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The Selling Real Estate Broker and the Purchaser: Assessing the Relationship

I. INTRODUCTION

Residential real property sellers have traditionally employed licensed real estate brokers¹ to find suitable purchasers for their properties. In a typical real estate transaction, the broker and the seller enter into an agency relationship through written agreement, thus creating a fiduciary relationship between the seller, as principal, and the broker, as agent. On the basis of this fiduciary relationship, the broker is required to act with utmost good faith toward the seller in protecting the seller's best interests.² While the broker's duty to the seller is clearly recognized, an increasing number of courts have also recognized a legal duty owed by the broker to the purchaser.³

The uncertainty of the exact nature of the relationship between the selling broker and the purchaser has been confusing to those in the real estate industry as well as to the general public. Understandably, the broker is uncertain as to his duties because of the legal predicament in which he finds himself. The broker is obviously aware that as the seller's agent he owes a fiduciary duty to the seller. In addition, the broker is becoming

1. "Broker," as used in this Comment, refers to a real estate broker, salesperson or licensee.

2. See, e.g., *M.S.R., Inc. v. Lish*, 527 P.2d 912, 914 (Colo. Ct. App. 1974) ("Under both the common law and applicable statutes, a real estate agent, in all dealings affecting the subject matter of his agency, has a fiduciary duty to act with the utmost faith and loyalty in behalf of his principal."). For a more detailed discussion of this good faith requirement, see *infra* notes 13-22 and accompanying text.

3. See, e.g., *Funk v. Tifft*, 515 F.2d 23, 25 (9th Cir. 1975) (broker who outbid buyer for property breached fiduciary duty to deal fairly with buyer); *Bevins v. Ballard*, 655 P.2d 757, 761-63 (Alaska 1982) (buyer has cause of action against broker for innocent misrepresentation communicated by broker); *Easton v. Strassburger*, 199 Cal. Rptr. 383, 390 (Ct. App. 1984) (broker has affirmative duty to investigate property and disclose material defects to buyer); *Zichlin v. Dill*, 25 So. 2d 4, 5 (Fla. 1946) (broker owes duty to buyer to deal fairly and ethically); *Miles v. McSwegin*, 388 N.E.2d 1367, 1369-70 (Ohio 1979) (broker owes duty to buyer to correct prior, misleading representations concerning condition of property); *Wegg v. Henry Broderick, Inc.*, 557 P.2d 861, 863-64 (Wash. Ct. App. 1976) (holding broker liable to buyer for failure to advise buyer of seller's remedies under land sale contract in event of buyer's default).

aware of a duty he owes to the purchaser—a duty which remains unclear but appears to be expanding. Both the broker and the prospective purchaser need direction in understanding the precise nature of the broker's duties.

This comment analyzes this broker/purchaser relationship. Part II reviews existing agency law applicable to a selling broker and explains how this law is reflected in a broker's relationship with a purchaser. Part II also discusses possible problem areas arising out of the establishment of an agency relationship between the selling broker and the purchaser, including the need to rely on the court to find an agency relationship, dual agency, and subagency in Multiple Listing Service transactions. Part III reviews the duties owed by the selling broker to the purchaser absent the establishment of an agency relationship. In conclusion, Part IV proposes not only that the broker be required to disclose to prospective purchasers that he is in a fiduciary relationship with the seller, but also that the broker be required to conduct a diligent inspection of the property and disclose any material defects to the purchaser.

II. AN AGENCY RELATIONSHIP?

A. *Elements of an Agency Relationship*

An agency relationship generally arises when (1) one party manifests its intention that another shall act on its behalf; (2) the other party consents to such relationship; and (3) the party for whom the other acts has the right to control the ultimate direction of the cooperative effort.⁴

The first element is the principal's manifestation of his intent that the agent act for him.⁵ In the typical agency relationship, one authorizes another to act on his behalf either by written or spoken words or by conduct through which another may reasonably believe that such authorization to act was given.⁶

The second element requires that the agent accept responsibility to act for the principal.⁷ No specific words are neces-

4. See RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

5. See *id.* § 15.

6. See *id.* § 26. Because the primary aspect is the principal's manifestation that the agent shall act in his behalf, what the principal actually intends is not important in deciding whether there is an agency relationship. *Id.* § 26 cmt. a. Silence may also be a manifestation of authorization. *Id.* § 26 cmt. d.

