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Golden Gate University School of Law

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Instructor:

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BEST ESSAY
QUESTION 2

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Essay #2

Jane won't be able to derive any tax benefits from the sale of her house to Carlos (which resulted in a gain of \$200k), because, as her accountant informed her, she had not lived there sufficiently long before she sold her house (she had lived there for less than 2 years). It is irrelevant that Penny did not know, and never inquired about, how long Jane lived in the house. Penny, and through Penny, Sands, owed Jane certain fiduciary duties as her agents. However, those duties do not extend to informing Jane about the tax consequences of selling her house. Arguably, Jane's lawyer (if she had had a lawyer when she was selling her house) would have had some duty to counsel her about the tax consequences of selling her house. But the courts have made clear that brokers (and real estate salespersons) are very limited in the kinds of services they are allowed to offer to their clients. If they cross the line and start engaging in the unauthorized practice of law, they can lose their right to a commission and open themselves up to liability for any harm they might cause by way of misinforming their clients. Therefore, Penny was smart not to go down that path with Jane. Jane is stuck paying taxes on the \$200k she gained when she sold her house.

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Part of that amount will be used to pay the brokers' commissions. Sands will collect the commission (since Sands is the licensed broker, not Penny), and will probably split that commission with Wilson. Penny's payment will be worked out between Penny and Sands, according to the terms of her employment contract.

Jane probably should have hired a lawyer to help her with all of these transactions. Unfortunately for her, she didn't, and she is not going to like what she hears when a lawyer finally sits down with her to discuss her situation. The tax issue is just the tip of the iceberg.

As far as the Bank to Jane sale (of the Bloom Condominium, "BC") is concerned, Sands was the only broker involved in the transaction (since Penny and Jim are both salespersons working under the same brokers license). Sands was therefore the dual agent of Bank and Jane. Sands owed certain duties to each party, as their agent. For example, Sands owed Jane a duty of full disclosure of all material facts which might affect her decision to enter into the transaction (this includes information regarding the possible existence of physical defects in the property).

It appears that Sands fulfilled its obligation to Jane when it, along with Bank, disclosed to Jane in writing that she should be aware that a lawsuit had been brought against the developer of the condo for defects, and that it had been settled for \$5.1 million. This disclosure was enough to put Jane on notice that there might be existing defects on the property that she should be concerned about. Although Sands had a duty toward Jane, at all times Jane had a duty of her own to diligently inspect the property for any defects that she might reasonably be able to discover. Also, since she was on notice of the possible existence of defects, but failed to hire an independent professional inspector, Jane might find herself out of luck if she discovers that the building has latent defects which cause her condo to be worth less than she paid.

Jane might argue that, under a negligence theory of liability, Sands had a duty to conduct a reasonably diligent visual inspection of the building and disclose to her any "red flags" that such an inspection would reveal. However, if this jurisdiction has enacted any kind of rule similar to the Easton rule that has been enacted in CA, such a duty on the part of Sands would be pretty limited. For example, in condominiums, brokers are usually only responsible for

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inspecting the unit itself, and are not responsible for inspecting the surrounding premises (i.e., in this case, the rest of the high rise building). It is likely that many of the defects in the building would not be discovered simply by searching the interior of Jane's unit. Therefore, Sands' liability in negligence would be fairly limited. As far as other theories of liability are concerned, Sands did not fraudulently misrepresent anything to Jane (didn't lie to her about the absence of any defects), Sands also did not commit negative fraud by failing to disclose known latent defects. In fact, Sands disclosed to Jane that there might be defects, giving Jane the opportunity to inspect the premises herself or hire a professional. Sands also did not negligently misrepresent anything to Jane (i.e., Sands did not relay misinformation provided to it by Bank without taking reasonable steps to verify the accuracy of that information). Under the circumstances, it appears that Sands did everything it had to do under the duties it owed to Jane. It wasn't Sands' job to negotiate a better deal for Jane. That was Jane's job, or perhaps the job of Jane's attorney (if she had retained one). 7

Additionally, Sands did not breach any duty owed to Jane when Jim walked through the building with Jane and told her that "there should be no problem" installing marble flooring. When Jim said this to Jane, he was merely puffing. Any reasonable person would not rely on the language Jim used and go out and spend a lot of money purchasing marble, without first taking steps to verify the accuracy of the statements. Jim told Jane very clearly that she would not be able to install marble flooring without first obtaining the approval of the homeowner's association. It appears that Jane only heard what she wanted to hear. That is unfortunate, because now that the homeowner's association has denied Jane's request to install the marble, she has wasted her money. But that isn't Jim's fault. Again, his statement was mere puffery, trade talk, and did not amount to a representation that her request to install marble flooring would certainly be approved. 4

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When Bank sold the condo to Jane, it had a duty not to lie to her about the existence of defects, and not to actively conceal any defects. However, Bank did nothing of the sort. Bank fully disclosed that there may be defects on the property. Bank informed Jane that it had acquired the property through foreclosure and did not know as much about the property as an owner occupant might know. Bank bargained for and included an 'as is' provision in the purchase agreement. When Jane signed the agreement, she was given plenty of notice of the possible existence of defects. At that point, it was her responsibility to go out and inspect the property, or, more appropriately, to hire a professional to inspect the property for her. If she had hired a professional, and the professional had failed to discover defects that it should have discovered, then the professional would be liable to her for any damages she suffered as a result of relying on the bogus inspection report. Similarly, if Jane had thought to alter the terms of the purchase agreement, she might have obtained a warranty from Bank that there were no defects (instead, she got just the opposite: a disclaimer of any liability on the part of the Bank for any defects that might exist). Jane could have avoided these problems by hiring a lawyer. What a pity that she did not.

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Bank cannot be held liable to Jane for any loss she has suffered as a result of her ill-advised purchase. But Jane can probably sue the developer for material defects in the property caused by its negligent construction of the building. Depending on the rules of the jurisdiction, and how long ago the building was constructed, Jane may no longer have a cause of action against the developer, but it is worth investigating. The fact that the developer has already settled with the homeowner's association does not automatically bar Jane from suing the developer for harm she has suffered as a result of the developer's negligence. Her cause of action may not sound in negligence, but rather in breach of an implied warranty of

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merchantability that runs with the property from owner to owner. Such a warranty is implied by law and cannot be disclaimed or written out of a contract. However, statutory modification may result in a limitation of the duration of the right to sue on a breach of the warranty (i.e., if the building was constructed 30 years ago, the developer may no longer be liable to Jane).

However, since the homeowner's association just got \$5.1 million from the developer, perhaps Jane still has a good cause of action. I would advise her to investigate further into the matter.

For a reasonable fee, I will investigate further into the matter myself, on her behalf. It's time for Jane to hire a lawyer.

J. Hunt