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The Real Estate Broker and the Buyer: Negligence and the Duty to Investigate

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THE REAL ESTATE BROKER AND THE BUYER:
NEGLIGENCE AND THE DUTY TO INVESTIGATE

Paula C. Murray†

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I. Introduction

The majority of sellers of single family residences employ licensed real estate brokers1 to find suitable buyers for their

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1. For the purpose of this article, a real estate broker, salesman or licensee will be referred to as a “broker.” A real estate broker is defined as:

(939)
properties. In the typical transaction, the broker and the seller have entered into a written agreement of employment—a listing contract, which creates an agency relationship between the seller

[A] a person who, for another person and for a fee, commission, or other valuable consideration, or with the intention or in the expectation or on the promise of receiving or collecting a fee, commission, or other valuable consideration from another person

(A) sells, exchanges, purchases, rents, or leases real estate;
(B) offers to sell, exchange, purchase, rent, or lease real estate;
(C) negotiates or attempts to negotiate the listing, sale, exchange, purchase, rental, or leasing of real estate;
(D) lists or offers or attempts or agrees to list real estate for sale, rental, lease, exchange, or trade;
(E) appraises or offers or attempts or agrees to appraise real estate;
(F) auctions, or offers or attempts or agrees to auction, real estate;
(G) buys or sells or offers to buy or sell, or otherwise deals in options on real estate;
(H) aids, attempts, or offers to aid in locating or obtaining for purchase, rent, or lease any real estate;
(I) procures or assists in the procuring of prospects for the purpose of effecting the sale, exchange, lease, or rental of real estate; or
(J) procures or assists in the procuring of properties for the purpose of effecting the sale, exchange, lease or rental of real estate.

Id. § 2(2)

A real estate salesman is defined as: “a person associated with a Texas licensed real estate broker for the purposes of performing acts or transactions comprehended by the definition of ‘real estate broker’ as defined in this Act.”

Id., 2

2. Approximately 81% of single family home sellers employ the services of a broker. Federal Trade Commission Staff Report, “Residential Real Estate Brokerage Industry,” Consumer Survey, 8 (Figure I-1), (Gov’t Print, Dec. 1983 (Stock 018-000-00305-8) [hereinafter FTC report].

3. Nothing prohibits the buyer from employing a broker to find suitable property for purchase. The buyer and broker enter into a contractual agreement whereby the buyer agrees to compensate the broker when a suitable property is found by the broker. This arrangement is unusual in the typical residential transaction because the buyer will not have the cash available to pay the broker’s fee. However, in many commercial transactions the buyer will be represented by a broker. For further discussion on the buyer-broker relationship, see infra notes 71-79 and accompanying text. See also Comment, Real Estate Brokers Liability for Failure to Disclose: A New Duty to Investigate, 17 PAC. L.J. 327, 328-29 (1985) [hereinafter Comment, Real Estate Brokers Liability for Failure to Disclose].

4. There are three basic types of listing contracts: a) the open listing: the broker will be entitled to the commission if she is the procuring cause of the buyer; the owner retains the right to sell the property himself or to hire other brokers to sell the property; b) the exclusive agency listing contract: only one broker may be employed to sell the property under this contract, however, the owner retains the right to sell the property without compensating the listing broker; and c) the exclusive right to sell listing contract: the listing broker will receive the commission if the property is sold during the listing period regardless of who actually sells the property. 7 R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY ¶ 938.16[2][a], [c] & [d] (1984).
and the broker.⁵ A fiduciary relationship exists between the seller, as principal, and the broker, as agent.⁶ The broker’s duty to the seller is very similar to a trustee’s duty to a beneficiary:⁷ the broker is required to act with utmost good faith toward the seller.⁸ This duty is well recognized at common law and by statute in many states.⁹ While the broker’s duty to the seller-principal is clearly recognized, there are increasing numbers of court decisions which recognize a legal duty that the broker owes to the buyer.¹⁰

The exact nature of the duty the broker employed by a seller owes to a buyer varies from jurisdiction to jurisdiction. Most courts hold that a broker will be liable for an intentional misrepresentation made to the purchaser of real property.¹¹ A number

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⁵ 12 C.J.S. Brokers § 25 (1985) (describing such agency relationship as ordinarily special one).
⁶ Comment, The Real Estate Broker’s Fiduciary Duties: An Examination of Current Industry Standards and Practices, 12 Pepperdine L. Rev. 145, 150 n.22 (1984) (“Agency is a fiduciary relationship between two persons, resulting from the consensual delegation from one to another to act on his behalf and [usually] to exercise some degree of discretion while acting”) (citing Skopp v. Wenver, 16 Cal. 3d 432, 439, 546 P.2d 307, 312, 128 Cal. Rptr. 19, 24 (1976)) [hereinafter Comment, The Real Estate Broker’s Fiduciary Duties].
⁷ See, e.g., Batson v. Strehlow, 68 Cal. 2d 662, 674, 441 P.2d 101, 109-10, 68 Cal. Rptr. 589, 597-98 (1968); see also Comment, The Real Estate Broker’s Fiduciary Duties, supra note 6, at 150.
⁸ M.S.R., Inc. v. Lish, 34 Colo. App. 320, 322, 527 P.2d 912, 914 (1974) (“Under both the common law and applicable statutes, a real estate agent, in all dealings affecting the subject matter of his agency, has a fiduciary duty to act with the utmost faith and loyalty in behalf of his principal.”) (citing McKinney v. Christmas, 143 Colo. 361, 363, P.2d 373, 374 (1960); Treat v. Schmidt, 69 Colo. 190, 191, 193 P. 666, 667 (1920); Colo. Rev. Stat. § 117-1-12 (1963)). For a more detailed discussion of this good faith requirement, see infra notes 20-41 and accompanying text.
¹⁰ See, e.g., Funk v. Tiffl, 515 F.2d 23, 25 (9th Cir. 1975) (broker under fiduciary duty to deal fairly with buyer and that duty was breached when broker outbid buyer for property); Bevins v. Ballard, 655 P.2d 757, 761-63 (Alaska 1982) (buyer has cause of action against broker for innocent misrepresentation communicated by broker); Easton v. Strassburger, 152 Cal. App. 3d 90, 102, 199 Cal. Rptr. 383, 390 (1984) (broker has affirmative duty to investigate property and disclose material defects to buyer); Zichlin v. Dill, 25 So. 2d 4 (Fla. 1946) (broker owes duty to buyer to deal fairly and ethically); Miles v. McSwegin, 58 Ohio St. 2d 97, 101, 388 N.E.2d 1367, 1369-70 (1979) (broker owed duty to buyer to correct representations concerning condition of property); Wegg v. Henry Broaderick, Inc., 16 Wash. App. 589, 592-931, 557 P.2d 861, 863-64 (1976) (broker held liable to buyer for failure to advise buyer of seller’s remedies under land sale contract in event of buyer’s default).

It is the law of this state [California] that where a real estate broker or agent, representing the seller, knows facts materially affecting the value

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[3]
of courts have expanded this duty of a broker to include liability for negligent\textsuperscript{12} as well as innocent\textsuperscript{13} misrepresentation. Other courts have found liability of a broker to a buyer based on a negligence cause of action.\textsuperscript{14} Some courts have foregone traditional tort remedies as bases for the legal duty a broker owes a buyer and have found that a fiduciary duty exists between broker and buyer who are not in a written contractual relationship.\textsuperscript{15} In some cases the courts have found that an agency relationship exists between buyer and broker which gives rise to a fiduciary duty.\textsuperscript{16} However, the uncertainty of the exact nature of this rela-

or the desirability of property offered for sale and these facts are known or accessible only to him and his principal, and the broker or agent also knows that these facts are not known to or within the reach of the diligent attention and observation of the buyer, the broker or agent is under a duty to disclose these facts to the buyer.

\textit{Id.} (citing Lingsch v. Savage, 215 Cal. App. 2d 729, 735-36, 29 Cal. Rptr. 201, 204 (1963); Annotation, \textit{Liability of Vendor's Real-Estate Broker or Agent to Purchaser for Misrepresentations as to, or Nondisclosure of, Physical Defects of Property Sold}, 8 A.L.R.3d 537 (1966)); see also Reed v. King, 145 Cal. App. 2d 261, 266-67, 193 Cal. Rptr. 130, 132-33 (1983) (broker liable to buyer for his knowing failure to disclose murders of woman and four children that took place ten years earlier in home that buyer purchased); Harper v. Admetz, 142 Conn. 18, 22, 113 A.2d 136, 138 (1955) ("[Jere [broker] was not the agent of the plaintiff [buyer]. Nevertheless, he could not deliberately deceive him.").

12. Provost v. Miller, 473 A.2d 1162, 1163-64 (Vt. 1984) (broker guilty of negligent misrepresentation only if he passes on information from seller which he knows or has reason to know is untrue); First Church of the Open Bible v. Cline J. Dunton Realty, Inc., 19 Wash. App. 275, 281, 574 P.2d 1211, 1215 (1978) (broker liable for negligently misrepresenting boundary lines to purchaser).

13. Bevins v. Ballard, 655 P.2d 757, 763 (Alaska 1982) (buyer who relies on material misrepresentation of broker, notwithstanding innocently made, has cause of action); Spargnapani v. Wright, 110 A.2d 82, 83-84 (D.C. 1954) (broker liable to buyer for innocently misrepresenting that house could be heated for "a little over $100 a year," when defect in heater made it impossible to heat house at all).

14. Easton v. Strasserburger, 152 Cal. App. 3d 90, 103, 199 Cal. Rptr. 383, 390 (1984). The court stated: "However, in cases where, as here, the cause of action is for negligence, not fraud, it need not be alleged or proved that the broker had actual knowledge of the material facts in issue nor that such facts were accessible only to him or his principal and that he therefore had constructible knowledge thereof."

\textit{Id.}


16. See Lerk v. McCabe, 349 Ill. 348, 360-61, 182 N.E. 388, 393 (1932) (defendant-bank officer held to be voluntary agent of plaintiff for purpose of buying real estate); Fairfield Sav. & Loan Ass'n v. Kroll, 106 Ill. App. 2d 296, 363-05, 246 N.E.2d 327, 330-31 (1969) (broker who voluntarily undertook to obtain fi-
relationship has led to a certain confusion in the real estate industry. The broker is understandably bewildered by the legal morass in which he is floundering. On one hand, the broker is the agent of the seller and owes a fiduciary duty to that seller. On the other, the broker is aware that he has some sort of duty to the buyer and that duty seems to be broadening. The broker needs guidance as to the precise nature and extent of his duty to prospective purchasers of real property.

This article will analyze the various types of legal duties to a buyer that courts have imposed on the real estate broker. General agency concepts and fiduciary duties applicable to brokers, sellers and purchasers will first be discussed. The various types of tort liability that give rise to a duty to the purchaser of real property will then be discussed. Finally the article will indorse a legal analysis which characterizes the broker’s duty to the buyer in terms of liability for negligence rather than that of a fiduciary relationship.

The broker owes a duty to the buyer to act reasonably, ethically and honestly in all his dealings with the buyer. This duty, as stated by the California Court of Appeals for the First District in Easton v. Strassburger, requires that the broker “conduct a reasonably competent and diligent inspection of the residential property listed for sale and . . . disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal.”

The recognition of this duty by courts, and legislatures across the country will not only provide much needed protection for purchasers of residential real estate, but also protect the broker from any further expansion of liability. If the broker is required to conduct a reasonable inspection of the property, the

19. Id. at 102, 199 Cal. Rptr. at 390 (footnote omitted).
20. The California legislature, in direct response to Easton, enacted California Civil Code § 2079 (West Supp. 1988) and California Civil Code § 1102 (West Supp. 1988), in an attempt to define the nature and extent of the inspection and disclosure requirements of real estate brokers. Section 2079 codifies the inspection and disclosure duties of the broker and section 1102 involves the implementation of the disclosure and investigation duties.
broker can protect himself from seller misinformation and prospective purchasers are much more likely to receive material factual information concerning the property. This duty will ultimately lead to fewer lawsuits being filed against the broker by disgruntled buyers.

II. AGENCY LAW AND THE REAL ESTATE BROKER

A. The Broker's Duty to the Seller

1. The Fiduciary Duties

In the usual residential transaction, the seller and the broker are in an agency relationship. This relationship is created by the execution of the listing contract. In the listing contract the broker agrees to use his best efforts to find a buyer for the property and the seller promises to pay an agreed commission to the broker if the property sells within the listing period. The broker, as a result of the agency relationship, owes certain duties to the principal; among them, the duties of honesty, loyalty, and full disclosure to the principal of all material facts concerning the transaction.


