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Brokers-Real Estate Brokers' Duties to Prospective Purchasers - Funk v. Tifft

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Brokers—Real Estate Brokers’ Duties to Prospective Purchasers—Funk v. Tifft, 515 F.2d 23 (9th Cir. 1975).

Benjamin and Betty Lou Funk inquired at the office of Ward Tifft, a licensed real estate broker in Idaho, about purchasing some real property. A salesman showed them certain property listed with the Tifft Agency. The following day, the Funks wrote a check for $100 to the Tifft Agency as an earnest-money deposit and signed an agreement to purchase the property for $30,000, with $1,000 to be paid upon acceptance of the offer and “payments of $100 per month for fifteen months, followed by a lump sum payment of $5,000 and payments of $150 per month thereafter.” Tifft mailed the Funk offer to the owner, but before the owner received that offer, Tifft called the owner and stated that he and two of his business associates were mailing an offer of $30,000 for the same property, with terms of $6,000 down and payments of $300 per month. The owner accepted the offer of Tifft and his associates. A month later, in response to a telephone call from the Funks, Tifft returned the $100 earnest-money deposit and informed the Funks that their offer had been rejected.

Upon learning that Tifft had purchased the property, the Funks sued to have Tifft and his associates declared constructive trustees of the property with the Funks as beneficiaries. The United States District Court for the District of Idaho dismissed their complaint. On appeal, the United States Court of Appeals for the Ninth Circuit reversed, holding that Tifft had breached the fiduciary duties he owed the Funks, and directed the imposition of a constructive trust.

I. Background

Traditionally, the real estate buyer-seller relationship has been one of caveat emptor. Since the broker in a real estate transaction is usually the seller’s agent, the buyer-broker rela-

1. Funk v. Tifft, 515 F.2d 23, 24 (9th Cir. 1975).
tionship has also been one of caveat emptor. Consequently, real estate brokers historically have not had any fiduciary or affirmative obligations to prospective purchasers. Courts have generally held brokers liable to buyers only when the broker was acting as the buyer's agent or when the buyer could prove fraud on the part of the broker.

Contrary to the traditional rule of caveat emptor, however, some modern courts have held that although the real estate broker is primarily the seller's agent, the broker nevertheless has


Usually both the real estate seller and his agent deal at arm's length with the purchaser. See, e.g., Reese v. Harper, 8 Utah 2d 119, 329 P.2d 410 (1958). The broker owes his principal, the seller, the duties of loyalty, skill, and full disclosure. He cannot act for persons having interests adverse to those of the seller without the seller's consent. See, e.g., Schepers v. Lautenschlager, 173 Neb. 107, 112 N.W.2d 767 (1962). Thus, historically, a real estate broker has been bound to act for his principal alone, using utmost good faith in his principal's behalf. See Lister v. Sakwinski, 206 Mich. 121, 172 N.W. 397 (1919).


6. Dunshee v. Novotny, 77 Colo. 6, 233 P. 1114 (1925); Lear v. Bawden, 75 Colo. 385, 225 P. 831 (1924); Isenbeck v. Burroughs, 217 Mass. 537, 105 N.E. 595 (1914); Hokanson v. Oatman, 165 Mich. 512, 131 N.W. 111 (1911); Sawyer v. Tildahl, 275 Minn. 457, 148 N.W.2d 131 (1967); Collins v. Philadelphia Oil Co., 97 W. Va. 464, 125 S.E. 223 (1924); Booker v. Pelkey, 173 Wis. 24, 180 N.W. 132 (1920). The courts are not in agreement as to what facts rise to the level of actionable fraud. For example, in Sanders v. Stevens, 23 Ariz. 370, 376, 203 P. 1083, 1085 (1922), the court stated that "a false representation as to the owner's lowest price is not actionable, because it is not a representation of a material fact." The court in Collins v. Philadelphia Oil Co., 97 W. Va. 464, 470, 125 S.E. 223, 224 (1924), however, held that such a misrepresentation did constitute fraud and stated that a buyer has a right to rely on the broker's statement of the seller's minimum price. In some cases where a broker has been held liable for misrepresenting the seller's price, the courts have noted that the buyer was inexperienced and unfamiliar with real estate values. See, e.g., Hokanson v. Oatman, 165 Mich. 512, 131 N.W. 111 (1911).
certain duties to a potential buyer to deal honestly and fairly with him and to communicate accurately the buyer's offer and the seller's price. Courts have held brokers liable for breach of these affirmative duties to buyers in cases where the broker has undertaken to act on behalf of the buyer, concealed or failed to communicate the buyer's offer, or made damaging misrepresentations to the buyer concerning the seller's price. These courts have based their conclusions that real estate brokers owe potential buyers certain obligations on either of two theories: (1) a fiduciary relationship exists between the broker and the buyer, or (2) public policy requires brokers to act in an honest and ethical manner toward potential buyers.

