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The Real Estate Broker's Fiduciary Duties: An Examination of Current Industry Standards and Practices*

The Federal Trade Commission has recently published a comprehensive report addressing a wide variety of issues concerning the real estate industry. The authors herein address several prominent issues within the report while examining current legal treatment of the fiduciary duties imposed on real estate brokers.

I. INTRODUCTION

The significance of purchasing a home has assumed many different meanings for consumers in today's real estate market. For some, the transaction signifies the decision to "take roots." For others, the transaction is a necessary financial investment. For still others, purchasing real estate is an income-producing activity. Whatever the motivation, parties to a real estate transaction invest a great deal of time, money and personal energy when they become involved in the purchase of property.

For these reasons, both purchasers and sellers of real estate are reasonably entitled to rely on adequate representation of their best interests during all phases of a real estate transaction. However, it is an unfortunate reality of the law that parties to a real estate transaction, particularly purchasers, are often not adequately represented.¹ Furthermore, most parties are unaware of this lack of representation. Consumer knowledge of the role a real estate broker² plays in residential real estate transactions is

* This article is the product of a collaboration between two students. The opinions and conclusions in the article do not necessarily reflect the views of both authors.

1. After receiving numerous complaints from consumers, consumer groups, and real estate agents about unfair practices in the industry and inadequate representation of parties' interests, the Federal Trade Commission (FTC) undertook a staff investigation in order to inquire into the role of the broker in residential brokerage transactions, including the conflicting duties and interests which make it difficult to adequately represent consumers. FEDERAL TRADE COMMISSION STAFF REPORT, RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY (Gov't Print, December 1983) (Stock #018-000-00305-8) [hereinafter cited as FTC REPORT]. The FTC commissioned National Family Opinion, Inc. (NFO) to survey a nationwide cross-section of recent sellers and buyers of residential real estate.

2. The terms "broker" and "agent" are used interchangeably throughout the

alarmingly low.³

The source of confusion most likely stems from the disparity between the *apparent* relationship the seller, broker and purchaser share and the *actual* legal relationship which is created by both agency and real estate law. Determining the legal relationships between broker, seller, and buyer is an urgent issue in the real estate field today which demands resolution.⁴

An overview of the application of agency and real estate law will be presented, along with various legal theories which have become somewhat popularized. Next, the authors will present alternative solutions to the current legal treatment of the broker/client relationship.

II. OVERVIEW

A. *The Significance of Broker/Consumer Relationships*

The utility and necessity of the functions performed by residential real estate brokers are well recognized today.⁵ The average consumer is often inexperienced and ill-equipped to handle the contractual and financial procedures required to consummate an orderly and safe transfer of real estate.⁶ Coupled with the fact that the buying and selling of residential real estate normally constitutes the largest financial transaction in the average consumer's lifetime, the use of competent brokerage services is required as a primary way to hedge against the personal financial risks involved.

text to denote the agent involved in real estate transactions. Licensed brokers have been described as "principals, partners, corporate officers or trustees, [who] are engaged principally in buying, selling, exchanging, renting or leasing, managing, appraising or financing [r]eal [e]state for others for compensation. . . ." *Grillo v. Board of Realtors*, 91 N.J. Super. 202, 207, 219 A.2d 635, 637 (1966) (citation omitted).

3. *Grillo*, 91 N.J. Super. at 209-18, 219 A.2d at 643-52. See also Currier, *Finding The Broker's Place In The Typical Residential Real Estate Transaction*, 33 U. FLA. L. REV. 655 (1981).

4. Rein, *Whose Broker Is It, Anyway?*, L.A. MAG. Feb. 1984, at 186, 187. The California Department of Real Estate (DRE) has created a task force to specifically analyze the obvious conflicts of interest within the system. Additionally, the DRE has commissioned two studies on agency and dual agency relationships. California Technical Assistance Associates, Inc. (CTAA), *DUAL AGENCY PROBLEMS IN CALIFORNIA REAL ESTATE TRANSACTIONS* (1981); CTAA, *THE EXTENT AND NATURE OF SINGLE AGENCY REAL ESTATE PRACTICES IN CALIFORNIA* (1981).

5. Approximately 81% of all sellers of single-family residences engage the services of brokers. FTC REPORT, *supra* note 1, Consumer Survey, Figure I-1, at 8. More than 1% of the entire population of the United States holds a brokerage license. FTC REPORT, *supra* note 1, at 63.

6. The broker performs such services as price estimating, submitting the listing to the Multiple Listing Service (MLS), negotiating sales terms, arranging escrow, and arranging for financing.

The market-making and advisory functions performed by brokers have contributed to broad consumer reliance upon brokerage services. The experienced broker can be invaluable in providing accurate and complete information on market conditions and matching compatible sellers with prospective purchasers.⁷ The parties to a transaction rely on a broad range of brokerage services including suggestions of financing alternatives and the advice and assistance offered in negotiating the terms of the sale.⁸ Such dependence points to the significance of the broker/consumer relationship and the necessity for consumers and their advising attorneys to gain familiarity and understanding of the legal obligations and duties real estate brokers owe to both buyers and sellers.

B. *The Initiation of the Property Transfer*

1. Formation of the Listing Contract

The broker/client relationship arises most frequently through a written agreement.⁹ There are three common types of written

7. Multiple Listing Services (MLS) are organizations composed of brokers in local geographic areas that disseminate information on listings procured by each participating MLS broker to all other MLS brokers. The key to needing brokers for these purposes revolves around the lack of consumer access to MLS. See FTC REPORT, *supra* note 1, at 210-19 (membership requirements of MLS). Approximately 92% of the sellers surveyed felt the agent's knowledge of the housing market was an important factor when they selected a real estate agent. FTC REPORT, *supra* note 1, at National Family Opinion, Inc. Survey (NFO Survey) seller question 52. An agent's honesty or integrity and ability as a salesperson were slightly more important to the sellers surveyed. *Id.*

8. For survey data on the broker's functions and the relative amount of time spent in each function, see Barry & Finley, FTC REPORT, *supra* note 1, at 51 n.3 (chart). See also *id.* at 49-56 (buyers' and sellers' demand for brokerage services).

9. This agreement need not go far beyond affirming the existence of the relationship itself. See *C. Forsman Real Estate Co. v. Hatch*, 97 Idaho 511, 547 P.2d 1116 (1976) (the listing contract had to describe the property only well enough to ensure that the seller and broker understood which property was to be sold and that the broker be able to locate it for purposes of showing to buyers). *But cf. Aruda Realty, Inc. v. Doyon*, 35 Conn. Supp. 617, 401 A.2d 625 (1978) (listing agreement held unenforceable for failure to include the seller's address as required by state statute).

The California Department of Real Estate requires that all exclusive listings to sell must have a termination date due to the lack of informed consent given by the seller. Failure to do so will invalidate the contract and may even result in disciplinary actions against the broker. Rhoads, *Exclusive Listings Are Unfair Contracts*, 9 REAL EST. REV. 93 (Summer 1979).

Sometimes the amount of the broker's commission must be stated. See *Gray v. Kohlase*, 18 Ariz. App. 368, 502 P.2d 169 (1972) (memorandum sufficient to show employment had omitted the amount of commission and thus, broker was unable

listing contracts.¹⁰ The *open* (or non-exclusive) listing provides the seller with the most flexibility. More than one broker may be hired under such a contract. A broker will earn a commission only if he (and not the seller) is the first to procure a purchaser.¹¹ An *exclusive agency* listing bars the owner from hiring another broker to sell; however, the property owner himself may sell his house without compensation to the broker.¹² This listing may

to recover as the amount of commission was an essential element of the contract).

The broker/seller relationship may even arise by implication. *See* Sharp-Boylston Co. v. Lundeen, 145 Ga. App. 672, 244 S.E.2d 622 (1978) (broker-procured information used by seller which ultimately culminated in a sale. The seller had accepted valuable services and broker was entitled to recover in quantum meruit on seller's implied promise to pay); Kohn v. Cohn, 567 S.W.2d 441 (Mo. Ct. App. 1978) (stating that before a broker may expect compensation an employment contract must exist, either express or implied).

This is often seen where a written listing agreement has expired, and then is impliedly extended. *See* Danieli Corp. v. Bryant, 399 So. 2d 387 (Fla. Dist. Ct. App. 1981) (vendor waived the initial listing contract terms by telling brokers to continue work after contract had expired); Ferris v. Meeker Fertilizer Co., 258 Or. 377, 482 P.2d 523 (1971) (seller impliedly waived the written agreement's provision on time for performance by approving and encouraging the broker to continue efforts to close the sale).

However, many jurisdictions require a writing simply in order to satisfy the statute of frauds requirements governing contracts for the sale of real estate. *See, e.g.,* Good v. Paine Furniture Co., 35 Conn. Supp. 24, 391 A.2d 741 (1978) (documents offered by broker in court must singly or in aggregate satisfy the statute of frauds); Jones v. Del Anderson and Assocs., 539 S.W.2d 348 (Tex. 1976); CAL. CIV. CODE § 1624(5) (West Supp. 1984). *See also* Annot., 9 A.L.R. 2d 747 (1950).

A minority of jurisdictions view listing agreements as contracts for the performance of personal services and therefore exempt from the statute. *See, e.g.,* Seay v. Bennett and Kahnweiler Assocs., 73 Ill. App. 3d 944, 392 N.E.2d 609 (1979) (broker allowed to recover in quantum meruit if shown that services were rendered); Reich v. Kimnach, 216 Va. 109, 216 S.E.2d 58 (1975) (oral listing agreement was enforceable where required to be performed within one year and was a contract for services). *Cf. Nepa v. Marta*, 348 A.2d 182 (Del. 1975) (court held the statute of frauds inapplicable as the terms of the listing agreement could be performed within one year); Samuels v. Firestone Tire and Rubber Co., 342 So. 2d 661, 662 (La. 1977) (citing *Whatley v. McMillan*, 152 La. 978, 94 So. 905 (1922), which held that listing agreements need not be in writing as they in no way affect the real estate, unlike the placing of encumbrances on real estate).

10. *See generally* CALIFORNIA CONTINUING EDUCATION OF THE BAR, *Real Estate Broker Practice* §§ 1.59-1.63 (June-July 1981).

11. *Kelly v. Beaudoin*, 131 Vt. 27, 298 A.2d 831 (1972) (broker implicitly accepts competition with the seller when entering into a non-exclusive listing contract).

