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## A Toxic Nightmare on Elm Street: Negligence and the Real Estate Broker's Duty in Selling Previously Contaminated Residential Property

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A TOXIC NIGHTMARE ON ELM STREET:  
NEGLIGENCE AND THE REAL ESTATE BROKER'S  
DUTY IN SELLING PREVIOUSLY CONTAMINATED  
RESIDENTIAL PROPERTY

*Sarah Waldstein\**

I. INTRODUCTION

Imagine the new homebuyer who discovers soon after moving in that the hill across the street is a toxic landfill.<sup>1</sup> Or, imagine buying a house only to find that it is insulated with a substance that renders it unsuitable for occupation.<sup>2</sup> New homeowners in such situations face a number of possible problems. They may find that, due to toxic contamination, their newly bought houses are uninhabitable or unsafe, or their properties' resale values have plummeted.<sup>3</sup> Additionally, both the federal and many state governments require owners of contaminated property to pay for or contribute to the removal or cleanup of toxins.<sup>4</sup> Such clean-up costs can be astronomical.<sup>5</sup> To

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<sup>1</sup> See, e.g., *ATCO National Bank v. Jackson*, No. C-3489-83 (N.J. Super. Ct. Ch. Div. filed Aug. 15, 1983); Amended Complaint, *Cuzzupe v. Paparone Realty Co.*, No. 83-4485 (D.N.J. filed Nov. 22, 1983); Frank, *Realty and Reality: Must Toxic Dump Be Revealed?*, 71 A.B.A. J. 20, 20 (Apr. 1985) (citing *ATCO National Bank v. Jackson*) [hereinafter *Realty and Reality*].

<sup>2</sup> *Roberts v. Estate of Barbagallo*, 531 A.2d 1125, 1128 (Pa. Super. 1987).

<sup>3</sup> See *Realty and Reality*, *supra* note 1, at 20 (homeowner offers a free Hawaiian vacation as inducement to selling his house); Amended Complaint, *Cuzzupe*, No. 83-4485 (for health and safety reasons, U.S. Department of Housing and Urban Development refused to authorize Federal Housing Administration (FHA) mortgages in the area); Affidavit of William and Blanche Jackson, *ATCO National Bank*, No. C-3489-83.

<sup>4</sup> See *infra* notes 140-47 and accompanying text.

<sup>5</sup> Cf. H.R. REP. NO. 253(I), 99th Cong., 2d Sess. 4, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835-37. Congress amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), 42 U.S.C. §§ 9601-9657 (1982 & Supp. III 1985), for the purpose of, among other things, appropriating an additional \$10 million to help clean up hazardous waste sites on the national priority list alone. *Id.* In

compound these problems, the buyer may have no recourse either against the creators of the pollution or against the sellers of the property, because the source of pollution is unknown,<sup>6</sup> or the polluter is bankrupt. Furthermore, the seller may have been unaware of any contamination if the toxins were not manifest during the seller's ownership. The only recourse available to the residential real estate buyers in the situations described above, who find themselves owners of contaminated property, is to seek recovery from the real estate brokers who sold them the land.<sup>7</sup>

Until the 1950s, purchasers of residential real estate had almost no recourse against real estate brokers for defects in the property sold.<sup>8</sup> Traditionally, the principle of *caveat emptor*, or buyer beware, shielded the sellers and brokers from liability for defective property.<sup>9</sup>

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1980, Superfund allocated \$1.6 billion to clean up four hundred waste sites. *Id.* at 2836. In 1986, the "total cost of completing the Superfund program is estimated to be as much as \$100 billion." *Id.* at 2837. This cost includes the cleanup of industrial waste as well as of waste from "households [that] have disposed of solvents, paints and cleaning fluids." *Id.* These estimated costs only measure the amounts that the federal government will pay, and do not include contributions from private sources or from state governments.

<sup>6</sup> Telephone interview with John Fitzgerald, Director of the Division of Solid and Hazardous Waste Site Assessment and Clean-Up, Massachusetts Department of Environmental Quality Engineering—Woburn, Mass. (Nov. 7, 1986) [hereinafter Fitzgerald interview].

<sup>7</sup> This Comment focuses on the liability of real estate brokers to purchasers, and thus does not concern the liability of sellers. This Comment is not a fifty-state survey on the status of real estate broker liability, as it varies from state to state. For a comprehensive compilation of case law on real estate broker liability in fraud, see, Annotation, *Real Estate Broker's Liability To Purchaser For Misrepresentation or Nondisclosure of Physical Defects In Property Sold*, 46 A.L.R. 4TH 546 (1986). Nor will this Comment discuss the issues related to commercial real estate. Purchasers of commercial real estate are usually represented by their own brokers and are often more experienced and knowledgeable about real estate matters. *Easton v. Strassburger*, 152 Cal. App. 3d 90, 102 n.8, 199 Cal. Rptr. 383, 390 n.8 (1984). Also, Congress has viewed commercial real estate sales as a different species of transactions from residential real estate. Congress recently created the innocent-landowner defense to liability under CERCLA, 42 U.S.C. §§ 9601, 9607 (1982), when it passed the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1613, 1616 (1986), § 101(f) (amending CERCLA §§ 9601(35)(A), 9607(b)(3) (1982 & Supp. III 1985)). Congress's view is expressed in the Conference Committee's statement that "those engaged in commercial [real estate] transactions should, however, be held to a higher standard [of due diligence to investigate for the presence of contamination] than those who are engaged in private residential transactions." Joint Explanatory Statement of the Committee of Conference, H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 5, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3279-80.

<sup>8</sup> Case Comment, *Brokers—Real Estate Brokers' Duties to Prospective Purchasers—Funk v. Tift*, 1976 B.Y.U. L. REV. 513, 513 n.2. The rule of *caveat emptor*, "buyer beware," had for centuries governed the relationship between the buyer and the seller. *Id.* at 513-14. The same rule applied derivatively to the seller's agent, the real estate broker. *Id.*

<sup>9</sup> *Id.* This principle protected brokers unless the purchaser could prove actionable fraud on the broker's part.

Under the doctrine of *caveat emptor*, buyers were required to inspect the property for sale, and were solely responsible if they failed to discover material defects.<sup>10</sup> Recently, however, the rule of *caveat emptor* has been eroding.<sup>11</sup> Instead of adhering to the doctrine, courts have held that there is a sufficient relationship between real estate brokers and purchasers to allow purchasers a cause of action against the brokers independent of any liability on the sellers' part. Depending on the facts and circumstances, some courts have based this broker-buyer relationship in contract or agency law.<sup>12</sup> Many other courts have based a cause of action against brokers in tort for fraud.<sup>13</sup> Very recently, three courts have held that real estate brokers can be liable to buyers in simple negligence.<sup>14</sup>

Tort law is the area experiencing the greatest expansion of broker liability to purchasers.<sup>15</sup> Over the past thirty years the duties of real estate brokers have broadened. Courts have begun to recognize that *caveat emptor* could not insulate brokers from liability to a purchaser when they commit fraud.<sup>16</sup> Today in most states, brokers can be held liable to a purchaser for damages arising from their fraudulent statements because purchasers are often justified in relying on real estate brokers' statements.<sup>17</sup> Furthermore, some state courts have held

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<sup>10</sup> See generally Romero, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*, 20 ARIZ. L. REV. 767 (1978).

<sup>11</sup> *Cashion v. Ahmadi*, 345 So. 2d 268, 271 (Ala. 1977); *Dugan v. Jones*, 615 P.2d 1239, 1248 (Utah 1980) ("In this state . . . the rule of *caveat emptor* does not apply to those dealing with licensed real estate brokers."). See, e.g., *Foust v. Valleybrook Realty Co.*, 4 Ohio App. 3d 164, 165-66, 446 N.E.2d 1122, 1126 (1981) ("*Caveat emptor* applies to sales of real estate relative to conditions open to observation.") (emphasis included) (citing *Traverse v. Long*, 165 Ohio St. 249, 135 N.E.2d 256 (1956)); Case Comment, *supra* note 8, at 513 n.2.

<sup>12</sup> See *infra* notes 33-57 and accompanying text.

<sup>13</sup> See generally Romero, *supra* note 10; *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984). See also *infra* notes 78-137 and accompanying text.

<sup>14</sup> *Easton*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383; *Gouveia v. Citicorp Person-to-Person Financial Center*, 101 N.M. 572, 686 P.2d 262 (1984); *Secor v. Knight*, 716 P.2d 790 (Utah 1986).

<sup>15</sup> See generally Romero, *supra* note 10.

<sup>16</sup> Initially the broker was held liable for concealment of a defect or fraudulent misrepresentation on which the buyer relied in making a decision to purchase the property. See Case Comment, *supra* note 8, at 514. A broker's misrepresentation, coupled with the buyer's reliance, was sufficient grounds for overlooking *caveat emptor*, even though the buyer could have discovered the defect by his own investigations. *Miles v. McSwengin*, 58 Ohio St. 2d 97, 101, 388 N.E.2d 1367, 1370 (1979).

<sup>17</sup> Case Comment, *supra* note 8, at 514. See also *Fausett & Co. v. Bullard*, 217 Ark. 176, 179, 229 S.W.2d 490, 491 (1950) ("[T]he doctrine of *caveat emptor* . . . has not been applied inflexibly to every situation . . . . [T]here are many circumstances that justify the buyer in acting upon the seller's statements . . . ."); *Spargnapani v. Wright*, 110 A.2d 82, 84-5 (D.C. 1954) (*caveat emptor* not applied in case of fraudulent misrepresentation); *Keith v. Wilder*, 241 N.C. 672, 676, 86 S.E.2d 444, 447 (1955) (*caveat emptor* not applied to case of fraudulent

real estate brokers to the professional standard of care enunciated in their real estate licensing laws and found the brokers liable in fraud for failing to behave according to those standards.<sup>18</sup> Beginning with fraud, the decline of the *caveat emptor* shield has resulted in a broker duty in most jurisdictions to conduct themselves in an ethical, competent manner, and to disclose material defects to purchasers.<sup>19</sup>

The real estate duty based in fraud, however, requires brokers to disclose only defects about which they know, and about which the buyers are unaware.<sup>20</sup> Brokers must reveal known information, or information about which they should have known. Independent of any such disclosures, it is generally not the brokers' responsibility to inspect the property for signs of defects such as those of hazardous-substance contamination.<sup>21</sup> Such signs are often subtle and cannot be discovered without investigation.<sup>22</sup>

Under present law in most jurisdictions, where brokers need only mention those defects about which they are or should be aware, they have no incentive to make an additional inspection for toxic pollution or to question sellers about it. Though toxic contamination is important to a buyer's decision, such a defect—of which even the seller may be unconscious—will remain undetected. As a result, sellers and brokers, who are in the best position to know the property, will receive prices and commissions that do not reflect these defects and that are thus artificially high. Meanwhile, buyers alone bear the burden of risk that the property may be contaminated. Brokers are licensed by the states, and are expected to perform their jobs competently and honestly on behalf of the public. If licensed brokers, who are familiar with the vagaries of residential real estate, are not required to inspect for this sort of defect, they will not be fulfilling a duty to the public as defined by the licensing laws. More important, an opportunity to discover environmental contamination, which is a significant national objective, is overlooked if there is no incentive to inspect.

In three jurisdictions, however, an additional step in the decline of *caveat emptor* has occurred and it can help the buyer of contam-

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misrepresentation); *First Church of the Open Bible v. Cline J. Dunton Realty Inc.*, 19 Wash. App. 275, 279 n.2, 574 P.2d 1211, 1214 n.2 (1978) (*caveat emptor* does not shield broker from liability to buyer for fraudulent misrepresentation).

<sup>18</sup> See *infra* notes 50–57 and accompanying text.

<sup>19</sup> See *infra* notes 42–137 and accompanying text.

<sup>20</sup> *Easton v. Strassburger*, 152 Cal. App. 3d 90, 99, 199 Cal. Rptr. 383, 387 (1984).

<sup>21</sup> See generally *infra* notes 148–50 and accompanying text.

<sup>22</sup> See, e.g., Fitzgerald interview, *supra* note 6.

inated property. In 1984, the California Superior Court in *Easton v. Strassburger*<sup>23</sup> established that a real estate broker may be held liable in simple negligence for failure affirmatively to inspect sale-property for defects and failure to disclose those defects to the purchaser.<sup>24</sup> Under the *Easton* negligence theory, real estate brokers owe buyers a duty to investigate for and reveal information about defects in the property they sell. This duty would encourage inspection of sale property for toxic contamination.<sup>25</sup> Two other state courts have followed *Easton*.<sup>26</sup> Whereas real estate brokers once enjoyed relatively unbridled freedom, there is precedent for replacing *caveat emptor's* protection of real estate brokers with a broker duty owed to purchasers in tort, and particularly in simple negligence. This precedent exists despite the still-recognized fact that, in residential real estate sales, the broker is the seller's agent and owes the seller a duty of allegiance.<sup>27</sup>

Thus far, only three states, California, New Mexico and Utah have advanced the law of real estate brokers beyond fraud to simple negligence by establishing an affirmative duty to buyers to investigate the property for material defects.<sup>28</sup> This Comment proposes that state law ought to hold real estate brokers liable to buyers in simple negligence for breaching a duty to investigate reasonably and disclose indications of possible toxic contamination on residential real estate. Those states that have not yet done so should adopt the standard of care enunciated in *Easton v. Strassburger*.<sup>29</sup> Toward this end, this Comment analyzes the *Easton* decision, and argues that the *Easton* court was correct in holding that real estate brokers can

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<sup>23</sup> *Easton*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383.

<sup>24</sup> *Id.* at 97, 199 Cal. Rptr. at 386.

<sup>25</sup> *Cf. id.* at 102, 199 Cal. Rptr. at 390; *Roberts v. Estate of Barbagallo*, 513 A.2d 1125, 1128 (Pa. Super. 1987) (where seller did not know the type of insulation in the house except that it was "blown into the walls," and broker did not investigate further, broker failed to disclose presence of urea formaldehyde).

<sup>26</sup> *Gouveia v. Citicorp Person-to-Person Financial Center*, 101 N.M. 572, 576, 686 P.2d 262, 266 (1984); *Secor v. Knight*, 716 P.2d 790, 795 (Utah 1986). Additionally, real estate brokers have been held to standards stricter than those in simple negligence. *See generally* *Romero*, *supra* note 10. For an argument that brokers can be held to an even higher duty to buyers, see *Fossey & Roston, The Broker's Liability In a Real Estate Transaction: Bad News and Good News For Defense Attorneys*, 12 UCLA-ALASKA L. REV. 37 (1982-83) (arguing that decision in *Bevins v. Ballard*, 655 P.2d 757 (Alaska 1982) holds real estate brokers strictly liable for misrepresentations communicated in the real estate transaction).

<sup>27</sup> *See Tennant v. Lawton*, 26 Wash. App. 701, 706, 615 P.2d 1305, 1309 (1980).

<sup>28</sup> *See Easton*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383; *Gouveia v. Citicorp Person-to-Person Financial Center*, 101 N.M. 572, 686 P.2d 262 (1984); *Secor v. Knight*, 716 P.2d 790 (Utah 1986).

<sup>29</sup> *Easton*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383.

be liable in negligence. The first section sets out the legal precedent for the real estate broker duty in negligence. The second section explains the negligence standard as the *Easton* court and its adherents have employed it. The next section then demonstrates that the *Easton* holding is the natural and implicit result of the precedent found in real estate broker law. Adopting the real estate broker's negligence standard, easily applied to inspections for signs of toxic pollution, requires no significant additional expertise on the part of competent brokers. Finally, by imposing the rule and theory of *Easton*, courts could promote the national goal of discovering and cleaning up toxic pollution.<sup>30</sup> To this end, the Comment's last section explains the advantages of employing this standard of care in light of the national goal of identifying and cleaning up toxic contamination of the environment.

## II. NEGLIGENCE AND THE REAL ESTATE BROKER'S DUTY OF CARE—PRECEDENT FOR THE DECISION IN *EASTON* V. *STRASSBURGER*

### A. *Agency Law and the Real Estate Broker's Fiduciary Duty to Buyers*

In the typical residential real estate transaction, the broker is not a neutral party.<sup>31</sup> Rather, an agency relationship forms between the seller and the broker. Either they enter into a listing agreement,<sup>32</sup>

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<sup>30</sup> See generally Clean Air Act of 1967, 42 U.S.C. §§ 7401-7626 (1982); Federal Water Pollution Control Act, and amendments of 1972, 33 U.S.C. §§ 1251-1376 (1982); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (1982 & Supp. III 1985); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1982 & Supp. III 1985); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 (1982 & Supp. III 1985); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 135-136y (1982 & Supp. IV 1986).

<sup>31</sup> *Cashion v. Ahmadi*, 345 So. 2d 268, 269 (Ala. 1977).

