Civil

University of the Pacific, McGeorge School of Law

Follow this and additional works at: https://scholarlycommons.pacific.edu/mlr

Part of the Legislation Commons

Recommended Citation
University of the Pacific, McGeorge School of Law, Civil, 28 Pac. L. J. 663 (1997).
Available at: https://scholarlycommons.pacific.edu/mlr/vol28/iss3/11

This Greensheet is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.
Civil

A New Weapon in the War on Drugs: Using Civil Remedies to Evict Tenants Engaged in Illegal Drug Activity Rapidly

Michael C. Weed

I. INTRODUCTION

In the realm of landlord and tenant relations, the legal system has sought to strike a balance between competing property interests that often conflict. The landlord is primarily interested in the preservation of his rights as an owner, while the tenant demands security in his rights as possessor of the property. At times, problems will arise that will cause the landlord to seek to evict a particular tenant, whether it be for nonpayment of rent or disruptive behavior that affects neighbors. However, the process that the landlord must utilize to accomplish the eviction can, at times, be lengthy and expensive.¹ Chapter 658 seeks to remedy the potential difficulties that occur when a landlord evicts a tenant who is disrupting the neighborhood or rental property through the illegal sale of controlled substances.²

II. THE CHANGES ENACTED BY CHAPTER 658

Existing law provides that a tenant may be evicted on three days’ notice if that tenant has maintained or permitted a nuisance on the property.³ Under this statute, a tenant committing a nuisance is deemed to have terminated the lease, thus allowing the landlord to seek restitution of possession after only three days’ notice.⁴ Chapter 658 amends § 1161 of the California Civil Procedure Code to specifically include the illegal sale of a controlled substance as a nuisance.⁵ Moreover, Chapter 658 amends California Civil Code § 3479, which sets forth the statutory definition of “nuisance” to include the illegal sale of a controlled sub-

---

¹. See Laura C. Marks, Landlords Get Legal Advice in Lecture Series, HARTFORD COURANT, Oct. 27, 1995, at B4 (describing how the eviction efforts of landlords can be frustrated and delayed by tenants who know the loopholes in the process).

². See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2970, at 2 (May 20, 1996); see id. (stating that Chapter 658 seeks to aid landlords in evicting drug-selling tenants in a timely manner); see also CAL. HEALTH & SAFETY CODE §§ 11054-11058 (West 1991 & Supp. 1997) (enumerating the materials classified as “controlled substances,” including marijuana, cocaine and heroine, as well as numerous prescription drugs).

³. See CAL. CIV. PROC. CODE § 1161(4) (amended by Chapter 658).


⁵. CAL. CIV. PROC. CODE § 1161(4) (amended by Chapter 658); see id. (stating expressly that a tenant illegally selling a controlled substance is deemed to have committed a nuisance on the property).
stance. Thus, Chapter 658 clarifies and provides certainty to existing law, enabling a landlord to quickly evict a tenant based exclusively on the tenant's illegal sale of a controlled substance.

III. THE RATIONALE UNDERLYING THE CHANGES

The war on drugs in America is in full swing, and Chapter 658 represents another weapon in the struggle. Drug use and trafficking is viewed as one of the country's most serious problems, a problem that can encroach on every city and citizen in the nation. Often, the drug problem is most acute in public housing, or multi-family housing developments. Left unchecked, the drug problem in multi-family dwellings can spread, exposing all residents to the violence and crime that usually accompanies drug activity. Chapter 658 creates a tool to aid in preventing the neighborhood erosion caused by drug activity. By enacting legislation that labels the illegal sale of controlled substances a nuisance per se, lawmakers hope to reduce the crime and violence caused by drug sales, making entire neighborhoods safer for law-abiding residents.

Because traditional criminal sanctions have been ineffective in defeating illegal drug trafficking, law enforcement agencies are adopting new methods to fight the battle. Among the weapons becoming more popular is the use of civil remedies to fight criminal activity. Consistent with this trend, several states have enacted

---

6. CAL. CIV. CODE § 3479 (amended by Chapter 658); see id. (incorporating the illegal sale of controlled substances into the statutory definition of nuisance); id. (defining "nuisance" as, for example, anything injurious to health, indecent or offensive to the senses, or interfering with the comfortable enjoyment of life or property).


9. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2970, at 2 (May 20, 1996) (describing the increase in crime and violence to which innocent residents are exposed when drug houses flourish in a neighborhood or building); see also Kellner v. Cappellini, 516 N.Y.S.2d 827, 830-31 (N.Y. City Civ. Ct. 1986) (articulating the court's fear that the use of real property for illegal drug sales will infect entire neighborhoods).

10. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2970, at 2 (May 20, 1996) (describing the intent of Chapter 658 to enable landlords to quickly evict drug-selling tenants so that the quality of life for others may be preserved); see also CAL. CIV. CODE § 3479 (amended by Chapter 658) (defining "nuisance" to include the illegal sale of a controlled substance). See generally 47 CAL. JUR. 3D, Nuisances § 9 (1979) (explaining that when a legislature validly declares a specific activity to be a nuisance, that activity is a nuisance per se).

11. See Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives, 42 HASTINGS L.J. 1325, 1322-33 (1991) (describing law enforcement's use of civil remedies, such as the remedies available in the Racketeering Influence Corrupt Organizations Act, to fight criminal activity).

