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## THE AVAILABILITY OF BENEFIT OF THE BARGAIN EXPECTANCY-BASED DAMAGES FOR BUYERS DEFRAUDED IN CALIFORNIA REAL ESTATE TRANSACTIONS

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### I. INTRODUCTION

California law provides several measures of damages for customers defrauded by real estate brokers, including, according to some

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courts, benefit of the bargain damages.<sup>1</sup> The law, however, is not wholly consistent as to when such damages are available.<sup>2</sup> Some courts, for example, have held that defrauded buyers may only recover out-of-pocket damages,<sup>3</sup> under California Civil Code (“CCC”) § 3343,<sup>4</sup> a rule the Fifth District currently follows.<sup>5</sup> The Second District, in 2004, held the contrary,<sup>6</sup> concluding that where financial inju-

<sup>1</sup> See *Fragale v. Faulkner*, 1 Cal. Rptr. 3d 616, 622-24 (Ct. App. 2d Dist. 2003) (fraud in purchase of home); *Salahutdin v. Valley of California, Inc.*, 29 Cal. Rptr. 2d 463, 468-69 (Ct. App. 4th Dist. 1994) (prosecution of case on a negligence theory, upon finding of constructive fraud by fiduciary); *Pepitone v. Russo*, 134 Cal. Rptr. 709, 711 (Ct. App. 1st Dist. 1976) (damages for loss of motel as a result of fiduciary fraud would be motel’s fair market value plus refinancing expenditures plaintiff incurred trying to forestall foreclosure, noting relevant statutes “tend to” provide a benefit of the bargain recovery).

<sup>2</sup> See *Strebel v. Brenlar Invs. Inc.*, 37 Cal. Rptr. 3d 699, 704-05 (Ct. App. 1st Dist. 2006) (discussing split of authority on proper measure of damages under CCC § 3333 for a real estate broker’s intentional fraud); *Fragale*, 1 Cal. Rptr. 3d at 622-24 (discussing split, but authorizing repair costs as damages approximating benefit-of-the-bargain damages); *Salahutdin*, 29 Cal. Rptr. 2d at 468-69 (discussing split and awarding benefit-of-the-bargain damages on constructive fraud theory where case prosecuted under negligence theory); *Walters v. Marler*, 147 Cal. Rptr. 655, 670 (Ct. App. 1st Dist. 1978) (CCC § 3333 tends to give the injured party the benefit-of-the-bargain (or the difference between the actual value of what he received and what he expected to receive), and, insofar as possible, to place him in the same position as he would have been had the promisor performed) (citing, e.g., *Pepitone*, 134 Cal. Rptr. at 711, but noting *Overgaard v. Johnson*, 137 Cal. Rptr. 412, 413 (Ct. App. 5th Dist. 1977)), held § 3333 does not set forth a benefit-of-the-bargain rule but rather a tort measure of damages (the purpose of which is to compensate for loss sustained) rather than providing benefit of any contract bargain); *Zeppenfeld v. Reilley*, No. A110461, 2007 WL 4480140, at \*10 (Cal. Ct. App. 1st Dist. Dec. 28, 2007) (awarding difference in value between what was actually received and what plaintiff was fraudulently led to believe he would receive, noting authority split on damages).

<sup>3</sup> See, e.g., *Hensley v. McSweeney*, 109 Cal. Rptr. 2d 489, 492 (Ct. App. 5th Dist. 2001) (discussing split and refusing to award benefit-of-the-bargain damages); *Overgaard*, 137 Cal. Rptr. at 413. See also *Strebel*, Cal. Rptr. 3d at 704-05 (citing *Hensley* and *Overgaard*); *Zeppenfeld*, 2007 WL 4480140, at \*10.

<sup>4</sup> CAL. CIV. CODE § 3343 (West. 2014). The text of CCC § 3343 is set forth in its entirety in the text below at page [redacted].

<sup>5</sup> See, e.g., *Hensley*, 109 Cal. Rptr. at 492; *Roque-Duran v. Bird*, F063155, 2012 WL 6641370, at \*3-4 (Cal. Ct. App. 5th Dist. Dec. 21, 2012) (denying benefit-of-the-bargain damages under *Hensley*).

<sup>6</sup> See *Fragale*, 1 Cal. Rptr. 3d at 622-24 (rejecting contrary authority); *Salahutdin*, 29 Cal. Rptr. 2d at 469-71; *Diaz v. Ajrab*, No. B203081, 2009 WL 784056, at \*5-6 (Cal. Ct. App. 2d Dist. Mar. 26, 2009); *Taheri v. Khadavi*, Nos. B222132, B226670, B228313, 2012 WL 119976, at \*14-17 (Cal. Ct. App. 2d Dist. Jan. 17, 2012) (given fiduciary breach, plaintiff could recover lost profits and value of shares at time of trial); *Molina v. Jeffery*, B225753, 2012 WL 2354650, at \*6 (Cal. Ct. App. 2d Dist. June 21, 2012) (rejecting argument that court erred in applying benefit of the bargain approach to the breach of fiduciary duty claim where plaintiff claimed entitlement to “[a]t a minimum, [to] the out-of-pocket loss” of her \$50,000 capital contribution and up to \$108,221, representing value of misappropriation of funds and prejudgment interest, noting courts have discretion to determine proper measure of damages under CCC § 3333, citing *Strebel*, 37 Cal. Rptr. 3d at 706-07).

ry arising from a real estate sale transaction traces to fiduciary fraud or fiduciary recklessness, benefit of the bargain awards are permissible,<sup>7</sup> under CCC §§ 3333<sup>8</sup> and 1709,<sup>9</sup> rejecting the Fifth District view.<sup>10</sup>

Other courts have held that although CCC §§ 3333 and 1709 permit a recovery to make the injured plaintiff whole, neither statute expressly states plaintiff may receive the benefit of his bargain as damages,<sup>11</sup> although the statute, in the words of some cases, “tends” to award benefit of the bargain damages or its equivalent.<sup>12</sup> The method by which benefit-of-the-bargain damages may be computed is also unclear. Although California’s jury instructions set forth a computation which subtracts the value of what plaintiff received from

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<sup>7</sup> See *Fragale*, 1 Cal. Rptr. 3d at 622-24; *Salahutdin*, 29 Cal. Rptr. 2d at 469-71; *Masantuono v. Creekside Fin., Inc.*, No. B244966, 2014 WL 1493171, at \*5 (Cal. Ct. App. 2d Dist. Apr. 17, 2014) (measure of damages for fiduciary breach is all loss proximately caused by the breach, including loss of the benefit-of-the-bargain, citing *Fragale*, noting that if damages were measured by the difference between the property as represented and the actual value, measure would not be adequate to compensate plaintiffs for their losses—trial court properly held losses to be the principal amount of the loan plus interest, plus costs for completing home and foreclosing); *Trattmann v. Key*, B241337, 2013 WL 5519356, at \*3-4 (Cal. Ct. App. 2d Dist. Oct. 7, 2013) (in action to quiet title, measure of damages for fraud committed by a fiduciary is the “benefit-of-the-bargain” measure under CCC §§ 1709 and 3333). See also *Green v. Johnson*, No. B239546, 2013 WL 1768971, at \*5 (Cal. Ct. App. 2d Dist. Apr. 25, 2013).

<sup>8</sup> CCC § 3333 provides: “For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.”

<sup>9</sup> CCC § 1709 provides: “One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.”

<sup>10</sup> *Salahutdin*, 29 Cal. Rptr. 2d at 468-71.

<sup>11</sup> See, e.g., *Zarate v. Century 21 Su Casa*, No. H029470, 2007 WL 1555808, at \*2 (Cal. Ct. App. 6th Dist. May 30, 2007) (CCC § 3343 provides that the out-of-pocket measure of damages applies in the case of fraud in the purchase, sale or exchange of property, but where the victim is defrauded by a fiduciary, damages are authorized by CCC §§ 1709 and 3333, but noting that *Overgaard* clarified that CCC § 3333 does *not* set forth any benefit-of-the-bargain rule, but set out a tort measure of damages to compensate plaintiff for a loss sustained, not the benefit of any contract, holding it is unclear whether benefit of the bargain is available for intentional misconduct under CCC § 3333).

<sup>12</sup> See *Pepitone*, 134 Cal. Rptr. at 709 (where property was lost to foreclosure due to a real estate brokerage firm’s failure to disclose an acceleration clause in second deed of trust, CCC §§ 3333 and 1709 were applicable—court observed these provisions “tend to” give the injured party the benefit of his bargain and, insofar as possible, to place him in the position he would have been in had the promisor performed the contract—the faithless fiduciary must make good the full amount of the loss he causes and courts must consider the loss sustained, not the value with which the injured party parted).

what he was promised, plus interest and consequential damages,<sup>13</sup> some cases suggest a fiduciary-defrauded plaintiff may obtain, for example, full market appreciation, through the date of trial, a form of benefit-of-the-bargain recovery, to realize plaintiff's expectancy interest, which does not follow from the form instruction.<sup>14</sup>

Expectancy-protective remedies frequently result in greater damages than out-of-pocket damage measures, serving deterrent purposes.<sup>15</sup> Cases which have departed from California's benefit-of-the-bargain jury instruction, have awarded damages in excess of what the text of the instruction seems to provide.<sup>16</sup> Courts, however, generally refuse to place plaintiffs in a better position than they would have been in if the fraud had not occurred.<sup>17</sup> The choice of damage theory is particularly important where, for example, a fiduciary buyer's broker is involved,<sup>18</sup> or where a single real estate firm acts as a broker for both buyer and seller, a so-called dual broker or agent situation.<sup>19</sup>

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<sup>13</sup> See, e.g., *Hackbart v. Uppal*, D059657, 2013 WL 4041955, at \*8-9 (Cal. Ct. App. 4th Dist. Aug. 8, 2013) (one defrauded in the purchase or sale of property is entitled to recover the difference between the actual value of that with which the defrauded party parted and the actual value of that received—"value" ordinarily means "market value" as determined by the price at which property could be resold in an open market or private sale if its quality or other characteristics which affect its value were known).

<sup>14</sup> See, e.g., *Strebel*, 37 Cal. Rptr. 3d at 704-05 (awarding market appreciation damages (citing *Estate of Anderson*, 196 Cal. Rptr. 782 (Ct. App. 1st Dist. 1983))).

<sup>15</sup> See *Stout v. Turney*, 586 P.2d 1228, 1231-32 (Cal. 1978) ("out-of-pocket rule" has been viewed as more consistent with the logic and purpose of the tort form of action, i.e., compensation for loss sustained rather than satisfaction of contractual expectations—"benefit-of-the-bargain" rule a more effective deterrent).

<sup>16</sup> See *Fragale*, 1 Cal. Rptr. 3d at 622-24; *Salahutdin*, 29 Cal. Rptr. 2d 463, 468-69.

<sup>17</sup> See, e.g., *SourcingLink.Net, Inc. v. Carrefour, S.A.*, No. D049638, 2008 WL 933556 (Cal. Ct. App. 4th Dist. Apr. 8, 2008) (judgment notwithstanding the verdict properly granted where jury award would have placed plaintiff, which claimed it entered into a licensing agreement based on fraudulent misrepresentations, in a better position than if the misrepresentations had not been made where the agreement was terminable on 90-days notice and contained no fixed term but award presupposed contract would last 10 years—because plaintiff failed to present evidence of out-of-pocket damages for 90-day period, the trial court properly limited plaintiff to compensation for detriment suffered by restoring plaintiff to the financial position enjoyed before the transaction, based on value of rights given up).

<sup>18</sup> Under California law, a buyer's broker is deemed a fiduciary of the buyer and has duties beyond that of visual inspection as is statutorily mandated for a seller's broker under CCC § 2079. See *Field v. Century 21 Klowden-Forness Realty*, 73 Cal. Rptr. 2d 784, 789-90 (Ct. App. 4th Dist. 1998) (imposing duties independent of reasonable visual inspection under CCC § 2079 on fiduciary buyer's broker—broker's failure to properly determine size of easement fell below standard of a reasonable broker because broker failed to obtain reasonably obtainable material information—brokers may not simply pass information from the seller to the buyer but must independently verify same or disclose to the buyer that independent confirmation of information is not available or has not been obtained).