22. For a discussion of the types of listing contracts, see supra note 4 and accompanying text. In most cases the exclusive right-to-sell listing contract will establish the agency relationship between the broker and seller. Currier, Finding the Broker's Place in the Typical Residential Real Estate Transaction, 33 U. Fla. L. Rev. 655, 660 (1981) [hereinafter Currier, Finding the Broker's Place].


interest of his principal.27 The fiduciary relationship between the broker and the seller has been analogized to that of a trustee and beneficiary.28 The breach of the fiduciary duty by the broker gives rise to a number of remedies including refusal to pay compensation, rescission of the listing contract, an action for restitution and an action for losses.29

Perhaps the most important fiduciary duty the broker owes to the principal is the "duty to disclose any material fact known to the agent, which, if known to the principal, would possibly influence the principal’s decision on the subject matter of the agency agreement."30 The broker has a duty to disclose any relationship that the broker has with the buyer, including a familial,31 personal32 or business relationship.33 Thus, the broker must be extremely careful of his duty to the seller when he is in any way

rule is well established in equity that the relation existing between principal and agent for the purchase or sale of property is a fiduciary one, and the agent in the exercise of good faith is bound to keep his principal informed on all matters that may come to his knowledge pertaining to the subject matter of the agency." (citing Rieger v. Brandt, 329 Ill. 21, 160 N.E. 130 (1928)).

27. Vivian Arnold Realty Co. v. McCormick, 19 Ariz. App. 289, 293-94, 506 P.2d 1074, 1078-79 (1975) ("A real estate agent owes a duty of utmost good faith and loyalty to the principal, and one employed to sell property has the specific duty of exercising reasonable due care and diligence to effect a sale to the best advantage of the principal—that is on the best terms and at the best price possible.").

28. See Rattray v. Scudden, 28 Cal. 2d 214, 222-23, 169 P.2d 371, 376 (1946) (real estate broker has same duty of loyalty and service as trustee to beneficiary).

29. Restatement (Second) of Agency § 399 (1958) (possible remedies are listed from a-k).

30. See Romero, Theories of Real Estate Broker Liability: Arizona’s Emerging Malpractice Doctrine, 20 ARIZ. L. REV. 767, 774 (1978) (footnote omitted) [hereinafter Romero, Theories of Real Estate Broker Liability]; see also Restatement (Second) of Agency § 381 (1958) ("An agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have.").

31. Mersky v. Multiple Listing Bureau, 73 Wash. 2d 225, 229-30, 437 P.2d 879, 897-900 (1968) (broker's agent breached fiduciary duty by failing to disclose buyers were her sister and brother-in-law).

32. Smith v. Zak, 20 Cal. App. 3d 785, 98 Cal. Rptr. 242 (1971) (broker was business associate of the purchaser); Loughlin v. Idora Realty Co., 259 Cal. App. 2d 619, 631, 66 Cal. Rptr. 747, 754 (1968) (broker breached fiduciary duty to seller by failing to disclose purchaser who bought property for $11,280 and sold it shortly thereafter for $16,500 was broker's mother-in-law); Hickam v. Colorado Real Estate Comm'n, 36 Colo. App. 76, 534 P.2d 1229 (1975) (broker's license was revoked for his failure to communicate higher offer to seller).

affiliated with the buyer.\textsuperscript{34} Likewise, the broker has a duty to disclose the actual value of the listed property, particularly when the broker is the purchaser of the property.\textsuperscript{35} As one court has stated: "'[i]f . . . the agent by the conveyance will acquire an equitable or beneficial interest in the property, then the agent must specifically disclose the nature of the interest to his principals.'"\textsuperscript{36} As a matter of practice a broker should probably avoid the purchase of any property that he has listed.

Clearly, any information that the seller would deem to be important or influential must be disclosed by the broker.\textsuperscript{37} The information usually is suppressed because of the broker placing his individual concerns above those of the principal. The type of information considered material includes:

[a]ny circumstances affecting the buyer's ability or desire to perform, any facts influencing the seller in his determination of a fair price, or influencing his decision as to whether to accept or reject a particular offer, or to attempt a compromise through a counteroffer. Other pertinent information includes any circumstances influencing the agent's opinion as to the benefits of a particular transaction for the seller, such as a close relationship to the purchaser, or an interest other than an interest in a commission.\textsuperscript{38}

Closely related to the duty to disclose material information concerning the property to the principal is the duty of loyalty.

\textsuperscript{34} See Levine, \textit{Real Estate Malpractice Areas of Liability}, 18 Trial 33, 34 (1982) ("A licensee will be looked at with a jaundiced eye when the licensee acquires a property, even when not acting as a licensee, and subsequently and quickly turns the property for a substantial profit.") (emphasis in original).

\textsuperscript{35} Riley v. Powell, 665 S.W.2d 578, 580-81 (Tex. Ct. App. 1984) (broker/buyer held to have breached fiduciary duty to seller when he purchased property and knew that property was worth considerably more than purchase price).

\textsuperscript{36} Velten v. Robertson, 671 P.2d 1011, 1012 (Colo. App. 1983).

\textsuperscript{37} In Morley v. J. Pagel Realty & Insurance, 27 Ariz. App. 62, 550 P.2d 1104 (1976), the court held that the broker breached his fiduciary duty to the seller by failing to inform the seller that the purchase price of the property should be secured by a mortgage. The court stated:

\begin{quote}
We think that as a part of appellees' [brokers'] duty to effect a sale for appellants [sellers] on the best terms possible and to disclose to them all the information they possessed that pertained to the prospective transaction, appellees [brokers] were bound to inform appellants [sellers] that they should require security for the Heyden's [sellers'] performance.
\end{quote}

\textit{Id.} at 65, 550 P.2d at 1107.

\textsuperscript{38} Romero, \textit{Theories of Real Estate Broker Liability, supra} note 30, at 775.
The duty of loyalty prohibits a broker from acting for himself or any other party without full disclosure to the principal.\textsuperscript{39} Often the duty of loyalty is coupled with a so called "duty of good faith" to require that the broker act in the principal's best interest.\textsuperscript{40} Although the duty of good faith is not specifically found in the \textit{Restatement (Second) of Agency}, it is often mentioned as a duty owed by an agent to his principal.\textsuperscript{41} Both the duty of loyalty and good faith, as well as the duty to disclose, only serve to reiterate the notion that the broker must act clearly and unambiguously in the best interest of his principal, i.e., the seller.

2. \textit{Cooperating Brokers}

In the event that the broker has signed a listing contract with the seller, the fiduciary duty owed to that seller is relatively easy to understand and carry out. The broker, as a result of the contractual relationship between the two parties, knows the seller and seeks to protect his interest. However, the listing broker may agree to "cooperate" with another broker, i.e., share the commission, in return for that broker, the selling broker, finding a buyer who is ready, willing and able to purchase the property.\textsuperscript{42} Cooperation among brokers has become formalized by the widespread use of Multiple Listing Services (MLS) throughout the country. By becoming a member of MLS, a broker agrees to pool all listings and to cooperate with other MLS member-brokers who produce buyers for the listed property.\textsuperscript{43} Any MLS member can show any of the property listed through the MLS without receiving a prior cooperation agreement from the broker with the listing on that particular property. Clearly this arrange-

\textsuperscript{39} See M.S.R., Inc. v. Lish, 34 Colo. App. 320, 322-23, 527 P.2d 912, 914 (1974) ("This duty [of loyalty] requires the agent to make a full and complete disclosure before he becomes the purchaser of property which is the subject of his agency with his principal.").

\textsuperscript{40} See Lerk v. McCabe, 349 Ill. 348, 360-61, 182 N.E. 388, 393 (1930) ("[T]he agent in the exercise of good faith is bound to keep his principal informed on all matters that may come to his knowledge pertaining to the subject matter of the agency.").

\textsuperscript{41} See Batson v. Strehlow, 68 Cal. 2d 662, 674-75, 441 P.2d 101, 110, 68 Cal. Rptr. 589, 599 (1968) ("This relationship not only imposes upon him [agent] the duty of acting in the highest good faith towards his principal but precludes the agent from obtaining any advantage over the principal . . . in any transaction had by virtue of his agency."); see generally Romero, \textit{Theories of Real Estate Broker Liability}, supra note 30, at 776-77.

\textsuperscript{42} Currier, \textit{Finding the Broker's Place}, supra note 22, at 660-61.

\textsuperscript{43} See generally Levine, \textit{The Dual Agency Trap} 110 (1985); Austin, \textit{Real Estate Boards and Multiple Listing Systems as Restraints of Trade}, 70 \textit{COLUM. L. REV.} 1325, 1328-30 (1970); Currier, \textit{Finding the Broker's Place}, supra note 2, at 661.
ment can be beneficial to both sellers and buyers. Sellers' properties have a much greater exposure to potential buyers and buyers have a larger selection of available properties. The broker who has entered into the listing contract with the seller is called the "listing broker" and the broker who procures the buyer is called the "selling broker." The selling broker, though not in a direct contractual relationship with the seller, is held to be a sub-agent of the listing broker, and as such, an agent of the seller.

As agent, both the listing and selling brokers are in a fiduciary relationship with the seller. As the court in Mersky v. Multiple Listing Bureau stated:

[T]here flows from this agency relationship and its accompanying obligation of utmost fidelity and good faith, the legal, ethical, and moral responsibility on the part of the listing broker, as well as his subagents, to exercise reasonable care, skill, and judgment in securing for the principal the best bargain possible; to scrupulously avoid representing any interest antagonistic to that of the principal in transactions involving the principal's listed property, or otherwise self-dealing with that property, without the explicit and fully informed consent of the principal; and to make, in all instances, a full, fair, and timely disclosure to the principal of all facts within the knowledge or coming to the attention of the broker or his sub-agents which are, or may be, material in connection with the matter for which the broker is employed, and which might affect the principal's rights and interest

44. The majority of MLS require that the broker-members utilize an exclusive right-to-sell listing agreement; a minority will accept exclusive agency listing contracts. FTC report, supra note 2, at 131.

45. See Romero, Theories of Real Estate Broker Liability, supra note 30, at 771-73 (discussion of roles of selling and listing brokers).

46. See First Church of the Open Bible v. Cline J. Dunton Realty, Inc., 19 Wash. App. 275, 279, 574 P.2d 1211, 1214 (1978). In Dunton, the court stated: "In a multiple listing situation, it has been held that in effecting a sale, the selling agency is an authorized subagent of the listing broker, who is the seller's agent for the purpose of finding a purchaser." Id. But see Blockinger v. Schlegel, 58 Ill. App. 3d 324, 326, 374 N.E.2d 491, 493 (1978) (no fiduciary duty existed between seller and broker/buyer by virtue of fact that property was listed in MLS and broker/buyer was member of MLS). See also LEVINE, supra note 43, at 110 (while selling broker is legally subagent of seller, "it is clear that the selling broker is representing the buyer").

or influence his actions.\textsuperscript{48}

This fiduciary duty is obviously recognized between the seller and the listing broker because of the contractual privity between them. However, the selling broker is usually not in direct contact with the seller.\textsuperscript{49} The selling broker's only link with the transaction may be through the buyer. The buyer, in a typical situation, has contacted the broker and enlisted the broker to show him a number of potentially suitable properties.\textsuperscript{50} Not surprisingly, both the buyer and the selling broker, may reasonably believe that the selling broker is the agent of the buyer.\textsuperscript{51}

Despite the fact that the buyer and selling broker may believe themselves to be in an agency relationship, the general rule is that the selling broker is a subagent of the listing broker and thus an agent of the seller.\textsuperscript{52} The selling broker, as subagent, owes the same fiduciary duties to the seller as does the listing broker.\textsuperscript{53}

\textsuperscript{48} 73 Wash. 2d 225, 229, 437 P.2d 897, 899 (1968) (emphasis supplied).

\textsuperscript{49} In most cases neither the seller nor the selling broker are aware of this agency relationship. The seller, in many cases, will not even meet the selling broker until she brings an offer on behalf of the buyer. Usually the listing broker will also be present at the delivery of the offer and thus the appearance is that the selling broker represents the buyer. See generally Levine, supra note 43, at 110-11 ("[T]he selling broker presents an offer on behalf of his buyer to the seller in the presence of the listing broker. The seller has every reason to believe that the selling broker is representing the buyer. He has no reason to believe that the selling broker has any other function.").

\textsuperscript{50} In the process of selecting suitable properties to show the potential buyer, the broker must determine the buyer's financial status and his personal preferences concerning the real property. Obviously, the buyer discloses quite a bit of sensitive and confidential information to the selling broker. This, as well as the fact that the buyer and the selling broker usually spend a large amount of time together viewing the various properties, may lead the buyer to believe, quite reasonably, that the selling broker is acting as the buyer's agent in the transaction. See Romero, Theories of Real Estate Broker Liability, supra note 30, at 771-74; Comment, Easton v. Strassburger: Judicial Imposition of a Duty to Inspect on California Real Estate Brokers, 18 Loy. L.A.L. Rev. 809, 819 (1985) ("In many transactions, the purchaser may spend hours with, and place much confidence in, the cooperating broker. In spite of this, the subagency relationship with the seller generally precludes the establishment of a broker-purchaser agency relationship.") [hereinafter Comment, Judicial Imposition of a Duty to Inspect].