7. See *id.* § 15 cmt. c.

sary to find such an acceptance. If the principal communicates to the purported agent his desire that the agent act on his behalf, and the agent subsequently acts as requested without expressly accepting the responsibility, the principal may reasonably infer from these actions that the agent acted on the principal's behalf.⁸

The final element requires that the principal has the right to control the direction of the cooperative effort.⁹ Though the principal may exercise the right to control either before the agent acts, at the time the agent acts, or at both times, the principal need not exercise this right at all.¹⁰ To establish an agency relationship, the principal needs only to exhibit the right to control the ultimate direction of the cooperative effort, not a specific act. As a result, the principal may have no control over the actual physical acts of an agent.¹¹ As long as the agency agreement does not specify exactly how the agent is to perform, the principal may not interfere with the agent's actions which are customarily within the agent's control.¹²

B. The Agent's Powers and Duties

Once the principal/agent relationship has been established, the agent is authorized both to bind the principal to third parties and to alter the principal's relationships with these parties.¹³ However, these agency powers also give rise to agency duties. Because the agent is in a fiduciary relationship with the principal concerning those matters which fall within the agency's scope,¹⁴ the agent must act primarily for the principal's benefit as to such matters. These duties include making reasonable, diligent efforts to accomplish the agency

8. See *id.* § 15 cmt. b, illus. 3.

9. See *id.* § 14.

10. See *id.* § 14 cmt. a.

11. See *id.*

12. See *id.*

13. See *id.* § 12 cmt. a. In a real estate transaction, however, even the listing broker does not usually have the power to bind the seller by signing the contract of sale on behalf of the seller. See, e.g., *Holland v. Hannan*, 456 A.2d 807, 817 (D.C. 1983) (well-settled principle that broker cannot bind seller to contract of sale); *Carroll v. Action Enter., Inc.*, 292 N.W.2d 34, 36 (Neb. 1980) (broker has no authority to enter into binding contract of sale on behalf of owner).

14. See RESTATEMENT (SECOND) OF AGENCY § 13 (1958); see also *SNML Corp. v. Bank of N.C.*, 254 S.E.2d 274, 280 (N.C. Ct. App. 1979) ("An agent is a fiduciary concerning the matters within the scope of his agency.").

objectives;¹⁵ acting in accordance with the principal's reasonable instructions;¹⁶ exercising the standard of care and skill common to the locality for those matters within the agent's scope and using any special skill that the agent may possess;¹⁷ disclosing to the principal all material facts relating to agency matters that are within the agent's knowledge or which the agent may discover;¹⁸ accounting for funds received or spent in performing the agency's activities;¹⁹ abstaining from acting for one whose interests are adverse to the principal's;²⁰ avoiding competition with the principal for the agent's benefit or for a third party's benefit with respect to agency matters;²¹ and refraining from disclosing confidential information received from the principal regarding agency matters.²²

C. Application to the Selling Broker's Relationship with the Purchaser

Determining whether an agency relationship exists between a selling broker and a purchaser requires an application of the traditional agency elements.

1. Principal manifests intention that agent act on his behalf

First, an inquiry must be made as to whether the purchaser manifests an intent that the selling broker act on his behalf.

15. See RESTATEMENT (SECOND) OF AGENCY § 377 cmt. b (1958).

16. See *id.* § 385 cmt. a. Business custom determines what is reasonable. *Id.*

17. See *id.* § 379(1); see also *I. Cohen Sons, Inc. v. Dowd*, 84 P.2d 830, 831 (Colo. 1938) (agent who holds himself out as possessing special skills is liable for losses from failure to possess and exercise those skills); *Northern Pac. Ry. v. Minnesota Transfer Ry.*, 16 N.W.2d 894, 896 (Minn. 1944) (agent owes to principal the use of such skill required to accomplish the object of employment).

18. See RESTATEMENT (SECOND) OF AGENCY § 381 (1958); see also *MacGregor v. Florida Real Estate Comm'n*, 99 So. 2d 709, 712 (Fla. 1958) (duty to inform principal of all pertinent facts); *Santaniello v. Department of Professional Regulation*, 432 So. 2d 84, 85 (Fla. Dist. Ct. App. 1983) (duty to inform principal of all facts within agent's knowledge).

19. See RESTATEMENT (SECOND) OF AGENCY § 382 (1958).

20. See *id.* §§ 23, 24. An agent may act for a principal when his interests are adverse provided that the agent discloses the adverse aspect of the relationship to the principal. *Id.*

21. See *id.* § 387; see also *Ehringer v. Brookfield & Assocs.*, 415 So. 2d 774, 776 (Fla. Dist. Ct. App. 1982) (agent who furthers his own interests over those of the principal breaches his fiduciary duty); *Mitchell v. Allison*, 213 P.2d 231, 233-34 (N.M. 1949) (broker who purchases property for himself rather than his principal breaches his fiduciary duty).

22. See RESTATEMENT (SECOND) OF AGENCY § 395 (1958). Some matters require confidentiality even after the agency relationship has terminated. See *id.* § 396.

Typically, since no formal agency agreement exists between the selling broker and the purchaser, one must examine the activities of the selling broker and the purchaser to determine whether the required intent is actually present.

In a modern real estate transaction, numerous acts by the purchaser reasonably imply that the purchaser intended the selling broker to act on his behalf. In a typical transaction, the purchaser approaches the broker and either inquires about specific property or discusses generally with the broker the purchaser's desires and needs. The purchaser seeks the selling broker's assistance to acquire pertinent information regarding the specific property or to locate other property in which the purchaser may be interested. The purchaser relies on the selling broker's expertise not only to ascertain the fair market value of the property, but also to determine whether to include in the offer financing terms, inspection and repair procedures, and other contingencies. As a result of these communications, the purchaser reveals to the selling broker some of the most personal aspects of his financial condition and needs.