12. *Des Rivieres v. Sullivan*, 247 Mass. 443, 142 N.E. 111 (1924) (broker/exclusive agent unable to recover where owner sold the property before agent had opportunity to proffer other ready, willing and able purchaser); *Martin Realty Co. v. Fletcher*, 103 N.J.L. 294, 136 A. 498 (1927) (plaintiff was unable to recover commission where owner sold the property, even though authorized "exclusively" to sell the property; construed as an exclusive agency); Annot., 88 A.L.R. 2d 936 (1950). The mere fact that the listing contract refers to the broker as an exclusive agent is enough to create an exclusive agency. *Harris & White v. Stone*, 137 Ark. 23, 207 S.W. 443 (1918) (owner allowed to sell the property himself as long as he dealt with his "exclusive agent" in good faith).

also allow the seller access to a multiple listing service (MLS).¹³ The *exclusive right to sell* listing entitles the broker to a commission regardless of who ultimately sells the property, provided that the sale is consummated within a specified period of time.¹⁴ Exclusive listings authorize the broker to cooperate with subagents and are interpreted by brokers as an authorization to use the MLS.¹⁵ This is by far the most prevalent type of listing contract.¹⁶

2. Contractual Standardization

Problematic of the widespread use of exclusive right to sell listings is the standardization of contracts. The more obvious factors contributing to the standardization of formal broker/seller relationships through exclusive listings are the sellers' inexperience in the purchase of brokerage services and the brokers' desire to obtain the right to a commission. Indeed, the whole Realtor system appears to be geared toward bringing the pressures of uniformity to bear in such a way as to ensure that the broker has the most favored position under the contract. The courts have long recognized this lack of contractual flexibility confronting sellers.¹⁷

Local Realtor boards often dictate such important terms as the type of listing available, the time frame for MLS use, the intended degree of cooperation with other brokers, the duration of the listing contract, and the standard contract forms to be used.¹⁸ Re-

13. See *supra* note 7. A minority of MLS's accept exclusive agency listings. FTC REPORT, *supra* note 1, at 131.

14. *Flynn v. LaSalle Nat'l Bank*, 9 Ill. 2d 129, 137 N.E.2d 71 (1956) (dictum) (broker may be able to recover where owner effects the sale of property subject to exclusive right to sell). See Annot., 88 A.L.R. 2d 941 (1950); E. FICEK, T. HENDERSON & R. JOHNSON, REAL ESTATE PRINCIPLES AND PRACTICES 255-57 (1976).

15. FTC REPORT, *supra* note 1, at 3177. MLS's cannot reject exclusive listings submitted by NAR members on the basis of the quality or price. NAT'L ASS'N OF REALTORS, MULTIPLE LISTING POLICY 6-2 (4th ed. 1980).

16. FTC REPORT, *supra* note 1, at 3177.

17. *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 555, 236 A.2d 843, 857 (1967) (the use of standardized forms, which laypersons are compelled to enter into even though they do not understand the language, may be held unconscionable).

18. Most listings are for a period of 90 days. FTC REPORT, *supra* note 1, at (NFO Survey) seller question 45. The majority of MLS's are controlled by local realtor boards. Of the MLS's surveyed for the FTC, 84% provide forms for use in creating the broker/seller relationship and 21% require that their forms be used. FTC REPORT, *supra* note 1, at 131. In theory, all of these contract terms are "negotiable." However, due to consumer inexperience and the prevalent failure to consult an attorney in this stage of the residential real estate transaction (at least in most western states), the negotiation of listing contract terms is more of an ideal than a reality. The American Bar Association has expressly recognized that a law-

markably, the National Association of Realtors (NAR) deems such broad standardization a matter of ethical duty.¹⁹ Since these elements are so vital to the efficiency and effectiveness of efforts to procure a suitable buyer, one would reasonably expect the seller to be at least cognizant of what it is he has agreed to pay for. However, many listing contracts fail to specify the precise services to be performed by the broker or to define the legal relationships between the buyer, seller, and broker.²⁰ Therefore, buyers often rely heavily on the broker's oral assurances.

C. Controlling Laws

1. Agency Law

Every broker, whether employed to lease, rent, sell or buy real property, is governed by the phase of contract law known as agency law.²¹ Since this relationship is often likened to that of a trustee and beneficiary, a real estate agent has the same obligations of undivided service and loyalty that the law imposes on a trustee.²²

Normally, an agency relationship is created between the seller

yer's approval should be obtained before the seller signs a listing agreement and "in theory, a new contract should be drawn each time a broker is employed." Casner, *Residential Real Estate Transactions: The Lawyer's Proper Role - Services - Compensation*, 1978 A.B.A. SPECIAL COMM. ON RESIDENTIAL REAL ESTATE TRANSACTIONS 3. Many brokers, however, will seek to avoid at all costs the involvement of lawyers. See *id.* at 9 (broker's fear of the "overmeticulous attention" lawyers tend to give contract terms).

19. See *infra* note 34 and accompanying text. Brokers may be held in violation of the Code for failing to urge exclusives on their clients. See NAT'L ASS'N OF REALTORS, INTERPRETATIONS OF THE CODE OF ETHICS 6-1, at 34 (6th ed. 1976).

20. Only 57.1% of the sellers surveyed for the FTC believed the agent who handled the sale of their home had provided a written, itemized list of the services he/she would perform before signing the listing agreement. FTC REPORT, *supra* note 1, at (NFO Survey) seller question 59.

21. *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 89 Ill. 2d 379, 385, 432 N.E.2d 849, 851 (1982) (broker's relationship to employer is one of agent-principal).

22. Agency is a fiduciary relationship between two persons, resulting from the consensual delegation from one to another to act on his behalf and (usually) to exercise some degree of discretion while acting. *Skopp v. Weaver*, 16 Cal. 3d 432, 439, 546 P.2d 307, 312, 128 Cal. Rptr. 19, 24 (1976) (authority to exercise discretion is not essential to creation of agency); *Gipson v. Davis Realty Co.*, 215 Cal. App. 2d 190, 206, 30 Cal. Rptr. 253, 262 (1963) (distinguishing features of agency are its representative authority and its derivative authority); H. MILLER & M. STARR, CALIFORNIA REAL ESTATE LAW § 4:2, at 4 (1975) [hereinafter cited as MILLER]; RESTATEMENT (SECOND) OF AGENCY § 3 comments a, c (1958).

Ratray v. Scudder, 28 Cal. 2d 214, 222-23, 169 P.2d 371, 376 (1946) ("The law of California imposed on . . . the real estate agent the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary. Violation of his trust is subject to the same punitive consequences that are provided for a disloyal or recreant trustee.") (footnote omitted); *Moehling v. W.E. O'Neill Constr. Co.*, 20 Ill. 2d 255, 267, 170 N.E.2d 100, 107 (1960) (fiduciary relationship of principal and agent requires full disclosure).

and broker upon signing the listing agreement.²³ More precisely, a real estate agent might be considered a special agent since a special agent is often authorized to conduct a single transaction or a series of transactions not involving continuity of service.²⁴ However, whether or not the broker is labelled a general agent or a special agent, the broker has a fiduciary duty to act in the best interest of, and to obtain the best price and terms possible for his principal.²⁵ He is bound by good faith and must act with reasonable diligence and such skill as is ordinarily possessed by persons of common capacity engaged in the same business.²⁶

2. Real Estate Law

In addition to agency law, individual state statutes and governmental regulations concerned with the real estate profession often govern the duties and obligations owed by a broker to his client. Without exception, each state requires licensing of real estate brokers and salespersons.²⁷

With regard to professional practices, every state prohibits false, misleading and deceptive representations by real estate

23. *Bau v. Sobut*, 50 Ill. App. 3d 732, 737-38, 365 N.E.2d 724, 728 (1977) (even though a contract of employment is necessary to create an agency relationship between a broker and an owner, no particular form is required); *Dickerson Realtors, Inc. v. Frewert*, 16 Ill. App. 3d 1060, 1063, 307 N.E.2d 445, 447 (1974). Normally, in order to create an agency relationship, all that is necessary is that the broker act upon the principal's written, oral or implied consent.

24. *Stenson v. Thrush*, 36 Wash. 2d 726, 728, 219 P.2d 977, 978 (1950) ("A real estate broker is, generally, a special agent with limited powers and is, therefore, closely restricted within the terms of his agency."); RESTATEMENT (SECOND) OF AGENCY § 3 comment a (1958); 3 AM. JUR. 2d *Agency* § 6 (1962).

25. *Smith v. Fidelity & Columbia Trust Co.*, 227 Ky. 120, 122, 12 S.W.2d 276, 277 (1928) (it is the broker's duty to make an honest and diligent effort to accomplish the purpose of the agency.); *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 552-53, 236 A.2d 843, 856 (1967) (broker is subject to duty of fidelity, honesty and full disclosure); *Zwick v. United Farm Agency, Inc.*, 556 P.2d 508, 511 (Wyo. 1976). The duties and obligations a broker owes to his principal are the same as those owed by any agent to his principal. See *Currier*, *supra* note 3, at 661-62.

26. *Smith*, 227 Ky. at 122, 12 S.W.2d at 277. "The broker is . . . under a duty to possess and employ that degree of skill in the business that is usually possessed and exercised by persons professing that particular calling." *Id.* See H. MILLER, *supra* note 22, at § 4.

27. FTC REPORT, *supra* note 1, at 3101. "Each state has a dual licensing system, one for brokers and another for salespersons. . . . Applicants for brokers' licenses are usually required to have proportionately more education and experience than those for salespersons' licenses." *Id.*

See also *id.* at 18, app. B § 1 for a more detailed discussion of proscriptions and requirements contained in the licensing laws.

licensees.²⁸ Generally, without reference to a statutory code of ethics, most states proscribe any conduct demonstrating incompetency, bad faith, dishonesty or like characteristics.²⁹ Various sanctions for violations of these statutes exist, ranging from suspension or revocation of a license to imposition of criminal penalties such as fines or imprisonment.³⁰

Additionally, throughout the states, licensure statutes establish regulatory agencies to enforce these statutory provisions and to oversee the licensing process. Generally, industry members serve on designated commissions or boards. However, more than half the state statutes provide that at least one non-licensed representative of the public must serve on these commissions or boards.³¹

3. Code of Ethics

Brokers and courts may also refer to the professional code of ethics for further guidance in determining a broker's duties and liabilities. The National Association of Realtors (NAR)³² adopted a code of ethics in 1913 in order to provide a helpful guide to all real estate professionals.³³ The various articles within the Code espouse the prevailing industry view on how the broker/client relationship is best handled.³⁴ For instance, article seven³⁵ pledges

28. FTC REPORT, *supra* note 1, at 16. See, e.g., CAL. BUS. & PROF. CODE § 10176 (West 1964).

29. FTC REPORT, *supra* note 1, at 16. See, e.g., CAL. BUS. & PROF. CODE § 10177(a)-(1) (West 1964).

30. FTC REPORT, *supra* note 1, at 3102. See, e.g., CAL. BUS. & PROF. CODE §§ 10175, 10185 (West 1964). Section 10175 states: "Upon grounds provided in this article and the other articles of this chapter, the license of any real estate licensee may be revoked or suspended in accordance with the provisions of this part relating to hearings." Section 10185 states in pertinent part: "Any person . . . who wilfully violates or knowingly participates in the violation of any provisions of this division or of the rules and regulations of the commissioner . . . is guilty of a misdemeanor."

