If the House You Bought Is Haunted

By Sharlene A. McEvoy

Ghostbusters may be your only recourse

Most people would agree that one of the most important financial decisions a person makes in his or her life is the purchase of a house. Such a decision has vast economic and emotional implications, carrying with it at least a generation of debt and constituting the largest asset a person will own in his or her lifetime. Buyers spend a great deal of time and effort in scrutinizing potential dwellings—size, style, and location are examined with care. Indeed, buyers spend several hundred dollars to hire construction experts to examine the structural integrity of the building before the deal is finalized.

There have been many cases in which buyers have rescinded sales contracts or obtained damages for latent physical defects in the house such as a leaking roof,[1] cockroaches,[2] basement flooding,[3] cracked walls, foundation problems,[4] and the presence of uranium tailings.[5] Few would argue that justice demands that a buyer be recompensed for such serious latent physical defects in the property.

But what about disturbing events that have occurred on the property that might affect its value or the buyer's feelings about owning the property? Should the fact that a grisly crime occurred on the property or that a prior owner was infected with the human immunodeficiency virus (HIV) or that the house is reputed to be haunted be disclosed to the prospective buyer?

Many prospective purchasers may not know that during the past three years, state legislatures have quietly been passing laws deeming such information not to be material facts—not to be essential or relevant to the buyer when making a decision whether to purchase a house. These laws exonerate real estate agents and sellers from liability if they fail to disclose this information concerning "psychologically impacted" property.

One impetus for the passage of these laws was *Reed v. King*,[6] a California case decided in 1983. Dorris Reed had purchased a house from Robert King. Neither King nor his real estate agents had informed Reed that a woman and her four children had been brutally murdered on the property ten years earlier. After moving in, Reed learned of the gruesome incident from a neighbor and found that "no one was interested in purchasing the house because of the stigma" connected with it. Reed sued to rescind the sale and sought damages. When King and his agents successfully moved to dismiss, Reed appealed. The issue before the California Court of Appeals was whether in the sale of a house the seller must disclose that if was the site of a multiple murder.

Reed argued that not only did King and his agent know about the murders and fail to tell her about them but also the tragedy materially affected the market value of the house. Reed paid $76,000, but it was worth only $65,000.

The Court of Appeals worried that the stability of real estate transactions would be adversely affected by a decision favorable to Reed. Quoting an earlier case, it said, "The power to cancel a contract is a most extraordinary power. It is one which should be exercised with great caution. . . ." But it ruled in Reed's favor, saying:

> If information known or accessible only to the seller has a significant and measurable effect on market value and, as is alleged here, the seller is aware of this effect, we see no principled basis for making the duty to disclose turn upon the character of the information.

As a result of this decision, in 1987 California became the first state to pass a law defining a real estate agent's and an owner's responsibility in selling stigmatized real property.[7] While no state or federal appellate court has extended or even followed the *Reed* decision, since 1989 at least nineteen other states have passed statutes or adopted rules concerning psychologically impacted property.

AIDS

One case decided since *Reed v. King* dealt with the psychological impact of property owned by an AIDS sufferer.

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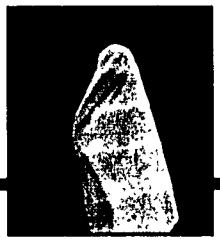

Is occupation by an AIDS sufferer a material fact?

Kleinfield v. McAnally[8] involved a Manhattan couple who entered into a contract to purchase a cooperative apartment. During an interview with the co-op board, they learned that the previous owner of the apartment had died of AIDS while living there. The couple stated that they did not want to go forward with the purchase; they indicated they would not have contracted to purchase the property if the real estate agent had told them that the previous owner had AIDS. However, to avoid a financial loss, they went through with the closing and moved into the apartment.

The couple subsequently sued the estate of the former owner and the real estate broker to rescind the sale and to recover damages for fraudulent misrepresentation and for the intentional infliction of emotional distress. The court dismissed the claim against the estate, saying that the plaintiffs should have preserved their rights by seeking to postpone the closing with the argument that "circumstances excused them from performance." Instead, "they weighed the economic and legal realities and decided that closing, rather than breach, was the better part of prudence."