<sup>19</sup> "Dual agent" is defined in § 2079.13, subdivision (d) as "an agent acting, either directly

In the latter situation, the broker is inherently conflicted and some courts deem the broker to not only be a fiduciary of its customer,<sup>20</sup> but a trustee, i.e., the highest form of fiduciary.<sup>21</sup>

California cases have upheld a broad range of expectancy-based remedies in cases involving the sale of California real estate that do not follow the jury instruction computation, decisions attempting to put fiduciary-injured plaintiffs in economic positions they would have been in, but for the fraud at issue.<sup>22</sup>

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or through an associate licensee, as agent for both the seller and the buyer in a real property transaction.” California permits a seller's broker to represent the buyer and act in the capacity of a dual agent to complete a property purchase and sale, a principle codified in §§ 2079.14 and 2079.16. Section 2079.16 requires disclosure be made to a client for which a broker is acting as a dual agent and which has a fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the buyer or the seller and a duty of honest and fair dealing and good faith toward the buyer and the seller—diligent exercise of reasonable care and skill in performing the duties of an agent. Dual agents must disclose all facts known to the agent materially affecting the value or desirability of the property and not known to, or within the diligent attention and observation of, the parties. *See A.C. Invs., Inc. v. Gordon*, No. B186421, 2007 WL 520326, at \*5 (Cal. Ct. App. 2d Dist. Feb. 20, 2007); *Samuels v. Merrill*, No. B190158, 2007 WL 2084093 (Cal. Ct. App. 2d Dist. July 23, 2007) (in dual broker situation, broker is a fiduciary for buyer and seller (citing *Fragale*, 1 Cal. Rptr. 3d at 620-21)).

<sup>20</sup> *See Brown v. Wells Fargo Bank, NA*, 85 Cal. Rptr. 3d 817, 834-35 (Ct. App. 2d Dist. 2008) (fiduciary and confidential relationships exist among parties to a transaction wherein one party is duty bound to act with the utmost good faith for the benefit of the other; essence of a fiduciary/confidential relationship is that parties do not deal on equal terms because person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over dependent party—duties generally arise when one party's vulnerability is so substantial as to give rise to equitable concerns).

<sup>21</sup> *See Ford v. Cournale*, 111 Cal. Rptr. 334, 340 (Ct. App. 1st Dist. 1973) (real estate broker has same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary (citing *Batson v. Strehlow*, 441 P.2d 101 (Cal. 2007)); *Alhino v. Starr*, 169 Cal. Rptr. 136, 143 (Ct. App. 1st Dist. 1981) (imposing on the broker the duty of acting in the highest good faith, precluding agent from obtaining advantage over principal in any transaction had by virtue of his agency—the relationship binds the agent to the utmost good faith not only in form but also in substance and requires full disclosure of all material facts respecting the property or relating to the transaction in question; failure to make a full and complete disclosure or any concealment of a material fact is the equivalent of an affirmative misrepresentation or fraud).

<sup>22</sup> *See, e.g., Strebel*, 37 Cal. Rptr. 3d at 704-05 (awarding market appreciation damages); *Fragale*, 1 Cal. Rptr. 3d at 622-24 (cost of repair approximating benefit of bargain damages where plaintiff failed to provide proof of market value); *Anderson*, 196 Cal. Rptr. at 782 (awarding market appreciation damages through date of trial); *Salahutdin*, 29 Cal. Rptr. 2d at 468-69 (benefit-of-the-bargain damages based on comparison of value of property plaintiffs received and value of the property they would have received had broker's representations been true, relying on expert testimony regarding comparable properties, determining damages as of trial date); *Pepitone*, 134 Cal. Rptr. at 710-11 (noting CCC § 3333 tends to provide for substantially the same damages as CCC § 3300 for breach of contract, i.e., benefit-of-the-bargain, computing damages by subtracting the value of undisclosed encumbering loans on

Part II discusses California's law on real estate damages, including CCC § 3343, which sets forth an out-of-pocket rule, CCC §§ 3333 and 1709, which, according to some cases, provides for benefit-of-the-bargain damages or their equivalent, in cases of fiduciary fraud or recklessness, or constructive fraud.<sup>23</sup> Parts III, IV, V, and VI discuss some of California's leading real estate damages cases in the 1970s, 1980s, 1990s and 2000s, focusing on the above statutes and damages theory. Part VII discusses California's fraud and deceit jury instruction, including its provision of benefit-of-the-bargain damages, and concludes California law protects real property purchaser expectancies, in fiduciary fraud and recklessness contexts, as well as cases of constructive fraud, making benefit-of-the-bargain damages (or their equivalent) available to injured plaintiffs.

## II. REAL ESTATE DAMAGES: RELEVANT STATUTES AND JURY INSTRUCTIONS

### A. Introduction

California law provides two measures of damages for fraud, the out-of-pocket measure and benefit-of-the bargain measure.<sup>24</sup> The

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the subject motel, from the fair value of the motel, and adding refinance charges the injured party incurred in an effort to avoid a foreclosure—award intended to put plaintiff in the position he would have been in, but for defendant's failure to disclose the encumbering loans). *See generally* Wayne v. Byrens, B227575, 2012 WL 1925410, at \*8-11 (Cal. Ct. App. 2d Dist. May 29, 2012) (where neither out-of-pocket nor benefit-of-the-bargain measure was particularly helpful to jury in fashioning award, jury could reasonably conclude an award of some interest in company was necessary to compensate appellant for detriment suffered due to defendant's false promises or it could fashion an award based on a percentage of amount derived from sale of property (then rolled into different property) in reliance on defendant's false promises—jury's award was within a reasonable range to compensate plaintiff for all detriment, no new trial).

<sup>23</sup> *See, e.g.,* Salahudin, 29 Cal. Rptr. 2d at 468-69 (citing cases and commentators); *Fragale*, 1 Cal. Rptr. 3d at 622-24. *See generally* Woodruff v. Bekeris, B233470, 2012 WL 653896, at \*4 (Cal. Ct. App. 2d Dist. Feb. 28, 2012) (benefit-of-the-bargain measure is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive).

<sup>24</sup> *See Fragale*, 1 Cal. Rptr. 3d at 621-25 (noting split, authorizing benefit-of-the-bargain damages); *Salahudin*, 29 Cal. Rptr. 2d at 468-71 (awarding benefit-of-the-bargain damages where defendant fiduciary's misconduct, although not actually fraudulent, amounted to a "constructive fraud" within the meaning of California law). *See also* Graves v. Esyon Corp., No. G035700, 2006 WL 2869566, at \*4 n.8 (Cal. Ct. App. 4th Dist. Oct. 10, 2006) (discuss-

out-of-pocket measure restores a plaintiff to the financial position he enjoyed prior to the fraudulent transaction by awarding the difference in actual value between what the plaintiff gave and what he received, as of the date of the fraud.<sup>25</sup> The benefit-of-the-bargain measure places a defrauded plaintiff in the position he would have enjoyed had the false representation been true, awarding him the difference in value between what he actually received and what he was fraudulently led to believe he would receive.<sup>26</sup>

In the context of real estate transactions not involving the fraudulent acts of fiduciaries, California has limited defrauded parties to out-of-pocket damages.<sup>27</sup> An exception has been recognized for cases where the injury is the result of fiduciary fraud or recklessness or, according to some courts, constructive fraud.<sup>28</sup>

## B. The Relevant Statutes

### I. CCC § 3343

CCC § 3343 provides: Fraud in purchase, sale or exchange of property; additional damages.

(a) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising

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ing split in authority on availability of benefit-of-the-bargain damages, noting that in *Alliance v. Rothwell*, 900 P.2d 601 (Cal. 1995), California's Supreme Court held a plaintiff may recover only out-of-pocket damages for a fiduciary's negligent misrepresentation, but left open whether a plaintiff may recover benefit-of-the-bargain damages for a fiduciary's intentional fraud).

<sup>25</sup> See *Zeppenfeld*, 2007 WL 4480140, at \*10 (out-of-pocket measure restores a plaintiff to position enjoyed prior to the fraudulent transaction, awarding difference in actual value between what plaintiff gave and received).

<sup>26</sup> *Id.* (benefit-of-the-bargain measure places a defrauded plaintiff in the position he would have enjoyed had the false representation been true, awarding him the difference in value between what he actually received and what he was fraudulently led to believe he would receive (citing *Alliance*, 900 P.2d. at 615-16, and *Fragale*, 1 Cal. Rptr. 3d at 621-25 (noting split, authorizing benefit-of-the-bargain damages))).

<sup>27</sup> See *Fragale*, 1 Cal. Rptr. 3d at 623-24.

<sup>28</sup> *Id.* at 236-37 (CCC § 3343 does not apply when a victim is defrauded by its fiduciaries; broader measures of CCC §§ 1709 and 3333 apply, permitting compensation for "all detriment proximately caused").



from the particular transaction, including any of the following: (1) Amounts actually and reasonably expended in reliance upon the fraud. (2) An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud. (3) Where the defrauded party has been induced by the reason of the fraud to sell or otherwise part with the property in question, an amount which will compensate him for profits or other gains which might reasonably have been earned by use of the property had he retained it. (4) Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply: (i) The defrauded party acquired the property for the purpose of using or reselling it for a profit. (ii) The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property. (iii) Any loss of profits for which damages are sought under this paragraph have been proximately caused by the fraud and the defrauded party's reliance on it. (b) Nothing in this section shall do either of the following: (1) permit the defrauded person to recover any amount measured by the difference between the value of property as represented and the actual value thereof. (2) Deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled.<sup>29</sup>

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<sup>29</sup> Civ. § 3343.

In *Zeppenfeld v. Reilley*,<sup>30</sup> Judge Rivera explained that in fraud cases involving the purchase, sale or exchange of property, the “out-of-pocket” rather than the “benefit-of-the-bargain” measure of damages should apply, as CCC § 3343 provides the exclusive measure of damages for fraud in such cases and excludes benefit-of-the-bargain damages by prohibiting the defrauded person from recovering any amount measured by the difference between the value of property as represented and the actual value thereof.<sup>31</sup> Out-of-pocket damages are directed to restoring the plaintiff to the financial position he enjoyed prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what plaintiff gave and what he received, with . . . actual value meaning “market value.”<sup>32</sup> Proof of the property’s actual value at the time of the fraudulent transaction and time of discovery of the fraud and/or the time of trial is particularly important and plaintiffs which fail to produce expert testimony of value are frequently frustrated.<sup>33</sup> It is also critical that plaintiff establish the expenditures made are directly traceable to the fraudulent wrongdoing.<sup>34</sup> Where plaintiff fails to establish this, courts have rejected application of the out-of-pocket theory.<sup>35</sup>

## 2. CCC § 3333

CCC § 3333 is California’s general tort damage statute which provides, in relevant part: “For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate

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<sup>30</sup> No. A110461, 2007 WL 4480140, at \*10 (Cal. Ct. App. 1st Dist. Dec. 21, 2007).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at \*11 (“While cost of repairs has some probative worth on the issue of value, it is not of itself the proper measure of damages . . . cost of repairs may not be separately assessed without reference to the loss of market value of the property” (citing *Sacramento & San Joaquin Drainage Dist. v. Goehring*, 91 Cal. Rptr. 375, 379-81 (Ct. App. 3d Dist. 1970)).

<sup>33</sup> See, e.g., *Zarate*, 2007 WL 1555808, at \*4 (plaintiff’s failure to produce expert testimony to prove property was worth less than he paid, precluded finding of damages).

<sup>34</sup> *Id.* (when defrauded person has made reasonable expenditures, these may ordinarily be recovered where they have been lost or rendered fruitless by the deceit and consequential damages would be proper if buyer was obliged to move from the property that he had been fraudulently induced to purchase on account of the dangerous character of the premises—in such a case, he could not only recover the difference between the amount paid for the property and its actual value, but the expense of moving).

<sup>35</sup> *Id.* (expenses not incurred in reliance on the misrepresentation or fraud should not be included in a damages award).

for all the detriment proximately caused thereby, whether it could have been anticipated or not.”<sup>36</sup> Civil Code § 3333 damages, according to some cases, are designed to protect the expectancy interest of persons injured by fiduciary frauds by placing them in the financial position they would have been in if the fraudulent representations that induced a transaction were true.<sup>37</sup>

The phrase “all detriment” has been broadly construed as subsuming such injuries as the inability to obtain desired financing at specific rates,<sup>38</sup> and even emotional distress damages.<sup>39</sup> Market adjusted awards, discussed in Part III below, make plaintiffs whole by forcing defendants to live up to their representations, deterring fiduciary fraud by forcing the defrauding fiduciary to make good total damages their misrepresentations cause.<sup>40</sup>

### 3. CCC § 1709

CCC § 1709 provides that “[o]ne who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.”<sup>41</sup>

### 4. *The Central Question*

CCC § 3333 provides that the injured party will receive compensation for “all the detriment proximately caused.”<sup>42</sup> Civil Code § 1709 provides the injured party will be compensated for “any damage” he suffers as a result the deception.<sup>43</sup> The question is whether the impairment of the victim’s future financial position as a result of a fiduciary’s fraud or other wrongful conduct constitute a “detriment.”

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<sup>36</sup> CAL. CIV. CODE § 3333 (West 2014).

<sup>37</sup> *See Fragale*, 1 Cal. Rptr. 3d at 624.

<sup>38</sup> *See, e.g., Bankers Realty, Inc. v. Shiotsugu*, No. B190143, 2008 WL 73691, at \*3-4 (Cal. Ct. App. 2d Dist. Jan. 8, 2008).

<sup>39</sup> *See, e.g., id.* at \*4; *Jahn v. Brickey* 214 Cal. Rptr. 119, 123-25 (Ct. App. 4th Dist. 1985); *Quezada v. Hart*, 136 Cal. Rptr. 815, 819 (Ct. App. 2d Dist. 1977).