A. Fiduciary Relationship

The Supreme Courts of Florida and Connecticut have held

7. Quinn v. Phipps, 93 Fla. 805, 113 So. 419 (1927); cf. Van Woy v. Willis, 153 Fla. 189, 14 So. 2d 185 (1943) (broker's extensive involvement with buyer's transactions); Siler v. Gunn, 177 Ga. App. 325, 160 S.E. 2d 427 (1968) (dual agency). See also note 5 supra.


12. The Restatement defines a fiduciary as

a person having a duty, created by his undertaking to act primarily for the benefit of another in matters connected with his undertaking. Among the agent's fiduciary duties to the principal is the duty to account for profits arising out of the employment, the duty not to act as, or on account of, an adverse party without the principal's consent, the duty not to compete with the principal on his own account or for another in matters relating to the subject matter of the agency, and the duty to deal fairly with the principal in all transactions between them.

Restatement (Second) of Agency § 13a (1958). Bogert gives a similar definition of the duties of a fiduciary:

[Fiduciaries] must employ the principal's property for his benefit . . . . They are held to the highest amount of good faith, are required to exclude all selfish interest, are prohibited from putting themselves in positions where personal interest and representative interest will conflict, and must, in any direct dealing
real estate brokers liable for affirmative misrepresentations and for failure to communicate the buyer's offer by concluding that a fiduciary relationship exists between the broker and a potential buyer.\footnote{13} In \textit{Quinn v. Phipps},\footnote{14} the Florida court found that the broker's fiduciary duties arose from the buyer's reliance on the broker's oral agreement to communicate the buyer's offer and to negotiate with the seller on the buyer's behalf. The court reasoned that a real estate broker invites public confidence,\footnote{15} and that a fiduciary relationship should be found wherever influence is acquired and abused or confidence is reposed and betrayed.\footnote{16} The court rejected the broker's argument that since he had been employed by the seller, he could not at the same time have been an agent for the buyer. The court asserted that even if the broker had been the seller's agent, his exclusive contract to sell the property would not have conflicted with his agreement to submit the buyer's offer.\footnote{17} By concealing the buyer's $50,000 offer and purchasing the property for himself for $45,000,\footnote{18} the broker breached a fiduciary duty to the buyer. The court accordingly upheld a constructive trust on the land for the buyer's benefit.\footnote{19}

In a later case, \textit{Van Woy v. Willis},\footnote{20} the Florida court relied on \textit{Quinn}'s broad definition of a fiduciary relationship to find that

\begin{footnotes}
\item[14] 93 Fla. 805, 113 So. 419 (1927).
\item[15] 93 Fla. at 815, 113 So. at 422.
\item[16] \textit{Id.} at 808-12, 113 So. at 420-21. The court further stated that "[t]he origin of the confidence is immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies upon another." \textit{Id.} at 809-10, 113 So. at 421 (citations omitted).
\item[17] 93 Fla. at 820, 113 So. at 424. The court further stated that "[i]f there were reasons known to [the broker] why he could not carry out his agreement with [the buyer], it was his duty to fully disclose such reasons to [the buyer]." \textit{Id.} at 820-21, 113 So. at 424.
\item[18] \textit{Id.} at 811-12, 113 So. at 421.
\item[19] \textit{Id.} at 828, 113 So. at 427.
\item[20] 153 Fla. 189, 14 So. 2d 185 (1943).
\end{footnotes}
the broker owed the buyer certain duties which were fiduciary in nature,\(^\text{21}\) despite the fact that he was not the buyer's agent.\(^\text{22}\) The broker in Van Woy had falsely represented to the buyer that he was the seller's exclusive agent. Then, after misrepresenting that the property could not be purchased for less than $75,000,\(^\text{23}\) the broker used the buyer's money to purchase the property for himself for $37,500 and resold it to the buyer for $75,000.\(^\text{24}\) The court found that the broker's duties to the buyer arose from the broker's extensive involvement in helping the buyer purchase the property.\(^\text{25}\)

In *Harper v. Adametz*,\(^\text{26}\) the Connecticut Supreme Court found a fiduciary relationship between the broker and the buyer\(^\text{27}\) even though the broker had clearly been employed by the seller.\(^\text{28}\) The broker had fraudulently misrepresented the seller's minimum price and failed to communicate the buyer's offer. After purchasing the property for himself, the broker resold a small part of the property to the buyer, telling him that the seller had decided to retain the balance of the property in his family.\(^\text{29}\) Although the broker was not the buyer's agent, the court concluded that the buyer had a right to assume that the broker would both "deal honestly with him and be faithful to his principal [the seller]."\(^\text{30}\) The court held that the broker's conduct had been fraudulent and that the broker had breached the fiduciary duties

\(^{21}\) *Id.* at 199-203, 14 So. 2d at 190-192.  
The Van Woy court discussed various authorities and cases concerning the obligations on the broker that result from agency and fiduciary relationships. After reviewing the broker's dealings with the buyer, the court concluded that even "if [the broker] was not the agent of the [buyer] in these several transactions, certainly he was due her certain duties and obligations, arising out of the relationship then existing between them." *Id.* at 203, 14 So. 2d at 192. The court did not, however, expressly find a fiduciary relationship between the broker and the buyer.  

