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I. 2017 Statutes

Uniform Advertising Standards. All first point of contact solicitation materials must include: 1. Name and license number of licensee; 2. The responsible broker's identity (license number is optional). No exceptions for advertisements in print, electronic media, including for sale, open house, rent, lease and directional signs if licensee identification is included. If no licensee information is provided on signs, then responsible broker's identity must be included. AB 1650. Bus. & Prof. Code §10140.6. Effective. 1/1/17.

Team Names. For advertising, responsible broker's license number no longer required. SB 710. Bus. & Prof. Code §10159.7. Effective 8/30/16.

Licensing. "Real estate salesman license is now renamed "real estate person license. AB 685. Bus. And Prof. Code secs.6742, 10003 *et seq*. Effective 1/1/17.

Disclosures. Death of Occupant. Existing law is clarified to state that death of an occupancy or manner of death, occurring more than three years prior to an offer to purchase is not a material fact requiring disclosure. No disclosure is required where an occupant was living with HIV or died from AIDS. AB 73. Civil Code sec. 1710.2. Effective 9/25/16.

Disclosures. Environmental Hazards Booklet. Liability protections for delivery of Residential Hazards booklet extended to include leases of more than one year. Delivery is optional. Under Civil Code section 2079.7, when a seller or broker elects to deliver this booklet the information is deemed legally adequate to inform the transferee regarding common environmental hazards: asbestos, formaldehyde, hazardous waste, household hazardous waste, lead, mold, radon. Additional information on these issues is not required unless broker or seller have actual knowledge. The new law makes protections applicable to "real property" which includes, residential 1-4 units, and all commercial and vacant land properties. Ab 1750. Civil Code sec. 2079.13. Effective 1/1/17.

Junior Accessory Dwelling Units. Authorizes a city or county to provide by ordinance for the creation of junior accessory dwelling units within an existing dwelling within single-family residential zones. The local ordinance (Novato, Tiburon adopted, San Rafael soon, Fairfax, Larkspur, Belvedere considering) must include standards for creation of junior accessory dwelling units, required deed restrictions prohibiting the sale of the JADU, owner occupancy requirements, and include: an existing bedroom, separate entrance from the main entrance to the structure, prohibits required additional parking, efficiency kitchen (sink with waste line, cooking facility and food preparation and storage cabinets, may share sanitation facilities, no more than 500 SF. A permit shall be issued within 120 days of application. The JADU will not be considered a separate unit for utility purposes. AB 2406. Gov. Code sec. 65852.22. Effective 9/22/16

Accessory Dwelling Unit. Renames second units "Accessory Dwelling Units" or "ADU." Applies a statewide standard regardless of whether local ordinance has been adopted. An application must be ministerally reviewed or disapproved within 120 days after receipt. New ADU standards include: increased SF of an attached ADU up 50% of the existing living area (previous 30%), no passageways shall be required, setbacks are limited, local agency may reduce or eliminate parking requirements. AB 2299, SB 1069. Gov. Code secs. 65852.2. Effective 1/1/17.

Landlord/Tenant-Bedbug Disclosure. Landlord is prohibited from renting vacant units if Landlord knows it has a current bed bug infestation. Landlord has no duty to inspect a dwelling unit or common areas for bedbugs if landlord has no notice of infestation. Requires landlords to provide copies of pest control reports to tenants of inspected units and to all tenants if infestation found in common areas. Landlord may not engage in retaliatory conduct against a tenant who has notified landlord of finding bedbugs in the unit. Tenants must cooperate with inspections to facilitate detection and treatment of bedbugs. AB 551. Civ. Code secs. 1942.5, 1954.1, 1954.600 *et seq*. Effective: New disclosure requirements for new tenants, commencing July 1, 2017, and for existing tenants, January 1, 2018.

Landlord/Tenant Commercial Leasing re CASp Report. This law requires a lessor to state on a commercial lease whether or not the property has been *inspected* by a Certified Access Specialist (CASp). Previously, the law required a statement in leases whether a Certified Access Specialist had determined to meet all applicable disability access requirements. Additionally, if the property has been issued an inspection report by a CASp, indicating that it meets applicable standards, the commercial property owner or lessor shall provide a copy within seven (7) days of lease execution. If no report has been issued, then a specific disclosure statement would be required.