<sup>40</sup> *See Fragale*, 1 Cal. Rptr. 3d at 622 (benefit-of-the-bargain damages calculated to require the faithless fiduciary to make good the “full amount of the loss” (quoting *Salahudin*, 29 Cal. Rptr. 2d at 470-471). Appreciation damages may be awarded under CCC § 3333, noting flexibility as to date used to compute damages which should reflect goal of compensation for entire loss. *Id.* at 470 (citing *Anderson*, 196 Cal. Rptr. at 782 (1983)).

<sup>41</sup> CAL. CIV. CODE § 1709 (West 2014).

<sup>42</sup> CIV. § 3333.

<sup>43</sup> CIV. § 1709.

ment,” under §3333, or “any damage,” within the meaning of CCC §1709. Restated, do these statutes, CCC §§ 3333 and 1709, individually or collectively, provide for “benefit-of-the-bargain damages” or its equivalent in cases of fiduciary fraud notwithstanding that the phrase “benefit-of-the-bargain damages” does not appear in the statutory text?

### III. THE 1970S—*FORD, PEPITONE, OVERGAARD, AND WALTERS*

#### A. 1974 - *Ford v. Cournale*

In *Ford v. Cournale*,<sup>44</sup> plaintiff, a 70 year old widow, sued a broker and salesman for fraud and misrepresentation arising from plaintiff’s purchase of an apartment building.<sup>45</sup> Although defendants provided financial information about the building and information about its condition to plaintiff, they did not further investigate the owner’s books and records but relied solely on the owner’s statements about the building.<sup>46</sup> In fact, a number of apartments were leaking, there were maintenance problems and difficulties with tenants not yet evicted.<sup>47</sup> Expert testimony showed the building had been greatly overvalued.<sup>48</sup> The court found that plaintiff’s fiduciaries had no basis other than the statements of the broker as to projected net income for the building, a fact material to plaintiff.<sup>49</sup> Although the broker had access to the books and records of the building’s prior owners, they were not reviewed.<sup>50</sup>

*Ford* established that brokers, in selling properties, may not simply accept the seller’s statements regarding the condition of the premises and/or the financial bona fides of an income producing property without independently reviewing public information to confirm them.<sup>51</sup> The court held that the trial court’s restrictive view of damages was error and that monies over and above out-of-pocket damages could be available where rescission was not a viable species

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<sup>44</sup> 111 Cal. Rptr. 334 (Ct. App. 1st Dist. 1974).

<sup>45</sup> *Id.* at 336.

<sup>46</sup> *Id.* at 337.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 337-38.

<sup>49</sup> *Ford*, 111 Cal. Rptr. at 338.

<sup>50</sup> *Id.* at 340.

<sup>51</sup> *Id.* at 342.

of relief, an issue to be addressed on remand.<sup>52</sup>

### B. 1976 - *Pepitone v. Russo*

*Pepitone v. Russo*<sup>53</sup> involved a retrial solely on the issue of damages. Plaintiff had sued for fraud and breach of fiduciary duty seeking damages when she lost her motel through a foreclosure resulting from her real estate brokerage firm's failure to disclose a second deed of trust encumbering the property had an acceleration clause.<sup>54</sup> The jury found for plaintiff in the amount of \$85,735.<sup>55</sup> Respondents moved for a new trial and, on retrial, the court, reduced damages to \$25,834.<sup>56</sup> Plaintiff, appealed, arguing she should have been awarded the benefit of her bargain under CCC § 3333, rather than being subject to an out-of-pocket recovery.<sup>57</sup> The appeal court began by explaining that CCC § 3333 and 1709 were applicable and tend to give the injured party the benefit of her bargain:

California law is committed to the view that the fraudulent breach of fiduciary duty is a tort, and the faithless fiduciary is obligated to make good the full amount of the loss of which his breach of faith is a cause. . . . Where, as here, the defrauding party stands in a fiduciary relationship to the victim of fraud, the damages must be measured pursuant to the broad provisions of sections 3333 and 1709 regulating compensation for torts in general. . . . [T]he measure of damages provided by the foregoing sections is substantially the same as that for breach of contract prescribed by section 3300; i.e., it tends to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been had the promisor performed . . . .<sup>58</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> 134 Cal. Rptr. 709 (Ct. App. 1st Dist. 1976).

<sup>54</sup> *Id.* at 710-11.

<sup>55</sup> *Id.* at 710.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Pepitone*, 134 Cal. Rptr. at 711 (citations and some text omitted). *See also* Burkhouse v. Phillips, 96 Cal. Rptr. 197 (Ct. App. 1st Dist. 1971) (in action against broker and sellers for rescission of residential home sale, instruction that plaintiffs could not recover if there

The court held that, insofar as possible, its job was to place the injured party in the same position she would have been in had the promisor performed the contract.<sup>59</sup> Therefore, the court concluded it was required to consider the loss sustained rather than the value with which the injured party parted.<sup>60</sup> The court stated:

Under the benefit of the bargain doctrine we must consider the *loss* sustained by appellant rather than the value with which she parted . . . we must look solely to the fair market value of the motel which was lost by reason of respondents' breach and the expenditures that appellant incurred in her efforts to forestall the foreclosure.<sup>61</sup>

Plaintiff was made whole through damages equivalent to what she lost.<sup>62</sup> She obtained the value of what the motel would have been worth if the misrepresentations had not been made and refinance costs, as well, that would not have been incurred but for the foreclosure.<sup>63</sup> The court upheld the trial court's discretionary determination that plaintiff should not obtain pre-judgment interest, which would have placed her in a better position than if no fraud occurred.<sup>64</sup>

*Pepitone* establishes that where parties stand in a fiduciary relation under CCC §§ 3333 and 1709, damages may consist of the monetary equivalent of what was lost, and, that because costs that would not have been incurred, but for the wrongdoing, are recoverable, there is no need for pre-judgment interest.<sup>65</sup> The court deemed the value of the hotel, i.e. the benefit of the bargain, to fall within the phrase "what was lost," under CCC §§ 3333 and 1709.

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was no difference between the purchase price of the property at the time it was sold and the actual value of the property was error under CCC § 3343—subsequent circumstances may sometimes be considered, *e.g.*, where foreclosure resulted from defendant's fraud).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (loss sustained by appellant equivalent to difference between the purchase price and the encumbrances plus refinance charges to prevent foreclosure) (emphasis added).

<sup>62</sup> *Id.*

<sup>63</sup> *Pepitone*, 134 Cal. Rptr. at 711.

<sup>64</sup> *Id.* at 712.

<sup>65</sup> *Id.*

### C. 1977 - *Overgaard v. Johnson*

In *Overgaard v. Johnson*,<sup>66</sup> real estate buyers recovered damages from sellers because the tract the sellers sold them contained less vineyard acreage than sales documents stated.<sup>67</sup> After recovering from the sellers, the buyers sued the real estate salesman and broker he employed, arguing their negligence caused the loss.<sup>68</sup> The trial judge awarded benefit of the bargain damages.<sup>69</sup> Both sides agreed CCC § 3333 controlled on damages, but disagreed as to what damages were proper.<sup>70</sup> The Fifth District began by noting that part of the difficulty in analyzing the law “arises out of a veritable gallimaufry of confusing rules gleaned from different types of actions.”<sup>71</sup> The court defined “benefit-of-the-bargain” as “the difference between the actual value of what plaintiff has received and that which he expected to receive.”<sup>72</sup> It then defined “out-of-pocket” as “the difference between the actual value received and the actual value conveyed.”<sup>73</sup> The court then observed that CCC § 3333 sets out a tort measure of damages, namely damages which compensate a plaintiff for a loss sustained rather than providing him, definitively, with the benefit of any contract bargain.<sup>74</sup>

Citing *Pepitone*, the court explained that because the fraudulent breach of fiduciary duty is a tort, the defrauding fiduciary must make good the full amount of the loss of which his breach of faith is a cause.<sup>75</sup> For that reason, damages are measured under CCC §§ 3333 and 1709 which regulate tort compensation, generally, and which tend to give the injured party the benefit of his bargain, attempting to place the injured party in the position he would have been in had the contract been performed.<sup>76</sup>

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<sup>66</sup> 137 Cal. Rptr. 412 (Ct. App. 5th Dist. 1977).

<sup>67</sup> *Id.* at 413.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Overgaard*, 137 Cal. Rptr. at 413.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 413-14.

<sup>75</sup> *Id.* at 414 (“California law is committed to the view that the fraudulent breach of fiduciary duty is a tort . . .” (quoting *Pepitone*, 134 Cal. Rptr. at 711)).

<sup>76</sup> *Overgaard*, 137 Cal. Rptr. at 414 (cases amplify that CCC §§ 3333 and 1709 provide a measure of damages substantially the same as for breach of contract prescribed by § 3300, namely it *tends to* give the injured party the benefit of his bargain and insofar as possible to

The *Overgaard* Court distinguished fiduciary fraud from fiduciary negligence cases, stating that even if CCC § 3333 were applicable, it does not, in all cases, require a benefit-of-the-bargain standard; rather, the court should have flexibility to determine the damage measure so that, in certain cases, what amounts to a benefit of the bargain measure can be applied in the judge's discretion.<sup>77</sup> The court stated: "It is an anomaly that a negligent broker has no more to lose than the amount which he gains by his negligent actions . . . it has been a real 'loss' as far as the respondent is concerned."<sup>78</sup>

*Overgaard* established three principles first, that the theory of applicable damages in real estate broker cases depends on the relationship between the broker and customer (fiduciary or non-fiduciary).<sup>79</sup> Second, that the quantum of applicable damages may depend on the level of scienter motivating the alleged misconduct (fraudulent, negligent or, possibly, somewhere in between, *e.g.*, constructive fraud), and third, even in fraud cases applying CCC § 3333, which had been interpreted as providing benefit of the bargain damages, such damages may not be appropriate, under CCC § 3333, even in fiduciary breach cases under the "all detriment proximately caused" language of CCC § 3333.<sup>80</sup>

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place him in the same position he would have been had the promisor performed the contract); *Pointe San Diego Residential Cmty., L.P. v. W.W.I. Properties, L.L.C.*, No. D044695, 2007 WL 1991205, at \*6 (Cal. Ct. App. 4th Dist. July 11, 2007) (neither statute expressly sets forth a benefit-of-the-bargain rule, but cases have noted § 3300 tends to give benefit-of-the-bargain).

<sup>77</sup> *Id.* at 415.

<sup>78</sup> *Id.* at 416.

<sup>79</sup> *Id.*

<sup>80</sup> *See Zarate*, 2007 WL 1555808, at \*2. In *Zarate*, the court stated:

[W]here the victim is defrauded by a fiduciary, damages are authorized by [CCC §§] 1709 and 3333. Section 3333 does not specify any particular measure of damages. As *Overgaard* . . . clarified, "section 3333 does not set forth any benefit of the bargain rule. That section simply sets out the measure of damages long recognized in torts, namely, to compensate a plaintiff for a loss sustained rather than give him the benefit of any contract." It is unclear whether the measure of damages under section 3333 would provide a benefit-of-the-bargain measure of damages in the case of a fiduciary's *intentional* misrepresentation. It is settled, however, that victims of fiduciary *negligence* are entitled to only the out-of-pocket measure of damages. . . . Thus, with the possible exception of claims against a fiduciary for intentional misrepresentation, courts do not have broad flexibility to fashion a damage award in cases such as this. The out-of-pocket measure applies.

*Id.* (quoting *Overgaard*, 137 Cal. Rptr. at 413).



**D. 1978 - *Walters v. Marler***

In *Walters v. Marler*,<sup>81</sup> plaintiff sued numerous parties for damages in connection with their purchase of one parcel of a property and home supposedly on it.<sup>82</sup> The facts were particularly complicated. Due to the error of a county assessor, all improvements for a six parcel property were allocated to the fourth parcel and, due to an erroneous survey, the house plaintiff purchased appeared to be located entirely on the fourth parcel.<sup>83</sup> Defendants, the Marlers, bought the entire property for \$95,000, through a sales person, Fickle, who was employed by Rector, doing business as Action Realty Co.<sup>84</sup> The Marlers built an addition and listed the house as “one acre plus” for \$125,000 with Fickle, with Action and Fickle acting as seller’s broker.<sup>85</sup>

The Marlers told Fickle the “one acre plus” was the area immediately around the house but it was understood the exact boundaries needed to be defined by a survey.<sup>86</sup> Plaintiff Walters contacted Leseman, a broker with Lampliter Realty, and, through Leseman, Walter told Fickle he would buy the property, but only if more land was made available.<sup>87</sup> Fickle told Walters the Marlers might sell the entire fourth parcel, but there would have to be a survey.<sup>88</sup> Leseman said there was no time for a survey but asked what the fourth parcel included.<sup>89</sup> Fickle showed Leseman a plot map and marked the location of the improvements, in the fourth parcel boundaries.<sup>90</sup> Leseman, misreading the erroneous map, mistakenly thought the top of the map was north when it was, in fact, east, so Leseman incorrectly pointed out the property boundaries Walters.<sup>91</sup> Walters and the Marlers contracted to buy and sell the fourth parcel and its improvements for \$105,000.<sup>92</sup>

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<sup>81</sup> 147 Cal. Rptr. 655 (Ct. App. 1st Dist. 1978).

