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PROTECTING THE CONSUMER:
BUYER AGENCY IN RESIDENTIAL REAL ESTATE TRANSACTIONS

by

Robert D. King*

Corporate Legal Times, October 1993, at 1. Making money under these circumstances will require a policy of expense reduction.

See Steven Brill, "The New Leverage," *The American Lawyer*, July/August 1993, regarding innovative billing practices based on value to clients and results. There is a strong movement afoot to limit the amount of attorney compensation in contingency fee cases by linking fees to the degree of risk actually borne by personal injury lawyers. The contingency portion of the fee would kick in only after trial and would be based on that portion of the award which exceeds the defendant's original offer. Peter Passell, *Windfall Fees in Injury Cases Under Assault*, *New York Times*, February 11, 1994, Section A, Page 1. If this or similar approaches achieve success in bar associations, ethics ruling, or in the judiciary, lawyers should lean more and more to neutral forums where clients can be seen and heard in a timely fashion, barriers to settlement can be effectively eliminated by neutrals, and value judgments can be truth-tested at an early stage in the BATNA (Best Alternative To a Negotiated Agreement) evaluation process. (Fisher and Ury, *supra* note 2, at 101.) Attorneys who doubt the changing attitude of corporate America regarding obtaining value and results for legal expenditures should consult *Corporate Legal Times*, Chicago, Illinois, a national monthly on managing in-house corporate legal departments.

See also Dahlgren, Jennifer, *Consulting the Future*, *ABA Journal*, April 1994, regarding prepaid legal services.

³⁰ In this connection see HOWARD RAIFFA, *supra*, note 17, especially part IV "Many Parties, Many Issues," at 251.

³¹ KEITH DAVIS AND JOHN W. NEWSTROM, *HUMAN BEHAVIOR AT WORK: ORGANIZATIONAL BEHAVIOR*, (7th ed. 1985), at 217 et. seq. See ARNOLD BIRENBAUM AND EDWARD SAGARIN, *NORMS AND HUMAN BEHAVIOR* (1976), especially Chapter 4, "Explaining Behaviors." and Hubert Bonner, *GROUP DYNAMICS* (1959), at 45. In describing "togetherness" of a group as a dynamic structure he refers to a "circular reaction" in which there is a high degree of self intensification in each member of his own 'excitement' as he finds it reflected in others. In this process shared feelings and tension, which in each member separately had no adequate outlet, are freely expressed. When a person's responses to others is shared by them when these experiences become reciprocal or interactive, there exists the basic condition of group behavior."

³² J. JAY BRAUN AND DARWYN E. LINDER, *PSYCHOLOGY TODAY: AN INTRODUCTION*, (4th ed. 1975), at 619 et. seq.

³³ Davis and Newstrom, *supra*, Fuller *supra* note 15, at 308, suggests that the mediation is directed not to conforming to norms, but rather to creating the relevant norms. Note 31, at 312.

³⁴ FISHER AND URY, *supra*, note 2, at 101.

I. Introduction

The single most important investment for most Americans is the purchase of a home. The decision to buy a home requires substantial financial consideration. Similarly, one who sells a home must consider the financial consequences. It is inappropriate, therefore, that such an important financial transaction is in many instances conducted in a manner which is inconsistent with prevailing notions of agency theory and which does not accurately reflect the understanding of the buyer, the seller, and the real estate professional.

The typical residential real estate transaction promotes this inconsistency through the use of "listing brokers" and "cooperating or selling brokers," the latter of whom are deemed to be "sub-agents" of the listing broker.¹ In this transaction, the seller designates a broker to act as his or her exclusive agent in marketing the property. A listing agreement setting forth the obligations of the parties is executed.² This broker is referred to as the "listing broker," and is legally recognized as the agent of the seller in the sale of the property.³ The listing agreement typically requires the listing broker to place the listing in the local Multiple Listing Service ("MLS"). Through the MLS, selling brokers learn that the property is for sale and are advised of the conditions and terms of the offer to sell. The selling brokers who market the property to prospective buyers are deemed sub-agents of the listing broker and, consequently, sub-agents of the seller, to whom they owe a fiduciary obligation.⁴