31. FTC REPORT, *supra* note 1, at 178.

32. The National Association of Realtors (NAR) is the parent organization for local real estate groups. Organized in 1908, the NAR was originally known as the National Association of Real Estate Boards (NAREB) until it changed its name in 1974. See generally Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325-28 (1970). See also FTC REPORT, *supra* note 1, at 136-57.

33. See National Association of Realtors Code of Ethics (1974), reprinted in E. FICEK, *supra* note 14, at 225-28.

34. Article 6 emphasizes the industry view that the seller is best represented when the REALTOR obtains an exclusive listing on the property. It is presumed that the possibility for "dissension and misunderstanding" are too great where more than one agent is attempting to satisfy the owner's need for service.

Article 8 prohibits a REALTOR from accepting compensation from more than one party unless all parties to the transaction have been informed of the fact of dual representation.

Article 9 compels REALTORS to "avoid misrepresentation, or concealment of

the REALTOR³⁶ to "protect and promote the interests of his client." Even though this obligation is considered primary, the broker is not relieved of his duty to treat all parties to the transaction fairly.³⁷

While case law pertaining to a broker's relationship with his client may be somewhat difficult for a broker to interpret without the aid of a lawyer, the Code of Ethics sets out in simple and sometimes direct terms, important guidelines for a broker to act upon. Former legal counsel for NAR, William North, observed that none of the classical legal relationships appeared to solve the "identity crisis of the broker."³⁸ He further stated:

By his commitment to the REALTOR's Code of Ethics [the REALTOR] clearly defines his duty to his seller, his purchaser, his fellow broker and to the public.

Realtors abandoned for themselves and those with whom they deal, the rule of *caveat emptor* in 1913 when the Code of Ethics was adopted.³⁹

Although the Code replaced *caveat emptor*, the duties of a broker are not "clearly defined" by the Code.

III. APPLICATION

A uniform application of statutes, codes, and government regulations to the problem of broker liability is more easily affected by the courts than the application of agency principles. This is due in part to the number of different agency theories applied, includ-

pertinent facts," and impresses an affirmative obligation on the REALTOR to inspect for any adverse factor that a diligent investigation would disclose.

Article 12 requires a REALTOR to specifically disclose "to all affected parties" any self-interest he has in the transaction. This provision appears to be specifically aimed at problems such as withholding the listing from the MLS and cooperation with other brokers, thereby allowing the listing broker to avoid the splitting of commissions.

Article 13 prohibits the undisclosed direct or indirect purchase of property by the broker.

Finally, Article 22 authorizes the listing broker to cooperate with other brokers in finding an acceptable buyer for the listed property. Interestingly enough, this provision requires the cooperating broker working with a prospective purchaser to refrain from any direct contact with the seller unless done with the consent of the listing broker.

35. National Association of Realtors Code of Ethics, art. 7 (1974).

36. Members of local real estate boards who are affiliated with NAR are known as REALTORS. "REALTOR" is a registered trademark of NAR and only members of NAR may be identified as such. FTC REPORT, *supra* note 1, at 137-38.

37. *Id.*

38. North, *Identity Crisis REALTOR Style*, REAL ESTATE TODAY Nov.-Dec. 1973, at 48, 55.

39. *Id.*

ing subagency,⁴⁰ dual agency, agency based on the public interest theory,⁴¹ and agency implied in fact.⁴² As a result of the less-than-consistent application of these legal theories, a number of problems have arisen. These problems, affecting both the buyer and seller, will be presented and possible alternative solutions suggested.

A. *Treatment of The Broker/Client Relationship*

The broker may fulfill two basic roles in relation to a buyer. First, although the broker is the seller's listing agent, he may also assist the buyer in negotiations for the purchase of the property.⁴³ Second, a broker may "cooperate"⁴⁴ with a listing agent by working primarily with the buyer, exposing him to the listed property and negotiating the purchase of the property for him.⁴⁵

Each role is distinct from the other and the degree of buyer reliance invoked necessarily varies according to the role assumed by the broker. Yet absent special factors or agreements, the law has tended to treat the broker acting in both roles as either the agent or subagent of the seller, owing fiduciary duties only to him.⁴⁶

The treatment of the seller/broker relationship is premised upon the presumption that the seller pays the broker's commission. Theoretically speaking, this may appear to be accurate since the commission is normally disbursed from the gross proceeds of the sale due the seller at the close of escrow. The seller's responsibility for payment of the commission, and the buyer's apparent noninvolvement, is strong evidence tending to show that the broker or brokers involved in the transaction are employed by the seller. Absent a strong showing otherwise, this evidence supports the theory that the broker owes fiduciary duties solely to the seller.⁴⁷

40. See *infra* notes 67-84 and accompanying text.

41. See *infra* notes 119-33 and accompanying text.

42. See *infra* notes 112-18 and accompanying text.

43. For instance, a prospective purchaser may notice an advertisement which the listing broker has placed in a local newspaper and decide to inspect the property alone. Should this prospective purchaser enter into an agreement to purchase the property without seeking aid from an outside source, only one broker will be involved in the transaction. Therefore, only one professional will be available for advice and guidance to both parties.

44. "Cooperation broker" is a term of art derived from a clause in the multiple listing agreement permitting member brokers to assist or cooperate in the purchase and sale of a property listed by another broker.

45. Sixty-six percent of sales involving brokers also involve cooperating brokers. FTC REPORT, *supra* note 1, at (NFO Survey) seller question 52, and figure I-1, p.8.

46. See *infra* notes 65-84 and accompanying text.

47. See *infra* note 71.

However, a more pragmatic approach to this issue might reveal that in actuality the buyer is responsible for at least a portion of the commission paid. The purchase price that the *buyer pays* more often than not comprises some, if not all, of the commission fee charged. The FTC queried buyers as to the single most important reason prospective purchasers might inspect homes for sale by owners.⁴⁸ A total of 45.8% of the buyers stated that the primary reason was the expected reduced cost due specifically to the lack of realtor/broker services.⁴⁹ An additional 31.5% of the buyers felt that homes for sale by owners were generally less expensive.⁵⁰ This data indicates that when the majority of buyers elect to inspect and buy homes listed by a broker, they are aware of the seller's fixed costs for brokerage services and are willing to pay the increased market price for the property reflecting that cost.

It logically follows that since a buyer pays the whole of the purchase price, he is involved in the compensation of the broker and should be entitled to some type of agent representation. Nonetheless, this reasoning is seldom adopted.⁵¹ Since it is the seller who has the formal relationship with the broker via the listing agreement, it is the seller to whom the fiduciary obligations are owed.⁵²

An extensive nationwide study commissioned by the FTC revealed that the discrepancy between a buyer's expectation of fiduciary representation and the legal status the law gives to that relationship results in at least three distinct problems for the buyer: "*non-disclosure* to the buyer of the broker's position, *under-representation*, and *lack of legal responsibility* of the bro-

48. FTC REPORT, *supra* note 1, at (NFO Survey) buyer question 21.

49. *Id.*

50. *Id.*

51. The court in *Duffy v. Setchell*, 38 Ill. App. 3d 146, 149, 347 N.E.2d 218, 221 (1976), stated:

If a buyer requests a broker's assistance in obtaining a particular piece of property, the broker may be held to be the buyer's agent for that transaction, even though the broker is paid nothing by the buyer and it is expected that he will receive a fee from the seller.

52. *Huttig v. Nassy*, 100 Fla. 1097, 1102-03, 130 So. 605, 607 (1930) (per curiam); *Linnemann v. Summers*, 95 N.J. Eq. 507, 509, 123 A. 539, 540 (1924); *Brink v. Martin*, 50 Wash. 2d 256, 310 P.2d 870, 871-72 (1957). Although an agent may act gratuitously, (RESTATEMENT (SECOND) OF AGENCY § 16 (1958)), most brokers earn their living from commissions gained through real estate transactions. Therefore, it is difficult to overcome the presumption that the seller, who pays the commission, is the principal.

ker to the buyer.”⁵³

1. *Existing Problems*

a. Non-disclosure of the Broker's Position

Rarely will a buyer discuss with a broker the duties and legal obligations that are owed to him.⁵⁴ Nor is it customary for any type of employment contract to be signed between a buyer and a broker. However, as aforementioned, the very nature of the relationship between a purchaser and a broker invokes a purchaser's reliance and trust.⁵⁵

For example, buyers often spend a considerable amount of time with a broker inspecting various properties while relating detailed personal information about their own needs, preferences and lifestyles. The unsophisticated buyer may never suspect, and consequently never question, that the law generally does not recognize a legal relationship between himself and the broker.

b. Underrepresentation of the Buyer

Certainly a buyer is free to engage or hire a separate broker in order to secure undivided professional advice, guidance and representation. However, the fee normally charged for this type of representation is separate from any of the other costs the buyer will incur when he purchases the property. This is because the commission fee the seller is obligated to pay is not offset by the buyer's payment for his own professional representation. The added cost, coupled with the fact that most buyers do not even realize that they are underrepresented, deters buyers from seeking and hiring separate agents.

National Family Opinion, Inc. (NFO) surveyed parties that had been involved in a real estate transaction and asked, “Who do you think the agent who handled the purchase of your house was representing?”⁵⁶ A total of fifty-seven percent of the buyers believed that the broker with whom they dealt represented them.⁵⁷ Where

53. B. BROWN & E. GREEN, *THE ROLE OF THE BROKER IN RESIDENTIAL REAL ESTATE TRANSACTIONS* 3 (1979) (Report to the FTC on the status of state agency law as it affects the role of residential real estate brokers).

54. See *infra* notes 56-58 and accompanying text.

55. Buyers were asked to identify the single most influential source of information used to determine the price that they offered the seller. Twenty-one percent identified the source as the advice of their broker. Another 17.5% stated comparable sales information provided by the broker. FTC REPORT, *supra* note 1, at (NFO Survey) buyer question 33. Almost 67% of buyers surveyed agreed that they “relied on [their] agent's advice a great deal when making decisions about purchasing [their] house.” *Id.* at (NFO Survey) buyer question 53.

56. *Id.* at (NFO Survey) buyer questions 46a, 46b.