<sup>32</sup> *Romero*, *supra* note 10, at 769. The listing agreement is the contract between the buyer and seller in which the terms spell out, among other things, the property, the terms and price of the sale. *Id.* at 769 n.18. There are a number of possible arrangements under the listing agreement. Among them is the "exclusive listing," under which the listing broker has the exclusive right to show and sell the property. *Id.* at 769-70. There is also the "multiple listing" or "open listing" in which, through publication, other brokers in the area obtain access to the listing, or the property's description. *Id.* at 771; *Currey v. Kornack*, No. 5436 (Del. Ch. Sept. 13, 1978), *aff'd*, No. 5436 (Del. Ch. Oct. 19, 1978) (LEXIS, States library, Del file). According to both custom and the terms of the multilisting contract, in the multiple listing or cooperative transaction both the listing broker and the selling broker (the broker who makes the sale) share the commission. *Romero*, *supra* note 10, at 771. See also *Currey*, No. 5436 (Del. Ch. Sept. 13, 1978), *aff'd*, No. 5436 (Del. Ch. Oct. 19, 1978) (LEXIS, States library, Del file). Under this second method, the selling broker is deemed a subagent: agent of the listing

or the seller hires the broker to find a purchaser and is the one who pays the broker's commission.<sup>33</sup> Whether express or implied, the resulting agency relationship imposes on the broker all of the responsibilities and liabilities that agents owe their principals.<sup>34</sup> As their principals' agents, brokers owe sellers a duty of undivided loyalty, due care, and expertise.<sup>35</sup> The broker's and seller's interests are naturally allied since the higher the selling price and the quicker the sale, the larger the broker's commission and the sooner it is collected.<sup>36</sup>

In this agency relationship between broker and seller, purchasers are viewed as third parties, and thus have no privity or legal relationship with the broker.<sup>37</sup> Some courts see this arrangement as the reason for refusing to hold brokers liable to purchasers for the breach of any duty under the listing agreement.<sup>38</sup> To hold otherwise means that brokers could be legally responsible to both parties. This would create a conflict for brokers, since buyers and sellers have opposing interests: "the seller wants to receive the highest possible price . . . . [while] the buyer wants to purchase the property at the lowest possible price."<sup>39</sup> Any defects and weaknesses in the property which brokers bring to the purchasers' attention are used as leverage to negotiate a lower price. What works to the buyers' advantage works

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broker, who in turn is agent of the seller. Romero, *supra* note 10, at 771; Currey, No. 5436 (Del. Ch. Sept. 13, 1978), *aff'd*, No. 5436 (Del. Ch. Oct. 19, 1978) (LEXIS, States library, Del file); *cf.* Maxwell v. Ratcliffe, 356 Mass. 560, 562, 254 N.E.2d 250, 252 (1969).

<sup>33</sup> Cashion v. Ahmadi, 345 So. 2d 268, 270 (Ala. 1977).

<sup>34</sup> Romero, *supra* note 10, at 771, 773-79; Comment, *Real Estate Brokers Liability for Failure to Disclose: A New Duty to Investigate*, 17 PAC. L.J. 327, 329 (1985) (discussing the broker's duty as being the "equivalent of a trustee's duty to a beneficiary . . . . [The duty is] stringent . . . .").

<sup>35</sup> Romero, *supra* note 10, at 771, 773-79; Tennant v. Lawton, 26 Wash. App. 701, 706-07, 615 P.2d 1305, 1309-10 (1980); Cashion, 345 So. 2d at 270 ("A broker employed to sell property has the specific duty . . . to effect a sale to the best advantage of the principal—that is, on best terms and at the best price possible.") (citing 12 AM. JUR. 2D, *Brokers*, § 96 (1962)); *cf.* First Church of the Open Bible v. Cline J. Dunton Realty Inc., 19 Wash. App. 275, 279, 574 P.2d 1211, 1214-15 (1978) (broker, as seller's agent, owes seller duties arising from that agency). Non-listing real estate agents and salesmen are also responsible to the principal as subagents of the listing agent. Romero, *supra* note 10, at 772.

<sup>36</sup> See generally Romero, *supra* note 10; Comment, *supra* note 34, at 331 ("[T]he broker has [a] separate and distinct self-interest in completing the sale and earning a commission.").

<sup>37</sup> *Cf.* Romero, *supra* note 10, at 778. "Only the principal may recover from the agent for breach of the agent's duty since certain duties owed to the principal . . . are not owed to the third party . . . in the transaction." *Id.* (footnote omitted).

<sup>38</sup> *Id.*

<sup>39</sup> Comment, *supra* note 34, at 331. "Inherent in the dual agency . . . is a conflict of interest for the broker. The two principals have competing interests that the broker must attempt to reconcile." *Id.* (footnotes omitted).



to the sellers' disadvantage. Thus, if they are liable to buyers, brokers would find themselves in the conflicting position of the dual agent: having two masters.<sup>40</sup> For this reason, buyers have traditionally had no grounds for recovery against brokers for any harm suffered due to the brokers' actions.<sup>41</sup>

Recently, however, courts have begun to find brokers liable to buyers for breach of a fiduciary duty despite the lack of contractual privity or of any traditional agency relationship.<sup>42</sup> Courts have used two rationales to support this conclusion. First, brokers provide an actual service to buyers in real estate transactions. A more intimate relationship may develop between them than between brokers and sellers. Brokers and buyers spend many hours together, discussing the buyers' needs and tastes, engaging in confidential interviews, exchanging ideas, seeking advice and searching for just the right house.<sup>43</sup> In contrast, sellers and brokers may see each other only once to sign the listing agreement.<sup>44</sup> It is not surprising then that buyers may believe that brokers are actually working for them.<sup>45</sup>

Brokers are also professionals and not laymen.<sup>46</sup> Buyers rely on real estate brokers for substantial guidance because of the brokers' superior knowledge, experience and skill in the area of residential real estate.<sup>47</sup> Realizing that purchasers have placed their trust in

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<sup>40</sup> *Cashion v. Ahmadi*, 345 So. 2d 268, 271 (Ala. 1977) ("A servant cannot have two masters."). Although real estate brokers may be agents for both buyer and seller in the sale, they may become liable if they act as dual agents without full disclosure to both parties. *Id.*; Comment, *supra* note 34, at 331 ("The conflicts . . . are acute if the broker has not fully disclosed the nature of the dual agency relationship and the principals are unaware of the broker's divided loyalties.").

<sup>41</sup> *See Zichlin v. Dill*, 157 Fla. 96, 97, 25 So. 2d 4, 4 (1946) ("Generally speaking an agent is responsible only to his principal.").

<sup>42</sup> *First Church of the Open Bible v. Cline J. Dunton Realty Inc.*, 19 Wash. App. 275, 279, 574 P.2d 1211, 1214 (1978) (although listing broker is seller's agent, he may also be liable to third parties); *see also* Case Comment, *supra* note 8, at 513-14.

<sup>43</sup> *Romero*, *supra* note 10, at 772-73.

<sup>44</sup> *Id.* Sales agents may never and need never meet each other though they may share information. *See, e.g., Gouveia v. Citicorp Person-to-Person Financial Center*, 101 N.M. 572, 574, 577, 686 P.2d 262, 264, 267 (1984). In fact, the selling broker need never meet the sellers and the listing broker need never meet the buyers. *See, e.g., Currey v. Kornack*, No. 5436 (Del. Ch. Sept. 13, 1978) *aff'd*, No. 305 (Del. Sept. 19, 1979) (LEXIS, States library, Del file).

<sup>45</sup> *See Dugan v. Jones*, 615 P.2d 1239, 1249 (Utah 1980); *see, e.g., Currey v. Kornack*, No. 5436 (Del. Ch. Sept. 13, 1978) (LEXIS, States library, Del file); *cf. Romero*, *supra* note 10, at 772-73.

<sup>46</sup> *Dugan*, 615 P.2d at 1248 ("[A] real estate broker . . . does not occupy the position of a lay-vendor of property."); *see also Tylle v. Zoucha*, 226 Neb. 476, 483-85, 412 N.W.2d 438, 442-43 (1987) (Caporale, J., concurring) (citing twenty-four cases from many states supporting the proposition that real estate brokers are professionals).

<sup>47</sup> Comment, *Expansion of a Real Estate Broker's Duties: Is Easton v. Strassburger in*

brokers, some courts have held that brokers should deal fairly and honestly with purchasers.<sup>48</sup> Therefore, those courts which have recognized the buyers' trust in brokers, and have imposed on brokers an obligation to conduct themselves fairly and competently on behalf of buyers, have actually imposed on real estate brokers a standard of behavior as a fiduciary to buyers based on the nature of the relationship between the parties.<sup>49</sup>

The courts' second rationale for brokers' fiduciary duty to buyers arises from state laws regulating real estate brokers. These statutes recognize that because brokers deal with the public they are concerned with public interest.<sup>50</sup> For example, one court determined that the state Real Estate Brokers and Salesmen's Act is "affected with public interest" because it was enacted to protect the public at large from the "unscrupulous" real estate broker.<sup>51</sup> In many states, real estate brokers must demonstrate a certain level of knowledge and competence to obtain a license to practice.<sup>52</sup> These licensing requirements serve as the applicable standard of care and level of skill against which brokers may be measured.<sup>53</sup> Licensing statutes are also seen as imposing a duty on brokers to act honestly and competently toward buyers in particular.<sup>54</sup> One court has aptly char-

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*Illinois' Future?*, 1984 N. ILL. U.L. REV. 97, 104; Case Note, *Broker Can Be Held Liable For Negligent Misrepresentation To Vendee*, 1981 UTAH L. REV. 229, 230; *Tennant v. Lawton*, 26 Wash. App. 701, 706, 615 P.2d 1305, 1309 (1980) (reason for broker duty to buyer, who is not principal, is broker as professional is in position to verify information from seller).

<sup>48</sup> See Comment, *supra* note 47, at 103.

<sup>49</sup> See *Amato v. Rathbun Realty, Inc.*, 98 N.M. 231, 232, 647 P.2d 433, 434 (1982); see also Sinclair, *The Duty of the Broker to Purchasers and Prospective Purchasers of Real Property in Illinois*, 69 ILL. B.J. 260 (Jan. 1981).

<sup>50</sup> *McRae v. Bolstad*, 32 Wash. App. 173, 175, 646 P.2d 771, 774 (1982), *aff'd*, 101 Wash. 2d 161, 676 P.2d 496 (1984); *Johnson v. Geer Real Estate Co.*, 239 Kan. 324, 330, 720 P.2d 660, 666 (1986). Cf. *Pride Mark Realty v. Mullins*, 30 Md. App. 497, 499, 352 A.2d 866, 867 (1976). For a discussion of the differences between the "public interest" and "fiduciary duty" approaches to analyzing the buyer-broker relationship, see Case Comment, *supra* note 8.

<sup>51</sup> *McRae*, 32 Wash. App. at 175, 646 P.2d at 774, *aff'd*, 101 Wash. 2d 161, 646 P. 2d 496.

<sup>52</sup> *Dugan v. Jones*, 615 P.2d 1239, 1248 (Utah 1980). Sinclair, *supra* note 49.

<sup>53</sup> See, e.g., Real Estate Brokers and Salesmen Act, N.M. STAT. ANN. §§ 61-29-1-69-29-29 (1978); ARIZ. REV. STAT. ANN. § 32-2124 (1986). Section 10(B) of the New Mexico statute requires brokers to demonstrate in a written exam, among other things, a knowledge of business ethics and general provisions of the statute relating to brokers and salesmen. N.M. STAT. ANN. §§ 61-29-1-69-29-29 (1978). Brokers in Arizona must pass an exam which includes questions on the general purpose and legal effect of agency contracts. ARIZ. REV. STAT. ANN. § 32-2124 (1986). Sinclair, *supra* note 49.

<sup>54</sup> *Zichlin v. Dill*, 157 Fla. 96, 97, 25 So. 2d 4, 4 (1946); *Pride Mark Realty*, 30 Md. App. at 499, 352 A.2d at 867; *Amato v. Rathbun Realty, Inc.*, 98 N.M. 231, 232-33, 647 P.2d 433, 434 (1982); *Dugan*, 615 P.2d at 1248; *McRae*, 32 Wash. App. at 175, 646 P.2d at 774, *aff'd*, 101 Wash. 2d 161, 646 P.2d 496 (1984). But, some courts have strained to find a fiduciary relationship. Case Comment, *supra* note 8, at 518.

acterized the duty as somewhere between *caveat emptor* and strict fiduciary duty: one of "honest, ethical and competent behavior, . . . answerable at law for breaches of statutory duty" to the purchasers and to the public.<sup>55</sup> Hence, the public interest is the paramount force behind some courts' conclusions that, despite the lack of a formal agency relationship between brokers and buyers, brokers must maintain a standard of behavior of good faith and fair dealing, as dictated by the licensing requirements. Buyers may sue brokers who breach this standard.<sup>56</sup>

In states that approach the real estate broker responsibility through the law of fiduciaries, the duty to disclose arises when circumstances are such that failure to disclose would violate ethical standards to act in good faith, competently, and with a level of skill mandated by the state licensing scheme.<sup>57</sup> This duty includes disclosure of material facts and information known or knowable<sup>58</sup> to the broker—but not to the purchaser—that affect the value and desirability of the sale property.<sup>59</sup>

There is precedent, therefore, for holding real estate brokers liable to purchasers for breach of a kind of fiduciary duty. Originally the brokers' duties were clearly defined: they were the sellers' agent and only owed sellers a duty in agency. Today in some jurisdictions, neither the absence of an agency relationship with the buyer, nor the brokers' fiduciary duties in agency to sellers, may insulate real estate brokers any longer.<sup>60</sup> Rather, some courts allow buyers re-

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<sup>55</sup> See *Dugan*, 615 P.2d at 1248.

<sup>56</sup> Sinclair, *supra* note 49, at 266; Zichlin, 157 Fla. at 98, 25 So. 2d at 4.

<sup>57</sup> *Dugan*, 615 P.2d at 1248; *Pride Mark Realty*, 30 Md. App. at 499 n.1, 352 A.2d at 867 n.1 (Maryland code allows revocation of real estate broker's license for failure to disclose material facts.); *McRae*, 32 Wash. App. at 175, 646 P.2d at 774, *aff'd*, 101 Wash. 2d 161, 646 P.2d 496 (1984) (Washington licensing scheme heavily regulates the real estate industry to protect public from unscrupulous brokers and requires broker to disclose facts.).

<sup>58</sup> *Johnson v. Geer Real Estate Co.*, 239 Kan. 324, 332, 720 P.2d 660, 665-66 (1986) (broker liable under statute for failing to disclose what he knew or should have known).

<sup>59</sup> *Dugan*, 615 P.2d at 1249; *Pride Mark Realty*, 30 Md. App. at 499 n.1, 352 A.2d at 867 n.1. Such a statutory duty to disclose may even be more strict than the seller's concomitant duty. *Johnson*, 239 Kan. at 332, 720 P.2d at 666 (statute places higher duty on broker to disclose flaw about which broker knew or should have known even when seller was not liable, because brokers are experts and public relies on them). Comment, *Real Estate Broker's Liability for Failure to Disclose: A New Duty to Investigate*, 17 PAC. L.J. 327, 331 (1985) ("[f]iduciary duty of the broker encompasses several duties, the most important aspect is the duty of disclosure."). Cf. *McRae*, 32 Wash. App. at 175-77, 646 P.2d at 774-75, *aff'd*, 101 Wash.2d 161, 676 P.2d 496 (1984). For a thorough discussion of what constitutes materiality, see *infra* note 92.

<sup>60</sup> *Johnson*, 239 Kan. at 332, 720 P.2d at 666 (broker can be liable to purchaser even when seller in transaction is not).

course against real estate brokers for the breach of their duty of loyalty and honesty to conduct themselves in an ethical and competent manner and to disclose material defects.<sup>61</sup> Liability for betraying the buyer's reliance on the realities of the buyer-broker relations, or for violating the ethical standard of the broker-licensing laws, is the beginning of the development of the brokers' duty in negligence. This fiduciary duty to disclose, then, is a precursor to the *Easton* court's duty in simple negligence.

*B. Tort Law—Fraud as Antecedent to the Real Estate Broker's Duty to Buyers in Simple Negligence*

Case law has established a real estate broker's duty to disclose information to buyers.<sup>62</sup> Although the law of broker liability has evolved at different rates across the country, today brokers almost universally owe buyers a duty to disclose material facts not reasonably noticeable to the purchaser, but observable to brokers or about which brokers are aware.<sup>63</sup> Historically, the duty to disclose material facts originated in fraud.<sup>64</sup> Because of the absence of a contract and thus privity between brokers and buyers, any broker liability would have had to lie not on the contract, but in tort.<sup>65</sup>

The broker's tort liability in fraud to buyers for breaching the duty of disclosure may arise in one of three situations. First, brokers

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<sup>61</sup> See *supra* notes 42–57 and accompanying text.

<sup>62</sup> Brokers must make truthful representations or disclosures. *Currey v. Kornack*, No. 5436 (Del. Ch. Sept. 13, 1978) *aff'd*, No. 305 (Del. Sept. 14, 1979) (LEXIS, States library, Del file). "If an agent cannot truthfully answer an inquiry regarding the property . . . he should frankly admit his lack of knowledge." *Id.* (emphasis added). Prior to the decision in *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984), California law had established that the broker must disclose material defects known to the broker but unknown to the buyer. 152 Cal. App. 3d at 99, 199 Cal. Rptr. at 387 (citing *Cooper v. Jevne*, 56 Cal. App. 3d 860, 866, 128 Cal. Rptr. 724, 727 (1976) and *Lingsch v. Savage*, 213 Cal. App. 2d 729, 733, 29 Cal. Rptr. 201, 203 (1963)).

