

ORANGE COUNTY REGISTER

+ ON THE LAW

Understanding Broker Liability

Orange County is one of the most active real estate markets in the country. Whether you're an investor hoping to take advantage of a growing market, an owner trying to lease space to others, or a developer seeking to entitle property for a particular use, you may at some point seek to buy or sell real property.

In such transactions, it is important to understand the potential pitfalls, as well as the rights and duties of the persons involved—not only of the parties themselves, but of the third-party professionals as well, such as real estate agents and brokers. Similarly, it is critical for real estate brokers to understand the full extent of their duties and responsibilities, so they can avoid incurring unforeseen liabilities.

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With respect to their own clients, real estate brokers are held to a very high standard of care, being deemed "fiduciaries" of their clients under the law. Based on that status, brokers are required to act with the "utmost good faith," and to refrain from even the

"slightest misstatement" on an issue that could influence their clients' decision. In fact, the law even imposes a duty on brokers to investigate issues they know to be important to their clients, and deems them to be experts in the field of real estate, on which their clients may justifiably rely.

Because of this high standard, form disclaimers in purchase-and-sale agreements may not prevent a lawsuit by a client for an alleged breach of trust. For instance, disclaimers stating that a broker has no specific knowledge on a particular subject will not protect the broker if he or she actually made representations to the client on that subject. Moreover, the fact that a matter may be of "public record" (i.e., something the client could discover by reviewing public documents) will not protect the broker from actual misstatements of fact, even if the client was specifically directed by a form disclaimer to check that public record.

At Rutan & Tucker, we routinely handle issues of broker and agent liability, both for the brokers themselves and for the buyers and sellers they represent. In addition to handling litigation, we also advise our broker clients on how to tailor their transactional disclosures to the specifics of each situation, and thereby avoid unexpected liability. Sometimes a little forethought goes a long way.

Mark J. Austin, Partner, Rutan & Tucker, LLP



Mark Austin is a partner in Rutan & Tucker's Government & Regulatory Law and Trial Departments, where his practice focuses on business litigation and municipal law, with emphases on real-estate, land use, and environmental litigation. He has extensive trial experience and has handled and argued numerous appeals. While retaining a focus on land-use disputes and other public-agency litigation, Mark has greatly expanded his practice to include complex commercial disputes on behalf of developers and businesses of all sizes, general real-estate litigation, and environmental litigation. In his several years of practice, his clients have included residential and commercial developers, nationally recognized private companies, public entities, small businesses, and private homeowners. Mark can be reached at 714.662.4677 or maustin@rutan.com.



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