The purchaser subsequently authorizes the selling broker to deliver the offer to the seller on the purchaser's behalf. Once the seller accepts the offer, the purchaser often seeks and relies on the selling broker's experience regarding title examination, financing, inspections, and so forth. Thus, in the typical real estate transaction, the purchaser's actions reasonably permit one to infer that the selling broker is the purchaser's agent, acting on the purchaser's behalf.²³

2. *Agent consents to an agency relationship*

The next question is whether the selling broker's actions reasonably indicate to the purchaser that the broker is consenting to act on the purchaser's behalf. Whether such consent exists must be determined from existing circumstances.²⁴

23. See Molly M. Romero, Note, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*, 20 ARIZ. L. REV. 767, 772-73 (1978).

24. See, e.g., *Butler v. Colorado Int'l Pancakes, Inc.*, 510 P.2d 443, 445 (Colo. Ct. App. 1973) (franchisee held to be the franchisor's agent when the franchisor specifically instructed the franchisee to "buy back" the plaintiff's subfranchise and also instructed the franchisee to harass the plaintiff into selling); *Duffy v. Setchell*, 347 N.E.2d 218, 221 (Ill. App. Ct. 1976) (broker may be held to be the buyer's agent if the buyer requests the broker's assistance in obtaining a particular piece of property, even though the broker is paid nothing by the buyer and it is expected that he will receive a fee from the seller).

The selling broker usually suggests by his conduct that he has consented to act on the purchaser's behalf. In the typical transaction, the selling broker endeavors to determine the purchaser's wants and needs and attempts to match them with available property. In attempting to locate a property, the selling broker often uses a Multiple Listing Service (MLS).²⁵ Once a property is located in the MLS, the broker provides the purchaser with all the available, pertinent information outlined in the MLS. Next, the selling broker often advises the purchaser regarding the terms to include in his offer relating to conditions of title, financing, inspections and repairs, and so forth. At the purchaser's request, the selling broker then presents the offer to the listing broker²⁶ and the seller, individuals with whom the selling broker may be unacquainted. The selling broker then negotiates with the listing broker and the seller to establish terms under which the seller and purchaser may reach agreement. Once the parties enter into the purchase and sale agreement, the selling broker advises the purchaser of available financing, prevailing interest rates, reputable inspection companies, and other relevant information. In general, the selling broker's conduct leads the purchaser to believe that the broker is acting as the purchaser's representative.²⁷

3. *Principal controls the direction of the cooperative effort*

The final question in determining the existence of an agency relationship is whether the purchaser, as principal, has the

25. A multiple listing service is typically defined as an arrangement between independent real estate brokers in a particular locale whereby each member broker is authorized to sell property exclusively listed by any other member broker.

By agreement between the member brokers, all pertinent listings with the various members are registered with a central exchange office or bureau and thereafter disseminated to the other member brokers for their information and action. When a sale of a listed property [sic] is introduced by any member broker, other than the listing broker, the sales commission is divided between the selling broker, the listing broker, and the central registration office.

Frisell v. Newman, 429 P.2d 864, 868 (Wash. 1967).

26. A listing broker's "role is merely to procure an executed listing agreement and submit it to the MLS for distribution." D. BARLOW BURKE, JR., *LAW OF REAL ESTATE BROKERS* § 1.15, at 1:16 (2d ed. 1992). Thus, the listing broker has contracted with the seller as an agent. In contrast, a selling broker in this context is "the broker who obtains the offer to purchase from the buyer." Romero, *supra* note 23, 771 n.23.

27. See generally BURKE, *supra* note 26, § 1.5 (discussing the legal mechanics of the MLS).

right to control the ultimate direction of the cooperative effort. Because the control need only relate to the general course or direction of the agency, the purchaser need not supervise or direct the specific steps in the process. Moreover, the purchaser is not expected to direct the broker's actions in detail because a broker typically has greater knowledge than the purchaser over the specific aspects of the real estate transaction.

In a modern-day real estate transaction, several factors indicate that the purchaser controls the general direction of the agency relationship. First, the purchaser is the party that decides which property to investigate. Second, having examined the property, the purchaser then decides whether to make an offer, and if so, the offer's terms. After an offer is made, the purchaser has the right to withdraw the offer before the seller accepts it subject to certain limitations.²⁸ Finally, the purchaser may accept or reject any counteroffer. Therefore, the purchaser exerts his right to control the general direction of the relationship by exercising his power to approve or disapprove any agreements made during the negotiation process. Throughout the typical broker/purchaser relationship, the purchaser sufficiently controls the direction of the relationship with the selling broker to establish an agency relationship.

*D. Problems Arising from an Agency Relationship
Between the Selling Broker and the Purchaser*

Even though the relationship between the selling broker and the purchaser in a modern day real estate transaction evidences an agency relationship, several problems arise from this characterization. First, the purchaser must rely on a court to find an implied agency relationship; second, the problem of dual agency arises when the broker acts as agent for both the buyer and seller; and third, the problem of subagency often arises in Multiple Listing Service transactions. These three problems call into question the wisdom of implying an agency relationship between the purchaser and the selling broker.