57. *Id.* Forty-five percent of the buyers had participated in transactions in-

a cooperating broker was involved, seventy-one percent of the buyers thought that the cooperating broker represented their interests.⁵⁸

The infrequent nature of real estate transactions is probably the primary reason why consumer knowledge of the legal intricacies of the transaction is so low. This lack of experience enhances the dependence a consumer invariably places upon a broker. Unfortunately, due to the problem of nondisclosure, a buyer's reliance may be legally misplaced.

c. Lack of Legal Responsibility Owed the Buyer

Despite the obvious reliance a buyer may place on a broker, courts have traditionally held that the rule of *caveat emptor* applied to the relationship between a broker and a buyer in a real estate transaction.⁵⁹ Since the law attaches great significance to a fiduciary relationship created between an agent and a principal, the nonexistence of an agency relationship between a buyer and broker may leave a buyer remediless, or at least at a serious legal disadvantage in the event something goes wrong before or after the closing of escrow.

Due to the recognition of this problem and others, the trend has been toward avoiding the strict application of agency law.⁶⁰ However, as will be discussed, even though many cases have found a remedy for a wronged buyer, the duties and obligations a broker

volving one broker; about 53% participated in a transaction involving a cooperating broker.

58. *Id.* at (NFO Survey) buyer question 69.

59. *Brink*, 50 Wash. 2d at 256, 310 P.2d at 871-72. The court held that brokers "were agents of the owners, and not agents of the prospective purchasers. They owed no duty to the prospective purchasers to prepare an enforceable contract." *Huttig*, 100 Fla. at 1104, 130 So. at 608 (since purchaser was not principal of agent, he had no legal interest in how much agent received for making the sale); *Handy v. Garmaker*, 324 N.W.2d 168, 171 (Minn. 1982). The inevitable compromising of one or both parties' interests has often caused dual agencies to be held against public policy whether or not fraud is involved or a party has suffered any injury; *Linnemann*, 95 N.J. Eq. at 509-10, 123 A. at 540 (real estate agent bought property from seller and resold it to purchaser for a secret profit); *Buckley v. Hatupin*, 198 Wash. 543, 556, 89 P.2d 212, 217 (1939) ("[H]owever unethical respondent's conduct may have been, appellants have no legal ground for recovery of judgment against him."); *Id.* See also Comment, *Caveat Emptor, The Doctrine's Stronghold*, 1 WIL-LAMETTE L.J. 369 (1960).

60. *Collins v. Philadelphia Oil Co.*, 97 Va. 464, 125 S.E. 223, (1924) (false representation as to owner's lowest price is actionable fraud). See also Comment, *A Real Estate Broker's Duty to His Purchaser: Washington State's Position and Some Projections for the Future*, 17 GONZ. L. REV. 79 (1981); Note, *Theories of Real*

owes the buyer have not yet been well defined.⁶¹ As a result, not only has the buyer's position remained insecure, but the seller's position, once so well defined, has also become somewhat muddled.

B. *The Legal Theories*

1. Subagency

Ordinarily, a buyer looking for a home will seek professional help.⁶² Sometimes the selection is made by referral⁶³ or because the broker is a friend or relative.⁶⁴ When the buyer enlists the aid of a broker unassociated with the listed property, the broker is said to "cooperate" with the listing agent in the sale transaction. Essentially, this term refers to the real estate profession's established practice of utilizing a Multiple Listing Service (MLS).⁶⁵ If a property is listed with the MLS,⁶⁶ the broker has basically

Estate Broker Liability: Arizona's Emerging Malpractice Doctrine, 20 ARIZ. L. REV. 767 (1978).

Contra Sawyer v. Tildahl, 275 Minn. 457, 148 N.W.2d 131 (1967) (action to recover damages for misrepresentations made by brokers); Gilbey v. Cooper, 37 Ohio Misc. 119, 310 N.E.2d 268 (1973) (willful misrepresentation by failure to disclose easements). See Carrel v. Lux, 101 Ariz. 430, 420 P.2d 564 (1966) (action against broker for fraudulent representations as to rents, profits and income); Sanders v. Stevens, 23 Ariz. 370, 376, 203 P. 1083, 1085 (1922) (false representation as to owner's lowest price is not a material fact and does not constitute actionable fraud); Ward v. Taggart, 51 Cal. 2d 736, 336 P.2d 534 (1959) (action against brokers to recover secret profits).

61. See *infra* notes 62-133 and accompanying text.

62. Approximately 90% of buyers surveyed by the NFO utilized the professional services of a broker. FTC REPORT, *supra* note 1, at (NFO Survey) buyer question 10.

63. "Referral" in this sense means that the client was directed toward the particular broker either through a non-professional source (for example, a former client who had been satisfied with the services rendered by the broker) or through a professional source (perhaps as a professional courtesy from one broker to another).

64. The NFO survey also indicated that 22.9% of those buyers selected their broker by referral; 26.9% selected the broker because he was a friend or relative. FTC REPORT, *supra* note 1, at (NFO Survey) buyer question 15a.

65. The FTC consumer survey found that almost 92% of sellers utilizing the services of brokers have their property listed on an MLS. *Id.* at (NFO Survey) screener question 13.

See Fair Housing Council, Inc. v. Eastern Bergen County Multiple Listing Service, Inc., 422 F. Supp. 1071, 1074-75 (D.N.J. 1976) (court describes widespread use of MLS services); see, e.g., Wheatly Heights Neighborhood Coalition v. Jenna Resales Co., 447 F. Supp. 838, 840 (E.D.N.Y. 1978) ("The part played by MLS listings in the sale of residential properties within its business area is substantial."). See generally Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325, 1326-30 (1970).

66. A property is usually listed through the MLS by way of an exclusive right to sell the listing. FTC REPORT, *supra* note 1, at (NFO Survey) MLS survey question H2 and B9. See also *supra* note 16 and accompanying text.

agreed to pool his listing with others and split his commission with the cooperating broker.

In *Derish v. San Mateo-Burlingame Board of Realtors*,⁶⁷ the California Court of Appeal described the MLS as a facility whose ultimate purpose is the formation of subagency relationships.⁶⁸ The practical effect of the MLS can be beneficial to the buyer, seller, and broker.⁶⁹ However, the legal ramifications of the MLS concept and the resulting subagency relationships created between the seller, listing broker and cooperating broker,⁷⁰ are actually adverse to the best interests of the buyer.

In most real estate transactions, the cooperating agent is considered to be a subagent of the seller and therefore bound to the same fiduciary obligations to the seller. The fiduciary obligation carries with it a duty to act in the best interest of the seller in all respects and that of course includes negotiating a contract for the seller on the best terms and at the best price obtainable. Therefore, neither the listing nor the selling agent should suggest to a prospective purchaser terms less favorable to the seller than the terms set forth in the listing agreement unless the seller has given approval to this tactic.⁷¹

The practical effect of this arrangement leaves the buyer in a

67. 136 Cal. App. 3d 534, 186 Cal. Rptr. 390 (1982). The *Derish* opinion represents the first express recognition by California courts that an MLS is a facility for the extension of blanket unilateral offers of subagency appointments.

68. *Id.* at 541, 186 Cal. Rptr. at 394.

69. Use of the multiple has had significant impact on the real estate industry as a whole. This impact is manifested in the reduction of the obstacles brokers must face in adjusting supply to demand: market imperfections are overcome in that information and communication barriers are reduced, along with the easing of the built-in geographical barrier confronting the buyer-seller relationship. Moreover, a realistic price structure is engendered. In effect, real estate becomes by virtue of the multiple, "a more liquid commodity."

Austin, *supra* note 65, at 1329 (footnotes omitted).

70. MILLER, *supra* note 22, at § 4:8; *Granberg v. Turnham*, 166 Cal. App. 2d 390, 333 P.2d 423 (1958) (court held listing broker liable for wrongful acts of cooperating broker); *Kruse v. Miller*, 143 Cal. App. 2d 656, 300 P.2d 855 (1956) (even though broker had no dealing with principal in relation to the listing or sale of the property, defendant was acting with the express permission of the listing agent and was, therefore, a subagent).

Contra *Walters v. Marler*, 83 Cal. App. 3d 1, 147 Cal. Rptr. 655 (1978) (a broker employed by a prospective buyer owes a fiduciary duty to that buyer even though the broker cooperates with a listing broker and his commission will be paid by the seller); *Wise v. Dawson*, 353 A.2d 207 (Del. 1975) (multilisting arrangement between listing and selling broker is not an agency relationship for purposes of imposing liability on listing agent for misrepresentation made by a cooperating agent unless clearly proven otherwise); *Blocklinger v. Schlegel*, 58 Ill. App. 3d 324, 374 N.E.2d 491 (1978) (court holds that cooperating broker was not employed by owner and therefore owed no greater duty to seller than owed the public at large).

71. CALIFORNIA REAL ESTATE, March 1979, at 51.

peculiarly vulnerable legal position. While the buyer is not represented at all, the seller is represented by both brokers. Counsel for the NAR observed: "Often a purchaser's only available source of expertise and information is his seller's brokers."⁷² There appears to be no logical reason for the denial of adequate representation of the buyer, other than the dubious value of strict adherence to agency law.

The better view appeared in *Blocklinger v. Schlegel*,⁷³ where the purchaser, who was also a broker, brought suit against the vendors for specific performance of a real estate contract.⁷⁴ The defendant vendors claimed that the plaintiff breached a fiduciary duty owed to them as sellers and that the resulting constructive fraud was sufficient grounds for rescission.⁷⁵ The basis of the argument was that since the property was listed on the MLS, the plaintiff broker allegedly became a subagent for the defendant sellers.⁷⁶ As a subagent, the plaintiff would have owed fiduciary duties to the defendants, including the duty to disclose his occupation as a realtor and his particular expertise as to land values.⁷⁷ After examining the MLS agreement, the Illinois Appellate Court found that no fiduciary duty existed between the plaintiff and defendant because there was no existing contractual privity between these parties.⁷⁸ Referring to the tenuous relationship between a broker and seller created by the MLS concept, the court stated that "the business of being a realtor is not one containing an element of public interest so as to require him to deal as a fiduciary with everyone."⁷⁹

It should be noted that the views expressed in both *Blocklinger* and *Derish* may, in some cases, favor a buyer's interests and ironically work against the seller's best interest. All statements, omissions, and misrepresentations made by the seller's subagent will be attributed to the seller.⁸⁰ In *Johnston v. Seargeants*,⁸¹ the seller was held responsible for the cooperating broker's misrepresentations concerning existing termite infestation. The court held that any representation made by the cooperating broker was also

72. North, *supra* note 38, at 53.

73. 58 Ill. App. 3d 324, 374 N.E.2d 491 (1978).

74. *Id.* at 325, 374 N.E.2d at 492.

75. *Id.* at 326, 374 N.E.2d at 492.

76. *Id.* at 326, 374 N.E.2d at 493.