12. See id. at 1325-26 (stating that civil remedies are being used in tandem with criminal remedies, and even supplanting criminal remedies entirely in certain situations); see also Elaine Bennett, Lease Tightens on Drugs, Violence, ORLANDO SENTINEL, Jan. 28, 1996, at K1 (detailing a new standardized lease for use in public housing...
measures that declare the illegal sale of controlled substances to be a nuisance.\textsuperscript{13} Chapter 658 enacts the same declaration,\textsuperscript{14} and expressly incorporates the illegal sale of drugs into California’s unlawful detainer statute.\textsuperscript{15} Incorporation into the unlawful detainer statute activates the faster eviction process of that provision.\textsuperscript{16} Thus, Chapter 658 creates an efficient and effective tool to be utilized by landlords and law enforcement agencies in the effort to reduce the prevalence of drug activity and drug houses in California neighborhoods.

\section*{IV. POTENTIAL DIFFICULTIES WITH CHAPTER 658}

The goals of Chapter 658, aiding in the war on drugs and making neighborhoods safer,\textsuperscript{17} will clearly receive strong support. However, in practice, Chapter 658 may give rise to various concerns.

\subsection*{A. Due Process Concerns}

First, because law enforcement is utilizing a civil remedy to address a criminal activity, the traditional safeguards in place for a criminal defendant\textsuperscript{18} may be legally circumvented in the civil arena.\textsuperscript{19} Lacking many of the burdens imposed by the criminal justice system, the civil remedy is more efficient, less costly and easier to utilize.\textsuperscript{20} This makes civil remedies attractive to law enforcement officials, parti-
cally when, as with Chapter 658, a specific goal is intended that can be achieved directly through implementation of a specific civil remedy.\textsuperscript{21}

However, the ease with which the eviction process provided by Chapter 658 can be implemented also creates constitutional concerns. By providing a speedy eviction process,\textsuperscript{22} Chapter 658 may raise due process concerns as tenants are evicted based on criminal activity without criminal conviction.\textsuperscript{23} Yet, proponents of Chapter 658 point out that court and district attorney supervision will be involved in every eviction, and that probable cause evidence of illegal sales of controlled substances is required prior to implementation of the eviction process.\textsuperscript{24} By providing these safeguards, Chapter 658 ensures that when evictions do occur, the affected tenants will be provided sufficient due process prior to being put out of their homes.

B. Double Jeopardy Concerns

A second concern raised by Chapter 658 is the possibility of exposing an evicted tenant to double jeopardy.\textsuperscript{25} Although criminal conviction is not required to activate the eviction process created by Chapter 658,\textsuperscript{26} if a tenant is prosecuted criminally and convicted, and also evicted through civil proceedings, double jeopardy issues are created.\textsuperscript{27}

\textsuperscript{21} See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2970, at 2 (May 20, 1996) (stating that the aim of Chapter 658 is to provide landlords and law enforcement with a means of evicting drug-dealing tenants in a timely manner); see also Cheh, supra note 11, at 1345 (stating that civil remedies are being increasingly utilized by governmental agencies to combat various criminal activities).

\textsuperscript{22} See supra notes 3-6 and accompanying text (detailing the three-day eviction process Chapter 658 makes applicable to tenants engaged in drug activity).

\textsuperscript{23} See Cheh, supra note 11, at 1338 n.64 (explaining the federal government's experience with due process difficulties regarding leasehold forfeiture in public housing developments). The federal government's civil forfeiture program was enjoined by a Virginia court, requiring the government to provide prior notice and an opportunity to be heard before implementing leasehold forfeiture actions against public housing residents. See id. (reviewing Richmond Tenants Organization v. Kemp, 753 F. Supp. 607 (E.D. Va. 1990)). Since then, the Department of Housing and Urban Development has rewritten its procedures, incorporating additional due process protection to tenants sought to be evicted. See id. (noting the changes reflected by DEP'T OF HOUSING AND URBAN DEVELOPMENT AND DEP'T OF JUSTICE, FORFEITURE OF LEASES FOR DRUG FREE NEIGHBORHOODS 3 (1990)). These additional safeguards include a requirement that the tenant to be evicted be the leaseholder, that compelling evidence be obtained regarding the drug offenses, and that the property be notorious for the drug activity. See id.

\textsuperscript{24} See Telephone Interview with Sgt. Paul Curry, San Bernardino County Sheriff Department (June 20, 1996) (notes on file with the Pacific Law Journal).

\textsuperscript{25} See U.S. CONST. amend. V (prohibiting the prosecution of a criminal defendant twice for the same offense).

\textsuperscript{26} See CAL. CIV. PROC. CODE § 1161(4) (amended by Chapter 658) (omitting any requirement that the tenant to be evicted be convicted of illegal controlled substance sales).

In *United States v. Ursery*, however, the Supreme Court recently held that in rem civil forfeiture proceedings, distinct from criminal prosecution but based on the same illegality, do not violate double jeopardy. In that case, the Court found that the clear intent of Congress was that forfeiture be a civil, rather than criminal, remedy, and as such, civil forfeiture did not constitute punishment for double jeopardy purposes. The civil forfeiture is viewed as distinct from the criminal sanction. Because the civil sanction sought is remedial, rather than punitive, it does not violate the Double Jeopardy Clause. Just as a private person may pursue civil compensation against a convicted criminal for one event or activity, so may the government seek compensation or recompense for one event or activity.

The eviction process enacted by Chapter 658 is in the same vein. Because the rental property at issue has been used for illegal drug distribution, the rental property is analogous to an “instrumentality” that is vulnerable to civil forfeiture. Thus, because the tenant’s leasehold can be viewed as being involved in drug trafficking, and thus subject to civil forfeiture, the resulting eviction would not amount to double jeopardy under *Ursery*, even in the event the tenant is criminally prosecuted for the activity.