The court also held that the prior owner's death from AIDS was simply not a "material fact"; absent an express request for information from the purchaser, it need not be disclosed. The court said:

> Death, of course, is the ever present handmaiden and twin of life. It occurs in homes and streets, in hospitals and in open spaces. The fact that members of plaintiffs' families had died previously does not mean that plaintiffs could thereafter wrap themselves in a cocoon and insulate themselves from the fact of death.

The New York Supreme Court further commented that the fact that the "plaintiff's morbid fear of death was unreasonable in the eyes of others or of utmost importance to them is beside the point."

Even though the court debunked the plaintiffs' concerns, such cases have caused realtors nightmares. Realtors have pressed state legislatures to enact laws stating that AIDS is not material to a home sale. Realtors want rules put in place to help head off expensive lawsuits based on charges of discrimination by sellers as well as by angry buyers.[9] New York attorney Marc H. Glick, who represented the defendant in *Kleinfield v. McAnally*, estimated that the case cost $20,000 in legal fees.[10]

The AIDS issue poses a peculiar problem because changes in the federal Fair Housing Act as well as states' Bills of Rights forbid discrimination on the basis of the HIV status of a resident.[11] AIDS should not be a major stumbling block for purchasers, because most authorities agree that the HIV virus can be communicated only by sexual contact, shared needles, and contaminated blood.[12] There is no evidence that the human immune deficiency virus can be transmitted through droplets in the air; by food; or by touching infected persons, their clothing, or the objects handled by them. Nor can HIV be spread by contact with toilet seats, bathtubs, showers, or doorknobs. AIDS is not a communicable disease like measles, tuberculosis, or influenza.[13]

There is no indication that living in a house formerly occupied by an AIDS sufferer is harmful. Nonetheless, there is considerable debate among realtors as to whether occupation by a person suffering with AIDS is a "material fact" that must be disclosed.[14]

> Broadly construing the materiality concept, a creditable argument can be made that a property owner's AIDS condition is material given the fear, albeit irrational, held by some persons that AIDS can be transmitted by casual contact, notwithstanding the overwhelming scientific evidence to the contrary, and also the social stigma attached to homosexuality and intravenous drug use through which AIDS is known to be communicated.[15]

Ghosts

Two other cases decided since the *Reed* decision in California dealt with the psychological impact of a purported haunting. In Hebron, Connecticut, JoAnn Rich claimed that the house she rented was haunted and won an award of $40. Rich had sought to recover a $1,250 security deposit, $500 partial payment of a month's rent, and the $185 fee paid to Ed and Lorraine Warren, nationally known "ghostbusters" who investigated the house and agreed that it was haunted. Lorraine Warren claimed that she felt the presence of a "confused, somewhat frustrated human spirit in the house." Rich produced photographs of a pink haze at the top of the stairway and a blue haze over a candle that would not burn down.[16]

Much more was at stake in *Stambovsky v. Ackley, et al.*[17] At issue was a house widely reputed to be possessed by poltergeists. In 1989, New York bond trader Jeffrey Stambovsky put down a $32,500 deposit on an eighteen-room Victorian mansion overlooking the Hudson River in Nyack, New York.[18] When an architect refused to work there because it was haunted, Stambovsky learned that seller Helen V. Ackley had published stories in *Reader's Digest* and the local press about the house's ghost, a cheerful "little person" in a Revolutionary War uniform, with a round, apple-cheeked face, who once ate a ham sandwich in her presence.

Stambovsky sued Ackley and real estate broker Richard Ellis to rescind the contract to purchase the $650,000 house. The New York Supreme Court

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noted that Ackley had publicized her close encounters with the spirit, and that in 1989 the house had been included in a five-home walking tour of Nyack, described in a newspaper article as a "riverfront Victorian with ghost." Therefore, the court concluded that "the reputation thus created goes to the very essence of the bargain between the parties, greatly impairing both the value of the property and its potential for resale." The court wryly noted that the broker was under no duty to disclose to a potential buyer the "phantasmal reputation of the premises" and that "in his pursuit of a legal remedy for fraudulent misrepresentation against the seller, plaintiff hadn't a ghost of a chance." Nevertheless, the court in a 3–2 decision allowed Stambovsky to seek rescission and recover his down payment. The case was later settled.