> A Certified Access Specialist (CASp) can inspect the subject premises and determine whether the subject premises comply with all of the applicable construction-related accessibility standards under

> state law. Although state law does not require a CASp inspection of the subject premises, the commercial property owner or lessor may not prohibit the lessee or tenant from obtaining a CASp inspection of the subject premises for the occupancy or potential occupancy of the lessee or tenant, if requested by the lessee or tenant. The parties shall mutually agree on the arrangements for the time and manner of the CASp inspection, the payment of the fee for the CASp inspection, and the cost of making any repairs necessary to correct violations of construction-related accessibility standards within the premises.

Prior to signing the lease, the prospective lessee has the right to review an inspection report issued by a CASp, if one exists, and is not provided at least 48 hour prior to lease execution, the prospective lessee may cancel lease within 72 hours after signing based on the report.

This law also establishes a presumption that making repairs or modifications necessary to correct violations of construction-related accessibility standards that are noted in a CASp report is the responsibility of the commercial property lessor unless otherwise agreed upon by the parties to the lease. AB2093. Civ. Code sec. 1938. Effective 9/17/16.

Landlord/Tenant. Unlawful Detainer Case Public Access Reporting. No public access to UD records is permitted unless the plaintiff/landlord prevails within 60 days of filing, or by court order. Previously, defendant/tenant had to prevail within 60 days of filing to bar access. A court can bar access by the parties' stipulation. The practical effect of this law will be to make permanently unavailable to public view many UD filings even where the landlord's initial complaint was justified. AB 2819. Code of Civ. Proc. Sec. 1161.2, 1161.7. Effective 1/1/17.

Landlord/Tenant Water Submeters. This law requires that submeters be installed on all *new* multifamily residential units or mixed commercial and multifamily units, and requires that landlords bill residents of these new units for the increment of water they use. This requirement will come into effect pursuant to standards which may only be proposed and adopted after January 1, 2018. When a multi-unit property has submeters installed prior to 2018 and the landlord elects to charge a tenant separately for water service, then all the requirements of this new law must be complied with commencing January 1, 2018. However, this law does not affect existing properties without submeters where tenants are billed separately through ratio-allocation utility systems (RUBS). If a submetered water bill remains unpaid for 180 days, or the water bill exceeds $200, landlord may terminate the tenancy. SB 7. Civ. Code secs.

1954.201 *et seq*. Health & Saf. Code sec. 17922.14, Water Code secs. 517, 537 *et seq*. Effective 1/1/18.

Notary. Maximum fees that can be charged by a notary to notarize a deed or certifying a power of attorney increase from $10 to $15. AB 2217. Gov. Code sec. 8211. Effective 1/1/17.

Water Use Fines Imposed for Excessive Use. The new law requires each water supplied (e.g. MMWD, NMWD to define "excessive water use" by a residential customer and maximum fine is $500 per 100 cubic feet (748 gallons) above defined local standard for excessive water use during a drought emergency. SB 814. Water Code sec. 365-367. Effective 1/1/17.

II. 2016 Cases of Note.

Case Name: *Westside Estate Agency, Inc. v James Randall* (2016) 6 Cal. App. 5th 317.

Issue: Whether a real estate broker working with a buyer without a written agreement and who finds a buyer a property can collect a commission from the buyer who eventually buys the property through another broker.

Holding: No.

Facts: Stephen Shapiro of Westside Estate Agency agreed to represent the Randall's, who were friends and on a verbal agreement, attempted to find a home in Los Angeles. In October 2014, Shapiro identified a property in the Bel Air neighborhood for which the listing broker was offering a 2% cooperating broker commission. Shapiro wrote an offer for $42 million, which was later increased to $45 million. When Shapiro refused to credit his entire commission to the Randall's to apply to the purchase price, the Randall's instructed him to cancel the offer. Three months later the Randall's purchased the property for $46.25 million with their attorney acting as their broker. The attorney/broker credited the Randall's the full $925,000 cooperating broker fee to apply to the purchase price. Westside sued both the Randall's and the attorney for $925,000. The trial court dismissed the claim against the Randall's. Westside dropped its suit against the attorney/broker. Westside appealed. The California Court of Appeal affirmed the trial court decision.