\textsuperscript{51} The 1983 FTC study on residential real estate brokerage indicated that more than 70% of buyers thought the selling broker was "their" broker, and were not aware of his agency relationship with the seller. FTC report, supra note 2, at 69.

\textsuperscript{52} See Rattray v. Scudder, 28 Cal. 2d 214, 224-51, 169 P.2d 371, 377-78 (1946); see generally Comment, The Real Estate Broker's Fiduciary Duties, supra note 6, at 158-62.

\textsuperscript{53} Kruse v. Miller, 143 Cal. App. 656, 660, 300 P.2d 855, 857-58 (1956). The Miller court held that even though the subagent had no dealings with the seller, the selling broker, "as a subagent, was under the same duty as [listing broker] to act in the utmost good faith." Id.; accord First Church of the Open
Not only does the agency relationship between the selling broker and the seller lead to increased protection for the seller’s interests, it has the unanticipated result of increasing the seller’s liability to third parties for misleading statements or omissions concerning the property. The seller, as principal, is liable for the misrepresentations made by his agents and subagents. This agency relationship between the seller and selling broker has led to much misunderstanding and confusion regarding the broker’s proper relationship to the buyers among the general public, the real estate industry and the legal profession.

This misunderstanding of the relationships of the parties in a typical residential real estate transaction may be, in part, the cause of the increasing liability of the broker to the purchaser for misrepresentations concerning the property. The buyer, an unrepresented party in the transaction, reasonably believes that he


54. Restatement (Second) of Agency §§ 264, 256-63 (1958). At least two commentators have proposed that the way to avoid the increased liability and confusion caused by the subagency between the seller and selling broker is to hold the selling broker to be the agent of the buyer. Comment, The Real Estate Broker’s Fiduciary Duties, supra note 6, at 161 (“Clearly, this over exposure to liability would be eliminated [and the buyer’s representation enhanced] if the cooperating broker was considered to be the buyer’s agent.”); Comment, A Reexamination of the Real Estate Broker-Buyer-Seller Relationship, 18 WAYNE L. REV. 1343, 1353 (1972) (“In the absence of a listing agreement between the broker and the seller, the broker should be deemed the agent of the buyer and not the subagent of the listing broker.”) [hereinafter Comment, A Reexamination].

55. See Romero, Theories of Real Estate Broker Liability, supra note 30, at 772-73. Romero noted:

Given such extensive conduct with the buyer [by selling broker], and such minimal contact with the seller, the buyer is justified in believing that the agent will do his best to obtain the property for the buyer at the lowest possible price and on the most advantageous terms. Of course, for the agent to do so is a violation of the agent’s duty to the seller. However, it would be unrealistic to expect the buyer to feel that a broker who has worked with him extensively is attempting to obtain the highest possible price for the seller, which, in actuality is the agent’s duty.

Id.

56. See Levine, supra note 43, at 110 (author maintains that selling broker in MLS situation is in dual agency with both buyer and seller); Hanna & Richardson, supra note 17.

57. See Blocklinger v. Schlegel, 58 Ill. App. 3d 324, 327, 374 N.E.2d 491, 493 (1978) (broker/buyer who was member of MLS not subagent of seller); First Church of the Open Bible v. Cline J. Dunton Realty, Inc., 19 Wash. App. 275, 574 P.2d 1211 (1978) (selling broker in MLS situation is subagent of seller).
is represented by the selling broker. The buyer feels that he can safely rely on the statements that the selling broker has made concerning the property. When a statement on which the buyer relies turns out to be false, the buyer looks to "his" agent for relief. Often, the selling agent retreats behind the agency relationship with the seller and denies that any legal duty is owed to the buyer. The buyer then sues the selling broker often alleging breach of fiduciary duty as well as bringing a cause of action for fraud based on the alleged misrepresentation. The seller and the listing agent will also be sued on account of their liability for the acts of their subagent, the selling broker.  

This scenario need not be replayed repeatedly throughout the country. Brokers must be educated as to their proper role in the typical residential real estate transaction. While some inroads have been made in this educational process, much more material, factual information needs to be communicated and understood by the local broker. More importantly, the buyer must understand, at the outset of the transaction, that he is not represented. Should he wish representation, he may employ a broker and/or attorney of his choice. This type of disclosure requirement has been suggested by one commentator:

Brokers could be required by law or regulation to inform buyers of the agency relationship the broker has directly with some sellers, through listing agreements, and indirectly with others, through multiple listing arrangements. The broker would have to explain that he may not volunteer more information than the owner of the home would have to disclose nor give advice about the appropriate price or subjective qualities of the houses inspected.

A standardized, clearly written, printed disclosure given to the potential buyer at the first meeting with the broker would clarify the broker-buyer relationship from the start. The buyer would be aware of the broker's role as a representative of the seller, and would be less likely to rely unquestioningly on the broker. Since the buyer would be less likely to rely on the selling broker, the broker's potential liability for fraud or misrepresentation should be lessened—the buyer would be aware that he must

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58. Restatement (Second) of Agency § 264, 256-63 (1958).
59. See supra note 51.
60. Currier, Finding the Broker's Place, supra note 22, at 679.
search out new avenues of information concerning the property. A disclosure form would also benefit the broker by serving as a constant reminder that he is the agent of the seller and must not give the buyer any misleading signals.

B. The Broker's Duty to the Buyer

1. Implied Agency

In the usual situation, the broker, either listing or selling, is not in an express agency relationship with the buyer. The buyer, however, may attempt to claim that he and the broker were in fact in an agency relationship. Generally this will be a difficult task because of the lack of a contractual arrangement between the broker and buyer and because of the formal listing agreement between the seller and the listing broker and the cooperation agreement between the listing and selling brokers. Nonetheless, the mere existence of a written listing agreement between the seller and the broker does not automatically negate the notion that the buyer may also be the broker's principal.61 Perhaps the strongest indication that the broker and the seller are in an agency relationship is that the seller pays the broker's commission.62 The commission is usually paid out of the proceeds the seller receives at closing. This payment arrangement is clearly spelled out in the listing agreement.63 Although the payment of the commission by the seller is a very strong indicator that the broker is the agent of the seller, it is by no means conclusive. In certain circumstances the broker may in fact be paid by the seller,

61. PMH Properties v. Nichols, 263 N.W.2d 799, 802-03 (Minn. 1978) (jury question as to whether broker acting for buyer and seller); Billington v. Crowder, 553 S.W.2d 590, 593 (Tenn. 1977) (broker can act for seller, buyer or both); Mays v. Emery, 3 Wash. App. 31, 475 P.2d 124, 128 (1970) (agency relationship between seller's broker and buyer arose when broker undertook to have an inspection of property conducted for buyer); see also 12 C.J.S. Brokers § 31 (1980) ("The question as to whom a broker represents in a transaction is determinable from the facts.").

62. See Comment, The Real Estate Broker's Fiduciary Duties, supra note 6, at 154 (faced with broker paying seller's commission, coupled with lawyer's apparent non-involvement, buyer must come forth with strong evidence to negate broker's fiduciary duties as being owed solely to seller).

63. The payment of the purchase price by the buyer is obviously the ultimate source of the broker's commission. In practice many buyers may feel that they are actually paying the commission. At least one commentator has recognized the irony of this situation: "If the superiority of the broker-seller relationship is based on the broker's compensation flowing from the seller, it is therefore undermined to the extent that the commission is buried in the sales price." Currier, Finding the Broker's Place, supra note 22, at 664.
yet in fact represent the buyer. These situations, however, are infrequent and the buyer must rely on the court or jury to infer an agency relationship from the facts of the case. Certainly, a buyer cannot rely on the somewhat capricious nature of our judicial system to establish an agency relationship with the broker.

2. The Dual Agency Problem

One problem that quickly arises when the courts find that the broker acted for the buyer as well as the seller is that of dual agency. Although the broker can legally act as an agent for both parties in a real estate transaction, he must make full disclosure to both before the agency relationship begins. The broker owes both parties the same fiduciary duties and this, in turn, leads to an impossible situation for the broker. The parties to the transaction have diametrically opposed goals. The seller wants to receive the highest price possible for the property, while the buyer would like to purchase the property at a lower price. Disclosures made to one party in many instances will certainly not be in the best interest of the other, and thus, the broker will have breached his fiduciary duty. Clearly the broker is in a no-win situation.

64. See Ramey v. Myers, 111 Cal. App. 2d 679, 245 P.2d 360, 364 (1952) (broker/buyer agency relationship inferred from broker and buyer's friendship and fact that broker gave buyer advice); Banner v. Elm, 251 Md. 694, 248 A.2d 452 (1968) ("It is not uncommon for a condition of sale to be that the agent of the purchaser shall be paid by the seller."), Billington v. Crowder, 553 S.W.2d 590, 593 (Tenn. 1977) ("Even though the identity of the party who is to pay the broker may not be conclusive of the identity of his principal, it is nevertheless a strong circumstance.").

65. Restatement (Second) of Agency § 392 (1957). The Restatement provides:

An agent who, to the knowledge of two principals, acts for both of them in a transaction between them, has a duty to act with fairness to each and to disclose to each all facts which he knows or should know would reasonably affect the judgement of each in permitting such dual agency, except as to a principal who has manifested that he knows such facts or does not care to know them.

Id.

66. For a discussion of the fiduciary duties a broker owes his principal, see supra notes 21-41 and accompanying text.

67. Restatement (Second) of Agency § 395 (1957) (An agent is "not to use or to communicate information confidentially given him by the principal or acquired by him during the course of ... his agency ... to the injury of the principal."); see Marnis v. Solot Co., 117 Ariz. App. 499, 502, 573 P.2d 902 ("Chapparal (buyer) contended Solot's (broker's) position as a fiduciary was compromised and it attempted to serve two masters by entering into a fiduciary relationship with chapparal, a prospective buyer. The undertaking of such a dual representation of conflicting interests, without knowledge or approval of the competing principals, would, of course, not be countenanced."); see also Comment, The Real Estate Broker's Fiduciary Duties, supra note 6, at 162-63.
Even if the disclosure of the dual agency is made to both parties, the broker still runs the risk of breach of the fiduciary duty owed to an individual party. The broker has the duty to disclose any material fact that might affect the principal’s decision to buy or sell the property, and by attempting to represent both the buyer and the seller he has placed himself in a situation almost guaranteed to breach the duty to disclose. Although the broker may be, in theory, capable of acting on behalf of both parties in a real estate transaction, in practice, the broker would be fool-hardy to attempt to do so; he could be likened to the attorney who attempts to represent both parties in a divorce action.

3. *The Buyer’s Broker*

The buyer, in order to be assured that he will be adequately represented in the real estate transaction, can always hire a broker and pay the commission himself. The broker would then unequivocally represent the buyer and no problems of misplaced loyalty would occur. The crucial element in the broker-buyer agency relationship is that the buyer pay the broker’s fee, because of the presumption that the party who pays the commission is the broker’s principal. A few courts and commentators have maintained that the broker was the agent of the buyer even though the commission was to be paid by the seller. Even though there are a number of cases in which the court has held that the broker owed a fiduciary duty to the buyer (although the seller was paying

68. See *Jorgensen v. Beach ‘N’ Bay Realty, Inc.*, 125 Cal. App. 3d, 155, 160, 177 Cal. Rptr. 882, 885 (1981) (brokers disclosed dual agency to seller but jury question was presented as to whether brokers disclosed all material facts which might have affected seller’s decision to accept buyer’s offer).

69. *Restatement (Second) of Agency* § 381 (1958); see Comment, *Real Estate Brokers Liability for Failure to Disclose*, supra note 3, at 333, 336.

70. The Realtor Code of Ethics does not prohibit a broker from acting as a dual agent. Comment, *The Real Estate Broker’s Fiduciary Duties*, supra note 6, at 162.

71. *But see Velten v. Robertson*, 671 P.2d 1011 (Colo. 1983). In *Velten* the broker was to be compensated by the buyer, yet was held to be in a dual agency because he contacted the seller and obtained both the buyer and seller’s signatures on the documents. The court held his failure to disclose his financial interest in the property a breach of his fiduciary duty to the seller. *Id.* at 1012. For a discussion of the case, see Natelson, *Colorado ‘Buyer Brokerage’: Does It Still Exist After Velten v. Robertson?*, 55 U. Colo. L. Rev. 83 (1983) [hereinafter Natelson, *Colorado ‘Buyer Brokerage’*].