The majority's decision flies in the face of the settled New York law of caveat emptor, which still applies to real estate transactions.[19] Dismayed by the decision that set aside the sale, the New York State Association of Realtors is now trying to push legislation through the New York State Assembly to absolve brokers of any responsibility to disclose such information.[20]

The laws

If the realtors' associations are successful in their bid to dematerialize ghosts, New York will join twenty other jurisdictions that have similar laws or rules in effect. Eighteen states and the District of Columbia[21] have enacted legislation, while two have adopted rules.[22] There have been very few cases involving stigmatized property, but realtors have been spooked by cases like *Reed v. King, Kleinfield v. McAnally,* and *Stambovsky v. Ackley* to the extent that six jurisdictions passed laws in 1989,[23] five in 1990,[24] and eight in 1991.[25] Alaska considered but did not pass such a law in 1991, and Idaho's governor vetoed a bill in 1991.

Of the twenty jurisdictions' laws and rules that protect nondisclosure, only California's sets a time limit. California requires disclosure of the occurrence or the manner of death of the occupant of the real property if the death occurred within three years prior to the date the transferee seeks to purchase, lease, or rent the property. In no event is the transferee required to reveal that an occupant of that property was afflicted with or died from AIDS. However, an owner or his or her agent is not immunized from making an intentional misrepresentation in response to a direct inquiry from a prospective transferee of the property concerning deaths on the property.[26]

The nineteen other jurisdictions provide no duty to disclose at any time. It is clear from most of these laws that the real estate lobby was very effective in influencing state legislatures. While thirteen of these laws provide guidance for both the agent and the seller of the property,[27] five laws protect only the agent.[28]

Some of the laws cover only certain events. Fifteen jurisdictions specifically identify homicide and suicide,[29] while thirteen jurisdictions specify felonies[30] and two include death by natural causes[31] as events that need not be disclosed to prospective purchasers. All of the jurisdictions provide that the situations defined as having a psychological impact are not material to the sale, and therefore there is no duty for the agent and, in most jurisdictions, the owner to disclose such information to a purchaser.

Most of these statutes have been in place for only a few years; there has not yet been a challenge to determine their validity. A close examination, however, reveals that these laws are flawed in many ways.

First, what is the precise definition of "psychologically impacted?" Most states define it to mean that the property was suspected to be infected with the HIV virus or was the site of a homicide, suicide, or other felony. The typical statute uses the term "includes but is not limited to . . ." the above. It is conceivable that many other potentially stigmatizing situations would fall under this broad language, such as a house that was formerly a bordello, a drug dealer's headquarters, a gang hangout, a scene of child abuse or of a shoot-out, a graveyard, or a funeral home.

The wording of these statutes thus leaves considerable room for judicial mischief. Plaintiffs might raise spurious claims in order to rescind an unfavorable purchase contract.

Consider the plight of the Snedecker family, who moved from Hurleyville, New York, to Southington, Connecticut, in 1986 into a newly renovated, two-family, spacious colonial with a big yard. Much to their chagrin, they discovered that they were living in a former funeral home. The family lived in the house for well over a year and reported many unusual events, including three men who got into the locked house, a disembodied hand and arm fondling Mrs. Snedecker's teenage niece, and shattered rosary beads. A clerical blessing of the house and several masses were said to no avail. Ultimately, an exorcism banished the "evil spirits,"[32] so the family did not have to resort to secular rites in court.

Only Connecticut and Oklahoma provide an opportunity for a prospective buyer to ask questions about the property when in "the process of making a bona fide offer." If the would-be buyer

> advises an owner of real estate or his or her agent in writing that knowledge of psychological impact is important to his decision to purchase or lease the property, the owner, through his or her agent, shall report any findings to the purchaser or lessee in writing subject to and consistent with the applicable laws of privacy.[33]

Both states further provide that "if an owner refuses to disclose such information, his or her agent shall so advise the purchaser or lessee *in*

(*Continued on page 53*)