77. *Id.*

78. *Id.* at 327, 374 N.E.2d at 493.

79. *Id.* at 326, 374 N.E.2d at 493. *Accord Wise*, 353 A.2d at 209 ("[A] multilist arrangement between listing and selling agents is not an agency relationship unless clearly proven otherwise.").

80. See MILLER, *supra* note 22, at §§ 4:8, 4:28 (role of the cooperating broker and liability of the principal to third parties for acts of the agent).

81. 152 Cal. App. 2d 180, 313 P.2d 41 (1957).

the representation of the listing agent.⁸² As the seller was responsible for her agent's statements, the plaintiff/buyer was granted rescission.

In addition to pointing out the seller's vicarious liability for his subagent's statements, the *Johnston* case is unique in that both the listing and the cooperating brokers were known by the seller to be seeking an acceptable buyer. The more typical case arises where the seller has had absolutely no direct contact with the cooperating broker.⁸³ Despite the fact that the seller has virtually no control over the selection of the subagent (since any broker with access to the MLS may assume that role), and has made no personal instructions to the character evaluation of the subagent, he is nonetheless required, as a principal, to account for the cooperating broker's wrongdoing.⁸⁴

Clearly, this over-exposure to liability would be eliminated (and the buyer's representation enhanced) if the cooperating broker was considered to be the buyer's agent. In light of the possible consequences, the listing broker should be required at a minimum to specifically disclose that authorization to cooperate with other brokers exposes the seller to an increase in potential liability.

2. Dual Representation

Through the ages it has long been recognized that "[n]o servant can serve two masters: for either he will hate the one and love the other; or else he will hold to the one, and despise the other."⁸⁵ Undaunted by the obvious truth of this maxim, two basic situations have developed in which a broker may legally act in the interest of both the buyer and the seller.

a. Middleman

82. *Id.* at 187, 313 P.2d at 46.

83. *See supra* note 44. As previously mentioned, article 22 of the *Realtor Code of Ethics* requires that direct contact between the seller and the cooperating broker be avoided in negotiations (unless approved by the listing broker). *See Granberg*, 166 Cal. App. 2d 390, 395, 333 P.2d 423, 426 (1958) (seller was forced to return buyer's downpayment when sale arranged by cooperating brokers, with whom seller was not acquainted, was rescinded due to cooperating brokers' misrepresentation of the property's zoning).

84. Further, the seller (and listing broker) may be bound by "admissions" made by the subagent (cooperating broker). *See* FED. R. EVID. 801(d)(2)(D).

85. *Luke* 16:13.

In order to avoid placing the broker in the compromising position of representing the inherently incongruent interests of buyers and sellers, a limited number of courts have cast the role of a broker as analogous to that of a middleman.⁸⁶ This characterization limits the duties of a broker to simply bringing the parties together, and proscribes the broker's participation in the negotiation of the transaction.⁸⁷ However, due to the complexity of real estate transactions, limiting the broker's participation to a middleman status is both unnecessary⁸⁸ and illogical.⁸⁹ Rather than one party being underrepresented or not represented, the result of classifying a broker as a middleman is simply that neither party is represented at all.

b. Dual Agency

The more recurring and problematic situation exists where a broker takes it upon himself to attempt the representation of both the buyer's and the seller's best interest. The *Realtor Code of Ethics* places virtually no restrictions on the representation of multiple principals in a real estate transaction.⁹⁰ As listing agent, the broker is under a fiduciary duty to negotiate for and represent the best interests of the seller.⁹¹ This invariably concerns ob-

86. See, e.g., *Harry M. Fine Realty Co. v. Stiers*, 326 S.W.2d 392, 398 (Mo. Ct. App. 1959).

87. A broker is simply a middleman . . . when he has no duty to perform but to bring the parties together, leaving them to negotiate and to come to an agreement themselves without any aid from him. If he takes . . . any part in the negotiations, however, he cannot be regarded as a mere middleman, no matter how slight a part it may be.

Jensen v. Bowen, 37 N.D. 352, 358, 164 N.W. 4, 5 (1917). See also *Spratlin, Harrington & Thomas, Inc. v. Hawn*, 116 Ga. App. 175, 156 S.E.2d 402 (1967) (broker was not determined a middleman where he aided defendants in obtaining a loan, gave advice as to the amount and terms of the loan defendants were seeking, or in other aspects was active for parties to the transaction); *Van Leeuwen v. Huffaker*, 78 Utah 521, 5 P.2d 714 (1931); RESTATEMENT (SECOND) OF AGENCY § 258 comment d (1958).

88. *Mallory v. Watt*, 100 Idaho 119, 594 P.2d 629 (1979) (a broker is not required to act as a mere middleman so long as full disclosure of dual agency and fair treatment of the principals is afforded).

89. *Stambler & Stein, The Real Estate Broker - Schizophrenia or Conflict of Interests*, 28 D.C.B.J. 16, 17 (1961) (the broker is the active go-between; the direction and details of the transaction are personal knowledge of the broker).

90. The Code simply provides that the broker must act in the interests of his client(s) and deal with all parties involved in a fair manner. See *supra* note 34 and accompanying text.

91. *George Ball Pac., Inc. v. Coldwell Banker & Co.*, 117 Cal. App. 3d 248, 256, 172 Cal. Rptr. 597, 601 (1981) (citing *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 782, 598 P.2d 45, 50, 157 Cal. Rptr. 392, 397 (1979)) ("A real estate licensee is 'charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision.'"); *Alhino v. Starr*, 112 Cal. App. 3d 158, 169, 169 Cal. Rptr. 136, 143 (1980). "The law imposes on a real estate agent the same obligation of undivided services and loyalty that it imposes on a

taining the highest price and best terms possible for the seller. Conversely, a buyer's interest, among other things, would include obtaining the property at a bargain price and on terms most favorable to a purchaser. Despite this conflict of interests, the broker is allowed to simultaneously act as an agent for the buyer,⁹² forming an uneasy dual agency alliance.

The courts have long been unwilling to recognize the legitimacy of the dual agency relationship⁹³ in the absence of full disclosure to both the buyer and seller.⁹⁴ Additionally, the broker must disclose any material facts that would reasonably affect the judgment of the principal in permitting the dual agency.⁹⁵

trustee in favor of his beneficiary.'" *Id.* (quoting *Batson v. Strehlow*, 68 Cal. 2d 662, 674-75, 411 P.2d 101, 108, 68 Cal. Rptr. 589, 597 (1968)).

92. *Brimbau v. Ausdale Equip. Rental Corp.*, 440 A.2d 1292, 1296 (R.I. 1982) (a person may serve simultaneously as the agent of two independent principals); *Utah State Univ. of Agriculture and Applied Sciences v. Sutro & Co.*, 646 P.2d 715, 722 (Utah 1982) ("It is not necessarily always true that a party acting as an agent in a transaction must be exclusively the agent of one party or the other.").

93. This situation must be distinguished from the case in which the broker represents the seller as to one parcel of land, and represents the buyer in a subsequent sale of another parcel. In *Fred Tuke & Son v. Burkhardt*, 7 Ohio Op. 2d 324, 156 N.E.2d 490 (1958), *aff'd*, 109 Ohio App. 183, 160 N.E.2d 283 (1959), plaintiff/real estate agency was hired by, and found a purchaser for defendant/seller's house. Defendant refused to pay the commission on the grounds that plaintiff's subagent had a contract with the intended purchaser to sell *another* parcel of land for him, and that this "dual agency" (not in the usual sense where an agent represents both buyer and seller with regard to the same parcel) had not been disclosed. The court held that the agent was under no legal duty to make such a disclosure (though it would have been highly ethical) and ordered plaintiff's commission to be paid. *Id.* at 185, 160 N.E.2d at 285.

94. *Cogan v. Kidder, Matthews & Sehner, Inc.*, 97 Wash. 2d 658, 662, 648 P.2d 875, 877 (1982) ("Where an agent has dual responsibilities or is serving an interest adverse to the principal, disclosure of such conflict is always required."); *Mersky v. Multiple Listing Bureau*, 73 Wash. 2d 225, 437 P.2d 897 (1968) (it is of no consequence that the failure to disclose dual relation did not involve intentional or deliberate fraud, did not result in injury to principal, or did not affect principal's ultimate decisions in the transaction). *Accord* *Duffy v. Setchel*, 38 Ill. App. 3d 146, 347 N.E.2d 218 (1976). *See also* RESTATEMENT (SECOND) OF AGENCY § 392 (1958); *Warren v. Magels Realty*, 23 Ariz. App. 318, 321, 533 P.2d 78, 81 (1975); *Mallory v. Watt*, 100 Idaho 119, 122, 594 P.2d 629, 632 (1979); *Brandt v. Koepnick*, 2 Wash. App. 671, 674, 469 P.2d 189, 190-91 (1970).

Also, brokers are often required by state statute to disclose any dual agency situations. *See, e.g.*, CAL. BUS. & PROF. CODE § 10176(d) (West Supp. 1984). If a broker continues in a dual agency without notifying both parties, he thereby forfeits his commission, RESTATEMENT (SECOND) OF AGENCY §§ 389, 391 (1958), and may even lose his license. *Hickan v. Colorado Real Estate Comm'n*, 36 Colo. App. 76, 534 P.2d 1220 (1975).

95. *Koller v. Belote*, 12 Wash. App. 194, 528 P.2d 1000 (1974) (broker did not disclose impossibility of securing for defendant/prospective purchasers the best price and terms available while representing the best interests of seller).

Essentially, dual agency contemplates that the broker can provide each principal to a real estate transaction undivided loyalty and full disclosure. Although legal decisions may support and defend this concept, it is logically unclear how a broker may provide full disclosure to either party without harm or detriment to the interests of the other.⁹⁶ In some cases, courts have understandably sought to avoid the inherently conflicting prospect of dual agency,⁹⁷ while other courts have strained to establish a dual relationship between the broker and the parties of the transaction.⁹⁸

96. The NFO surveys point out some interesting buyer and seller perceptions of the dual agency relationship. Over 63% of all sellers surveyed believed that they and the buyer had been represented by the same agent. FTC REPORT, *supra* note 1, at (NFO Survey) seller question 52(b). Seventy-four point two percent of all buyers surveyed shared the same belief. *Id.* at buyer question 46(b). This data clearly suggests that most buyers and sellers share an unknowing comfort in allowing dual representation in the residential real estate transaction. As further evidence of the parties' lack of familiarity with the inherent conflict with which the broker is faced, 78.7% of all sellers surveyed had told their agent the lowest price they would accept. FTC REPORT, *supra* note 9, at (NFO Survey) seller question 60(k). Seventy-three percent of all buyers surveyed had likewise indicated the highest price that they would bid. *Id.* at (NFO Survey) buyer question 53(k). The broker's plight at this point is apparent. In any given case, he must either opt for the role of a middleman, or proceed to advise and negotiate the parties through an inevitable compromise of loyalties and interests.