1. Purchaser must rely on a court to find implied agency relationship

Because the selling broker does not usually enter into an express, contractual agency relationship with the purchaser,

28. See RESTATEMENT (SECOND) OF CONTRACTS § 42 (1981).

the purchaser must rely on a court to make the determination that an implied agency relationship actually existed between the parties. This may be a difficult task for a court, especially in light of several factors which indicate that the selling broker is already in an agency relationship with the seller.

First, in situations in which the broker is involved in both listing and selling the property, the seller and the broker enter into a contractual agency relationship prior to the purchaser's involvement. Nevertheless, the mere existence of a written listing agreement between the seller and the broker does not automatically negate the possibility that the broker may also represent the purchaser.²⁹ The second factor, and perhaps the strongest indicator of an agency relationship between the broker and the seller, is that the seller pays the broker's commission. One commentator has stated:

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.³⁰

Although the commission payment by the seller strongly evidences that the broker is the seller's agent, this factor is likewise inconclusive. Some courts have found the broker to represent the purchaser even though the broker was in fact paid by the seller.³¹

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

30. William J. Minick, III & Marlynn A. Parada, *The Real Estate Broker's Fiduciary Duties: An Examination of Current Industry Standards and Practices*, 12 PEPP. L. REV. 145, 154 (1984).

31. See *Ramey v. Myers*, 245 P.2d 360, 364 (Cal. Dist. Ct. App. 1952) (agency relationship between the broker and the buyer inferred from the broker and buyer's friendship and from the broker's advice to the buyer); *Banner v. Elm*, 248 A.2d 452, 455 (Md. 1968) ("It is not uncommon for a condition of sale to be that the agent of the purchaser shall be paid by the seller."); *Billington v. Crowder*, 553 S.W.2d 590, 593 (Tenn. Ct. App. 1977) ("Even though the identity of the party who is to pay the broker may not be conclusive of the identity of his principal, it is nevertheless a strong circumstance.").

2. *The problem of dual agency*

One problem that arises when courts find that the broker acted as agent for the purchaser as well as the seller is that of dual agency. In this situation, the broker takes it upon himself to represent the best interests of both the seller and the purchaser. Thus, the broker owes both parties the same fiduciary duty³² and degree of care as he would if he represented each party separately. The broker must act loyally, fairly, and in good faith, with respect to both the seller and the purchaser.³³

Despite the conflicts inherent in the dual agency relationship, courts have generally recognized the legitimacy of this relationship provided that the broker make full disclosure to both parties *before* the agency relationship is established.³⁴ However, making such disclosure and obtaining the consent of both parties might be difficult given the usual residential transaction. Typically, no agreement is executed between the broker and the purchaser before the broker undertakes the task of locating suitable residential property for the purchaser. Likewise, obtaining the seller's consent to a dual agency relationship is problematic because a seller who fully understands the implications of consenting to a broker/purchaser relationship may be reluctant to disclose to the broker his true expectations regarding the sale of his property. Consequently, because the broker may be unable to satisfy the seller's needs, the seller might resist the dual agency arrangement.

32. For a discussion of the fiduciary duties owed by a broker to his principal, see *supra* notes 13-22 and accompanying text.

33. See, e.g., *Martin v. Hieken*, 340 S.W.2d 161, 165 (Mo. Ct. App. 1960) ("A broker so unwise as to place himself in the anomalous position of representing adverse parties must scrupulously observe and fulfill his duties to both."); *Investment Exch. Realty, Inc. v. Hillcrest Bowl, Inc.*, 513 P.2d 282, 284 (Wash. 1973) (en banc) ("[A] real estate broker owes to his client the duty to exercise the utmost good faith Loyalty is the chief virtue required of an agent." (citations omitted)).

34. See, e.g., *PMH Properties v. Nichols*, 263 N.W.2d 799, 802 (Minn. 1978); *Cogan v. Kidder, Mathews & Segner, Inc.*, 648 P.2d 875, 877 (Wash. 1982) (en banc). See also RESTATEMENT (SECOND) OF AGENCY § 392 (1958), which provides:

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

The shortcomings of dual agency are further illustrated by the requirement that the broker disclose any material facts that would reasonably affect the principal's decision to buy or sell the property.³⁵ As a dual agent, the broker must consider whether he is required to reveal the purchaser's highest price to the seller and the seller's lowest price to the purchaser. Though the broker is generally permitted to act as a dual agent, when confidential information such as a statement about price is given to the agent by the principal, the agency's duty compels the broker's silence.³⁶

Although legal decisions may allow dual agency, the broker is put in the precarious situation of having to provide full disclosure to one party without harming the interests of the other. Because of the opposing goals of the seller and the purchaser,³⁷ the broker will almost assuredly breach either his fiduciary duty owed to the individual party or his duty to disclose.