The typical real estate sale involves the prospective buyer contacting the sub-agent and requesting that the sub-agent assist the buyer in locating suitable property that is for sale. The sub-agent reviews properties listed for sale in the MLS and presents them to the buyer for consideration. If the buyer decides to bid on a property, the sub-agent then prepares the buyer's offer to purchase, often after having counselled the buyer on the purchase bid as compared with similar properties in the area. As negotiations with the seller over the terms of the proposed sale continue, the sub-agent often negotiates on behalf of the buyer.⁵

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The close relationship between the selling broker and the buyer implies that the selling broker is the buyer's agent. In fact, in a survey conducted by the Federal Trade Commission ("FTC"), 67% of buyers surveyed stated that they relied on the advice of a listing or selling broker, including advice concerning the valuation of the property. As might be expected, the typical buyer assumes that he or she is represented by the selling broker. Approximately 71% of buyers surveyed in the FTC Report believed that the selling broker was the agent of the buyer.⁶ Indeed, the entire selling process, when accomplished through the use of a selling broker, supports this assumption. In fact, most selling brokers see themselves as representing the buyer.⁷ The entire range of activities which transpire from the moment the buyer steps into the selling broker's office until the buyer is handed the keys to the new residence suggests that the selling broker represents the buyer.

Notwithstanding the sub-agent's apparent representation of the buyer in identifying, valuing, bidding for and negotiating with the seller over the property, the selling broker, as a sub-agent, is considered the agent of the seller.⁸ This agency scheme is confusing to the average real estate purchaser and inconsistent with the actions of both the buyer and the selling broker. Moreover, the seller too is victimized by the sub-agency principle. Sellers who use due care in selecting a listing broker as a sales agent may nonetheless become liable in tort to the buyer for any misrepresentation of agents, including the sub-agents about whom the seller knows little or nothing.⁹

The purpose of this article is to identify the weaknesses in the sub-agent rule; examine the principal alternatives to sub-agency; and, recommend a form of buyer's agency which will comport with the realities of the real estate sale process, offer protection to the consumer, particularly the buyer, and do as little damage to the existing methodology of real estate sales as possible.

II. The Weaknesses Of Sub-agency In Residential Real Estate

A typical home sale involves a seller, a buyer, and two real estate brokers: the listing broker and the selling broker.¹⁰ The contractual agency relationship is created by the seller's execution of a listing contract. Contained within the agreement is the seller's consent to the placement of the property in the MLS.¹¹ The MLS serves as a quasi-public market for residential real estate transactions whereby the listing and other relevant information about the property is made available to all brokers who subscribe to the service.¹² Moreover, participation in the MLS by the seller is interpreted as consent to the creation of subagents.¹³ The listing agreement is a unilateral contract by the seller to pay the commission if the property is sold according to the terms of the listing agreement.¹⁴

Without a doubt, it is clear that an MLS listing benefits the parties to the proposed transaction. The MLS listing benefits the seller by increasing the universe of prospective buyers aware that the property is for sale. Similarly, the MLS provides exposure to the maximum number of brokers in the area, assuring that in the event the listing broker is unable or unwilling to market the property actively, the seller may find another listing broker. The listing broker benefits from the MLS listing because it better enables him or her to bring an

offer to buy to the seller within the terms of the listing agreement, thereby increasing the likelihood that the listing broker will receive at least some portion of the commission.¹⁵ The MLS listing procedure also benefits the selling broker by increasing the inventory of properties available to show the buyer. And finally, the buyer benefits from the broker's affiliation with the MLS since the MLS provides the buyer with a catalog of similar properties in the area having the qualities that the buyer is seeking.