\(^{22}\) *Id.* at 198-99, 14 So. 2d at 190.  
\(^{23}\) *Id.* at 191, 14 So. 2d at 186.  
\(^{24}\) *Id.* at 195-96, 14 So. 2d at 188-89.  
\(^{25}\) The broker accepted the buyer's check in downpayment on the property, represented her at the closing, and assisted her in obtaining and refinancing a loan for the purchase of the property. *Id.* at 203, 14 So. 2d at 192.  
\(^{26}\) 142 Conn. 218, 113 A.2d 136 (1955).  
\(^{27}\) The *Harper* court stated:  
[El]quity 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.  

*Id.* at 225, 113 A.2d at 139 (citations omitted).  

\(^{28}\) *Id.* at 221-22, 113 A.2d at 138.  
\(^{29}\) *Id.* at 220-23, 113 A.2d at 137-38.  
\(^{30}\) *Id.* at 224, 113 A.2d at 139.
he owed to the buyer. Therefore, the court upheld a constructive trust on the "retained" property in favor of the buyer.

In these three cases, the brokers had dealt dishonestly with prospective purchasers by making significant misrepresentations and by concealing the purchasers' offers. The courts in each of these cases, however, had little evidence upon which to base a finding of a fiduciary relationship between the broker and buyer. In Quinn, the broker's agreement merely to communicate the buyer's offer and to negotiate with the seller on the buyer's behalf was held to be sufficient grounds for finding a fiduciary relationship. The court in Van Woy found that the broker's extensive involvement in helping the buyer purchase the property imposed on him affirmative obligations to the buyer. In Harper, the court found a fiduciary relationship between the broker and the buyer despite the absence of even these tenuous bases. Thus, it appears that the courts in all three cases strained to find fiduciary relationships upon which to hold the dishonest brokers accountable to the buyers. The facts in Quinn and Van Woy apparently did not rise to the level of actionable fraud. In Harper, however, although it had concluded that the broker's actions were fraudulent, the court further found a breach of a fiduciary relationship. Apparently as the result of the brokers' extremely unethical and

31. Id. at 224-26, 113 A.2d at 139. A vigorous dissent asserted that the broker had no duties to refrain from buying the property himself or to disclose to the buyer that he had bought the property, inasmuch as the broker was admittedly not the buyer's agent and the facts did not support the existence of any confidential relationship between the parties. The dissent further rejected the majority's conclusion that the buyer had been defrauded since the buyer had not sustained any actual damage. Id. at 226-28, 113 A.2d at 140-41.

32. Id. at 224-26, 113 A.2d at 139.

It has been suggested that the Connecticut court strained in Harper to find a fiduciary relationship between the broker and the buyer in order to impose a constructive trust. See 35 Bosr. U.L. Rev. 604, 605-06 (1955). It appears that the Harper court had little evidence from which to find a fiduciary relationship and that the court failed to consider the conflicts and problems resulting from such a finding. The court did not, however, have to find a fiduciary relationship in order to impose a constructive trust for the benefit of the purchaser since it had already concluded that the broker had defrauded the buyer. 142 Conn. at 223-24, 113 A.2d at 138-39.

A constructive trust is a remedy devised for the purpose of furthering justice and frustrating fraud. Fraud in this context includes all conduct which is "unfair, unconscionable, and unjust." Whenever equity finds a wrongful retention of property, it will give relief, whether the type of injustice is new or old. The court does not restrict itself by naming all the specific forms of inequitable holding which will move it, but rather reserves complete liberty to apply this remedy to whatever knavery human ingenuity can invent.

Bogert § 471 (footnotes omitted).

33. See note 32 supra.
dishonest conduct, the Florida and Connecticut courts were persuaded to find the broker-buyer relationships in these cases were fiduciary in nature.34

B. Public Policy

In cases with facts similar to the three cases discussed above, the Supreme Courts of Florida, California, and Louisiana concluded that although a fiduciary relationship did not exist between the broker and buyer, public policy, as expressed in the state statutes, requires brokers to act in an honest and ethical manner toward buyers.35 These courts found that brokers owe duties to potential buyers as members of the public because of the status given to, and responsibilities imposed on, licensed real estate brokers by the state statutes. Affirmative misrepresentation and a failure to communicate the buyer’s offer were held to constitute a breach of the broker’s statutory duty to deal fairly and honestly with prospective purchasers.