The Decision: The Statute of Frauds (SOF) declares that an agreement authorizing or employing a broker to sell real estate for compensation or commission is invalid unless the agreement or some note or memorandum thereof is in writing subscribed by the party to be charged. Two possible exceptions to the SOF are (1) fraud and (2) if the principal enters into a contract to buy or sell the property, and it specifies the broker will receive a commission and the principal cancels. Fraud only applies in a narrow circumstance where the broker is told the commission agreement is in writing and it is not. Another exception to the SOF for equitable estoppel does not apply to real estate brokers because they are licensed professionals. Since the exceptions to

the SOF are not applicable to the case before the court, Westside's case against the Randall's was properly dismissed.

The Implication: "*Caveat sectorem*": Broker beware. Longstanding case law has similarly denied brokers' commissions under similar circumstances. The Appellate Court citing numerous previous cases, stated, "Once the statute of frauds applies, its bar against relief is absolute and applies no matter how the unhappy broker styles his or her claim to recover …" and "… licensed brokers are 'conclusively presumed' to know that their commission agreements must be in writing to be enforceable" and "Courts … have 'little sympathy' for licensed brokers who assume the risk of relying on unwritten agreements for a commission."

Case Name: *Elliott Homes, Inc., v Superior Court* (Hicks) (2016) 6 Cal. App. 5th 333

Issue: Whether a homeowner may file a construction defect claim against a builder for actual damages without first giving the builder a right to repair as set forth in SB 800, Civil Code Sections 895 – 945.5.

Holding: No.

Facts: Hicks and others purchased 17 single-family homes built by Elliot after January 1, 2003, the effective date of SB 800. They filed a lawsuit against Hicks alleging product liability and negligence. Elliott filed a motion to stay the lawsuit to give it time to repair the defect under SB 800. The trial court denied the motion. Elliott filed a writ with the Appellate Court. The Appellate Court granted the writ and ordered the trial court to stay the lawsuit to give Elliott the opportunity to apply the prelitigation procedure (right to repair) to the dispute.

The Decision: SB 800 applies to new residential units where a purchase agreement was signed by buyer and seller on or after January 1, 2003. This law sets standards for residential construction, imposes a minimum one-year warranty and prescribes a non-adversarial procedure giving builder a chance to repair a defect. Hicks claims the repair right only applies if the claims made is for violation of the specific law itself. The Appellate Court held that the statute must be read in its entirety, not clause by clause. The particular section applicable to right to repair (Section 910) therefore must be read in context of Section 896 that provides that the scope of the act applies to any action seeking recovery of damages …" Accordingly, the plain language of the law permits the builder a chance to repair a claimed defect before the suit can go forward. The Appellate Court distinguished case law that Hicks cited for the contrary conclusion as going to the issue of whether the non-statutory claims can proceed not whether the builder has a right to repair.

The Implication: A builder of new residential property must be given an opportunity to repair claimed construction defects before a plaintiff may proceed with a lawsuit against a builder. By filing suit first, time will be lost and expenses will unnecessarily rise. SB 800 is a comprehensive statute that was entered into after

extensive negotiations with many interested parties and the Appellate Court has indicated that all parties to the legislation have a right to rely on its terms.

Case Name: *Horiike v Coldwell Banker* (2016) 1 Cal. 5th 1024.

Issue: Whether a real estate salesperson who lists a property for sale owes a fiduciary duty to the buyer when that buyer is working through another salesperson in the same company as the listing agent?

Holding: Yes.

