

## 24 MISREPRESENTATION IN CONNECTION WITH THE SALE OF REAL PROPERTY<sup>283</sup>

In Alaska, a seller of real property may be held liable to a buyer who justifiably relied upon a false statement of material fact made by the seller about the property.<sup>284</sup> A buyer's reliance on the statement is "justified" unless it is wholly irrational, preposterous, or in bad faith.

A false statement of fact is an incorrect statement susceptible of exact knowledge at the time the statement was made. A material fact is anything that a reasonable person would consider important in deciding whether to purchase the property, but it does not have to be so important that it controls the decision to buy.

In 1982, the Alaska Supreme Court held that real estate brokers and agents may be held liable for misrepresentations made to a buyer, regardless of whether the misrepresentations were innocent, negligent, or intentional.<sup>285</sup> Thus, when a broker or agent makes a statement regarding the condition of the property, he or she has an obligation to make sure that the information provided is accurate.<sup>286</sup> In 1994, in a direct effort to protect realtors from unwittingly and unfairly serving as the personal guarantors of the condition of property, the Alaska Legislature enacted a statute providing that agents and brokers should **not** be held liable for purely innocent misrepresentations made in connection with the transfer of an interest in real property, "if the agent does not have personal knowledge of the error, inaccuracy, or omission that is the basis for the misrepresentation."<sup>287</sup> This change applies to all claims accruing on or after September 8, 1994.<sup>288</sup>

A realtor is considered a fiduciary to his principal (generally, the party paying the commission).<sup>289</sup> A fiduciary has a duty to disclose all known material facts to his

<sup>283</sup> The C.F.R.'s and U.S.C.'s cited in this section are too voluminous for inclusion in the Law Summary. However, we will be happy to send you copies at your request.

<sup>284</sup> *Cousineau v. Walker*, 613 P.2d 608, 612 (Alaska 1980).

<sup>285</sup> *Bevins v. Ballard*, 655 P.2d 757, 762-63 (Alaska 1982).

<sup>286</sup> *Bevins*, 655 P.2d at 760.

<sup>287</sup> See AS 09.65.230.

<sup>288</sup> A cause of action "accrues" when all essential elements forming the basis for the claim have occurred. See *Wright v. Wright*, 904 P.2d 403, 408-09 (Alaska 1995); see also *Lamoreux v. Langlotz*, 757 P.2d 584, 585 (Alaska 1988). The authors do not herein attempt to differentiate between causes of action accruing before and after September 8, 1994 as such questions tend to be fact-specific and not well suited to a general analysis.

<sup>289</sup> *Black v. Dahl*, 625 P.2d 876, 880-81 (Alaska 1981).

beneficiary. The fiduciary duty of a realtor also includes the legal, ethical, and moral responsibility to exercise reasonable care, skill, and judgment in securing for the principal the best bargain possible.<sup>290</sup> If a real estate broker or agent becomes a dual agent for both buyer and seller, that broker or agent will have disclosure obligations to both parties. While the duty to disclose includes **latent** defects (such as code violations), the Alaska Supreme Court has held that there is no duty to disclose **patent** defects.<sup>291</sup>

The Alaska Supreme Court has held that a disclaimer in a contract for the sale of land was enforceable.<sup>292</sup> The contract at issue provided that the seller did not warrant that the land was suitable for a particular purpose, and the buyer acknowledged that he "had inspected the parcel, or had voluntarily declined to do so, and was satisfied with [its] description and condition." The court held that these provisions demonstrated that the risk of the condition of the land was allocated to the buyer.

AS 34.70.010, *et seq.* (effective July 1, 1993), requires a seller of residential real property to deliver to the purchaser a detailed disclosure statement. A seller does not have any liability for a defect or other condition in the real property, if the existence of the defect or condition at issue is set forth in the disclosure statement.<sup>293</sup> A seller who acts in good faith in selling his home is not liable to purchasers who subsequently discover latent defects.<sup>294</sup> In *Amyot*, the sellers of a home prepared a "Residential Real Property Transfer Disclosure Statement" pursuant to AS 34.70.010 *et seq.*, wherein they indicated that, to the best of their knowledge, there were no defects in the walls or foundation of the house. Shortly thereafter, while remodeling the basement in order to install a lap pool, the new owner discovered that the foundation was rotting, and would cost approximately \$100,000 to replace. He thereafter sued the sellers for the cost of repairs under innocent, negligent, and intentional misrepresentation theories.<sup>295</sup> The trial court concluded that the innocent misrepresentation claims were barred by AS 34.70.010 *et seq.* The Alaska Supreme Court agreed, explaining in part that:

<sup>290</sup> *Lee Houston & Assoc. v. Racine*, 806 P.2d 848, 853 (Alaska 1991).

