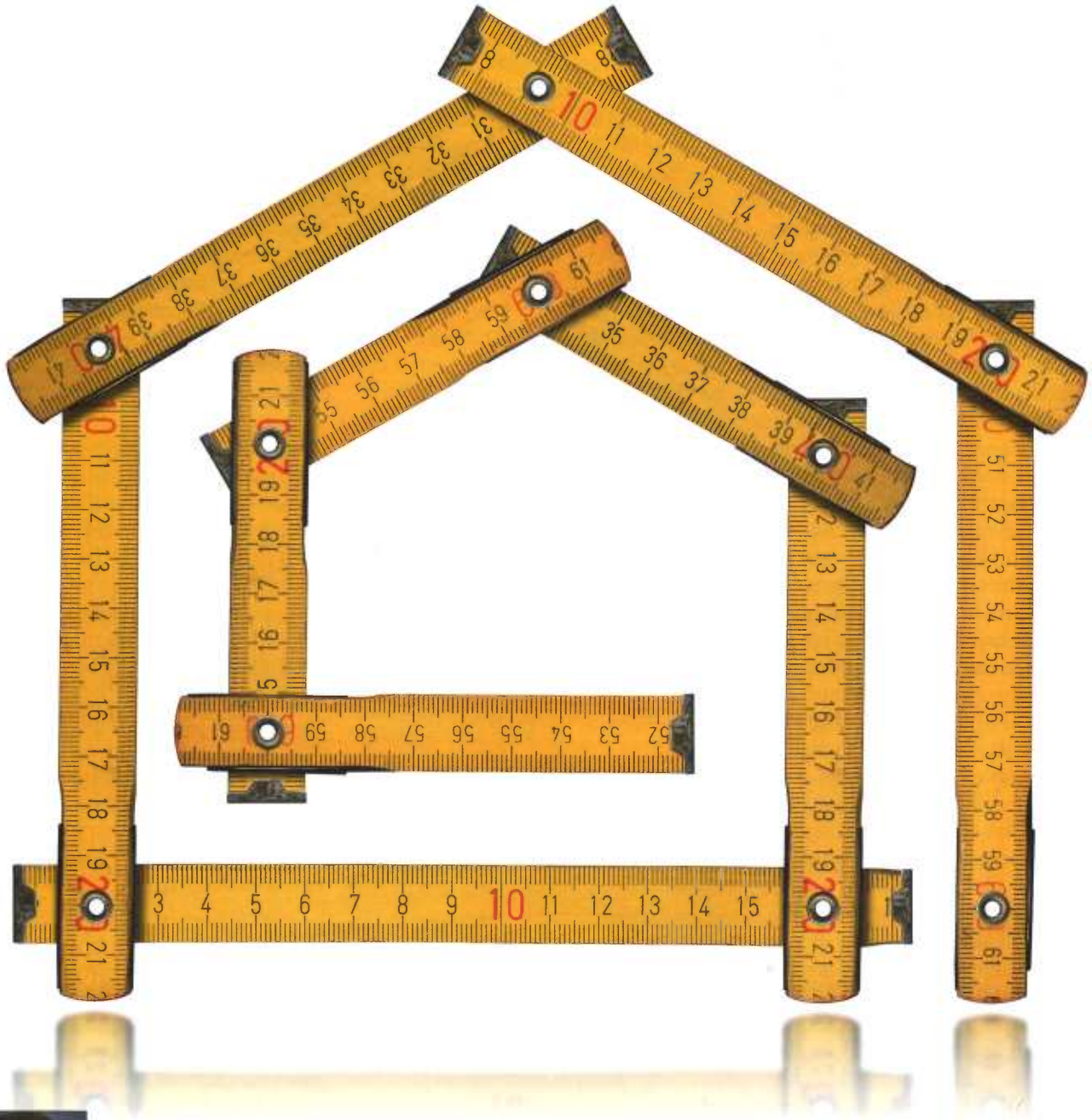
Fighting the Square Footage Fight

By Charles N. Insler

# Defenses Against Consumer Protection Statutes



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The old adage in real estate—location, location, location—captures the most important characteristics of a home, for the school district, the feel of a neighborhood, the views, the age of a home, and the proximity to work and leisure activities all relate back to a home's location. These considerations, in turn, inform a home's price. While square footage estimates are not part of the real estate maxim, buyers continue to file lawsuits alleging that a home's square footage was inflated and, as a consequence, so was the purchase price. These lawsuits assert causes of action for breach of contract, negligence, misrepresentation, and, increasingly, violation of consumer protection statutes. From the plaintiff's side, these consumer statutes can be particularly attractive because many eliminate the need to show reliance on any misrepresentation by the buyer. Fortunately, agents, brokers, and real estate firms have a number of defenses and counter-punches that may be available to them in a square footage fight.