Facts: Cortazo, a real estate salesperson working out of the Malibu office of Coldwell Banker, listed a luxury property in Malibu. Namba, a real estate salesperson working out of the Beverly Hills office of Coldwell Banker, found a buyer for the property. Cortazo gave the buyer a flyer showing the property had approximately 15,000 square feet of livable area. Cortazo gave Namba a copy of the building permit showing just over 9,200 square feet in the main residence plus a guest house, garage and basement. After close of escrow, the buyer discovered the discrepancy and sued Cortazo and Coldwell Banker but not Namba, for several claims including breach of fiduciary duty. The trial court dismissed the fiduciary duty claim. The defendants were found not liable by a jury on the other claims. The buyer appealed the fiduciary duty ruling.

The Decision: The Appellate Court and California Supreme Court held that the listing agent owes a fiduciary duty to the buyer and the claim should have been sent to a jury. The decision was based on Civil Code Section 2079.13(b), part of the agency disclosure law. The Court held that real estate agency relationships are formed between a broker and a principal, not separately between a salesperson and a buyer or seller. The Court found that the Civil Code section at issue means that if a broker is a dual agent, all licensees working through the broker in a transaction are also dual agents. Consequently, Cortazo, as a dual agent, owed a fiduciary duty to the buyer to disclose known material facts affecting the value or desirability of the property. Whether Cortazo satisfied the duty by providing different reports, without specifically highlighting the difference in square footage is something that a jury would have to decide.

The Implication: According to the Supreme Court, the duty the buyer alleged that Cortazo breached was not really any different from the non-fiduciary duty that Cortazo would otherwise have owed the buyer. Real estate agents have been and continue to be advised to conduct a diligent visual inspection of the property, to disclose known facts affecting the property's value or desirability, and to attribute the source of any information provided and either verify the representation or disclose that the representation has not been verified.

Case Name: Boston LLC v Juarez (2016) 240 Cal.App.4th Supp. 28

Issue: Whether a landlord can evict a tenant following a 3-day notice for the tenant's failure to obtain renter's insurance.

Holding: No, since renter's insurance is for the tenant's benefit and not the landlord's and therefore is not a material breach of the lease.

Facts: Juarez rented an apartment from Boston LLC that was subject to the Los Angeles Rent Stabilization Ordinance (LARSO). The lease contained two clauses relevant here. A forfeiture clause gave the landlord the right to terminate the tenancy or any failure of compliance or performance by the tenant. Another clause required the tenant to obtain and pay for insurance to protect tenant for any personal injury or property damage. After Juarez had resided in the property for 15 years, Boston, on the Friday before a 3-day holiday, gave Juarez a 3-day notice to obtain renter's insurance or quit. Juarez did not obtain the insurance within the 3-day period but did so shortly thereafter. Boston sued Juarez in unlawful detainer. The trial court found in favor of the landlord, holding that the forfeiture clause made all breaches material as a matter of contract. Juarez appealed to the Appellate Division of the Superior Court, which, in a 2-1 decision, affirmed the trial court's decision. The Second Appellate District asserted its own jurisdiction to resolve an important issue of law.

The Decision: The Court of Appeal reversed the decision of the Appellate Division of the Superior Court, holding that a tenant's breach must be *material* to justify forfeiture. The Appellate Court found that prior case law, in the context of a commercial lease, held that materiality was a requirement to terminate a lease regardless of a forfeiture clause and that the principal announced in those cases should apply equally, if not more so, in the context of a residential lease where the tenant typically does not have equal bargaining power with a landlord. The Appellate Court also found that public policy supports its decision because the purpose of the LARSO would be undermined if landlords could use "pretext" evictions for minor or trivial violations based on unilateral forfeiture clauses in residential leases. Another ground for the decision was that forfeiture clauses should be strictly construed against the party seeking enforcement. Since the renter's insurance clause contained language absolving Boston for any liability, regardless of fault, it was overreaching. Lastly, the Court of Appeal held that Juarez's slight delay in obtaining insurance after the 3-day notice expired did not harm Boston given the 15 years that Boston let the situation go unnoticed and considering Boston's "gamesmanship" in delivering the notice immediately before a 3-day holiday, and therefore the delay was immaterial and did not justify forfeiture.

