ARTICLE:

OBFUSCATION MASQUERADING AS LEGISLATION: CONFUSION RULES IN CALIFORNIA'S RESIDENTIAL DISCLOSURE AND TENANT ABANDONMENT STATUTES

By Karl E. Geier[*]

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."

- Lewis Carroll, *Through the Looking Glass, and What Alice Found There*

"It's not a house, said Judas Priest, it's not a house . . . it's a home."

- Bob Dylan, *The Ballad of Frankie Lee and Judas Priest*

Introduction

An unfortunate trend in recent legislation is the increased use of technical definitions in widely separated areas of law, forcing the reader to review multiple volumes of several different codes in order to understand a single, apparently simple, piece of legislation. An early example of this was the Unruh Act, which originally prohibited business establishments from discriminating on the basis of race, color, national origin, or religion, and has been amended and expanded over time to now also prohibit discrimination on the basis of ancestry, sex, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status.[1] Although most of these terms are either self-evident or are defined in the text of the law, in some cases the statute has been amended to include additional categories or characteristics defined elsewhere, and the interpretation of the Unruh Act in the Civil Code now requires reference to §§ 12926 and 12926.1 of the Government Code for definitions of certain types of medical conditions or disabilities[2] and also with regard to sexual orientation.[3]

The use of defined terms to govern a portion or all of a statute is a common

---

[*]Karl E. Geier is a senior shareholder of Miller Starr Regalia and Editor-in-Chief and a principal author of the treatise, Miller & Starr, California Real Estate 4th, published by Thomson Reuters.

and useful practice when the definitions are in close proximity and readily located with the operative provisions of a statute and are not themselves misleading. For the most part, the Unruh Act remains comprehensible, at least in general terms, without the need to refer to the other codes. In 2018, however, the California Legislature took this statute-drafting technique to a new level, and has produced some misleading and confusing statutory language in two areas involving real property that is sure to challenge members of the real estate industry and their lawyers charged with understanding and implementing these laws.

These two pieces of legislation involve the residential transfer disclosure laws and the commercial tenant abandonment statutes, both of which have the potential to mislead or obfuscate what should be fairly simple concepts. While hardly unique, these statutory obfuscations are outlined in this article for the benefit of non-specialists who might otherwise be left in the dark by the semantic contortions and opaque definitional cross-references found in these laws, which specifically affect owners, lessors, and transferors of real property.

A. The Residential Transfer Disclosure Statement Law

The most serious example of legislative malpractice in 2018 was the amendments to the provisions of the Civil Code pertaining to the disclosures required upon transfer of residential property.[4] Prior to 2019, these provisions clearly and unambiguously applied to transfers of any "real property or residential stock cooperative, improved with or consisting of not less than one nor more than four dwelling units" and to specified mobilehome and manufactured home transfers.[5] In 2018, the operative section of the statute (Civ. Code, § 1102) was modified effective January 1, 2019, to now apply only to transfers of "single family residential property."[6] Section 1102.2, subd. (k) also was amended to make it abundantly clear that "this article does not apply to . . . (k) sales or transfers of any portion of a property not constituting single-family residential property."[7] As a result, the statute seems emphatically to state that it does not apply to any residential property with more than one dwelling unit or to any other type of property, residential or not.

Although it might seem obvious that "single family residential property" is just what it seems, i.e., property that is improved with a single residential dwelling unit, that is not what the statute actually means. Rather, the law has been amended in a particularly misleading and underhanded way to mean something

entirely different. A small sentence has been added to section 1102, subd. (b), which now contains the oblique statement:

> (b) For purposes of this article, the definitions contained in Chapter 1 (commencing with Section 10000) of Part 1 of Division 4 of the Business & Professions Code shall apply.[8]

If one then goes to the Business & Professions Code, and fails to notice that the Business & Professions Code also was extensively amended and augmented by a completely different piece of legislation in 2018, one might not even be aware that a number of new definitions have been added to the latter code. Nothing in the language of Section 1102 of the Civil Code would lead one to consider whether particular terms (such as "single-family residential property") that seem to have self-evident meanings in fact now have more "precise" meanings as now provided in the Business & Professions Code, and nothing in the Civil Code sections identifies which of the many words in the Transfer Disclosure Statement statute have now been defined elsewhere, let alone that they have been redefined to mean something other than what they seem to mean on their face.