## "Buyer Beware" Still Applies

The doctrine of caveat emptor applies in real estate transactions generally and has been extended to square footage fights in particular. In *Hughes v. Cloud*, the Supreme Court of Alabama found that a square footage fight (the listing gave 1,632 square feet while an appraiser claimed 1,184) did not deserve to go to the jury. 504 So.2d 734, 735 (Ala. 1987). Because the plaintiffs had "unlimited access to the house prior to purchase," had "ample opportunity to measure the house," and "could have discovered the actual size of the house" with ordinary diligence, the court found that a purchaser could not close his or her eyes to what ordinary diligence required him or her to see.

Courts in Kentucky, Louisiana, North Carolina, and South Carolina have reached similar conclusions in square footage cases, with one court noting that with the state of modern education, a seller should be able to "assume that his prospective buyer possesses the mathematical skills required for determining the square footage contained in the house." *Marshall v. Keaveny*, 248 S.E.2d 750, 754 (N.C. Ct. App. 1978); *see also Blaine Co. v. Lookout Corporate Ctr.*, No. 2009-CA-000605-MR, 2010 WL 1404617, at *3 (Ky. Ct. App. Apr. 9, 2010) (unpublished) ("[W]here no direct representation is made by the vendor concerning definite facts and the purchaser has sufficient opportunity to observe the condition of the premises, the maxim of *caveat emptor* is applicable."); *Smith v. Remodeling Serv., Inc.*, 648 So.2d 995, 999 (La. Ct. App. 1994) ("[T]he plaintiffs could have easily measured the residence prior to the sale to determine the actual living area of the home."); *Alpha Contracting Servs., Inc. v. Household Fin. Corp., II*, No. 2011-UP-289, 2011 WL 11734662, at *3 (S.C. Ct. App. June 13, 2011) (unpublished) ("Alpha failed to take its own measurements of the home's square footage. Therefore, Alpha's reliance on the square footage indicated in the MLS listing was unreasonable as a matter of law. Alpha cannot obtain compensation from Respondents if it has not exercised its own due diligence."); *Smith v. Powell*, No. 04-CP-40-2404, 2005 WL 5621423 (Ct. of Common Pleas S.C. Oct. 24, 2005) ("The law does not impose liability upon sellers for matters that buyers can ascertain upon the use of their own due diligence.").

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In New York, the Appellate Division found that a broker's advertisements of "550 s.f." and "approximately 500 s.f." for an apartment were not proof of fraud, but rather indications that the "plaintiff should have taken the opportunity to inspect the apartment before he contracted to buy it." *Estrada v. Metro. Prop. Grp., Inc.*, 973 N.Y.S.2d 147, 148 (N.Y. App. Div. 2013). This defense is hardly universal, as numerous plaintiffs have survived summary judgment on square footage claims. In addition, one federal court in North Carolina has distinguished the *Marshall* case for contemporary homes with irregular angles and odd shapes. *John v. Robbins*, 764 F. Supp. 379, 385 (M.D.N.C. 1991).

To enjoy this potential defense, agents should be sure to provide prospective buyers—and their inspectors—unfettered access to all the rooms and spaces in a house and to permit prospective buyers to visit the property on multiple occasions if desired.

## Feature Disclaimers

In most cases, the MLS listing sheet will contain square footage disclaimers, explaining that the square footage is an estimate or approximation from a third-party source, and encouraging the prospective buyer to verify the square footage.

A strong disclaimer can prove effective in warding off future square footage disputes. In *ELM Ret. Ctr., LP v. Callaway*, the Arizona Court of Appeals affirmed a dismissal noting that the party's specific agreement provided that "ANY REFERENCE TO THE SQUARE FOOTAGE OF THE PREMISES… IS APPROXIMATE" and that "IF SQUARE FOOTAGE IS A MATERIAL MATTER TO THE BUYER, IT MUST BE VERIFIED DURING THE INSPECTION PERIOD." 246 P.3d 938, 942 (Ariz. Ct. App. 2010). In *Smith v. Powell*, the Court of Common Pleas of South Carolina granted the sellers' and their listing agent's motions for summary judgment, finding that there had been no misrepresentation because the square footage of the house had been qualified as "2850 +/- 10 percent." *Smith*, 2005 WL 5621423.

This is not always the case. One California appeals court has found that a jury must determine whether a buyer was unreasonable for failing to heed the square footage disclaimers in the MLS. *Furla v. Jon Douglas Co.*, 76 Cal. Rptr. 2d 911, 916 (Cal. Ct. App. 1998).