Since a major goal of most sellers is to obtain the highest price for their home, FTC REPORT, *supra* note 1, at (NFO Survey) seller question 14(j), negotiations will hinge, to a large degree, on the buyer's perception of how low a price the seller is willing to accept. However, the NFO survey further points out that 62% of the buyers surveyed reported that their agent had revealed how low he thought the seller would go. *Id.* at (NFO Survey) buyer question 53(d). It appears that these buyers were indeed represented well, but only at the expense and breach of the broker's duty of loyalty to the seller in obtaining the highest and best price possible. Comment, *A Reexamination of the Real Estate Broker-Buyer-Seller Relationship*, 18 WAYNE L. REV. 1343, 1351 (1972) [hereinafter cited as *Reexamination*]. Furthermore, even if the seller had been more alert to this conflict and the principles of agency law involved, the dual representation is likely to work injury to his interests. A seller who understands agency law may hold back information, such as the acceptable price range, that will be necessary for the broker to know in fulfilling his duty to the seller, but that he is afraid the buyer will find out. Currier, *supra* note 3, at 675. The FTC survey clearly points out that this fear is not ill founded.

Just as it breaches a duty to seller when his agent tells the buyer how low a price a seller is willing to accept, in a dual agency situation, an agent breaches his fiduciary duty to the buyer when he tells the seller how high he thinks the buyer will go. Transmittal of this information will inevitably compromise the buyer's interest in obtaining the lowest price possible in negotiations. "Comments to the Restatement of Agency state that the dual agent does not violate a duty to one principal by fully disclosing all relevant facts to the other; however, when confidential information, such as statement about price, is given to the agent by the principal, the agent's duty compels his silence." *Id.* at 676 (footnote omitted). See RESTATEMENT (SECOND) OF AGENCY § 392 comment b (1958).

97. See *supra* notes 86-89 and accompanying text.

98. See *infra* notes 99-133 and accompanying text.

i. Fiduciary duties owed without express recognition of an agency relationship.

In *Harper v. Adametz*,⁹⁹ the broker failed to disclose the buyer's offer to the seller. Instead, the broker purchased the property through a relative and then subdivided the property, selling a portion to the prospective purchaser and conveying the remaining portion to his son. The broker failed to disclose his purchase and secret profit.¹⁰⁰ The court held that a constructive trust be placed on the property in the buyer's name.¹⁰¹

It is true that this rule is most often applied in situations where the relationship between the plaintiff and the defendant is one which equity clearly recognizes as fiduciary. But equity has carefully refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations. It has left the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other.¹⁰²

Clearly, the above situation can easily be distinguished from the situation where no fraud on the part of the broker can be found. However, courts have attempted to ameliorate the otherwise inequitable position of the buyer by straining the fiduciary concept to create a fiduciary duty applicable to the broker/buyer relationship, even where the broker is already the agent of the seller.

For instance, the Ninth Circuit Court of Appeals held in *Funk v. Tift*¹⁰³ that when a real estate broker acts as an intermediary between a seller and prospective buyer, the broker has a fiduciary obligation to deal fairly and honestly with the prospective buyer.¹⁰⁴ In this case, the broker had failed to disclose to a prospective buyer that he, along with two other parties, had submitted a subsequent (and substantially more generous) offer to the prospective purchaser's offer.¹⁰⁵ Tift had disclosed his role as agent of the vendor, and no allegation of fraudulent misrepresentation or confidential information existed.¹⁰⁶ However, the majority relied on a number of cases which, in fact, dealt with situations where the broker was in a relationship with the pro-

99. 142 Conn. 218, 113 A.2d 136 (1955).

100. *Id.* at 221, 113 A.2d at 137-38.

101. *Id.* at 225, 113 A.2d at 139.

102. *Id.*

103. 515 F.2d 23 (9th Cir. 1975).

104. *Id.* at 25.

105. *Id.* at 24.

106. *Id.* at 28 (Wright, J., dissenting).

spective buyer,¹⁰⁷ made affirmative misrepresentations,¹⁰⁸ and misused confidential information.¹⁰⁹

As the dissent noted, the court's decision was the first to hold a broker liable for breach of affirmative duties owing to a buyer in which the broker was not the buyer's agent, did not make fraudulent or deceitful misrepresentations, and did not conceal or fail to communicate the buyer's offer.¹¹⁰ In a conclusory manner, the court also found that a fiduciary relationship existed.¹¹¹

Notably, the court never termed the broker the buyer's agent. The very concept of a fiduciary relationship is allied with a legal relationship of some type. It may be presumed that the court sought to avoid categorizing the relationship as one of agency because of the inherent problems raised when dual agency relationships are applied in real estate transactions.

ii. Agency implied-in-fact

Alternatively, rather than avoiding the recognition of an agency relationship, some courts have found a dual agency relationship based on an implied promise to complete the transaction.¹¹² In

107. See *Quinn v. Phipps*, 93 Fla. 805, 808, 113 So. 419, 421 (1927) (citing *Mayrand v. Mayrand*, 194 Ill. 45, 48, 61 N.E. 1040, 1041 (1901)).

The term "fiduciary" or "confidential" relation . . . is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused,—in which confidence has been reposed and betrayed. The origin . . . and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another.

Id.

Accord *Pepper v. Underwood*, 48 Cal. App. 3d 698, 122 Cal. Rptr. 343 (1975); *Wolf v. Price*, 244 Cal. App. 2d 165, 52 Cal. Rptr. 889 (1966); *Mitchell v. Allison*, 51 N.M. 315, 183 P.2d 847 (1947) (the assumption by the agent of the undertaking to purchase and the confidence necessarily reposed in him by the principal, who accepts the agent's offer to act, instead of acting himself, is the basis of the agent's liability).

108. See *Ward*, 51 Cal. 2d at 741-42, 336 P.2d at 537; *Quinn*, 93 Fla. at 822, 113 So. at 421-22.

109. *Funk*, 515 F.2d at 28 (Wright, J., dissenting).

110. *Id.*

111. *Id.* at 25. *Cf.* *Darling v. Nineteen-Eighty Corp.*, 176 N.W.2d 765, 767 (Iowa 1970). Absent property owner's informed consent, owner's agent who also acted as escrow agent did not thereby become agent of purchaser. Therefore, owner was not precluded from changing his mind and instructing agent not to consummate deal after owner had mailed signed contract of sale to agent who had power of attorney.

112. *Harris v. Perl*, 41 N.J. 455, 463, 197 A.2d 359, 364 (1964) ("In a practical world the broker must trust that those who seek or willingly accept his services will not cheat him of the fruit of his industry. The courts should protect him from that abuse. . . ."); *Tanner Associates, Inc. v. Ciraldo*, 33 N.J. 51, 161 A.2d 725 (1960) (court recognizes an implied agency relationship between the buyer and seller).

Ellsworth Dobbs, Inc. v. Johnson,¹¹³ the New Jersey Supreme Court took judicial notice of the expectations of the parties and concluded that if the purchaser fails or refuses to consummate a real estate transaction without valid reason,¹¹⁴ thereby preventing the broker from earning a commission, he becomes liable to the broker for breach of an implied promise.¹¹⁵

Generally, under this view, the broker is considered to be an agent of the buyer and of the seller.¹¹⁶ This resembles a finding of an implied promise in fact or an agreement inferred by conduct,¹¹⁷ which is the equivalent of an implied agency.¹¹⁸ Certainly, in the jurisdictions where a broker may assert an implied agency relationship, a buyer may do likewise. However, it appears that the *Dobbs* court also attempted to avoid labelling the relationship as one of dual agency.

As highlighted in the foregoing discussion, hindsight creation of fiduciary duties toward a party never intended as a principal creates perplexing problems. On one hand, the broker has an established agency relationship with the seller. On the other hand, the uncertainty of the law leaves a broker in the insecure position of fulfilling vague fiduciary duties toward the buyer in order to avoid possible future liability. While the courts' decisions in many cases may seek to remedy a wrong suffered by a buyer, the failure to define the relationship upon which those duties are based provides no legal guidance for brokers. Hence, the application of these theories may actually be more detrimental than beneficial to a buyer.

113. 50 N.J. 528, 236 A.2d 843 (1967).

114. *Id.* at 559, 236 A.2d at 859; *Harris*, 41 N.J. at 461, 197 A.2d at 363.

115. *But see* Joseph J. Murphy Realty, Inc. v. Shervan, 159 N.J. Super. 546, 548-49, 388 A.2d 990, 991 (1978) (*Dobbs*' view has eroded somewhat since in New Jersey it is now held that financial inability to carry out the transaction is not enough fault by the buyer to allow the broker to sue for his lost commission).

116. California is in accord with the *Dobbs* principle of purchaser liability. *See* *Donnellan v. Rocks*, 22 Cal. App. 3d 925, 99 Cal. Rptr. 692 (1972). *But see* *Professional Realty Corp. v. Bender*, 216 Va. 737, 738-39, 222 S.E.2d 810, 811 (1976) (purchaser's promise to purchase is not an implied promise to pay commission if he defaults on contract with vendor).

Other states allow recovery from the buyer only if the buyer acted in bad faith. *See* *Treadaway v. Piazza*, 156 So. 2d 328 (La. Ct. App. 1963); *Brawner v. Cumbie*, 264 S.W. 497 (Tex. Civ. App. 1924).

117. A. CORBIN, CORBIN ON CONTRACTS § 19, at 27-30 (1 Vol. ed. 1952); L. SIMPSON, LAW OF CONTRACTS § 5, at 8 (1954).

118. 1 A. CORBIN, CORBIN ON CONTRACTS § 50, at 206-08 (1963).

iii. The public interest theory

Where courts have been unable or reluctant to find a fiduciary duty owed to the buyer by the broker, the "public policy" or "public interest" theory has been utilized to impose a duty upon brokers to act in an honest and ethical manner toward buyers.¹¹⁹ This duty is founded upon the theory that state statutes grant a status to, and make certain responsibilities incumbent upon, licensed real estate brokers.¹²⁰ In these cases, a failure to communicate the buyer's offer and any affirmative misrepresentations constituted a breach of the broker's statutory duty to deal fairly and honestly with prospective purchasers.