<sup>63</sup> See, e.g., *Lingsch*, 213 Cal. App. 2d at 735, 29 Cal. Rptr. at 204; *Cooper*, 56 Cal. App. 3d at 866, 128 Cal. Rptr. at 727; *Reed v. King*, 145 Cal. App. 3d 261, 265, 193 Cal. Rptr. 130, 131–32 (1983); *Spargnapani v. Wright*, 110 A.2d 82, 83 (D.C. 1954); *Foust v. Valleybrook Realty Co.*, 4 Ohio App. 3d 164, 164–65, 446 N.E.2d 1122, 1124 (1981); *Miles v. McSwengin*, 58 Ohio St. 2d 97, 101, 388 N.E.2d 1367, 1370 (1979); see generally, Annotation, *Real Estate Broker's Liability for Misrepresentation and Nondisclosure of Physical Defects in Property Sold*, 46 A.L.R. 4TH 546 (1986).

<sup>64</sup> *Lingsch*, 213 Cal. App. 2d at 737–38, 29 Cal. Rptr. at 206.

<sup>65</sup> See generally *Romero*, *supra* note 10, at 770–79; *Rayner v. Wise Realty Co. of Tallahassee*, 504 So. 2d 1361, 1365 (Fla. App. 1987) ("As is" provision in contract for sale will not necessarily function as a defense to liability in fraud) (citing Annotation, *Construction and Effect of Provision in Contract for Sale of Realty by Which Purchaser Agrees to Take Property "As Is" or in the Condition in Which It Is*, 97 A.L.R. 2D 849 (1964)).

can be liable for making a fraudulent misrepresentation in order to mislead buyers,<sup>66</sup> or to prevent buyers from discovering a material defect.<sup>67</sup> This is fraud by commission. Second, brokers can be responsible to buyers for pecuniary damages resulting from an act of omission for concealment or nondisclosure of a defect.<sup>68</sup> In such cases, brokers, by their non-action, failed to inform the buyers of a material defect.<sup>69</sup> Third, many courts have adopted section 552 of the Restatement of Torts which states in part, "[o]ne who . . . supplies false information is . . . liab[le] . . . if he fails to exercise reasonable care or competence in obtaining or communicating that information."<sup>70</sup> Those courts will hold brokers liable for negligent misrepresentation, that is, negligently making a false statement.<sup>71</sup> Thus, by relying on a cause of action in tort for either fraudulent misrepresentation, fraudulent concealment, or for negligent misrepresentation, purchasers have been able to recover from brokers even in the absence of any contractual or fiduciary duty.<sup>72</sup>

### 1. The Broker's Fraudulent Misrepresentation

A fraudulent misrepresentation of a defect occurs when a broker makes an active misstatement designed to conceal material defects in the property for sale.<sup>73</sup> This is a tort of commission or malfeasance in which the broker has made a positive misrepresentation with the intention to mislead or deceive the buyer.<sup>74</sup> When brokers know of defects and consequently of the falsity of their statements, they have

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<sup>66</sup> RESTATEMENT (SECOND) OF TORTS § 525 (1977); see *infra* notes 73-79 and accompanying text.

<sup>67</sup> See *infra* notes 73-79 and accompanying text.

<sup>68</sup> RESTATEMENT (SECOND) OF TORTS § 550 (1977); see *infra* notes 86-93 and accompanying text.

<sup>69</sup> See *infra* notes 86-93 and accompanying text.

<sup>70</sup> RESTATEMENT (SECOND) OF TORTS § 552 (1977).

<sup>71</sup> *Id.*; see *infra* notes 110-16 and accompanying text. This Comment does not address an additional possible cause of action for innocent misrepresentation. RESTATEMENT (SECOND) OF TORTS § 552C(1) (1977). For a thorough discussion of that theory of liability, see Comment, *Realtor Liability for Innocent Misrepresentation and Undiscovered Defects: Balancing the Equities Between Broker and Buyer*, 20 VAL. U.L. REV. 255 (1986).

<sup>72</sup> *First Church of the Open Bible v. Cline J. Dunton Realty Inc.*, 19 Wash. App. 275, 279 n.2, 574 P.2d 1211, 1214 n.2 (1978). The court rejected the defendant listing broker's arguments that since he was the seller's agent he owed no duty to the buyer, and held that, despite the lack of fiduciary relationship, the listing broker is "nevertheless liable to a third party for misrepresentation of boundary lines . . ." *Id.* at 279, 574 P.2d at 1214. See also *Johnson v. Geer Real Estate Co.*, 239 Kan. 324, 332, 720 P.2d 660, 665 (1986) (broker can be liable for own fraud when seller is not); *infra* note 111.

<sup>73</sup> RESTATEMENT (SECOND) OF TORTS § 525 (1977).

<sup>74</sup> *Keith v. Wilder*, 241 N.C. 672, 675, 86 S.E.2d 444, 447 (1955).

scienter,<sup>75</sup> that is, knowledge or intent to deceive.<sup>76</sup> Real estate agents can be liable for fraud if they make remarks in response to specific inquiries by the purchasers.<sup>77</sup> Some courts have held brokers liable for making misleading implications or statements upon which buyers have relied.<sup>78</sup> When brokers make statements in order to prevent buyers from learning the truth or to deceive them about the state of affairs, courts have found liability.<sup>79</sup>

Brokers have been held liable to buyers for misrepresentations whether or not the brokers knew the statements to be false.<sup>80</sup> For example, one court found that, had the real estate broker checked before representing that the house's heating system was in perfect working order, the broker would have discovered the seller's attempts to conceal major flaws.<sup>81</sup> Thus, an affirmative, but false representation with the intent to deceive the buyer can lead to broker liability regardless of whether the broker currently knew of its falsity.

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<sup>75</sup> See, e.g., *McGerr v. Beals*, 180 Neb. 767, 778, 145 N.W.2d 579, 582 (1966) (knowing it to be false, broker told buyer basement does not flood); *Loch Ridge Construction Co. v. Barra*, 291 Ala. 312, 318-19, 280 So. 2d 745, 750 (1973) (knowing it to be false, broker told buyer building was constructed under Veteran's Administration and FHA specifications and was in perfect condition).

<sup>76</sup> W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 107 (5th ed. 1984).

<sup>77</sup> *Loch Ridge Construction Co.*, 291 Ala. at 315-16, 280 So. 2d at 747.

<sup>78</sup> *Keith*, 241 N.C. at 673-74, 86 S.E.2d at 445-46. In *Keith*, the agent showed the buyer the parcel of land in question, "pointing out its boundaries," when in fact he was indicating land owned by someone other than the seller. The North Carolina Supreme Court found that the statement was false and calculated to induce the purchase. *Id.* See also *Berryman v. Reigert*, 286 Minn. 270, 274, 175 N.W.2d 438, 441 (1970) (In response to buyer's apprehensions about flooding problems, the broker replied "[A]fter the rains we have had here, if there is no water here now there never should be any," though past history of flooding was information accessible to broker).

<sup>79</sup> See, e.g., *McGerr*, 180 Neb. at 770-71, 145 N.W.2d at 582 (knowing it to be false, broker said rain water draining from east would empty into street rather than basement and there was no threat of basement flooding); *Romero*, *supra* note 10, at 782; W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 107 (5th ed. 1984); *Loch Ridge Construction Co.*, 291 Ala. at 320-21, 280 So. 2d at 752 (when buyer specifically asked whether house was built according to FHA specifications, saleswoman said it was, even though she knew it was not).

<sup>80</sup> *Lingsch v. Savage*, 213 Cal. App. 2d 729, 736, 29 Cal. Rptr. 201, 205 (1963) (holding broker "jointly and severally liable with the seller for the full amount of the damages as a party connected to the fraud" for relaying seller's false statements); *Spargnapani v. Wright*, 110 A.2d 82, 83-84 (D.C. 1954); *Maxwell v. Ratcliffe*, 356 Mass. 560, 562, 254 N.E.2d 250, 252 (1969) (broker liable for false statements where he knew or should have known of falsity); *Keith*, 241 N.C. at 676, 86 S.E.2d at 447 (Despite brokers' claim of ignorance as to correct boundaries, because buyers relied on brokers' statements as to property's boundaries, court refused to reverse jury finding of fraud.); *Romero*, *supra* note 10, at 782. *But see* *Provost v. Miller*, 144 Vt. 67, 69-70, 473 A.2d 1162, 1163-64 (1984) (agent not liable for principal's or another agent's misrepresentation as to defect unless agent knew or should have known of it).

<sup>81</sup> *Spargnapani*, 110 A.2d at 83-84.

Sometimes it is enough to make out a case of fraud if brokers, while seeking to mislead,<sup>82</sup> make assertions even though they either know there is no basis for their statements, or they simply have no confidence in the statements' accuracy.<sup>83</sup> In the former case, although they may not actually have known it was false, if brokers recklessly assumed the given information was true, then courts have deemed them to have committed a fraudulent misstatement.<sup>84</sup> In the latter case, when brokers knew that they were unaware of the truth, but made assertions that turned out to be false, those assertions, if made with intent to mislead, are fraudulent misrepresentations.<sup>85</sup> A finding of liability in fraud, therefore, necessarily implies that the broker either knowingly failed to disclose information truthfully, or knowingly disclosed information of which the veracity is in doubt. The consequential responsibility of the broker is truthfully to disclose material information, or risk liability for fraudulent misrepresentation. To protect themselves then, brokers must at least verify their principals' statements before conveying them.

## 2. The Broker's Nondisclosure-Fraudulent Concealment

Whereas fraudulent misrepresentation is a tort involving disclosure, concealment is a tort involving nondisclosure. Under the law of fraudulent nondisclosure, real estate brokers are liable for intentionally withholding, suppressing, preventing others from acquiring, or failing to disclose a material fact when it causes pecuniary loss to others.<sup>86</sup> Effectively, the broker's nondisclosure of a fact "amounts to a representation of the nonexistence of the fact. . . ."<sup>87</sup>

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<sup>82</sup> RESTATEMENT (SECOND) OF TORTS § 526 (1977).

<sup>83</sup> RESTATEMENT (SECOND) OF TORTS § 526 (a)-(c), comment f (1977); *Keith*, 241 N.C. at 675, 86 S.E.2d at 446; *Spargnapani*, 110 A.2d at 84 ("fraud indicates the pretense of knowledge when knowledge there is none") (quoting *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441, 444 (1931)).

<sup>84</sup> *Hammond v. Matthes*, 109 Mich. App. 352, 359-60, 311 N.W.2d 357, 360-61 (1981); *Keith*, 241 N.C. at 675, 86 S.E.2d at 446.

<sup>85</sup> RESTATEMENT (SECOND) OF TORTS § 526b comment e (1977); *Fausett & Co. v. Bullard*, 217 Ark. 176, 179, 229 S.W.2d 490, 491 (1950).

<sup>86</sup> RESTATEMENT (SECOND) OF TORTS §§ 550 and 551 (1977). Section 550 states: "One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability . . . for pecuniary loss as though he had stated the nonexistence of the matter . . ." See also *Maples v. Porath*, 638 S.W.2d 337, 337-40 (Mo. App. 1982) (citing "substantial and impressive out-state authority," court established broker liability to buyer for nondisclosure of a material fact). See *Lingsch v. Savage*, 213 Cal. App. 2d 729, 735, 29 Cal. Rptr. 201, 204 (1963); Annotation, *Real Estate Broker's Liability to Purchaser For Misrepresentation and Nondisclosure of Physical Defects In Property Sold*, 46 A.L.R. 4TH 546 (1986).

<sup>87</sup> *Lingsch*, 213 Cal. App. 2d at 736, 29 Cal. Rptr. at 205 (citing RESTATEMENT (SECOND)

Three conditions together create a broker's legal duty to disclose information to buyers:<sup>88</sup> first, the broker possesses or has access to information;<sup>89</sup> second, the broker knows such information is unknown to the buyer;<sup>90</sup> third, the facts are material.<sup>91</sup> A material defect is one that affects the property's value or desirability and therefore influences the purchaser's decision to buy.<sup>92</sup> If a fact is material, the

OF TORTS § 551 (1977)); *see also* Currey v. Kornack, No. 5436 (Del. Ch. Sept. 13, 1978) *aff'd*, No. 305 (Del. Sept. 19, 1979) (LEXIS, States library, Del file) ("[T]here has been an inadvertent nondisclosure, and thus, a misrepresentation . . .").

<sup>88</sup> *Cf. Lingsch*, 213 Cal. App. 2d at 735, 29 Cal. Rptr. at 204 ("[W]hile such a duty [to disclose] may arise from a fiduciary or other confidential relationship . . . such relationship obtains in the case at bench and the duty of disclosure must therefore arise from other circumstances."); *Rayner v. Wise Realty Co. of Tallahassee*, 504 So. 2d 1361, 1364 (Fla. App. 1987) (citing *Johnson v. Davis*, 449 So. 2d 344 (Fla. Dist. Ct. App. 1984)); *Romero*, *supra* note 10, at 780. The elements of a cause of action for nondisclosure are the same as those necessary for a showing of misrepresentation. *Id.* Though the number varies among states, the essential elements for a cause of action against a broker are: 1) a broker misrepresented or did not disclose a material fact that affects the value or desirability of the property; 2) *the broker had knowledge of the falsity of the representation or withheld information*; 3) *the purchaser's ignorance of the falsity*; 4) the broker intended to induce the purchaser to buy; 5) *the misrepresentation or nondisclosure induced the purchaser to act*; and 6) the purchaser suffered damages as a result of the misrepresentation or nondisclosure. *Romero*, *supra* note 7, at 780 (emphasis added).

<sup>89</sup> *Treece & Mead, Real Estate Brokers: A Duty to Investigate?*, 27 FOR THE DEF. 16, 17 (Apr. 1985); *Lingsch*, 213 Cal. App. 2d at 735-37, 29 Cal. Rptr. at 204-06; *Rayner*, 504 So. 2d at 1364 (seller's duty to disclose all known facts materially affecting property's value which are not known or readily observable to buyer applied to seller's broker).

<sup>90</sup> *Lingsch*, 213 Cal. App. 2d at 735-38, 29 Cal. Rptr. at 204-07.

<sup>91</sup> *Roberts v. Estate of Barbagallo*, 531 A.2d 1125, 1130-31 (Pa. Super. 1987). ("Under the RESTATEMENT (SECOND) OF TORTS § 550, the concealment . . . must relate to material information."); *Lingsch*, 213 Cal. App. 2d at 773-78, 29 Cal. Rptr. at 204-07. (The court first defined this as the seller's duty, and then asserted that the seller's broker is under the same duty of disclosure as the seller.). *See also* *Reed v. King*, 145 Cal. App. 3d 261, 265, 193 Cal. Rptr. 130, 131 (1983) (whether seller has duty to disclose depends on materiality of facts in question).

<sup>92</sup> *Lingsch*, 213 Cal. App. 2d at 738, 29 Cal. Rptr. at 206; *cf. McRae v. Bolstad*, 32 Wash. App. 173, 176-77, 646 P.2d 771, 774 (1982), *aff'd*, 101 Wash. 2d 161, 676 P.2d 496 (1984); *Cooper v. Jevne*, 56 Cal. App. 3d 860, 866, 128 Cal. Rptr. 724, 727 (1976). A material fact is also defined as a fact "that relates to matters of substance and [is] of such importance as to influence the actions of the party to whom it is represented to be true." *Currey v. Kornack*, No. 5436 (Del. Ch. Sept. 13, 1978) *aff'd*, No. 305 (Del. Sept. 19, 1979) (LEXIS, States library, Del file).

Some of the characteristics of residential property which have been found to be material to a purchaser's decision to buy, and that give rise to the broker's duty to disclose are: that there be no urea formaldehyde foam insulation (UFFI) in the house, *Roberts v. Estate of Barbagallo*, 531 A.2d 1125, 1131 (Pa. Super. 1987); that the house be built according to plans and specifications approved by the Veterans Administration and FHA, *Loch Ridge Construction Co. v. Barra*, 291 Ala. 312, 315-16, 280 So. 2d 745, 747 (1973); that there is a U.S. Department of Agriculture quarantine on the property due to a noxious weed, *Elder v. Clawson*, 14 Utah 2d 379, 381, 384 P.2d 802, 803 (1963); that the building had been condemned, *Lingsch*, 213 Cal. App. 2d at 732-33, 29 Cal. Rptr. at 203; whether there is "anything wrong with the property," *McRae*, 32 Wash. App. at 174, 646 P.2d at 773, *aff'd*, 101 Wash. 2d 161,



broker should bring it to the buyer's attention or risk liability to the buyer for nondisclosure.<sup>93</sup>

Central to a finding of nondisclosure is the broker's knowledge of the concealed defect and of the buyer's ignorance of it.<sup>94</sup> In litigation, the buyer must show not only that the broker knew of the facts in question but that the broker knew these facts were unknown to or beyond reach of the buyer.<sup>95</sup> Thus, the brokers' scienter, i.e. fraudulent conduct, lies in the suppression of material facts that the brokers know about or that are accessible only to them *and* that are beyond the reach of the diligent buyer.<sup>96</sup> To avoid liability in nondisclosure then, brokers must affirmatively determine—on behalf of buyers—what information is at their disposal, whether it is material to the buyers' decision, and then disclose those flaws that buyers cannot themselves reasonably ascertain.<sup>97</sup>

While the general rule requires brokers to disclose only currently known facts, brokers have been held liable for nondisclosure of a

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646 P. 2d 496 (1984); that there is septic efflux and sewage back-up into the house, *id.*; that the building was not luxury as represented, but in fact dangerously built, *Cooper*, 56 Cal. App. 3d at 865, 128 Cal. Rptr. at 726; that the basement be dry, *McGerr v. Beals*, 180 Neb. 767, 769, 145 N.W.2d 579, 582 (1966); that there be an optional sewer system hook-up, *Foust v. Valleybrook Realty Co.*, 4 Ohio App. 3d 164, 164-65, 446 N.E.2d 1122, 1124 (1981); that there were multiple murders on the property ten years earlier, *Reed v. King*, 145 Cal. App. 3d 261, 267, 193 Cal. Rptr. 130, 133 (1983); that the neighboring wooded lot remain as such, *Currey v. Kornack*, No. 5436 (Del. Ch. Sept. 13, 1978) *aff'd*, No. 305 (Del. Sept. 19, 1979) (LEXIS, States library, Del file).