The benefits afforded by the MLS, including the efficiencies related to seller liquidity, valuation for the buyer and the seller, and the aggregation of inventory from which the buyer may choose, all suggest that the MLS system should be maintained. It is, however, the notion of sub-agency connected to the MLS which needs to be abolished. As one commentary noted, "Even though the NAR [National Association of Realtors] urges and promotes this subagency theory, the agency relation between the seller and the cooperating [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." It should not be the law.¹⁶

When brokers become members of the MLS they agree to pool listings and share commissions. Under the NAR framework, placing the listing in the MLS "constitutes an offer of subagency by the listing broker to other [MLS] members to procure a buyer in exchange for a percentage of the sale commission."¹⁷ In the typical transaction utilizing the MLS, the selling broker functions as the agent of the listing broker and, thereby, is deemed the sub-agent of the seller.¹⁸ Consequently, both the listing and the selling broker stand in a fiduciary relationship to the seller.¹⁹

While it is clear to the parties and indeed makes sense that the listing broker is the agent of the seller and, therefore, stands in a fiduciary relationship to him or her, it is generally contrary to the beliefs and reasonable expectations of the parties that the selling broker is also the agent of the seller. As commentators have suggested,

Most buyers and sellers are unaware of the true legal relationship between them and the brokers under the MLS structure. The sellers do not understand the listing agreements and the consent to subagency. ...Sellers are not informed to the potential liability for the conduct of agents and subagents. The buyer does not know that secrets revealed may be divulged by the [selling] broker under the legal duty owed to the seller.²⁰

And further,

[E]ven experienced real estate brokers are not fully aware of the agency relationships created in real estate transactions, particularly those involving MLS, nor can they be certain of the extent of their duties and liabilities. If experienced real estate brokers are not sure of their own agency status, the average homebuyer and seller, who may be involved in a real estate transaction only two or three times during their lifetimes, probably will not know who represents whom and what responsibilities each has.²¹

But it is the buyer, who under sub-agency is not legally represented by a real estate agent, who is the most vulnerable. Virtually every aspect of the relationship between the buyer and the selling agent suggests that the selling agent represents the buyer. Typically, the buyer, acting as a principal, initiates the contact with the selling agent and controls the entire venture, and through his/her actions manifests an intent that the selling agent act on his/her behalf.²² Among the actions indicating the buyer's belief that the selling agent acts on his/her behalf are the buyer's reliance on the expertise and counsel of the selling agent with regard to issues such as the market value of the prospective purchase, financing terms, inspection and repair procedures, and the condition of the property. Furthermore, the buyer is often requested to reveal his/her financial position to the selling agent in order for the agent to "qualify" the buyer for financing purposes and to allow the selling agent to select property listings which the buyer can afford.²³ Indeed, buyers often feel so comfortable with selling agents that they reveal the highest price they are willing to pay for a property. Clearly, the relationship between the buyer and selling agent suggests that the selling agent is acting on the buyer's behalf.²⁴

The selling agent's actions also suggest that the selling agent is acting as the agent of the buyer. As one commentator noted:

...the selling agent will locate and show property to the buyer which meets the buyer's specifications. This action creates the impression that the selling agent is working for the buyer. Then, once the buyer is interested in a property, the selling agent will assist the buyer in determining an offer price, provide financing information, and accompany the purchaser in a final "walk through." Again, these actions would suggest an intent on the part of the selling agent to act as the buyer's representative.²⁵

Notwithstanding the plethora of indications that the selling agent is the agent of the buyer, the rule of sub-agency holds that the selling agent is the agent of the seller. This means that the broker "owes his principals an obligation of utmost fidelity and good faith."²⁶ The element of "good faith" includes a legal, ethical, and moral responsibility to obtain for the principal, the seller, the best bargain and terms that his/her skill, judgment and diligence can achieve.²⁷

In spite of the sub-agent rule's apparent shortcomings for the buyer, some commentators have nonetheless maintained that the rule actually benefits the buyer. The Colorado Supreme Court, for example, concluded that the buyer is actually protected as a result of the sub-agency relationship.²⁸

Since both real estate agents are agents of the seller, the seller may become liable to the buyer in tort for any misrepresentation of his agent through the ratification doctrine. Such liability allows the remedy of rescission against the seller. If there is no agency relationship between the seller and the selling broker, but the agency relationship is between the buyer and the selling broker, this remedy of rescission is no longer available to the buyer because the ratification doctrine would not be applicable, and the buyer's only recourse may be a suit against the broker for damages.²⁹

The continuation of sub-agency as the preferred interpretation of the relationship between the buyer and the selling broker also avoids the problems created by dual agency. Dual agency arises when both the seller and buyer are represented by the same agency.³⁰ Problems of conflict of interest are immediately apparent. Although the disclosure of dual agency and the written consent of both principals, the buyer and seller, can ostensibly avoid the charge of conflict of interest, the question remains regarding the benefits to the consumer. As one commentator noted:

It's no problem ... if an agency attempts to [represent both the buyer and seller] so long as all parties agree to it. The agent involved simply slips into neutral territory, the firms say, and becomes a dual agent--not favoring either seller or buyer but just attempting to bring them together.