Alternatively, by declaring the illegal sale of a controlled substance a nuisance per se, Chapter 658 activates California’s unlawful detainer statute, independent of the civil forfeiture label. Under this statute, the tenant’s lease is automatically terminated by the nuisance activity, and a three-day eviction may then be initiated. Thus, the tenant illegally selling controlled substances is guilty of unlawful detainer

---

30. Id. at 2147-49.
31. See id. at 2142-47 (reviewing the Court’s consistent history of holding that civil forfeiture proceedings are distinct from criminal proceedings for double jeopardy purposes). The holding in *Ursery* would seem limited to in rem forfeiture proceedings against property, where the property is actually the focus of the proceeding. However, termination of a leasehold, if viewed as a property interest, is analogous to civil forfeiture.
32. See id. at 2148-49 (explaining the Court’s focus on whether the civil sanction sought to be imposed is clearly criminal, or rather, primarily serves other remedial purposes); see also Cheh, supra note 11, at 1373-75 (reviewing the historical position of the Supreme Court that remedial civil remedies do not enroach upon double jeopardy).
33. See Cheh, *supra* note 11, at 1373 (explaining that because the criminal and civil actions for the same crime have been held not to violate double jeopardy, a civil forfeiture action, even after a criminal conviction has been obtained, may be pursued by the government for the same event).
34. See CAL. CIV. PROC. CODE § 1161(4) (amended by Chapter 658) (stating specifically that illegal sales of controlled substances from a rental property is a nuisance).
35. See Cheh, *supra* note 11, at 1341 (describing the expansion of “instrumentality” subject to civil forfeiture to include leasehold interests in property used for drug distribution).
36. See supra notes 28-33 and accompanying text (explaining that a civil proceeding against property, as held in *Ursery*, does not violate double jeopardy).
37. See CAL. CIV. PROC. CODE § 1161(4) (amended by Chapter 658) (defining illegal sales of a controlled substance as a nuisance, thus providing the three-day eviction option created by the unlawful detainer statute).
38. See id.
under Chapter 658, and the eviction may proceed on that basis, independent from any potential criminal prosecution and free from controversy regarding double jeopardy.

Thus, whether viewed as a civil forfeiture,\textsuperscript{39} or as a lease termination,\textsuperscript{40} the eviction process of Chapter 658, and the resulting ouster of the tenant, is legally distinct from any criminal proceeding. Therefore, Chapter 658 should withstand any double jeopardy challenges that may be put forward.

C. Fairness in Application

Apart from constitutional concerns, Chapter 658 raises issues of fairness in application. An eviction under Chapter 658, in practice, may not differentiate between the seller of the illegal drugs and other tenants residing in the same home or apartment. Tenants who are innocent, or even without knowledge, of the drug activity on which the eviction is founded, may be ousted, thus creating problems with unjustified dislocation of tenants.\textsuperscript{41} Other states that have enacted similar eviction statutes\textsuperscript{42} have encountered court challenges to the provisions.\textsuperscript{43} Among the issues to emerge have been whether the tenant to be evicted must have had knowledge of the drug activity and whether a tenant can be held responsible for the illegal drug activities of their guests or children.\textsuperscript{44}

In practice, Chapter 658 will confront some of the same issues. If used without restraint, the eviction weapon provided by Chapter 658 sweeps broadly enough to potentially evict some innocent tenants along with the undesirable. However, this result would be contrary to the goals of Chapter 658.\textsuperscript{45} For this reason, it is likely that

\textsuperscript{39} See supra notes 34-36 and accompanying text (explaining that a tenant's leasehold property interest is analogous to an "instrumentality" that is vulnerable to civil forfeiture if used in the pursuit of drug activity).

\textsuperscript{40} See supra notes 37-38 and accompanying text (reviewing California's unlawful detainer statute and the provision of a three-day eviction process for nuisance activity, based on statutory lease termination).

\textsuperscript{41} See Thom Gross, Project 87 Renders Families Homeless, ST. LOUIS POST-DISPATCH, Nov. 26, 1995, at 1D (detailing how innocent renters had been evicted along with the targeted drug offenders under a city program aimed at cleaning up neighborhoods); Fred Kalmbach, C-P Gets Evictions from High-Crime Street, ADVOCATE (Baton Rouge, La.), Apr. 9, 1996, at 1B (describing tenant complaints that they were being wrongly evicted because the police had failed to drive the drug dealers from their neighborhood). This result, if it occurred, would result in Chapter 658 helping to solve the drug problem, only by adding to the significant social problem of homelessness.

\textsuperscript{42} See supra note 13 (listing various state statutes declaring illegal drug activity as a nuisance per se, thus activating each state's respective abatement or eviction process).

\textsuperscript{43} See, e.g., Housing Auth. of Norwalk v. Harris, 625 A.2d 816 (Conn. 1993).

\textsuperscript{44} See id. (holding that a mother without specific knowledge that her daughter was selling drugs from their apartment could not be evicted under Connecticut's rapid eviction statute based on serious nuisance). But see New Haven Hous. Auth. v. Bell, No. SP-NH-9006-25275, 1990 WL 290119, at *1 (Conn. Super. Ct. July 17, 1990) (holding that a tenant may be evicted when it is established that the tenant permitted the illegal drug activity to occur in the rental property).

