Dear Friend of Bob Bruss:

In lawsuits against real estate brokers it is common for the courts to find a way around the bar created by a statute of limitations. In the William Lyon case, the Court of Appeal created a very uncommon way around a two-year statute of limitations. But in the Cyr case, the Court of Appeal enforced a two-year statute of limitations. The RealPro case is a short reminder that a listing is an invitation for offers and not an offer itself.

The Great Recession has spawned much litigation regarding California deeds of trust. The Bank of America case defends the California anti-deficiency law. The Haynes and Debrunner cases strongly defend California's title theory of deeds of trust, which still provides a relatively inexpensive and efficient foreclosure remedy.

Happy Reading,

Harold Justman

P.S. I will be speaking to the San Francisco Bar Association's Real Estate Section on July 11, 2012 on the subject of "Real Estate Expert Witnesses." I hope to see you there.

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Duty of Inspection under CC 2079 Limited to Listing Agent

Robert and Denise Costa ("Seller") listed their home on Clubhouse Drive in Rocklin ("Property") for sale with William L. Lyon & Associates, Inc. ("Listing Broker"). Allegedly while the Property was with the Listing Broker, dark brown paint was applied to the exterior stucco at the Property to cover water intrusion damage. Ted Henley and Patri Henley ("Buyer") signed a standard buyer-broker agreement giving the Listing Broker the exclusive right to represent the Buyer in the purchase of a home. The buyer-broker agreement provided for a two-year statute of limitations for any action for breach of the duties arising from the agreement.

The Buyer purchased the Property on May 9, 2006. On May 8, 2009, the Buyer filed a first amended complaint against the Listing Broker alleging the following: (1) that the Listing Broker breached the buyer-broker agreement by failing to conduct an inspection of the Property; (2) that the Listing Broker was negligent in failing to conduct a reasonable inspection of the Property and inquire as to defects in the Property; (3) that the Listing Broker fraudulently failed to disclose that defects in the Property had been painted over; (4) that the Listing Broker negligently failed to disclose the defects in the Property; and (5) that the Listing Broker negligently failed to disclose the defects in the Property.

The Listing Broker moved to summarily grant a judgment in its favor based upon Civil Code section 2079. Civil Code section 2079(a) ("2079") provides, in substance, that a listing broker or a broker who cooperates with a listing broker to obtain a buyer for real property has a duty to conduct a reasonably competent and diligent visual inspection of the property and disclose to the buyer all facts materially affecting the value of the property that said investigation would reveal. Significantly, Civil Code section 2079.4 ("2079.4") provides, in substance, for a two-year statute of limitations from the date of the buyer's possession for an action alleging a breach of the 2079 duty to conduct a reasonably competent and diligent visual inspection. The trial judge denied the motion for summary judgment.

THE DECISION: The Court of Appeal affirmed the denial of the Listing Broker's motion for summary judgment. The Court of Appeal recited the usual grounds for denying the Listing Broker's motion. The breach of contract action had a two-year statute of limitations but a statute doesn't commence to run until the buyer discovers the breach of the contract. The negligence statute of limitation of two-years also does not commence to run until the injury is discovered. The fraud claims have a three-year statute of limitations. And, the breach of fiduciary duty claim has a four-year statute of limitations. Then the Court of Appeal recited a very unusual reason for holding that the 2079.4 only applied to the listing agent representing the Seller and did not apply to the agent representing the Buyer.

WHY THIS DECISION IS IMPORTANT: This case is contrary to real estate industry practices when it states that 2079 imposes a duty to conduct a reasonably competent and diligent visual inspection only on the broker who represents the seller. The Court of Appeal rejected the contention that 2079 imposes a duty on the broker representing the buyer.