In Zichlin v. Dill,36 the broker allegedly had falsely told the buyer that the seller’s minimum price was $5,500. The broker then made a $1,000 secret profit by purchasing the property for himself with the buyer’s money and then reselling it to the buyer.37 The Supreme Court of Florida concluded that a real estate broker is an exception to the general rule that an agent is responsible only to his principal, and reversed the lower court’s dismissal of the complaint. The court noted that a real estate broker in Florida enjoys statutory privileges and responsibilities, citing a Florida statute that requires applicants for a brokerage license to be honest, trustworthy, of good character, and fair.38 In

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35. Cases cited note 11 supra.
37. Id. at 97, 25 So. 2d at 4. Furthermore, “[t]he broker induced [the buyer] not to engage an attorney to represent her in closing the transaction saying he would attend to all details and record the deed.” Two weeks after the closing, the buyer learned that she had taken a deed to the property from the broker, not the original seller. Id.
38. Fla. Stat. Ann. §§ 475.01 to .49 (1941), as amended, Fla. Stat. Ann. §§ 475.01 to .49 (Supp. 1975-76). The Zichlin court quoted § 475.17 from the 1941 Florida Statutes: “All applicants who are natural persons shall be competent, honest, truthful, trustworthy, of good character, and bear a reputation for fair dealing . . . .” That section now reads:

An applicant for registration . . . shall be required to make it appear . . . [that he] intends [to be] . . . honest, truthful, trustworthy, of good character, and that he bears a good reputation for fair dealing. An applicant . . . shall be required to make it appear that he is competent and qualified to make real estate transactions and conduct negotiations therefor with safety to investors
the court's view, the state law "granted [brokers] a form of monopoly, and in doing so the old rule of caveat emptor is cast aside. Those dealing with a licensed broker may naturally assume that he possesses the requisites of an honest, ethical man."39

In a California case, Ward v. Taggart,40 the real estate broker misrepresented to a prospective buyer both the seller's minimum price and that the broker was the seller's agent. The broker used the buyer's money to purchase the property himself; then he resold it to the buyer at a profit.41 The court held that, despite the absence of a fiduciary or agency relationship between the broker and the buyer, public policy would not allow the broker to fraudulently take advantage of a potential buyer.42 The court, relying on certain California statutes concerning real estate brokers43 and fraudulent conduct,44 stated that a licensed real estate broker has a "duty to be honest and truthful in his dealings."45 Under California law, an applicant for a brokerage license may be required to submit proof of his honesty and good reputation.46 Furthermore, a broker's license may be revoked if he is guilty of "[m]aking any false promises of a character likely to influence, persuade, or induce."47

The broker in Amato v. Latter & Blum, Inc.48 failed to communicate to the seller the plaintiff-buyer's offer of $9,500; then the seller accepted an offer of $9,250. Consequently, the plaintiff, needing the property for the expansion of his business, could not

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40. 39. 157 Fla. at 98, 25 So. 2d at 4-5.
41. 51 Cal. 2d 736, 336 P.2d 534 (1959).
42. Id. at 739-40, 336 P.2d at 536.
43. 41. Id. at 741, 336 P.2d at 537.
44. CAL. BUS. & PROF. CODE §§ 10150, 10176 (West 1964), as amended, CAL. BUS. & PROF. CODE §§ 10150, 10176 (West Supp. 1975); see note 46 infra.
45. 44. "No one can take advantage of his own wrong." CAL. CIV. CODE § 3517 (West 1970). "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." Id. § 2224.
46. 45. 51 Cal. 2d at 741, 336 P.2d at 537.
47. 46. The Ward court relied on CAL. BUS. & PROF. CODE § 10150 (West 1964), which required that an applicant for a brokerage license submit with his application two recommendations certifying that the applicant was "honest, truthful and of good reputation." Section 10150 has since been amended, deleting that requirement for applicants. However, § 10152 has continued to require that, at the request of the commissioner, an applicant must submit proof of his "honesty, truthfulness and good reputation." CAL. BUS. & PROF. CODE § 10152 (West Supp. 1975).
48. 47. CAL. BUS. & PROF. CODE § 10176(a), (b) (West Supp. 1975).
acquire the property from the new owner for less than $25,000.\textsuperscript{49} The Louisiana Supreme Court, reversing the trial court’s dismissal of the complaint, stated that under Louisiana statutes\textsuperscript{50} brokers owe legal duties to buyers as members of the public.\textsuperscript{51} These statutes require the State Real Estate Board to inquire into the honesty, truthfulness, and reputation of all applicants for brokerage licenses,\textsuperscript{52} and further required the broker to “honestly conduct his business and pay all damages which may result from his actions as a real estate broker or from the actions of his salesmen.”\textsuperscript{53}