72. For a discussion of the presumption, see *supra* note 62 and accompanying text. *See also Prichard v. Reitz*, 178 Cal. App. 3d 445, 223 Cal. Rptr. 734 (1986) (broker/vendor who took commission on sale is holding him/herself as broker in transaction and owes duty of disclosure to buyer).

the commission), those courts found the duty to the buyer was in addition to that already owed to the seller by virtue of the listing agreement. Thus, in order to be absolutely certain that the broker will be exclusively in an agency relationship with the buyer, the commission should be entirely paid by the buyer.

The present structure of the MLS and its pervasive use throughout the residential real estate industry raises interesting questions for the broker who wishes to exclusively represent buyers. As previously stated, the MLS is a formalized method for broker cooperation. The cooperating brokers in the MLS system are paid by the seller and are considered in an agency relationship with the seller. The broker who finds a buyer ready, willing and able to purchase the property is considered the sub-agent of the listing broker. The question arises as to whether or not a broker seeking to maintain an exclusive agency relationship with the buyer can utilize the MLS in order to find a suitable property. Certainly, it would seem that if the broker received any part of his fee from the seller, there is a danger that he has placed himself in an agency situation with that seller. Even if the broker's fee is paid only by the buyer, the information that the MLS provides concerning each listed property may be such that the broker would also be considered the seller's agent. A court could reasonably conclude that the MLS is organized in such a way that only brokers in an agency relationship with the seller should have access to its information and a broker, by accessing the data, becomes an agent of the seller. The possibility of the broker who represents the buyer also becoming the agent of the broker, as noted, raises interesting questions for the broker who wishes to exclusively represent buyers.


75. For a discussion of the MLS procedure, see supra notes 43-46 and accompanying text.

76. For example, the information furnished in the MLS guide could include that the seller was hoping for a quick sale. Clearly the seller would not want a broker representing the buyer to be privy to this type of information and would certainly not want the information communicated to the buyer.

77. This position may be further strengthened by the fact that the seller must consent to allow his property to be listed within the MLS system. In many cases, the seller would not consent to the listing if brokers who represent buyers also have access to all of the information. See Natelson, Colorado Buyer Brokerage, supra note 71, at 85. Natelson stated:

For example, a buyer who asks a real estate broker to assist him in finding property may think of the broker as 'his broker', but in fact the broker is the agent or subagent of the seller and owes fiduciary duties to the seller. The rationale for this position appears to be that one who elects to attempt to sell property listed within an MLS system does so
seller as a result of MLS access is very real. The broker attempting to maintain an exclusive relationship with the buyer should be aware of the potential for conflict of interest and dual agency.

Despite the fact that a buyer is free to hire a broker to represent him in the real estate transaction, the majority of buyers do not take advantage of this opportunity. The basic reason for this is that the broker’s fee will be an expense in addition to the sale price and other costs that a buyer incurs in the purchase of real property. Most buyers will not be able to scrape together the necessary cash to pay the broker as well as the other expenses such as down payment, loan acquisition fees, insurance and miscellaneous closing costs. The current industry norm—both the listing and selling brokers’ commissions paid out of the sales price received by the seller—is probably preferred by many buyers simply because of the cash flow problems they incur in the purchase of real property.

While buyer’s brokerage may be an idea that would provide the solution to the lack of representation of most buyers in the usual residential real estate transaction, as a practical matter the idea will not work in the majority of situations because of the commission arrangements. Thus, the need for buyer education as to the role of the broker, both the selling and listing, is further emphasized. The only way to dissuade the buyer from the notion that the broker, particularly the selling broker, is representing him is through a formalized, written disclosure document that clearly states the broker’s relationship with the seller. A clear, simple disclosure form will be a step in the right direction in preventing the buyer from harboring the mistaken belief that the

with the consent of the individual who placed the property in the system, and is paid by that individual.

Id.

78. Currier, Finding the Broker’s Place, supra note 22, at 664. Currier noted: Nothing theoretically prohibits a buyer from hiring a broker, agreeing to pay a fee for services, and thus creating a principal-agent relationship. In practice, however, this seldom occurs. The organization and operation of the residential brokerage business discourages such arrangements. Home buyers understand that brokers will receive compensation from sellers, and they know that brokers will work with them without additional charge.

Id.; see also Comment, The Real Estate Broker’s Fiduciary Duties, supra note 6, at 156.

79. For a discussion of buyer confusion as to broker presentation, see supra notes 51 & 60 and accompanying text. According to a National Family Opinion, Inc. (NFO) survey, 57% of buyers who were involved in cooperating sales believed that the cooperating broker represented them. FTC report, supra note 2, at buyer question 31.
broker is acting in his best interest and will also alert the buyer to the fact that he may need to hire independent representation.

III. Broker’s Duties to the Buyer

A. The Fiduciary Duty

The lack of an agency relationship between the broker and the buyer, originally led most courts to find that the broker owed no fiduciary duty to the buyer. The rationale for this conclusion was that the broker, as agent for the seller, stood in the seller’s shoes and had the same relationship to the buyer as did the seller.  

However, a number of courts have found that regardless of the fact that the broker and buyer are not in any agency situation, the broker does owe a legal duty to the buyer and the courts characterize this duty as a fiduciary one. In Harper v. Adametz the Supreme Court of Connecticut held that a real estate broker breached his fiduciary duty to the buyer when he failed to disclose the buyer’s offer to the seller. The court then imposed a constructive trust on the broker in favor of the buyer. The court stated:

It is true that [a constructive trust] is most often applied in situations where the relationship between the plaintiff and the defendant is one which equity clearly recognizes as fiduciary. But equity has carefully refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations. It has left the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other.

Thus, the court clearly recognized that the broker owed a legal duty to the buyer even though they were not in a contractual relationship.

The United States Court of Appeals for the Ninth Circuit in Funk v. Tiff held that a real estate broker had a fiduciary duty to deal fairly and honestly with a prospective purchaser and that

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80. See Comment, A Reexamination, supra note 54, at 1345.
81. 142 Conn. 218, 113 A.2d 136 (1955).
82. Id. at 222-25, 113 A.2d at 138-39. The broker in this case, failed to tell the seller of the buyer’s offer and then purchased the property through his son. The broker then sold a portion of the property, at a profit, to the buyer and led the buyer to believe that the original owner was the seller. Id.
83. Id. at 225, 113 A.2d at 139 (citations omitted).
84. 515 F.2d 23 (9th Cir. 1975).
duty was breached when the broker outbid the purchaser.85 The court stated, "[w]hen a real estate broker acts as an intermediary between a seller and a prospective buyer, he is under a duty to deal fairly and honestly with the prospective buyer. That duty is breached when the real estate agent outbids the prospective buyer without notice to him before the seller has acted on his offer."86

A fiduciary relationship can be created when one party, the buyer, places trust and confidence in another party, the broker, because of the broker's superior skill and expertise in the transaction.87 "More specifically, a fiduciary relationship is created where one party has expressly reposed trust and confidence in the other; where trust and confidence, although not express, are implied because of a past history of fiduciary dealings; or where the very nature of the transaction is fiduciary."88

However, certainly not all courts have been willing to find a fiduciary relationship between the broker and the purchaser.89 In fact, in a number of cases with facts quite similar to Harper and Funk the courts have expressly found that no fiduciary duty existed between the broker and buyer. In Klotz v. Fauber,90 the Virginia Supreme Court held that the real estate broker did not breach a fiduciary duty to the buyer by purchasing the property from the seller, even though the broker did not even transmit the buyer's offer to the seller.91 The Supreme Judicial Court of Mass-

85. Id. at 25.
86. Id.
89. See Blocklinger v. Schlegel, 58 Ill. App. 3d 324, 327, 374 N.E.2d 491, 493 (1978) ("Before a fiduciary duty arises it must be proven that a realtor has been employed by someone and that he is therefore an agent for them."). But see Fairfield Sav. & Loan Ass'n v. Kroll, 106 Ill. App. 2d 296, 305, 246 N.E.2d 327, 331 (1969) (although broker not employed by buyer, agency relationship still arose).
90. 213 Va. 1, 189 S.E.2d 45 (1972).
91. Id. at 2, 189 S.E.2d at 45. The Virginia Supreme Court first stated the rule in this area to be that "a real estate agent is liable to a prospective buyer when the agent fails to transmit the prospective buyer's offer and buys the property for his own account at a price equal to or less than the price the prospective buyer agreed to pay." Id. (emphasis added). Next, the court found that "'[t]he amended motion for judgment in this case does not allege that Klotz (broker) agreed to buy the property at a price that equalled or exceeded the price paid by
sachusetts in *DiBurro v. Bonasia* 92 held that the broker did not breach a fiduciary duty to the buyer when he was asked by the prospective buyer 93 to determine if a particular piece of property was worth the asking price. 94 The broker learned that the seller was willing to sell the property the buyer was interested in as well as an adjoining tract. 95 The broker eventually purchased both tracts without informing the potential buyer. 96 The court held that no constructive trust could be imposed because the broker was not in an agency relationship with the buyer. 97

The dissenting opinion in *Funk* points out that the broker in this case did transmit the prospective buyer’s offer to the seller and then offered the seller a better deal and the seller chose to accept the broker’s offer rather than wait for more offers. 98 The dissent maintains that “[w]here the broker is not the agent of the prospective buyer, where he acts with the knowledge of his principal, the seller, where there is no misuse of confidential information, where there is no fraudulent misrepresentation, and where the broker bids more than any of the prospective buyers, there should be no liability on the part of the broker if the seller chooses to accept his offer without asking for another round of bids.” 99 The dissenting opinion in *Funk* argues that only those acts which have traditionally been held to be a breach of an agent’s fiduciary duty such as fraudulent misrepresentation, misuse of confidential information and failure to disclose a conflicting agency relationship should be the basis of liability. 100 Yet, perhaps the better way of viewing the relationship of the broker and the buyer is not as a fiduciary one, but as a normal business relationship in which the broker must not intentionally or negligently mislead the buyer.

The recognition of a fiduciary duty between the broker and

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93. *Id.* at 13, 71 N.E.2d at 401.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 15, 71 N.E.2d at 402.
98. 515 F.2d at 28.
99. *Id.*
100. *Id.*
buyer (absent an agency relationship between the parties) will
give rise to the same types of duties owed in a principal-agent
relationship. These would, of course, include the duties of hon-
esty, loyalty and full disclosure of material information concern-
ing the property.101 If the broker breached any of these duties,
the buyer would have a cause of action against the broker. The
broker is in virtually the same position as he would be in a dual
agency situation.102 The broker would have to totally disregard
his agency relationship with the seller and act as agent for both
parties. As discussed previously, acting as agent for both parties,
even with the best of intentions, is a thankless and often impossi-
ble job. Surely the courts which have imposed a fiduciary rela-
tionship on the broker and the buyer do not intend to place the
broker in a position in which it is almost certain that he will
breach his fiduciary duty to one of the parties.

In many cases, these courts are using the term “fiduciary
duty” as synonymous with a duty to treat the buyer honestly and
fairly.103 The reason the courts find it necessary to impose a fidu-
ciary duty on the broker is that, traditionally, the seller’s rela-
tionship with the buyer was one of caveat emptor104 and the broker,
as the seller’s agent, also was acting under caveat emptor. Thus,
the courts, in order to circumvent the harsh doctrine of caveat
emptor, found that the broker had not just a duty to deal fairly
with the buyer, but to deal as one in a fiduciary relationship
would—with utmost trust and confidence. This well-meaning at-
ttempt by the courts to protect the buyer may have had the unint-
tended result of putting the broker in an untenable legal
position.105

B. The Public Interest Theory

Where the courts have been reluctant to find a fiduciary rela-

101. For a discussion of these fiduciary duties, see supra notes 23-41 and
accompanying text.
102. For a discussion of the dual agency problem, see supra notes 65-70 and
accompanying text.
103. In fact, in Funk, the court imposed a fiduciary duty on the broker to
deal honestly and fairly with the buyer. 515 F.2d at 24-25.
104. Comment, A Reexamination, supra note 54, at 1345.
105. As one commentator has stated: “On one hand, the broker has an
established agency relationship with the seller. On the other hand, the uncer-
tainty of the law leaves a broker in the insecure position of fulfilling vague fiduci-
ary duties toward the buyer in order to avoid possible future liability.”
Comment, The Real Estate Broker’s Fiduciary Duties, supra note 6, at 167.
ale has been invoked in several cases to impose a duty on thebroker to act fairly and honestly toward the buyer. These cases recognize that the broker cannot totally disregard the interests of the buyer, yet he is not in a relationship which could result in an undesirable dual agency. The broker has a duty to the public to act fairly and ethically. As the Supreme Court of Florida stated in Zichlin v. Dill: "Those dealing with a licensed broker may naturally assume that he possesses the requisites of an honest, ethical

The duty of the broker to act honestly and ethically toward the buyer is based on the statutes which govern the licensing and activities of the broker. In Zichlin the court cited the Florida statute that states that "all [real estate broker] applicants who are natural persons shall be competent, honest, truthful, trustworthy, of good character, and bear a reputation for fair dealing." The court found that the broker, because of his status under the law and the high standards of his qualifications, owes a duty to the public which is separate and apart from the agent/principal relationship of the broker and the seller.