Critics of dual agency say that point of view is hogwash, that agents will knowingly or unknowingly do whatever is necessary to make a deal.³¹

III. Alternatives to Sub-agency

The obvious deficiencies in sub-agency began to attract the attention of commentators during the mid-1980s.³² The typical response to the objection that the sub-agent rule leaves the seller vulnerable and buyer unrepresented was that through disclosure of the workings of sub-agency to all parties by the sales agents the consumer would be made aware and therefore able to protect himself. The disclosure contemplated can apply to an agent who wishes to represent more than one party in the transaction notifying all the parties, or alternatively, an agent who represents only one party disclosing this fact to the other principals. Pressure from consumer groups, primarily, with some help from the real estate industry itself, caused many states to enact laws to require disclosure by sales agents about whom he or she represents.³³ There is no uniformity among the states, however, with regard to the nature and extent of the disclosure. Although the majority of states today have mandatory disclosure laws, a study by the Consumer Federation of America concluded that few have disclosure requirements essential to meet the needs of buyers.³⁴ The Consumer Federation of America proposed a four-pronged test that every disclosure should meet:

A written statement, provided to the purchaser, that explains the relationship between the agent, the seller and the buyer. If the agent is functioning as a "buyer's broker"...that, too, must be explained.

The disclosure must take a standard, prescribed form... Agents must be required to provide the disclosure to the buyer at the first "substantive contact." Substantial contact means any circumstance in which a buyer begins to relate information about the type, location or price range of the property he or she desires. Unwary buyers who assume that the agent represents them can divulge valuable tactical information early on, and then be handed a disclosure form at the closing table--far too late to be of any value.

The forms must be short, simple and to the point. Lengthy, boilerplate forms rarely get read.

Both the buyer and the agent need to sign the disclosure form, acknowledging that the prescribed form was read and understood by the consumer.³⁵

Disclosure, however, does not appear to be the panacea for all the ills suggested by sub-agency. As one commentator noted, "...mere disclosure still fails to provide the buyer with adequate representation."³⁶ Another commentator noted that, "Limiting the disclosure solely to the agency relationship does not provide the consumer with information about many of the options available that would be helpful, though perhaps not in the best interests of the broker, in choosing how to market his or her property or how to locate a home that best satisfies his or her requirements."³⁷ Practical reality suggests as well that the buyer may simply not comprehend the significance and consequences that result from disclosure.³⁸ Does the average consumer understand what is meant by the phrases "fiduciary duty" or "duty to disclose?"³⁹ Moreover, will disclosures simply be lost on buyers who are preoccupied with all the other issues and paperwork attending the purchase of a home?⁴⁰

In response to the weaknesses inherent in sub-agency, even with mandatory disclosure of the agency relationships, some commentators have suggested other alternatives which ostensibly would better protect the consumer and at the same time give legal effect to the intentions of the parties as manifested by their conduct. Two of the principal alternatives are dual agency and buyer's or seller's agency.