This reading of 2079 contradicts the expert opinion of every reputable expert witness on the standard of care of real estate brokers whom I know. Reputable expert witnesses on the standard of care of real estate brokers and agents regularly testify in deposition and at trial that a real estate agent or broker who represents a buyer has a 2079 duty to conduct a reasonably competent and diligent visual inspection of the property. This opinion, which I have testified to on numerous occasions as an expert witness, is even expressed in the statutory transfer disclosure statement ("TDS") in article IV - Agent's Inspection Disclosure (see Civil Code section 1102.6). Real estate agents and brokers who obtain buyers regularly conduct a reasonably competent and diligent visual inspection of the property and report there findings of material facts in Article IV of the TDS. I seriously doubt that reasonably careful real estate agents and brokers who obtain buyers for real property are going to stop conducting reasonably competent and diligent visual inspections of the real property. Moreover, I predict that reasonably careful real estate agents and brokers will continue to complete Article IV of the TDS. Inasmuch as the standard of care of real estate agents and brokers is established by the conduct of reasonably careful real estate agents and brokers, I will as an expert witness, continue to base my opinions on the conduct of reasonably careful real estate agents and brokers and not the opinions expressed in this case.
COMMENT: The Court of Appeal in this case found several causes of action which were not time barred by 2079.4. The opinion regarding 2079.4 was unnecessary and misguided. Hopefully, this case will be depublished.

Special thanks to Palo Alto real estate attorney Julia Wei of the law offices of Peter Brewer for help with this case and for pointing out that 2079 was designed to protect consumers and that the real estate industry has acted accordingly by having both the listing agent and the selling agent conduct a reasonably competent and diligent visual inspection of the real property for the benefit of the buyer. The William L. Lyon case limits the protection of 2079 by only requiring the listing agent to comply with 2079. This decision is contrary to the goal of protecting consumers.


THE DECISION: The Court of Appeal affirmed the trial judge, holding that Code of Civil Procedure Section 339(1) ("339") provides a two-year statute of limitations for a professional negligence claim against a real estate agent or broker. While the two-year statute of limitations does not begin to run until the injured party discovers the negligence and sustains damages, the Court of Appeal had no problem pointing to the filing of the lender's lawsuit in December of 2005 as the date of discovery of the alleged negligence and the infliction of damages. The Court of Appeal also easily dismissed the Buyer's contention that Code of Civil Procedure Section 338(b) ("338"), a three-year statute of limitations for injury to real property, applied to the complaint. The Court of Appeal pointed out that an option to buy real property is not real property.

WHY THIS DECISION IS IMPORTANT: This is one of the few cases that applies a statute of limitations in favor of a real estate agent and broker. Usually, the Courts of Appeal find a way to elongate the statute of limitations in order to allow a lawsuit against a real estate agent or broker.

COMMENT: To see a case where the Court of Appeal bent over backwards to elongate a statute of limitations against a real estate agent and broker, reread the Thompson case in the November 2011 California Real Estate Law Newsletter.


Seller's Action for Negligence Barred by Two-Year Statute of Limitations

Dwayne and April McGovran ("Seller") owned a ranch consisting of eight parcels of land in San Luis Obispo County ("Ranch"). In 2002, the Seller listed the Ranch for sale with Gail Kemble and Ken Taylor through Century 21 Filer Realtors ("Listing Agent"). In August of 2002, Scott Cyr ("Buyer") agreed to purchase two parcels of the Ranch and options on the remaining parcels to be exercised over a period of two years. In December of 2002, the Seller refinanced the Ranch and gave the lender options to buy the same parcels which had been optioned to the Buyer. On November 26, 2003, the lender filed a lawsuit to specifically enforce its options. The Buyer retained attorneys who defeated the lender's claimed interest in the Ranch.

On December 23, 2005, the Buyer sued the Listing Agent for negligence alleging that the Listing Agent negligently failed to prevent the Seller from granting options to the lender, correct the lender's erroneous options, and to cooperate in defeating the lender's options. The trial judge summarily entered judgment against the Buyer and in favor of the Listing Agent. The trial judge ruled that the Buyer's complaint was time barred by the two-year statute of limitations for professional negligence.
Cooperating Broker Has Not Earned a Commission by Presenting Full Price Offer

J&A Gonzales, LLC ("Seller") listed for sale with MGR Services, Inc. ("Listing Broker") 46.8 acres of vacant land in Riverside County ("Property"). The listing agreement set forth the following sale price and terms: $17 million cash or for such other price and terms acceptable. The listing agreement also provided as follows: "a cooperative broker may, as a third party beneficiary hereof, enforce the terms of this listing agreement against the Seller..." RealPro, Inc. ("Cooperating Broker") presented to the Listing Broker an all-cash offer to purchase the Property for $17 million. The Seller countered the offer at $19.5 million with a 4% commission to be split equally between the Listing Broker and the Cooperating Broker. The counter-offer was rejected by the potential buyer.

