

# Real Estate Legal Update

January 2014

## Short Sale Sellers May Not Be Responsible for Deficiency Judgments on Purchase Money Loans

By [Fredric W. Trester](#)

Recently, we have seen an increase in lenders going after short sale sellers for deficiency judgments. Section 580 of the California Code of Civil Procedure provides homeowner/borrowers some protection against deficiency judgments.

Section 580b may protect homeowner/borrowers with purchase money loans against deficiency judgments, but many assumed until a recent California Court of Appeal decision that this protection only applied after a foreclosure. Section 580e may protect homeowner/borrowers against deficiency judgments after short sales, but it is only in effect after July 15, 2011. Neither section may afford protection if fraud with the loan or waste with the property was involved.

On July 23, 2013, the California Court of Appeal in *Coker v. JP Morgan Chase Bank, N.A.*, et al, 218 Cal. App. 4th 1, decided that section 580b covered borrowers after short sales as well after foreclosures if the loan was a purchase money loan and the short sale was approved by the lender. It protects homeowner/borrower even where the short sale approval was based on an agreement by the homeowner/borrower that he or she would be liable for the deficiency judgment.

While the decision has been appealed to the California Supreme Court, unless overturned this decision will give short sale sellers a basis for arguing against lenders threatening deficiency judgments on purchase money loans.

## The Impact Of Stigma In Real Property Claims

By [Rinat Klier-Erich](#)

All real estate claims involve damages to the real property. Typically, the damages involve cost of repair, but often the homeowners also seek diminution. Most states hold that a homeowner cannot recover both cost of repair and diminution. In construction defect cases, the homeowner may be entitled to diminution or cost of repair, whichever is lower. In other cases, since the damages involve a property that is unique, a homeowner may be entitled to cost of repair, even if it is higher. Yet, in tort cases alleging non-disclosure against real estate

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### Firm Events

MKERT is a sponsor of the Third Annual REAL Symposium hosted by Stanford's SPIRE and The Real Property Law Section of the California State Bar on January 29, 2014. Click [here](#) to sign up.

### Virtual Real Estate Office Hours with Mary E. Work

Join former BRE Prosecutor and MKERT Partner Mary E. Work for a Virtual Office Hours conference call on February 26, 2014 at 12:00 p.m. Click [here](#) to sign up. Send your questions in advance to [mew@manningllp.com](mailto:mew@manningllp.com).

the homeowner may be entitled only to diminution (whether higher or lower than cost of repair). Therefore, diminution of value is an important component of damages and it is often misunderstood and confused with stigma.

Diminished value means the value of the property with the damage. The diminished value can be cost of repair but it can also be more than the cost of repair (inconvenience of having to do the repair), or it can be less than the cost of repair (a property that is dilapidated even without the non-disclosed damage). There also can be diminished value due to the fact that something cannot be fully repaired.

Stigma damage, however, is more amorphous. It is the notion that something happened to the property that may dissuade other buyers from purchasing it. It can be as a result of a significant event where a prospective buyer may fear that the property was not properly fixed, or it can be the perception of further adverse effects. Stigma damages also involve more unique cases, where there is no physical damage to the real property hence there is no cost of repair involved at all. Examples of such cases include where there is an intangible damage like, smell, noise, a difficult neighbor, or death in the home. Such 'diminution' in value is better referred to as 'stigma' and it describes the diminished value that attaches to the home for the foreseeable future, due to the home's history.

The issue with stigma damages is the difficulty in evaluating them. By their nature stigma damages are subjective. Therefore, they can result in extensive litigation. Stigma damages are defined as the reduced willingness of a subjective potential buyer to purchase the property due to its negative perception. The difficulty is in assessing the state of mind of a prospective buyer where there is no similar property to compare. Further, as our memories are short and damages from stigma typically dissipate over time there is some guess work involved in evaluating future stigma. Moreover, if market value is going to be affected by a detrimental condition, then this particular condition has to be given enough weight in the decision process of buyers in order to have a material effect on price. It has to be important as a variable that influences the home purchase decision (and different people have different values and needs).