The Implication: Forcing tenants to purchase renter's insurance pursuant to a lease term cannot be used by a landlord to justify termination of the lease for the tenant's failure to obtain such insurance. Certainly, that is the case in rent control jurisdictions and likely elsewhere as well. It should be noted that those who use the C.A.R.

Residential Lease would not encounter this situation because the tenant is not obligated to obtain insurance under the C.A.R. lease but rather just advised to do so.

The Court of Appeal explicitly noted that its decision will prevent the use of court resources for frivolous, pretext filings by landlords seeking to evict tenants. The flip side of the coin is that tenants will certainly argue materiality as a defense to any performance based eviction proceeding. What other lease terms will be considered immaterial by courts and thus unenforceable giving tenants a valid defense to a 3-day notice to perform or quit? That will have to be determined in the future. Another unanswered question raised by the Appellate decision is whether in other instances failure to comply with a performance requirement within the statutory 3-day notice provision will be considered immaterial. It is one thing to say the term required by the lease is immaterial and quite another to say that failure to comply with the statutory time to comply with a term is immaterial. Is this language by the court mere dicta or does it expose landlords to risk if the tenant complies with a notice to perform 4 days, 5 days or a week after the statutory 3 days to satisfy the lease term?

III. Rifkind Law Group Recent Pending Cases/Transactions

1. **Boundary.** New fence encroaches into lane and Tiburon will not approve fence, requiring quiet title action.
2. **Boundary.** Dispute between neighboring property owners in Dillon Beach.
3. **Code Enforcement**. Defense of code enforcement matters: Belvedere, Bolinas, Marshall.
4. **Commercial Leasing.**
5. **Commercial Sales Transactions**
6. **Construction.** Represent general contractor in payment dispute with homeowner.
7. **Construction.** Represent building owner claiming construction defects and payment dispute with general contractor.
8. **Construction**. Failed fire sprinkler system.
9. **Disability Access Issues.**
10. **Disclosures.** Defend seller in disclosure claim regarding cost to access neighbor's sewer lateral.
11. **Easement.** Represent HOA in easement dispute with adjoining commercial property owner regarding overburden of access easement.
12. **Easement.** New improvement encroaches into existing easement, and County will not sign final approval, requiring quiet title action.
13. **Easement.** Represent owner in dispute with MCOSD.
14. **Easement.** Drainage disputes.
15. **Easement.** Scope of utility easement dispute.
16. **Entity Formations.** LLC's, corporations.
17. **Estate Planning**
18. **Evictions.** Mental health issues seem on the rise. Most evictions are now contested.
19. **Finance.** Represent lender in enforcement of unsecured promissory note.

20. **Finance.** Draft loan documents.
21. **For Sale By Owner Transactions.**
22. **Homeowner Association Disputes**.
23. **Landslide.** Defense of property owner in landslide claim.
24. **Land Trusts.** Form trusts to provide confidentiality for true owners.
25. **Land Use.** Obtain design review approval for single family residence. Multiple cases in multiple jurisdictions.
26. **Land Use.** Residential subdivision work in Larkspur, Tiburon and Colma.
27. **Land Use.** Approval of SFR in the coastal zone.
28. **Land Use.** Represent Marin General Hospital regarding land use issues re: rebuild of campus.
29. **Liquidated Damages Disputes in PSA's.**
30. **Neighbor (Nuisance).** Neighborhood noise and nuisance claims.
31. **Neighbor (Project).** Opposition to scope of new adjoining parking deck.
32. **Neighbor (Trees).** Defendant downslope tree owner in Belvedere tree dispute.
33. **Neighbor (Trees).** Enforce view covenant in Strawberry.
34. **Neighbor (Trees).** Dispute regarding scope of view under Tiburon tree ordinance.
35. **Partnership Disputes.**
36. **Residential Transactions.**
37. **Septic system.** Property owner legal challenge of local agency decision to deny approval of a septic system for new single family residence
38. **Title.** Represent borrower to remove fraudulent deeds of trust from title.