The causes of action sustained in both \textit{Zichlin}\textsuperscript{54} and \textit{Ward} were based on allegations that the brokers had misrepresented the sellers’ prices, concealed the buyers’ offers, and used the buyers’ money to make secret profits for themselves. The court in \textit{Amato}, however, held that a broker may be liable to a buyer for damages resulting from a mere failure to convey the buyer’s offer, even though the broker’s conduct in that case did not appear to be fraudulent. Thus, a broker’s implied statutory duty to act in an honest and ethical manner may extend beyond liability for affirmative misrepresentations and concealment of a buyer’s offer to entail liability for a failure to accurately and immediately convey a buyer’s offer, regardless of the buyer’s ability to prove fraud.

\begin{itemize}
  \item \textsuperscript{49} \textit{Id.} at 539-40, 79 So. 2d at 874.
  \item \textsuperscript{50} \textit{LA. REV. STAT. ANN.} §§ 37:1431-59 (1974).
  \item \textsuperscript{51} 227 La. at 540-43, 79 So. 2d at 874-76.
  \item \textsuperscript{52} \textit{LA. REV. STAT. ANN.} §§ 37:1438(3), 1438.1 (1974).
  \item \textsuperscript{53} \textit{Id.} § 37:1447.
\end{itemize}

The \textit{Amato} court quoted further from the Louisiana statutes to justify their decision, 227 La. at 541, 79 So. 2d at 875:

\begin{quote}
Anyone who is injured or damaged by the broker or his salesmen by any wrongful act done in the furtherance of such business or by any fraud or misrepresentation by the salesmen or broker may sue for the recovery of the damage . . . . [\textit{LA. REV. STAT. ANN.} § 37:1447 (1974)]
\end{quote}

The dissent in \textit{Amato} argued that although these statutes were enacted by the Louisiana legislature “in the interest and for the protection of the public,” the statutes, particularly § 37:1447, were only intended to protect those members of the general public to whom the agent or broker owed a duty either pursuant to a contract or by operation of law. The broker in \textit{Amato} did not owe any duties to the buyer, for “[n]o language is contained in the statutes indicating an intention to impose new or additional duties on real estate agents or to create relationships between them and other parties not theretofore in effect.” 227 La. at 544-45, 79 So. 2d at 876 (dissenting opinion). For a casenote supporting the dissent on this point see \textit{69 HARV. L. REV.} 559 (1956).

\begin{itemize}
  \item \textsuperscript{54} In \textit{Zichlin}, the Supreme Court of Florida reversed a lower court dismissal of the plaintiff’s complaint. 157 Fla. 96, 25 So. 2d 4 (1946).
\end{itemize}
C. Traditional View

Many courts have not yet departed from the traditional view of the broker-buyer relationship that the broker owes no fiduciary duty to a potential buyer. Some of these courts have refused to extend the broker's liability to potential buyers in cases with facts similar to those discussed above. For example, in Ries v. Rome, the Supreme Judicial Court of Massachusetts adhered to the traditional view. The broker misrepresented to the buyer the status of certain property, took advantage of confidential information the buyer had communicated to him, and sold the property to an associated broker. The court denied relief to the would-be buyers and held that the brokers, as agents of the sellers, owed no fiduciary duties to the buyers.

In Klotz v. Fauber, the broker failed to transmit the buyer's offer to the seller and purchased the land for himself. The Supreme Court of Virginia refused to hold the broker liable. The court cited Quinn, Harper, Amato, and Ward for the limited rule that a broker is liable to a buyer for failure to communicate the buyer's offer only when the broker purchases the property at a price equal to or less than the price the prospective buyer agreed to pay. Since the plaintiff-buyer in Klotz had not alleged that his offer equaled or exceeded the price the broker paid, the court affirmed the dismissal of his complaint. Apparently, the Virginia court concurred in the Quinn, Harper, Amato, and Ward holdings but, unwilling to wholly abandon the rule of caveat emptor by further extensions of a broker's liability to purchasers, the court distinguished the case at bar on its facts.

Despite reluctance by some courts to depart from the traditional view, however, it appears that prior to Funk v. Tifft courts...
have been increasingly inclined to extend a real estate broker's liability to buyers. Based on either a fiduciary duty or a duty implied from statutes pertaining to brokers, some courts have imposed upon real estate brokers a duty to deal honestly and fairly with prospective purchasers. Liability has been imposed in cases where the broker has made affirmative misrepresentations to the prospective buyer or has concealed or failed to communicate the buyer's offer to the seller. Funk v. Tifft is a further extension of a real estate broker's liability to prospective purchasers.

