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“As Is” Sale - Introduction

Everything presented below is supported with Case Precedents later. This is a functional explanation for As Is Sales that summarizes Legal Theories and Case Precedents.

The Term “As Is” is NOT a Permission Slip for Cheating!!

The term “As Is” Sale is one of the most frustrating things to convey to people who want to cheat when selling real estate.

It does NOT mean, “what a buyer finds is what they are buying” AND there is no way to make that phrase do what some aspiring cheaters want it to do (per case precedents, too).

It also does not mean, “You bought it as is. Tough luck you didn’t find those defects before you took possession of the home”.

The foundation of all Contract Law is based on “Good Faith Dealing”.

In Good Faith Dealings, there is no room for “bait and switch” schemes. Those are mutually exclusive.

You can not intentionally hold back information that might affect a buyer’s perception of value to induce a contract. That is a classic case of “Common Law Fraudulent Misrepresentation”.

Likewise, if you “accidentally” fail to disclose something, that also still may have consequences related to “negligent misrepresentation”.

There are no legal exceptions to this, no matter how much some people may want there to be loopholes.

A seller must “represent” to a buyer anything and everything a buyer can not see or surmise from a walk through of a home that might affect a buyer’s perception of value.

This concept “good faith dealings” and “representation of material facts and defects” prior to entering a Contract applies to ALL CONTRACTs, not just real estate.

The Term “As Is” has two different connotations in Real Estate:

1. An “As Is” Sale is a sale juxtaposition to “with Warranty”.
 - a. All used homes are “As Is” Sales.
 - b. All new homes are “with warranty” sales. Most/All jurisdictions in the United States require Builders of new homes to provide warranties for consumer protection, since a new home is an untested product.

2. The “As Is” Condition is comprised of two things
 - a. What a buyer can see on a casual walk through.
 - b. A written list of details from the Seller that defines anything and everything not visible to a seller on a walk through that might affect the Buyers perception of value.
 - i. That actual legal term for the statements made about conditions are “representation statements”.
 - ii. Representation Statements may be made as part of “disclosure documents”
 - iii. Disclosure Documents may or may not be Statutory Documents
 - iv. Anything material that is not covered via questions on Disclosure Documents still needs to be conveyed in writing somehow.

The General Process for an “As Is” sale (the sale of a used home) is as follows:

1. A buyer walks through a home and looks at it.
2. A buyer is given a written list of information that describes material facts and defects that might affect their perspective of value. Ideally they get this list before they walk through so they can look at anything referenced, but this does not always transpire.
3. A buyer makes an offer on the “As Is” Condition, as they saw it and as it was described to them
4. A buyer gets a Ratified Contract, and at that time, Title (rights) to the property transfers to them in the Condition seen and described.
5. A buyer does inspections to “confirm” the As Is Condition as was described by the Seller
 - a. If “As Is” conditions are found that were outside of their view during walk throughs that do not match those described by the Seller in their the Seller has to adjust for those or they can be sued for negligent/fraudulent misrepresentation
6. A buyer closes escrow, and they take possession of the home. When they take possession, the home needs to be in the same or better “As Is” Condition as it was in when they made the offer.

Real Estate Contracts are just Contracts with an “Executory Period”

One thing that leads people to believe real estate contracts are “different” from other contracts is the idea an agreement is made initially but the deal then takes weeks or months to complete.

When you sign the contract, the contract is “executed”, just like when signing a Lease. The difference is there is more complex work that has to be done to “complete the execution of the contract” as it relates to lending, insurance, title search work.

The period after signing a contract and before making payment for the home and taking possession of it is referred to as “escrow”.

Disclosure Requirements for As Is Sales (used home sales)

At the “close of escrow” , payment is made for the home and the “deed is recorded”. Many people believe the “deed recording” represents the execution of the contract. That is false. The deed recording represents the formal, public recording of the contract execution that transpired weeks or months prior.

When you dine in a sit down restaurant, you are entering into a contract with an executory period. You place an order for food, which is your contract. Then you eat and pay for it later.

Duty to Disclose in Real Estate

The word Disclose, when used in this context, is synonymous with the word “represent”, which has implied legal meaning related to acts of representation and fraudulent/negligent misrepresentation.

Damages for non-disclosure are legally referred to as damages for failing to represent facts prior to entering a contract. Those are fully referred to as fraudulent/negligent misrepresentation.