In Amato v. Latter & Blum, Inc., the real estate broker failed to communicate the plaintiff's offer to the seller and the property was sold to another party for $250 less than the plaintiff's offer. The Supreme Court of Louisiana examined the Louisiana statutes dealing with real estate brokers and determined that the real estate brokerage business was vested with a public trust and that the real estate broker owed a duty to the public. This duty was breached when the broker failed to communicate the higher offer to the seller. Amato is rather unusual in that the buyer,


108. Id. at 98, 25 So. 2d at 5.

109. Comment, The Real Estate Broker's Fiduciary Duties, supra note 6, at 168.

110. Id. at 98, 25 So. 2d at 4 (citing Fla. Stat. Ann. § 475.1 (West 1981)).

111. Id. at 97-98, 25 So. 2d at 4. In Zichlin, the broker told the buyer that the property could not be purchased for less than $5500 and then purchased the property from the seller, using the buyer's own money, for $4500. Id. at 97, 25 So. 2d at 4. He then allowed the buyer to believe that he was purchasing the property from the seller for $5500. Id.


113. Id. at 539, 79 So. 2d at 874.

114. Id. at 540-44, 79 So. 2d at 875-76.
not the seller, is the complainant in this case.\textsuperscript{115} The seller, the principal of the broker, was not complaining about the failure of the broker to communicate the higher offer.\textsuperscript{116} The court recognized that the broker must deal fairly and ethically with the buyer, even though the broker is not in a fiduciary relationship with the buyer.\textsuperscript{117}

Ward \textit{v.} Taggart\textsuperscript{118} is another case in which the broker misrepresented the seller's price to the buyer, then used the buyer's money to purchase the property and sold the property to the buyer at a profit. The California court used the California statutes dealing with the licensing and conduct of real estate brokers to establish that the broker had a duty to the general public to act in an honest and ethical manner.\textsuperscript{119} The court refused to condone such fraudulent activities even though the broker and the buyer were not in a fiduciary agency relationship.\textsuperscript{120}

Clearly in \textit{Ward} and \textit{Zichlin} the brokers were engaged in fraudulent activities and the courts were utilizing the vague "duty to act ethically and fairly" to prohibit this sort of fraudulent and misleading conduct. However, in \textit{Amato} the punished conduct is not as clearly fraudulent or misleading as in the other two cases. The broker in \textit{Amato}, by failing to present all offers to the seller, clearly breached his duty to the seller.\textsuperscript{121} Yet, not all courts believe that the broker's duty to present all offers to the seller is a duty upon which the buyer can rely.\textsuperscript{122} Thus, the court in \textit{Amato} appears to be recognizing a general duty of the broker to act ethically and honestly even if the buyer is unable to prove fraud or misrepresentation.

Once again, as in the case of the imposition of a fiduciary duty between the broker and the buyer, the courts are attempting

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\textsuperscript{115} \textit{Id.} at 539, 79 So. 2d at 874. \\
\textsuperscript{116} \textit{Id.} at 539-40, 79 So. 2d at 874. \\
\textsuperscript{117} \textit{Id.} at 539, 79 So. 2d at 874. \\
\textsuperscript{118} 51 Cal. 2d 736, 336 P.2d 534 (1959). \\
\textsuperscript{119} \textit{Id.} at 741, 336 P.2d at 537. \\
\textsuperscript{120} \textit{Id.} \\
\textsuperscript{121} The broker must disclose to the seller any information concerning the property which the seller would deem to be important or material. For a discussion of the broker's duty of disclosure, see supra notes 23-41 and accompanying text. \\
\textsuperscript{122} See \textit{Amato v. Latter \\& Blum, Inc.}, 227 La. at 546, 79 So. 2d at 876 (Hamiter, J., dissenting) ("Unquestionably, the legislation invoked was enacted in the interest and for the protection of the public. But thereby the Legislature, in my opinion, intended only to protect those members of the general public to whom the agent or broker owed a duty either pursuant to a contract or by operation of law.").
\end{flushleft}
to circumvent the harsh doctrine of caveat emptor through the imposition of a duty to act honestly, fairly and ethically. In fact, the court in Zichlin recognizes that by requiring "a high standard of qualifications" of real estate brokers the state was eliminating the old caveat emptor doctrine. At the time that Zichlin, Amato, and Ward were decided, the doctrine of caveat emptor was still a viable legal doctrine. Today, however, the doctrine has virtually been eliminated in the real estate context.

These courts, unlike the courts which have found a fiduciary duty between the broker and the buyer, may have established a more workable standard of conduct for the broker to follow. While the broker still has a duty to act fairly in regard to the buyer, there is no establishment of a fiduciary duty between the two parties. Thus, there will be no danger of the unintended dual agency. The broker will remain exclusively the agent of the seller, but will have to act in a fair and ethical manner toward the buyer. Certainly this is not an egregious standard to maintain. The real estate broker, because of his close connections with the buyer, should be bound by an express, legal duty to deal fairly with that buyer.

Some commentators have criticized the establishment of a legal duty between the buyer and broker based on public policy rationale because of the uncertainty of the standard to be applied to the broker's conduct. As one commentator states, "Since the broker is obligated to act in the best interest of the seller, there may be situations where the broker's conduct borders the line between a violation of fiduciary duties owed to the seller, and a violation of public fairness." Without a doubt there is some merit in this criticism of the duty of honest and fairness; however, in recent years there has been a growing trend in many areas of law to impose a standard of good faith and fair dealing on the parties.

123. "The state, therefore has prescribed a high standard of qualifications and by the same law granted a form of monopoly and in so doing the old rule of caveat emptor is cast aside." Zichlin, 157 Fla. at 98, 25 So. 2d at 4-5.


125. Comment, The Real Estate Broker's Fiduciary Duties, supra note 6, at 169. Another commentator states: "The public interest approach is a vague and guideless standard. It requires a determination as to the social desirability of a broker's particular act based upon virtually undefined considerations." Comment, A Reexamination, supra note 54, at 1348.
of all sorts of transactions.\textsuperscript{126} This trend in the law should not bypass the real estate industry. While the broker's ultimate duty and responsibility is to his principal, the seller, this duty does not absolutely prevent the broker from dealing with the buyer in an ethical and fair manner. The public should have the right to expect that the broker, even though employed by the seller, will act in a fair and honest manner, and if this expectation proves to be false, the broker should be liable for the failure to act in such a manner.

The question now becomes whether courts should recognize a "duty to act honestly and fairly" or whether the current statutes and court decisions dealing with intentional, negligent and innocent misrepresentation will suffice to adequately protect the buyer's rights \textit{vis-a-vis} the broker in the residential real estate transaction.

C. Tort Causes of Action

1. Introduction

The broker, despite the lack of an agency relationship with the buyer, can be held liable to the buyer for a misrepresentation made concerning the property. Most courts hold that the broker will be liable to the buyer for an intentional misrepresentation. However, there are many cases which impose liability for negligent as well as innocent misrepresentation. Some courts have foregone the misrepresentation analysis altogether and have based liability on the tort of negligence. These tort cases, both for misrepresentation and negligence, evidence a trend in the law to hold the broker accountable to the buyer. While the older cases struggled with the notions of fiduciary duty and public policy, these recent cases are utilizing traditional tort notions to form the basis of the broker's duty to the buyer.

\textsuperscript{126} \textit{Restatement (Second) of Contracts} § 205 (1979) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."); see Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958) ("There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement."); see also Fergus v. Wilmarth, 117 Ill. 542, 7 N.E. 508 (1886); Cottman Co. v. Continental Trust Co., 169 Md. 595, 182 A. 551 (1936); Starkman v. Sigmond, 184 N.J. Super. 600, 446 A.2d 1249 (Ch Div. 1982). But see English v. Fischer, 660 S.W.2d 521, 522 (Tex. 1983) ("The novel concept [the theory of good faith and fair dealing] advocated by the courts below would abolish our system of government according to settled rules of law and let each case be decided upon what might seem 'fair and in good faith,' by each fact finder.").
2. **Misrepresentation**

a. **Intentional Misrepresentation**

At common law, the elements of the tort of deceit were stated as follows: 1. a false representation of a fact; 2. knowledge by the defendant that the information is false (or lack of a basis for making the representation); 3. intent to induce the plaintiff to rely on the information, either in the form of acting or refraining from acting on the information; 4. justifiable reliance on the representation by the plaintiff; 5. damage to the plaintiff resulting from the reliance on the representation.127

The courts have recognized that because of the lack of an agency relationship or other type of fiduciary relationship between the broker and the buyer, some sort of legal protection must be afforded to the buyer. This protection has traditionally taken the form of liability of the seller and/or the broker for misrepresentation of fact concerning the property which is known or should have been known by the seller and/or broker.128 As the court stated in the California case of *Lingsch v. Savage*:129

It is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. . . .

The real estate agent or broker representing the seller is a party to the business transaction. . . . Where such agent or broker possesses, along with the seller, the requisite knowledge . . . whether he acquires it from, or independently of, his principal, he is under the same duty of disclosure.130

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128. See Comment, Judicial Imposition of a Duty to Inspect, supra note 50, at 820.


130. Id. at 735-36, 29 Cal. Rptr. at 204-05 (citations omitted). In *Lingsch*, the purchasers brought suit against the real estate broker and seller for fraud. Id. at 732, 29 Cal. Rptr. at 203. The purchasers alleged that both the broker and the seller knew that the building was in disrepair and that the building had been closed for condemnation. Id. at 733, 29 Cal. Rptr. at 203. The court found that the broker's nondisclosure of the information would constitute fraud even
Clearly the court is using the fraud cause of action to mitigate the lack of buyer protection caused by the agency to mitigate the lack of buyer protection caused by the agency relationship between the seller and broker. Also, the development, through the fraud cause of action, of an affirmative duty of disclosure of material facts concerning the property by both the seller and broker, is an erosion of the rule of caveat emptor. In Lingsch, the defendants raised the doctrine of caveat emptor as a defense to their duty to disclose the defects concerning the property. However, the court refused to recognize the validity of the caveat emptor doctrine in this case and stated, "'[t]he present tendency is, however, to class concealment as actual fraud in those cases where the seller knows of facts which materially affect the desirability of the property which he knows are unknown to the buyer ... "'\(^\text{131}\)

The courts have had no difficulty in imposing liability on the broker who knowingly makes a misrepresentation concerning the property to the purchaser.\(^\text{132}\) Intentional fraud on the part of the broker has been found in a variety of situations, for example, where a misrepresentation was made as to the zoning of the property;\(^\text{133}\) where the sales agents of a condominium project misrepresented units as "luxurious" and "outstanding investments;"\(^\text{134}\) where the broker failed to reveal to the purchaser that the property was the site of the murder of a woman and her four children ten years earlier.\(^\text{135}\) Without a doubt, the imposition of a duty on the broker and the seller to disclose material information con-

\(^{\text{131}}\) Id. (quoting Dyke v. Zaiser, 80 Cal. App. 2d 639, 653, 182 P.2d 344, 353 (1947)).

\(^{\text{132}}\) See Reed v. King, 145 Cal. App. 3d 261, 193 Cal. Rptr. 130 (1983) (broker knew that home was site of multiple murder and should have disclosed that fact to buyer); Harper v. Adametz, 142 Conn. 218, 113 A.2d 136 (1955) (broker unknowingly misrepresented negotiations between buyer and seller; court found fraud as well as fiduciary relationship between broker and buyer).


\(^{\text{134}}\) Cooper v. Jevne, 56 Cal. App. 3d 860, 128 Cal. Rptr. 724 (1976) (agents knew condominiums were built in substandard manner). The court in Cooper held "a real estate broker or agent in the sale of real estate is liable for damages caused by nondisclosure to the buyer of defects known to him and unknown to and unobservable by the buyer." Id. at 866, 128 Cal. Rptr. at 727 (citations omitted).