However, when one goes to the Business & Professions Code, one finds a whole series of new definitions that were added in 2018 and became effective January 2, 2019.[9] One of these is Bus. & Prof. Code, § 10018.07, which defines "real property" as follows:

> Real property means any estate specified in (1) or (2) of Section 761 of the Civil Code in Property, and includes (a) single-family residential property, (b) multiunit residential property with more than four dwelling units, (c) commercial real property, (d) vacant land, (e) a ground lease coupled with improvements, or (f) a manufactured home as defined in Section 18007 of the Health & Safety Code or a mobile home as defined in Section 18008 of the Health & Safety Code.[10]

As if this prolix definition with multiple statutory cross-references were not enough, Bus. & Prof. Code, § 10018.08 goes on to define "single family residential property" as something entirely different than "single family residential property" in common parlance:

> "Single family residential property" or "single family residential real property" means (a) real property *improved with one to four dwelling units*, including any leasehold exceeding one year's duration of such, (b) a unit in a residential stock cooperative, condominium, or planned unit development, or (c) a mobile home or manufactured home *when offered for sale or sold through a real estate broker* pursuant to Section 10131.6 [of the Business & Professions Code].[11] (Emphasis added.)

Now, it suddenly becomes apparent that "single family residential property," as the term is used throughout the transfer disclosure statements law as a result of the amendment to Civil Code Section 1102, subd. (b), means not only "single family" residential property but also property improved with two to four dwelling units and certain properties that in some contexts would be considered multi-family or something other than "single family," particularly when situated in a stock cooperative, condominium, or planned unit development and not consisting of a standard single family dwelling. In other words, although perhaps technically not ambiguous because of the cross-reference to the Business & Professions Code definitions contained in the amended language of Civil Code Section 1102, the Legislature has inserted a new term that means one thing to the uninitiated reader ("single family residential"), but that, as with Humpty Dumpty's comments to Alice in *Through the Looking Glass*, actually means something entirely different and potentially unexpected.

The explanation for how this came to happen seems clear enough. The same people who were engaged in drafting one piece of legislation thought it convenient as a shortcut to assume and adopt the definitions that were concurrently being drafted for a completely separate piece of legislation in order to avoid what they might otherwise have introduced, i.e., either duplicative definitions in two separate codes or inconsistent definitions in two separate codes. And no doubt the drafters, as participants in the California residential brokerage industry, understood well enough that the jargon used in that industry considers "single family residential" to mean the one-to-four unit, owner-occupied residential property that is referenced in various laws and regulations, including many of the California statutes governing consumer credit and home loans as well as the federal mortgage lending and truth-in-lending laws. But none of these laws actually define "single-family residential" as such, and the jargon of a specialized group of industry participants is no substitute for clarity in the drafting of statutory language.

In this case, in addition to the great likelihood of misunderstanding, there were a number of other unintended consequences that will require either further legislation or litigation to resolve. Aside from the potential to mislead the uninitiated and uninformed reader of the Civil Code sections that now have been amended to use the term "single family residential property" rather than the old definition of "one to four unit residential property" in earlier versions of the transfer disclosure statement statute, the Legislature also placed the term "single family residential property" in other provisions of law that do not techni-

cally cross-reference the definitions that are now invoked by the § 1102 cross-reference to Business & Professions Code. One of these is Civil Code § 2079, which defines the duty of a real estate broker or salesperson to a buyer of property to conduct a reasonably competent and diligent visual inspection and to disclose facts that materially affect the value or desirability of that property to the buyer.[12] Civil Code § 2079 previously required such inspection and disclosure to a prospective purchaser of property "comprising one to four dwelling units."[13] That section now has been amended to state that the duty of inspection and disclosure is owed by the broker or salesperson "to a prospective buyer of single-family residential real property or a manufactured home as defined in section 18007 of the Health & Safety Code . . .." Nowhere has this writer been able to find a cross-reference in Article 2 of Part 4 of Division 3 of the Civil Code (§§ 1738 to 3273) to any definition of "single family residential property." The cross-reference to the Business & Professions Code definitions in § 1102 of the Civil Code, by its terms, only applies "for purposes of this article," which is Article 1.5 of Part 4 of Division 2 of the Civil Code (§§ 1000 to 1422). Although the drafters of the legislation undoubtedly thought the broad definition of "single family residential property" in § 10018.08 should govern § 2079, nowhere is this intent stated in any statutory provision, and one could argue that the term "single family residential" standing alone is not an ambiguous term and means just what it says, rather than something that is not evident from the four corners of § 2079. Moreover, the Legislature left unamended Civ. Code, § 2079.1, which provides in full as follows:

> The provisions of this article relating [sic] sale transactions of residential real property comprising one to four dwelling units apply with equal force to leases of that property that include an option to purchase, ground leases of land in which one to four dwelling units have been constructed, or real property sales contracts, as defined in section 2985, for that property.[14]