These paragraphs below are good summaries on a Seller’s Duty to Disclose. (aka Seller’s Duty to Represent)

Seller’s -- Common Law Duty to Disclose

Per Attorney George Wolff - "The common law has for decades imposed duties on sellers of real estate, particularly residential real estate such as homes, condominiums, etc., to disclose to the buyer “any material facts known to the seller affecting the value or desirability of the real estate “ being sold.

Seller’s Statutory Duty to Disclose - CA 1102

Per Attorney Georg Wolff - In 1985 the California General Assembly added an article to the Civil Code, § 1102 et seq., entitled "Disclosures Upon Transfer of Residential Property." (Stats. 1985, ch. 1574, § 2, p. 5788.) Real Estate contracts also usually require disclosures pursuant to this statute, as well as other disclosures. Other statutes also impose other disclosure obligations in sales of this type. Before execution of a residential sales contract, the seller or his or her broker is required to deliver the statutory real estate transfer disclosure statement to the buyer, which contains a checklist to give notice of problems or potential problems with the property. Civil Code §§ 1102.3, 1102.6. The form Transfer Disclosure Statement (“TDS”) disclosure shall be filled out and made in "good faith," which is expressly defined to mean "honesty in fact in the conduct of the transaction." Civ. Code § 1102.7 (emphasis added)

NOTES:

1. See appendix for more on George Wolff and a bizarre conversation with him.
2. Neither of his two summary statements above make it crystal clear “when” disclosure statements are required. It’s an odd omission that becomes relevant in the context of trying to navigate around the Fraudulent CAR Contracts.

CASE PRECEDENTS - “As Is” Sale -- Fraud Found During Escrow

RELIANCE BASED ON FACTS PRESENTED PRIOR TO SIGNING PURCHASE AGREEMENT

Jue v Smiser (1994) 23 Cal. App. 4th 312-318

"The plaintiffs discovery of the true facts after signing a real property purchase agreement but before the close of escrow does not preclude a finding of justifiable reliance with respect to false representations made by the defendant before the purchase agreement was signed. The plaintiff's reliance at the inception of the agreement is sufficient to support recovery for fraud".

DEFRAUDED BUYER CAN STAND ON CONTRACT AND SUE FOR DAMAGES

Bagdasarian v. Gragnon (1948) 31 Cal. 2d 744, 750 [192 P.2d 935]

"When a party learns that he has been defrauded, he may, instead of rescinding, elect to stand on the contract and sue for damages, and, in such case his continued performance of the agreement does not constitute a waiver of his action for damages. [Citations.]" (.)

Commentary

These two case precedents were NOT part of George Wolff's PDF . The fact that they were not is odd given the depth of information he covered in that document. .

It took years to figure out his PDF was missing the two key precedents that would have shown the current CAR Contracts were fraudulent.

The CAR Contract instructions for delivering representation statements AFTER Agreement Acceptance was absurd, but without these case precedents in public view, Attorneys who wanted to play along and make money on disputes could do that without properly representing law or exposing the CAR Contract Fraud situation..

You can't have "Fraud found during escrow" if you are allowed to present representation statements throughout escrow. Those are mutually exclusive concepts, (obviously).

CASE PRECEDENTS - "As Is" Sale

DUTY TO DISCLOSE TO AVOID FRAUD OR DECEIT IN THE TRANSFER TRANSACTION

Shapiro v. Sutherland (1999) 64 Cal. App. 4th 1534, 1545

The specification in the law and the TDS of particular matters to be disclosed was not intended to limit or abridge any obligation for disclosure by law which may exist to avoid fraud or deceit in the transfer transaction. Civ. Code, § 1102.8, 1572(3), 1710(3);

DUTY TO DISCLOSE - COMMON LAW and STATUTORY

1 Miller & Starr, California Real Estate (3d ed. 2005) § 1:140

In California, the seller of a residence has both a common law and statutory duty of disclosure to the buyer, and even full compliance with the statutory duty does not excuse the common law duty.

DUTY TO DISCLOSE - COMMON LAW

Lingsch v. Savage, supra, 213 Cal. App. 2d at 735

"where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer."

FAILURE TO DISCLOSE GIVES RISE TO CAUSE OF ACTION FOR RESCISSION AND DAMAGES

Shapiro v. Sutherland, supra, 64 Cal.App.4th at p.1544; Karoutas v. HomeFed Bank (1991) 232 Cal. App. 3d 767, 771. -

"A breach of this duty of disclosure will give rise to a cause of action for both rescission and damages. [Citation.]".