II. FUNK v. TIFFT

The United States Court of Appeals for the Ninth Circuit held in Funk v. Tifft that the broker, Tifft, had breached his fiduciary duties of fairness and honesty when he outbid the Funks without notice to them before the seller had acted on their offer. In so holding, the court followed the modern trend of imposing upon real estate brokers a duty of fairness and honesty in their dealings with prospective buyers.66

The Ninth Circuit relied primarily on the case of Quinn v. Phipps,67 wherein the Supreme Court of Florida imposed fiduciary duties on a broker who had agreed to communicate a buyer's offer and had further agreed to negotiate with the seller on the buyer's behalf. The court in the present case viewed the Quinn decision as controlling, stating that Quinn had held that when a broker undertakes to act as an intermediary between a seller and a prospective buyer and then purchases the property himself without notice to the buyer, the broker becomes a constructive trustee for the benefit of the buyer.68

66. 515 F.2d at 25 (9th Cir. 1975).
67. 93 Fla. 805, 113 So. 419 (1927). Discussed notes 14-19 and accompanying text supra.
68. 515 F.2d at 25.
The court also relied upon the trial testimony of two Idaho real estate brokers that "a realtor who acts as an intermediary between a seller and a prospective buyer has a duty not to compete secretly with and outbid the prospective buyer when that buyer has made an offer on a piece of property and signed an earnest-money purchase agreement." Furthermore, the court found that requiring brokers to make adequate disclosure to prospective buyers was consistent with the "standards of the Idaho real estate profession" and analogous to the disclosure requirements of various "statutory enactments designed to protect the unknowing individual from the professional." The court concluded that imposing an obligation of disclosure on a broker who wishes to compete with prospective purchasers benefits the seller as well as the buyer. If a buyer is notified of the broker's competing offer, he may choose to better the broker's offer.

Having found that Tifft had breached his fiduciary duty to the Funks, the court reversed the trial court's dismissal and directed the imposition of a constructive trust in favor of the Funks.

In contrast, the dissenting opinion denied the existence of a fiduciary relationship between Tifft and the Funks, and stated that neither precedent nor the findings of the district court supported the court's finding of a fiduciary duty or breach. Decisions from other jurisdictions were cited for the proposition that "a broker for the seller can, with the seller's knowledge, outbid prospective buyers . . . ." The cases relied upon by the majority were distinguished on the ground that they involved situations in which the broker was the buyer's agent, made affirmative

69. Id.
71. 515 F.2d at 25.
72. 515 F.2d at 26. The court stated that:
[T]he Funks [had] established the essential elements required for the imposition of a constructive trust—the existence of a fiduciary relationship, its breach, and the wrongful acquisition of the land by the breacher.
73. 515 F.2d at 26. The court stated that:
Id. (citation omitted). It is not necessary, however, to prove the existence of a fiduciary relationship in order to impose a constructive trust. See note 32 supra.
misrepresentations, or underbid the prospective buyer’s offer for the property. The dissent concluded that

[where the broker is not the agent of the prospective buyer, where he acts with the knowledge of his principal, the seller, where there is no misuse of confidential information, where there is no fraudulent misrepresentation, and where the broker bids more than any of the prospective buyers, there should be no liability on the part of the broker if the seller chooses to accept his offer without asking for another round of bids.]

III. Analysis

The Ninth Circuit’s decision in Funk v. Tifft significantly extends real estate brokers’ duties to potential buyers. As the dissent pointed out, this is the first decision to hold a broker liable for a breach of affirmative duties owing to a buyer in which the broker was not the buyer’s agent, did not conceal or fail to communicate the buyer’s offer, and did not make fraudulent or deceitful misrepresentations.

The case of Quinn v. Phipps, upon which the majority placed chief reliance, is distinguishable both on its facts and on its reasoning. The broker in Quinn had concealed the buyer’s offer and purchased the property for himself for less than the buyer’s bid after he had agreed not only to convey the offer, but also to negotiate with the seller on the buyer’s behalf. The broker in the present case neither concealed the buyer’s offer nor purchased the property for a price lower than the buyer’s bid. In addition, the Quinn court in dictum indicated that if the broker and buyer “had been dealing at arm’s length,” then the broker “might not have been bound by his agreement to purchase” for the buyer. In the present case, the broker had dealt at arm’s length with several prospective purchasers, including the Funks.

The Ninth Circuit also relied upon two other distinguishable cases: Mitchell v. Allison and Stephenson v. Golden. The brokers in these two cases had been employed by the buyers, not by the sellers. In contrast, an agency relationship between the

75. Id. at 28.
76. 93 Fla. 805, 113 So. 419 (1927). Discussed notes 14-19 and accompanying text supra.
77. 93 Fla. at 816-17, 113 So. at 423.
78. 515 F.2d at 28 (dissenting opinion).
79. See note 67 supra.
80. 54 N.M. 56, 213 P.2d 231 (1949).
broker and buyer did not exist in the present case. Tifft had been employed by the seller and had disclosed to the Funks his agency relationship with the seller. The Ninth Circuit further cited Ward v. Taggart. In Ward, however, the broker had made fraudulent misrepresentations to the buyer. No such misrepresentations were made in Funk v. Tifft.