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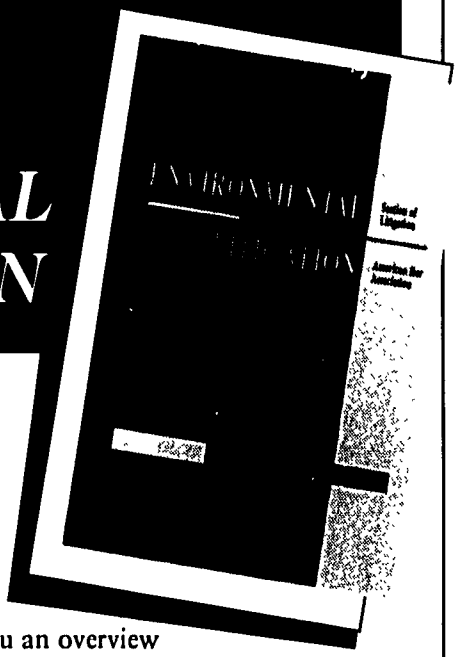

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standing orders adopted by some or all judges. The case management techniques discussed in this article are designed to be compatible with the CJRA, and many are appearing as features of CJRA plans.

14. *ACC/Lincoln*, cited in note 4, Practice and Procedure Order Upon Transfer Pursuant to 28 USC § 1407(a), filed April 24, 1990, at ¶ 13.

15. *ACC/Lincoln*, cited in note 4.

16. *FPI/Agretech*, cited in note 3.

17. See, for example, Northern District of California Local Rule 235-3.

18. See, for example, Central District of California Local Rules 6.1-6.4.2.

19. In determining whether to style this request as a formal motion, an ex parte application, or an informal letter request (with service to all counsel of record and unrepresented parties) counsel will be guided by the practice and requirements of the particular district and judge.

20. See "Sample Order Setting Initial Conference," MCL 2d § 41.2.

21. See MCL 2d §§ 21.63, 31.11.

22. See MCL 2d § 41.31.

23. MCL 2d § 30.12. See also MCL 2d § 21.41.

24. MCL 2d §§ 30.11, 32.11.

25. MCL 2d § 20.22-.225.

26. See also MCL 2d § 41.3, "Sample Case Management Order after Initial Conference," ¶ 2 (Organization of Counsel).

27. MCL 2d §§ 24.1, 30.41.

28. MCL 2d §§ 24, 30.

29. MCL 2d §§ 21.14, 30.11.

30. See 1 *Newberg on Class Actions* 2d (1985) § 3.43. Class denial is an extreme penalty that is viewed with disfavor unless prejudice would otherwise result. *Feder v. Harrington*, 52 FRD 178, 181-82 (SD NY 1970).

31. *ACC/Lincoln*, cited in note 4.

32. *In Re Oracle Securities Litigation*, 132 FRD 538 (ND Cal 1990).

33. *Id.* at 542-546.

34. *In re Activision*, 723 F Supp 1373, 1378-79 (ND Cal 1989).

35. See MCL 2d § 41.37-41.38.

36. See, for example, *FPI/Agretech*, cited in note 3, Pretrial Order No. 1: CASE MANAGEMENT, ¶ 5(h).

37. See MCL 2d §§ 42.1 *et seq.*, regarding role of sanctions, general principles, types of sanctions, procedures.

38. MCL 2d § 23.11.

39. See also MCL 2d § 23.12.

40. MCL 2d §§ 23.14-23.24, 30.4-47.

41. See 28 USC § 473(a)(6).

Haunted Houses

(*Continued from page 23*)

writing."[34] The statutes do not indicate whether or not a buyer can then withdraw the offer. Also, the laws are unclear as to whether the written query can be made at the time of the initial offer or at the time the deposit is placed when the seller accepts the offer. These loopholes will probably be resolved by litigation.

Some states, including Rhode Island and South Carolina, do not even offer the buyer an opportunity to ask questions before making the purchase. Their laws provide only that "under no circumstances shall the provision be interpreted as or used as authorization for an agent to make any misrepresentations"[35] of fact or any false statement. Such language is superfluous in light of common law fraud principles that allow a buyer a recovery against the owner or agent.

There are two other important issues regarding these statutes. First, how specific must the buyer's question be? If the buyer words the question to ask about a murder but not other felonies, what is the duty of the seller or agent? To answer the question truthfully may be to omit important information about some other stigma attached to the property. Statutes in Connecticut and South Carolina do not spell out how specific the question must be.