An interesting point with stigma damages (as opposed to diminution) is that it can also affect properties that have not been at issue, but are close in proximity to the problem. This may happen for example, where there are environmental problems and fear that it would affect other properties. Many courts have addressed stigma damages and concluded that recovery of stigma damages must be based on more than just a "proximal fear." Courts generally require some current or former physical damage or actual interference with the use of the property that is separate from the perceived diminution in market value. Therefore there has to be a demonstrable temporary physical injury to the property and if this involves physical damage that the repair will not return the value of the property to its prior level because of negative public perception. Absent physical damage or substantial interference, damages based solely on the public's perception or fears are generally not recoverable.

The ability to recover for stigma damages depends on the specific state law on damages and on how a party attempts to allege its claim for damages. For example, if the damage is related to a nuisance claim the entitlement to an award may be more restrictive. Yet, if a breach of fiduciary duty claim is made against a real estate broker the recovery can be more expansive. In general, while the laws may differ from one state to the other, typically courts in most states acknowledge either explicitly or implicitly the ability to recover stigma damages.

## Are Real Estate Agents Professionals Or Sales People?

By [Fredric W. Trester](#)

As I grew up, my grandfather, who was a child of the depression, always said to me “get a profession.” To me, that meant an occupation which would require a graduate or post graduate degree.

Many real estate licensees view themselves as sales persons or facilitators. Perhaps this is due to the fact that the educational requirements to obtain a real estate license may in some jurisdictions not require even a college degree. Yet courts in most states view real estate licensees as professionals and failing to understand this can give rise to unhappy clients.

For example, in California, courts have found that a real estate agent’s duties to his client are equal to those a trustee owes to the beneficiaries of a trust. This is expressed in a leading California treatise and adopted by the California Court of Appeals indicates a *Fields v. Century 21 Klowden Forness Realty* (1998) 63 Cal App.4th 18, that “the broker as a fiduciary has a duty to learn the material facts that may affect the principal’s decision. He is hired for his professional knowledge and skill; is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal’s decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The agent’s duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information... the facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of each transaction, the knowledge and experience of the principal, the questions asked of the principal, and the nature of the property and the terms of the sale. The broker must place himself in the position of the principal and ask himself the type of

information required for the principal to make a well-informed decision. This obligation requires investigation of facts not known to the agent and disclosure of all material facts that might reasonably be discovered.”

Another California case, *Salahutdin v. Valley of California* (1994) 24 Cal App.4th 555 found that a buyer’s broker was liable for damages where he had passed on the wrong lot size information to his buyer without telling the buyer the source of the information and that he had not verified the accuracy thereof.

Of course some states, such as Florida, have created statutory relationships, defined as “transaction brokers” which allows a limited form of representation to a client, short of a fiduciary relationship. Instead, their duties are similar to those in most states where there is no fiduciary relationship namely: (1) dealing honestly and fairly; (2) accounting for all funds; (3) using skill, care and diligence in the transaction; (4) disclosing all known facts material that materially affect the value of residential real property and are not readily observable to the buyer; presenting all offers and counter-offers in a timely manner, unless instructed otherwise; (5) keeping limited confidentiality which prevents disclosure of what the seller will accept and what a buyer will pay.

So, what does the above mean in your day to day practice? Bottom line; real estate licensees should consider themselves professionals. As such, they should spend the time to educate themselves by taking regular classes on issues which are pertinent to their practice. They should endeavor to read the forms that they use, so that they can explain them to their clients. By definition, a professional should be someone that the client can rely on to provide knowledge and insights which the client doesn’t have. In addition the client should know that they can trust their agent, acting as a fiduciary, to look out for their best interest. This may mean that the agent must

read all the documents that are provided to the client to check for red flags or at least explain to the client that they need to read the documents carefully themselves. In addition the licensee should advise the client that they may need to seek advice from other professionals. For example, if there are issues in a title report, the agent should not take it upon themselves to explain what may be a legal issue, but instead refer the client to a title expert.