HALF TRUTHS ARE UNACCEPTABLE

San Diego Hospice v. County of San Diego (1995) 31 Cal.App.4th 1048, 1055, fn. 4.

"A duty to disclose may also arise in the so-called 'half-truth' context--that is, when a speaker makes a representation which, though not false, he knows will be misleading absent full disclosure of additional facts known to him which qualify the initial representation."

SUPPRESSION AND OMISSION OF FACTS UNACCEPTABLE

Marketing West, Inc. v. Sanyo Fisher (USA) Corp. (1992) 6 Cal.App.4th 603, 613

Where one undertakes to speak to a matter, he must not only state the truth, he also must not suppress or conceal facts within his knowledge that materially affect those stated.

FULL STATEMENTS REQUIRED

Jacobs v. Freeman (1980) 104 Cal.App.3d 177, 192

In other words, when one speaks at all, he must make a full disclosure on the subject.

FULL STATEMENTS REQUIRED

Marketing West, Inc. v. Sanyo Fisher (USA) Corp., supra, 6 CalApp.4th at 613;

Lacher v. Superior Court (1991) 230 Cal. App. 3d 1038, 1046-1047

Thus, a duty to fully disclose may arise from a partial disclosure that is likely to mislead, if other material facts are not also disclosed.

AS IS SALE clause and BUYER INSPECTION do NOT release liability for Fraudulent for known facts/defects not otherwise observable to buyer .

Loughrin v. Superior Court (1993) 15 Cal.App.4th 1188, 1195;

[view](#)

Shapiro v. Hu (1986) 188 Cal. App. 3d 324, 333-334, 233 Cal. Rptr. 470;

[view](#)

Lingsch v. Savage (1963) 213 Cal. App. 2d 729, 740-742, 29 Cal. Rptr. 201;

Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions (The Rutter Group 2005) § 4:3 52, p. 4-86.10;

1 Miller & Starr, California Real Estate supra, §1:154

Neither an "as is" sale nor the buyer's independent inspection exonerates a seller or the seller's agent from fraudulent misrepresentations concerning known defects not otherwise visible or observable to the buyer.

AS IS SALE clause does NOT relieve seller of liability for Misrepresenting Condition, Failing to Disclose Facts, or Concealment

Lingsch v. Savage, supra, 213 Cal. App. 2d at 742;

Galen v. Mobil Oil Corp., 922 F. Supp. 318, 324 (C.D. Cal. 1996)

"[W]here the seller actively misrepresents the then condition of the property or fails to disclose the true facts of its condition not within the buyer's reach and affecting the value or desirability of the property, an 'as is' provision is ineffective to relieve the seller of liability arising from the concealed condition."

CASE PRECEDENT - Loughrin v Superior Court (Good Quotes)

Loughrin v. Superior Court (1993) 15 Cal.App.4th 1188, 1195;

This Case precedent has some exceptional quotes

1. "The purchase contract was not intended to insulate Seller from Liability for misrepresentation in the preparation of the statutory disclosure form. "
2. "Contrary to the apparent assumption of many people dealing in real estate (including some brokers), a sale "as is"" is not the equivalent of a waiver of potential claims for misrepresentation".
3. "Sale of real property "as is" is not equivalent of waiver of potential claims of common-law misrepresentations. ' as is' sale simply means that purchaser accepts property in condition visible or observable by him."
4. "[Stock or] augmented 'as is' clause will will not protect against claims of intentional misrepresentation, fraudulent concealment, or negligent concealment not related to failure to inspect".
5. "While the waiver clause . can be construed as avoiding claims for negligent misrepresentation based upon defects seller should have known existed but did not because he did not because of a lack of inspection, there remains other possibilities of claims on negligence."
6. "These commitments do NOT preclude the possibility of a claim of misrepresentation for failing to reveal concealed defects not apparent from an inspection of the property, including not only intentional but negligent".
7. "Even such augmented "as is" clause, however, does not address the issues of 1) intentional misrepresentation 2) fraudulent concealment or even 3) negligent concealment not related to failure to inspect"
8. From Hu v Lee - "the use of phrase "As Is" relieves a seller of real property from liability for defects. The only exception is when a seller through fraud or misrepresentation intentionally conceals material defects no otherwise visible or observable to the buyer." -- but its not just intentional acts either!!
9. From Katz v Department of RE - "An 'as is' provision, generally speaking means that the buyer takes the property in the condition visible to or observable by him. It does not in itself protect.. or absolve [seller] from liability for passive concealment".
10. The Docs required by 1102.6 (the TDS) has yes/no answers that MUST BE ANSWERED. Failure to comply results in award of damages. All other questions and instructions for disclosure must be followed or those damages. The failure of the Agent to answer the question about additional disclosure information is a violation and subject to damages.

