.4, 2079.5 (West Supp. 1985); CAL. INS. CODE. § 11589.5 (West Supp. 1985).

sion whether to purchase.⁵⁹ The legislature's efforts to both legitimize the *Easton* decision and to place reasonable limits on the holding, leave the home purchaser in an unenlightened position. The reasonably prudent real estate licensee is not likely to forewarn the home buyer of potential defects, given the degree of knowledge required to obtain a California license.⁶⁰ Furthermore, the legislation gives the broker little incentive to expand his professional expertise beyond the financing realm.

VI. PROPOSALS

The underlying conflict existing in both *Easton* and Senate Bill No. 453 arises as a result of the insistence of placing the interests of the home purchaser against that of the real estate broker. *Easton* promoted the interest of the buyer at the expense of the real estate broker, while Senate Bill No. 453 supports the broker's position by limiting purchaser protections to a minimal level. The interests of both parties may be served, however, without creating any injustices.

A. *Mandatory Housing Inspections*

As the price of real estate escalates in California,⁶¹ the purchaser requires increased protection upon acquiring a used residence. The price of homes has risen much faster than the rate of inflation, requiring the purchaser to expend a greater proportion of his income on housing.⁶² As an alternative to holding the broker liable for failing to discover potential defects, the California Legislature should enact legislation which would require inspection programs for all used homes older than a designated age.⁶³ These inspections would be carried out by experienced home inspectors who are trained specifically to discover common latent defects in structure and soil of residential property.

While the proposed legislation is novel, inspection agencies now

59. 152 Cal. App. 3d at 99, 199 Cal. Rptr. at 388.

60. See *supra* note 48 and accompanying text.

61. From 1970 to 1983 the median sales price of existing single family houses sold in California rose from \$24,300 to \$110,000, an increase of over 300%. During the same period, the consumer price index rose approximately 150%. See, e.g., CALIFORNIA ALMANAC, Table 28-2 (1984); DEP'T OF FINANCE, CAL. STATISTICAL ABSTRACT, Table D-8 (1984).

62. *Id.*

63. For a discussion of the availability of home inspection and warranty programs, see U.S. DEP'T OF HOUSING AND URBAN DEV., A STUDY OF HOME INSPECTION AND WARRANTY PROGRAMS (1977).

provide home inspection services to the private sector.⁶⁴ Generally, these inspection services provide the home purchaser with a detailed inspection of all components of the residential unit.⁶⁵ In addition, optional warranties are often provided to those components found to be in satisfactory condition.⁶⁶

Most importantly, the home inspection service alerts the prospective purchaser to potential problems arising in connection with a residence which otherwise might not be discovered by either the experienced home buyer or the diligent real estate broker. Furthermore, the inspection service offers the prospective purchaser the option of purchasing a warranty to insure against future defects.⁶⁷

1. *Specific Statutory Proposals*

In order to insure maximum protection for the home purchaser without placing an unduly harsh burden upon the real estate broker, legislation modeled after that legislation proposed in the Appendix to this comment should be enacted which sets out specific guidelines as to the duties and rights of all parties to the sales transaction.⁶⁸ The home inspection must be mandatory for all homes older than a designated age. The legislature should determine the age requirement on

64. *Id.* at 13-14. Two basic types of Home Inspection and Warranty (HIW) firms have arisen since 1970. These service contract firms warrant nonstructural items without providing any home inspection. The home inspection firms generally provide a detailed inspection of the residence and also provide an optional warranty on components of the home found in satisfactory condition. The home inspection firm warranty covers structural defects as well as non-structural defects.

65. *Id.* at 21. The inspections usually last two to three hours and include a detailed report outlining needed repairs. The inspection generally covers a broader area than the home warranty by including walkways, patios and drainage systems. Prices for the inspection ranged from approximately \$120 for a \$30,000 house to \$200 for a \$150,000 house based on 1977 prices.

66. For example, AMC Home Inspection Service is one of the major firms in the industry nationally. Its services include a detailed two to three hour inspection which covers mechanical systems such as plumbing, heating and electrical systems; and basic structural components such as roofs, ceilings, wall, floors and foundations. An optional one-year warranty is available for all components passing the inspection. *Id.* at appendix B5-B7. This appendix also includes an analysis of the growth patterns, marketing strategy and claims of processes of ten different home inspection agencies.