As the agent of both the seller and the buyer, the dual agent owes each the duties of loyalty, good faith and disclosure.⁴¹ However, since the interests of the buyer and seller are invariably at odds, it seems impossible for the fully disclosed dual agent to fully represent both parties at the same time. Consequently, the dual agent will typically assume the role of a neutral facilitator, providing the parties with the means to obtain information which they may need to negotiate the terms of the purchase. The dual agent refrains from giving advice to either party. Moreover, since the dual agent must still reveal any material facts of which he or she is aware, the dual agent is not likely to get too involved with either party in order to avoid the duty to disclose. The buyer and seller obviously are disadvantaged by this arrangement. As one commentator noted:

In fact, dual agency appears only to benefit the real estate agents. As dual agents, real estate agents are now free from some of the responsibilities of agency, but are still able to collect both the listing and sales commissions. Meanwhile, both the buyer and seller are left to represent themselves.⁴²

The dual agency practice is essentially the equivalent of the "facilitator," "mediator," or "middleman" approach. This practice allows the real estate agent to stand in the middle of the transaction and releases the sales agent from the traditional fiduciary responsibilities toward his or her client.⁴³ This approach does allow for the even-handed treatment of both the seller and buyer,⁴⁴ and may even reflect the real nature of the real estate agent's efforts, since the real estate agent is not generally paid unless a sale is consummated. If, for example, the seller rejects a buyer's offer, the agent typically receives no commission. The agent may, therefore, attempt to persuade the seller to accept the offer even when it may not be in the seller's best

interest. A sample facilitator contract form prepared by the Greater Boston Real Estate Board defines the broker's duties as furnishing "general advice concerning real estate practices and procedures" and assisting in "communications and negotiation" between the seller and buyer "so they can reach agreement between themselves."⁴⁵ Like the criticism of the dual agency, the facilitator approach is criticized as giving "the consumer the worst of all possible worlds."⁴⁶ However, it is the seller who is deemed to be the biggest loser under the facilitator approach:

"You give up the most important legal protections you have" as a seller--a binding "agency relationship." This fiduciary role is a major part of the package of services sellers pay for in their sales commissions. ...Signing a facilitator agreement means "you throw away all that" ... but pay the same.⁴⁷

Buyer's agency or seller's agency, or a combination of both, is the other most frequently suggested alternative to sub-agency. Some real estate brokerage firms have recently decided to add formal representation of buyers, or buyer's agency, to their offered services.⁴⁸ Some commentators argue, however, that this process is akin to dual agency and, therefore, as noted earlier, leaves the buyer and seller with little or no real benefits.⁴⁹ The issue of dual agency arises most often in these situations when the buyer decides to purchase a listing of the sales agent's firm. Again, the proponents of this process suggest that the potential for conflict of interest on the part of the agent can be dealt with through disclosure.⁵⁰

Obviously, firms that specialize in providing either buyer's brokerage or seller's brokerage, but not both, avoid the potential for dual agency suggested by the above-mentioned. Firms specializing in seller's agency provide essentially the same services as the seller receives under sub-agency. The seller, however, would presumably not be appointing sub-agents and would benefit by not being liable for the sub-agent's misrepresentations and misdeeds.⁵¹ The buyer, on the other hand, is clearly a beneficiary of buyer's agency. Whereas buyers are unrepresented in the typical sub-agency sale process, in the buyer's agency mode the buyer has an agent representing him or her exclusively. Issues which once were thought to doom the utility and practicality of buyer's agency, such as the buyer's agent's splitting the listing agent's commission from the seller and the apparent unavailability of the MLS to buyer's agents, have been resolved. The fact that the buyer's agent may be splitting a commission paid by the seller with the listing agent is no longer viewed as determining the agent's principal.⁵² Moreover, the availability of the MLS to buyer's agents has been agreed to by the NAR.⁵³ As one commentator noted, "In 1976 when the NAR defined the MLS as a 'means of disseminating information,' the California Supreme Court ruled that the NAR couldn't restrict MLS access to Realtors."⁵⁴ Buyer's agents benefit the buyer by allowing the buyer access not only to all the homes listed in the MLS (where the buyer's agent will typically split the commission with the listing agent) but also to homes that are for sale by owners (where the buyer's agent may negotiate a fee beforehand with the sellers or arrange for the buyer to pay a fee). Furthermore, buyer's agents claim that they are free to render an honest assessment of a home to the buyer since they are not agents of the seller.