Brokers must determine which characteristics of the property are important to the buyer in order to determine whether they must disclose them. Materiality thus can be determined by whether it would affect the property's market value. *Reed*, 145 Cal. App. 3d at 267, 193 Cal. Rptr. at 133. "[S]o long as information is known or accessible . . . and will have watered effect on marketability, there is no reason" not to disclose it. *Id.*

Materiality is also established when the misrepresentation of a factor induces the purchaser to buy the property. RESTATEMENT (SECOND) OF TORTS § 538 (1977).

<sup>93</sup> *Lingsch*, 213 Cal. App. 2d at 735-37, 29 Cal. Rptr. at 204-05.

<sup>94</sup> *See, e.g.*, *Cooper v. Jevne*, 56 Cal. App. 3d 860, 866, 128 Cal. Rptr. 724, 727 (1976) (rule is: "broker is liable to buyer for nondisclosure of defects known to him . . ."); *Elder v. Clawson*, 14 Utah 2d 379, 382, 384 P.2d 802, 803 (1963) (broker liable for nondisclosure of quarantine on property due to noxious weed where broker was aware of it); *Maples v. Porath*, 638 S.W. 2d 337, 339-40 (Mo. App. 1982); *Romero*, *supra* note 10, at 780. *Cf. Lingsch*, 213 Cal. App. 2d at 738, 29 Cal. Rptr. at 206, *Treece & Mead*, *supra* note 89, at 17.

<sup>95</sup> *See, e.g.*, *Roberts*, 513 A.2d at 1130-31; *Lingsch*, 213 Cal. App. 2d at 738, 29 Cal. Rptr. at 206 ("The concealment must be intentional and it must relate to material information.")

<sup>96</sup> 213 Cal. App. 2d at 737, 738, 29 Cal. Rptr. at 206, 207 (emphasis added); *see, e.g.*, *Roberts*, 513 A.2d at 1131 (real estate agent had "intentional" policy of nondisclosure of UFFI where agent knew of its materiality, and by nondisclosure, prevented buyers from conducting their own investigation).

<sup>97</sup> *McRae v. Bolstad*, 32 Wash. App. 173, 176-77, 646 P.2d 771, 774 (1982), *aff'd*, 101 Wash. 2d 161, 676 P.2d 496 (1984).

material fact that was merely accessible or knowable to the brokers.<sup>98</sup> Hence, if brokers are unaware of, but have access to, information material to a buyer's decision, they can have an independent duty to ascertain the relevant information for the benefit of the purchaser.<sup>99</sup> The logical result is that brokers can have a duty to ascertain and communicate defects that are material to the buyers' decision. Brokers must thus be attentive to the buyers' concerns despite the fact that brokers are the sellers' agents.<sup>100</sup>

Some courts have even held brokers liable in nondisclosure when they were ignorant of a defect.<sup>101</sup> This has occurred when purchasers specifically asked questions about the property and brokers failed to determine the facts.<sup>102</sup> In such cases, brokers did not need to have present knowledge of the defect.<sup>103</sup> A buyer's inquiry makes the sought-after information material, and the broker must truthfully respond because the buyer will rely on the answer.<sup>104</sup> The question itself effectively gives rise to a duty to do more than hedge: a duty to determine the truth on behalf of the purchaser.<sup>105</sup>

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<sup>98</sup> *Lingsch*, 213 Cal. App. 2d at 735-37, 29 Cal. Rptr. at 204-05 (broker under duty of disclosure where material facts are *accessible* only to broker) (emphasis added). See, e.g., *Reed v. King*, 145 Cal. App. 3d 261, 264, 193 Cal. Rptr. 130, 131 (1983) (under California law, broker is liable in fraud for concealing facts susceptible of knowledge); *Currey v. Kornack*, No. 5436 (Del. Ch. Sept. 13, 1978), *aff'd*, No. 305 (Del. Sept. 19, 1979) (LEXIS, States library, Del file) (inadvertent nondisclosure and thus fraud where selling broker was unaware of and failed to disclose material factor though seller disclosed to listing broker); *Sawyer v. Tildahl*, 275 Minn. 457, 461, 148 N.W.2d 131, 133 (1967) (broker liable for nondisclosure where, though broker did not actually know of water seepage, information was "susceptible of knowledge").

<sup>99</sup> *Lingsch*, 213 Cal. App. 2d at 735-37, 29 Cal. Rptr. at 204-05; *Currey*, No. 5436 (Del. Ch. Sept. 13, 1978), *aff'd*, No. 305 (Del. Sept. 19, 1979) (LEXIS, States library, Del file). *But see* *Cashion v. Ahmadi*, 345 So. 2d 268, 270 (Ala. 1977) (real estate broker is not under *Lingsch* duty unless broker was agent of buyer as well as of seller); *Foust v. Valleybrook Realty Co.*, 4 Ohio App. 3d 164, 165, 446 N.E.2d 1122, 1125 (1981) (broker required to reveal material facts known to him); *Elder v. Clawson*, 14 Utah 2d 379, 383, 884 P.2d 802, 805 (1963) (broker liable in nondisclosure based on superior knowledge).

<sup>100</sup> See generally *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984); *Currey*, No. 5436 (Del. Ch. Sept. 13, 1978), *aff'd*, No. 305 (Del. Sept. 19, 1979) (LEXIS, States library, Del file) (selling broker deemed to have same knowledge of property as owner and where listing and selling brokers failed to exercise care to assure that selling broker has same information as seller and listing broker, selling broker committed nondisclosure and sale is rescinded).

<sup>101</sup> *Treece & Mead*, *supra* note 89, at 17-18; *Currey*, No. 5436 (Del. Ch. Sept. 13, 1978), *aff'd*, No. 305 (Del. Sept. 19, 1979) (LEXIS, States library, Del file).

<sup>102</sup> *Treece & Mead*, *supra* note 89, at 17; *Currey*, No. 5436 (Del. Ch. Sept. 13, 1978), *aff'd*, No. 305 (Del. Sept. 19, 1979) (LEXIS, States library, Del file).

<sup>103</sup> *Treece & Mead*, *supra* note 89, at 17; *Currey*, No. 5436 (Del. Ch. Sept. 13, 1978), *aff'd*, No. 305 (Del. Sept. 19, 1979) (LEXIS, States library, Del file).

<sup>104</sup> *Treece & Mead*, *supra* note 89, at 17; *Currey*, No. 5436 (Del. Ch. Sept. 13, 1978), *aff'd*, No. 305 (Del. Sept. 19, 1979) (LEXIS, States library, Del file).

<sup>105</sup> *Treece & Mead*, *supra* note 89, at 17 (citing *Berryman v. Riegart*, 286 Minn. 270, 175

There are a number of reasons for holding real estate brokers liable to purchasers for nondisclosure. (They are similar to the reasons for finding liability in misrepresentation.) Because real estate brokers are a party to the transaction and derive personal profit from the sale, they are under the same duties of disclosure as their agents, the sellers.<sup>106</sup> Furthermore, the brokers' knowledge alone gives rise to a duty to disclose if the information is material, because buyers will rely on the brokers' statements.<sup>107</sup> Of course, if buyers inquire about a factor, brokers risk liability in fraud if they do not answer truthfully.<sup>108</sup> Courts reason that buyers are justified in relying on brokers' representations.<sup>109</sup>

The broker's duty in nondisclosure is thus not simply to speak the truth, as in fraud, but to provide information which purchasers deem relevant. This duty may arise when brokers know of a material defect of which buyers are unaware; or when a material fact is accessible (that is, the broker should know of its existence); or when the buyer inquires. Brokers acting on behalf of buyers to ascertain accessible, relevant, or sought-after information, or risking liability for failing to do so, necessitates that they anticipate the needs and concerns of buyers. Though not quite imposing an independent duty on brokers to investigate for material defects, this duty requires vigilance for the benefit of the purchasers, and anticipates the brokers' responsibility to seek out material defects on behalf of buyers. This duty is an antecedent to the standard laid out in *Easton* where

N.W.2d 438 (1970)); *Currey*, No. 5436 (Del. Ch. Sept. 13, 1978), *aff'd*, No. 305 (Del. Sept. 19, 1979) (LEXIS, States library, Del file).

<sup>106</sup> *Lingsch v. Savage*, 213 Cal. App. 2d 729, 736-37, 29 Cal. Rptr. 201, 205 (1963).

<sup>107</sup> See *Foust v. Valleybrook Realty Co.*, 4 Ohio App. 3d 164, 165, 446 N.E.2d 1121, 1125 (1981) (seller's "realty agents have a duty to disclose any material facts which are not visible and nondisclosure is willful misrepresentation"). Cf. *Lingsch*, 213 Cal. App. 2d at 738, 29 Cal. Rptr. at 206; see, e.g., *Cooper v. Jevne*, 56 Cal. App. 3d 860, 866, 128 Cal. Rptr. 724, 727 (1976); *Elder v. Clawson*, 14 Utah 2d 379, 383, 384 P.2d 802, 803 (1963).

[A] legal duty to disclose may exist where there is no existing fiduciary relationship between the parties and where no special confidence is expressly reposed. The duty to disclose may arise from the circumstances of the case, including . . . the superior knowledge of one party, which knowledge is not within the fair and reasonable reach of the other party.

*Maples v. Porath*, 638 S.W.2d 337, 340 n.2 (Mo. App. 1982) (quoting *Jones v. Arnold*, 359 Mo. 161, 221 S.W.2d 187, 193 (1949)); *Romero*, *supra* note 10, at 780.

<sup>108</sup> See generally *Currey*, No. 5436 (Del. Ch. Sept. 13, 1978), *aff'd*, No. 305 (Del. Sept. 19, 1979) (LEXIS, States library, Del file); *Treece & Mead*, *supra* note 89, at 17.

<sup>109</sup> *Faussett and Co. v. Bullard*, 217 Ark. 176, 179, 229 S.W.2d 490, 491 (1950); *Keith v. Wilder*, 241 N.C. 672, 675-76, 86 S.E.2d 444, 447 (1955); but see *Cashion v. Ahmadi*, 345 So. 2d 268, 270 (Ala. 1977) (court refused to follow *Lingsch*, 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1983), and held *caveat emptor* remains intact where defect does not affect health).

brokers are responsible to purchasers in negligence to disclose information reasonably ascertainable by independent, diligent inspection.

### 3. The Broker's Negligent Misrepresentation

The third theory in the broker's trilogy of liability for failure to disclose facts, and the final step toward a real estate broker's obligation to buyers in simple negligence, is liability for negligent misrepresentation.<sup>110</sup> While the two previous causes of action delineate the broker's duty of truthfulness in disclosure, the negligent misrepresentation standard defines the duty of a professional to avoid providing false information by taking reasonable care in ascertaining and disseminating facts.<sup>111</sup> With negligent misrepresentation, the focus is on how the information is obtained in addition to how it is disclosed.

The duty to disclose here sounds in negligence:<sup>112</sup> that is, brokers must take reasonable care in acquiring information and disclosing

<sup>110</sup> "One who in the course of his business, profession or 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.*" RESTATEMENT (SECOND) OF TORTS § 552 (1977) (emphasis added).

<sup>111</sup> *First Church of the Open Bible v. Cline J. Dunton Realty Inc.*, 19 Wash. App. 275, 281-82, 574 P.2d 1211, 1215-16 (1978) (broker must exercise due care in determining boundary of sale property); see *Josephs v. Austin*, 420 So. 2d 1181, 1185 (La. App. 1982), *cert. denied*, 427 So. 2d 870 (La. 1983); *Dugan v. Jones*, 615 P.2d 1239, 1249 (Utah 1980).

Negligent misrepresentation is distinct from a misrepresentation made innocently. In the former, a broker is liable for breaching a duty to the buyer to take reasonable care, as a professional, to confirm the truth of his or her statements. RESTATEMENT (SECOND) OF TORTS § 552 (1977). The latter type of statement, known as innocent misrepresentation, RESTATEMENT (SECOND) OF TORTS § 552C(1) (1977), provides for broker liability regardless of any fraud or breach of duty. See Comment, *Realtor Liability for Innocent Misrepresentation and Undiscovered Defects: Balancing the Equities Between Broker and Buyer*, 20 VAL. U.L. REV. 255 (1986). The RESTATEMENT (SECOND) OF TORTS § 552C(1) states:

One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act . . . is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, *even though it is not made fraudulently or negligently.*

*Id.* (emphasis added).

<sup>112</sup> RESTATEMENT (SECOND) OF TORTS § 552 comment e (1977). Comment e reads [T]he rule of liability . . . is based upon negligence[;] the defendant is subject to liability if . . . he has failed to exercise the care or competence of a reasonable man in obtaining or communicating the information. . . . [T]he supplier will exercise that care and competence in its ascertainment which the supplier's business or profession requires . . . . [S]uch investigations as are necessary will be carefully made and that . . . informant will have normal business or professional competence . . . .

defects.<sup>113</sup> A broker's duty under negligent misrepresentation is to take care to "confirm or refute information from the seller which he knows, or should know, is pivotal to the transaction from the buyer's perspective."<sup>114</sup> Because the purchasers will rely on that information in making decisions, this duty then specifically requires brokers—who stand to benefit from the transaction<sup>115</sup>—to take reasonable steps on behalf of purchasers to investigate the accuracy of the brokers' or the sellers' statements.<sup>116</sup>

While real estate brokers must already disclose material information that is accessible<sup>117</sup> or actually in their possession,<sup>118</sup> negligent misrepresentation additionally specifically requires a broker to undertake reasonable investigation.<sup>119</sup> Courts may expect brokers to inquire as to the accuracy of the property's description before listing it in the multiple listing service.<sup>120</sup> Courts may also consider real estate brokers to be on notice that there are potential defects that

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*Id.*; *Tennant v. Lawton*, 26 Wash. App. 701, 706, 615 P.2d 1305, 1309 (1980) ("liability attaches . . . on grounds of negligence"). *See, e.g., First Church of the Open Bible*, 19 Wash. App. at 281-82, 574 P.2d at 1215-16 (given confusion over precise property boundaries, broker's duty is to ascertain exact bounds of sale property). According to at least one commentator, the theory of liability proffered in the RESTATEMENT (SECOND) OF TORTS § 552 (1977) subjects an agent to liability in negligence. Comment, *Developments in Utah Law-Property Law: Broker Can Be Held Liable for Negligent Misrepresentation to Vendee*, 1981 UTAH L. REV. 229, 231; *cf. Josephs*, 420 So. 2d at 1185, *cert. denied*, 427 So. 2d 870 (La. 1983) ("[T]o apply negligent misrepresentation, there must be a legal duty to supply the correct information, and a breach of that duty causing damage to plaintiff.").

<sup>113</sup> *See Tennant*, 26 Wash. App. at 706, 615 P.2d at 1309 (broker's duty is to "take reasonable steps to avoid disseminating to the buyer false information").

<sup>114</sup> *Tennant*, 26 Wash. App. at 706, 615 P.2d at 1310 (emphasis added); *Hoffman v. Connall*, 108 Wash. 2d 69, 77, 736 P.2d 242, 246 (1987).

<sup>115</sup> Real estate brokers' commissions represent their "pecuniary interest" in the sale. Comment, *supra* note 34, at 328.

<sup>116</sup> *See, e.g., Tennant*, 26 Wash. App. at 706, 615 P.2d at 1310 (broker liable for failing to take due care to verify); *Josephs*, 420 So. 2d at 1185, *cert. denied*, 427 So. 2d 870 (La. 1983) ("Where one real estate broker negotiated for both vendor and vendee, it is particularly important that the broker-agent relay accurate information, since both parties are relying on his honesty, access to information, knowledge and expertise." (emphasis in original)).

<sup>117</sup> *See supra* notes 86-100 and accompanying text.

<sup>118</sup> *See supra* notes 73-79, 89, 94 and accompanying text.

<sup>119</sup> *Tennant*, 26 Wash. App. at 707, 615 P.2d at 1310 (broker held liable for negligence in failing "to take the simple steps within her area of expertise and responsibility" to discover flaw); *see, e.g., Lyons v. Christ Episcopal Church*, 71 Ill. App. 3d 257, 263, 265, 389 N.E.2d 623, 627, 629 (1979) (Moran, J., dissenting).