<sup>82</sup> *Id.* at 661.

<sup>83</sup> *Id.* at 663.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Walters*, 147 Cal. Rptr. at 663.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Walters*, 147 Cal. Rptr. at 663.

<sup>92</sup> *Id.*

Transamerica, then, at Fickle's request, issued a preliminary title report, which made no mention of any improvements.<sup>93</sup> Walters then obtained an \$84,000 purchase money loan from Wells Fargo Bank and gave a deed of trust covering the fourth parcel.<sup>94</sup> Transamerica issued Walters a standard title insurance policy which, as it happened, did not insure against facts not disclosed by public records and which an accurate survey would disclose.<sup>95</sup> Transamerica also issued to Wells Fargo an extended coverage policy which included relevant endorsements "100" and "116."<sup>96</sup> The 116 endorsement insured a house located on the fourth parcel and the 100 endorsement insured against loss due to any encroachment of the house onto adjoining lands.<sup>97</sup>

Transamerica, however, neglected to inspect the property before issuing the policy to Wells Fargo.<sup>98</sup> Walters learned the property that Leseman had shown him was actually not his property and the house would be close to the property line.<sup>99</sup> When Walters had a survey prepared, he learned only a small portion of the house was on the fourth parcel.<sup>100</sup> At trial, Walters alleged numerous theories of recovery against the sellers, their brokers, his own brokers, and the insurers.<sup>101</sup> He maintained he only bought the property because of defendant's misrepresentations regarding the parcel boundaries.<sup>102</sup> Defendants argued, *inter alia*, mutual mistake and negligence on Walter's part.<sup>103</sup> A jury held for plaintiff in the amount of \$105,000, plus interest, plus punitive damages, and an appeal followed.<sup>104</sup> The appeal court began by stating that where a defrauding party stands in a fiduciary relationship to the victim of fraud, damages must be measured pursuant to CCC §§ 3333 and 1709, but that the cases were in conflict as to the measure of damages.<sup>105</sup> *Pepitone*, it noted, held

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Walters*, 147 Cal. Rptr. at 663.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Walters*, 147 Cal. Rptr. at 664.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 677.

<sup>105</sup> *Id.* at 670.

these sections provide damages substantially the same as that for breach of contract prescribed by § 3300; i.e., they tend to give the party the benefit-of-the-bargain (or the difference between the actual value of what he received and what he expected to receive), and insofar as possible to place him in the same position as he would have been if the promisor performed the contract.<sup>106</sup> *Overgaard*, it noted, was contrary, holding CCC § 3333 does not set forth a benefit of the bargain rule; rather, it just sets out the tort measure of damages, namely, to compensate plaintiff for a loss, not to provide him the benefit of any contract bargain.<sup>107</sup>

Because Leseman and Lampliter were Walters' own real estate agents, the court held that they owed him a fiduciary duty to disclose all material facts that might affect his decision to purchase the property and, therefore, that damages, as to them, would be governed by CCC §§ 3333 and 1709.<sup>108</sup> The Marlars and their own real estate agents, Fickle, Rector and Action, were not Walters' fiduciaries so their liability for damages would be governed by the out-of-pocket rule.<sup>109</sup> Although the court found the trial judge had improperly failed to provide separate measures of damages for defendants in a fiduciary relationship and those who were not, it concluded that under either measure of damages the award was excessive.<sup>110</sup>

Under the out-of-pocket rule of CCC § 3343, Walters would be entitled to recover the difference between the actual value of that with which he parted (\$105,000) and the market value of that which he received (\$23,500 to \$24,500), or \$80,500 to \$81,500. Subsequent expenditures for landscaping, property taxes, title insurance, property insurance, interest on the loan, and maintenance and repair of the property would not be recoverable. Because these expenditures would have been made even if the property had been as represented, they were not made in reliance on the fraudulent misrepresentations. Under CCC § 3333, Walters could only recover an amount sufficient to compensate him for his losses resulting from reliance on the fraud, which was equal to the difference between the market value of what he received (\$23,500 to \$24,500) and what he expected to receive

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<sup>106</sup> *Walters*, 147 Cal. Rptr. at 670.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 670-71.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

(\$105,000) or \$80,500 to \$81,500.<sup>111</sup> The appeal court rejected plaintiff's damage claim seeking cost of repair of the property because it concluded those expenditures would have been made even if the property had been as it was represented.<sup>112</sup> The court disregarded the fact no repairs would have been necessary because plaintiff would not have bought the property, had defendants not made the misrepresentations.<sup>113</sup>

*Walters* illustrates how courts carefully analyze the relationship between real estate brokers and the persons they represent to determine what statutory damages are available. It illustrates the rule that if a court concludes certain costs would have been incurred even if the property was in the condition it was represented to be in, plaintiff may not recover such costs. The *Walters* court did not provide any analysis as to why the loss of a contract bargain proximately caused by a fiduciary's misconduct would not be a "detriment," for purposes of computing statutory damages, nor why loss of contract bargain would not be subsumed within the broad language "all detriment proximately caused."

#### IV. THE 1980s—*ESTATE OF ANDERSON AND CORY V. VILLA*

##### A. 1983 - *Estate of Anderson*

*Estate of Anderson*<sup>114</sup> involved a bank which was named as executor and trustee of an estate which had been given discretionary authority, in both capacities, to sell estate property.<sup>115</sup> Without advising plaintiff beneficiaries, the bank sold 1330 acres of land, the estate's principal asset.<sup>116</sup> The trial court held that in selling the land, the bank breached its fiduciary relationship by failing to disclose material information to the beneficiaries, including the sale, finding it guilty of tortious nondisclosure.<sup>117</sup> The trial court awarded full "market appreciation damages," through the date of trial, based upon the

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<sup>111</sup> *Walters*, 147 Cal. Rptr. at 671.

<sup>112</sup> *Id.* at 672-73.

<sup>113</sup> *Id.* at 673.

<sup>114</sup> 196 Cal. Rptr. 782 (Ct. App. 1st Dist. 1983).

<sup>115</sup> *Id.* at 785.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 794-95.

trial date value of the property.<sup>118</sup>

The appeal court sustained the damages, noting appellant breached its fiduciary duty of loyalty, including its duty to fully inform the beneficiaries of material information regarding the sale of property, rejecting the argument that California law did not provide for such damages or that simple legal interest could make plaintiffs whole.<sup>119</sup> Full market appreciation, through trial, was justified, it held, because the sale prevented plaintiffs from realizing their expectancy interest under CCC § 3333—“Further support can be found in the general tort measure of damages found in Civil Code section 3333 since this case presents elements of tortious nondisclosure and fraud . . . the use of an 8.5 percent annual appreciation figure was in accord with substantial justice, being reasonable and consistent with the marketplace . . . .”<sup>120</sup>

The *Anderson* plaintiffs’ expectancy included all appreciation the property would have experienced if it were available to be sold on the date of trial.<sup>121</sup> Such an award represents an implicit “market adjusted” damage approach in looking to what plaintiffs’ financial situation should have been, on the date of trial, if plaintiffs had available for sale what they were supposed to have had, i.e., a saleable property.<sup>122</sup> In other words, the *Anderson* plaintiffs expected to enjoy the full appreciation of the then California real estate market, as owners of their property, and as its sellers. They could not realize that expectation because, in breach of duty and through fraudulent nondisclosure, their fiduciaries had previously sold the property.<sup>123</sup> The “index” the court used to market-adjust plaintiffs’ financial position was the California real estate market in which their property was appreciating, through the date of trial, and damages, under CCC § 3333, were a benefit-of-the-bargain recovery, quantified through property appreciation, functioning as that market index.<sup>124</sup>

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<sup>118</sup> *Id.*

<sup>119</sup> *See Anderson*, 196 Cal. Rptr. at 794.

<sup>120</sup> *See Anderson*, 196 Cal. Rptr. at 795.

<sup>121</sup> *See Boyle v. Sosnowski*, No. A103494, 2004 WL 569871, at \*2 (Cal. Ct. App. 1st Dist. Mar. 23, 2004) (“expectancy interest” includes “lost property appreciation”).

<sup>122</sup> *See generally* Laurence A. Steckman & Robert E. Conner, *Computing Damages in Rule 10b-5 Unsuitability Cases: Litigating “Offset” Defenses*, reprinted in 1994 SEC. ARBITRATION 377, 392-405 (P.L.I. 1994) (discussing the calculation of market index adjusted damages under Second Circuit precedent).

<sup>123</sup> *Anderson*, 195 Cal. Rptr. at 795.

<sup>124</sup> *Id.*

*Anderson* was a trust case that involved a sale of property, rather than a standard real estate fraud case.<sup>125</sup> What is notable, however, is that the court looked to CCC § 3333; a broad, general statute whose remedies are not restricted to any particular type of cases.<sup>126</sup> Dual agents and buyer's brokers are not deemed to be merely fiduciaries, but, under California law, are deemed to be trustees of their customers.<sup>127</sup> Buyer's brokers are trustees so there is even more reason to hold them to their representations by awarding full expectancy damages.<sup>128</sup>

*Anderson* established three key principles, first that market appreciation damages may be awarded under California law to realize the expectancy interests of persons defrauded by their fiduciaries.<sup>129</sup> Second, that the quantum of appreciation may be determined by examining the percentage increase of similar properties in the same geographical region and, third, that the courts attempting to determine the appropriate quantum of market appreciation may use the date of trial, not the date the injury occurred or the date of notice of the wrongdoing, as a benchmark.<sup>130</sup> In other words, because plaintiffs were entitled to and expected to have a property they could monetize at a time of their choosing, the broad provisions of § 3333 would put in them in the same economic position they would have been in, as of the trial date.

### B. 1986 - *Cory v. Villa Properties*

In *Cory v. Villa Properties*,<sup>131</sup> purchasers of realty brought action against vendors and vendors' broker for fraud, intentional and negligent misrepresentation.<sup>132</sup> Defendants prevailed on summary judgment and the buyers appealed.<sup>133</sup> The appeal court held, *inter alia*, that defendants' misrepresentation that the property was 2.8

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<sup>125</sup> *Id.* at 785.

<sup>126</sup> *Id.* at 795.

<sup>127</sup> See *Ford*, 111 Cal. Rptr. at 340 ("It is well settled in this state that a law imposes on a real estate broker the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary.").

<sup>128</sup> *Anderson*, 195 Cal. Rptr. at 795.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> 225 Cal. Rptr. 628 (Ct. App. 2d Dist. 1986).

<sup>132</sup> *Id.* at 629.

<sup>133</sup> *Id.*

acres, when it was really 1.8 acres, was actionable fraud against both the seller and its (licensed) broker; and that the exclusive measure of damages for fraud was out-of-pocket loss plus specified additional damages.<sup>134</sup> The court justified its analysis by providing “a bit of background”:

Until 1935, California Civil Code section 3333 provided the general rule regarding the measure of damages for recovery in tort, that being that the amount to be compensated would be for all the detriment proximately caused which principle was called the “benefit of the bargain rule.” Recognizing that the “benefit of the bargain” rule was an extreme rule, the Supreme Court stated that “[I]t should . . . be applied only in clear cases and upon just terms.” The Legislature responded in 1935 by the passage of Civil Code section 3343 and the Supreme Court in *Bagdasarian v. Gragnon*, 192 P.2d 935 (Cal. 1948), concluded that this statute provided the exclusive measure of damages thereby eliminating entirely the possibility of recovery based upon the “benefits of the bargain” measure.<sup>135</sup>

The *Cory* court continued:

In [*Bagdasarian*], the Supreme Court recognized that “[t]he right to recover *additional* damages does not refer to the *measure* of damages, but, rather, to such matters as expenses or consequential injury resulting from the fraud.” Hence, this interpretation is in accord with the general rule that a defrauded plaintiff may recover for all the detriment proximately caused, which must necessarily include necessary expenses and indirect injuries caused by the fraud. . . . The Supreme Court then went on to elaborate on the recovery of expenditures by explaining that “[e]xpenditures which were reasonable under the circumstances, . . . may ordinarily be recovered, insofar as they have been lost or rendered fruitless because of the deceit.” Hence, the

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<sup>134</sup> *Id.* The court noted that the licensed broker and seller were more knowledgeable than the buyer and that the difference in acreage was not obvious to the buyer on a visual inspection.

<sup>135</sup> *Id.* at 631-32.