Although a real estate licensee must deal with a complex transaction with many moving parts, it is not expected that they know everything about all aspects of the transaction. An agent meets their fiduciary duties and act in a professional manner by:

1. Assuring that your client is advised to obtain all investigations available for a particular property (not all investigations may be necessary, such as one may recommend a survey for rural property, but not necessarily for a tract home);
2. Make sure your client listens to the advisors that they retained, and follows up on recommendations made by said advisors (if a home inspector recommends a geological report, then question your client as to whether they plan to follow this advice, and document their response);
3. Notify your clients that you are not the source of the information you are providing and you have not independently verified it;
4. Put yourself in your client's shoes and ask yourself whether you would want to know something about the property involved in the transaction.

Ultimately you will find that through your increased education and professionalism, your reputation as an experienced knowledgeable real estate licensee will grow, along with referrals and income.

### ***Dromy v. Lukovsky*** **Weekday Afternoon Hours Are Objectively Reasonable For Open House**

By [Candace Kallberg](#)

Civil Code Section 1954 “forbids the landlord from entering a dwelling, except in specified circumstances.” Subd. (b) provides: “Except in cases of emergency or when the tenant has abandoned or surrendered the premises, entry may not be made during other than normal business hours unless the tenant consents to an entry during other than normal business hours at the time of entry.”

In *Dromy v. Lukovsky* (2013) 219 Cal. App. 4th 278, Dromy rented a condominium to Lukovsky. Dromy wished to sell the property. The trial court issued a declaratory judgment permitting Dromy to hold open houses, under certain conditions, on weekend days between 1:00 p.m. and 4:30 p.m. Lukovsky contended that the declaratory judgment violated Section 1954.

In this case of first impression, the Court interpreted the meaning and scope of the phrase “normal business hours” in Section 1954. The statute attempts to balance the competing policies of the right of the tenant to quiet enjoyment with the landlord’s interest in being able to sell his property. It was undisputed that the custom and practice of licensed real estate agents is to hold open houses during weekends, thereby making viewing residential property more convenient for prospective purchasers, most of whom work during weekdays.

The Court upheld the trial court’s judgment finding “Dromy and his agent can hold open houses only twice per month, during limited afternoon hours. Further, after receiving notice, Lukovsky can propose alternative days for open houses. The judgment also includes safeguards designed to address Lukovsky’s concerns regarding third parties having access to her personal property. We conclude the judgment is reasonable under

the facts and circumstances and that it complies with the requirements of section 1954, subdivision (b).”

***Bushnell v. JPMorgan Chase***  
**Loan Modifications – Borrower**  
**Compliance with Trial Plans**

By [Mary E. Work](#)

In *Bushnell v. JPMorgan Chase Bank*, , C070643 (Cal. Ct. App. 2013), the Third District Court of Appeal held that when a lender offers a distressed borrower a trial modification plan under the Home Affordable Mortgage Program (HAMP) and the borrower successfully complies with the terms of the plan, then the lender must permanently modify the mortgage loan.

The facts surrounding *Bushnell* are as follows. In May 2004, borrowers Richard and Susan Bushnell (the plaintiffs) obtained a loan from Washington Mutual Bank to purchase a home. Plaintiffs executed a deed of trust, using the property as security. Defendant JPMorgan Chase Bank, N.A. (hereafter Chase), acquired plaintiffs’ loan and deed of trust.

In December 2008, plaintiffs defaulted on their loan. In May 2009, the plaintiffs received a trial loan modification plan from Chase. The plan asked plaintiffs to: (1) sign and return certain documents; and (2) submit the first trial period payment, which was calculated pursuant to HAMP guidelines. In June 2009, Chase sent a letter further stating that if plaintiffs made 3 trial period payments on time and complied with all applicable HAMP guidelines, then they would qualify for a permanent modification.

