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## Doron F. Eghbali Real Estate Law

### [Broker's Liability in Real Estate Transactions: Fraud or Lack Thereof](#)

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Real estate brokers, generally, might be found liable on contract or tort basis. A broker is found liable on contractual basis for not specifically complying with provisions of the stated contract. Broker is found liable on tort for running afoul of statute or common law. One of the most frequent tortious grounds is fraud. Fraud could be intentional or negligent. Let us explore this important subject matter further.

#### **FRAUD**

Fraud is referred to deceptive conduct by broker. Such fraud could be either *ACTUAL* or *CONSTRUCTIVE*.

#### **A. ACTUAL FRAUD**

There are five main types of fraud:

##### **1. INTENTIONAL MISREPRESENTATION**

Intentional misrepresentation is when the broker does not believe something is true but says it is true. Generally, to recover damages under this type of fraud, the plaintiff **MUST** show the defendant Broker **INTENDED** to **INDUCE** the plaintiff to change a position leading to plaintiff's detriment or risk. Since, often, large sums of money is involved in real estate transaction, the temptation might be to deceive the principals, lender or seller to commit to the transactions by making statements the broker does not believe it is true.



## **2. NEGLIGENT MISREPRESENTATION**

Negligent misrepresentation is when the broker states something is true but the information broker has does not warrant making such positive statement. This is noteworthy there must be a positive statement, and not merely failing to disclose something to constitute negligent misrepresentation. For instance, broker might be liable for making affirmative statements as to the exact square footage of a property without adequate investigation. In addition, broker could be found liable for making affirmative statement as to the structural condition of the property without knowing there was a report by an engineer stating the property would not withstand an earthquake.

## **3. PROMISSORY FRAUD**

Broker could be found liable for promising a party to do something without any INTENTION of performing it. For instance, broker could be liable for promising buyers to find them tenants when they buy a property, but would not have ever intended of fulfilling it.

## **4. CONCEALMENT OR NON-DISCLOSURE**

For concealment or non-disclosure, broker MUST have:

1. Concealed a fact MATERIALLY affecting the desirability of the property in the eyes of the other party;
2. Known the fact was unknown to the other party; AND
3. Had a duty to disclose such fact OR had stated other facts which omitting a particular fact would have misled the other party.

## **5. OTHERS**

This type of fraud serves as a catchall for conduct construed as deceit but not fitting other categories. For example, if a broker affirmatively states to a prospective buyer that an easement would not have any impact on the right of way and would not impede the buyer's pathway, but in reality the terms of easement would prevent the buyer from having a driveway on that portion of easement.

## **SALIENT NOTE**

As a matter of public policy, statements in a contract absolving or exculpating brokers from intentional misrepresentation or fraud are void.



## B. CONSTRUCTIVE FRAUD

Constructive fraud could be a cause of action against a broker where there was no actual intent to defraud, yet broker gained an advantage. To claim constructive fraud, it must be shown, among other things:

- The broker had a fiduciary duty to the plaintiff;
- The fiduciary duty was breached; AND
- As a result of the breach of the fiduciary duty, the broker gained a profit, even though he did not fraudulently intend to.

For instance, a broker could be held liable for constructive fraud for asserting a particular property is exactly what the buyers are looking for without really investigating what really the buyers desire, despite having no fraudulent intent, but making a commission by selling the property.

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