\textsuperscript{45} See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2970, at 2 (May 20, 1996) (stating that the aim of Chapter 658 is to remove drug-dealing tenants for the benefit of those remaining); Telephone Interview with Sgt. Paul Curry, supra note 24 (stating that Chapter 658 is designed to remove the problem tenants by requiring the drug dealers to vacate, rather than forcing the law-abiding tenants to choose between living among the crime and violence or making a costly and difficult relocation themselves to get away from the drug activity).
care will be taken to ensure that only those tenants who deserve eviction will be impacted by Chapter 658.\textsuperscript{46} Even so, situations are sure to arise where a tenant sought to be evicted argues lack of knowledge or innocence regarding drug activity, that will lead to court battles over the eviction procedures enacted by Chapter 658.

\textbf{D. The Potential for Abuse}

Finally, because Chapter 658 provides such an efficient means of ridding properties of drug-dealing tenants,\textsuperscript{47} it is possible that the tool will be abused. If so, Chapter 658 could be utilized to remove unruly or disruptive tenants who have not been engaged in illegal sales of controlled substances, but are undesirable for other reasons.\textsuperscript{48} This development would make a reality out of the fear that Chapter 658, and laws like it, serve to diminish all tenants’ rights.\textsuperscript{49}

However, Chapter 658 requires that, prior to eviction, probable cause exists showing that the tenant to be evicted has engaged in illegal drug sales.\textsuperscript{50} Before a tenant can be evicted on three days notice, under the unlawful detainer statute, a nuisance must be established.\textsuperscript{51} Chapter 658 simply specifies that the illegal sale of a controlled substance is within the definition of nuisance, and thus qualifies for the rapid eviction process.\textsuperscript{52} Beyond this clarification, Chapter 658 does not expand the bases for eviction. Thus, it is unlikely that tenants who are merely unruly, or disruptive for reasons other than illegal drug activity, can be evicted through the use of the provisions enacted by Chapter 658.

\textbf{V. CONCLUSION}

In summary, Chapter 658 will likely provide a workable and legitimate tool to aid in the war on drugs. By clarifying existing law, Chapter 658 creates a precise mechanism to remove drug-dealing tenants in hopes of making the neighborhood safer and improving the quality of life for the remaining tenants. Chapter 658 does

\begin{itemize}
\item \textsuperscript{46} Chapter 658 forces those tenants who create the problem to move, rather than those affected by the problem. Thus, because of this moral foundation, it is safe to assume that the enforcing officials will make sure they do not evict the undeserving, as that result would be exactly contrary to the goals sought to be achieved. \textit{See supra} notes 7-10 and accompanying text (discussing the goals of ridding neighborhoods of drug activity without forcing innocent citizens to relocate in order to avoid the drug atmosphere).
\item \textsuperscript{47} \textit{See supra} notes 3-6 and accompanying text (detailing the three-day eviction process Chapter 658 makes applicable to tenants engaged in illegal drug activity).
\item \textsuperscript{48} \textit{See} \textit{A Better Response to Neighborhood Nuisances}, \textit{St. Louis Post-Dispatch}, Oct. 30, 1995, at 6B (explaining how St. Louis’s Project 87 program, designed to help evict drug-dealing tenants, had been abused by officials to rid neighborhoods of “nuisance houses” apart from drug activity).
\item \textsuperscript{49} \textit{See Peter J. Howe, Rights Concerns Stall Bill to Make Public Housing Safer}, \textit{Boston Globe}, Aug. 28, 1995, at Metro/Region 14 (detailing the concern regarding the potential erosion of tenant rights presented by a pending Massachusetts bill that provides for rapid eviction of problem tenants in public housing).
\item \textsuperscript{50} \textit{See} Telephone Interview with Sgt. Paul Curry, \textit{supra} note 24.
\item \textsuperscript{51} \textit{See} CAL. CIV. PROC. CODE § 1161(4) (amended by Chapter 658).
\item \textsuperscript{52} \textit{See id.}
\end{itemize}
not necessarily impact the volume of drug trafficking in a given city. It will, however, make it more difficult and less comfortable for drug-dealing tenants to set up shop and establish themselves in a particular area. At the minimum, Chapter 658 will make it more expensive for drug dealers, and will also, one block at a time, force drug-dealing tenants to relocate to other, perhaps less profitable areas.

APPENDIX

Code Sections Affected

Civil Code § 3479 (amended); Code of Civil Procedure § 1161 (amended).
AB 2970 (Olberg); 1996 STAT. Ch. 658
I. INTRODUCTION

Traditionally, the law has avoided protecting purchasers of real property by embracing the doctrine of caveat emptor. Although California law has become more sympathetic in protecting purchasers of residential property, the law still struggles to determine the extent of a broker’s duty to a prospective purchaser. Unlike a seller’s listing agreement, which places a fiduciary duty upon the listing broker, the typical purchaser of residential property does not have similar protection. Moreover, even finding a cooperative broker to help in a real estate transaction will not create a fiduciary relationship between the broker and the purchaser. In fact, agency law normally views a purchaser’s cooperating broker as a subagent for the seller. Accordingly, without any expressed duty being placed upon a broker to protect a

1. See Joel M. King, Broker Liability After Easton v. Strassburger, 25 SANTA CLARA L. REV. 651, 652 (1985) (stating that traditionally the buyer was held to caveat emptor); William J. Minick, III & Marlynn A. Parada, The Real Estate Broker’s Fiduciary Duties: An Examination of Current Industry Standards and Practices, 12 PEPP. L. REV. 145, 157 (1984) (declaring that courts traditionally applied the doctrine of caveat emptor to a broker and a buyer in a real estate transaction); see also BLACK’S LAW DICTIONARY (6th ed. 1990) (defining “caveat emptor” as a maxim that states that purchasers take the risk of quality and condition unless they protect themselves). See generally William B. Crow, Caveat Emptor! The Doctrine’s Stronghold, 1 WILLAMETE L. REV. 369 (1960) (describing the development of the doctrine of caveat emptor in the law of real estate); Walter H. Hamilton, The Ancient Maxim Caveat Emptor, 40 YALE L.J. 1133, 1178 (1931) (explaining that America is where caveat emptor achieved triumph).