The Cooperating Broker sued the Seller for a 2% commission, alleging that it had earned a share of the listing commission by producing a ready, willing and able buyer for the property on the terms set forth in the listing agreement. The trial judge dismissed the complaint ruling that it did not state facts giving rise to a right to a commission.

THE DECISION: The Court of Appeal affirmed the trial judge’s dismissal of the complaint, holding that a listing is not an offer to sell but merely an invitation for offers. Absent an accepted offer, the Cooperating Broker has no right to a commission.

WHY THIS DECISION IS IMPORTANT: This is the clearest explanation of the law that a listing is merely an invitation for offers but not an offer itself. And, this decision has the advantage of being short.

COMMENT: This will be a good case to cite to disappointed buyers. Active real estate attorneys regularly get calls from disappointed buyers complaining that they made a full price offer and the seller did not accept it. When these buyers ask the lawyer to sue for breach of the listing offer, the lawyer now has a short, clean case to cite as to why the buyer cannot sue.


Anti-Deficiency Law Bars Action by Assignee of Second Deed of Trust

Michael Mitchell ("Borrower") borrowed $315,000 from GreenPoint Mortgage Funding, Inc. ("Lender") to purchase a home at 45245 Kingtree Avenue, Lancaster ("Home"). The Lender prepared a first note and deed of trust in the amount of $252,000 ("1st Deed of Trust") and a second note and deed of trust in the amount of $63,000 ("2nd Deed of Trust"). The loans were made in 2006. In 2008, the Borrower defaulted on the loans, and in 2009, the Lender sold the Home at a foreclosure sale based upon the 1st Deed of Trust. More than a year later, the Lender assigned the 2nd Deed of Trust to Bank of America ("Assignee"). The Assignee then sued the Borrower for breach of contract seeking damages of $63,000. The trial judge dismissed the breach of contract complaint, holding that there were no facts sufficient to constitute a legal cause of action.

THE DECISION: The Court of Appeal affirmed the trial judge’s dismissal of the complaint, holding that California Code of Civil Procedure Section 580(d) ("580d") barred an action on the 2nd Deed of Trust loan. 580d provides, in substance, that a lender who conducts a non-judicial trustee's sale of real property pursuant to a deed of trust cannot seek a deficiency judgment on the debt remaining unpaid from the sale. The Court of Appeal reasoned that a lender who forecloses a first deed of trust while holding a second deed of trust is subject to 580d on both deeds of trust. Inasmuch as the Assignee only has the rights of the Lender, the Assignee was barred from suing on the 2nd Deed of Trust loan.

WHY THIS DECISION IS IMPORTANT: This is the first published decision of which I am aware that holds the sale of a wiped out second loan and does not avoid the bar of 580d where the same lender held the first and second deeds of trust and sold the second deed of trust after foreclosure.

COMMENT: California's anti-deficiency statutes have held up well against the great recession.

Recorded Assignment of Deed of Trust Not Required To Initiate Foreclosure

In 2006, Nathaniel Haynes ("Homeowner") borrowed $437,500 from EquiFirst Corporation ("Lender") to purchase a home located at 1900 17th Street, Oakland ("Property"). The Homeowner signed a deed of trust naming Placer Title Company as trustee under the deed of trust ("1st Trustee"). In 2008, Quality Loan Service Corp. ("2nd Trustee") recorded a notice of default ("NOD") and commenced a non-judicial foreclosure against the Property. After the recording of the NOD, the 2nd Trustee recorded a substitution of trustee, whereby the 2nd Trustee was substituted for the 1st Trustee. At the end of 2008, the 2nd Trustee recorded a deed upon sale to EMC Mortgage ("Foreclosing Lender") providing that the Foreclosing Lender was the purchaser of the Property. The Homeowner sued, claiming that there had been an unlawful foreclosure because there was no recorded assignment of the promissory note for $437,500 to the Foreclosing Lender at the time of the non-judicial foreclosure sale.