<sup>291</sup> *Matthews v. Kincaid*, 746 P.2d 470, 471-72 (Alaska 1987).

<sup>292</sup> *State v. Carpenter*, 869 P. 2d 1181 (Alaska 1994).

<sup>293</sup> See AS 34.70.030.

<sup>294</sup> *Amyot v. Luchini*, 932 P.2d 244 (Alaska 1997).

<sup>295</sup> In a separate action, the purchaser also sued the real estate agent and broker for alleged misrepresentation. Guess & Rudd represented the realtors in that action, and successfully obtained summary judgment in their favor. *Raymond Amyot v. ERA Meyeres Real Estate*, Super. Ct. Case No. 4FA-95-1997 Civil.

Prior to the enactment of AS 34.70, sellers of real property were not required to make any representations about the property. However, sellers were strictly liable for those representations they made. Under the disclosure statute a seller is now required to make representations about a wide range of the property's features and characteristics. We conclude that the legislature intended to offset the seller's increased disclosure responsibilities by the lower liability standard for misrepresentations.<sup>296</sup>

In a typical misrepresentation case, plaintiff has the option of choosing either the remedy of rescission (canceling the contract) or damages.<sup>297</sup> Plaintiff's election of a remedy need not occur until the time of judgment. In order to pursue rescission, the buyer must tender the property back to the seller.<sup>298</sup> Damages for misrepresentation are measured either by "the benefit of the bargain" (the difference in the value of the property as purchased and the value if it had been as represented) or by the amount of plaintiff's out-of-pocket expenses (the cost to repair the property to the condition represented).<sup>299</sup>

The Alaska Supreme Court has determined that an appropriate measure of damages is the "cost of putting the property in the condition that would bring it into conformity with the value of the property as it was represented."<sup>300</sup> In *Beaux*, the seller had violated the Uniform Residential Disclosure Act by failing to disclose the need for the buyer to obtain a second sump pump to address water infiltration. The court held the buyers were limited to receiving carpet of "quality similar to the original quality of the replaced carpet." However, the buyers were allowed to recover the cost of obtaining new carpet instead of the depreciated carpet they had (despite the fact that this would effectively result in a windfall). The court's rationale was that the buyers were entitled to

<sup>296</sup> *Amyot*, 932 P.2d. at 246 (citation omitted).

<sup>297</sup> *Thompson v. Wheeler Constr. Co.*, 385 P.2d 111, 112 (Alaska 1963). However, AS 34.70.090(a) provides that a transfer of real estate is not invalidated solely because a seller fails to provide the disclosures mandated by law. A person who negligently violates the disclosure requirements or fails to perform a duty required by law is liable to the transferee "for the amount of the actual damages suffered by the transferee as a result of the violation or failure." AS 34.70.090(b). A person who willfully violates the statute or fails to perform a duty required by law "is liable to the transferee for up to three times the actual damages suffered by the transferee as a result of the violation or failure." AS 34.70.090(c). A court may also award the buyer costs and attorney fees. AS 34.70.090(d).

<sup>298</sup> *Miller v. Sears*, 636 P.2d 1183, 1193 (Alaska 1981).

<sup>299</sup> *Turnbull v. LaRose*, 702 P.2d 1331, 1335-36 (Alaska 1985).

