

July 25, 1999

## NO CONSUMER PROTECTION ACT VIOLATION FOR FAILURE TO DISCLOSE

### I.

A recent Court of Appeals case interprets the Seller Disclosure Act regarding the Consumer Protection Act. Again, John L. Scott, the most active real estate litigator, is one of the parties. In the Division One action, a home buyer sued the real estate agency for failure to disclose flooding problems with the house. Svendsen v. John L. Scott, \_\_ Wn.App. \_\_ (1999). The jury awarded the home buyer the cost of a new drainage system, along with punitive damages and attorney fees and costs under the Consumer Protection Act (CPA).

However, the Court of Appeals overturned the CPA damages and attorney fees. The home buyer won the appeal on the cost of a new drainage system, totaling \$38,298.00, plus interest.

The Court held that violations of the Seller Disclosure Act are not violations of the Consumer Protection Act. From a practical point of view, home buyers have little means if any to enforce the Seller Disclosure Act because attorney fees will oftentimes exceed the award of damages.

Since the case was brought in Division One, the case is not mandatory authority for us in Division Two. However, out of Division cases are generally considered persuasive authority though not mandatory.

### II.

In a similar case, a homebuyer sued the seller and Windermere for fraudulent concealment, intentional misrepresentation, breach of contract and violation of the Consumer Protection Act regarding the concrete slab and foundation that had settled and continued to settle. The sellers also alleged that the Windermere agents knew about the material defects prior to sale, failed to disclose it, and actually altered the Seller Disclosure Statement to hide the defect.

The Defendants contended that the buyer should have been aware of the defect once they noticed a slope in the floor. And the settling was minor and not ongoing. The Defendants offered a total of \$6,000.00 to settle, while the home inspector settled prior to trial for \$23,000.00.

The jury returned a verdict of \$149,000.00, which included \$50,000.00 for emotional distress.

The Judge held as a matter of law that the Plaintiffs failed to meet the Consumer Protection Act burden of proof regarding the public interest impact.

Apparently sellers and their real estate agents are not being “as careful as they might be”

regarding disclosures on the Seller Disclosure Statements. Although the courts are not acknowledging the Consumer Protection Act violation in these actions, the courts and juries are likely holding against sellers and real estate agents when they had knowledge that they failed to disclose. This case has not yet been appealed, and has no precedential value to date. Graham v. Konikson et al., King County Superior Court, Cause No. 97-2-28957-2SEA.

Prudent real estate agents will disclose all knowledge of defects, not alter Seller Disclosure Statements, and urge sellers to be forthright in disclosing defects. The legislature is likely to hear complaints from home buyers that the Seller Disclosure Act is toothless and needs some bite. That bite might be to make violations per se violations of the Consumer Protection Act.