The trial judge dismissed the complaint, ruling that the Homeowner had not stated facts sufficient to state a legal cause of action.

THE DECISION: The Court of Appeal affirmed the dismissal of the complaint, holding that the trustee under a deed of trust may initiate foreclosure irrespective of whether or not a recorded assignment of the beneficiary interest in the note and deed of trust is of record. The Court of Appeal pointed out that California is a title theory state where a deed of trust passes a legal title to the property to the trustee.

Accordingly, the trustee can conduct a sale and convey title regardless of who holds the promissory note secured by the deed of trust which is being foreclosed.

WHY THIS DECISION IS IMPORTANT: This is the first published California state court decision which follows the majority of federal district court decisions that have considered this issue.

COMMENT: California’s title theory of deeds of trust has withstood the populist attacks arising from the Great Recession. California real property law still provides a quick and efficient procedure for foreclosing upon a deed of trust. While banks may deserve punishment, a protracted and expensive foreclosure procedure punishes both banks and home borrowers.

Possession of Note Not Required To Initiate Foreclosure

On September 15, 2009, Old Republic Default Management Services ("Foreclosure Trustee") recorded a notice of default ("NOD") on a note and deed of trust secured by a home in Los Altos ("Property"). In November of 2009, Stephen Debrunner ("Owner") filed a lawsuit to stop the impending foreclosure of the Property. In January of 2010, an assignment of the deed of trust was recorded naming Deutsche Bank National Trust Company ("Lender") as the beneficiary of the deed of trust. At the same time, a substitution of trustee was recorded naming the Foreclosure Trustee as the trustee under the deed of trust. Thereafter, the trial judge dismissed the Owner’s complaint, ruling that the alleged facts were not sufficient to constitute a cause of action.

THE DECISION: The Court of Appeal affirmed the dismissal of the Owner’s complaint. The Court of Appeal held that California foreclosure law does not mandate physical possession of the promissory note which is secured by the deed of trust being foreclosed in order for the initiation of the foreclosure to be valid. Moreover, the Court of Appeal held that the Foreclosure Trustee’s failure to record its substitution of trustee before recording the NOD did not constitute a prejudicial procedural irregularity. Accordingly, the foreclosure sale was presumed to be conducted fairly.

WHY THIS DECISION IS IMPORTANT: This is the first published California state court decision of which I am aware which confirms what the federal courts have been deciding; that is, California law does not require physical possession of the promissory note in order to initiate foreclosure.

COMMENT: As the Court of Appeal pointed out, California foreclosure law is designed to provide a quick, inexpensive and efficient remedy for a lender when a debtor does not pay a home loan.


Robert J. Bruss (1940–2007)

Robert J. Bruss was a real estate attorney and broker whose nationally syndicated advice columns earned him the nickname of the “Dear Abby of real estate.” During his life, Bob wrote as many as seven columns a week, including the “Real Estate Mailbag” question and answer feature that was carried in more than 175 newspapers nationwide, including the Washington Post, the Los Angeles Times, and the New York Post. In addition to his columns, Bob Bruss produced two monthly newsletters, including this California Real Estate Law Newsletter. His book, “The Smart Investor’s Guide to Real Estate” (1981), has appeared in multiple editions.

In addition to his writing and an active career in real estate, Bob was an associate professor of real estate at College of San Mateo for 28 years. Following his death in 2007, publication of the Real Estate Law Newsletter was carried on by his estate and then transferred to the San Mateo County Community College District. The Newsletter is written and edited by Harold Justman. Bob’s longtime friend and personal real estate attorney of more than 25 years, who contributes his time to this project as a tribute to Bob’s work. Harold is a graduate of Stanford University and a colleague of Bob’s at Hastings’s Law School; he continues to teach the Legal Aspects of Real Estate Class, which he taught in partnership with Bob for many years, at College of San Mateo. The newsletter is published by the San Mateo County Community College District; proceeds benefit the Home Savings Incentive Fund for faculty and staff of the College District.