<sup>120</sup> *Lingsch v. Savage*, 213 Cal. App. 2d 729, 736, 29 Cal. Rptr. 201, 205 (1963) (holding broker "jointly and severally liable with the seller for the full amount of the damages as a party connected to the fraud" for relaying seller's false statements); *Gouveia v. Citicorp Person-to-Person Financial Center*, 101 N.M. 572, 575-76, 686 P.2d 262, 265 (1984); *First Church of the Open Bible v. Cline J. Dunton Realty Inc.*, 19 Wash. App. 275, 281, 574 P.2d 1211, 1215 (1978).

they must confirm. For example, the real estate broker in *First Church of the Open Bible v. Cline J. Dunton Realty Inc.*<sup>121</sup> “had a hunch that something was amiss” in the listing’s description of the property’s boundaries. The Washington Appeals Court held that where brokers suspect that something is wrong, they must verify the truth or falsity of the information.<sup>122</sup>

There is also precedent for holding a broker liable for negligently misrepresenting a fact about which the broker did not know, but should have known.<sup>123</sup> The broker in *Johnson v. Geer Real Estate Co.*<sup>124</sup> was found liable for stating that the house was on the city sewer when it was not. The sellers were themselves entirely unaware of the sewer and held blameless.<sup>125</sup> But, because there were indications of a septic tank that the trained broker should have detected, the court affirmed that the failure to discover the septic tank’s presence was a breach of the broker’s duty to the buyer to disclose material facts that the broker should have known.<sup>126</sup>

Negligent misrepresentation does not impose on brokers any separate requirement to make a general inspection of all aspects and attributes of the property for the benefit of any prospective purchasers.<sup>127</sup> Rather, the seller’s or broker’s representations to the buyer trigger the duty. There is nevertheless a duty to investigate: to avoid liability for negligent misrepresentation, brokers need to ensure that information which is disclosed is correct, and that which is undisclosed is not material.<sup>128</sup>

There are many rationales for establishing the real estate brokers’ duty in negligent misrepresentation. With motives similar to those for holding brokers liable in fraudulent misrepresentation and concealment,<sup>129</sup> courts have reasoned that, because buyers will rely on the information brokers provide, brokers have a duty to assure that

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<sup>121</sup> 19 Wash. App. at 277–78, 281–82, 574 P.2d at 1213, 1215–16.

<sup>122</sup> *Id.*

<sup>123</sup> *Johnson v. Geer Real Estate Co.*, 239 Kan. 324, 332, 720 P.2d 660, 665 (1986).

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

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

<sup>126</sup> *Id.* at 330–31, 720 P.2d at 664–65. The court cited the Kansas Real Estate Brokers and Salespersons Licensing Act, KAN. STAT. ANN. § 58-3062(a)(31) (1983) as specifically stating that the broker’s duty in this case is to disclose that which the broker knew or should have known.

<sup>127</sup> Compare notes 104–05 and accompanying text.

<sup>128</sup> See *supra* note 62. If the buyer inquires into a matter about which the broker has no knowledge, the broker can avoid buyer’s reliance on any broker-representations by simply asserting ignorance. *Id.* Once the broker makes a representation, however, the broker can be chargeable if it is negligently made. See *supra* notes 110–27.

<sup>129</sup> See *supra* notes 106–09 and accompanying text.

their information is correct.<sup>130</sup> Purchasers view real estate brokers as being experts who have the necessary, reliable knowledge about the property.<sup>131</sup> As between the buyer and the broker, the latter is in a superior position to gain knowledge.<sup>132</sup> Furthermore, from the purchasers' point of view, the real estate transaction is a significant expense and a confusing procedure, where one must rely on the brokers' honesty.<sup>133</sup> Finally, the underlying purpose of requiring brokers to hold real estate licenses is to protect the public from abuses through regulation of brokers.<sup>134</sup>

Before the decision in *Easton*, therefore, case law had established a legal relationship between real estate broker and purchaser despite the absence of contractual privity. The courts imposed a real estate broker duty of disclosure to buyers distinct from those broker responsibilities that are derivative of the sellers' duty to buyers.<sup>135</sup> States have also looked to the licensing requirements to find that real estate brokers owe the buying public a quasi-fiduciary duty of honesty and fairness to conduct their business in a competent manner.<sup>136</sup> By the beginning of the 1980s, there was precedent in the tort law of fraudulent misrepresentation, nondisclosure, and negligent misrepresentation, for the real estate brokers' legal duty to buyers. This legal duty is to ascertain and disclose truthfully all characteristics of the property that would materially affect its value or desirability, because: 1) brokers are aware of the defects and of the buyers' ignorance; 2) brokers should have been aware of the defects; 3) the defects are inquired about; or 4) brokers should have taken reasonable care to assure that all material information be accurately disclosed.<sup>137</sup>

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<sup>130</sup> *Josephs v. Austin*, 420 So. 2d 1181, 1185 (La. App. 1982), *cert. denied*, 427 So. 2d 870 (La. 1983).

<sup>131</sup> *Id.*

<sup>132</sup> *Cf. Hoffman v. Connall*, 108 Wash. 2d 69, 73, 736 P.2d 242, 244 (1987).

<sup>133</sup> *Josephs*, 420 So. 2d at 1185.

<sup>134</sup> *Amato v. Rathbun Realty, Inc.*, 98 N.M. 231, 232, 647 P.2d 433, 434 (1982). As one commentator stated, "[i]f the law did not require a standard of competence and integrity, 'the license would serve only as a foil to lure the unsuspecting public into being duped by people more skilled . . . in such affairs.'" Comment, *supra* note 112, at 231 (quoting *Reese v. Harper*, 8 Utah 2d 119, 122, 329 P.2d 410, 412 (1958)).

<sup>135</sup> *See, e.g., Foust v. Valleybrook Realty Co.*, 4 Ohio App. 3d 164, 164-65, 446 N.E.2d 1122, 1125 (1981) (buyer entitled to rely on realtor's representations because of broker-buyer fiduciary relationship); *see also Cooper v. Jevne*, 56 Cal. App. 3d 860, 866, 128 Cal. Rptr. 724, 727 (1976) (in action against sales agents and architects of new condominiums, agents are liable for nondisclosure, but architects are not under same duty to disclose); *Lingsch v. Savage*, 213 Cal. App. 2d 729, 734, 20 Cal. Rptr. 201, 204-05 (1963) (real estate broker has duty of disclosure that does not depend on contractual privity).

<sup>136</sup> *See supra* notes 50-56 and accompanying text.

<sup>137</sup> *See supra* notes 73-136 and accompanying text. *See also supra* note 7.

The broker duty in fraud however, has its limits. In none of these causes of action were brokers required to conduct an independent inspection of the premises for the benefit of the buyer and to disclose signs of defects. The broker duty prior to *Easton* was anchored in the facts of each case and depended on the knowledge of the buyer, the extent to which state law viewed agents as independent of their principals, and the brokers' access to defects and awareness of the buyers' knowledge. For instance, the law of fraudulent concealment has imposed on a real estate broker a duty merely to reveal material defects about which they know, or which is accessible or sought-after.<sup>138</sup> Absent the broker's current suspicion or knowledge, or the buyer's inquiries, in no case under these various theories of broker liability has a broker the incentive independently to inspect the property. While fraud and negligent misrepresentation require brokers to conduct investigations for buyers, that duty is usually limited to conducting an investigation sufficient to ensure that the disclosed information is accurate, or, to the extent necessary to prevent dissemination of false information.<sup>139</sup> Though brokers must know the property well enough to ensure the veracity of their (or of the sellers') statements, the duty under this cause of action does not otherwise mandate any affirmative, independent investigation of the property for signs of defects.

Toxic contamination, one of the potential defects, often only manifests signals of its presence. Unless brokers know about a potential for pollution, or that contamination exists, or unless the buyers specifically inquire about it, the property will pass on to unsuspecting purchasers while the sellers and brokers benefit from the sale. Under the current theories, if the subject of toxic contamination was not already raised, brokers have no motivation to conduct even a cursory inspection of the property for signs of toxic pollution. The opportunity to discover contamination therefore, will be overlooked if brokers are not required to inspect.

Further, innocent purchasers of contaminated land may fall within the sweep of liability under the comprehensive schemes of both the state and federal superfund statutes.<sup>140</sup> Under such statutes, con-

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<sup>138</sup> See *supra* notes 94-100 and accompanying text.

<sup>139</sup> *Latter and Blum, Inc. v. Richmond*, 388 So. 2d 368, 372 (La. 1980) ("The precise duties of a real estate broker must be determined by an examination of the nature of the task the real estate agent undertakes to perform and the agreements he makes with the involved parties."). Cf. *First Church of the Open Bible v. Cline J. Dunton Realty Inc.*, 19 Wash. App. 275, 281-82, 574 P.2d 1211, 1215-16 (1978).

<sup>140</sup> 131 CONG. REC. H11,159 (daily ed. Dec. 5, 1985) (statement of Rep. Moakley). Section 101(f) of the Superfund Amendments and Reauthorization Act of 1986 (SARA) was passed to



taminated property can become subject to a lien for cleanup or removal costs.<sup>141</sup> For instance, liability for cleanup under the federal Superfund statute is joint and several, and can attach to all past and present owners of contaminated property, regardless of participation in or knowledge of pollution.<sup>142</sup> Thus, new purchasers may be held responsible even when they were ignorant of the contamination at the time of purchase, and regardless of the status of past owners' responsibility.<sup>143</sup> Additionally, where contamination in the surrounding area has seeped onto the buyers' property, the sellers—themselves unaware of the problem—cannot necessarily absolve the purchaser of potential clean-up liability under Superfund.<sup>144</sup> Even Superfund's new innocent landowner defense<sup>145</sup> may prove elusive. To avail themselves of this defense,<sup>146</sup> purchasers must demonstrate

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exempt the wholly innocent landowner from liability. SARA § 101(f), Pub. L. No. 99-499, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1613, 1616 (1986) (amending CERCLA, 42 U.S.C. §§ 9601(35)(A), 9607(b)(1)-(3) (1982 & Supp. III 1985)). While no case law to date addresses the effectiveness of the innocent-landowner defense, the burden of demonstrating innocence under this defense is becoming increasingly more demanding. See Mays, *Settlements with SARA: A Comprehensive Review of Settlement Procedures Under the Superfund Amendments and Reauthorization Act*, 17 *Env'tl. L. Rep.* 10,101, 10,107 (Env'tl. L. Inst.) (Apr. 1987).

<sup>141</sup> SARA § 107(f), Pub. L. No. 99-499, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1630 (1986) (amending CERCLA §§ 9607(l), (m) (1982 & Supp. III 1985); see also N.J. Spill Compensation & Control Act, N.J. REV. STAT. § 58-10-23.11(f) (1980); MASS. GEN. L. ch. 21E, § 13 (1983). See generally Note, *The Impact of State "Superlien" Statutes on Real Estate Transactions*, 5 VA. J. NAT. RES. L. 297 (1986).

<sup>142</sup> H.R. REP. NO. 253(I), 99th Cong., 2d Sess. 4, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2855-56; 42 U.S.C. § 9607 (1982 & Supp. III 1985); Cf. Light, *Federal Preemption, Federal Conscriptio Under the New Superfund Act*, 38 *MERCER L. REV.* 643, 652 (1987).

<sup>143</sup> 131 CONG. REC. H11,159 (daily ed. Dec. 5, 1985) (statement of Rep. Moakley) ("Unfortunately, under present law and EPA policy, we . . . hold an innocent landowner . . . responsible."); H.R. REP. NO. 253(I), 99th Cong., 2d Sess. 4, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2855-56; 42 U.S.C. § 9607 (1982 & Supp. III 1985).

<sup>144</sup> All owners, past, present and future will be held liable unless there is some previous indemnity arrangement. Cf. H.R. REP. NO. 253 (I), 99th Cong., 2d Sess. 4, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2855-56; 42 U.S.C. § 9607 (1982 & Supp. III 1985).

<sup>145</sup> SARA § 101(f), Pub. L. No. 99-499, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1616 (1986) (amending CERCLA, 42 U.S.C. §§ 9601(35)(A), 9607(b)(1)-(3) (1982 & Supp. III 1985)).

<sup>146</sup> 42 U.S.C. § 9607(b)(3) (1982 & Supp. III 1985) states that the defendant will not be liable under CERCLA if the defendant

can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance [was] caused solely by . . . a third party . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third

that before buying, they made every effort to determine the presence of contamination.<sup>147</sup> Real estate brokers could aid buyers in this effort by independently investigating on purchasers' behalf for the presence of pollution. Only under a standard of care in negligence would brokers be required to conduct a reasonable, independent investigation of the property on behalf of buyers, for material defects—such as the presence of toxic contamination—regardless of whether any party originally was aware of it.

### III. NEGLIGENCE AND THE REAL ESTATE BROKER'S DUTY OF CARE—RECENT DEVELOPMENTS IN BROKER LIABILITY: *EASTON V. STRASSBURGER*

Only three states have held that real estate brokers can be liable in simple negligence for failing to conduct an independent investigation and to disclose potential defects to purchasers.<sup>148</sup> The three states that have adopted this standard have done so by explicitly citing the California Court of Appeals decision in *Easton v. Strassburger*.<sup>149</sup> In *Easton*, the court established that sellers' real estate brokers owe an affirmative duty to purchasers "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."<sup>150</sup>

In *Easton*, the plaintiff-purchasers bought a house, a guest house, and swimming pool from the Strassburgers.<sup>151</sup> The house had been built on landfill that had been incorrectly engineered and compacted.<sup>152</sup> Prior to the sale, the Strassburgers had experienced two

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party and the consequences that could foreseeably result from such acts or omissions

....  
*Id.*

<sup>147</sup> *Id.*; see, e.g., Mays, *supra* note 140.

<sup>148</sup> *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984); *Gouveia v. Citicorp Person-to-Person Financial Center*, 101 N.M. 572, 686 P.2d 262 (1984); *Secor v. Knight*, 716 P.2d 790 (Utah 1986).

<sup>149</sup> 152 Cal. App. 3d 90, 199 Cal. Rptr. 383. See also *Gouveia*, 101 N.M. 572, 686 P.2d 262; *Secor*, 716 P.2d 790.

<sup>150</sup> 152 Cal. App. 3d at 102, 199 Cal. Rptr. at 390 (footnote omitted). The court specifically held that there was no error in the instructions to the jury that a seller's broker in a residential real estate transaction "is under a duty to disclose facts materially affecting the value or desirability of the property . . . which through reasonable diligence should be known to him." *Id.* at 98, 103, 199 Cal. Rptr. at 387, 391.

<sup>151</sup> *Id.* at 96-97, 199 Cal. Rptr. at 385-86.

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

earth slides but never told the real estate agents about this defect.<sup>153</sup> Nevertheless, the brokers, who had conducted a limited inspection of the property several times before the sale,<sup>154</sup> observed "red flags" that indicated soil instability.<sup>155</sup> For instance, the agents knew that the house was built on landfill, because they had seen netting on the property.<sup>156</sup> The owners used the netting to maintain the slope after a recent slide.<sup>157</sup> In addition, the brokers noted that some of the guest house floors were warped and not level, and the walls were cracked.<sup>158</sup> Yet, the brokers did not bring these red flags to the purchasers' attention.<sup>159</sup> The fact that the brokers were cognizant of red flags, that is, indications of possible soil problems, means that the brokers were effectively put on constructive notice that there was a potential material defect that would be of importance to buyers.<sup>160</sup> Actual notice of soil instability, however, was unnecessary for liability in negligence to attach.<sup>161</sup> The court held that the brokers' failure to further question the sellers or request soil testing, and failure to indicate these flags to the buyers was the breach of this real estate broker duty.<sup>162</sup>

The court based its reasoning on three premises. First, case precedent implied a similar duty.<sup>163</sup> Brokers already had a duty to communicate material facts of which they were, or *should have been*, aware.<sup>164</sup> Second, the court took judicial notice of the ethical standards set forth in the National Association of Realtors Code of Ethics.<sup>165</sup> Based on this Code, the court imposed a legal obligation on real estate brokers to conduct themselves according to those standards which realtors had already voluntarily assumed.<sup>166</sup> The Code sets out an obligation to disclose that which should be known and affirmatively to "discover adverse factors that a reasonably

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

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

<sup>156</sup> *Id.* at 104, 199 Cal. Rptr. at 391.

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

<sup>158</sup> *Id.* at 96, 199 Cal. Rptr. at 385.

<sup>159</sup> *Id.* at 96, 199 Cal. Rptr. at 386.

<sup>160</sup> *Id.* at 104, 199 Cal. Rptr. at 391.

<sup>161</sup> *Id.* at 103-05, 199 Cal. Rptr. at 391-92.

<sup>162</sup> *Id.* at 104-05, 199 Cal. Rptr. at 391.

<sup>163</sup> *Id.* at 99, 199 Cal. Rptr. at 388.

<sup>164</sup> *Id.* at 99, 199 Cal. Rptr. at 387-88 (emphasis added). The real estate broker is already obligated "to disclose to a buyer material defects known to the broker but unknown to and unobservable by the buyer" or risk liability for fraudulent concealment. *Id.*

<sup>165</sup> *Id.* at 101-02, 199 Cal. Rptr. at 389-90.