3. *The problem of subagency in Multiple Listing Service transactions*

If the agency elements are present in the typical real estate transaction involving a selling broker and a purchaser, a problem also arises when the listing broker agrees to "cooperate" with the selling broker by sharing the commission in return for the selling broker finding a purchaser who is ready, willing, and able to purchase the property. Such "cooperation" refers to the real estate industry's established practice of using

35. See RESTATEMENT (SECOND) OF AGENCY § 381 (1958); see also *Koller v. Belote*, 528 P.2d 1000, 1003 (Wash. Ct. App. 1974) (broker did not disclose to the prospective purchasers the impossibility of securing the best price and terms available while representing the best interests of the seller).

36. The agent . . . is under no duty to disclose, and has a duty not to disclose to one principal, confidential information given to him by the other, such as the price he is willing to pay. If the information is of such a nature that he cannot fairly give advice to one without disclosing it, he cannot properly continue to act as advisor.

RESTATEMENT (SECOND) OF AGENCY § 392 cmt. b (1958) (emphasis added).

37. See *Nahn-Heberer Realty Co. v. Schrader*, 89 S.W.2d 142, 144 (Mo. Ct. App. 1936).

The interests of the buyer and the seller are naturally antagonistic to each other. The broker, in undertaking to arrange terms between them, if he favors the buyer is necessarily disregarding the interest of the seller, and, if he favors the seller, is necessarily disregarding the interest of the buyer.

an MLS, whereby listing brokers agree to pool all listings and to cooperate with other MLS member-brokers who produce purchasers for the listed properties.³⁸ This arrangement clearly benefits both sellers and purchasers by exposing sellers' properties to more potential purchasers and by affording purchasers a larger selection of available properties. In addition, the MLS has eased the geographical barrier between purchaser and seller and enhanced the flow of information and communication between the parties.³⁹

In an MLS arrangement, an agency relationship is obviously recognized between the listing broker and the seller based on the contractual privity between them. The contract typically authorizes the listing broker to use the services of other brokers. Therefore, any broker other than the listing broker who attempts to arrange a sale of the property is considered a subagent of the listing broker. However, since the selling broker has never been in direct contact with the seller, neither the seller nor the selling broker is often aware of the fiduciary relationship that exists between them. Sellers may be surprised to discover that this relationship actually increases the seller's liabilities to third parties for misleading statements or omissions relating to the property. Based on agency doctrine, the seller, as principal, is liable for the misrepresentations made by his agents and his subagents.⁴⁰

Though courts have generally upheld the agency relationship based on a subagency theory,⁴¹ the effects of this theory are actually adverse to the purchaser's best interests. Under this theory, courts have held that both the listing and selling brokers are in a fiduciary relationship with the seller.⁴² As

38. See generally Arthur D. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325, 1328-30 (1970) (discussing the advantages of multiple listing systems).

39. See *id.* at 1329.

40. RESTATEMENT (SECOND) OF AGENCY §§ 256-264 (1958).

41. See, e.g., *Fennell v. Ross*, 711 S.W.2d 793, 795-96 (Ark. 1986); *Stortroen v. Beneficial Fin. Co.*, 736 P.2d 391, 396 (Colo. 1987) (en banc); *Givan v. Aldemeyer/Stegman/Kaiser, Inc.*, 788 S.W.2d 503, 504 (Ky. Ct. App. 1990).

42. See, e.g., *Licari v. Blackwelder*, 539 A.2d 609, 613 (Conn. App. Ct. 1988) ("A real estate broker acting as a subagent with the express permission of another broker who has the listing of the property to be sold is under the same duty as the primary broker to act in the utmost good faith."); *Mersky v. Multiple Listing Bureau of Olympia, Inc.*, 437 P.2d 897 (Wash. 1968). In *Mersky*, the court stated:

[T]here flows from this agency relationship and its accompanying obligations of utmost fidelity and good faith, the legal, ethical, and moral responsibility on the part of the listing broker, as well as his subagents, to

such, this arrangement leaves the purchaser without adequate representation. Thus, even though the majority of purchasers undoubtedly believe that the selling broker is representing the purchaser's best interests, application of the subagency doctrine makes this belief a delusion.

Though some courts have taken alternative, and arguably better approaches,⁴³ the rule that the selling broker is a subagent of the listing broker, and thus an agent of the seller, remains the dominant view.⁴⁴ Therefore, the purchaser must understand at the outset of the transaction that he is not represented. One way to provide this information is to impose a disclosure requirement upon the broker. One commentator described this suggested communication requirement:

exercise reasonable care, skill, and judgment in securing for the principal the best bargain possible; to scrupulously avoid representing any interest antagonistic to that of the principal in transactions involving the principal's listed property, or otherwise self-dealing with that property, without the explicit and fully informed consent of the principal; and to make, in all instances, a full, fair, and timely disclosure to the principal of all facts within the knowledge or coming to the attention of the broker or his subagents which are, or may be, material in connection with the matter for which the broker is employed, and which might affect the principal's rights and interests or influence his actions.

437 P.2d at 899 (emphasis added) (citations omitted).

43. See, e.g., *Wise v. Dawson*, 353 A.2d 207 (Del. Super. Ct. 1975); *Blocklinger v. Schlegel*, 374 N.E.2d 491 (Ill. App. Ct. 1978); *Menzel v. Morse*, 362 N.W.2d 465 (Iowa 1985).

