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All Parties Liable for Cleanup

Q&A
ASK AN ATTORNEY

Q. *As a listing agent, do I have a fiduciary duty to explain tax consequences to a seller who provides seller financing?*

A. Generally, no. The court in *Carlton* v. *Tortosa* held that real estate licensees have no duty to explain tax implications of a real estate transaction. "Aside from obligations imposed by statute and implementing regulations, a real estate broker's duty is derived from the agreement between the broker and client." If the written agreement between the seller and the listing agent clearly states that the agent has no duty to recognize and advise the seller regarding the potential tax consequences of the transaction, there is no such fiduciary duty. The court in *Carlton* held that such contractual provisions do not violate public policy "because the Legislature has determined that sellers and buyers of real estate should obtain tax advice from professionals other than real estate brokers." C.A.R. listing contracts RLA, RLAA, RLAN, CLA, MHL, and PL contain disclaimer language to that effect.

Under federal law, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), is a "super-strict" liability statute for the cleanup costs of environmental contamination. Under the law, liability is "joint and several" when the harm is indivisible. This means that any one defendant out of many can be held fully liable for the entire cleanup costs at a site despite the fact that the defendant was responsible for only a fraction of the contamination. However, the courts will attempt to apportion liability when and if possible.

A now-defunct company, Brown & Bryant, Inc. (B&B), owned and operated a facility where toxic chemicals were stored and distributed. Part of the land on which the chemical operation was located was owned by two railroad companies (the Railroads), and some of the chemicals used by B&B were supplied and delivered to the facility by Shell Oil Company (Shell). Because toxic chemicals remaining at the facility threatened groundwater (and may continue to do so in the future), the United States Environmental Protection Agency (EPA) and California's Department of Toxic Substances Control (DTSC) spent a considerable amount of money to clean up the site. The two agencies sought to recover these costs under CERCLA, but the district court held the Railroads and Shell liable for only a minor portion of the total cleanup costs. B&B was defunct by that time, and so could not contribute to the cleanup costs. The agencies (i.e., the taxpayers) were left holding the bag for a great deal of money. The EPA and DTSC appealed, seeking to hold the Railroads and Shell jointly and severally liable for the entire cleanup cost.

The 9th Circuit Court of Appeal in *U.S. v. Burlington Northern & Santa Fe Railroad Co.* (2007) held that the Railroads were liable as "owners" of the site and Shell was held liable as an "arranger"– a "person who . . . arranged for disposal . . . of hazardous substances" under CERCLA. The appellate court rejected the district court's efforts at apportioning the damages and held that "apportionment is the exception, available only in those circumstances in which adequate records *were* kept and the harm *is* meaningfully divisible." The appellate court held that the Railroads failed to prove any reasonable basis for apportioning liability for the costs of remediation. As for Shell, the appellate court opined that "Shell's harm was *capable* of apportionment" but "Shell put its eggs in the no-liability basket" and didn't provide sufficient data. Thus, the 9th Circuit Court of Appeal found both the Railroads and Shell jointly and severally liable for all the cleanup costs at the contamination site.

Property Manager and HOA Liable for Workers' Compensation

The California Workers' Compensation Act–California Labor Code Sections 3200 et seq. (the Act)–is designed to ensure that an employee injured at work receives medical

care and benefits. The Act is very liberally construed and, if someone is deemed to be an "employer," the penalties can be quite severe if this employer does not provide workers' compensation insurance. In *Heiman* v. *Workers' Compensation Appeals Board* (2007), the 2nd District Court of Appeal decided that the property manager was an "employer" for purposes of workers' compensation. In addition, the homeowners' association (HOA) was liable as a "principal" but the individual condominium owners had no personal liability.

Heiman, a property manager, worked for the Montana Villas Homeowners Association. Part of the written agreement was that Heiman would arrange for repairs of the common area. Heiman hired Hruby, an unlicensed and uninsured contractor, to install new rain gutters. On the first day of the job, worker Freddy Aguilera was severely injured when a rain gutter contacted a high voltage electrical wire. Aguilera filed for workers' compensation.

The case ultimately went to the 2nd District California Court of Appeals. Among the legal consequences of hiring an unlicensed contractor is that, when an employee is injured, different employment relationships may arise with respect to "employer" or "principal" liability for workers' compensation damages. Section 2750.5 of the Act requires an independent contractor to be licensed. No license means treatment as an employee. Thus, Heiman was a liable "employer" under Section 2750.5. Liability for an agent's authorized acts may be imputed to the principal under Civil Code Section 2330. Thus, the HOA has liability as a "principal." Finally, the court held that the individual condo owners have no personal liability for acts of the HOA under Corporations Code Section 7350. ◆

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