Disclosure Requirements for As Is Sales (used home sales)

APPENDIX - Attorney - George Wolff

The As Is Sale Case precedents presented in this document, less those for fraud found during escrow, came from a document found online published by Attorney George Wolff. His PDF also provides a section related to Broker Involved Disclosure Fraud. [View PDF](#)

Wolff claims to handle Real Estate Related Cases from his San Francisco office. Wolff has an engineering undergraduate degree from the Midwest and then he moved to California to study and practice law.

His Summaries of Seller's Duty to Disclosure and the introduction of CA 1102 are simple and to the point.

In his intro statements, he makes no clear identification of "when" the statements are due to Buyers.

Obviously, a buyer deserves to know if the "roof leaks in winter" before making an offer, and when I read these I assumed he'd think that way too.

SELLER'S - COMMON LAW DUTY TO DISCLOSE

Per Wolff - "The common law has for decades imposed duties on sellers of real estate, particularly residential real estate such as homes, condominiums, etc., to disclose to the buyer "any material facts known to the seller affecting the value or desirability of the real estate " being sold.

SELLER'S - STATUTORY DUTY TO DISCLOSE - CA 1102

Per Wolff - In 1985 the California General Assembly added an article to the Civil Code, § 1102 et seq., entitled "Disclosures Upon Transfer of Residential Property." (Stats. 1985, ch. 1574, § 2, p. 5788.) Real Estate contracts also usually require disclosures pursuant to this statute, as well as other disclosures. Other statutes also impose other disclosure obligations in sales of this type. Before execution of a residential sales contract, the seller or his or her broker is required to deliver the statutory real estate transfer disclosure statement to the buyer, which contains a checklist to give notice of problems or potential problems with the property. Civil Code §§ 1102.3, 1102.6. The form Transfer Disclosure Statement ("TDS") disclosure shall be filled out and made in "good faith," which is expressly defined to mean "honesty in fact in the conduct of the transaction." Civ. Code § 1102.7 (emphasis added)

It's the TIMING of Disclosure Statement Delivery that is the QUESTION, and that which makes the CAR Contracts Fraudulent...

It's apparent from these summaries and his PDF of Case Precedents he was interested at one time in pursuing Real Estate Cases and Brokerage Fraud. However, a conversation with him by phone was bizarre.

It suggested he may have had his a-s handed to him or been threatened, and he had resigned himself to playing the game that was in play as opposed to trying to ruffle more feathers or bust up the Contract Fraud situation as is transpiring now.

When I spoke to him on the phone, he held the line of the CAR Contract, stating representation statements could be made up until the close of escrow, which in no way represents proper protocol or common sense when discussing good faith negotiations.

In that sense he was using the current CAR Contract to define law instead of using the law to identify them as fraudulent, which he could have done with ease with the two case precedents related to fraud found during escrow, which I found later in the Law Library with ease.

When I started challenging his position and that of the CAR Contract related to the timing of representation statements, he got very uncomfortable and exited the conversation within 2-3 minutes.

In retrospect, it was as if he may have tried to take CAR and/or the Brokers on at some point and gotten run over or threatened. Then, instead of trying to convey that when someone like myself with background sought dialogue, he just assumed an illogical position to play the game others were playing.

One issue he tried to bring up was that CA 1102.3 said the Statutory Documents were due prior to Transfer of Title and he stated that happened at "close of escrow".

I told him that was incorrect. It happened at time of Agreement Acceptance.

He disagreed and that's when he started to sound uncomfortable and then exited the call.

It was later that day or week that went back to the contract to see if it referenced when transfer of title transpired, and sure enough, Clause 13B of the Contract states "buyer takes title" at time of Agreement Acceptance.

At face value CA 1102.3 and Clause 13B provide proper instructions for delivering statutory disclosure documents, which is BEFORE Agreement Acceptance.

Those proper instructions contradict the instructions in 14A, which were played to in our transaction to attempt to execute a massive amount of fraud.

The fraud in the current CAR Contracts is evident at face value. See CAR Contract Fraud Document for more granular details on the contract fraud. .