In *Wise*, the court concluded that no agency relationship existed between the selling and listing brokers, stating that "a multi-list arrangement between listing and selling agents is not an agency relationship unless clearly proven otherwise." 353 A.2d at 209. The court reasoned that the local MLS defined itself as an "information exchange"; that the MLS had no provision for control of the selling broker by the listing broker, as is required in an agency relationship; and that the splitting of the fee commission was no "indicia of agency," because independent contractors split fees as well. *Id.*

In *Blocklinger*, the sellers argued that the purchaser, who was a real estate broker, became their subagent by virtue of an MLS agreement. 374 N.E.2d at 493. The court, however, found that no fiduciary duty existed between the parties because there was no actual agency relationship because of the MLS agreement. *Id.* Referring to the tenuous relationship created by the MLS concept between a seller and a broker, 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." *Id.*

In *Menzel*, the court adhered to the rule that a "real estate broker is the agent of the party who first employs him or her, and this may be the buyer even though it is anticipated the fee will be received from the seller." 362 N.W.2d at 475. The court noted that the MLS arrangement meant only that the selling broker would receive some commission from the listing broker. *Id.*

44. BURKE, *supra* note 26, § 1.6, at 1:35.

Brokers could be required by law or regulation to inform buyers of the agency relationship the broker has directly with some sellers, through listing agreements, and indirectly with others, through multiple listing arrangements. The broker would have to explain that he may not volunteer more information than the owner of the home would have to disclose nor give advice about the appropriate price or subjective qualities of the houses inspected.⁴⁵

Requiring the selling broker to advise the potential purchaser that he will be acting solely as the seller's agent would help clarify the nature of the broker's relationship with the seller and the purchaser and would assist in overcoming the misleading and confusing nature of the current system. Other effects of this disclosure requirement have been outlined as follows:

The buyer . . . would be less likely to rely unquestioningly on the broker. Since the buyer would be less likely to rely on the selling broker, the broker's potential liability for fraud or misrepresentation should be lessened—the buyer would be aware that he must search out new avenues of information concerning the property. A disclosure form would also benefit the broker by serving as a constant reminder that he is the agent of the seller and must not give the buyer any misleading signals.⁴⁶

Though such a mandatory disclosure requirement would likely clarify the broker/purchaser relationship, brokers may be hesitant to disclose such information to potential purchasers.⁴⁷ Advising the purchaser at the outset of the transaction that neither the listing nor the selling broker represents him may encourage the purchaser to seek alternative representation. Though it would likely be more advantageous to the purchaser to employ her own broker or attorney as her representative, such a concept works adversely to the selling broker's psychological advantage of getting the purchaser committed in writing as soon as possible. Nevertheless, a mandatory disclosure re-

45. Barry A. Currier, *Finding the Broker's Place in the Typical Residential Real Estate Transaction*, 33 U. FLA. L. REV. 655, 679 (1981).

46. Paula C. Murray, *The Real Estate Broker and the Buyer: Negligence and the Duty to Investigate*, 32 VILL. L. REV. 939, 951-52 (1987).

47. Joseph M. Grohman, *A Reassessment of the Selling Real Estate Broker's Agency Relationship with the Purchaser*, 61 ST. JOHN'S L. REV. 560, 584 (1987).

quirement with the potential for broker liability for nondisclosure would cause the wary broker to think twice before violating this ethical and legal responsibility.

Another potential problem with imposing this disclosure duty upon the broker is that merely revealing the existence of the subagency relationship between the listing and the selling broker still fails to provide the purchaser with adequate representation of the purchaser's interests.⁴⁸ However, this concern is somewhat alleviated by imposing a duty upon the broker to exercise reasonable care to discover and disclose material defects in the property.⁴⁹

III. THE SELLING BROKER'S DUTIES TO THE PURCHASER ABSENT AN AGENCY RELATIONSHIP

Even if no agency relationship exists between the selling broker and the purchaser, the question remains whether the broker still owes a fiduciary duty to the purchaser. A fiduciary relationship is generally created when one party, the purchaser, places trust and confidence in another party, the broker, because of the broker's superior skill and expertise.⁵⁰ "More specifically, a fiduciary relationship is created where one party has expressly reposed trust and confidence in the other; where trust and confidence, although not express, are implied because of a past history of fiduciary dealings; or where the very nature of the transaction is fiduciary."⁵¹

Originally, the lack of an agency relationship led most courts to find that the broker owed no fiduciary duty to the purchaser. The rationale for this conclusion was that the broker, as agent for the seller, stood in the seller's shoes and had the same relationship to the purchaser as did the seller.⁵² However, a number of courts have found that the broker does owe a legal fiduciary duty to the purchaser even though the broker and purchaser are not in any agency relationship.

48. *Id.* at 585.

49. For a more detailed discussion of this duty, see *infra* part IV.

50. See *Fairfield Sav. & Loan Ass'n v. Kroll*, 246 N.E.2d 327, 330-31 (Ill. App. Ct. 1969) (holding broker to be in fiduciary relationship with elderly purchaser because broker undertook to obtain financing for purchaser).