Chase issued a notice of trustee’s sale, even though plaintiffs complied with all of the loan modification requirements that Chase had outlined. The plaintiffs brought a lawsuit against Chase. The trial court decided in favor of Chase and held that the trial loan modification plan was not a binding contract

for a loan modification and also that plaintiffs failed to allege they qualified under HAMP.

The Court of Appeal reversed the trial court’s decision.

The Appellate Court found that when a lender offers a trial modification plan to a distressed borrower, the lender has already determined that the borrower satisfies the basic requirements regarding the loan obligation pursuant to HAMP, assuming the borrower’s representations on which the modification plan is based remain true and correct. Therefore, if the borrower complies with all of the terms in the trial modification plan during the trial period, and the borrower’s representations remain true, then the lender must make a permanent loan modification. The Court of Appeal explained, by receiving public tax dollars under the Troubled Asset Relief Program, the lender agrees to offer trial modification plans under HAMP and pursuant to the regulations issued by the Department of Treasury.

For these reasons, the Court concluded that the trial modification plan was an enforceable contract. Since the plaintiffs performed the conditions required under the contract, defendant Chase breached the contract by failing to offer plaintiffs good faith permanent loan modification.

***“[I]f the borrower complies with all of the terms in the trial modification plan during the trial period, and the borrower’s representations remain true, then the lender must make a permanent loan modification.”***

## Good Fences Make Good Neighbors But Not Very Good Property Lines

By [Jonathan A. Feldheim](#)

Imagine buying your dream retirement home only to learn a year after you've moved in that the 50-foot long fence running across the perimeter of your backyard is in the wrong place. And not just any wrong place, but encroaching your neighbor's backyard by 10 feet.

Suddenly 500 square feet of what you thought was your backyard is gone, making your backyard barely half the size you thought it was when you moved in.

In learning this you discover a few months before you closed escrow your neighbor commissioned a property survey that revealed the fence dividing the two backyards was 10 feet off the property line, but you didn't know that until it was too late.

You're upset, and rightfully so.

But you're even more upset when your neighbor tells you he told the real estate agent who listed and sold you your house about the survey and about the fence being in the wrong place before you ever even met the realtor, because of course the realtor never mentioned anything to you about talking to your neighbor, the property lines or the fences.

Now a year after escrow you call the agent about the survey but he denies ever having any communication with the neighbor, or at least claims he doesn't remember. You're suspicious. Your neighbor agrees to provide you his phone records and sure enough, the records reveal several phone calls between the neighbor and the number you yourself used to call the realtor.

This recently happened to a married couple in San Diego in the case of *Akin v. Sullivan*, San Diego N. County Case No. 37-2007-00054939-CU-OR-NC, and when they learned about the agent's non-disclosure of the survey revealing the property line, they sued alleging fraud and sought damages for the lost use and enjoyment of their backyard.

What the Plaintiffs did not realize, however, is that California Civil Code Section 3343 mandates that even if you are defrauded in the purchase of real estate, you are only entitled to recover, as damages, the difference between the actual value of what you paid and what you received.

What Plaintiffs also did not realize is that the deed delivered to them when they closed escrow identified the same property line boundaries as the neighbor's survey, and the law in California is that a homeowner is charged with notice of the contents of their deed.

For these reasons, while Plaintiffs' case at all times centered on what seemed to be an apparent non-disclosure by a listing agent of a material fact that should have been disclosed per California Civil Code Section 2079, suddenly Plaintiffs had a problem establishing any damages.

Their last hope was to put on expert testimony to explain how Plaintiffs had been damaged through the loss of use and enjoyment of what they thought was their backyard. Unfortunately for Plaintiffs, their expert testified his opinion was that the property would have been worth what Plaintiffs paid if they had received the property as described on their deed. They did.

Because of this testimony, it didn't matter if Plaintiffs reasonably believed the backyard fence represented their property line, it didn't matter whether the agent had been informed of the survey indicating otherwise, it didn't matter whether the agent failed to disclose the backyard fence did not run with the property line, it even didn't matter if the agent intentionally didn't disclose this information to Plaintiffs.