In *Ward v. Taggart*,¹²¹ the real estate broker misrepresented to a prospective purchaser both the seller's minimum price and the fact that he was the seller's agent. The broker discretely used the purchaser's money to purchase the land from the seller and then subsequently resold the subject land to the purchaser at a profit. The court held that public policy would not allow such fraudulent activities, despite the fact that no fiduciary or agency relationship could be established between the buyer and broker.¹²² The court relied on California statutes which concern fraudulent conduct,¹²³ and real estate brokers.¹²⁴ Under California law, a broker's license may be revoked if he violates a state statute by making false promises likely to persuade, induce or influence.¹²⁵ Additionally, a broker may be required to submit proof of his veracity and honest character.¹²⁶ These statutes impute a duty on the broker to act in an honest and ethical manner with the general public, the intended beneficiaries of the statutes.¹²⁷

In *Zichlin v. Dill*,¹²⁸ the Florida Supreme Court held that since

119. *Ward*, 51 Cal. 2d at 736, 336 P.2d at 534; *Zichlin v. Dill*, 157 Fla. 96, 25 So. 2d 4 (1946); *Amato v. Latter & Blum, Inc.*, 227 La. 537, 79 So. 2d 873 (1955). See *Reexamination*, *supra* note 96, at 1345-48.

120. *Ward*, 51 Cal. 2d at 736, 336 P.2d at 534.

121. *Id.*

122. *Id.* at 741, 336 P.2d at 537.

123. "One who gains a thing by fraud . . . or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." CAL. CIV. CODE § 2224 (West 1970). "No one can take advantage of his wrong." *Id.* at § 3517.

124. CAL. BUS. & PROF. CODE §§ 10150, 10176 (West 1964), as amended CAL. BUS. & PROF. CODE §§ 10150, 10176 (West Supp. 1984). Even though § 10150 has been amended and no longer requires an applicant for a brokerage license to submit two recommendations certifying their honesty, truthfulness and good character, § 10152 has continued to require that this application be submitted on request by the commission. CAL. BUS. & PROF. CODE § 10152 (West Supp. 1984).

125. CAL. BUS. & PROF. CODE § 10176(a), (b) (West Supp. 1984).

126. See *supra* note 124.

127. *Ward*, 51 Cal. 2d at 741, 336 P.2d at 537.

128. *Zichlin*, 157 Fla. at 96, 25 So. 2d at 4.

"a broker belongs to a privileged class and enjoys a monopoly to engage in a lucrative business," state statutes require that the broker shall be "competent, honest, truthful, trustworthy, of good character, and bear a reputation for fair dealing."¹²⁹ The court went on to conclude that since the statute prescribed a standard of qualifications, the rule *caveat emptor* must not prevail.¹³⁰

While both *Zilchin* and *Ward* involved an affirmative misrepresentation on the part of the broker, in *Amato v. Latter & Blum, Inc.*,¹³¹ the broker's treatment of the buyer appeared less fraudulent. The defendant broker failed to present the plaintiff's offer resulting in the sale of the property to another purchaser. The plaintiff was unable to purchase the property without paying an exorbitantly inflated price.¹³² The court concluded that public policy imposed a duty upon a broker to act honestly.¹³³ Thus, it appears that a broker may have an implied statutory duty to act in an honest and fair manner, whether or not the purchaser can prove actionable fraud.

Similar to the hindsight creation of fiduciary duties owed to a buyer, the public policy theory offers no concrete guidelines on which a broker may base his conduct. Certainly, some acts are so inherently dishonest that no statutory definition is needed. However, since the broker is obligated to act in the best interests of the seller, there may be situations where the broker's conduct borders the line between a violation of fiduciary duties owed the seller, and a violation of public fairness. Non-material disclosures would easily fall into this category. If the courts continue to simply "put the fires out" by establishing hindsight fiduciary relations, brokers will be left in the quandary of choosing between established fiduciary duties owed the seller and second-guessing the nebulous professional standards espoused under the public interest theory.

C. *Specific Problem Areas*

The practices of self-dealing and vest-pocket listing, and the absence of brokerage commission rate negotiability and unbiased real estate valuation, all relate to the consumer's lack of experi-

129. *Id.* at 98, 25 So. 2d at 4-5.

130. *Id.*

131. *Amato*, 227 La. at 537, 79 So. 2d at 873.

132. *Id.* at 539-40, 79 So. 2d at 874.

133. *Id.* at 543, 79 So. 2d at 876. See generally *Currier*, *supra* note 3.

ence in real estate transactions. Recognition of these problem areas is essential in any attempt to ensure the efficient and economically accurate transfer of residential property.

1. Self-Dealing

The real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains. We know from our judicial records that the opportunities have not been lost.¹³⁴

This fact is perhaps best illustrated by the problem of self-dealing. "The self-dealing broker is the seller's agent who directly or indirectly purchases the seller's house without disclosing his or her interest in the purchase."¹³⁵ The general rule has long been that a broker cannot purchase from his principal unless the latter assents with full knowledge of the facts.¹³⁶ This is currently the law in at least thirty-seven states.¹³⁷

There may be a rare case in which a broker purchase, properly disclosed, is appropriate.¹³⁸ However, "[s]elf-dealing is, by definition, unknown to the consumer,"¹³⁹ and constitutes a "flagrant violation of the broker's duty to disclose material facts to the principal."¹⁴⁰ The typical case involves a broker's failure to communicate a buyer's offer to a seller after agreeing to do so. He then buys the property himself and sells it to the buyer at a profit, with the buyer thinking the purchase is directly from the original owner. In such a case, the vendor's agent may be held liable to

134. *Roman v. Lobe*, 243 N.Y. 51, 54, 152 N.E. 461, 462 (1926) (Cardozo, J.).

135. FTC REPORT, *supra* note 1, at 121. An example of indirect broker self-dealing occurs where the broker fails to disclose that the property is being purchased by the listing broker's sister for the benefit of the broker and his wife. *Abell v. Watson*, 155 Cal. App. 2d 158, 317 P.2d 159 (1957). On the duty of a real estate broker to disclose that prospective purchaser is a relative, see Annot., 26 A.L.R. 2d 1307 (1952).

136. *Batson v. Strehlow*, 68 Cal. 2d 662, 441 P.2d 101 (1968) (broker failed to disclose his intent to purchase through a corporation in which he and his wife were the sole stockholders); *Estrin v. Watson*, 150 Cal. App. 2d 107, 309 P.2d 506 (1957) (listing broker failed to disclose that he was purchasing property under his fictitiously named realty company).

137. See FTC REPORT, *supra* note 1, at app. B, § 1. This is also the rule of disclosure under the NAR Code of Ethics, art. 13. See *supra* note 34.

138. For example, when there is a tight money market and adequate bank financing for home owners is scarce, the anxious seller may want to sell to a broker who has the financial resources to make the purchase immediately. The typical problem arises when the broker already has a ready, willing and able buyer to whom the broker intends to resell to at a profit. For a discussion of instances where the seller grants the broker a limited right to purchase the property himself and the conflicts of interest that arise (in California law), see Comment, *Unprofessional Conduct by Real Estate Brokers: Conflict of Interest and Conflict in the Law*, 11 PAC. L.J. 821 (1980).

139. FTC REPORT, *supra* note 1, at 122. Thus, the NFO surveys were incapable of actually measuring its prevalence with any degree of accuracy.

140. *Id.* at 314.

the buyer for failure to communicate his offer to the vendor,¹⁴¹ and liable to the seller for failure to reveal that other offers were made.¹⁴²

Self-dealing practices are the subject of frequent litigation¹⁴³ and complaints to state licensing agencies.¹⁴⁴ The burden of showing that any conflict of interest was fully disclosed, and not just discoverable by a diligent principal, is squarely on the broker.¹⁴⁵ If he fails to meet this burden, the broker may forfeit his commission,¹⁴⁶ lose his profits,¹⁴⁷ lose his license,¹⁴⁸ and/or be assessed both compensatory and exemplary damages.¹⁴⁹ The seller has the right to rescind the transaction whether or not actual injury was sustained.¹⁵⁰

Perhaps the most effective way to prevent broker self-dealing is for the seller to insist that the listing be immediately placed on the MLS. In this way, a broker may be discouraged from attempting to procure illicit gains as he will be cognizant of his fellow colleagues' awareness of the listing's existence and status.

141. See, e.g., *Harper v. Adametz*, 142 Conn. 218, 113 A.2d 136 (1955) (buyer suffered no pecuniary loss but was able to recover on equitable grounds (doctrine of constructive trusts)); *Amato*, 227 La. at 537, 79 So. 2d at 873 (real estate agent held liable for misrepresenting to owner that no higher offer was outstanding; buyer prevailed).

142. See, e.g., *Simone v. McKee*, 142 Cal. App. 2d 307, 298 P.2d 667 (1956) (failure to reveal all offers made is the same as an affirmative representation that no other offers were made).

143. See CALIFORNIA CEB, CALIFORNIA REAL ESTATE TRANSACTIONS 156, 157 (1967).

144. FTC Interview with R. Arnold, F. Carasko, California Dep't of Real Estate, in Los Angeles (March 19, 1979).

145. *Frisell v. Newman*, 2 Wash. App. 85, 467 P.2d 340 (1970) (where cooperating broker purchased the property for his own salesman's account, the fact that the seller could have learned of the relationship by reading the contract documents was insufficient to show that broker had met his duty of disclosure).

146. *Berry v. Marx*, 206 Ala. 619, 91 So. 583 (1921).

147. *Metcalf v. Drew*, 78 Cal. App. 2d 226, 177 P.2d 620 (1947) (conspiracy between broker and buyer to self-deal; plaintiff awarded damages in amount of secret profit less commission).

148. *Holland Realty Inv. Co. v. Nevada*, 84 Nev. 91, 436 P.2d 422 (1968) (license revoked for failure to disclose double escrow).

149. *Ward*, 51 Cal. 2d at 736, 336 P.2d at 534 (defendant, who never even held the listing, sold certain property in self-dealing at a profit; plaintiff received damages in full amount of secret profit); *Simone*, 142 Cal. App. 2d at 307, 298 P.2d at 667 (1956) (compensatory and exemplary damages assessed where broker failed to disclose second offer to purchase).

150. *Carluccio v. 607 Hudson St. Holding Co., Inc.*, 141 N.J. Eq. 449, 57 A.2d 452 (1948) (public policy alone would give right of rescission).

2. Vest-Pocket Listing

A less well-recognized problem area in broker/seller relationships has been termed "vest-pocket listing."¹⁵¹ This involves yet another way in which brokers strive to maximize their own returns through restricting the flow of information in the marketplace. To avoid splitting commissions with cooperating brokers, a listing broker may purposefully withhold a particular listing from the MLS, believing that the property will sell quickly and easily. The FTC Report indicates that property so withheld tends to stay on the market for longer periods of time due to the lack of public exposure.¹⁵² Also, vest-pocket listings appear to command lower average selling prices.¹⁵³ Though the survey results admittedly do not conclusively demonstrate the problem, the time-on-market and price comparisons strongly suggest that it does in fact occur and works clearly to the disadvantage of the seller seeking to sell his property at the highest price in the least amount of time possible. It is not unlikely that most brokers are unaware of the price comparisons that only in-depth empirical studies (such as those conducted for the FTC) point out. However, it should be evident that in order to fulfill the broker's duty to act in the seller's best interests, he must use every means available, including the MLS, to solicit offers on the property.