51. Kathryn J. Brown, *Expansion of a Real Estate Broker's Duties: Is Easton v. Strassburger in Illinois' Future?* 5 N. ILL. U. L. REV. 97, 103 (1984) (citing JOHN N. POMEROY, *EQUITY JURISPRUDENCE* § 902 (5th ed. 1941)).

52. See Paul A. Longton, Comment, *A Reexamination of the Real Estate Broker-Buyer-Seller Relationship*, 18 WAYNE L. REV. 1343, 1345 (1972).

In *Harper v. Adametz*,⁵³ the Connecticut Supreme Court held that the real estate broker breached his fiduciary duty to the purchaser when he misrepresented the seller's minimum price and failed to disclose the purchaser's offer to the seller.⁵⁴ Although the broker was not the purchaser's agent, the court concluded that the purchaser had a right to assume that the broker would both "deal honestly with him and be faithful to his principal [the seller]."⁵⁵ Because the broker had breached the fiduciary duties he owed to the buyer, the court then imposed a constructive trust on the broker in favor of the purchaser.⁵⁶ The court reasoned that a constructive trust

is most often applied in situations where the relationship between the plaintiff and the defendant is one which equity clearly recognizes as fiduciary. But equity has carefully refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations. It has left the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other.⁵⁷

Thus, despite the absence of a principal-agent relationship, the court clearly recognized that the broker owed a legal duty to the purchaser.

The Ninth Circuit Court of Appeals held in *Funk v. Tiff*⁵⁸ that a real estate broker breached his fiduciary duty of dealing fairly and honestly with a prospective purchaser.⁵⁹ In this case, the broker failed to disclose to a prospective purchaser that he had submitted a subsequent offer for the realty which superseded the prospective purchaser's offer.⁶⁰ As the court stated,

When a real estate broker acts as an intermediary between a seller and a prospective purchaser, he is under a duty to deal fairly and honestly with the prospective [purchaser]. That

53. 113 A.2d 136 (Conn. 1955).

54. *Id.* at 138-39. After purchasing the property through his son, the broker then sold a small portion of the property at a profit to the buyer, leading the buyer to believe that the original owner was the seller and had decided to retain the balance of the property. *Id.* at 137-38.

55. *Id.* at 139.

56. *Id.*

57. *Id.*

58. 515 F.2d 23 (9th Cir. 1975).

59. *Id.* at 25.

60. *Id.* at 24.

duty is breached when the real estate agent outbids the prospective [purchaser] without notice to him before the seller has acted on his offer.⁶¹

In contrast, the dissenting opinion in *Funk* denied the existence of a fiduciary relationship between the broker and the prospective purchaser.⁶² The dissent argued that only those acts traditionally held to be a breach of an agent's fiduciary duty such as affirmative misrepresentations, misuse of confidential information, and failure to disclose a conflicting agency relationship should be the basis of liability.⁶³ The dissent concluded that

[w]here the broker is not the agent of the prospective buyer, where he acts with the knowledge of his principal, the seller, where there is no misuse of confidential information, where there is no fraudulent misrepresentation, and where the broker bids more than any of the prospective buyers, there should be no liability on the part of the broker if the seller chooses to accept his offer without asking for another round of bids.⁶⁴

Many courts have continued to embrace the traditional view and are unwilling to find a fiduciary relationship between the selling broker and the purchaser.⁶⁵ In fact, even in cases with facts quite similar to *Harper* and *Funk*, courts have expressly found that no fiduciary duty existed between the broker and purchaser.

For example, in *Klotz v. Fauber*,⁶⁶ the Virginia Supreme Court refused to hold the broker liable, even though the broker failed to transmit the purchaser's offer to the seller and purchased the land for himself.⁶⁷ Likewise, in *DiBurro v.*

61. *Id.* at 25.

62. *Id.* at 27 (Wright, J., dissenting).

63. *Id.* at 28.

64. *Id.*

65. See *Blocklinger v. Schlegel*, 374 N.E.2d 491, 493 (Ill. App. Ct. 1978) ("Before a fiduciary duty arises it must be proven that a realtor has been employed by someone and that he is therefore an agent for them."). But see *Fairfield Sav. & Loan Ass'n v. Kroll*, 246 N.E.2d 327, 331 (Ill. App. Ct. 1969) (agency relationship still arose even though broker was not employed by buyer).

66. 189 S.E.2d 45 (Va. 1972).