What is unclear at this point is whether § 2079 is any longer one of the "provisions of this article relating [to] sale transactions of residential real property comprising one to four dwelling units . . ." referred to in § 2079.1. The same problem appears in Civil Code § 2079.10.5, governing notices regarding gas and hazardous liquid transmission pipelines, which has been amended to now only apply to contracts for the sale of "single family residential real property."[15] And Civil Code § 2079.10a, governing real property disclosures as to registered sex offenders, as amended in 2018, now applies only to "every lease or rental agreement for single family residential real property . . ., any leasehold interest

in real property consisting of multi-unit residential property entered into on or after July 1, 1999, any leasehold interest in real property consisting of multi-unit residential property of more than four dwelling units entered into after that date, and every contract for the sale of residential real property comprised of one to four dwelling units entered into on or after that date . . .."[16] As a result of the (presumably inadvertent) failure to define "single family residential property" in a pertinent location, the statute as now amended does not require this disclosure to be made to a lessee of two to four unit residential property, although it does require such disclosures to the *purchasers* of such property.

Yet another unintended consequence of the elliptical cross-reference in § 1102, subd. (b), to the Business & Professions Code definitions is the effect on the mobilehome and manufactured home disclosure requirements of the Civil Code. Civil Code § 1102.3a requires a transferor of a manufactured home or mobilehome "subject to this article" to deliver a transfer disclosure statement in a slightly different form from that required for other properties.[17]

The question of whether a "manufactured home or mobilehome subject to this article" is involved in a transaction has been obfuscated by the indirect and obscure cross-reference in § 1102, subd. (b), to the definition of "single family residential property" in Bus. & Prof. Code § 10018.08, which now includes a "mobilehome or manufactured home" *only* when it is "offered for sale or sold through a real estate broker pursuant to section 10131.6 [of the Business & Professions Code]."[18] There is no longer a definition of "manufactured home or mobilehome" anywhere in the text of § 1102, whereas previously § 1102, subd. (b), clearly provided that the transfer disclosure statement requirements applied to "a resale transaction . . . for a manufactured home, as defined in section 18007 of the Health & Safety Code, or a mobilehome, as defined in section 18008 of the Health & Safety Code."[19] Moreover, nothing in Civil Code § 1102.3a continues the limitations of the former definition, which went on to require that a manufactured home or mobilehome be "classified and intended for use as a residence" in order for the transfer disclosure statement requirement to apply.

Further, Bus. & Prof. Code § 10018.08 now would define as included within the term "single family residential property" *only a mobilehome or manufactured home when offered for sale through a real estate broker*. If the mobilehome is not offered for sale through a real estate broker, then it is not single family residential property and it is explicitly excluded from the operation of the disclosure

statute by subdivision (k) of § 1102.2, which now provides the statute does not apply to sales or transfers of any portion of a property not constituting "single family residential property." The result is a "Catch 22" of statutory language—the disclosure is required to be provided by a transferor of "single family property" when there is no agent, but there is no "single family property" *unless* an agent is involved. Does this mean that the seller of a mobilehome or manufactured home who is *not* using the services of a real estate broker is *not* required to utilize the special transfer disclosure statement form of § 1102.3a and is instead required to use the general transfer disclosure statement form of § 1102.3? Is this so even if that person is *not* selling the mobilehome or manufactured home in an otherwise-exempt transaction, i.e., a sale by a mobilehome dealer or other person, not offered for sale as residence? One may think the answer should be obvious, but we will have to wait to see how such a seller would be treated unless the statute is amended to clarify this issue.

Another conundrum pertaining to manufactured homes and mobilehomes is more a function of sloppy draftsmanship than inaccurate definitional amendments, but is found in Civil Code § 1102.6d. This section contains the prescribed form of manufactured home and mobilehome transfer disclosure statements, as noted, with some materially different provisions than the standard form for other types of residential property. Section 1102.6d now provides (as it has always provided) that "the disclosures applicable to the resale of a manufactured home or mobilehome pursuant to subdivision (b) of § 1102 are set forth, and shall be made on a copy of, the following disclosure form . . .."[20] Section 1102, subd. (b), previously explicitly and unequivocally referred to certain mobilehome transactions as indicated in the language quoted above. Section 1102, subd. (b) has been eliminated and replaced with the completely opaque language cross-referencing the Business & Professions Code for various unspecified definitions used "in this article." This replacement subdivision has no purpose other than to cross-reference the Business & Professions Code, and it does not make any "disclosures applicable to the resale of a manufactured home or mobilehome." Thus, it no longer has a discernable meaning in the context of § 1102.6d. Again, it is possible to speculate on the intent of the drafters to leave the intent and meaning of § 1102.6d intact as if the statute had not been amended, but that is not what the words of the statute actually say.