\(^{\text{135}}\) Reed v. King, 145 Cal. App. 3d 261, 193 Cal. Rptr. 130 (1983). The court found that three considerations were relevant to the determination of materiality of the misrepresentation: "the gravity of the harm inflicted by nondisclosure; the fairness of imposing a duty of discovery on the buyer as an alternative to compelling disclosure, and the impact on the stability of contracts if rescission is permitted." Id. at 266, 193 Cal. Rptr. at 132.
cerning the property which they know and which the buyer is unable to discover is justifiable from a public policy standpoint. The doctrine of caveat emptor is no longer viable in the modern real estate transaction.\textsuperscript{136} Today’s buyer does not have the time nor the expertise necessary to discover latent defects of the property. The real estate broker, as a professional, must be responsible to disclose these defects to the buyer. This duty is easily met when the defects are known to the broker. However, the duty to disclose material defects of the property has not been limited to those defects of which the broker has actual knowledge.

b. Negligent Misrepresentation

In most situations the broker will receive the vast majority of the information concerning the property from the seller. The broker will then relate this information to the potential buyer. In the multiple listing situation the information received from the seller is distributed among all the member brokers. If this information is incorrect or if the seller fails to provide complete information, the broker may unintentionally misrepresent a material fact or facts concerning the property. The question becomes whether the broker should be liable to the buyer for merely relating incorrect information or failing to relate information which was not known by the broker. Many, if not most courts, have found that the broker is liable for the misrepresentation and cannot escape liability by asserting that he was only a conduit of information or did not have actual knowledge that the information was incorrect.\textsuperscript{137}

The elements necessary to prove negligent misrepresentation are basically the same as those of intentional misrepresentation. The major difference is that the plaintiff does not have to prove that the defendant made the misrepresentation with an intent to deceive or had actual knowledge of the falsity of the statements.\textsuperscript{138} As the Minnesota Supreme Court in \textit{Berryman v.}

\begin{footnotesize}
\textsuperscript{136} For a discussion of this outdated doctrine, see \textit{supra} note 116 and accompanying text.

\textsuperscript{137} See \textit{Young v. Joyce}, 351 A.2d 857 (Del. Supr. Ct. 1975) (broker could be liable under Delaware Consumer Fraud Act for misrepresenting basement of home did not have water leakage problem even though he never investigated or asked seller about water problem); \textit{First Church of the Open Bible v. Cline J. Dunton Realty, Inc.}, 19 Wash. App. 275, 574 P.2d 1211 (1978) (listing broker was held liable for misrepresentation of land area even though he did not personally point out erroneous boundary).

\textsuperscript{138} See \textit{Lyons v. Christ Episcopal Church}, 71 Ill. App. 3d 257, 259, 389
\end{footnotesize}
The rule governing recovery on the basis of fraud requires the plaintiff to show that defendant made a false representation of a past or existing fact, susceptible of knowledge, knowing it to be false or without knowing whether it was true or false, with the intention of inducing the person to whom it was made to act in reliance upon it or under such circumstances that such person was justified in so acting and was thereby deceived or induced to so act to his damage.140

Thus, even though the broker may have had an honest belief in the truth of the statement, it may be used as a basis for a cause of action in negligent misrepresentation. As Prosser and Keeton state: "A representation made with an honest belief in its truth may still be negligent, because of lack of reasonable care in ascertaining the facts, or in the manner of expression, or absence of the skill and competence required by a particular ... profession."141 The broker should not be allowed to be viewed as a mere conduit of information between the seller and the buyer. The broker must, in some way, verify the information that the seller is giving him concerning the property. Clearly, if the bro-

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139. 175 N.W.2d 438 (Minn. 1970).
140. Id. at 442 (citations omitted) (broker misrepresented that home was "high and dry," and held liable even though he did not actually know of water seepage problem).
141. Prosser & Keeton, supra note 127, § 107, at 745 (footnotes omitted).
ker is relating material information about the property, he should have a reasonable belief that the information is sound. The seller, because of his interest in having the property sold at the highest possible price, may not be the best source of correct information. Quite possibly, the broker may decide that a routine inspection of each property he lists is a necessary, if not legally required, function in his day-to-day business activities.  

The courts that have decided cases in the area of negligent misrepresentation in regard to a broker's statement concerning real property have reached a wide variety of conclusions. Some have held a broker liable for repeating a statement made by the seller only if the broker knew or should have known that the statement was false. Some courts have found that though the broker owes no duty to furnish information to the buyer, once the broker undertakes to do so, he must do so accurately. Other courts have gone beyond the traditional negligent misrepresentation analysis and found liability for "innocent" misrepresentations. Accordingly, these courts hold that "a purchaser who relies on a material misrepresentation, even though innocently made, has a cause of action against the broker originating or communicating the misrepresentation."  

These cases run the gamut of possible liability for misrepresentation—from intentional fraud to arguably strict liability. The common thread running through all these cases is the need to balance the damage done to the buyer as a result of the misrepresentation with the relative culpability of the broker. As Prosser and Keeton stated:  

142. See infra notes 187-89 and accompanying text.  
143. Lyons v. Christ Episcopal Church, 71 Ill. App. 3d 257, 259, 389 N.E.2d 623, 625 (1979) ("[A] realtor has no duty to prospective purchasers to independently substantiate the representation of a disclosed seller unless he is aware of facts which tend to indicate that such representation is false.").  
144. Lawlor v. Scheper, 232 S.C. 94, 99, 101 S.E.2d 269, 271 (1957) (no evidence to indicate that false information was furnished by seller, however, court found "appellants owed no duty to furnish any information...but when they undertook to do so, they owed a duty not to mislead respondent").  
145. Bevins v. Ballard, 655 P.2d 757 (Alaska 1982) (broker represented to buyers that well on property was "good well" when in fact it was not adequate; court found broker to have made misrepresentation by not investigating); see infra notes 167-81 and accompanying text.  
No doubt virtually all courts today would recognize the existence of some situations where the nature of a representer's activity or a pre-existing relationship between the representer and the representee or the two factors together will constitute the basis for the imposition of a duty to exercise reasonable care to avoid harm from reasonable and expectable reliance on what is said at least about certain matters related to the subject matter of the transaction.\(^\text{147}\)

The question becomes where should a court draw the line in regard to the broker's duty to the buyer. Certainly the broker has a duty not to make statements to the buyer which he knows are false. However, once the courts hold that the broker will also be liable for statements which he should have known are false, the problem becomes one of determining what information the broker should know. This raises, once again, questions as to the broker's proper role in the real estate transaction—whether he is merely a conduit between seller and buyer or a professional who has a duty to treat both parties fairly and equitably.

The courts apply a wide variety of tests and standards in determining what the broker reasonably should have known concerning the property. At one end of the spectrum is the Supreme Court of Vermont in *Provost v. Miller*,\(^\text{148}\) which held that:

\[\text{a} \text{agent of a seller, a real estate broker or agent is guilty of negligent misrepresentation only if he or she passes information from a seller to a buyer that he or she knows or has reason to know may be untrue. Real estate brokers and agents are marketing agents, not structural engineers or contractors. They have no duty to verify independently representations made by a seller unless they are aware of facts that [seem to indicate that the representation is false].}\(^\text{149}\)

This sentiment is closely echoed by the Illinois Appellate Court in *Lyons v. Christ Episcopal Church*,\(^\text{150}\) which stated:

It is our belief that a realtor has no duty to prospective purchasers to independently substantiate the representa-

\(^{147}\) *Prosser & Keeton, supra* note 127, § 107, at 746.


\(^{149}\) *Id.* at 69-70, 473 A.2d at 1163-64 (citations omitted).

tion of a disclosed seller unless he is aware of facts which tend to indicate that such representation is false. . . . Of course, even if such a duty is invoked, there is no breach unless the realtor could have discovered the falsity of the representation by exercise of reasonable care.\textsuperscript{151}

Under the holdings of \textit{Provost} and \textit{Lyons} the broker, as long as he is aware of no information that would lead him to believe that the seller’s representations are false, can relay that information to the buyer without fear of liability. Both cases rely on comment b of section 348 of the \textit{Restatement (Second) of Agency}, which states:

An agent is not liable because of misrepresentations of the principal or of another agent unless he knows or should know of them. He is not affected by the knowledge of facts [that] the principal or another agent has and which, if known to him, would cause his representations to be fraudulent. An agent who makes untrue statements based upon the information given to him by the principal is not liable because of the fact that the principal knew the information to be untrue. An agent can properly rely upon statements of the principal to the same extent as upon statements from any other reputable source.\textsuperscript{152}

c. Innocent v. Negligent Misrepresentation

In the \textit{Lyons} and \textit{Provost} cases the broker’s duty to investigate the seller’s representations concerning the property arises only if the broker should have known that the statements were false.\textsuperscript{153} However, other cases interpret the broker’s duty to investigate the truth or falsity of the seller’s statements concerning the property much more broadly: the broker has been held liable for an “innocent” misrepresentation.\textsuperscript{154} These cases hold the broker li-

\begin{itemize}
  \item \textsuperscript{151} \textit{Id.} at 259-60, 389 N.E.2d at 625.
  \item \textsuperscript{152} \textit{Restatement (Second) of Agency} § 348 comment b (1958) (cited in \textit{Provost}, 144 Vt. at 68, 473 A.2d at 1163, and \textit{Lyons}, 71 Ill. App. 3d at 260, 389 N.E.2d at 625).
  \item \textsuperscript{153} The misrepresentation that was the basis of the lawsuit in \textit{Lyons} involved a statement by the broker that the home was connected to the city sewage system when in fact it was not. \textit{Lyons}, 71 Ill. App. 3d at 258-59, 389 N.E.2d at 624. The \textit{Provost} case involved the failure of the broker to inform the buyer of a structural defect in the home that caused the collapse of a basement wall. \textit{Provost}, 144 Vt. at 68, 473 A.2d at 1163.
  \item \textsuperscript{154} The tort of innocent misrepresentation is defined in the \textit{Restatement (Second) of Torts} § 552C(1) (1977):
\end{itemize}
able for communicating or originating a material misrepresentation to the buyer even though the misrepresentation was innocently made.\textsuperscript{155} Other cases interpret the broker's duty to investigate more broadly than do the courts in \textit{Lyons} and \textit{Provost}, yet do not reach the strict liability standard that innocent misrepresentation liability implies.\textsuperscript{156}

Clearly, the broker, as a professional, must be more than a conduit of information between the seller and the buyer. Yet, should the broker be an absolute guarantor of the truth of the information that the buyer receives? A position which is midway between the two extremes is preferable. The broker would be liable to the buyer for misrepresentation if he failed to exercise reasonable care in the obtaining or communicating of the information. Reasonable care would involve a duty to investigate to determine the truth or falsity of information supplied by the seller and, in some instances, a duty to conduct an independent investigation of the property to determine its true condition. This standard of liability is set out in section 552 of the \textit{Restatement (Second)} of \textit{Torts}:

One who, in the course of his business, profession or employment or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.\textsuperscript{157}

Although few cases involving real estate broker liability to the buyer of real property for misrepresentation have been expressly

\textsuperscript{155} See Bevins v. Ballard, 655 P.2d 757, 763 (Alaska 1982) ("[W]e hold that a purchaser who relies on a material misrepresentation, even though innocently made, has a cause of action against the broker originating or communicating the misrepresentation.").

\textsuperscript{156} See Tennant v. Lawton, 26 Wash. App. 701, 615 P.2d 1305 (1980) (broker must confirm or refute information from seller which broker knows is important to buyer).

\textsuperscript{157} \textit{Restatement (Second) of Torts} § 552(1) (1977).
based on section 552 of the Restatement (Second) of Torts,\textsuperscript{158} several 
have used the same underlying principles in evaluating the 
broker's liability. In the 1957 case of Lawlor v. Scheper,\textsuperscript{159} the 
Supreme Court of South Carolina held that the brokers:

owed no duty to furnish any information . . . but when 
they undertook to do so, they owed a duty not to mislead 
[the buyer]. They may not have known that the repre-
sentation was false but as to liability for actual damages,
the effect is the same where, as here they professed to 
have knowledge of the facts stated.\textsuperscript{160}

The court in Lawlor is basically using a reasonable care standard 
as the basis of liability. The broker, by representing that he has 
knowledge, must use reasonable care to make certain that the in-
formation is truthful. 

In 1970 the Supreme Court of Minnesota, in Berryman,\textsuperscript{161} 
held that the broker should have known that the property had a 
water problem and thus made a false representation to the buyer 
which induced the buyer to purchase the property.\textsuperscript{162} The court 
found that it was not necessary to prove that the broker acted with 
an intent to deceive, nor that he knew that the information was 
false.\textsuperscript{163} The court stated that "[t]he right of recovery . . . is based 
on the fact that such statement, being untrue in fact, relied upon 
by the other party in entering into the transaction, has resulted in 
the loss to him which he should not be required to bear."\textsuperscript{164} The 
court reasoned that because the broker knew that the buyers 
would not consider purchasing a home with a water seepage 
problem and that the broker could have discovered the seepage 
problem, the fact that the broker did not actually know of the

\textsuperscript{158} See Gouveia v. Citicorp Person-to-Person Fin. Center, Inc., 101 N.M. 
572, 686 P.2d 262 (1984) (listing broker may be liable for negligent failure to 
discover and disclose defects, if, in exercise of reasonable care, he should have 
had actual knowledge of defects).

\textsuperscript{159} 232 S.C. 94, 101 S.E.2d 269 (1957).

\textsuperscript{160} Id. at 99-100, 101 S.E.2d at 271. Lawlor involved a misrepresentation 
by the broker as to the amount owing on two mortgages covering the property. 
Id. at 98, 101 S.E.2d at 270. The seller, apparently, had no knowledge of the 
misrepresentation and did not authorize it. Id.