California statutory law follows the out of pocket rule. . . . Civil Code § 3343 which states the rule of damage recovery for actions in fraud, awards the difference between what the defrauded party has expended and what he has received in value, *plus* additional damages arising from the transaction.<sup>136</sup>

In determining out-of-pocket damages, the court noted that the property was purchased for \$705,000 on March 7, 1980 and that its role, first, was to look to the actual value of the property on that date.<sup>137</sup> There was no appraisal of the property to support any valuation as of that date other than the purchase price, itself.<sup>138</sup> The trial court considered a number of appraisals made a little more than a year after the sale, the affidavit of the appellant Josephine Cory in the bankruptcy action stating that the realty had a value of \$1,230,000 as well as the Finding of Fact of the bankruptcy judge that the lot with the house had a value on February 10, 1982, of \$850,000 exclusive of the additional unimproved lot.<sup>139</sup> Appellants alleged they would not have bought the property had they known the property's actual size.<sup>140</sup> The sellers and their broker presented appraisals to the court and the buyers submitted no competent evidence to refute the values alleged.<sup>141</sup>

Despite the fact that the appraisals considered the value a year after the sale, the court found that the change of value between the time of appraisal and trial went merely to evidentiary weight.<sup>142</sup> Finding no out-of-pocket loss, the court concluded other types of compensable damage might still exist, including possible lost profits damages or gains reasonably anticipated from subdividing and selling the acreage which appellants thought they purchased.<sup>143</sup>

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<sup>136</sup> *Cory*, 225 Cal. Rptr. at 631-632.

<sup>137</sup> *Id.* at 633.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Cory*, 225 Cal. Rptr. at 633.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*



**V. THE 1990S—SALAHUTDIN, ALLIANCE MORTGAGE AND ONOFRIO**

**A. 1994 - *Salahutdin v. Valley of California, Inc.***

In *Salahutdin v. Valley of California, Inc.*,<sup>144</sup> a property purchaser sued Coldwell Banker for the misrepresentations of its broker-employee, Siegel, concerning the boundaries of a property and the buyer's ability to subdivide to induce plaintiff's purchase.<sup>145</sup> Siegel had accepted the seller's agent's representations as to size, looked at the multiple listing sheet and "eyeballed" the property before representing to plaintiffs it was "more than an acre."<sup>146</sup> He did not, however, tell the buyers that he had not independently confirmed the property size nor whether it could be subdivided by the buyers.<sup>147</sup> Plaintiff sued for negligent misrepresentation for, *inter alia*, defendants' concealment of its failure to adequately investigate or disclose the true facts.<sup>148</sup>

Expert testimony confirmed the broker had an obligation to not merely accept the seller's representation as to the property size and to "eyeball," but to either confirm the accuracy of that statement or at least advise plaintiffs he had done nothing to establish the accuracy of this information.<sup>149</sup> The trial court applied § 3333 and computed damages by comparing the value of the property plaintiffs received and the value of the property they would have received had the broker's representations been true, which it referred to as a "benefit of the bargain" measure.<sup>150</sup> The court accepted plaintiffs' appraiser's testimony that as of November, 1991, the date nearest trial, the fair market value of comparable property that could be subdivided would be \$1,100,000 and the value of the subject property, given there was only a remote possibility that a variance could be obtained in the future to allow subdivision, was \$925,000.<sup>151</sup> The trial court, as in *Anderson*, examined the value of the property by asking what a

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<sup>144</sup> 29 Cal. Rptr. 2d 463 (Ct. App. 1st Dist. 1994).

<sup>145</sup> *Id.* at 464.

<sup>146</sup> *Id.* at 465.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Salahutdin*, 29 Cal. Rptr. 2d at 465-66.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 466.

property with the characteristics represented would have had *on the date of trial*, awarding the difference between what plaintiffs should have been able to realize as of the trial date and what plaintiffs actually received, as a result of fiduciary misconduct.<sup>152</sup>

On appeal, the court began by explaining that the broker's liability was not predicated on a breach of CCC § 2079 for a breach of the broker's inspection and disclosure which requires a reasonably competent and diligent "visual" inspection and disclosure to a prospective purchaser of "all facts materially affecting the value or desirability of the property that such an investigation would reveal."<sup>153</sup> Absent "red flags" visible from a reasonably diligent visual inspection indicating the property was not the size represented, that duty would not encompass a duty to survey the property to make sure it was the size represented.<sup>154</sup> However, what was really at issue was the broker's *fiduciary duty to his own client* to refrain from making representations of fact material to the client's decision to buy the property without advising that he was merely passing on information received from the seller, without verifying it.<sup>155</sup>

The court explained that under the doctrine of constructive fraud, a fiduciary is liable to his principal even if his conduct is not actually fraudulent.<sup>156</sup> Constructive fraud is a unique species of fraud applicable only to a fiduciary or one in a confidential relationship and breach of a fiduciary duty, the court noted, usually constitutes "constructive fraud."<sup>157</sup> The failure of the fiduciary to disclose a fact to his principal which might reasonably be expected to affect the fiduciary's motives or the principal's decision, which fact is known (or should be known) to the fiduciary, may constitute constructive fraud, as can even a careless misstatement.<sup>158</sup> A broker who acts as an innocent conduit of a seller's fraud may be innocent of fraud, but liable on a constructive fraud theory if he or she passes on the misstatements as true without personally investigating them or disclosing that the information has not been verified because the principal has a right

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 466 n.3.

<sup>154</sup> *Salahutdin*, 29 Cal. Rptr. 2d at 465-66.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 466.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

to rely on the broker's statements.<sup>159</sup>

Siegal was required to refrain from advising his clients that the parcel was more than an acre and could therefore be subdivided, and that the fence represented the southern boundary of the property where he did not know that to be the case.<sup>160</sup> Although he was not required to investigate the sellers' representations or the truth of the description contained in the multiple listing service sheet before showing the property to plaintiffs, he was required to tell plaintiffs he had not verified the information he was passing on to them and that he was actually relying on the description the sellers provided.<sup>161</sup> Although the court noted that there is no clear line establishing when a fiduciary's breach of the duty of care will be merely negligent and when it may be characterized as constructive fraud, it did note a breach of a fiduciary duty *usually* constitutes constructive fraud.<sup>162</sup>

On appeal, the court observed that the cases on the measure of damages were not consistent in their treatment of the measure of damages for breach of fiduciary duty, citing examples of the courts taking confusing and conflicting positions.<sup>163</sup> The court observed that the consensus of courts and commentators found that although CCC § 3343, the out-of-pocket measure, governs the measure of damages for fraud in the purchase, sale or exchange of real property, an exception is recognized where a fiduciary relationship existed between the parties, in which case CCC §§ 3333 and 1709 govern.<sup>164</sup> The court further observed that commentators had identified a split in authority regarding the measure of damages in fiduciary fraud cases.<sup>165</sup> First,

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<sup>159</sup> *Salahutdin*, 29 Cal. Rptr. 2d at 465-66.

<sup>160</sup> *Id.* at 466.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 466-67.

<sup>163</sup> It cited as examples: *Gagne v. Bertan*, 275 P.2d 15 (Cal. 1954), which cited CCC § 3333, rather than § 3343 in support of the "out-of-pocket" standard in a case not involving a fiduciary, *Ford*, 111 Cal. Rptr. at 331, and *Burkhouse*, 96 Cal. Rptr. at 198, involving fiduciaries, both of which relied on CCC § 3343 to support an award of more expansive damages than available under the "out-of-pocket" standard under § 3343. It noted that *Simone v. McKee*, 298 P.2d 667 (Cal. 1956), supports a broad measure of damages exceeding the "out-of-pocket" standard by reliance primarily upon CCC § 3333, but stated § 3343 would also support such award. In *Savage v. Mayer*, 203 P.2d 9 (Cal. 1949) and *Simone*, the court observed that the damages awarded included disgorging of secret profits by the fiduciary, but that in *Walsh v. Hooker & Fay*, 28 Cal. Rptr. 16, 22-23 (Ct. App. 1st Dist. 1963), the same court held that the award of the broader measure of damages under § 3333 was not limited to the secret profit situation.

<sup>164</sup> *Salahutdin*, 29 Cal. Rptr. 2d at 468.

<sup>165</sup> *Id.* at 468-69 (citing cases and commentators).

cases adopting a benefit-of-the-bargain-approach<sup>166</sup> and second, courts holding that § 3333 limits the defrauded principal's recovery to the extent of financial injury sustained and does not authorize the plaintiff to recover the benefit of his or her bargain.<sup>167</sup> The court cited commentators who attempted to explain the division by distinguishing between actions by a principal against his agent for *fraud* (in which the measure of damages for fiduciary fraud is the broader "benefit of the bargain" rule) and actions for negligence, which apply the "out-of-pocket" measure.<sup>168</sup>

The case was further complicated because although the parties agreed § 3333 was applicable against a fiduciary, the case was tried on a negligence theory against the broker and was complicated, again, by the fact that the issue seemed to be turning on whether the case was pleaded as a negligent misrepresentation case or a constructive fraud case; a question of pleading, rather than substantive damage theory.<sup>169</sup>

Recognizing the split in views, the *Salahutdin* Court chose to follow Division 2 courts that apply the broader measure of damages and it refused to limit damages to the out-of-pocket measure.<sup>170</sup> The appeal court affirmed the trial court's decision to calculate benefit of the bargain damages based on the date of discovery of the wrongdoing, rather than the transaction date.<sup>171</sup> Distinguishing out-of-pocket awards, which are usually calculated as of the transaction date, the court observed that benefit of the bargain damages may appropriately be calculated as of the date of discovery of the fraud.<sup>172</sup> The court stated, "Applying the difference as of the date of the transaction

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<sup>166</sup> *Id.* at 468; *see, e.g., Pepitone*, 134 Cal. Rptr. at 709; *Walsh*, 28 Cal. Rptr. at 16; *Simone*, 298 P.2d at 667; *Lund v. Albrecht*, 936 F.2d 459 (9th Cir. 1991); *Stout*, 586 P.2d 1228 (affirming award of broader remedy for fiduciary fraud as "consequential" or "additional" damages under CCC § 3343).

<sup>167</sup> *Salahutdin*, 29 Cal. Rptr. 2d at 468-69; *see, e.g., Walters*, 147 Cal. Rptr. at 655; *Overgaard*, 137 Cal. Rptr. at 412.

<sup>168</sup> *Salahutdin*, 29 Cal. Rptr. 2d at 469 ("2 MILLER & STARR, CALIFORNIA REAL ESTATE § 3.23, at 134-35, 137-38 (2d ed. 1989); *see* Timothy O'Leary, *Limiting the Fiduciary Duty Exception to the Out-of-Pocket Rule*, 16 REAL PROP. L. REP. 145, 145-47 (Cont. Ed. Bar, April 1993). That distinction led MILLER & STARR to explain *Overgaard* and *Christiansen v. Roddy*, 231 Cal. Rptr. 72 (Ct. App. 5th Dist. 1986), which rely on CCC § 3333 while applying the "out-of-pocket" loss rule, as decisions based on the negligence of the fiduciary and not upon actual or constructive fraud. (2 MILLER & STARR, *supra*, § 3.23, at 138 n.27).

<sup>169</sup> *Salahutdin*, 29 Cal. Rptr. 2d at 469.

<sup>170</sup> *Id.* at 469-70.

<sup>171</sup> *Id.* at 470.

<sup>172</sup> *Id.* at 470-71.

would defeat the goal of compensation for the entire loss where, as here, discovery of the fiduciary's constructive fraud did not occur until years after purchase of the property."<sup>173</sup>

Aside from its careful detailing of the authority split on damages and interpretation of § 3333 regarding bargain damages, *Salahutdin* made clear its determination to apply bargain damages traced to policies underlying CCC §§ 3333 and 1709.<sup>174</sup> It made clear that although the distinction between fiduciary negligence and fraud was important, its implications remained unclear given the doctrine of constructive fraud in California's fiduciary law.<sup>175</sup> It relied on the "common-thread" among fiduciary wrongdoing cases, i.e., the principle that the "faithless fiduciary" must "make good the full amount of the loss of which his breach of faith is a cause."<sup>176</sup> Section 3333 requires the defrauding fiduciary to make plaintiff whole for "all the detriment proximately caused"—and the loss of one's contract bargain seems fairly characterized as a "detriment."<sup>177</sup>

### B. 1995 - *Alliance Mortgage Co. v. Rothwell*

In *Alliance Mortgage Co. v. Rothwell*,<sup>178</sup> a lender sued a real estate broker, title insurers and others for losses sustained when it made loans to fictitious borrowers in reliance on defendant misrepresentations.<sup>179</sup> Plaintiff alleged defendants prepared false residential purchase agreements and loan applications in the names of fictitious borrowers and deliberately inflated the "fair market value" property appraisals, inventing "comparable property" valuations to support the inflated and fraudulent appraisals.<sup>180</sup> They also allegedly falsified employment and deposit verifications, tax returns, credit histories,

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<sup>173</sup> *Id.* The court distinguished cases applying different damage theories in the context of negligent damage to real property in which damage could be repaired so recoveries were limited to the cost of repair or diminution in value, but not both. The court stated: "a rule that would allow diminution in value to be awarded when it exceeds the cost of repair does not fit within underlying tort doctrines. That case did not address the measure of damages for fraud and breach of duty by a fiduciary." *Id.* at 471.