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## Are There Any Damages?

To buy a home is to buy more than a collection of empty rooms. The home's character, amenities, and location all influence a home's price. Because a home's square footage correlates imperfectly with its value, courts have found that square footage discrepancies (up to a certain point) do not actually produce damages. *See Evinger v. McDaniel Title Co.*, 726 S.W.2d 468, 475 (Mo. Ct. App. 1987) ("If a tract of land containing 1,000 square feet has a fair market value of $100,000.00, it cannot be said that one square foot of that property has a fair market value of $100.00 because it is possible that there would be no market at all for one square foot of real estate.").

This is particularly the case where a subsequent appraisal meets (or exceeds) the purchase price for the home. *Smith*, 2005 WL 5621423 (finding the plaintiffs had "not set forth any evidence that the house would have been worth less than what they paid for it… even with the diminished square footage [of roughly 300 square feet from the original estimate of 2,850]"); *Remodeling Service*, 648 So.2d at 1000 (affirming the dismissal of plaintiffs' claims because they had failed to prove that they suffered any actual damages, even with a shortfall of nearly 500 square feet (2,547 square feet of living space in the listing against 2,054 square feet of living space in reality)). In *Smith* and *Remodeling Services*, two examples where home buyers suffered no ascertainable losses from shortfalls in square footage, the disparities were significant: roughly 10 and 20 percent of the home's original square footage estimates.

Naturally, there is law on the other side. Plaintiffs have successfully argued that they have been damaged in square footage discrepancy cases or, at a minimum, that they deserve the opportunity to try their case before a jury. In *Cook v. McPherson*, the Superior Court of New Jersey affirmed a jury's award of $180,000 in favor of a couple whose home had a square footage shortfall of seventeen percent. *Cook v. McPherson*, No. L-186-03, 2007 WL 2067035, at *3 (N.J. Super. Ct. App. Div. July 20, 2007) (unpublished *per curiam*). In *Furla v. Jon Douglas Co.*, the California Court of Appeals overturned the trial court's summary judgment decision and ordered a trial on the plaintiff's misrepresentation claims. 76 Cal. Rptr. 2d at 916. In doing so, the court found that the jury had to determine whether the seller's agent and her firm had a reasonable basis for believing the square footage listed in MLS was accurate. *Id.*

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## Was the Purchase per Unit or in Gross?

Agents and real estate firms should pay particular attention to situations where a purchase may be "per unit" rather than "in gross." A sale "in gross" is as an undivided, collective unit. A sale "per unit" is just that: a sale in which the price is calculated based on a per unit measurement. "Per unit" sales usually involve the sale of large tracts of land and any shortfall in the described unit can create an easy case for damages. *See Matheus v. Sasser*, 164 S.W.3d 453, 462 (Tex. App. 2005) ("[Plaintiff] has pointed to no evidence that the final negotiated price was agreed upon per square foot, that is, per 'unit' as compared with a sale in 'gross' [which would] entitle him to measure the damages in the manner he seeks.").

On the other hand, where property is sold in gross, absent fraud or a large deficiency, it is usually "the buyer [who] takes the risk of the quantity." *Cantrell v. McDonald*, 412 S.W.2d 403, 408 (Mo. 1967); *see also Wood v. Murphy*, 47 Mo. App. 539, 545 (Mo. Ct. App. 1892) (noting that this rule is "relaxed only in cases where the excess or deficiency is *very great*" such that it would raise the presumption of fraud).

## Class Action Considerations

To date, there appears to be only one reported class certification ruling involving a square footage dispute. In *McGinnis v. Vischering*, the tenants of a commercial office building claimed that they had received less square footage than their leases promised. 791 N.W.2d 711, at *1 (Iowa Ct. App. 2010) (Table). The trial court declined to certify a class of tenants and the Court of Appeals of Iowa affirmed, noting that the evidence surrounding the meaning of "rentable square feet of space" would be different for each tenant. *Id.* at *5.

Despite the uniqueness of land and real property, the *McGinnis* case is unlikely to deter future class actions. Indeed, a square footage class action is currently pending in the Circuit Court for St. Louis County, alleging that the defendants misrepresented homes' square footage by including the open space above the first floor of a two-story entry foyer or great room. *See Heckemeyer v. NRT Missouri, LLC*, No. 12SL-CC02376-01 (St. Louis County Cir. Ct.).

## Conclusion

Agents, brokers, and real estate firms should be prepared for future square footage fights, either as individual actions or class actions. The California Supreme Court is currently considering a square footage fight involving a Malibu home that sold for $12.25 million, and a ruling in that case could prove to be another Hollywood-area blockbuster. IDQ