Thus, the Ninth Circuit's decision is not supported on its facts by the cases cited in the opinion. Further difficulties with the decision result from the court's finding of a fiduciary relationship between the parties and from the court's failure to place necessary limitations on the scope of the broker's duties to the buyer.

A. Source of the Broker's Duty: Fiduciary Relationship vs. Public Policy

As discussed above, the modern courts that have imposed duties upon real estate brokers to prospective purchasers have derived those duties either from a fiduciary relationship between the broker and buyer or from public policy as expressed in particular state statutes. The Ninth Circuit concluded that a fiduciary relationship existed between Tifft and the Funks and held Tifft liable for breach of his fiduciary duties to the Funks. The court did not, however, articulate the basis for its conclusion that a fiduciary relationship exists between a broker and a buyer. The court simply asserted that a broker has a duty to be fair and honest with a buyer and then appeared to derive this duty from a fiduciary relationship between the parties.

The court found a fiduciary relationship between Tifft and the Funks despite the fact that Tifft had been the seller's agent prior to and during the time that he had dealt with the Funks. As a result of his fiduciary relationship with the seller, Tifft's duties to the seller included a duty to refrain from acting ad-

82. 515 F.2d at 28 (dissenting opinion).
83. 51 Cal. 2d 736, 336 P.2d 534 (1959).
84. Note 10 and accompanying text supra.
85. Note 11 and accompanying text supra.
86. It is not clear from the opinion whether the court intended to impose upon the broker all the duties that evolve from a bona fide fiduciary relationship. The court held that "Tifft did breach the fiduciary duties he owed the Funks." However, the court's next statement appears to partially retract its finding of a fiduciary relationship: "When a real estate broker acts as an intermediary between a seller and a prospective buyer, he is under a duty to deal fairly and honestly with the prospective buyer." 515 F.2d at 26.
87. See notes 3, 12 supra.
versely to the seller’s interests in any manner, a duty to disclose all information that might have affected the seller’s position, and a “duty to act aggressively and actively in furthering the [seller’s] interests.” It is unrealistic to expect the broker in a real estate transaction to be able to fulfill these fiduciary duties of utmost loyalty, care, and complete disclosure to both the buyer and the seller. The irreconcilable conflicts which would necessarily arise were a broker required to act in a fiduciary capacity to two adverse parties would be further complicated if more than one potential buyer chose to bid on the property. On the other hand, imposing a more limited duty on a real estate broker to deal honestly and fairly with potential buyers would not conflict with his agency relationship to the seller.

The Ninth Circuit did not discuss the Idaho Code or find that public policy imposed affirmative duties on licensed real estate brokers to be honest and fair in their dealings. Those states which have held that brokers owe a duty of fairness and honesty to buyers on grounds of public policy have relied on specific statutory provisions requiring brokers or applicants for brokerage licenses to be ethical, trustworthy, and of good character. The Idaho Code does not include such express provisions. The Code does provide, however, that a broker may lose his license for any “conduct . . . which constitutes dishonest or dishonorable dealings . . . .” The court could have concluded that, by virtue of the Idaho statutes that license and regulate real estate brokers, a broker is “granted a form of monopoly” and a status which impose an ethical duty upon him to deal honestly and fairly with all members of the public. In fact, had the court based its decision

90. In Funk, several prospective buyers bid on the property. 515 F.2d at 28 (dissenting opinion).
91. One commentator has suggested that courts should “recognize the fiduciary nature of the relationship between broker and buyer.” He finds the public policy theory to be an undesirably “vague and guideless standard,” while asserting that “[u]nder the fiduciary approach the judiciary could examine new issues arising from broker-buyer relationships in the light of the established and defined duties of a fiduciary . . . .” He admits that finding a fiduciary relationship between the broker and buyer conflicts with and impairs the broker’s agency contract with the seller, but fails to give a satisfactory solution for those inevitable conflicts. Comment, A Reexamination of the Real Estate Broker-Buyer-Seller Relationship, 18 WAYNE L. REV. 1343, 1347-53 (1972).
92. See notes 35-53 and accompanying text supra.
94. Id. § 54-2040(k).
on public policy rather than on a fiduciary relationship, it could have avoided imposing the irreconcilable conflict of interest that arises when a broker is required to act in a fiduciary capacity to both adverse parties—buyer and seller—in a transaction.

B. Scope of the Broker's Duty: Prohibited from Competing vs. Required to Disclose

It is clear that a real estate broker who has been hired by the seller cannot act in a fiduciary capacity toward prospective buyers. If the broker's obligations to prospective buyers are restricted to a duty to deal fairly and honestly, what does that duty require of the broker when he desires to submit a competing bid on the property? Unfortunately, the majority opinion does not clearly define or limit the broker's responsibilities in such a situation. Initially, the court states that the principal issue presented by the case is whether a broker "owes a fiduciary duty to a prospective buyer not to purchase a tract of land for himself while his prospective buyer's offer to buy that land is outstanding."\(^96\) The majority goes on, however, to state that a broker's fiduciary duties of fairness and honesty are breached "when the real estate agent outbids the prospective buyer without notice to him before the seller has acted on his offer."\(^97\) Then, the majority asserts that the court is "merely giving force to the standards of the Idaho real estate profession,"\(^98\) but fails to clarify whether the standards of the profession require that a broker not bid at all on property for the purchase of which other offers are outstanding or whether a broker may compete with other prospective purchasers as long as he makes "adequate disclosures." At best, then, the court leaves confused the scope of a broker's duties when he wishes to compete with a prospective purchaser.