No doubt there are other inadvertent inconsistencies, incoherences, or obfuscations that will appear over time as these preexisting statutes have been amended by shoe-horning in a completely extrinsic set of definitions that were

created for a different purpose in a different code that governs the licensing and regulation of real estate brokers rather than disclosures required for transfers of real property. It is another example of how the interaction between the real estate brokerage community and the Legislature in drafting laws pertaining to disclosure requirements has sometimes overlooked the effect on general law, or on the non-broker parties, of specialized laws governing broker licensees. Eventually, some of these issues may be resolved by "cleanup legislation," but when and how this may occur is unknown.[21]

In the meantime, the unfortunate and highly misleading terminology of the Civil Code, without express and explicit reference to the changed meaning of common English terminology to mean something completely different as the result of an innocuous and oblique cross-reference to the Business & Professions Code, will take time to be resolved. It calls to mind the statement often attributed to Mark Twain, that "while intelligent people can often simplify the complex, a fool is more likely to complicate the simple."

B. The Commercial Tenant Abandonment Law

A second example of the inadvertent complications that can result from an overuse of apparently simple definitions is found in the new legislation that shortens and simplifies the process for a commercial landlord to establish abandonment of the premises and termination of the lease of a commercial tenant. Prior to January 1, 2019, Civil Code § 1951.3 contained an optional procedure for establishing abandonment of leased property by requiring notification to the tenant of "belief of abandonment," coupled with the nonpayment of rent for 14 consecutive days and a limited opportunity for the tenant to notify the landlord that the tenant did not intend to abandon the property and intended to pay rent. Section 1951.3 has now been amended to provide, in pertinent part,

> This section applies to real property other than commercial real property, as defined in subdivision (d) of section 1954.26.[22]

As a result, the former terms of § 1951.3 have been amended in various other ways, but it no longer applies to "commercial property." Instead, a new section, § 1951.35, establishes a different procedure applicable to "commercial property as defined in subdivision (d) of section 1954.26" allowing for a shorter period of nonpayment of rent and slightly different provisions for notice of belief of abandonment.[23]

In both cases, the cross-reference to § 1954.26 is to a definition of commercial real property that is contained in another, completely unrelated, law intended to prohibit the adoption of commercial rent control by local jurisdictions.[24] That definition provides as follows:

> (d) "Commercial real property" includes any part, portion or unit thereof, and any related facilities, space, or surfaces, *except the following*:
>
> (1) any dwelling or dwelling unit . . .
> (2) any accommodation in any residential hotel . . .
> (3) any hotel unit not otherwise specified in paragraph (1) or (2) [as further specified] . . .[25] (emphasis added).

As a result of this definition and its incorporation by reference into § 1951.35, the excluded dwelling units and hotel accommodations logically fall outside the definition of "commercial real property," now governed by Civil Code § 1951.3(a), because it applies "to real property *other than* commercial real property, as defined . . .." This, in turn, means they are not "commercial real property" as used in § 1951.35 for purposes of the exclusion of *only* such property from the operation of section 1951.3(a), so they are actually covered by § 1951.3.

It would have been simpler and less likely to cause confusion if § 1951.3 had been amended to provide that it applies only to residential real property, defined positively to include all of (1), (2) and (3) of the *exceptions* referred to above, and if § 1951.35 had stated that it applied to any property other than residential real property, which seems to be the intent. As it stands, there could be an argument over whether "real property other than commercial real property" in § 1951.3(a) could include certain types of agricultural or industrial property, in part because the definition of "commercial real property" in § 1954.26, subd. (d) is a grammatically incomplete definition that includes a reference to "any part, portion, or unit thereof" without first identifying that to which "thereof" refers. Its perpetuation in a "double negative" exclusion from § 1951.3 by the operation of § 1951.3(a) creates a risk of imprecision that is completely unnecessary and could easily have been avoided.

However, unlike the problems posed by the § 1102 references to the Business & Professions Code definitions, at least the terms defined by cross-reference in § 1951.3 and § 1951.35 are clearly identified, and the cross-referenced definitions can be easily located because the cross-reference refers to specific code sections, and those sections are at least in the same code as the sections in which the definition is now being incorporated by reference. In this respect, the stat-

ute is far less likely to mislead or be misconstrued, whether by inadvertence or misinterpretation, than the newly defined terms of the residential disclosure statutes discussed above.