\textsuperscript{161} 286 Minn. 270, 175 N.W.2d 438 (1970).

\textsuperscript{162} Id. at 276, 175 N.W.2d at 442.

\textsuperscript{163} Id. at 275, 175 N.W.2d at 442.

\textsuperscript{164} Id. at 276, 175 N.W.2d at 442 (quoting Swanson v. Domning. 251 
Minn. 110, 115, 86 N.W.2d 716, 720 (1957)).
water problem would not insulate him from liability. The Berryman court, however, is not adopting a strict liability standard for broker misrepresentations. The court clearly states that in order to be the basis of a fraud cause of action the false representation must be "susceptible of knowledge" by the defendant. Thus, the court seems to be pointing toward the use of reasonable care by the broker in his statements to the buyer—particularly if the broker is aware that the buyer considers the information of material importance. This duty to the buyer may, in fact, involve investigating not only the information concerning the property which the seller has related but also information which the seller may not have disclosed and yet is of primary importance to the buyer.

In 1980 the Washington State Court of Appeals, in Tennant v. Lawton, held that a real estate broker "is required to employ a reasonable degree of effort and professional expertise to confirm or refute information from the seller which he knows, or should know, is pivotal to the transaction from the buyer's perspective." The court recognized that despite the fact that the broker owed a fiduciary duty to the seller, he, as a professional, was in a position to verify the information that the seller related to him. The broker had a duty to take reasonable steps to protect the buyer from false information. Once again, a court is using the negligence-based standard of reasonable care to establish the broker's duty to the buyer.

Thus, even though the broker and the buyer are not in an

165. Id. The court suggests that an experienced broker who knows his merchandise would be able to discover the water seepage problem. Id.
166. Id. at 275, 175 N.W.2d at 439. The court states:

The rule governing recovery on the basis of fraud requires the plaintiff to show that defendant made a false representation of a past or existing material fact, susceptible of knowledge, knowing it to be false or without knowing whether it was true or false, with the intention of inducing the person to whom it was made to act in reliance upon it or under such circumstances that such person was justified in so acting and was thereby deceived or induced to so act to his damage.

Id. (emphasis added) (citations omitted).
168. Id. at 706, 615 P.2d at 1310. Tennant involved an unintentional misrepresentation by the broker that a septic tank approval permit had been issued on the lot. Id. at 703, 615 P.2d at 1308. The court found "that the 'agent was truly justifiably ignorant of the element of falsity in the representation.'" Id.
169. Id. at 706, 615 P.2d at 1309.
170. Id.
171. Id. The court in Tennant recognizes that liability is grounded in negligence. The court stated: "The correct rule is that the broker is liable because of material misrepresentations of the principal if he repeats them and knows, or
agency relationship, the broker must take affirmative steps to avoid disseminating false information to the buyer. This duty clearly mandates that the broker’s role in the transaction is more than that of a conduit of information between the seller and the buyer. The broker is an active participant in the transaction who has duties to both parties. His ultimate loyalty must lie with his principal, the seller, but he cannot ignore the right of the buyer to truthful information concerning the property. This duty to the buyer, in many situations, could involve an actual investigation by the broker to determine the truth or falsity of the seller’s information concerning the property and could also involve an investigation to discover defects that have not been disclosed.

Yet the broker’s role in the real estate transaction is not one of an omniscient being. He cannot be reasonably expected to know everything that concerns real property and certainly cannot be held liable for every misrepresentation. His duty to the buyer should be limited to only those false representations of which he knows or reasonably should know. This limitation, however, should not significantly restrict the broker’s duty to the buyer. The broker would have a duty to disclose material information concerning the property which through the exercise of reasonable care the broker could discover. In other words, the broker would be liable for a misrepresentation concerning the property if he negligently makes a misrepresentation or negligently fails to discover the defect in the property. As Prosser and Keeton state:

While the courts have justifiably been somewhat more conservative in the protection of intangible economic and business interests than they have with respect to interests in freedom from physical damage to things and persons, there would seem to be very little justification for not extending liability to all parties and agents to a bargaining transaction for making misrepresentations negligently.172

The broker, as a professional, should be required to meet a reasonable care standard; however, the broker should not be strictly liable for any false representation made to the buyer.

reasonably should know, of their falsity... Liability attaches in this context on grounds of negligence.” Id. (citations omitted).

172. PROSSER & KEETON, supra note 127, § 107, at 745. Prosser and Keeton point out that only a few jurisdictions have adopted this position; the majority have gone to a further extreme and made the representee strictly liable for the misrepresentation. Id. at 745-46.
One of the earliest cases to arguably adopt a strict liability standard is Spargnapani v. Wright, a municipal court of appeals decision for the District of Columbia. In Spargnapani, the broker was held liable for misrepresenting to the buyer that the heating system in the home was in good condition when, in fact, the crack in the boiler had been "doped" with a sealing preparation and the crack concealed with a patch and paint job. The camouflage of the boiler had been carried out by a seller of the property and the broker had no knowledge of any defect in the heating system. The court held that "if the broker innocently represented the heating plant was in workable condition and was mistaken in that representation without knowledge whether it was true or false, the injured party may recover in an action for fraud." The Spargnapani court did not discuss the broker's duty to investigate in order to discover the boiler defect; the court merely found that since the broker represented that the house could be heated for "a little over a hundred dollars" when in fact the house could not be heated at all because of the defect in the heating system, the broker was liable for the defect. The court did not discuss whether or not the broker should have known about the defective heater, but rather focused on the fact that the broker maintained a pretense of knowledge and that was a fraud. At least arguably the Spargnapani court adopted a strict liability standard with regard to broker liability to the buyer for misrepresentations made concerning the property.

In 1982 the Supreme Court of Alaska, in Bevins v. Ballard, held that a broker who falsely represented the condition of a well on the real property was liable to the buyers even though the mis-

174. Id. at 89.
175. Id. at 83.
176. Id. (citations omitted).
177. Id. at 84. The court stated:
[T]he broker displayed a "pretense of knowledge," conveyed to plaintiffs in the form of a representation, that if they bought the house they would be getting a functioning heating plant. Innocent though the pretended knowledge may have been, it was in fact baseless. The law does not, in such a situation, withhold its aid from one who has been led into a contract to his detriment.

Id.

178. Id. at 85 ("This pretense of knowledge on the part of the seller's agent, this vital though innocent misrepresentation, being in the eyes of the law a fraud, left no room for the application of caveat emptor.").
representation was innocently made. The court in Bevins based its holding on the fact that the potential of broker liability "would tend to lessen the likelihood of transactions tainted by misinformation and confusion." The court also recognized that by allowing a cause of action against the broker, the buyer will have another source of recovery, and "[a]s between the broker who communicated the misrepresentation, and the purchaser whose only fault was to rely on the broker, we think it preferable that the broker bear any loss caused by misrepresentation." The court pointed out that the broker could protect himself by investigating the information given to him by the seller, or by disclaiming knowledge, or by requiring the seller to give written representations concerning the property and agree to indemnify the broker if the representations are false.

As the dissent in Bevins argues, the allowance of an innocent misrepresentation cause of action against the broker is almost tantamount to imposing strict liability. One commentator states "under Bevins a broker may incur liability even where he has used due diligence in checking the accuracy of his information, but for some reason was mistaken." Unfortunately, the Bevins court expressly based its holding on the grounds of innocent misrepresentation instead of negligent misrepresentation. Arguably the broker would have been liable to the purchasers under the tort of negligent misrepresentation; the court noted that in order to determine whether the broker breached his duty to the buyer, the following criteria must be considered:

(a) whether the defendant had knowledge, or its equivalent, that the information was desired for a serious purpose and that the plaintiff intended to rely upon it;

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180. Id. at 763 (citing Restatement (Second) of Torts § 552C(1) (1977)). For the text of Restatement (Second) of Torts, see supra note 155 and accompanying text.

181. Bevins, 655 P.2d at 763.

182. Id.

183. Id.

184. Id. at 764 (Conner, J., dissenting). The dissent states that there is "no reason to make the broker the guarantor of representations emanating from the seller." Id.: see Fossey & Roston, The Broker's Liability in a Real Estate Transaction. supra note 146, at 40.


186. "Under this theory [negligent misrepresentation], Bevins, [the broker] could have been liable for breaching his duty to provide accurate information once he undertook to speak." Bevins, 655 P.2d at 760.
(b) the foreseeability of harm; (c) the degree of certainty that plaintiff would suffer harm; (d) the directness of causation; and (e) the policy of preventing future harm. In the land sales context, such a duty can arise when a broker becomes aware of suspicious facts regarding his or her representations, or when a buyer makes an affirmative inquiry and the broker fails to check the accuracy of his subsequent responding representation, or when a court determines that public policy requires brokers to undertake certain functions.\(^{187}\)

However, the trial court's dismissal of the negligence claim against the broker precluded the court from basing broker liability on the negligent misrepresentation theory.\(^{188}\) Thus, the court, because the broker clearly did not make an intentional misrepresentation, based liability on the innocent misrepresentation theory.\(^{189}\)

In *Guaerke v. Rozga*,\(^{190}\) the Wisconsin Supreme Court expressly based a broker's liability to the buyer for a misrepresentation on strict liability.\(^{191}\) In *Guaerke*, the court held a real estate broker strictly liable for misrepresentations regarding acreage and road frontage of the property.\(^{192}\) The broker was held strictly liable for not only those facts that he could be expected to know without an investigation, but also any facts which a broker could be expected to know.\(^{193}\) At the trial, the buyers sued on both a negligent misrepresentation theory and a strict liability theory; however, the jury was instructed that if they found the broker strictly liable they did not need to answer the negligence questions. They found strict liability and the verdict was upheld

\(^{187}\) *Id.* at 760-61 (citations omitted).

\(^{188}\) *Id.* at 761.

\(^{189}\) *Id.*

\(^{190}\) 112 Wis. 2d 271, 332 N.W.2d 804 (1983).

\(^{191}\) *Id.* at 277-80, 332 N.W.2d at 807-09 (1983).

\(^{192}\) *Id.* at 273-76, 332 N.W.2d at 811-12.

\(^{193}\) *Id.* at 280, 332 N.W.2d at 809. The court stated: "Strict responsibility applies in those circumstances which indicate that the speaker either had particular means of ascertaining the pertinent facts, or his position made possible complete knowledge and the statements fairly implied that he had it. Therefore the speaker ought to have known or else ought not to have spoken." *Id.* (quoting Notes For Trial Judge Wis., J. I. No. 2400, Misrepresentation: Basis For Liability and Damages (quoting Stevenson v. Barnweck, 8 Wis. 2d 557, 99 N.W.2d 690 (1959))). *Id.* The acreage figures that the broker communicated to the buyer were based on information received from the sellers, but which the broker had not verified. *Id.* at 273, 332 N.W.2d at 805. However, the sellers signed a warranty that the figures were correct. *Id.* at 273, 332 N.W.2d at 805-06.
on appeal. The court in Gauerke found that strict liability was merited in this case because public policy mandated that the loss be placed on the innocent defendant rather than the innocent plaintiff. Strict liability applied in situations in which the speaker could ascertain the particular facts and his statements implied that he had knowledge of those facts.

As in Bevins, the broker arguably could have been liable on a negligent misrepresentation theory, yet the court opted to expand the broker's potential liability. Both Gauerke and Bevins extend the broker's duty to the buyer beyond all reasonable proportion. The broker should not be made to guarantee absolutely to the buyer that the proper is free from all defects. He should only be liable for those defects which in the exercise of reasonable care or competence he knows or should know. Thereby, the buyer would be protected from a "head in the sand" approach by the broker, yet the broker would be protected by limiting his potential liability to only those misrepresentations which he as a real estate professional should know are false.

d. Negligence

Real estate brokers have been sued not only for breach of fiduciary duty to the buyer and misrepresentations made to the buyer, but also for simple negligence which led to the buyer's injury. The leading negligence case is the California Court of Appeals case of Easton v. Strassburger. The court in Easton points out that to maintain a cause of action in negligence, the plaintiff would not have to prove that the broker had actual knowledge of the defect or that the broker made a misrepresentation. As the court states: "[w]e are concerned here only with the elements of a simple negligence action; that is, whether appellant owed a legal duty to respondent to use due care, whether this legal duty was

194. Id. at 275, 332 N.W.2d at 806.
195. Id. at 280, 332 N.W.2d at 808-09.
196. Id. at 280-81, 332 N.W.2d at 809. The court also states: [T]he applicability of the doctrine of strict responsibility does not depend upon the actual source of the speaker's knowledge; rather, this element is satisfied if the speaker professes or implies personal knowledge. The other key element is the buyer's justifiable reliance on the statement. If the fact represented is something that one would not expect the speaker to know without an investigation, this might be a factor in determining whether there was justifiable reliance on the part of the buyer.

breached, and finally whether the breach was a proximate cause of appellant's injury. The Easton case involved the purchase of a home by the buyers which was built on a landfill that had been improperly compacted causing land slides and foundation cracks. The sellers knew of the slides and foundation problems and had taken corrective action yet failed to disclose this to the brokers. The jury found all the named defendants negligent, including the broker, the sellers, and the builder, and assessed damages at $197,000. The negligence was apportioned on the basis of comparative negligence and the broker was found to be 5% negligent.