<sup>174</sup> *Salahutdin*, 29 Cal. Rptr. 2d at 469.

<sup>175</sup> *Id.* at 469-70.

<sup>176</sup> *Id.* at 470.

<sup>177</sup> *Id.*

<sup>178</sup> 900 P.2d 601 (Cal. 1995).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 604.

and W-2 wage/income statements.<sup>181</sup> They also allegedly drafted inaccurate title reports that contained misleading descriptions of the properties in issue and falsely represented that escrow instructions had been followed, when they were not, and that required cash deposits and disbursements were made, when this had not occurred.<sup>182</sup> Defendants' misrepresentations regarding the properties' characteristics and values induced Alliance to make loans which far exceeded the properties' actual worth *at the time the loans were made*.<sup>183</sup>

The trial court dismissed the lender's cause of action but the appellate court reversed.<sup>184</sup> The California Supreme Court held that lender's purchase of property by full credit bid at a non-judicial foreclosure sale did not preclude it from maintaining a fraud action against third-party, non-borrowers who fraudulently induced the lender to make the loans.<sup>185</sup> The court noted that despite the case involving intentional fraud, the appellate court applied *Salahutdin*, a "negligent misrepresentation" case, that awarded bargain-based damages, stating:

The Court of Appeal here, relying on its earlier opinion in *Salahutdin v. Valley of California, Inc.*, concluded that the appropriate measure of damages for fraud by a fiduciary under section 3333 was the benefit-of-the-bargain rule. *Salahutdin*, however, involved the measure of damages for a fiduciary's negligent misrepresentation. We have previously held that a plaintiff is only entitled to its actual or "out-of-pocket" losses suffered because of fiduciary's negligent misrepresentation under § 3333.<sup>186</sup>

The Supreme Court thus appeared critical of both the appellate court's reliance on *Salahutdin* and of *Salahutdin's* reliance on § 3333 to award bargain-based damages in a negligence case, contrary holdings it seemed to believe mandated application of the out-of-pocket rule. The Supreme Court suggested § 3333 damages might be greater for a fiduciary's intentional misrepresentation, but declined to

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Alliance*, 900 P.2d at 605.

<sup>184</sup> *Id.* at 603-04.

<sup>185</sup> *Id.* at 616.

<sup>186</sup> *Id.*

address the issue.<sup>187</sup> *Salahutdin*, however, made clear its application of § 3333 was not based only on the fact that negligent misconduct had been alleged, but because negligent fiduciary misconduct, almost always, amounts to constructive fraud, under California law.<sup>188</sup> The question, then, was whether a non-intentional misrepresentation equivalent to “constructive fraud” should be treated, for damage purposes, in the same way intentional fraud by a fiduciary is treated (i.e., subject to bargain-based damages under § 3333) or as negligent conduct (subject to out-of-pocket damages). *Alliance*, not addressing the constructive fraud issue, identified the issue as whether intentional fraud would be subject to heightened damages, but found resolution of that issue unnecessary.<sup>189</sup>

### C. 1997 - *Onofrio v. Rice*

In *Onofrio v. Rice*,<sup>190</sup> a mortgagor sued a foreclosure consultant for violations of his duty as real estate broker and consultant when he and his wife, through a series of unethical and illegal acts, managed to buy plaintiff’s property at foreclosure sale conducted pursuant to a notice of default on a deed of trust.<sup>191</sup> Applying CCC § 2945.6, which provides an owner may bring an action against a foreclosure consultant for violation of the statute, along with exemplary damages, the court calculated actual damages based on difference between what the foreclosure consultant caused plaintiff to pay for her property at foreclosure sale and the property’s market value, awarding plaintiff \$65,174 actual damages and \$195,523 exemplary damages.<sup>192</sup> The appeal court, finding no cases defining the standard by which § 2945.6 actual damages are to be determined, found bargain based damages justified by *Salahutdin* and *Woosley v. Edwards*,<sup>193</sup> and affirmed the damage measure.<sup>194</sup>

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<sup>187</sup> *Id.* (“While the measure of damages under section 3333 might be greater for a fiduciary’s intentional misrepresentation, we need not address that issue here. . . . The question before us is whether *Alliance* stated a fraud claim.”).

<sup>188</sup> *Salahutdin*, 29 Cal. Rptr. 2d at 469.

<sup>189</sup> *Alliance*, 900 P.2d at 604.

<sup>190</sup> 64 Cal. Rptr. 2d 74 (Ct. App. 4th Dist. 1997).

<sup>191</sup> *Id.* at 75-76.

<sup>192</sup> *Id.* at 79-80.

<sup>193</sup> 117 B.R. 524 (Bankr. 9th Cir. 1990).

<sup>194</sup> *Onofrio*, 64 Cal. Rptr. 2d at 79.

## VI. THE 2000S—*HENSLEY, FRAGALE, STREBEL, AND POINTE*

### A. 2001 - *Hensley v. McSweeney*

In *Hensley v. McSweeney*,<sup>195</sup> a prospective purchaser of property whose agreement for purchase had fallen through brought suit against escrow agent who had held checks issued by purchaser in connection with transaction, asserting various tort claims.<sup>196</sup> Hensley alleged fiduciary and non-fiduciary causes of action both of which were submitted to a jury.<sup>197</sup> The trial court instructed the jury with California Civil Jury Instructions (“BAJI”) No. 12.56, which sets forth the out-of-pocket damages rule, and BAJI No. 12.57, which defines the benefit of the bargain damages rule.<sup>198</sup> The *Hensley* Court began by distinguishing the rules applicable in fraud and negligence cases noting that fraud cases involving the purchase, sale, or exchange of property, the out-of-pocket measure applied, under CCC § 3343, that the same rule applied with regard to a fiduciary’s negligent misrepresentation, and that the question of the proper measure of damages for intentional fraud by a fiduciary was not determined by *Alliance*.<sup>199</sup>

Although the law, the court held, was unclear as to the proper measure of damages, it also noted that the court had issued at least two published opinions to the effect that the measure of damages for fraud by a fiduciary is out-of-pocket damages, not the benefit of the bargain computation normally applicable to contract causes of action.<sup>200</sup> The parties had acknowledged a split of authority among the appellate courts with respect to the measure of damages for intentional fraud by a fiduciary, that the California Supreme Court had not yet definitively decided the issue and that *Overgaard* had questioned the applicability of BAJI No. 12.57 to instances where the defrauding party stands in a fiduciary capacity to the defrauded party because the cases cited in the Use Note in BAJI did not support this proposition.<sup>201</sup> *Hensley* distinguished *Salahutdin*:

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<sup>195</sup> 109 Cal. Rptr. 2d 489 (Ct. App. 5th Dist. 2001).

<sup>196</sup> *Id.* at 490-91.

<sup>197</sup> *Id.* at 491.

<sup>198</sup> *Id.* at 491-92.

<sup>199</sup> *Id.* at 492.

<sup>200</sup> *Hensley*, 109 Cal. Rptr. 2d at 491-92.

<sup>201</sup> *Id.* at 492 (citing *Overgaard*, 137 Cal. Rptr. at 415-17).



Although the court in *Salahutdin* applied the broader benefit of the bargain measure of damages, it acknowledged that the facts in *Salahutdin* were substantially similar to the *Overgaard* case in that both cases were tried on a negligence theory against the broker. *Onofrio* applied the benefit of the bargain measure of damages to a statutory cause of action pursuant to Civil Code section 2945.6 against a foreclosure consultant. Neither *Salahutdin* nor *Onofrio* are binding on this court.<sup>202</sup>

The *Hensley* Court concluded it was bound by *Overgaard* and it adopted an out-of-pocket measure of damages, expressly stating that given the absence of contrary authority from the Supreme Court, it would not depart from its long-standing decision in *Overgaard*, nor depart from *Overgaard*'s observations regarding application of BAJI No. 12.57.<sup>203</sup> It held the appropriate measure of damages, even in fiduciary tort actions, would be the out-of-pocket measure, not the benefit of the bargain measure.<sup>204</sup>

#### B. 2003 - *Fragale v. Faulkner*

In *Fragale v. Faulkner*,<sup>205</sup> buyers, the Fragales, sued seller, Faulkner, and real estate broker, Messing, for intentional and negligent misrepresentation, seeking benefit-of-the-bargain damages for their misconduct in the sale of a residential home.<sup>206</sup> Messing represented both parties in the transaction, a dual, inherently conflicted representation.<sup>207</sup> The Fragales alleged that defendants falsely represented that no structural defects or safety problems existed with respect to a laundry room and addition to the house, which was constructed without permits.<sup>208</sup> In fact, there were defects in the addition, defective interior walls, electrical wiring and other problems, hidden behind seller-installed paneling, which the Fragales dis-

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<sup>202</sup> *Id.* at 492.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> 1 Cal. Rptr. 3d 616 (Ct. App. 2d Dist. 2003).

<sup>206</sup> *Id.* at 618.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 618-19.

covered just after the purchase.<sup>209</sup>

On a Transfer Disclosure Statement, boxes indicated “[r]oom additions, structural modifications or other alterations or repairs made *without necessary permits . . . not in compliance with building codes.*”<sup>210</sup> In response to buyer’s questions, Faulkner wrote: “[l]aundry room, bonus room, MBR closet, no permits. Doorway can be closed if necessary from bonus room to BR.”<sup>211</sup> Messing did not instruct the seller to provide further disclosure.<sup>212</sup>

Messing had several further discussions with Fragale about the lack of permits, explaining they were built without someone “pulling a building permit.”<sup>213</sup> The Fragales inspection company reported no major defects, but noted the lack of permits.<sup>214</sup> Fragale, concerned about what was under the paneling, sent a list of questions to Faulkner and asked, as to the “unpermitted closet and laundry room,” whether the current owners made the improvements.<sup>215</sup> The buyers responded they bought house without permits.<sup>216</sup> In response to the question whether the rooms were basically built to code without permits, Faulkner responded that he was not sure.<sup>217</sup> Faulkner responded “no” to the question whether there were any structural deficiencies that might be a safety concern that should be addressed upon taking possession.<sup>218</sup> Fragale told Messing he needed to know the condition of the walls behind the paneling, and Messing told him that he had contacted the Faulknors and they said the walls were fine, that anything that might need to be done would be cosmetic and that the paneling could be taken off and the walls painted, and that there was just wall behind the paneling.<sup>219</sup>

Fragale testified he knew the bonus room and laundry room were not permitted, and he talked to Messing about what this meant and whether the rooms were built to Code, but just not permitted.<sup>220</sup>

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<sup>209</sup> *Id.* at 619-20.

<sup>210</sup> *Fragale*, 1 Cal. Rptr. 3d at 619 (emphasis added).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Fragale*, 1 Cal. Rptr. 3d at 619.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Fragale*, 1 Cal. Rptr. 3d at 619.

Messing told him not to worry about it, that there was no problem and that they would be fine for another twenty years.<sup>221</sup> After the Fragales took possession, they removed the paneling and found that major alterations had been concealed, including removal of plaster-board, false ceilings and walls, and dangling electrical wires.<sup>222</sup> The Fragales' expert testified the cost of repair, including demolition of the structurally defective bonus room, would be \$80,000.<sup>223</sup>

After plaintiff's case, Messing and Faulkner moved for nonsuit.<sup>224</sup> Messing's motion contended the Fragales offered no admissible evidence of diminution in the value of the property, as required under CCC § 3343.<sup>225</sup> The Fragales moved to reopen their case to allow Fragale to testify as to the value of the property, and to amend the pleadings to state a cause of action for fiduciary breach.<sup>226</sup> The trial court ruled diminution of value had not been established and denied the Fragales's motion to reopen so Fragale could testify on that issue.<sup>227</sup> The court denied Messing's motion for nonsuit and allowed the case to go to the jury on subparagraph 2 of BAJI 12.56, namely, the cost of the repair.<sup>228</sup> The court instructed the jury as follows:

The amount of such award shall include, number one, the difference, if any, between the actual value of that with which the plaintiff parted and the actual value of that which was received. This is sometimes referred to as the out-of-pocket loss. . . . Number 2, in addition to out-of-pocket loss, if any, plaintiff is entitled to recover any additional damage arising from the particular transaction, including an amount which could compensate the plaintiff for loss of use and enjoyment of the property to the extent that any such loss is caused by the fraud.<sup>229</sup>

The jury returned special verdicts against Messing and Faulkner, finding each of them liable for intentional misrepresentation and neg-

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<sup>221</sup> *Id.* at 619

<sup>222</sup> *Id.* at 620.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Fragale*, 1 Cal. Rptr. 3d at 620.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 620 n.3.

ligent misrepresentation, and awarded damages against each on both causes of action.<sup>230</sup> On the intentional misrepresentation claim against Messing, the jury found the total amount of all damages suffered was \$19,000; the same question on the negligent misrepresentation claim against Messing elicited an answer of \$12,000.<sup>231</sup> The same questions as to Faulkner elicited answers of \$8,000 in each case.<sup>232</sup> Messing moved for a judgment notwithstanding the verdict arguing the Fragales offered no evidence of an intentional misrepresentation and no evidence of the value of the property at the time of transfer.<sup>233</sup> The court held there was no evidence of what the market value of the property would have been had the true facts been known regarding the lack of permits and the lack of compliance with the building code and, for that reason, held that the Fragales failed to show damages within the meaning of CCC § 3343.<sup>234</sup> The Fragales appealed.<sup>235</sup>

The Court of Appeals held that because of the dual agency, Faulkner owed fiduciary duties to buyer.<sup>236</sup> It held damages for fiduciary fraud are measured under CCC § 3333, rather than CCC § 3343, and that the measure of damages for a fiduciary's intentional misrepresentation is not confined to out-of-pocket losses.<sup>237</sup> In cases of fraud by a fiduciary the broader measure of damages provided by CCC §§ 1709 and 3333 apply, including compensation “for all the detriment proximately caused” under § 3333, and “any damage” the defrauded party suffers, under CCC § 1709.<sup>238</sup> The *Fragale* Court relied on *Salahutdin*, stating “the remedy afforded by sections 1709 and 3333 aims at compensation for any and *all the detriment proximately caused* by the breach.”<sup>239</sup> The court continued:

One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is *liable for any damage which he thereby suffers*. In an

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<sup>230</sup> *Fragale*, 1 Cal. Rptr. 3d at 620.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 620-21 n.4.