Although buyer's agency has been touted by commentators as the wave of the future,⁵⁵ and most barriers to its implementation have been removed, it has not to date caught on. Some

of the reasons why the idea of buyer's agency has not caught fire with the public relate to the fact that the established real estate industry, as represented by NAR, have not been generally supportive. While the NAR has given some superficial support for the idea of buyer's agency, or at least has not formally attempted to preclude its development,⁵⁶ in reality, the rank and file in the industry have not been supportive.⁵⁷ The so-called "traditionalists" argue that buyer representation is not necessary since under the Realtors' Code of Ethics, they must treat both seller and buyer fairly. Moreover, the traditionalists bristle at the notion of sharing commissions with buyer's agents.⁵⁸ Buyers too have been slow to embrace the idea of buyer's agency. Buyers' reluctance is based, at least in part, on the belief that the agents working with them are in fact working for them and looking out for their interests.⁵⁹ Also, some buyers may believe that using a buyer's agent will cost them a fee.⁶⁰ Finally, many firms fear losing part of the market by specializing in seller's or buyer's agency. And, they fear doing both may be a conflict of interest.

IV. A Proposal To Integrate Buyer's Agency Into the Existing Mechanism for Real Estate Sales

Dominance of the sub-agent rule in the sale of residential real estate today indicates that the use of buyer and seller agency on a large scale basis is not likely to occur. For well over a decade sub-agency has been roundly criticized for its failure to protect the consumer.⁶¹ Notwithstanding the well-deserved criticism, the predominate method for the sale of residential real estate remains the traditional sub-agent methodology. The buyer remains essentially unrepresented, although ostensibly better informed of his or her inferior status. One of the principal reasons the sub-agent rule dominates the industry today is that it is so firmly entrenched, there is essentially no strong motive on the part of the industry to change it. Moreover, the buying public continues to labor under misconceptions as to its representation, or better, lack of representation.⁶²

The only viable avenue for wholesale change in the existing scheme is to effect it through a process that does minimal damage to the existing structure. This can be accomplished by recognizing and implementing the intentions of the parties. As noted earlier, sellers do not truly understand that they are appointing every real estate broker as their agent when they agree to allow the listing agent to submit their property for inclusion in the MLS. Similarly, buyers do not understand that the agent with whom they have worked so diligently is legally bound to look out for the interests of the unknown seller. The whole sub-agent process is artificial and does not comport with the beliefs and expectations of the parties. Since buyer's agency is now at least recognized as an alternative which can be maintained through the use of the MLS, and the NAR no longer requires sub-agency as a prerequisite to its use, then the beliefs of the buyer and seller should be recognized. In other words, when a buyer contacts a real estate salesperson concerning a property advertised in any manner, the buyer should be able to assume that the agent will be working as the buyer's agent. Only with regard to those listings which are with the agent's own agency should the buyer be informed, in writing at the first contact, that the sales agent is the agent of the seller. This fact is most likely what the average buyer would believe to be the case anyway. Moreover, throughout the interactions between the buyer and the agent, whenever the agent shows one of the agency's own listings,

the buyer should be again informed that the agent is the representative of the seller and the buyer should be advised to seek independent counsel. Although there may still be some instances where the buyer's interests may be compromised using this process, such as when the buyer reveals a maximum purchase price to the agent and subsequently develops an interest in an "in house" listing, the buyer can be made aware at the outset or the first contact with the agent that such information should be withheld. Moreover, the typical buyer is unlikely to discuss the maximum price he or she is willing to pay for a property until one has been found which is of enough interest to consider making an offer. When the property is not an "in house" listing, the buyer is free to disclose such information to the agent. Clearly, this option, while not as perfect as the use of a straight buyer's agency, is a vast improvement over the existing structure which makes all sales agents the agent of the seller. While some disclosure with regard to "in house" listings would still be required, it is much less complex and far more sensible for the average buyer to comprehend. Moreover, to utilize the concept of buyer's agency in this method recognizes the existence of the current structure, allows agencies to both list and sell real estate, and comports with the beliefs and expectations of the parties.