Another flaw in these laws, with the exception of California's, is that they are vague about time limits. If a buyer requests information of the seller and the latter responds that nothing untoward has ever occurred, and the buyer purchases the property but six months later finds out that a felony did occur on the property, how can the buyer prove the seller knew of the event? Not all sellers will be as candid as Helen Ackley was in advertising the eccentricities of her house. Is the seller responsible only for answering questions about events that occurred while he or she owned the property? Clearly, states should consider putting some time limits on the extent of the seller's or agent's liability.

Conclusion

Only a very small percentage of properties have been the sites of murders, suicides, or other felonies. "Psychologically impacted property" statutes have been passed or proposed at the behest of nervous real estate brokers. The rush to pass these statutes is unusual in light of the fact that there are very few decided cases. Of the twenty jurisdictions that have enacted these laws, only three reported receiving any complaints on this issue.[36]

The debate over these statutes revolves around one issue: What is a material fact in a real estate transaction? If a material fact is some important piece of information that would be the determining factor in a buyer's decision to make the purchase, then the information should be disclosed, so long as it does not constitute an invasion of privacy. The obvious situation is AIDS, but the scientific evidence so far indicates that the virus cannot be transmitted through contact with a house and its fittings. Moreover, disclosing such information would run afoul of the Fair Housing Act. Information about crimes like murder, burglary, and robbery, on the other hand, is a matter of public record and should be made available to any buyer, not just to those few people who happen to know about these laws.

The real estate lobby should be concerned less with limiting its liability than with conscientiously providing accurate information to prospective buyers. The nondisclosure laws in effect in most jurisdictions should be repealed. In their place should be laws requiring that every seller of real property and his or her agent notify a buyer that he or she has the right to obtain information about the property that might affect the buyer's decision—in-

formation about events that occurred during the seller's association or within ten years of the date of the offer, whichever is longer.

Because of the complexity and sensitivity of this problem, no legislation can fully address the issue. It is a problem that is best left to the courts. The cases discussed in the article were decided correctly. As the *Reed v. King* court said, a seller of real property has a duty to disclose material facts to a purchaser, facts that affect the value of the property, when the facts are known to the seller and not easily detectable by the buyer. This maxim should be the guiding principle in all real-estate transactions. □

Endnotes

1. *Johnson v. Davis,* 449 S 2d 344 (Fla App 3 Dist 1984).

2. *Weintraub v. Krobatsch,* 64 NJ 445, 317 A2d 68 (1974).

3. *Flakus v. Schug,* 213 Neb 491, 329 NW2d 859 (1983).

4. *Thacker v. Tyree,* 297 SE2d 885 (W Va 1982).

5. *Schnell v. Gustafson,* 638 P2d 850 (Colo Ct App 1981).

6. *Reed v. King,* 193 Cal Rptr 130, 145 Cal App 3d 261 (3 Dist 1983).

7. NARELLO (National Ass'n of Real Estate License Law Officials), Legislative/License Law Committee, Psychologically-Impacted Property Subcommittee Report, October 1991, at 2 [hereinafter NARELLO Report]. Courtesy of Carol Leighton, executive director, Maine Real Estate Committee.

8. *Kleinfield v. McAnally,* Index No 11181/88 (NY Sup Ct, New York County, January 24, 1989) [apparently unreported case]. See also Holly E. Heckathorne, *Real Estate Brokers Need Not Tell Buyers That a Prior Occupant Had AIDS,* 2 AIDS Law Rptr 1, 3 (March 1989).

9. *Home Phobia Haunts Realtors Who Fear the Stigma on Properties of AIDS Victims,* Wall St J, April 25, 1991, Business Bulletin at 1.

10. *Id.* The plaintiff in *Kleinfield* was unsuccessful. However, *Roberts v. Heramb,* a California case, involved a buyer who sued successfully to rescind a purchase agreement and recover a $10,000 escrow deposit. When she learned that one of the sellers had died of hepatitis and the other was ill with pneumonia, the buyer suspected that at least one of the owners had AIDS. As the case was settled out of court, the terms of the settlement are unknown and the case has no value as precedent. Slip op no 5943942. Statement on Raised Bill No 390, *An Act Concerning Psychologically Impacted Property,* Harry H. Neumann, Jr., legislative chairman, Conn Assn of Realtors, Inc., March 6, 1990.