<sup>233</sup> *Id.* at 620.

<sup>234</sup> *Id.* at 620-21.

<sup>235</sup> *Fragale*, 1 Cal. Rptr. 3d at 621.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 621-22 (citing *Alliance*, 900 P.2d. at 610).

<sup>238</sup> *Id.* at 623.

<sup>239</sup> *Id.*

action by a principal against an agent arising from the agent's fraud, *these two principles have been interpreted as providing a measure of damages based on the broader 'benefit-of-the-bargain' rule because a fiduciary should be responsible to compensate his or her principal for the full amount of the loss caused by his or her breach of duty.*<sup>240</sup>

The Second District fashioned a bargain-based remedy to enable plaintiffs' expectancy interest to be realized through a repair-cost-based money damage award.<sup>241</sup> Because the *Fragales* presented evidence of their repair costs, the award of such costs placed the buyers in the position they would have enjoyed if Messing's false representation were true and enabled the buyers to place the property in the condition they believed existed at the time of purchase.<sup>242</sup> The buyers thus obtained their bargain through damages, equitable in the circumstances which compensated them for all the "detriment proximately caused" by Messing's misrepresentation.<sup>243</sup> From the perspective of realized expectancy, the *Fragale* award was similar to the *Anderson* and *Salahutdin* awards.

On appeal, the Court of Appeal first addressed plaintiffs' claim for negligent misrepresentation, concluding that the out-of-pocket rule would control, under *Alliance Mortgage*.<sup>244</sup> However, a different result followed from the *Fragales*' claim against Messing for intentional misrepresentation. Joining courts that adopted the broader measure of damages for fiduciary fraud, the *Fragale* court concluded that damages should not be limited to out-of-pocket losses.<sup>245</sup> Rather, the result consonant with the principle that "the faithless fiduciary

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<sup>240</sup> *Fragale*, 1 Cal. Rptr. 3d at 623 (quoting 2 MILLER & STARR, *supra* note 168, at 190-91) (emphasis added).

<sup>241</sup> *Id.* at 623-24.

<sup>242</sup> *Id.*

<sup>243</sup> Repair costs are unavailable, however, where they are not traceable to the misrepresentation at issue. *See, e.g., Walters*, 147 Cal. Rptr. at 670-71 (where property was purchased based on misrepresentations regarding its boundaries, the appellate court rejected the plaintiff's claim of damages for repair of the property because those expenditures would have been made even if the property had been as it was represented to be, noting repair costs are not recoverable where they "constitute improvements of the property" and their cost is not "lost or rendered fruitless" as a result of the deceit; the court also rejected plaintiff's claims for the cost of landscaping, property taxes, title insurance, property insurance, interest on the loan, and maintenance).

<sup>244</sup> *Fragale*, 1 Cal. Rptr. 3d at 622-23.

<sup>245</sup> *Id.* at 622.

shall make good the full amount of the loss of which his breach of faith is a cause, and citing *Salahutdin*, refused to be constrained by the out-of-pocket rule.<sup>246</sup> Acknowledging authorities were not uniform on whether a measure of damages other than out-of-pocket losses should be applied in a case of an intentional misrepresentation by a fiduciary and that since *Alliance Mortgage*, the *Hensley* Court, concluded that out-of-pocket loss is the appropriate measure of damages for intentional fraud by a fiduciary,<sup>247</sup> the *Fragale* court observed that *Hensley* did not discuss the propriety of distinguishing intentional from negligent fiduciary misrepresentations.<sup>248</sup>

The Second District, in *Fragale*, expressly rejected the Fifth District's ruling in *Hensley*.<sup>249</sup> Instead, it held that the "preferable view" is that damages for fraud by a fiduciary should not be limited to out-of-pocket losses.<sup>250</sup> The *Fragale* court, discussing *Salahutdin*, noted that the case pre-dated the statement in *Alliance* that only out-of-pocket losses may be recovered where a fiduciary engages in negligent misrepresentation but while *Salahutdin* was tried on a negligent misrepresentation theory, the trial court had also held that the real estate agent committed constructive fraud.<sup>251</sup> For that reason, it refused to limit damages to plaintiffs' out-of-pocket loss and, instead, permitted a bargain-based measure, under CCC § 3333, comparing the value of plaintiffs' property with the value of comparable property that could be subdivided.<sup>252</sup>

*Fragale* presented claims of both intentional and negligent misrepresentation and there was sufficient evidence of "recklessness" to permit a jury to conclude "intentional misconduct" had occurred—in other words, the jury could conclude, as it apparently did, that Messing had made representations recklessly without knowing whether they were true or false. He had testified that he discussed with Faulkner "whether or not there were any conditions existing on the property that were not built to code," that the discussion referred to the laundry room and bonus room both built without permits, and

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 622-23.

<sup>248</sup> *Id.*

<sup>249</sup> *Fragale*, 1 Cal. Rptr. 3d at 623.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 623-24.

<sup>252</sup> *Id.* at 623 n.8.

that “there were things about those rooms that were not to code.”<sup>253</sup> Messing testified to his own observations of the rooms and that because the ceiling was barely above head height, he was sure it was not built to code and that this was what he called a “red flag.”<sup>254</sup>

Nevertheless, Fragale testified that Messing had assured him that the addition was built to code, that it just happened to not be permitted.<sup>255</sup> On this basis, a reasonable jury could conclude, per the court’s instructions, that Messing “must have known that the representation was false when made or must have made the representation recklessly without knowing whether it was true or false.”<sup>256</sup> Making statements without knowing whether they are true or false, *i.e.*, recklessly made statements, suffice, in the Second District, under *Fragale*, to justify a bargain-based award, as the functional equivalent of an intentional misrepresentation.<sup>257</sup>

### C. 2006 - *Strebel v. Brenlar Investments, Inc.*

In *Strebel v. Brenlar Investments, Inc.*,<sup>258</sup> a prospective home purchaser, Strebel, sued a real estate agency and its agent for fraud for the agent’s failure to disclose the property had tax liens and judgments exceeding the agreed upon value of the property rendering it unsalable.<sup>259</sup> Strebel sold his home to generate funds for the purchase of the new home but the escrow on the new home could not close due to the liens and judgments.<sup>260</sup> The broker was acting as a dual agent at the time of the transaction and so was deemed a fiduciary of the plaintiff buyer.<sup>261</sup> The question was what the measure of damages should be where a fiduciary fraudulently induces the sale of real property by failing to disclose a material fact unrelated to the value of the property.<sup>262</sup>

Plaintiff sued, *inter alia*, for the lost appreciation of the home that he sold with the measuring period the time between the date he

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<sup>253</sup> *Id.* at 624 n.10.

<sup>254</sup> *Fragale*, 1 Cal. Rptr. 3d at 624 n.10.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> 37 Cal. Rptr. 3d 699 (Ct. App. 1st Dist. 2006).

<sup>259</sup> *Id.* at 701.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

sold his original home and the date of trial.<sup>263</sup> Plaintiff's expert calculated damages by subtracting the 1999 sale price of his home from his opinion of the trial-date current fair market value of the house.<sup>264</sup> The expert relied upon on a study of comparable sales and a market survey showing the rate of appreciation in the area in which the home was located, net of closing costs.<sup>265</sup>

The trial court admitted evidence of appreciation, holding lost appreciation a proper element of recovery under CCC § 3343, as well as CCC §§ 1709 and 3333 for "all harm or loss caused" by defendant's wrongful conduct, whether or not it could be anticipated.<sup>266</sup> The court began by observing the out-of-pocket rule would not be applicable as fiduciary fraud was alleged; instead, the broad tort recovery rules in CCC §§ 1709 and 3333 would govern.<sup>267</sup> The court acknowledged a split in authority regarding the proper measure of damages under CCC § 3333, contrasting *Fragale* and *Pepitone* with *Overgaard* and *Hensley*, and that CCC § 3333 does not set forth a bargain-based rule, but merely a tort measure of damages designed to compensate plaintiff for any loss sustained—not to provide the benefit of his bargain.<sup>268</sup>

Plaintiff's damages were the result of non-disclosure of liens and judgments neither of which directly related to the actual value of the property and the court observed that the question was not whether plaintiff was entitled to out-of-pocket losses or the benefit of his bargain, but whether the amount by which the value of home appreciated after he sold was a reasonable measure of the harm suffered as the consequence of defendant's fraud.<sup>269</sup> Tort damages, the court continued, are intended to fully compensate the victim for all the injury suffered.<sup>270</sup> Observing that CCC § 3333 does not provide any fixed measure of damages, the court explained that it was required to award whatever measure "most appropriately compensates" the injured party for the loss sustained.<sup>271</sup>

Plaintiff argued he was injured because defendant's fraud

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<sup>263</sup> *Strebel*, 37 Cal. Rptr. 3d at 701.

<sup>264</sup> *Id.* at 702.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 703.

<sup>267</sup> *Id.*

<sup>268</sup> *Strebel*, 37 Cal. Rptr. 3d at 705.

<sup>269</sup> *Id.* at 705-06.

<sup>270</sup> *Id.* at 706.

<sup>271</sup> *Id.*



caused him to sell his home sooner than he would otherwise have done and that this rendered him unable to buy a replacement home before housing values substantially increased.<sup>272</sup> The resulting decrease in buying power of his proceeds in a rapidly appreciating housing market prevented him from buying what he could have bought had there been no fraud and, for that reason, the appeal court held that the jury was entitled to find recovery of lost appreciation was reasonable compensation for plaintiff's then inability to buy an acceptable home.<sup>273</sup>

Defendants, relying on *Anderson*, argued such damages were not permissible under CCC §§ 3333 and 1709 because damages caused by a fraud must be determined as of the date when the fraud took effect, not the date of a later increase or decline in value.<sup>274</sup> The court, however, noted that, in *Anderson*, the court held there was a basis in California law for "appreciation damages" and authority for giving the trier of fact discretion to choose a date other than the date of the fraud to "fix damages."<sup>275</sup> The court found that measuring plaintiff's damages as of the date of the sale would not provide compensation for the most significant portion of his losses and that applying appreciation-based damages, in the circumstances, was both reasonable and equitable:

[T]here is nothing inequitable about the recovery of appreciation damages in this case. The fact that . . . [plaintiff] received what was the fair market value for his house at the time he sold it did not eliminate financial loss from the premature sale of the property. . . . The amount by which the value of . . . [plaintiff's] former home appreciated after the fraudulently induced sale was a reasonable measure of his damage in this case.<sup>276</sup>

Appreciation damages were held permissible under CCC §§ 3333 and 1709.<sup>277</sup>

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<sup>272</sup> *Id.*

<sup>273</sup> *Strebel*, 37 Cal. Rptr. 3d at 706.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 707.

<sup>276</sup> *Id.* at 709-10.