2. See generally Diane M. Allen, Annotation, Real-Estate Broker’s Liability to Purchaser for Misrepresentation or Nondisclosure of Physical Defects in Property Sold, 46 A.L.R. 4TH 546 (1986) (analyzing state and federal cases in which the courts have discussed or decided whether to impose liability upon a real estate broker for misrepresentation or nondisclosure of physical defects in property sold).

3. See 2 B.E. Witkin, SUMMARY OF CALIFORNIA LAW, Agency and Employment § 268E (9th ed. Supp. 1996) (declaring that a seller’s agent, established by a listing agreement, has a fiduciary duty to the seller); Jack B. Hicks III, Easton v. Strassburger: Judicial Imposition of a Duty to Inspect on California Real Estate Brokers, 18 LOY. L.A. L. REV. 809, 814-15 (1985) (stating that in most cases a fiduciary duty is established between the seller and the broker); Stuart Knowles, Real Estate Brokers Liability for Failure to Disclose, 17 PAC. L.J. 327, 328-29 (1985) (explaining that in a typical real estate transaction, the seller and the broker enter into a listing agreement creating a fiduciary duty); Minick & Parada, supra note 1, at 150-51 (noting that the listing agreement creates a fiduciary relationship between the seller and the broker).

4. See Knowles, supra note 3, at 329 (maintaining that the listing contract does not provide the purchaser with any protection); see also Hicks, supra note 3, at 817 (declaring that rarely does a purchaser have a contract with a listing broker).

5. See Hicks, supra note 3, at 818 (noting that conflict of interest rules often prohibit the purchaser from entering into a fiduciary relationship with a broker).

6. Id. at 819.
purchaser, the prospective purchaser is in an adverse position because the law views a broker as having a duty only to the seller.  

For the last thirty years, California courts have been developing the duty of real estate brokers to disclose material defects to potential purchasers of residential property. In developing a broker's duty, courts have employed various theories of liability, and the legislature has created statutes to codify and clarify the duty being created by the courts. Although the duty of brokers to disclose material defects was solidified in California legislation, before the enactment of Chapter 476, there existed the question of whether this statutory duty preempted the common law duty of brokers.

II. BACKGROUND

A. Creating a Duty to Disclose and the Development of a Negligence Cause of Action

California began recognizing a duty of real estate brokers to disclose material defects by expanding the theory of fraud. By 1963, California law had long established that the seller of real property could be held liable for fraud for failure to dis-
close known material defects.\textsuperscript{14} California courts extended this duty to brokers in \textit{Lingsch v. Savage},\textsuperscript{15} where a California court of appeal held that real estate brokers have the same duty as sellers in disclosing known material defects.\textsuperscript{16} The duty created in \textit{Lingsch}, and later upheld in \textit{Cooper v. Jevne},\textsuperscript{17} was based upon the theory that a broker commits negative fraud by failing to disclose known material defects.\textsuperscript{18} This theory allowed a purchaser to recover losses from a real estate broker, but the purchaser had the burden of proving that the broker withheld \textit{known} material facts in an attempt to deceive.\textsuperscript{19} Consequently, while establishing that real estate brokers owed a duty to prospective purchasers, the court limited the remedies available to purchasers by placing the burden of proof on them.\textsuperscript{20}

In \textit{Easton v. Strassburger},\textsuperscript{21} however, the court further expanded broker liability by holding that there is a duty to disclose defects which the broker should have known.\textsuperscript{22} The court's holding revolutionized broker liability by establishing a negligence cause of action.\textsuperscript{23} Thus, after \textit{Easton}, a broker was responsible for conducting a diligent inspection of the property being sold, and liable for not disclosing any material facts that a competent inspection would have revealed.\textsuperscript{24}