Conclusion

The above examples of "overcomplexification" by attempted drafting shortcuts and cross-references are only two of a number of problematic legislative practices in drafting and adopting statutes. Another needlessly confusing statutory drafting technique that has become common in the past several years is the use of "replacement statutes" that take effect after another statute sunsets or otherwise changes through lapse of time. In other words, a statute that may be several thousand words in length and cover multiple pages through numerous subdivisions is stated to be in effect for a period of time ending on a date certain, and another version of the same statute is stated to take effect after that date and likewise consists of thousands of words on multiple pages with numerous subsections and no indication of how the statute has changed from one timeframe to another. Sometimes the "changes" involve only a few words buried in a long and turgid paragraph of statutory prose. This has happened repeatedly over the past several years in the context of the "Homeowner Bill of Rights" and related foreclosure legislation in Civil Code §§ 2920 et seq. Over time, the earlier statutes go by the wayside, but determining which provisions apply during which timeframes and when they change, and the effect of each such change, can be mind-numbingly difficult to decipher in a given situation.

But at least these duplicative provisions contain the full expression of the intention of the Legislature in a manner that can be determined with sufficient attention to detail. The 2018 amendments to the transfer disclosure statement and broker inspection and disclosure laws by cross-reference (without specificity) to a group of completely unrelated definitions in an unrelated code, discussed in earlier parts of this article, are a different matter entirely. There is no excuse for deceptive and indecipherable legalese in any context, including statutory language, however inadvertent it may be. We all deserve better!

Afterword

Some of the problems with Civil Code §§ 1102 et seq. and 2079 et seq. discussed in this article may be resolved if new legislation proposed by Assembly Member Holden in late February 2019 (Assembly Bill 892) is enacted. This proposed legislation would amend § 1102 and add a new § 2079.1.5, each

of which will set forth in substantially identical language the extensive list of definitions contained in the sections of the Business & Professions Code referenced in earlier sections of this article. If enacted, AB 892 would make the Civil Code disclosure statutes self-referential and no longer require cross-referencing to the Business & Professions Code sections, and substantially reduce the likelihood that someone will miss the specialized definition of "single family residential property" as now including one-to-four unit residential property as well as other types of residential units in common interest developments, condominiums and the like. To that extent, Assembly Member Holden's bill would eliminate many of the issues associated with the existing statute as discussed in earlier sections of this article, although the current language of the bill would not resolve all of them.

The writer continues to believe that using a term such as "single family residential" to refer to something entirely different constitutes a misleading and obfuscatory use of the English language, and it could have easily been avoided by retaining the standard notion of "one to four unit residential property" as the defined term, rather than the potentially deceptive "single family residential property" terminology. Apparently the author of AB 892 does not share this concern, however.

ENDNOTES:

[1]Civ. Code, §§ 51 to 51.4.

[2]Civ. Code, § 51, subd. (e)(1), (3).

[3]Civ. Code, § 51, subd. (e)(7).

[4]Civ. Code, §§ 1102, et seq.

[5]Former Civ. Code, § 1102, subd. (a), prior to 2018 amendments.

[6]Civ. Code, § 1102, subd. (a), following amendment by 2018 Stats., Ch. 907, § 7 (AB 1289), effective January 1, 2019.

[7]Civ. Code, § 1102.2, subd. (k).

[8]Civ. Code, § 1102, subd. (b).

[9]See Bus. & Prof. Code, §§ 10018.01 to 10018.17, all added by stats 2018, Ch. 285 (AB 2884).

[10]Bus. & Prof. Code, § 10018.07.

[11]Bus. & Prof. Code, § 10018.08.

[12]Civ. Code, § 2079, subd. (a).

[13]Civ. Code, § 2079, subd. (a), prior to 2018 amendments.

[14]Civ. Code, § 2079.1.

[15]Civ. Code, § 2079.10.5, subd. (a).

[16]Civ. Code, § 2079.10a, subd. (a).

[17]Civ. Code, § 1102.3a.

[18]See Bus. & Prof. Code, § 10018.08, defining "single family residential property."

[19]Former Civ. Code, § 1102, subd. (b), prior to 2018 amendments.

[20]Civ. Code, § 1102.6d, opening paragraph.

[21]See the Afterword to this article, describing one proposal that is now pending in the Legislature.

[22]Civ. Code, § 1951.3, subd. (a).

[23]Civ. Code, § 1951.35, added by 2018 Stats., Ch. 104, § 3 (AB 2847), effective January 1, 2019.

[24]Civ. Code, §§ 1954.25 et seq.

[25]Civ. Code, § 1954.26, subd. (d).