<sup>166</sup> *Id.*

competent and diligent investigation would disclose."<sup>167</sup> Third, the *Easton* court recognized that the realities of real estate transactions called for a delineation of the duty to inspect and disclose.<sup>168</sup> The court observed that, because purchasers rely on brokers to protect their interests, limiting the broker's duty to disclosing only defects the broker already knows would "provide a disincentive" to making a diligent inspection and discovering all defects.<sup>169</sup> Thus, the broker "would be shielded by his ignorance of that which he holds himself out to know."<sup>170</sup> Further, the court stressed that such a holding would "reward both the unskilled broker for his own incompetence," and the "unscrupulous broker . . . at the expense of those who justifiably rely on his advice."<sup>171</sup> On balance, the court concluded that as a real estate professional, the broker is more familiar with the property and with real estate transactions in general than is the buyer. The broker thus is better able to bear the burden of discovery.<sup>172</sup>

The standard of care enunciated in *Easton* is founded on a special relationship between the real estate broker and the buyer. This relationship is the result of the buyers' justified reliance on brokers.<sup>173</sup> Knowing of such reliance, brokers have a duty to look out for buyers' concerns.<sup>174</sup> Novice homebuyers naturally expect that the brokers are working for them and will protect their interests.<sup>175</sup> Furthermore, real estate brokers hold themselves out as experts in real estate matters and are frequently called upon for advice in choosing and valuating a piece of property.<sup>176</sup> Citing one commentator, the *Easton* court analogized this relationship to that of attorneys and their clients.<sup>177</sup> Buyers' reliance gives rise to a duty on the part of brokers to act competently in ascertaining and disclosing full and accurate information.<sup>178</sup>

The duty recognized by the *Easton* court has two parts. First, brokers must disclose to purchasers any indications of material de-

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 101-02, 199 Cal. Rptr. at 389.

<sup>169</sup> *Id.* at 100-01, 199 Cal. Rptr. at 388-89.

<sup>170</sup> *Id.*

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

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 100-02, 199 Cal. Rptr. at 388-89.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*; see *supra* notes 42-49 and accompanying text.

<sup>176</sup> *Easton*, 152 Cal. App. 3d at 100, 199 Cal. Rptr. at 388.

<sup>177</sup> *Id.* (citing Comment, *A Reexamination of the Real Estate Broker-Buyer-Seller Relationship*, 18 WAYNE L. REV. 1343 (1972)).

<sup>178</sup> 152 Cal. App. 3d at 100-01, 199 Cal. Rptr. at 389.

fects.<sup>179</sup> This obligation to disclose is not new; it is already widely accepted that brokers must disclose to purchasers material facts about which brokers know and purchasers are unaware.<sup>180</sup> Thus, the only additional requirement of this duty is the second part: the obligation to conduct a "reasonably competent and diligent inspection . . . in order to discover defects for the benefit of the buyer."<sup>181</sup> That is, brokers must disclose that which they would know by virtue of an independent inspection.

Hence, brokers must investigate the property for defects to fulfill this duty to disclose material facts.<sup>182</sup> According to the *Easton* court, brokers must conduct inspections on behalf of purchasers. The inspections must be thorough enough to reveal not only manifest defects, but also those facts that are "reasonably discoverable."<sup>183</sup> Brokers are thus responsible for discovering and disclosing not only material facts about which they know, but also facts about which they reasonably should know.<sup>184</sup> To establish liability, buyers must show that a "competent and diligent inspection would have uncovered" the flaws.<sup>185</sup> Buyers thus need not show that brokers knew of the defects, as required in fraudulent misrepresentation actions. Nor must buyers show that they ever raised the issue of defects, as they would have to in nondisclosure actions.<sup>186</sup> In fact, this duty in negligence arises before there is a question of fraud. Under *Easton*, brokers must act independently to discover reasonably ascertainable facts for buyers before buyers raise the issue.<sup>187</sup>

Although the *Easton* court set new precedent by establishing real estate broker liability in simple negligence, the *Easton* decision does not imply that brokers are subject to strict liability.<sup>188</sup> Because the

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<sup>179</sup> *Id.* at 99, 199 Cal. Rptr. at 388.

<sup>180</sup> *Id.* (citing *Cooper v. Jevne*, 56 Cal. App. 3d 860, 866, 128 Cal. Rptr. 724, 727 (1976) and *Lingsch v. Savage*, 213 Cal. App. 2d 729, 735, 29 Cal. Rptr. 201, 204 (1963)).

<sup>181</sup> *Id.* at 99, 199 Cal. Rptr. at 388.

<sup>182</sup> *Id.* at 101, 199 Cal. Rptr. at 389.

<sup>183</sup> *Id.* at 103, 199 Cal. Rptr. at 391.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 104, 199 Cal. Rptr. at 392 (emphasis omitted). The court recognized that at times, depending on the facts, expert testimony may be necessary to determine whether the broker breached the standard of care of the reasonable, prudent real estate broker. *Id.* at 105, 199 Cal. Rptr. at 393.

<sup>186</sup> *Id.* at 101-02, 199 Cal. Rptr. at 389.

<sup>187</sup> *Id.* at 99, 102, 199 Cal. Rptr. at 388, 390.

<sup>188</sup> *But see* Fossey & Roston, *The Broker's Liability in a Real Estate Transaction: Bad News and Good News for Defense Attorneys*, 12 UCLA-ALASKA L. REV. 37 (1982-83) (arguing that the 1982 Alaska Supreme Court decision in *Bevins v. Ballard*, 655 P.2d 757 (Alaska 1982), "adopted a rule of strict liability for any misrepresentations that a broker makes or commu-

standard sounds in mere negligence, brokers are only liable for damages that their breach of duty proximately caused.<sup>189</sup> Thus, a broker would not automatically be liable to buyers every time the property sold proves to be polluted.<sup>190</sup> Rather, the courts recognize that, at times, depending on the facts, expert testimony may be necessary to determine whether the broker breached the standard of care of the reasonable, prudent real estate broker.<sup>191</sup> Brokers can also seek indemnity from the sellers.<sup>192</sup> Furthermore, brokers may mitigate their liability by demonstrating that the buyer is comparatively or contributorily negligent. Under *Easton*, the brokers' liability may be reduced if they can demonstrate that the buyers failed to take steps to protect themselves.<sup>193</sup> For example, if the defect is obvious to all parties, then the buyer may be charged with having had notice, thus negating the broker's duty to disclose.<sup>194</sup> In *Easton*, the court allowed the broker to receive partial indemnity from the seller, and found the buyer five percent negligent as well.<sup>195</sup>

Two other states have followed the *Easton* duty of care: New Mexico and Utah.<sup>196</sup> The New Mexico Court of Appeals in *Gouveia v. Citicorp Person-to-Person Financial Center*,<sup>197</sup> cited the Restatement of Torts,<sup>198</sup> case precedent,<sup>199</sup> and *Easton* in holding that real estate brokers can have a duty to disclose "defects that an inspection would reveal."<sup>200</sup> In *Gouveia*, the broker had listed a townhouse for sale as being in top condition, without having actually inspected it.<sup>201</sup>

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nicates in a real estate transaction"). Such a rule would be stricter than holding the broker liable in simple negligence.

<sup>189</sup> *Easton*, 152 Cal. App. 3d at 111-12, 199 Cal. Rptr. at 396-97.

<sup>190</sup> *Cf. id.*; *supra* note 188; *supra* note 111.

<sup>191</sup> *Easton*, 152 Cal. App. 3d at 104-05, 199 Cal. Rptr. at 392-93.

<sup>192</sup> *Id.* at 107, 199 Cal. Rptr. at 393.

<sup>193</sup> *Id.* at 106-10, 199 Cal. Rptr. at 394-95.

<sup>194</sup> *Id.*; *see, e.g.*, *Foust v. Valleybrook Realty Co.*, 4 Ohio App. 3d 164, 165, 446 N.E.2d 1122, 1125 (1981) (seller's and agent's duty is to disclose any facts that are not visible to buyer). If defects are visible to the buyer, the broker may not have a duty to disclose. The accepted doctrine is that the real estate broker may be liable for failing to disclose latent defects about which the broker knew, while believing that the buyer was ignorant of them. *Treece & Mead, supra* note 89 at 21; *see, e.g.*, *Gouveia v. Citicorp Person-to-Person Financial Center*, 101 N.M. 572, 577, 686 P.2d 262, 267 (1984) (defects unavailable to buyer but available to broker are subject to disclosure).

<sup>195</sup> *Easton*, 152 Cal. App. 3d at 111-13, 199 Cal. Rptr. 396-97.

<sup>196</sup> *See Gouveia*, 101 N.M. 572, 686 P.2d 262; *Secor v. Knight*, 716 P.2d 790 (Utah 1986).

<sup>197</sup> *Gouveia*, 101 N.M. 572, 686 P.2d 262.

<sup>198</sup> *Id.* at 576, 686 P.2d at 266.

<sup>199</sup> *Id.* (citing *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984)).

<sup>200</sup> *Id.* at 576-77, 686 P.2d at 266.

<sup>201</sup> *Id.* at 575, 686 P.2d at 265.

After they bought it, the purchasers found substantial defects in the townhouse construction.<sup>202</sup> The court stated that the brokers' actions would be measured by whether the broker conformed to the community standard of care to know or to discover the building's defects.<sup>203</sup> Although the *Gouveia* court based the brokers' liability on negligent misrepresentation, the court explicitly cited the *Easton* duty to inspect the property on behalf of potential purchasers.<sup>204</sup> Thus, a court in New Mexico can hold a broker liable in negligence for failing to discover defects if the broker could have gained actual knowledge while conforming to community standards of practice.<sup>205</sup>

The *Gouveia* court's reasoning is similar to that of the *Easton* court. In *Easton*, the duty was based on a special relationship between brokers and buyers arising from the buyers' justified reliance.<sup>206</sup> The *Gouveia* court found that brokers have a fiduciary duty to anyone who relies on their representations.<sup>207</sup> Because reasonable listing-brokers will realize that potential purchasers (as well as other brokers) would rely on their description of the property, they must exercise care and competence in obtaining information for the listing.<sup>208</sup> Indeed, according to the *Gouveia* court, brokers must disclose material defects of which they do not have actual knowledge if failing to discover and disclose them would breach the community standard of the reasonable real estate broker.<sup>209</sup> The standard of care according to *Gouveia*, then, depends on the facts and circumstances and may include a duty to disclose those defects that an inspection would reveal.<sup>210</sup>

In *Secor v. Knight*, the Utah Court of Appeals noted its approval of the *Easton* decision.<sup>211</sup> In *Secor*, the court asserted in *dicta* that

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

<sup>203</sup> *Id.* at 577-78, 686 P.2d at 267-68.

<sup>204</sup> *Id.* at 576, 686 P.2d at 266.

<sup>205</sup> *Id.* at 576-77, 686 P.2d at 266-68 (citing *Amato v. Rathbun Realty, Inc.*, 98 N.M. 231, 647 P.2d 433 (1982)).

<sup>206</sup> See *supra* text accompanying note 173.

<sup>207</sup> *Gouveia*, 101 N.M. at 576, 686 P.2d at 266.

<sup>208</sup> *Id.* at 575-77, 686 P.2d at 265-67.

<sup>209</sup> *Id.* at 577, 686 P.2d at 267.

<sup>210</sup> *Id.* at 576, 686 P.2d at 267 (citing *Amato v. Rathbun Realty, Inc.*, 98 N.M. 231, 647 P.2d 433 (1982)).

<sup>211</sup> 716 P.2d 790, 795 n.1 (Utah 1986). The Utah Supreme Court in *Secor* held that the purchasers could not avoid enforcement of a restrictive covenant because they were on notice of the covenant's existence. *Id.* at 794. The deficiency of pleading coupled with the merger doctrine required a finding against the buyers. *Id.* The case thus is not about a real estate agent's duty to inspect; the facts here are about the defects of which the broker was aware.

real estate brokers have a duty to investigate for and disclose material defects to buyers independent of the sellers' responsibility.<sup>212</sup> The *Secor* court, concerned with what it viewed as the real estate brokers' and seller's unethical conduct, stated that the buyers ought to be protected from such dishonest behavior.<sup>213</sup> In that case, the broker was aware of a restrictive covenant prohibiting duplexes on the property. The broker merely alluded to the covenant, but did not explicitly tell the buyer about it.<sup>214</sup> The court expressed its approval of the *Easton* disclosure requirement as an alternative to the "substandard conduct"<sup>215</sup> of this broker.

Together these cases reveal that the real estate broker's duty to potential purchasers is to conduct a reasonable, diligent inspection of property for the benefit of buyers, regardless of red flags,<sup>216</sup> and to disclose any material facts which such inspection would uncover.<sup>217</sup> What is "reasonable" depends on community or licensing standards. The duty does not rest solely on the fact of a statement, or on concealed knowledge. Breach of this duty occurs if the broker fails to discover those flags that a reasonable investigation would uncover, before the subject is raised by the buyer's inquiries or by the seller's or broker's statements or concealments. This new standard in negligence is essentially the "knew or should have known" standard used in nondisclosure, negligent misrepresentation, and in other areas of tort law.<sup>218</sup> However, only in these cases is this standard specifically articulated as a real estate broker duty in simple negligence to investigate independently for the buyer's benefit as well as to disclose accurately all material information.

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Yet, in dicta, the Court disapproved of the conduct of the seller and the real estate broker in the sale and specifically indicated its approval of the real estate broker's duty as defined in *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984). *Id.* at 795 n.1. The decision can be read as a signal to brokers that the Utah Supreme Court will take that route should a case with the right facts arise.

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

<sup>213</sup> *Secor v. Knight*, 716 P.2d 790, 795 n.1 (Utah 1986).

<sup>214</sup> *Id.* at 794.

<sup>215</sup> *Id.* at 795.

<sup>216</sup> *See, e.g., Easton v. Strassburger*, 152 Cal. App. 3d 90, 104, 199 Cal. Rptr. 383, 391 (1984).

<sup>217</sup> *Id.* at 103, 199 Cal. Rptr. at 391. A real estate broker is "under a duty to disclose facts materially affecting the value or desirability of the property [that is known to him or] which through reasonable diligence *should be known to him.*" (emphasis added). *See also Secor*, 716 P.2d at 795 n.1; *Gouveia v. Citicorp Person-to-Person Financial Center*, 101 N.M. 572, 576, 686 P.2d 262, 266 (1984) ("if the broker. . . should have had, or could have gained, actual knowledge . . .") (citing *Amato v. Rathbun Realty, Inc.*, 98 N.M. 230, 647 P.2d 433 (1982)).

<sup>218</sup> *See supra* notes 80-85, 98-100, 121-26 and accompanying text.



#### IV. THE REAL ESTATE BROKER'S DUTY IN NEGLIGENCE TO BUYERS IN SELLING RESIDENTIAL PROPERTY THAT HAS BEEN PREVIOUSLY CONTAMINATED

This Comment proposes two reasons why other states should adopt the *Easton* standard of care, and why states should apply this standard to the sale of previously contaminated property.<sup>219</sup> First, there is strong precedent for such a duty, so that inspection for environmental contamination would impose no significant additional function or expertise on real estate brokers. Second, adopting *Easton* would further a national goal of ridding the environment of toxic pollution.

##### A. *There is Strong Precedent for the Broker's Duty to Inspect*

The real estate brokers' standard of behavior in negligence is essentially to disclose that which they know or reasonably should know through investigation.<sup>220</sup> The *Easton* court's requirement that brokers disclose to purchasers information of which they are aware is not extraordinary.<sup>221</sup> This is the law of fraud and nondisclosure.<sup>222</sup> The second part of the *Easton* duty is to disclose information of which brokers are not currently aware but which is reasonably accessible through investigation.<sup>223</sup> This part of the duty is consistent with the evolution of real estate broker law and is not a radical departure from precedent.<sup>224</sup>

According to the *Easton* court, the brokers' duty to disclose information about which they *should* know is "implicit" in the existing duty to reveal information that is accessible to them.<sup>225</sup> To satisfy this duty, brokers must conduct such an investigation as would reasonably uncover such accessible defects.<sup>226</sup> In fact, brokers have

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<sup>219</sup> This Comment is concerned only with property that was contaminated before it was put up for sale, because the *Easton* duty is predicated on the presence of signs of defects. Without current pollution, there would be no signs of defects on the sale property.

<sup>220</sup> See *supra* notes 183-87 and accompanying text.

<sup>221</sup> See *supra* notes 62-109 and accompanying text.

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

<sup>223</sup> *Easton v. Strassburger*, 152 Cal. App. 3d 90, 102, 199 Cal. Rptr. 383, 390 (1984).

<sup>224</sup> *Id.* at 99, 199 Cal. Rptr. at 388 (duty to disclose material facts about which the broker should have known "is implicit in the rule articulated in *Cooper and Lingsch*, which speaks . . . to facts that are *accessible* only to the broker and seller" (emphasis in original)). See *Gouveia v. Citicorp Person-to-Person Financial Center*, 101 N.M. 572, 577-78, 686 P.2d 262, 267 (1984) (broker's defense is that he did not breach standard of care to know of or discover defects). See *supra* notes 62-136 and accompanying text.