\begin{footnotesize}
\begin{enumerate}
\item See Herzog v. Capital Co., 27 Cal. 2d 349, 353, 164 P.2d 8, 10 (1945) (holding that there is a duty for sellers to disclose known material defects); see also \textit{Lingsch}, 213 Cal. App. 2d at 735, 29 Cal. Rptr. at 204 (stating that the seller is under a duty to disclose known material facts to the buyer).
\item \textit{Lingsch}, 213 Cal. App. 2d at 736, 29 Cal. Rptr. at 205.
\item 56 Cal. App. 3d 860, 128 Cal. Rptr. 724 (1976).
\item \textit{Cooper}, 56 Cal. App. 3d at 866, 128 Cal. Rptr. at 727; \textit{Lingsch}, 213 Cal. App. 2d at 736-37, 29 Cal. Rptr. at 205; see \textit{King}, supra note 1, at 654-55 (stating that \textit{Cooper} relied on \textit{Lingsch} in holding that a real estate broker committed negative fraud by failing to disclose known material defects).
\item \textit{Cooper}, 56 Cal. App. 3d at 866, 128 Cal. Rptr. at 727; \textit{Lingsch}, 213 Cal. App. 2d at 736, 29 Cal. Rptr. at 205; see \textit{Hicks}, supra note 3, at 811 (stating that brokers must disclose all known material defects).
\item \textit{Cooper}, 56 Cal. App. 3d at 866, 128 Cal. Rptr. at 727.
\item \textit{Easton}, 152 Cal. App. 3d at 103, 199 Cal. Rptr. at 390-91; see \textit{Knowles}, supra note 3, at 336 (declaring that the court in \textit{Easton} found that the broker does not need to have actual knowledge of the defect). See generally 2 B.E. \textsc{Witkin}, \textit{Summary of California Law, Agency and Employment Law} § 267 (9th ed. 1987) [hereinafter \textsc{Witkin}] (setting forth a detailed analysis of the \textit{Easton} holding).
\item See \textsc{Witkin}, supra note 22, § 267 (stating that the judge in \textit{Easton} instructed the jury on the cause of action of simple negligence); see also \textit{Imposing Tort Liability}, supra note 9, at 1864 (explaining that some courts have allowed buyers to sue under a negligence cause of action).
\item \textit{Easton}, 152 Cal. App. 3d at 102, 199 Cal. Rptr. at 390; see \textit{Loken v. Century 21-Award Properties}, 36 Cal. App. 4th 263, 269-70, 42 Cal. Rptr. 2d 683, 687 (1995) (stating that a broker's duty to inspect and disclose defects was first pronounced in \textit{Easton}); see also \textit{Hicks}, supra note 3, at 814 (declaring that \textit{Easton}'s holding required a real estate agent to investigate the property being sold, and that all material defects must be disclosed to the purchaser); \textit{King}, supra note 1, at 651 (explaining that \textit{Easton}'s holding imposed upon a real estate broker the duty to conduct a diligent and competent inspection of the property to be sold, and required that all material facts be disclosed to the prospective purchaser); \textit{Knowles}, supra note 3, at 327 (stating that \textit{Easton} held that there is an affirmative duty of real estate brokers to investigate the property to be sold, and that all material facts about the property must be disclosed to the prospective purchaser).
\end{enumerate}
\end{footnotesize}
The court in *Easton* reasoned that this expansion of broker liability was implicit in the *Lingsch* and *Cooper* decisions, and that brokers already created a similar duty in their own self-regulation. The court's holding constituted a massive move forward in protecting the interests of prospective purchasers, but left unresolved the details to determine how to carry out this protection.

**B. Codifying Easton in the Real Estate Broker Inspection Statutes**

The *Easton* decision accorded prospective purchasers of residential property more protection by placing a duty upon brokers to seek out and disclose material defects, but confusion quickly arose regarding what a broker must do to satisfy that duty. The law was unclear because the holding of *Easton* did not provide any guidelines on how to conduct a proper inspection and disclosure. Specifically, confusion arose about whether the duty only applied to sellers' agents, and whether this holding changed the duty traditionally owed to the seller in a transaction.

The California Legislature responded to the confusion by codifying and clarifying *Easton* in §§ 2079 through 2079.6 of the Civil Code. These sections provide, among other things, that all brokers must conduct a reasonable and diligent visual inspection of the property, and disclose all material facts that would affect the value and desirability of the property that such an inspection would uncover. Moreover, these provisions declare that the standard of care owed by a real estate broker

---

25. *Easton*, 152 Cal. App. 3d at 99, 199 Cal. Rptr. at 388; see Hicks, *supra* note 3, at 823 (explaining that the *Easton* court found that *Lingsch* and *Cooper* had established a duty to search for defects which a broker could reasonably discover); King, *supra* note 1, at 656 (stating that the *Easton* court supported its holding by looking at prior cases based on fraud); Knowles, *supra* note 3, at 337 (noting that the *Easton* court relied upon two prior cases).

26. *Easton*, 152 Cal. App. 3d at 101, 199 Cal. Rptr. at 389; see id. (quoting the Code of Ethics of the National Association of Realtors to evidence an already-existing duty for realtors to conduct a competent and diligent investigation); see also Hicks, *supra* note 3, at 825 (stating that the *Easton* court found support for its holding in the National Association of Realtor's Code); Dick Turpin, *Dick Turpin: Ruling Puts Onus on Sales Agents*, L.A. TIMES, Apr. 6, 1986, at Real Estate 1 (quoting an attorney that said the real estate industry created its own duty).

27. See Knowles, *supra* note 3, at 342-43 (commenting that there was confusion among brokers about which facts were to be disclosed); see also King, *supra* note 1, at 659 (declaring that *Easton* did not provide brokers with sufficient guidelines to discern which facts should be disclosed).


29. See King, *supra* note 1, at 659 (explaining that the application of the *Easton* holding was uncertain because the court did not provide any specific limitations on a broker's duty to inspect and disclose defects).

30. Id. at 659-60.

31. See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2935, at 2 (May 8, 1996) (declaring that the intent of §§ 2079-2079.6 of the Civil Code should be construed as a definition of the duty of care found to exist by the *Easton* holding); WITKIN, *supra* note 22, § 268 (noting that the intent of the legislature was to codify *Easton* in §§ 2079-2079.6 of the Civil Code); see also CAL. CIV. CODE §§ 2079-2079.6 (West Supp. 1997) (explaining that brokers have a duty to conduct a reasonable and diligent inspection, and stating that the standard of care in disclosing all material defects is that of a reasonably prudent real estate licensee).

32. CAL. CIV. CODE § 2079 (West Supp. 1997).
is that of a reasonably prudent real estate licensee, and is measured by the knowledge required to obtain a real estate license.\textsuperscript{33} Accordingly, the legislature limited the common-law duty of real estate brokers by preventing \textit{Easton} from being interpreted broadly,\textsuperscript{34} but a question still existed as to whether the statutory duty supplanted the common law duty.