A broker's obligation to deal honestly and fairly with potential buyers should not include an absolute duty to refrain from submitting his own competing offer for real estate. The seller is entitled to the best price possible for his property, no matter who offers that price; indeed, when the broker is the seller's agent, he has a fiduciary duty to aggressively promote the seller's interests by obtaining for the seller the highest bid on the property. Furthermore, since many real estate brokers are also in the business

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96. 515 F.2d at 24.
97. Id. at 25 (emphasis added).
98. Id. at 25 n.2.
of investing in real estate, they should be allowed to compete freely with others for property.99

There are, however, important reasons to impose a duty of disclosure upon brokers who compete with prospective purchasers to buy land. Inasmuch as a real estate broker is privy to confidential information—the price and terms of other prospective buyers' offers—he has an unfair advantage in competing with those buyers. When a broker conveys a potential buyer's offer, the broker should then be required to disclose to that buyer the price and terms of any prior or subsequent offers he makes on the property.100 Article 12 of the Code of Ethics, published by the National Association of Realtors, is consistent with this view:

The REALTOR shall not undertake to provide professional services concerning a property or its value where he has a present or contemplated interest unless such interest is specifically disclosed to all affected parties.101

Although he cannot reasonably be expected to owe broad fiduciary duties to both adverse parties to a transaction, when a broker undertakes to communicate a prospective buyer's offer to a seller, it is not unduly burdensome to require him to be responsible for the duties of fairness and honesty that arise in connection with that undertaking.102 Having agreed to convey the buyer's offer, the broker's duty of fairness and honesty should include a responsibility to fulfill the buyer's reasonable expectation that the broker will not take unfair advantage of that confi-

99. The actual purchaser of the property in Funk was a corporation. Shortly after Funk had submitted his offer, another prospective buyer, Richard Kahn, was shown the property by a salesman from the Tifft Agency. Mr. Kahn persuaded Tifft and his salesman to form a corporation for the purpose of purchasing the property. Kahn contributed $4,200 of the downpayment and received 51% of the stock of the corporation. Tifft and his salesman contributed their commission and received 24.5% of the corporate stock each. At Kahn's request, Tifft telephoned the seller for her approval of the terms of their offer. Kahn testified that he would have purchased the property alone but was interested in having Tifft and his associate participate in the purchase in order to facilitate the subdivision and resale of the property. Record, vol. II, at 263-82, Funk v. Tifft, 515 F.2d 25 (9th Cir. 1975).

100. See also Conant, Duties of Disclosure of Corporate Insiders Who Purchase Shares, 46 CORNELL L.Q. 53 (1960). The Securities and Exchange Commission and a growing number of state courts have held that, because of his superior access to information, a purchasing corporate insider has an affirmative duty to make disclosures to the selling shareholder. Id. at 72, 74. The corporate insider is not prevented from purchasing outstanding shares, but he must make appropriate disclosures. Similarly, the real estate broker should not be prevented from purchasing property, but should be required to make appropriate disclosures. Cf. 515 F.2d at 25 n.2.


idential information. A broker should be obligated not only to communicate the buyer’s offer faithfully and accurately, but also to disclose to all potential buyers with whom he has dealt his interest in, or his competing bid for, the property. As the court’s opinion in the present case notes, requiring the broker to make such disclosures to the buyer also benefits the seller by helping him obtain the best price for his property.\textsuperscript{103} Thus, a disclosure requirement not only protects the interests of both the buyer and the seller, but also allows the broker and the buyer to compete on the same basis for the purchase of the property.

IV. Conclusion

The Ninth Circuit’s decision in the present case is a reasonable extension of the duties imposed upon real estate brokers in their dealings with buyers if it is interpreted as requiring a real estate broker to disclose to those potential buyers his interest in the property and any competing bids he submits on the property. Such a disclosure requirement is beneficial to both the buyer and the seller. It is submitted, however, that the Funk \textit{v. Tifft} holding should not be interpreted broadly to impose upon the broker in his dealings with potential buyers the fiduciary duties of utmost loyalty, care, and complete disclosure that are traditionally associated only with true agency relationships. An imposition of such fiduciary obligations on the broker would conflict with his agency relationship with the seller and would prevent the broker from competing to purchase the property.

\textsuperscript{103} 515 F.2d at 25.