V. Conclusion

The sub-agent rule, which today remains the primary theory explaining and governing the relationship among the parties in residential real estate sales, does not serve the best interests of consumers and should, therefore, be discontinued. While commentators during the 1980s began to criticize the sub-agent rule, powerful forces, such as the NAR, fostered the continuation of the rule by tying use of the Multiple Listing Services to the establishment of sub-agency. Due to increasing criticism of the sub-agent rule, however, the NAR has agreed in more recent years to consider the utility of alternative methods of viewing the relationship among the agents, buyer, and seller. The NAR has dropped the two biggest stumbling blocks to the consideration of other relationships, such as buyer's agency and dual agency. The NAR does not insist upon sub-agency as a prerequisite to utilizing the MLS, and it no longer argues that the seller's payment of a commission necessitates that all who receive a portion are by virtue of that fact agents of the seller. Notwithstanding the favorable conditions for a wholesale change in the manner in which parties to residential real estate are legally related to each other, very little movement has been made away from the rule of sub-agency. Although there are numerous factors which may account for this slow progression, a significant factor concerns the fact that a movement to buyer's agency exclusively would require a major overhaul of the entire industry. Moreover, most real estate firms are not willing to limit their customer base to sellers or buyers exclusively. Consequently, if the customer is going to benefit from the notion of buyer's agency, then its integration into residential real estate sales must be effected in a manner which will essentially leave intact most of the existing structures while at the same time permitting the parties' beliefs and expectations to be given legal and practical effect. This can be accomplished by recognizing that in the typical residential real estate sale the sales agent is the agent of the buyer in all cases except where the buyer is interested in pursuing the purchase of a listing from the inventory of the sales agent's firm. In the latter case the agent would remain the agent of the seller. While this proposal is not without some drawbacks, it is a substantial improvement over the artificial and anti-consumer sub-agent rule.

ENDNOTES

1. Approximately eighty one percent of persons selling single family dwellings employ real estate brokers to assist in the transaction. See 1 FTC Los Angeles Regional Office, *The Residential Real Estate Brokerage Industry* 7 (1983) [hereinafter the "FTC Report"].
2. *Id.* at 4.
3. 12 C.J.S. Brokers sec. 25 (1985).
4. For a discussion of these fiduciary obligations, see Paula Murray, *The Real Estate Broker and the Buyer: Negligence and the Duty to Investigate*, 939 VILLANOVA L. REV. 939 (1987); Michael K. Braswell & Stephen L. Poe, *The Residential Real Estate Brokerage Industry: A Proposal For Reform*, 30 A.B.L.J. 271, 276-279 (1992).
5. Approximately eighty one percent of buyers surveyed by the FTC stated that the broker assisting them in the purchase of the home played a significant role in negotiating with the seller. FTC Report, *supra* note 1, at 183.
6. *Id.* at 83-84.
7. See Note, *Sub-Agency in Residential Real Estate Brokerage: A Proposal to End the Struggle with Reality*, 61 S. Cal. L. Rev. 399, 419 (1988).
8. *Id.* at 180-81.
9. See Louis A. Trosch, *The Effects of North Carolina's New Disclosure Law on Real Estate Agents-- Whom Will They Represent and in What Capacity*, 27 Business L. Rev. 115, 118 (1994).
10. See Guy P. Wolf & Marianne M. Jennings, *Seller/Broker Liability in Multiple Listing Service Real Estate Sales: A Case for Uniform Disclosure*, 20 Real Estate L.J. 22, 23-24 (1991).
11. See Braswell & Poe, *supra* note 4, at 274-75.
12. An MLS is "operated by a local group of brokers [as] an information sharing or exchange mechanism" through which affiliated brokers may obtain information regarding listed properties. FTC Report, *supra* note 1, at 7.
13. See Braswell & Poe, *supra* note 4, at 275.
14. *Id.*