C. \textit{Chapter 476}

Recently the California Association of Realtors raised the question of whether the common law provides a separate duty that real estate brokers must follow beyond that established by statutes.\textsuperscript{35} Although the issue was discussed in \textit{Wilson v. Century 21 Great Western Realty},\textsuperscript{36} the court did not provide an answer because neither the statutory duty nor the common law duty was violated in that case.\textsuperscript{37} Absent a conflict between the two duties, the court found it unnecessary to address the issue of which law should prevail.\textsuperscript{38}

Chapter 476 clarifies existing law by resolving the problem of whether the statutory duty of real estate brokers should prevail over any established common-law duty.\textsuperscript{39} Chapter 476 accomplishes this by stating that §§ 2079 through 2079.6 of the California Civil Code are declarative of the common-law duty, but courts may continue to interpret the parameters of the statutes.\textsuperscript{40} Declaring that the duty of real estate brokers is stated in the California Civil Code restricts broker liability from being interpreted too broadly; however, the issue of whether brokers should be liable for \textit{unknown} material defects remains a controversy in itself.\textsuperscript{41}

\textbf{III. \textit{Effects of Expanding Broker Liability}}

Liability for nondisclosure of material defects that should have been known to the broker, although pleasing to prospective purchasers, is not agreeable to every-

\begin{itemize}
\item \textsuperscript{33} \textit{Id.} § 2079.2 (West Supp. 1997).
\item \textsuperscript{34} \textit{See King, supra} note 1, at 651 (explaining that \textit{Easton} was limited by the legislature).
\item \textsuperscript{35} \textit{See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2935, at 2 (May 8, 1996)} (noting that the California Association of Realtors has received claims about a separate duty under common law).
\item \textsuperscript{36} 15 Cal. App. 4th 298, 18 Cal. Rptr. 2d 779 (1993).
\item \textsuperscript{37} \textit{Wilson}, 15 Cal. App. 4th at 308, 18 Cal. Rptr. 2d at 785.
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} \textit{See SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2935, at 1 (Aug. 7, 1996)} (noting that the amendment will clarify the duty to inspect and disclose defects by specifying that the California Civil Code governs the duty of real estate brokers).
\item \textsuperscript{40} \textit{CAL. CIV. CODE} § 2079.12 (amended by Chapter 476).
\item \textsuperscript{41} \textit{See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2935, at 2 (May 8, 1996)} (noting that courts should not be allowed to extend the common-law duty through case law).
\end{itemize}
Since the dramatic expansion of broker liability in Easton, there have been various arguments forwarded that such a duty placed upon real estate brokers is too severe.

A. Ability of Real Estate Brokers

One of the preliminary issues to be addressed is whether a real estate broker has the ability to conduct a diligent search for material defects. Although educated in the basic conveyance of property, real estate brokers are typically far from being experts in assessing the integrity of a residence. What may be a "red flag" to a plumber or a mason, may be nothing more than a bump or a noise to an inspecting broker. But the knowledge and ability of the broker is taken into consideration under current California standards, and the statutory duties set out in the California Civil Code limit a broker's liability to the extent of their expertise.

Moreover, existing law provides that a broker must conduct a reasonable visual inspection of the property, and that the knowledge of a reasonably prudent real estate licensee is used in determining the standard of care. Thus, the duty being placed upon real estate brokers does not require them to become skilled in the many aspects of residential inspection. The only requirement is that brokers act reasonably in their actions, which is not an excessive burden considering the importance of purchasing a home.

42. See Kubinsky v. Van Zandt Realtors, 811 S.W.2d 711, 715 (Tex. App. Ct. 1991) (stating that the Court of Appeals of Texas will not follow Easton); see also King, supra note 1, at 658 (commenting that the broker is not in the best position to find all defects); Mike Teverbaugh, Suit Put Brokers on Guard, L.A. TIMES, May 25, 1986, at Real Estate 1 (noting that realtors are nervous about new liabilities); cf. KAN. STAT. ANN. § 58-30, 106 (Supp. 1997) (stating that there is no duty to conduct an independent inspection of the property).

43. See Hicks, supra note 3, at 846-47 (noting that brokers are ill-equipped to conduct an efficient inspection); King, supra note 1, at 658 (stating that the broker is not in the best position to find all defects); Knowles, supra note 3, at 341-42 (explaining that the duty created in Easton can become problematic by holding brokers liable for knowledge beyond their expertise).

44. See Knowles, supra note 3, at 340-41 (describing the education requirements of a real estate broker, and stating that brokers are tested for knowing the basic skills of real estate transactions).

45. See supra note 43 (explaining that brokers have problems in conducting an adequate inspection).


47. See CAL. CIV. CODE § 2079.2 (West Supp. 1997) (stating that a broker's standard of care is measured by the knowledge required to obtain a real estate license).

48. Id. § 2079 (West Supp. 1997).

49. Id. § 2079.2 (West Supp. 1997).

676
B. The Burden of Increased Litigation

Another criticism of the expansion of real estate broker liability is that increased litigation has adversely affected the industry.\(^5\) One common complaint is that the cost of errors and omissions insurance has increased substantially due to the surge of litigation, and many real estate brokers are unable to afford the protection which is needed with the increasing risk of being sued.\(^1\) Currently, approximately twenty-five percent of all real estate licensees in California are protected by errors and omissions insurance,\(^2\) and it is argued that this small percentage of carriers is due to the high cost of coverage.\(^3\) Unquestionably, the rising cost of litigation and insurance is unbearable, but the legislature’s codification of broker liability has had a positive effect in dealing with this problem.