11. Federal Fair Housing Act of 1988, 42 USC §§ 3604–3606, as amended.

12. *Guidelines for the Prevention of Transmission of HIV and HBV to Health Care and Public Safety Workers* (Centers for Disease Control, Feb 1989).

13. "No environmentally mediated mode of HIV transmission has been documented." Statement by Lester N. Wright, M.D., Dept of Human Resources Health Div, March 6, 1989, before House Human Resources Committee, Oregon State Legislature, March 6, 1989, Exhibit B at 1.

14. See 1 *For the Record* (Fall 1990), a quarterly publication of the Nat'l Ass'n of Realtors.

15. *HUD says AIDS Disclosure Can Violate Title VII,* opinion of Robert D. Butlers, deputy general counsel (courtesy Patrice Mezanis, director, Member and Legal Services, Penn Assn of Realtors). Attorneys for the Texas Assn of Realtors recommended that prospective home buyers be told when a property had been occupied by a person suffering with AIDS. AIDS Law Rptr, cited in note 8, at 1.

16. *Tenant Gets $40 in Suit Over Ghosts,* New Haven Register, November 13, 1990, at 6; *Who Ya Gonna Call?* Natl LJ, October 29, 1990, at 47.

17. *Stambovsky v. Ackley, et al.* (NY App Div 1991) NYLJ, July 22, 1991, at 21.

18. Pacelle, *Ghost Stories Haunt Realtors: Who You Gonna Call? Lawyers,* Wall St J, October 31, 1991, at 1.

19. *Stambovsky,* cited in note 17, at 23 (Smith dissent).

20. *Ghost Stories,* cited in note 18, at A-10.

21. The nineteen jurisdictions are California, Colorado, Connecticut, District of Columbia, Georgia, Louisiana, Maryland, Missouri, Montana, Nevada, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Wisconsin, and Wyoming. NARELLO Report, cited in note 7, at 4.

22. New Jersey and Illinois.

23. NARELLO Report, cited in note 7, at 5. The states are Georgia, North Carolina, Oklahoma, Oregon, Rhode Island, and Wisconsin.

24. Connecticut, District of Columbia, Illinois, Montana, and South Carolina.

25. Colorado, Louisiana, Maryland, Missouri, Nevada, Tennessee, Utah, and Wyoming.

26. California § 1710.2 (West Ann 1992). NARELLO Report, cited in note 7, at 5. Other states that have AIDS-only statutes (California's covers the failure to disclose an occupant's manner of death more than three years prior to the property transaction, and then specifically exempts AIDS deaths) are Florida, Illinois, Kentucky, Hawaii, New Jersey, and Texas. The following jurisdictions address disclosure of AIDS as well as other psychological impacts: Colorado, Connecticut, District of Columbia, Illinois, Louisiana, Maryland, Missouri, Montana, Nevada, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, and Utah. Some statutes are broader. Georgia merely refers to "certain diseases," North Carolina covers "serious illness," and Wyoming refers to "health problems."

27. California, Connecticut, District of Columbia, Georgia, Louisiana, Maryland, Nevada, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, and Utah.

28. Colorado, Illinois, Missouri, Montana, and Wisconsin.

29. Colorado, Connecticut, District of Columbia, Georgia, Illinois, Louisiana, Maryland, Missouri, Montana, Nevada, Oklahoma, Oregon, Rhode Island, Tennessee, and Utah.

30. Colorado, Connecticut, District of Columbia, Georgia, Louisiana, Maryland, Missouri, Montana, Nevada, Oklahoma, Rhode Island, Tennessee, and Utah.

31. Maryland and Nevada.

32. Grandjean, *Houses Where Things Go Bump in the Night,* NY Times, Connecticut section, October 27, 1991, at 13.

33. Conn Gen'l Stats § 20-329cc–20-329ff (1990).

34. *Id.*

35. RI Pub Laws, Real Estate Brokers and Salesmen, 5-20 to 5-23; So Carolina Acts 40-57-270 (1990).

36. "Two of the complaints involved a death, one by murder and the other was a natural death. The third complaint filed in Nevada involved the failure to disclose that the property had been a paupers' cemetery." All the complaints were dismissed. NARELLO Report, cited in note 7, at 4.