The court analyzed the broker's duty to the buyer and found that the broker's duty to the buyer includes a duty to disclose that which should be known, and a duty to conduct a reasonable inspection to discover the information that reasonably should be known. The court then quoted a provision of the National Association of Realtors Code of Ethics and determined that the broker as a professional must possess certain knowledge about the property he is selling and that the broker has an "affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal."

The facts of the Easton case reveal that the broker was aware of certain "red flags" which indicated an erosion or settlement problem, and yet did not request that any soil testing be undertaken. The California court is clearly requiring that the broker

198. Id. at 98, 199 Cal. Rptr. at 387 (citations omitted).
199. Id. at 96, 199 Cal. Rptr. at 385.
200. Id. at 96, 199 Cal. Rptr. at 386.
201. Id. at 97, 199 Cal. Rptr. at 386.
202. Id.
203. Id. at 100, 199 Cal. Rptr. at 389. The court states: Definition of the broker's duty to disclose as necessarily including the responsibility to conduct a reasonable investigation thus seems to us warranted by the pertinent realities. Not only do many buyers in fact justifiably believe the seller's broker is also protecting their interest in securing and acting upon accurate information and rely upon him, but the injury occasioned by such reliance, if it be misplaced, may well be substantial. . . . It seems relevant to us, in this regard, that the duty to disclose that which should be known is a formally acknowledged professional obligation that it appears many brokers customarily impose upon themselves as an ethical matter.

Id. (footnote omitted).
204. Id. at 102, 199 Cal. Rptr. at 390 (footnote omitted).
205. Id. at 104, 199 Cal. Rptr. at 391.
 undertake a reasonable inspection of the property whenever the broker is alerted or should be alerted to potential problems that may materially affect the value or desirability of the property. The broker then has a duty to disclose his findings to the potential buyer. While the duty to inspect required by Easton has met with criticism among some commentators, the standard imposed on brokers in Easton is not much, if any, more rigorous than the standards imposed on the broker for innocent or negligent misrepresentation. Easton merely confirms the duty the broker, as a professional, owes to a third party, the buyer, in the exercise of his professional duties. The real estate industry has expressed shock and surprise at the imposition of a duty to the buyer by the Easton court; however, every professional has a duty to protect third parties from an unreasonable risk of harm. The real estate broker as a professional must accept some responsibility for third parties who are affected by his professional conduct.

The broker is not required to seek out and find every conceivable defect of the property and disclose all to the buyer—only those which are "reasonably discoverable." The broker is further protected by the principles of comparative negligence—the

206. See Comment, Judicial Imposition of A Duty to Inspect, supra note 50, at 836 ("[T]he broker may be held liable, despite a diligent inspection of the property, if he overlooks a defect which the jury in hindsight believes should have been discovered. The broker is not merely 'insuring' the seller's representation. Rather, he is insuring, for the purchaser's benefit, that the property will be free from defects."); Comment, Real Estate Brokers Liability for Failure to Disclose, supra note 3, at 339-45; see also Comment, Mandatory Disclosure: The Key to Residential Real Estate Brokers' Conflicting Obligations, 19 J. MAR. L. REV. 201 (1985). But see Comment, Expansion of a Real Estate Broker's Duties: Is Easton v. Strassburger in Illinois' Future?, supra note 88, at 120 ("Adoption of Easton in Illinois would not unduly burden a competent broker because one becomes competent by acquiring knowledge of the attributes and defects of subject property.").

207. For a discussion of the standard, see supra notes 142-79 and accompanying text.

208. See Professional Duty of Real Estate Brokers to Buyers, Nat'l L.J., Nov. 25, 1985, at 15, col. 3.

While the real estate industry has registered surprise at this imposition of responsibilities that were not based on the licensee's agency or duties to the principal, actually this case is nothing more than an expression of the general principle that every professional, including a real estate licensee, owes a duty to act reasonably and in such a manner that an unreasonable risk of harm is not caused to any person within the area of foreseeable risk.

Id.; see also Note, Imposing Tort Liability on Real Estate Brokers Selling Defective Housing, 99 HARV. L. REV. 1862 (1986) (real estate transactions will be more economically efficient if brokers are legally required to inspect and disclose reasonably discoverable defects to buyer).

209. Easton, 152 Cal. App. 3d at 103, 199 Cal. Rptr. at 391.
buyer has a duty to exercise reasonable care to protect himself. The buyer has a duty to discover defects which are clearly apparent from an inspection of the property.\textsuperscript{210} The broker will not be required to conduct an extensive investigation of the property in order to satisfy his duty to the buyer. He must simply use his expertise and professional knowledge to discover as much information about the product he is selling as he reasonably can. He must then disclose the information he has learned to the potential buyer and the buyer can choose whether or not to conduct a more extensive investigation.\textsuperscript{211}

Many other professionals, including notaries, attorneys, accountants, architects, engineers, and surveyors, may be liable to third parties for negligent conduct.\textsuperscript{212} Easton merely extended this liability to the real estate broker as a professional. The exact parameters of a real estate broker’s duty to the buyer have yet to be determined; however, because of the real estate broker’s vital role in a residential transaction the duty should be broadly defined. Certainly the broker must, at a minimum, verify all information that the seller gives to him, including all information to be put into the multiple listing system.\textsuperscript{213} The broker should, as a matter of course, inspect every property he lists and note any potential “red flags” of trouble. The broker should then disclose his findings to both the buyer and seller, and notify the buyer in writing that these potential problem areas should be further investigated by an expert in the appropriate field. If the buyer chooses not to follow up with an inspection, then the broker has discharged his duty and has potentially saved himself and the seller the cost of defending a misrepresentation or negligence law suit.

\textsuperscript{210} Id. ("[C]ases will undoubtedly arise in which the defect in the property is so clearly apparent that as a matter of law a broker would not be negligent for failure to expressly disclose it, as he could reasonably expect that the buyer’s own inspection of the premises would reveal the flaw. In such a case the buyer’s negligence alone would be the proximate cause of any injury he suffered.").

\textsuperscript{211} The broker in Easton would have probably discharged his duty to the buyer if he had merely alerted the buyer to the possible problems indicated by the “red flags.” The buyer would have been placed on notice of the possible problems and could have hired an engineer to make a thorough inspection of the property.

\textsuperscript{212} Professional Duty of Real Estate Brokers to Buyers, supra note 208, at 15, col. 3; see also Prosser & Keeton, supra note 127, § 107, at 747.

\textsuperscript{213} Cal. Civ. Code § 1088 provides: “If an agent places a listing in the Multiple Listing Service...that agent shall be responsible for the truth of all representations and statements in the listing of which that agent had knowledge, or reasonably should have had knowledge, to anyone injured by their falseness or inaccuracy.” Cal. Civ. Code § 1088 (West Supp. 1986) (emphasis added).
Easton is not the pariah that many in the real estate industry would like to believe. The competent broker already routinely conducts an inspection of the property and alerts potential purchasers of any "red flags" that the broker finds. This investigation benefits the broker by increasing his knowledge about the strengths and weaknesses of the property, thus increasing his professional competence. The buyer is benefited by acquiring the maximum amount of information about the property before making the decision to purchase the property, thus making a more informed choice.214 Easton is merely a judicial recognition and definition of the legal duty the broker owes to the buyer. In 1985 the California legislature passed two statutes in direct response to Easton. California Civil Code Sections 2079, 2079.1-.5 further defines the legal duty set forth in Easton;215 and California Civil Code Sections 1102, 1102.1-.14 specifies the type of disclosure that must be made to a potential purchaser.216 This legislative response to the growing liability of real estate brokers is much needed. The adoption of the mandatory disclosure form should give the California broker guidance concerning the nature and extent of the disclosures required.217 The standard of conduct is not onerous and the competent broker is most likely operating under this standard without actually being aware of it. Clearly

214. Comment, Expansion of a Real Estate Broker's Duties, supra note 88, at 120 ("Adoption of Easton...would not unduly burden a competent broker because one becomes competent by acquiring knowledge of the attributes and defects of subject property. Moreover, conducting a reasonable investigation is an ethical obligation imposed on brokers by their own professional organization. On the other hand, the purchasers are benefited in that they are making well-informed decisions concerning a major investment.").


It is the duty of a real estate broker, licensed under [California law], to a prospective purchaser of residential real property...to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to the prospective purchaser all facts materially affecting the value or desirability of the property that such an inspection would reveal, if that broker has a written contract with the seller to find or obtain a buyer or is a broker who acts in cooperation with such a broker to find and obtain a buyer.

Id. § 2079.

216. Id. §§ 1102, 1102.1-.14. Section 1102.6 contains a mandatory four part disclosure form with which all prospective purchasers must be provided. Id. § 1102.6.

the interest of dealing honestly and ethically with the buyer, the duty to investigate is warranted.²¹⁸

IV. CONCLUSION

Without a doubt, the real estate broker owes some sort of legal duty to the buyer in a residential real estate transaction. The courts have interpreted this duty as to encompass everything from a fiduciary relationship to strict liability. The real estate industry, as well as the general public, is understandably confused as to what actually is the proper relationship between the broker and the buyer. In recent years there has been a general trend toward imposing a standard of good faith and fair dealing in many types of transactions, and this standard should also be applied to the dealings of the broker and the buyer. However, a fiduciary duty should not be imposed on the broker and buyer. The broker is already in a fiduciary relationship with the seller, and the legal imposition of a fiduciary relationship with the buyer will put the broker in an impossible situation—he cannot act in the best interest of both parties. To try and do so is to invite a law suit by one or both parties.

Yet the broker cannot simply represent the seller and ignore the buyer. In the modern residential real estate transaction, the selling broker in a MLS transaction will spend many hours with the buyer. The buyer will come to depend and rely on the broker for his professional expertise. The broker will be a vital source of information concerning the property. This information should be correct and the broker should recognize a duty to the buyer to use reasonable care to make certain that the information is accurate. If the broker fails to use reasonable care in the obtaining or communicating of the information, then the buyer should have a cause of action for negligent misrepresentation against the broker.

The broker's duty to the buyer must not be interpreted as a strict liability standard. The broker cannot guarantee to the buyer that the property is free from all defects. Nevertheless, the broker, in the exercise of reasonable care, must utilize all his pro-

²¹⁸ “Brokers, even if not legally required to provide buyers with information about a property, may sometimes disclose defects because of the mandates of a professional responsibility code or concern for their market position; [footnote omitted] nevertheless, legal requirements are desirable, because these other considerations often provide inadequate monetary incentives to induce brokers to take the proper amount of care.” Note, Imposing Tort Liability on Real Estate Brokers Selling Defective Housing, 99 Harv. L. Rev. 1861, 1871 (1986).
This professional expertise to discover the material defects of the property. Thus, the broker cannot merely rely on the information concerning the property provided by the seller, but must undertake an independent investigation of the property. This investigation should be conducted as a routine part of the listing process. The broker must verify all information given to him by the seller, and, in addition, must conduct an independent inspection of the property to discover any information which might materially affect the value of the property.

The imposition of the duty to investigate upon the broker will benefit all parties to the transaction. Today, many buyers wrongly but understandably believe that the broker is acting in their best interest. They are many times disappointed in the broker's conduct in the transaction. By the time that the broker has explained the nature of his fiduciary duty with the seller, it is too late to avoid a law suit. The rash of suits against brokers and sellers for fraud, negligent or innocent misrepresentation, and simple negligence is an indication as to how severe this problem really is. Yet, many of these suits could be avoided if the broker would do two things—inform the buyer in writing at the beginning of their relationship that the broker is in a fiduciary relationship with the seller, and conduct an investigation of the property to discover all material defects and disclose any material defects to the buyer. If the broker would routinely follow these two relatively simple steps, he would, in many cases, forestall legal action by the buyer.

The Easton case and the corresponding California legislature's imposition of a duty to investigate should not be viewed as another potential legal headache for the broker, but as a turning point in broker liability. Brokers now know what their duty is to the buyer—to use reasonable care to avoid misleading the buyer. This is not an unconscionable standard, but one which ethical and honest brokers should readily embrace. It avoids the dual agency problem, but allows for fair treatment of the buyer. The real estate industry must recognize that as professionals they are going to be held to a high standard of care and instead of fighting the imposition of this standard, they should utilize it to create a more honest and ethical business environment for both the seller and the buyer.