Increased litigation due to the expansion of broker liability after Easton,\(^4\) and a strained insurance market as a result of insurance companies leaving California,\(^5\) led to a dramatic increase in price for errors and omissions insurance for real estate brokers.\(^6\) Since that time, the legislature has limited and clarified the liability of brokers by codifying their duty in the Civil Code, and now insurance companies are returning to California to do business again.\(^7\) Although many brokers are still having difficulties finding insurance to protect themselves against the costs of lawsuits, the current trend in California is moving in their favor by limiting their liability.\(^8\)

---

\(^{50}\) See Aurora Mackey, Trouble for Sale: More Home Buyers Say They Aren’t Getting the Full Story on Known Property Defects in Ventura County, L.A. TIMES, July 9, 1992, at J8 (reporting that lawsuits against brokers for nondisclosure has increased dramatically); see also Teverbaugh, supra note 42, at 1 (reporting that the increase of litigation has caused insurance problems).

\(^{51}\) See Marsha K. Seff, Cost Keep Many Realty Firms Away from Malpractice Insurance, SAN DIEGO UNION-TRIB., Dec. 10, 1989, at F27 (reporting that the increase of lawsuits has helped California beat the national average in premium cost); Teverbaugh, supra note 42, at 1 (reporting that, after Easton, insurance companies left California and insurance rates increased).

\(^{52}\) See Jim Johnson, Few Realtors in State Carry Liability Insurance, L.A. TIMES, Mar. 11, 1990, at K7 (reporting that only 22\% of California real estate brokers carry errors and omissions insurance).

\(^{53}\) See Teverbaugh, supra note 42, at 1 (reporting that the increase of lawsuits from Easton made errors and omissions insurance hard to obtain); see also Johnson, supra note 52, at K7 (reporting the reasons why many brokers do not have errors and omissions insurance, including the high cost of coverage).

\(^{54}\) See Mackey, supra note 50, at J8 (explaining that the number of lawsuits against brokers for nondisclosure has risen dramatically in recent years); see also Teverbaugh, supra note 42, at 1 (stating that Easton sparked numerous lawsuits that created insurance difficulties in the industry).

\(^{55}\) See Terenbaugh, supra note 42, at 1 (reporting that the increased litigation created by Easton led many insurance companies to leave the California real estate market).

\(^{56}\) See Johnson, supra note 52, at K7 (indicating that real estate liability insurance prices rose during the 1980’s because California courts increased broker liability); Teverbaugh, supra note 42, at 1 (reporting that increased litigation led to a rise in premiums for real estate broker insurance). See generally Seff, supra note 51, at F27 (explaining that California leads the country in annual premiums for errors and omissions insurance because of increased litigation).

\(^{57}\) See Johnson, supra note 52, at K7 (reporting that insurance carriers are returning to California as a result of current legislation).

\(^{58}\) Id.
C. Consumer Protection

Now that brokers are liable for conducting a reasonable and diligent search of material defects, one positive effect is that purchasers are getting more protection when buying a home. For most people, purchasing a home will be the most important investment in their life, but the typical purchaser embarks upon such an important transaction in a vulnerable position. The current law in California, although problematic in certain aspects, does protect vulnerable purchasers from buying a defective home. But this protection should continue to be limited by legislation so that brokers and sellers are not put into a harmful bargaining position.

D. Professional Inspection

A current trend to protect the parties involved in a real estate transaction is to hire a professional inspector to inspect the premises for material defects. Having a professional inspection of the listed property allows all the parties to benefit. The purchaser will have more knowledge about their purchase, and the sellers and brokers will have more assurance that they have satisfied their duty to disclose. Unfortunately, one inconvenience is that professional inspections create another step in an already difficult process, but in the end, the sale will become less hostile because of more accurate disclosure. There will still be litigation and difficulties over what should have been disclosed, but professional inspections at least provide proactive means of avoiding legitimate claims.

IV. CONCLUSION

For many years the law did not protect purchasers of property because of the doctrine of caveat emptor. Since that time, California courts have imposed various duties and liabilities upon real estate brokers to protect purchasers of residential property. Although these holdings established protection for prospective purchasers, the legislature needed to step in and codify real estate broker duties because

59. See Minick & Parada, supra note 1, at 146 (stating that the average consumer is inexperienced and ill-equipped); see also Knowles, supra note 3, at 338 (explaining that purchasers are mistaken in relying upon brokers).

60. See Home Inspection Keeps Expenses Down, L.A. TIMES, Nov. 19, 1994, at D6 (reporting that home inspection is a new profession, and that inspections are only conducted on 40% of all the homes sold in the United States); Linda Lipman, Disclosure of Inspection Report to Buyer May Help Seller, Too, SAN DIEGO UNION-TRIB., Mar. 27, 1988, at F11 (stating that an increasing number of buyers are requesting home inspections).

61. See Lipman, supra note 60, at F11 (reporting that sellers and brokers believe that home inspections benefit all parties in a deal).

62. See id. (stating that 75% of errors and omissions insurance claims could have been addressed by home inspections).

63. See supra note 1 (explaining that the doctrine of caveat emptor was traditionally embraced by real estate law).

64. See supra Part II.A. (describing cases that have placed duties and liabilities upon real estate brokers).
of the confusion created by the courts. Under Chapter 476, the statutory duty has been declared as reflecting the common-law duty; however, the courts still have the ability to interpret the statutes on a case-by-case basis. Protecting purchasers of the numerous calamities that may result in the nondisclosure of defects is a worthy goal, but Chapter 476 ensures that this protection is not at the expense of brokers and sellers.

APPENDIX

Code Section Affected

Civil Code § 2079.12 (amended).
AB 2935 (Figueroa); 1996 STAT. Ch. 476