Vest-pocket listing is another instance in which the use of standardized listing agreement forms often works to the disadvantage of the unsuspecting seller. Virtually all standard forms provided by the listing broker include a provision authorizing the use of MLS.¹⁵⁴ However, most fail to *require* the listing to be placed on an MLS within a specific time period. Unaware of the vest-pocket listing practice, many sellers unduly subject themselves to the listing broker's discretion.

151. FTC REPORT, *supra* note 1, at 122-25.

152. The FTC tested for vest pocket listing as follows: Some MLS's are "voluntary," leaving it within the broker's discretion whether or not to submit all of their listings. Others are mandatory. "If brokers who are members of voluntary MLS's regularly withhold more of their easy-to-sell listings than those brokers who belong to mandatory MLS's, the voluntary MLS's would be expected to contain, on average, properties relatively more difficult to sell." *Id.* at 122. These voluntarily listed MLS properties were found to stay on the market about 10% longer than the properties on a mandatory MLS. *Id.* at 122-23.

153. One of the ways the FTC tested for this was to compare the mean selling price of homes sold by the listing broker or one of his agents to the mean selling price of homes sold by cooperating brokers from firms other than the listing firm. Throughout different areas, the results consistently demonstrated that homes sold by cooperating brokers (who obtain listing information from a MLS) sold at a higher price level than did homes sold by brokers and salesmen with the listing firm. *Id.* at 123-24.

154. This authorization is often couched in terms of agreeing to the listing broker's cooperation with subagents.

3. Negotiability and Setting the Price

Another problem area which goes to the heart of the broker/seller relationship deals with the negotiability of brokerage rates and the valuation of the seller's property. It appears that the uniformity of commission rates across any geographic area,¹⁵⁵ consumer misperceptions of the cause of this uniformity,¹⁵⁶ and the lack of information on alternative arrangements¹⁵⁷ deter most sellers from negotiating broker compensation.¹⁵⁸ Furthermore, the broker is often relied upon to set the asking price for the subject property.¹⁵⁹ The advice and counsel of the broker is widely recognized as the single most influential factor in determining this figure.¹⁶⁰ In this situation, the broker's duty of loyalty, which implicitly includes the duty to get the best price possible,¹⁶¹ is in

155. Cases, articles, and studies across the country all indicate that commission rates are relatively uniform in most local markets. See *People v. National Ass'n of Realtors*, 120 Cal. App. 3d 459, 174 Cal. Rptr. 728 (1981) (an antitrust action in which the court recognized that, despite the discontinuance of setting rates by the local Board of Realtors, 97% of the properties in the local MLS were still at a flat commission of 6%); Owen, *Kickbacks, Specialization, Price Fixing, and Efficiency in Residential Real Estate Markets*, 29 STAN. L. REV. 931, 947-49 (1977); FTC REPORT, *supra* note 1, at 43-56 (an in-depth analysis of the uniformity of commission rates and the relation to industry interdependence and performance problems). Sixty-nine percent of all sellers surveyed by NFO agreed with the proposition that most agents charged the same sale commission. FTC REPORT, *supra* note 1, at (NFO Survey) seller question 60.

156. "About half of the sellers questioned said they had no idea how commission rates are determined. Of the half who did express an opinion, approximately 50% believed that rates are fixed by law or by Boards of Realtors." FTC REPORT, *supra* note 1, at 110 (footnote omitted).

157. Most sellers are not even aware of the existence of discount brokers (those who offer brokerage services at a commission rate below that prevailing in the local market). Sixty-four point nine percent of all sellers surveyed by the FTC were not aware of any "discount agents." FTC REPORT, *supra* note 1, at (NFO Survey) seller question 22.

158. Seventy-five point three percent of all sellers surveyed for the FTC made no attempt to bargain with their agent about the sales commission. *Id.* at (NFO Survey) seller question 38.

159. Fifty-four point nine percent of all sellers surveyed for NFO felt that the broker had provided "a great degree" of service in his ability to recommend a listing price. Another 34.5% believed this service had been provided to "some degree." *Id.* at (NFO Survey) seller question 21. Thirty point five percent of all sellers surveyed felt that the single most influential source of information used in determining their house's listing price was the advice of agents, with another 21% hinging their decision on "comparables" provided by the agent. *Id.* at (NFO Survey) seller question 29.

160. See F. CASE, *RESIDENTIAL BROKERAGE: HISTORY, CHARACTERISTICS, PROBLEMS* 2-8, 2-9 (1979).

161. *Reexamination*, *supra* note 96, at 1357. *Haymes v. Rogers*, 70 Ariz. 257, 219 P.2d 339, *modified*, 70 Ariz. 408, 222 P.2d 789 (1950); *Wechsler v. Bowman*, 285 N.Y.

direct conflict with his desire to earn a high hourly rate of compensation. The broker is confronted with the choice of making a quick sale at a reduced price or continuing pursuit of an acceptable buyer at the initial offering price.

Having identified seller ignorance of rate negotiability and the broker's conflict of interest in setting the listing price, it is interesting to note the resulting absence of stimuli for reform. Confronted with the uniformity of commission rates, despite how out of line that rate may be in relation to the efforts expended by the broker, most sellers will feel that they are receiving the same deal that everyone else who purchases brokerage services receives.¹⁶² And as most sellers have no expertise in real estate valuation, they are typically satisfied with the broker's efforts in setting a purchase price,¹⁶³ provided a sale results within a reasonable period of time at a price comparable to other recent sales in the same area.

The question becomes one of deciding whether customer satisfaction alone can justify the inherent anticompetitiveness of rate uniformity and the ignoring of possible inaccuracies of biased party real estate valuation. Absent reform, which, at the very least, alerts consumers to the realities and conflicts involved, it appears that these practices will continue and the competitive weaknesses in the brokerage industry will persist unchanged.

IV. ALTERNATIVES & SOLUTIONS

Assuming that the current state of the law remains unchanged, how can consumers better ensure the protection of their interests?

One solution is for the consumer to educate himself. In many areas of life, consumers are confronted with the problem of deciding whether to cope with their ignorance through the hiring of an outside party, or take the time and money required to become formally trained in the area. Whether it involves filling out a tax return, repairing an automobile, or valuing a work of art, the most practical decision, in light of the years of training that may be required, is to hire another individual or entity—a specialist—to perform the service. However, the training required to specialize

284, 34 N.E.2d 322, *modified*, 285 N.Y. 582, 35 N.E.2d 930 (1941) (duty to get highest and best price recognized).

162. Most sellers surveyed for the FTC were satisfied overall that the services they received from their agent were worth the sales commission paid. FTC REPORT, *supra* note 1, at (NFO Survey) seller question 61.

163. Eighty-four point two percent of all sellers surveyed by NFO felt that their agent had secured a good price for their house. *Id.* at (NFO Survey) seller question 60.

in real estate brokerage and to grasp the dynamics of the broker/buyer/seller relationship is a far less arduous task.

Heightening public awareness of the existing problems should be zealously pursued by consumer protection forces and local and state real estate commissions. Simply providing consumers with the information on the potential problem areas highlighted in this article in an easy-to-read, condensed pamphlet would allow sellers and buyers to more accurately and confidently evaluate the performance of their broker.¹⁶⁴ Through education, even on a rudimentary level, will come control. And through control, consumers may reduce their risk and better ensure the protection of their interests.

The more significant and potentially more beneficial solution to the problem is the development of the "buyer's broker" segment of the real estate brokerage service market.¹⁶⁵ The typical residential real estate transaction involves the efforts of two brokers, linked through the MLS.¹⁶⁶ The obvious benefits of this market consolidation and matching function is indisputable. Essential to the development of a buyer-broker market segment is recognition within the brokerage industry that sole representation of both the buyer and the seller would benefit all parties to the transaction.

As indicated, the belief that a broker can act in a dual agency capacity and effectively represent both the buyer and seller is erroneous. Even though parties are often satisfied with their broker's performance,¹⁶⁷ whether their interests were actually perfected is difficult to assess.

Effective representation of both buyers and sellers need not involve an immediate and total transformation of current contractual and service compensation practices. Buyer-broker services could simply register prospective purchasers who seek brokerage services through an agreement to cooperate with the broker upon his finding an acceptable property for purchase. The only caveat is that as the use of buyer-brokers becomes a more established industry practice, the natural tendency may be toward the same contractual standardization with which sellers are currently con-

164. The California Department of Real Estate has no such pamphlet available for the general public.

165. A "buyer-broker" would be hired exclusively by the prospective home purchaser and would act solely as the buyer's agent.

166. See *supra* notes 59 and 65.

167. See *supra* note 162.

fronted.¹⁶⁸ Furthermore, there is nothing in the law of agency that would prevent the buyer-broker from accepting compensation for his services through a disclosed commission split similar to the current practice between the listing and cooperating broker.¹⁶⁹

Eventually, when independent representation of both parties through their own brokers becomes a more well-recognized practice, more flexibility can be built into the area of compensation. Each party should be allowed to directly pay for the services of their respective broker, whether the figure is set as a percentage of the final purchase price or a flat rate. Such a practice would ensure that both brokers receive the negotiated commission¹⁷⁰ which is most in line with their abilities in a competitive marketplace. This practice would also diffuse any motivation on the part of the buyer's representative to steer away from the listings which provide a less than "adequate" commission split.¹⁷¹ Once established, independent representation of the buyer and seller will naturally lead to a more competitive, ethical and efficient brokerage industry.

V. CONCLUSION

The time has come for reassessment of the viability of sub-agency and dual agency principles as they relate to the residential real estate transaction. Though consumer education and industry self-correction would be ideal, it is likely that adequate representation of the interests of both buyers and sellers will be achieved only through legislative and/or judicial intervention. The FTC Staff Report and its National Family Opinion Survey appear to provide ample background information from which such intervention may proceed.

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168. See *supra* notes 17-20 and accompanying text.

169. The listing broker and any cooperating broker involved commonly split the commission fee which the seller agreed in the listing contract to pay upon sale. See FTC REPORT, *supra* note 1, at (NFO Survey) MLS question 10.

170. See *supra* notes 155-63 and accompanying text.

171. Some cooperating brokers are inclined toward "steering" buyers away from the listings of discount brokers that provide a commission split lower than that prevalent in their geographic area. See FTC REPORT, *supra* note, 1, at 38-41 and 154.