Plaintiffs failed to put on any evidence of damages. There was no reason for the case to go to a jury, and through a motion for non-suit Plaintiffs' case resulted in a complete defense verdict for the defendant listing agent. Plaintiffs got nothing but a bill for the defendant's costs.

Even giving the agent every benefit of every doubt, it is not safe to assume any agent making an error like this one will be so lucky to avoid a judgment or discipline. Most importantly, where a fence is should never be relied upon by a buyer, seller or a realtor as determinative of where property lines are.

### ***Lueras v. BAC Home Loans Servicing*** **Mortgage Lender's Duty Not To Make Material Misrepresentations To Borrower Forms** **Basis For UCL Claim**

By [Candace Kallberg](#)

After the foreclosure sale of his home, plaintiff borrower in *Lueras v. BAC Home Loans Servicing*, LP, 2013 Cal. App. LEXIS 886 (Cal. App. 4th Dist. Oct. 31, 2013) sued defendants, a lender, a trustee, and a government-sponsored enterprise, for negligence, breach of contract, fraud/misrepresentation, violation of Civ. Code, § 2923.5, and the unfair competition law (UCL), Bus. & Prof. Code, § 17200 et seq., and to quiet title. Demurrer was sustained to all causes of action. Plaintiff appealed.

The Court held that "a loan modification is the renegotiation of loan terms, which falls squarely within the scope of a lending institution's conventional role as a lender of money. A lender's obligations to offer, consider, or approve loan modifications and to explore foreclosure alternatives are created solely by the loan documents, statutes, regulations, and relevant directives and announcements from the United States Department of the Treasury, Fannie Mae, and other governmental or quasi-governmental agencies." *Id.* Thus, the lender and the trustee did not have a common law duty of care to offer, consider, or approve a loan modification, or to offer the borrower alternatives to foreclosure. (*But see, Bushell v. JPMorgan Chase Bank, N.A.*, 2013 Cal. App. LEXIS 841, 16-17 (Cal. App. 3d Dist. Oct. 22, 2013) holding that if the loan was placed into the federal Home Affordable Modification Program, an offer of a permanent solution is mandatory, stating "[w]hen [a lender] received public tax dollars under [TARP], it agreed to offer TPP's and loan modifications under HAMP according to [regulations] ... issued by the Department of the Treasury. .. Under ... [the] HAMP [S]upplemental [D]irective 09-01 [regulation] ... , if the lender approves [(i.e., offers)] a TPP, and the borrower complies with all the terms of the TPP and all of the borrower's representations remain true and correct, the lender must offer a permanent loan modification.")

However, the borrower could amend to state a cause of action for negligent misrepresentation because a lender did owe a duty to a borrower to not make material misrepresentations about the status of an application for a loan modification or about the date, time, or status of a

foreclosure sale. The court also found the borrower should be given leave to amend to state a claim for breach of contract.

The allegation that the borrower's home was sold at a foreclosure sale was sufficient to satisfy the economic injury prong of the standing requirement of Bus. & Prof. Code, § 17204. The borrower could amend his UCL cause of action to allege the lender caused him to lose his home through foreclosure. In addition, Lueras might be able to allege the lender did not work with him in good faith to evaluate and try to identify and implement a permanent solution, as a consequence of which he lost his home through foreclosure.

The Courts appear to be taking a looser attitude towards a lenders duties if a misrepresentation is properly alleged.

### ***Thrifty Payless, Inc. v. The Americana at Brand, LLC*** **Demurrer To Complaint Overruled Based Upon Extrinsic Evidence**

By [Candace Kallberg](#)

In *Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal. App. 4th 1230, during lease negotiations, the landlord provided written estimates of the tenant's probable pro rata share of property taxes, insurance, and common area maintenance for a shopping center under construction. The lease, which contained an integration clause, stated that the tenant would pay its pro rata share of such expenses.