<sup>225</sup> *Easton*, 152 Cal. App. 3d, 199 Cal. Rptr. at 388.

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

already been held liable in nondisclosure for failing to reveal material defects about which they know or which they should know.<sup>227</sup> In order to establish whether a factor is material to the buyer's decision, the broker must already investigate on the buyer's behalf.<sup>228</sup>

In addition to nondisclosure, negligent misrepresentation is a theoretical precursor of this *Easton* requirement. Under the negligent misrepresentation theory, brokers must investigate to assure the veracity of their statements, even without prior specific knowledge that the statement is inaccurate.<sup>229</sup> To verify representations, negligent misrepresentation requires brokers to investigate for factors about which neither the brokers nor the buyers are necessarily aware but which are accessible to the brokers through reasonable investigation.<sup>230</sup> For brokers to reveal what they should know, then, simply requires an investigation for accessible information. Hence, the *Gouveia* decision, though based on negligent misrepresentation, actually holds brokers to a standard of care in negligence to inspect for those defects that a reasonable investigation, as defined by community standards, would reveal.<sup>231</sup> Therefore, precedent already established the real estate brokers' duty to reveal all material information about which they know or should know.<sup>232</sup> This is not a new function for the expert real estate broker.

Just as this duty to conduct a reasonable inspection and disclose all material facts is not a significant change in real estate broker law, the *Easton* requirement imposes no additional burden on brokers to investigate for signs of contamination. Brokers must already disclose patent and material defects.<sup>233</sup> Many of the signs of contamination are tangible,<sup>234</sup> and material to a decision to buy.<sup>235</sup> At most, under *Easton* and its progeny, a real estate broker would be asked to be vigilant for signs of environmental contamination.

In sum, under the theories of negligent misrepresentation, fraud, or nondisclosure, the brokers currently have a duty to be informed about their "merchandise."<sup>236</sup> Real estate brokers already must in-

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<sup>227</sup> See *supra* notes 98-100 and accompanying text.

<sup>228</sup> See *supra* notes 88-97 and accompanying text.

<sup>229</sup> See *supra* notes 111-21 and accompanying text.

<sup>230</sup> See *supra* notes 123-28 and accompanying text.

<sup>231</sup> See *supra* notes 203-10 and accompanying text.

<sup>232</sup> See *supra* notes 62-139 and accompanying text.

<sup>233</sup> See *supra* notes 62-136 and accompanying text.

<sup>234</sup> See Fitzgerald interview, *supra* note 6.

<sup>235</sup> *Roberts v. Estate of Barbagallo*, 531 A.2d 1125, 1131 (Pa. Super. 1987) (presence in the house of urea formaldehyde foam insulation was a material fact); see, e.g., *infra* note 260.

<sup>236</sup> *Berryman v. Reigert*, 286 Minn. 270, 276, 175 N.W.2d 438, 444 (1970); see, e.g., *Amato*

spect the property and inform themselves of flaws that affect the property's value or desirability. The only additional aspect to the duty, as articulated by the *Easton* court, is the broker's duty to inspect the property for the presence of red flags, independent of any representations. That is, under *Easton*, brokers must determine if there are signs of contamination, what those signs are, and whether they are material, prior to disclosing them, regardless of any sellers' statements or buyers' inquiries. The level of knowledge required of a broker to avoid liability in negligence, therefore, is essentially no more than that required in tort law of fraud, nondisclosure, and negligent misrepresentation, or that required to become licensed in the first place.<sup>237</sup>

### 1. What Constitutes an Environmental "Red Flag"

The *Easton* decision is factually predicated on the presence of red flags which indicated the possibility of soil instability. Yet, the court held that actual knowledge of the soil problems was "unnecessary to establish liability for negligence."<sup>238</sup> Although the extent of an *Easton* investigation to discover problems is not clear,<sup>239</sup> the *Easton* court states that it must be "something more than casual visual

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v. Rathbun Realty, Inc., 98 N.M. 231, 233, 647 P.2d 433, 435 (1982); Sawyer v. Tildahl, 275 Minn. 457, 461, 148 N.W.2d 131, 133 (1967). *But see* Long v. Brownstone Real Estate Co., 335 Pa. Super. 268, 274, 484 A.2d 126, 130 (1984) (Wickersham, J., dissenting) (real estate broker not expected to be expert on physical quality of property).

<sup>237</sup> See, e.g., CAL. BUS. & PROF. CODE § 10,153 (b) (West 1986); N.M. STAT. ANN. § 61-29-1 (1978); ARIZ. REV. STAT. ANN. § 32-2124 (1986). CAL. BUS. & PROF. CODE § 10,153(b) (West 1986) states that the applicant for a broker's license must take a written exam to demonstrate an understanding of the principles of real estate conveyancing, the purposes and legal effect of deeds, mortgages, land contracts of sale, economics and appraisals. CAL. BUS. & PROF. CODE § 10,153.3 (West 1986) additionally requires a knowledge of the legal aspects of real estate. See Reply Brief for Respondents, *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984) (No. AO10566). The Real Estate Brokers and Salesmen Act of New Mexico, N.M. STAT. ANN. § 61-29-1 (1978) subsection 10(B), explicitly includes in its written exam for the real estate broker's license, "business ethics, writing . . . arithmetic, elementary principles of land economics and appraisals, a general knowledge of [New Mexico] statutes . . . relating to deeds, mortgages, contracts of sale, agency and brokerage and [all] provisions of [this act]." The written examination in Arizona, according to the ARIZ. REV. STAT. ANN. § 32-2124 (1986), requires brokers to demonstrate an understanding of, among other things, principles of real estate conveyances; the general purpose and legal effect of agency contracts, deposit receipts, deeds, mortgages, deeds of trust, security agreements, bills of sale, and land contracts of sale and leases; principles of business and land economics and appraisals; and a general understanding of the obligations between principal and agent, and principles of real estate and business practices (emphasis added).

<sup>238</sup> *Easton v. Strassburger*, 152 Cal. App. 3d 90, 104, 199 Cal. Rptr. 383, 391-92 (1984).

<sup>239</sup> Cleland & Koller, *Easton v. Strassburger: A Red Flag for California Real Estate Brokers*, BEV. HILLS B.J. 16, 19 (Winter, 1985).

inspection and general inquiry of the owners."<sup>240</sup> The brokers would be required to make a visual inspection that would uncover facts which are reasonably apparent.<sup>241</sup> Then, any presence of red flags, that are the manifestation of possible defects, results in the concomitant duty to inquire further and to disclose.<sup>242</sup> The brokers in *Easton*, if they had bothered to inquire further about the netting and sloped floors, could easily have discovered the earth slides.<sup>243</sup> The court held that since they did not disclose these red flags, they breached a duty of care.<sup>244</sup> Based on its facts, the *Easton* case does not create a requirement to inspect for any possible latent defect such as invisible signs of pollution.<sup>245</sup> The inspection would encompass defects which are not obvious but do manifest warning signals. What is a "warning signal" depends on the facts of the case.<sup>246</sup> There may be flags or signs of pollution. Therefore, under the reasoning in *Easton*, after a diligent inspection, the duty to disclose would be triggered by the discovery of a red flag or a reasonably obvious sign of the possible existence of contamination.

In *Easton*, the red flags were visible, tangible indications of soil erosion such as netting on the hill slope and slanted floors. Numerous indications of possible environmental contamination can also be tangible. Many toxins give off vapors or odors which, depending on their strength, would raise the suspicions of even a nonastute observer.<sup>247</sup> Visible signs of possible chemical contamination are vegetative distress, discoloration or staining of vegetation or of basement walls and floors, and even liquid seeping, or matter oozing into houses through the ground-level walls.<sup>248</sup> The more celebrated signs

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<sup>240</sup> *Easton*, 152 Cal. App. 3d at 105, 199 Cal. Rptr. at 392.

<sup>241</sup> *Id.* at 103-04, 199 Cal. Rptr. at 391.

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

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 104, 199 Cal. Rptr. at 391.

<sup>245</sup> See *Easton*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383. Real estate brokers have never been obligated to disclose latent defects, i.e., defects about which the broker could not gain information, except those that have been inquired after by purchasers. Cf. *Amato v. Rathbun Realty, Inc.*, 98 N.M. 231, 647 P.2d 433 (1982). See *supra* notes 101-19 and accompanying text.

<sup>246</sup> Reply Brief for Respondents at 10, *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984) (No. AO10566). For example, in *Easton*, the netting, sloped floor, and cracked walls were warning signs of earth slides. 152 Cal. App. 3d at 104, 199 Cal. Rptr. at 391. In *McGerr v. Beals*, 180 Neb. 767, 769, 145 N.W.2d 579, 582 (1966), the broker explained away the sump pump in the yard as being purely precautionary when the broker was aware of problems with flooding in the basement.

<sup>247</sup> See Fitzgerald interview, *supra* note 6.

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

of toxic waste are dry wells, rusty drums, and other types of disposal containers.<sup>249</sup> Finally, certain contaminants of the water supply can be tasted, smelled, or seen.<sup>250</sup> If real estate brokers detected these warning signs, they would be liable to the buyer in fraud for attempts to conceal them by active measures or by nondisclosure.

Under the decisions in *Easton*, *Gouveia*, and *Secor*, however, if brokers failed to discover these visible signs through "something more than a casual, visual inspection," and disclose at least their presence to the purchasers, the brokers would be liable in negligence.<sup>251</sup> This sort of toxic warning sign is not unlike those of the *Easton* case. While their meaning may be unfamiliar to the novice homebuyer—whether it be vegetative distress and strange odors, or netting and sloped floors—their meaning requires a minimum of explanation. As in *Easton*, where the broker knew the red flags' meaning, the brokers should point out their significance to the innocent buyer. Where some of the signals indicating possible contamination are analogous to the facts of *Easton*—that is, detectable by an attentive inspection—the broker's obligation is to disclose such warning signs.

Other red flags are more subtle. The most common avenue for contamination of both the drinking water and land is through private wells and septic systems.<sup>252</sup> This is because many household toxic wastes, such as paint thinner and motor oil, are poured down drains and come to rest in unclean septic tanks.<sup>253</sup> When the tanks become full, they can overflow and leech into the ground water.<sup>254</sup> In addition, drinking wells receive water through underground streams that could be carrying toxins.<sup>255</sup> For a concerned homebuyer it may thus be important to know what kind of water and sewer system is under the house. This would then be a material fact for disclosure.<sup>256</sup> Because water and sewer systems are common avenues for pollution entering residential property, they signify a potential for contamination. The presence of a septic tank and the source of water supply

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<sup>249</sup> *Id.*

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

<sup>251</sup> *Easton*, 152 Cal. App. 3d at 105, 199 Cal. Rptr. at 392. See *supra* notes 182–86 and accompanying text.

<sup>252</sup> See Fitzgerald interview, *supra* note 6.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

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

<sup>256</sup> Although the presence of a septic system or a private well is not per se a red flag of potential pollution, it is worthy of mention to the buyers that they should have it tested for cleanliness.

are already items that a real estate broker or seller would want to reveal, quite apart from their potential as a source of environmental contamination.<sup>257</sup> It is no longer merely a matter of a real estate broker's duty to speak truthfully. Rather, to satisfy the *Easton* court's duty to investigate, brokers would simply have to determine whether the property is on a septic system or a private well (for they could also contain warning signs of pollution), and if so, to inquire of the owners about possible contamination, and to suggest testing to the buyers.

A third category of more ubiquitous red flags is the character of the neighborhood.<sup>258</sup> If there is a gas station nearby that could be leaking gasoline from its underground tank, an industrial or manufacturing plant that could have generated hazardous waste, a waste disposal site, landfill site, or even a farm or nursery where pesticides and herbicides are used, then there is a possibility of contamination on the property for sale.<sup>259</sup> The source of the potential pollution is the red flag.<sup>260</sup> Under *Easton*, brokers would be required to be familiar with the neighborhood, to ask about contamination, and to bring this possibility to the attention of the purchasers.<sup>261</sup>

Of course, there may be no duty to disclose if the warning sign is so obvious that the buyer is assumed to have notice of it.<sup>262</sup> Where the source of possible pollution is the factory next door, for instance, the factfinder may determine that the purchaser had notice.<sup>263</sup> Because toxic contamination is clearly material, only when the brokers know that the buyers are unaware of the neighborhood signs would brokers have the duty to disclose these obvious sources to purchas-

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<sup>257</sup> CALIFORNIA ASSOCIATION OF REALTORS, FIVE STEPS TO HELP AVOID *Easton* LIABILITY 5 (1984) (Broker's Listing Information Guide & Standard Form) [hereinafter BROKER'S LISTING FORM]. The sample "Listing Information Disclosure Statement" has a check list of items for the broker to inspect and disclose to the buyer. This inventory includes the water supply, heat source, type of sewer system, and presence of sump pump and septic tank. *Id.*

<sup>258</sup> See Fitzgerald interview, *supra* note 6.

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

<sup>260</sup> See, e.g., Affidavit of William and Blanche Jackson at 3-5, *ATCO National Bank v. Jackson* (No. C-3489-83) (N.J. Super. Ct. Ch. Div. filed Aug. 29, 1983). The purchasers stated that since they had explicitly mentioned to the broker that they did not want to live near toxic dumps, the broker had notice. The broker's consequential failure to mention that the "pretty hill" across the street was a toxic landfill, they asserted, was negligence. *Id.* at 5.

<sup>261</sup> Where toxins from off the sale property can seep in via many avenues, such as ground water, or sewer pipes, the character of the neighborhood becomes material. See, e.g., Affidavit of William and Blanche Jackson at 2-3, *ATCO National Bank* (No. C-3489-83). Cf. *supra* note 92 and accompanying text.

<sup>262</sup> See *supra* notes 189-95 and accompanying text.

<sup>263</sup> Cf. Affidavit of William and Blanche Jackson, *ATCO National Bank* (No. C-3489-83).

ers. To avoid liability in negligence, brokers would thus simply have to be aware of the neighborhood and mention material facts to buyers.<sup>264</sup>

Only when the warning signs are invisible, or after a reasonable investigation, the broker discovers no past history of pollution, would the broker have no duty to speak under the *Easton* court's standard. If, upon a reasonable, diligent inspection, no signals are apparent, then the duty to inspect is satisfied. For instance, in the case where invisible or intangible pollution has migrated from afar, the signs would be invisible, and there would be nothing in the neighborhood to trigger the broker's thoughts about the possibility of contamination. It would thus take more than an *Easton* type of reasonable investigation to uncover them. Such an inspection would require an engineering or scientific study. It would fall outside the facts of *Easton* where the warning signs were detectable, and the broker could discover them by a reasonably diligent inspection.<sup>265</sup> Therefore, where flags themselves are invisible (that is undetectable by diligent inspection) or, even after inspection, there simply are no signs of contamination, the broker would not likely be found responsible for failing to discover and reveal them under the *Easton* standard of care.

## 2. The Duty to Investigate for and Reveal Toxic Contamination Imposes No Additional Functional Burden on Real Estate Brokers

This *Easton* duty in negligence is not a significant departure from the job brokers already must perform. Detractors of the *Easton* decision suggest that real estate brokers do not have the required expertise to conduct the kinds of investigations that the court had in mind.<sup>266</sup> They argue that real estate agents are experts in marketing, bringing together buyers and sellers, and real estate conveyancing, not soil science, structural engineering, and chemistry.<sup>267</sup> Yet, to obtain a license, a broker must already be familiar with

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<sup>264</sup> There is already precedent for requiring brokers to know the neighborhood. *Cf.* *Amato v. Rathbun Realty, Inc.*, 98 N.M. 231, 233, 647 P.2d 433, 435 (1982) (broker must be familiar with the local zoning ordinances and state laws).

<sup>265</sup> *See, e.g.*, *Easton v. Strassburger*, 152 Cal. App. 3d 90, 103, 199 Cal. Rptr. 383, 391 (1984); Reply Brief for Respondents at 9-12, *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984) (No. AO10566).

<sup>266</sup> Amicus Brief of California Association of Realtors at 7-9, *Easton*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (No. AO10566).

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

financing, mortgages, titles, and encumbrances<sup>268</sup> which are more complex than detecting common signs of contamination. The kinds of red flags enumerated here are routine. Many, such as the infamous container drums, certainly require no additional expertise or sophistication on the part of the real estate broker outside of an understanding of what is normal and what may be out of the ordinary. Furthermore, some of these signs such as septic tanks, wells, and neighborhood characteristics are items the brokers are already interested in for reasons other than environmental contamination.<sup>269</sup> Many of these signs are already analogous to, or the same as, items to which the real estate broker must already be alert.<sup>270</sup>

Additionally, just as the real estate brokers in *Easton* had the sophistication to know that netting and slanted floors implied possible soil problems,<sup>271</sup> so could an experienced broker understand indications of contamination such as strange odors, vegetative distress, or a neighboring gas station. Signs of pollution—such as water discoloration and ooze on the basement walls—do not require any technical knowledge.<sup>272</sup> Disclosing such red flags of contamination would thus require no significant additional expertise or education beyond the level required for a broker's license, nor beyond what brokers already know.<sup>273</sup> At most, the signs of contamination, meaningful to a nonscientist, can very easily be incorporated into the broker's education and practice.