15. When a sale is completed through the efforts of a selling broker, the listing broker splits the commission with the selling broker. Typically, the listing broker and the selling broker each take fifty percent of the commission.
16. See Braswell & Poe, *supra* note 4, at 279.
17. *People v. Colorado Springs Bd. of Realtors*, 692 P.2d 1055, 1059 (Colo. 1984). See also Braswell & Poe, *supra* note 4, at 279.
18. See Braswell & Poe, *supra* note 4, at 279.
19. *Id.*
20. *Id.* at 273.
21. See Wolf & Jennings, *supra*, note 10, at 23-24.
22. See Trosch, *supra* note 9, at 118.
23. *Id.*
24. In a 1983 survey conducted by the FTC 71% of buyers believed that the selling agents represented them. *Id.*
25. *Id.* at 119.
26. *Spence v. Spaulding and Perkins, Inc.*, 347 S.E.2d 864, 865 (N.C. App. 1986).
27. *Id.*
28. See Trosch, *supra* note 9, at 118. See also *Stortroen v. Beneficial Finance Co.*, 736 P.2d 391, 399 (Colo. 1987).
29. See Trosch, *supra* note 9, at 118. See also *Stortroen*, 736 P.2d at 399.
30. See Trosch, *supra* note 9, at 119.
31. See Gene Austin, *Is Dual Agency Nothing More Than "Dual Duplicity"?*, *Phila. Inquirer*, Sept. 6, 1992, at 1-L.
32. See, e.g., Joseph M. Grohman, *A Reassessment of the Selling Broker's Agency Relationship with the Purchaser*, 61 St. John's L. Rev. 560 (1987).
33. See Braswell & Poe, *supra* note 4, at 289.

34. See Kenneth Harney, *Reform Is Brewing for Broker Disclosure*, Newsday, July 4, 1992, at 36.

35. *Id.*

36. See Trosch, *supra* note 9, at 121.

37. See Braswell & Poe, *supra* note 4, at 292-93.

38. *Id.* at 293.

39. *Id.*

40. As one commentator noted:

The effectiveness of these disclosures also can be affected by their presentation to the consumer, whether made in a prescribed disclosure form or other writing. A written disclosure form is likely to become buried in the forms that a prospective seller or buyer must sign in the course of retaining a broker to sell or buy a home. Also, if circumstances in the transaction change which make a prior disclosure incorrect, most of these laws do not require an updated or corrected disclosure to be made.

Id.

41. See Trosch, *supra* note 9, at 121.

42. *Id.* at 121-22.

43. See *Realtors Want People to Know Who's Representing Whom*, Phila. Inquirer, Dec. 13, 1992, at H7.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. See Gene Austin, *Is Dual Agency Nothing More Than 'Dual Duplicity'?*, Phila. Inquirer, Sept. 6, 1992, at L1.

49. *Id.*

50. *Id.*

51. See generally, Elizabeth Lesly, *How Your Realtor Rips You Off*, Wall St. J., Nov. 30, 1990, at A14. It is not entirely clear, however, that seller's agency would not simply maintain

the current system of sub-agency wherein the seller is appointing all realtors, except those who specifically approach the listing broker as buyer's agents, as sub-agents.

52. See, e.g., Braswell & Poe, *supra* note 4, at 291. "In characterizing the agency relationship, some state laws expressly discount compensation relationships as a determining factor of whether the agent is representing the seller or the buyer...." *Id.* Trosch, *supra* note 9, at 122. "As the source of commission does not itself determine agency, the buyer agent can be compensated by either the buyer or seller." *Id.*

53. See Kenneth R. Harney, *Things Nader Would Change In Real Estate*, Phila. Inquirer, Dec. 11, 1992, at C14. "The concept [of buyer agency] has been spreading quickly in many states, encouraged in part by support from the industry's trade group, the National Association of Realtors (NAR)." *Id.* In 1992 the NAR amended its rules to permit local realty boards' Multiple Listing Services to be opened to allow buyers' agents access and fee splits as they would enjoy working as sub-agents. *Id.*

54. See Lesly, *supra* note 51.

55. See, e.g., Harney, *supra* note 53; Christi Harlan, *Home Buyers' Agents Threaten Brokers*, Wall St. J. Feb. 5, 1991, at B1; Gene Austin, *Home Buyers May Have An Agent In Their Corner Soon*, Phila. Inquirer, Dec. 1, 1991 at L1.

56. See Austin, *supra* note 55.

57. See Harlan, *supra* note 55.

58. *Id.*

59. See Austin, *supra* note 55.

60. *Id.*

61. See *supra* notes 10-31 and accompanying text.

62. See *supra* notes 20-21 and accompanying text.