<sup>300</sup> *Beaux v. Jacob*, 30 P.3d 90 (Alaska 2001).

be placed in the position they would have occupied had it not been for the seller's negligence.<sup>301</sup>

In the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. 4851 *et seq.*, Congress attempted to reduce the threat of childhood lead poisoning in housing owned, assisted, or transferred by the federal government. Whenever "target housing" (described as housing constructed prior to 1978, subject to certain exceptions, such as housing for the elderly) is offered for sale or lease, specific disclosures regarding lead-based paint are required.<sup>302</sup> A seller or lessor of target housing must disclose to the transferee the presence of any known lead-based paint, provide available records and reports, provide the purchaser or lessee a lead hazard information pamphlet, give purchasers a 10-day opportunity to conduct a risk assessment or inspection, and attach specific disclosure and warning language to the sales or leasing contract before the purchaser or lessee is contractually obligated to purchase or lease the target housing.<sup>303</sup>

In *Rosenberg v. Moore and State of Alaska*, Case No. 3AN-98-8555 Civil, Guess & Rudd was successful in convincing the Alaska Superior Court (acting as an intermediate appellate court) to reverse the order of the Alaska Real Estate Commission holding that real estate brokers could be held vicariously liable for claims against the Real Estate Surety Fund arising from actions or omissions of real estate agents under their supervision. The court found that the Real Estate Surety Fund statutes, AS 08.88.450 *et seq.*, did not authorize the imposition of vicarious liability against an otherwise innocent supervising broker. This ruling does not, however, impact the availability of vicarious liability for claims outside the Real Estate Surety Fund, but is useful to protect the licenses of real estate brokers from adverse actions that could be noted in their license files.

#### Appendices:

AS 09.65.230  
 AS 34.70.010  
 AS 34.70.030  
 AS 34.70.090

<sup>301</sup> The case is also significant in that the court explicitly rejected the seller's argument that the buyers had failed to mitigate their damages by notifying upon discovering the water damage to the carpet.

<sup>302</sup> See 42 U.S.C. §§ 4851b(27); *see also* 42 U.S.C. §§ 4852d.

<sup>303</sup> See 24 C.F.R. § 35 *et seq.*; 40 C.F.R. § 745 *et seq.*

**Sec. 09.65.230. Innocent misrepresentations by agents in real property transfers.** The agent of a transferor or transferee is not liable for an innocent misrepresentation in information provided to the transferor or transferee in the transfer of an interest in real property if the agent does not have personal knowledge of the error, inaccuracy, or omission that is the basis for the misrepresentation. (§ 1 ch 110 SLA 1994)

**Revisor's notes.** — Enacted as AS 09.65.170. Renumbered in 1994.

provides that this section "applies to causes of action that accrue on or after September 8, 1994."

**Editor's notes.** — Section 2, ch. 110, SLA 1994

**Sec. 34.70.010. Disclosures in residential real property transfers.** Before the transferee of an interest in residential real property makes a written offer, the transferor shall deliver by mail or in person a completed written disclosure statement in the form established under AS 34.70.050. Delivery to the spouse of the transferee constitutes delivery to the transferee unless the transferor and the transferee agree otherwise before the delivery. (§ 1 ch 115 SLA 1992)

#### NOTES TO DECISIONS

**Failure to disclose defects unreasonable.** — Because defendant was required by statute to disclose even minor defects of which she had been notified, the superior court did not abuse its discretion by enhanc-

ing the fee awards based on the unreasonableness of defendant's claims and defenses. *Cole v. Bartels*, 4 P.3d 956 (Alaska 2000).

**Sec. 34.70.030. Liability after disclosure.** A transferor is not liable for a defect or other condition in the real property or the real property interest being transferred if the transferor discloses the existence of the defect or condition in the disclosure statement. (§ 1 ch 115 SLA 1992)

**Sec. 34.70.090. Failure to comply.** (a) A transfer that is subject to this chapter is not invalidated solely because a person fails to comply with this chapter.

(b) A person who negligently violates this chapter or fails to perform a duty required by this chapter is liable to the transferee for the amount of the actual damages suffered by the transferee as a result of the violation or failure.

(c) A person who wilfully violates this chapter or fails to perform a duty required by this chapter is liable to the transferee for up to three times the actual damages suffered by the transferee as a result of the violation or failure.

(d) In addition to the damages allowed under (b) or (c) of this section, a court may also award the transferee costs and attorney fees to the extent allowed under the rules of court. (§ 1 ch 115 SLA 1992)