<sup>277</sup> See also *Everest Properties II v. Prometheus Dev. Co.*, No. A114305, 2007 WL 2793374, at \*29-30 (Cal. Ct. App. 1st Dist. Sept. 27, 2007) (trial court properly computed benefit-of-the-bargain damages by calculating the primary component of damages as the dif-

**D. 2007 - *Pointe San Diego Residential Community, L.P. v. W.W.I. Properties, L.L.C.***

The dispute in *Pointe San Diego Residential Community, L.P. v. W.W.I. Properties, L.L.C.*,<sup>278</sup> arose from a series of real estate financing transactions involving development of 1000 acres, a mixed use community that would include a business park, golf course and resort and over 900 single family homes.<sup>279</sup> One fiduciary breach claim was pleaded as both a direct and derivative suit.<sup>280</sup> Error was alleged because the court refused to apply a benefit of the bargain theory to the fiduciary breaches of the party which was providing the financing.<sup>281</sup> The Fourth District began its analysis by observing neither CCC §§ 3300 nor 3333 expressly sets forth a benefit-of-the-bargain rule but cases note that § 3300 tends to give the injured party the benefit of his bargain.<sup>282</sup>

The Fourth District upheld the trial court's determination of damages relying on the analysis set forth in *Overgaard*, specifically that CCC § 3333 does *not* set forth any benefit of the bargain rule and does not provide for recovery any contract bargain but it does permit courts to compensate plaintiff for all their losses.<sup>283</sup> The court explained that although in a given factual situation the result of applying CCC §§ 3300 or 3333 might turn out to be the same, the idea behind § 3333 is simply to make the successful plaintiff whole whereas the idea behind CCC § 3300 is to enforce a contract.<sup>284</sup> The court relied on *Overgaard*, noting *Overgaard* had identified cases in which

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ference between the value of certain apartments specified in a proxy statement, and the appraised fair market value at the time of approval of a merger; court considered evidence that the value of the apartment buildings increased after the merger, as an element of compensatory damages, along with lost prospective profits under CCC § 3333, concluding that damage measure would compensate plaintiff for "all detriment of any kind proximately caused" and "plaintiff was not limited to recovery of the actual value of the property of which it was deprived, but was also entitled to any unrealized future profits and increase in assets of the partnership that resulted from approval of the merger transaction."). *But see* Hogan v. Deangelis Const., Inc., Nos. A117321, A118257, A120840, 2009 WL 1398646 (Cal. Ct. App. 1st Dist. May 20, 2009) (rejecting claim for lost appreciation of home sold to fund acquisition of new property (as well as compensation for loss of favorable tax basis in sold home) and rejecting claim for appreciation as inconsistent with rescission remedy).

<sup>278</sup> No. D044695, 2007 WL 1991205 (Cal. Ct. App. 4th Dist. July 11, 2007).

<sup>279</sup> The transactions are described in detail in the decision. *Id.* at \*3-7.

<sup>280</sup> *Id.* at \*2.

<sup>281</sup> *Id.* at \*3.

<sup>282</sup> *Id.* at \*7 (quoting *Overgaard*, 137 Cal. Rptr. at 416).

<sup>283</sup> *Pointe San Diego*, 2007 WL 1991205, at \*7.

<sup>284</sup> *Id.*

application of CCC § 3333 did not result in a benefit-of-the-bargain award.<sup>285</sup>

Holding that CCC § 3333 allows judges the discretion to fashion awards that compensate plaintiff for the detriment defendant's tortious conduct causes, the court explained that the real issue regarding the damage award was not whether, as a matter of law, plaintiff was entitled to recover bargain-based rather than out-of-pocket damages, but whether the breach of fiduciary duty damages the court awarded constituted a reasonable measure of the harm suffered as a consequence of tortious conduct.<sup>286</sup> Tort damages, the court explained, are awarded to fully compensate the victim for all the injury suffered.<sup>287</sup> There is no fixed rule for the measure of tort damages under § 3333 and courts should adopt the measure that most appropriately compensates the injured party for the loss sustained.<sup>288</sup> The court attributed analytical difficulties regarding the appropriate measure of damages to the plethora of "confusing rules" resulting from different types of cases, some based on contract, others on fraud, and still others on unjust enrichment, and criticized litigants and courts which considered the out-of-pocket and benefit-of-the-bargain rules as the sole "antagonists on the battlefield of damages" when, in fact, at times neither is actually applicable.<sup>289</sup>

It explained that plaintiff's argument rested on the erroneous premise that CCC § 3333 provides a benefit-of-the-bargain measure of damages in *all cases* involving breach of a fiduciary duty, and, therefore, that the court was required to apply that measure, as a matter of law, excluding all other possible measures of damages.<sup>290</sup> Rather, the court held that courts have the flexibility and discretion to award damages in whatever measure or amount most appropriately compensates the victim for all the detriment proximately caused by the specific breaches of fiduciary duty proved at trial.<sup>291</sup>

The court held that, as of the trial date, the development was on-going and that no net profits had been shown that would trigger

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<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Pointe San Diego*, 2007 WL 1991205, at \*7.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

the distribution provisions of the WWI Operating Agreement.<sup>292</sup> Although the trial court found a number of breaches of fiduciary duty, it also found that the sale at issue did not result in any damage so that the parties were effectively in the positions they previously occupied, aside from improper commission payments and improperly charged legal and accounting expenses.<sup>293</sup> The appeal court found no error in the lower court's approach to assessing the damages for breach of fiduciary duty.<sup>294</sup>

## VII. "CONTRACT BARGAINS," "ALL THE DETRIMENT," AND "ANY DAMAGE"

### A. California's Jury Instructions on Fraud and Deceit Damages

California's jury instructions provide guidance on fraud and deceit damages. BAJI 12.57 on Fraud and Deceit Damages, for example, states, in relevant part that: "The amount of such award shall be the difference between the actual value of that which the plaintiff received and the value which it would have had if the fraudulent representation had been true. This is sometimes referred to as the 'benefit of the bargain.'"<sup>295</sup>

The Use Note to BAJI 12.57 provides, in relevant part: "This instruction applies . . . to fraud in the purchase, sale or exchange of property, real or personal, where the defrauding party stands in a fiduciary relationship to the defrauded party."<sup>296</sup> As pointed out in *Hensley*, neither *Walsh* nor *Simone* support the proposition benefit of the bargain damages are available in California and other courts, noting the Use Notes do not support the proposition that benefit of the

<sup>292</sup> *Id.* at \*8.

<sup>293</sup> *Pointe San Diego*, 2007 WL 1991205, at \*8.

<sup>294</sup> See generally *Kolodge v. Boyd*, Nos. A101485, A102094, 2004 WL 2669272 (Cal. Ct. App. 1st Dist. Nov. 23, 2004) (law unclear as to whether benefit of the bargain must be awarded under CCC § 1709 where there a fiduciary duty is present—tort damages available for breach of fiduciary duty increase along a scale depending on the seriousness of the fiduciary's breach and that the amount of damages that may be awarded should turn on whether the breach was intentional or merely negligent and, if intentional, greater damages might be awarded if the intention was specific rather than general and, if the breach was negligent, greater damages might be awarded if the negligence was gross, rather than simple).

<sup>295</sup> CACI No. 12.57 (2015).

<sup>296</sup> *Id.* See *Walsh*, 28 Cal. Rptr. at 18; *Simone*, 298 P.2d at 669.

bargain damages are available, have rejected the instruction.<sup>297</sup> For example, in *CRSS Commercial Group, Inc. v. Toothman*,<sup>298</sup> the court criticized the instruction:

CRSS cites BAJI No. 12.57 as supporting the proposition that it is entitled to benefit of the bargain damages on its fraud claim. BAJI No. 12.57 is neither a statute nor a court opinion and has no precedential value in and of itself. Moreover, although BAJI 12.57 does indeed instruct that benefit of the bargain damages may be awarded to a plaintiff in a fraud action, the authorities cited in the Use Notes to the instruction do not stand for that proposition. In *Gagne v. Bertran*, the court held only that “damages whether for deceit, or negligence, must be measured by the actual losses suffered because of the misrepresentation.” The court in *Roberts v. Karr* merely cited the holding in *Gagne* as authority for the same conclusion. Indeed, the *Roberts* court . . . specifically recognized that *Gagne* does *not* support an award of benefit of the bargain damages in a fraud action.<sup>299</sup>

The CRSS Court conceded the existence of authority awarding benefit of the bargain damages for fraud committed by a fiduciary.<sup>300</sup> Cases commenting on the BAJI 12.57 reflect the lack of clarity in the law and none clearly or comprehensively explain why the loss of a contract bargain does (or does not) fall within the “all the detriment” language of § 3333, or the “any damage which he thereby suffers” language of CCC§ 1709.

### **B. “All the Detriment Proximately Caused” and “Any Damage Which He Thereby Suffers”**

California Civil Code § 3282 defines “detriment” as “a loss or

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<sup>297</sup> *Hensley*, 109 Cal. Rptr. 2d at 492.

<sup>298</sup> 61 Cal. Rptr. 2d 673 (Ct. App. 1st Dist. 1997).

<sup>299</sup> *Id.* at 677-78 (quoting *Gagne*, 275 P.2d at 22, and *Roberts v. Carr*, 3 Cal. Rptr. 98, 103 (Ct. App. 4th Dist. 1960)).

<sup>300</sup> *Id.* at 678 (namely *Alliance*, 900 P.2d at 609-10; *Stout*, 586 P.2d at 1232; and *Salahudin* 29 Cal. Rptr. 2d at 469; but noted contrary authority in *Overgaard*, 137 Cal. Rptr. at 416-17).

harm suffered in person or property.”<sup>301</sup> As set forth in *Potter v. Firestone Tire & Rubber Co.*,<sup>302</sup> California courts have looked to the definition the term “harm” set forth in the Restatement Second of Torts.<sup>303</sup> It states, “ ‘Harm,’ under the Restatement Second of Torts means ‘the existence of loss or detriment in fact of any kind to a person . . . . According to the Restatement’s analysis, a plaintiff is entitled to recover damages from the tortfeasor for all ‘harm’—as opposed to ‘physical harm’—‘past, present and prospective, legally caused by the tort.’ ”<sup>304</sup> There is obvious circularity. The statute defines “detriment” in terms of “loss or harm.”<sup>305</sup>

The Restatement defines “harm” in terms of “loss” or “detriment” of “any kind.”<sup>306</sup> The “kind of harm,” in the cases discussed, is “financial harm,” loss of monies due a party injured by defendant’s failure to comply with fiduciary obligations. Loss of a real property contract bargain seems to naturally fall within the language “all the detriment” because some thing with a discernable value is being lost—and loss is “a harm” under California law, the Restatement and CCC § 3282. There has been substantial resistance to recognizing the loss of a contract bargain as a recoverable detriment in real property transactions governed by under CCC §§ 3333 and 1709 primarily because both statutes articulate tort remedies which, historically, have been counter-posed to contract remedies. Tort remedies normally do not include bargain-based expectancy damages.

Because tort and contract effectively operate in different legal worlds, the effort to read contract damages into the remedies provided under even broadly worded tort statutes has been viewed by some courts with hostility, *e.g.*, *Hensley* and *Overgaard*. However, where tortious conduct accompanies a contract breach and results in proximately caused financial harm, the economic detriment (loss) to the non-breaching party is equivalent to the financial value of the lost bargain. It is not necessary to conclude CCC §§ 3333 and 1709 provide benefit-of-the-bargain damages if the remedy for fiduciary breach caused harm may be properly measured by the value of the expectancy lost. This is why several cases have stated CCC §§ 3333

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<sup>301</sup> CAL. CIV. CODE § 3282 (West 2014).

<sup>302</sup> 863 P.2d 795 (Cal. 1993).

<sup>303</sup> *Id.* at 835-36.

<sup>304</sup> *Id.* at 822.

<sup>305</sup> CIV. § 3282.

<sup>306</sup> *Potter*, 863 P.2d at 822.

and 1709 damages most properly compensate plaintiff for all his detriment and, depending on circumstances, may be properly measured by an out-of-pocket, benefit-of-the-bargain or other measure of “most appropriate” damages to make plaintiff whole by compensating for “all detriment” suffered.<sup>307</sup>

### VIII. CONCLUSION

Whether one views the loss of a contractual financial benefit as a CCC § 3333 “detriment” or merely as a means of quantifying the “detriment suffered,” recovery measured by the loss of one’s bargain is available under CCC §3333 whether or not these statutes are construed to “permit,” “mandate” or “approximate” benefit of the bargain damages. Under CCC § 1709, the loss of a contract bargain is financial damage to the injured party and falls within the “all damages” statutory language. The quantum of damages under these statutes may, in a particular case, be measured by the economic loss of the bargain to the injured party. There is little difference between a statute which provides for a remedy equal to a benefit of the bargain award and one which expressly provides a benefit of the bargain remedy.

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<sup>307</sup> See *Martin v. Harpaz*, No B204388, 2009 WL 2596178 (Cal. Ct. App. 2d Dist. Aug. 25, 2009) (proper measure of damages is the measure which most appropriately compensates the injured party for all the loss sustained; plaintiffs were properly permitted to recover damages for the loss of equity in their home because trial court found plaintiffs could have kept their house and completed construction but for defendants’ fraud—damages measured by the loss of equity in the house at issue appropriate). See also *Amber Hotel Co. v. Chen*, No. B200271, 2009 WL 73624 (Cal. Ct. App. 2d Dist. Jan. 10, 2009) (where plaintiff alleged fiduciary fraud of dual agent broker in sale of a hotel, the extra measure of blameworthiness inhering in fraud and fact that courts are not concerned about the need for predictability about the cost of contractual relationships, in fraud cases, allowed plaintiffs to recover out-of-pocket and benefit-of-the-bargain damages).