67. The purchaser's option of not purchasing the warranty does not, however, shield the home inspection agency from liability for negligence in their inspection. *See* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 617 (4th ed. 1971).

68. City ordinances currently exist in the City of Pasadena and the City of Davis which require an inspection for building code defects upon the change in occupancy in any residential unit. PASADENA, CAL. CITY ORDINANCE 5,121; DAVIS, CAL. CITY CODE § § 6-19 to 6-28. *See* appendix for proposed state statute for mandatory housing inspections of all used residential property older than a designated age.

the basis of detailed studies on home deterioration and builder-vendor liability.⁶⁹ In addition, after a certificate of inspection is presented to the prospective purchaser, the broker should be relieved from liability for all defects that are unknown to him.

With respect to residential property that is newer than the designated age, the broker will be required to inform prospective purchasers of the availability and benefits of housing inspection agencies. The broker will be required to disclose information concerning items of inspection, costs of inspection and warranty coverage. The broker will be relieved from liability for future defects only upon receiving a signed disclaimer from the purchaser which states that he has been informed about the availability of housing inspections and that he consents to relieving the broker from liability.

VII. CONCLUSION

This comment has outlined the trend toward greater consumer protection in the law of real property sales. The courts have attempted to offer the home purchaser increased protection in recent years in order to insure an arms length transaction between buyer and seller. To further this objective, the real estate broker had an excessive burden to inspect for potential defects. The legislature's efforts to resolve the broker's dilemma however, merely recreate problems for the home purchaser.

The proposed legislation balances the interests of all parties to the real estate transaction. Furthermore, it offers an effective and equitable solution to the problems posed both by *Easton* and the present legislative response. Finally, the proposed legislation furthers the trend of offering the prospective home purchaser the opportunity to enter into the sales transaction on equal footing with the seller.

Joel M. King

APPENDIX

Proposal for State Statute for Mandatory Housing Inspections of Used Property Older Than a Designated Age

§ 0001 DEFINITIONS.

For the purposes of this statute, the following terms shall have the meanings ascribed by this section:

STATE. The State of California.

69. See *supra* note 1. On newer homes, the purchaser may hold the builder-vendor liable for defects based on implied warranty.

PERSON. An individual, partnership, corporation or association, or the agent of any of the foregoing.

BROKER. An individual who is licensed pursuant to the requirements of California Business & Professions Code § 10150.6.

UNIT. A single family residential unit.

§ 0002 REQUIREMENTS.

No owner shall enter into an agreement to sell or exchange, nor shall any person act as a real estate broker, salesperson or agent in connection with the sale or exchange of any residential unit older than _____ years of age unless such agreement includes a provision which specifies compliance with this section.

Prior to the sale or exchange of such property, the owner, broker, salesperson or agent shall present a certificate of home inspection to the home purchaser, including a detailed report of structural, mechanical and electrical defects present at the time of inspection. Such certificate shall be presented by a licensed home inspection agency.

§ 0003 LIABILITY

This provision shall relieve the owner, real estate broker, agent or salesperson from all liability for unknown defects later discovered in residential units older than _____ years of age.

§ 0004 CONTENTS OF CERTIFICATE.

The certificate of home inspection shall state:

- 1) The date of issue.
- 2) The address of the residential unit.
- 3) The name of the person to whom the certificate is issued.
- 4) The name of the record owners of the residential unit.
- 5) The name and license number of the home inspection agency providing such certificate.
- 6) A report of all items of the residential unit found to be in unsatisfactory condition.

§ 0005 COSTS.

The cost of such home inspection shall be established by agreement by purchaser and seller of the residential unit.

§ 0006 NEWER RESIDENTIAL UNITS.

No real estate broker, agent or salesperson shall enter into any agreement to sell or exchange any residential unit newer than _____ years of age unless such broker, agent or salesperson has informed the prospective purchaser of the availability, cost, benefits and warranty coverage of home inspection agencies.

§ 0007 DISCLAIMERS.

Pursuant to § 0006, upon informing the prospective purchaser

of the availability of home inspection agencies, the broker, agent or salesperson shall be required to obtain a signed, dated disclaimer from the prospective purchaser, wherein such disclaimer states that the purchaser has been duly informed of the availability of home inspections and said purchaser consents to the broker, agent or salesperson's release from further liability.