After the tenant moved into the shopping center, the amounts due for its share of the expenses substantially exceeded the landlord's estimates. The court held that extrinsic evidence was admissible pursuant to Code Civ. Proc., § 1856, subd. (g), under the fraud exception, to show that the landlord knew or should have known its estimates were grossly inaccurate. The tenant adequately pleaded facts to show its reliance was reasonable given the parties' previous dealings and the landlord's superior knowledge and information.

Although there was no tort of innocent misrepresentation, the tenant set forth sufficient particular facts to satisfy the pleading requirements for reformation and rescission based upon lack of mutual assent under Civ. Code, § 1640.

On the final causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, the Court found it adequate that plaintiff alleged the landlord had improperly exercised its discretion in allocating costs between retail and nonretail space to satisfy breach. The tenant did not have to allege breach of a specific lease provision to pursue its claims for breach of lease and breach of the implied covenant.

Defendants typically argue on demurrer that in breach of contract actions, the rule is "a contract may be alleged by setting it out verbatim in the complaint, attaching it to the complaint, or alleging the substance of its relevant terms (See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 479, 480, pp. 572-573), and breach of a specific term of the contract must be alleged. The Court in this case clearly held the pleader to a more liberal standard.

## About the Authors

**Fredric W. Trester** is a named partner on the firm's Real Estate Team. His practice focuses on real estate and civil litigation, as well as professional liability defense for real estate licensees, architects and engineers, insurance agents, and brokers. Mr. Trester has been a California Licensed Real Estate Broker since 1984, and acts as a volunteer mediator and arbitrator for the Los Angeles Courts. He can be reached at 213.624.6000 or by e-mail at [fwt@manningllp.com](mailto:fwt@manningllp.com).

**Rinat B. Klier Erlich** is a partner on the firm's Real Estate Team. She focuses her practice on real estate and professional liability defense. Ms. Klier Erlich is also a licensed real estate broker and is an active member of the California Association of Realtors, Legal Affairs Forum and Defense Strategy Panel. She is a lecturer on real estate topics and has authored many articles in this field. She can be reached at 213.624.6900 or by e-mail at [rke@manningllp.com](mailto:rke@manningllp.com).

**Candace Kallberg** is partner focusing primarily on civil litigation and appeals. Ms. Kallberg's civil experience includes handling cases involving real estate disputes, as well as premises and products liability. Her appellate experience includes arguing several matters before the Ninth Circuit Court of Appeals and in at least 35 cases before the California Courts of Appeal. She can be reached at 213.624.6900 or by e-mail at [cek@manningllp.com](mailto:cek@manningllp.com).

**Mary E. Work** is a partner in the Los Angeles office of Manning & Kass, Ellrod, Ramirez, Trester, LLP. Ms. Work's practice is focused on advising and representing professionals who face licensing or regulatory problems. Ms. Work has represented both licensees and applicants before the California Bureau of Real Estate (BRE, formerly, the State of California, Department of Real Estate), as well as other regulatory bodies such as the Department of Insurance, the California Board of Accountancy and the various boards governing healthcare professionals in California. She can be reached at 213.624.6900 or by e-mail at [mew@manningllp.com](mailto:mew@manningllp.com).

**Jonathan A. Feldheim** is an associate in the Los Angeles office of Manning & Kass, Ellrod, Ramirez, Trester. His practice focuses on real estate, professional liability litigation and all aspects of dispute resolution and litigation from pre-filing through appeal. He can be reached at 213.624.6900 or by e-mail at [jaf@manningllp.com](mailto:jaf@manningllp.com).

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**Manning & Kass,  
Ellrod, Ramirez, Trester LLP**  
801 South Figueroa Street, 15th Floor  
Los Angeles, CA 90017  
Phone (213) 624-6900  
[www.manningllp.com](http://www.manningllp.com)

**San Francisco Office**  
(415) 217-6990

**Irvine Office**  
(949)440-6690

**San Diego Office**  
(619) 515-0269

**Scottsdale Office**  
(480) 477-5269

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