Real estate brokers would not have to become scientists or engineers to fulfill their duty.<sup>274</sup> Rather, the broker's duty is merely to

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<sup>268</sup> See CAL. BUS. & PROF. CODE § 10,153 (West 1986); see *supra* note 237. But see Amicus Brief for California Association of Realtors at 7–8, *Easton* (No. AO10566) (arguing that broker's license requires only knowledge of English, arithmetic, conveyancing and real estate documentation, business and land economics, appraisals).

<sup>269</sup> See, e.g., *Sawyer v. Tildahl*, 275 Minn. 457, 459, 148 N.W.2d 131, 132 (1967) (broker is familiar with drainage patterns of flood plain in area); *Amato v. Rathbun Realty, Inc.*, 98 N.M. 231, 233, 647 P.2d 433, 435 (1982) (holding that broker is required to know zoning ordinances in area). See *supra* note 257; see *infra* note 221.

<sup>270</sup> D. Fink, *Legislative Response to Easton*, 4 CAL. REAL PROP. J. 18 (Winter 1986); BROKER'S LISTING FORM, *supra* note 257. On the Listing Information Disclosure Statement Standard Form the broker is already advised to inspect for septic tanks, heating systems, water supply, sump pump, wells, sewer system, water softener, gas hook-up, and defects or malfunctions in these and other attributes of the property. *Id.*

<sup>271</sup> See *Easton v. Strassburger*, 152 Cal. App. 3d 90, 104–05, 199 Cal. Rptr. 383, 391 (1984).

<sup>272</sup> See Fitzgerald interview, *supra* note 6. For arguments that the *Easton* duty of disclosure does not require any additional broker expertise, see Reply Brief for Respondents at 14, 19, *Easton* (No. AO10566); BROKER'S LISTING FORM, *supra* note 257 at 3–4.

<sup>273</sup> *Roberts v. Estate of Barbagallo*, 531 A.2d 1125, 1131 (Pa. Super. 1987); Reply Brief for Respondents at 14, 19, *Easton* (No. AO10566); BROKER'S LISTING FORM, *supra* note 257, at 3–4.

<sup>274</sup> *Contra* Reply Brief for Respondents at 9–12, *Easton* (No. AO10566).



conduct the reasonable, visual examination of a competent real estate broker according to community standards, that would uncover tangible red flags, and then disclose those flags to buyers.<sup>275</sup> Brokers would not have to detect pollution itself; they would simply have to ascertain the presence of its warning signs.

Nor must the broker conduct tests to discover actual presence of contamination once red flags are found. Under *Easton*, the residential real estate broker must inspect all accessible areas of the property.<sup>276</sup> Any flags that a reasonably competent broker could detect would have to be disclosed. If other jurisdictions imposed a duty to inspect on a real estate broker, the most that a broker would have to do differently would be to learn what these routine, obvious flags of pollution are before conducting a reasonable inspection of the neighborhood and of the sale-property to determine whether any of those flags exist. Brokers must then simply mention to buyers any discoveries that such an investigation reveals to avoid liability in negligence.<sup>277</sup> The obligation only goes so far as to require a determination and disclosure of the presence of warning signs. It does not require the broker to conduct tests or ascertain the specific kind of pollution.

The *Easton* duty of investigation does not mean that the responsibility of discovering contamination is solely that of the real estate broker.<sup>278</sup> Brokers will not become warrantors of the property. On the contrary, the brokers' responsibility is merely to conduct a diligent physical inspection to uncover and disclose warning signs that are meaningful to a competent, reasonable real estate broker.<sup>279</sup> Brokers then simply disclose to buyers the presence of pollution's red flags.<sup>280</sup> Any sophisticated environmental analysis would be left

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<sup>275</sup> See *supra* note 150, 183, 216-17, 240-42 and accompanying text; see also Gouveia v. Citicorp Person-to-Person Financial Center, 101 N.M. 572, 575, 577, 686 P.2d 262, 266, 267 (1984).

<sup>276</sup> *Easton v. Strassburger*, 152 Cal. App. 3d 90, 103, 199 Cal. Rptr. 383, 390 (1984).

<sup>277</sup> BROKER'S LISTING FORM, *supra* note 257, at 3-4.

<sup>278</sup> See *Easton*, 152 Cal. App. 3d at 104, 104-11, 199 Cal. Rptr. at 391, 392-97. The buyer also has a duty to protect himself. If the defect is so obvious that a jury would find that the buyer could well have detected it himself, then the broker could be contributorily or comparatively negligent. *Id.* The seller also has a duty to disclose material defects. The court in *Easton* upheld the jury's verdict finding all brokers responsible, and apportioned damages among all defendants. *Id.* at 112, 199 Cal. Rptr. at 397. The court also reversed a part of the verdict and remanded the case with instructions to enter a judgment for partial indemnity in favor of one of the realty companies against the sellers. *Id.* Thus, many parties to the transaction can be held liable for failure to disclose.

<sup>279</sup> *Easton*, 152 Cal. App. 3d at 104, 199 Cal. Rptr. at 390; see also Gouveia v. Citicorp Person-to-Person Financial Center, 101 N.M. 572, 576, 686 P.2d 262, 266 (1984).

<sup>280</sup> BROKER'S LISTING FORM, *supra* note 257, at 3-4. Step 4 is to recommend "that [buyers]

to those professionals with the specific skill and education to undertake it. Furthermore, sellers themselves have an obligation to buyers not to commit fraud or make misrepresentations.<sup>281</sup> To that end, they must disclose contamination of which they are aware. What is more important, however, is that since this standard is in simple negligence, buyers must still take steps to protect themselves or they may also be liable.<sup>282</sup> Purchasers will be required to detect problems that are so obvious that it would not even require the expertise of a broker to translate their meaning.

The *Easton* court merely made a legal duty out of what was already an obligation voluntarily assumed by the profession in the National Association of Realtors Code of Ethics.<sup>283</sup> The *Easton* decision cited Article 9 of the Code: "[t]he *Realtor* . . . has an affirmative obligation to discover adverse factors that a reasonably competent and diligent investigation would disclose."<sup>284</sup> Further, Articles 1 and 2 of the Code require the realtor to be informed about matters, laws, and regulations affecting the real estate "in his community."<sup>285</sup> Realtors thus already imposed on themselves an obligation to be familiar with neighborhoods.<sup>286</sup> More important for the purposes of this Comment, the preamble to the Code mentions as a goal "the preservation of a healthful environment,"<sup>287</sup> and reflects an overall sentiment that realtors presently feel toward the part they play in protecting the environment. Thus, the decision in *Easton* does not create an entirely new legal duty or burden for the real estate

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obtain services of 'specialists' to assist in determining what problems *may* underlie the red flag indicators." *Id.* at 3 (emphasis in original).

<sup>281</sup> *Foust v. Valleybrook Realty Co.*, 4 Ohio App. 3d 164, 165, 446 N.E.2d 1122, 1125 (1981) (sellers . . . have a duty to disclose); cf. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

<sup>282</sup> *Easton*, 152 Cal. App. 3d at 103, 199 Cal. Rptr. at 391.

<sup>283</sup> Not all real estate brokers are "Realtors." "Realtor" is the name for a member of the National Association of Realtors, and of any of the regional branches of the organization, and local board of Realtors. Thus, though voluntarily assumed, the Code of Ethics, is nevertheless a guide for the conduct of all Realtors. Comment, *Realtor Liability for Innocent Misrepresentation and Undiscovered Defects: Balancing the Equities Between Broker and Buyer*, 20 VAL. U.L. REV. 255, 255 n.1 (1986).

<sup>284</sup> National Association of Realtors CODE OF ETHICS, art. 9, (1982) (revised and approved by the Delegate Body by the Association at its 75th Annual Convention Nov. 15, 1982). art. 9.

<sup>285</sup> *Id.* Art. 2 reads as follows: "In justice to those who place their interests in his care, the *Realtor* should endeavor always to be informed regarding laws, proposed legislation, governmental regulations, public policies, and current market conditions in order to be in a position to advise his clients properly."

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

<sup>287</sup> *Id.* at preamble. "The *Realtor* should recognize that the interests of the nation and its citizens require the highest and best use of the land and the widest distribution of land ownership. They require the . . . preservation of a healthful environment." *Id.*

broker. Rather, the court merely articulated a duty already implied in precedent, and imposed in law what realtors have already voluntarily assumed.

*B. A Real Estate Broker's Duty of Care in Negligence Furthers a National Objective to Identify, Localize and Clean Up Environmental Contamination*

In recent years there has been an explosion of federal and state legislation designed to remedy toxic contamination of the environment.<sup>288</sup> A number of state laws or proposals require inspection of commercial real estate before legal title can pass.<sup>289</sup> The objectives behind such laws and proposals are to identify contamination, establish its extent, localize it, and remedy it. Already these laws have had an impact on professional practitioners from state environmental offices<sup>290</sup> to the real estate bar.<sup>291</sup> Holding a real estate broker responsible in negligence for not inspecting for and disclosing potential toxic contamination will further the goals embodied in these laws. Failure to apply the *Easton* court's standard of care, on the other hand, can only frustrate these important national objectives at the expense not only of the environment but also of the naive homebuyer.

If states were to adopt the *Easton* standard of care, real estate brokers would have a responsibility to conduct a reasonably diligent inspection of property on behalf of buyers, independent of any duty of the seller, to locate signs of toxic contamination, and to disclose any such signs that may be uncovered. Where the seller is unaware of contamination, the broker would be serving both the buyer and the public. The buyer would benefit by receiving all of the information necessary to make an educated decision. The public would benefit from the discovery of potential environmental contamination so

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<sup>288</sup> See *supra* note 30.

<sup>289</sup> See, e.g., N.J. Spill Compensation and Control Act, N.J. STAT. ANN. 58:10-23.11(f) (West 1982) (imposing a priority lien for clean up and removal of discharges); Blauvelde, *New Cleanup Laws in New Jersey Impose Increasing Liability on Real Estate*, 194 N.Y.L.J. 27, (1985) (The N.J. Environmental Cleanup Responsibility Act, N.J. STAT. ANN. §§ 58:10-32.11-58:10-23.11z (West 1982), imposes liability for clean up of pollution in the transfer, sale and lease of commercial property); Houlehan & Parish, *Hazardous Waste Regulation: Issues for the Real Estate Practitioner*, 8 COLO. LAW. 48, 52 (Jan. 1984) (discussing the proposed Colorado legislation requiring notation on deeds that the property contains disposed hazardous waste).

<sup>290</sup> See Fitzgerald interview, *supra* note 6. The Department receives many phone calls from prospective purchasers of residential real estate seeking to know whether the property for sale is "safe."

<sup>291</sup> See *supra* note 289.

that it can begin to remedy the problem. Where the sellers are aware of the problem, the brokers, in performing their duty, would be aiding the sellers in furthering their legal obligation to the buyers.<sup>292</sup> Critics of the *Easton* decision may argue that it is an unfair burden on brokers to investigate for defects on the property for the buyers' benefit when brokers are agents of the sellers, because it creates a conflict of interest.<sup>293</sup> Once defects are revealed, they may argue, the value of the property and the sale price go down.<sup>294</sup> On the contrary, where sellers must disclose information to buyers, or themselves risk liability, disclosure on the brokers' part would only help assure that the sellers fulfilled their own duty to buyers.<sup>295</sup> Imposing this real estate broker-duty in negligence does not mean that it is solely the broker's obligation to discover toxic contamination. Rather, this duty adds another capable professional to the list of those already working to locate and clean up environmental contamination.<sup>296</sup> Requiring brokers to investigate would make it more difficult to sell contaminated property. This difficulty, in turn, will eventually lead to greater awareness on everyone's part, of the existence of toxic pollution and the problems it engenders.

If other states do not follow the lead of California, New Mexico, and Utah and adopt the *Easton* standard of care, however, buyers may only hold brokers responsible in fraud or nondisclosure for concealing defects about which the brokers already knew or had an inkling,<sup>297</sup> or in negligent misrepresentation for negligently conveying false information about known defects.<sup>298</sup> The buyers would not be able to hold brokers liable for failing to disclose information about which the brokers should have known independent of what the seller knew or what the buyer asked.<sup>299</sup> Where the signs of contamination are tangible, are easily meaningful to competent real estate brokers,<sup>300</sup> and are material to buyers and to the public,<sup>301</sup> failing to hold brokers responsible would serve as a "disincentive"<sup>302</sup> to in-

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<sup>292</sup> Reply Brief for Respondents at 6-7, *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984) (No. A010566); see *Lingsch v. Savage*, 213 Cal. App. 2d 729, 735, 29 Cal. Rptr. 201, 204-05 (1963) (seller has duty to disclose).

<sup>293</sup> See *supra* notes 37-40 and accompanying text.

<sup>294</sup> See, e.g., Amicus Brief of California Association of Realtor at 11, *Easton* (No. A010566).

<sup>295</sup> Reply Brief for Respondents at 6-7, *Easton* (No. A010566).

<sup>296</sup> See *supra* notes 6, 289-90 and accompanying text.

<sup>297</sup> See *supra* notes 73-109.

<sup>298</sup> See *supra* notes 110-36 and accompanying text.

<sup>299</sup> See *supra* notes 73-136.

<sup>300</sup> See *supra* notes 239-62 and accompanying text.

<sup>301</sup> See *supra* notes 92, 290 and accompanying text.

<sup>302</sup> *Easton v. Strassburger*, 152 Cal. App. 3d 90, 100, 199 Cal. Rptr. 383, 388 (1984).

specting the property for toxins. When brokers are not required to inspect independently for defects, they are allowed to remain "ignorant of that which [they hold themselves] out to know."<sup>303</sup> In the face of the large body of legislation reflecting a public policy to identify and clean up contamination,<sup>304</sup> failure to hold real estate brokers liable in negligence only frustrates the important national goal.

A further policy justification for the *Easton* negligence standard lies in the rationale for finding a broker fiduciary duty to purchasers.<sup>305</sup> As between the real estate broker and the buyer, the former is in a better position to discover signs of potential toxic contamination.<sup>306</sup> The courts recognize that brokers know more about real estate matters than do unsophisticated residential purchasers.<sup>307</sup> The two parties do not have access to the same information: brokers have had time to review the property, or the listing, or to talk to the sellers; they know the history of the neighborhood; in comparison, this may be the buyer's first real-estate transaction. Therefore, where the two parties are not on equal footing, courts have held that the buyer is justified in relying on the broker's statements about the property.<sup>308</sup> The clear implication is that these courts recognize that, by virtue of their superior expertise, brokers not only possess certain facts, but also have access to important information if they seek it. To protect themselves, brokers should investigate the property and relay the truth. As an incidental advantage, brokers may also serve sellers, their principals, by aiding sellers in fulfilling their own duties of disclosure to buyers.

Finally, in those states where a standard of care and performance is embodied in the licensing statute, brokers owe a duty to the public to act reasonably, honestly, and competently.<sup>309</sup> Full and truthful disclosure is necessary both to avoid defrauding the purchasing public, and to clean up the environment. Brokers already have a duty to disclose what they know; to require them to disclose what they ought to know is hardly a new duty. This, coupled with the goal of protecting the environment set forth in the preamble to the National

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<sup>303</sup> *Id.*

<sup>304</sup> See *supra* notes 288-89 and accompanying text.

<sup>305</sup> See *supra* notes 42-57 and accompanying text.

<sup>306</sup> *Id.*

<sup>307</sup> See *supra* notes 44-49, 171-78 and accompanying text.

<sup>308</sup> *Dugan v. Jones*, 615 P.2d 1239, 1246 (Utah 1980). See also *supra* notes 33-38, 130-37 and accompanying text.

<sup>309</sup> See *supra* notes 42-56 and accompanying text.

Association of Realtors Code of Ethics, implies that their public responsibility necessarily includes doing what brokers can, while being held to the level of knowledge necessary to be licensed, to further the national objective of combatting environmental contamination. Because this standard of care represents no significant departure from the standard already imposed either from a legal or practical point of view,<sup>310</sup> it behooves those states that want to identify and clean up contamination to adopt the *Easton* court's standard of care in simple negligence.

#### V. CONCLUSION

Given today's possibility of pollution from innumerable sources, innocent purchasers may find themselves the owners of contaminated property. Research revealed no reported cases in which a buyer of residential real estate sued the seller's real estate broker in negligence for the sale of previously contaminated land. In only three jurisdictions is a real estate broker liable in simple negligence to purchasers for failing independently to inspect and disclose signs of defects. This Comment advocates that other states should adopt this duty enunciated in the *Easton*, *Gouveia*, and *Secor* decisions. Because there is already strong precedent for the standard of care in simple negligence,<sup>311</sup> and its adoption would not impose any additional burden on real estate brokers,<sup>312</sup> this standard would not represent a significant departure from the responsibilities already required of real estate brokers. In recognition of the demonstrated national concern for the identification and cleanup of environmental pollution, a negligence standard provides the most effective incentive for brokers to do their part to further this goal. Negligence supplies a vehicle for holding real estate brokers liable to buyers for failing to investigate reasonably and diligently for the buyer's benefit and disclose red flags that may indicate the presence of toxic contamination on the sale property.

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<sup>310</sup> See *supra* notes 134-37, 220-65 and accompanying text.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*