67. *Id.* The court stated that when a broker fails to communicate the purchaser's offer to the seller and subsequently acquires the property herself, the broker is liable to the purchaser only if the broker purchases the property at a price equal to or less than the price the prospective purchaser agreed to pay. *Id.*

Bonasia,⁶⁸ the Supreme Judicial Court of Massachusetts refused to hold the broker liable for breach of a fiduciary duty to the purchaser. In this case, the prospective purchaser asked the broker to determine if a particular piece of property was worth the asking price.⁶⁹ When the broker learned that the purchaser was interested in both the seller's property and an adjoining tract, the broker eventually purchased both tracts without informing the potential purchaser.⁷⁰ However, because the broker was not in an agency relationship with the purchaser, the court refused to impose a constructive trust on the broker.⁷¹

Recognition of a fiduciary duty between the broker and purchaser, in the absence of an actual principal/agent relationship, still gives rise to similar duties owed in an agency relationship. Where a relationship is construed as fiduciary, the broker owes the purchaser the duties of honesty, loyalty, and full disclosure of material information concerning the property.⁷² If the broker were to breach any of these duties, the purchaser would have a cause of action against the broker. In other words, the broker is in virtually the same position as he would be in a dual agency situation.⁷³ The broker would have to totally disregard his agency relationship with the seller and act as agent for both parties. Placing a broker in such a position will almost certainly cause the broker to breach his fiduciary duty to one of the parties. Surely the courts that have imposed these fiduciary duties on the broker did not intend to place the broker in such a precarious situation.

Perhaps the courts' willingness to impose a fiduciary duty on the broker arises primarily from the traditional notion that the seller's relationship with the purchaser was one of caveat emptor.⁷⁴ Thus, the broker, acting as the seller's agent, was also bound by the doctrine of caveat emptor. To circumvent the

Because the prospective purchaser had not alleged that his offer equalled or exceeded the price the broker paid, the court affirmed the dismissal of the complaint. *Id.*

68. 71 N.E.2d 401 (Mass. 1947).

69. *Id.*

70. *Id.*

71. *Id.* at 402.

72. For a discussion of these fiduciary duties, see *supra* notes 13-22 and accompanying text.

73. For a discussion of the dual agency problem, see *supra* notes 32-37 and accompanying text.

74. Longton, *supra* note 52, at 1345.

harsh doctrine of *caveat emptor*, courts found that the broker had not only a duty to deal fairly with the purchaser, but also a heightened duty to deal with utmost trust and confidence—as a “fiduciary.” Though the courts understandably wanted to protect the purchaser, such a heightened duty may have had the unintended result of putting the broker in an untenable legal position.⁷⁵ What courts today may really mean by the use of the term “fiduciary duty” is that the broker has the duty to treat the purchaser honestly and fairly.⁷⁶ Perhaps a better way to view the relationship of the broker and the purchaser is not as a fiduciary one, but as a normal business relationship in which the broker must not intentionally or negligently mislead the purchaser.

IV. RECOMMENDED SOLUTION AND CONCLUSION

The real estate broker unquestionably owes some sort of legal duty to the purchaser in a residential real estate transaction. However, courts at best have been inconsistent in defining and interpreting the precise nature of this duty. As a result, the real estate industry and the general public are both understandably confused about the proper relationship between the broker and the purchaser.

In a typical real estate transaction, the broker is already in a fiduciary relationship with the seller. Accordingly, an additional fiduciary duty toward the purchaser should not be imposed on the selling broker. The legal imposition of a fiduciary relationship with the purchaser would put the broker in the impossible situation of having to act in the best interest of both parties. Attempts by the broker to act in the best interest of both the seller and the purchaser may very well result in a law suit against the broker by one or both parties.

Nevertheless, the broker cannot simply protect the seller's best interests and ignore those of the purchaser. In the modern residential real estate transaction involving an MLS agreement, the selling broker will spend many hours with the purchaser. As a result, the purchaser will come to depend and rely

75. “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.” Minick & Parada, *supra* note 30, at 167.

76. See *Funk v. Tift*, 515 F.2d 23, 24-25 (9th Cir. 1975) (imposing a fiduciary duty on the broker to deal honestly and fairly with the buyer).

on the broker for his professional expertise and for his ability to provide vital information concerning the property. The broker should therefore recognize a duty to the purchaser to use reasonable care to make certain that this information is accurate. If the broker fails to use reasonable care in obtaining or communicating information, the purchaser should have a cause of action against the broker for negligent misrepresentation.

To satisfy this duty of reasonable care, the broker should use his professional expertise to discover any material defects of the seller's property. The broker must not merely rely on the information provided by the seller concerning the property. The broker should be required to verify all information received from the seller by routinely conducting an independent inspection of the property to discover any information which might materially affect the property's value or desirability.

The imposition on the broker of a duty to diligently inspect the seller's property will benefit all parties to the transaction. Under the current market structure, many purchasers wrongly believe that the broker is acting in their best interest. Such a belief is evidenced by the rash of suits against brokers and sellers for fraud, negligent or innocent misrepresentation, and simple negligence.⁷⁷ However, many of these suits could be avoided if the broker would (1) inform the purchaser, in writing, at the beginning of their relationship that the broker is in a fiduciary relationship with the seller, and (2) conduct a diligent inspection of the property to discover and disclose to the potential purchaser any material defects affecting the property's value or desirability.

Imposing a duty on the broker to diligently inspect the seller's property would alert the broker of his duty to the purchaser—to use reasonable care to avoid misleading the purchaser. This duty avoids both the dual agency and the sub-agency problems while still allowing for fair treatment of the purchaser. This high standard of conduct will not only create a more honest and ethical environment within the real estate industry, but will also clarify the duties and expectations of all the parties involved—the broker, the seller, and the purchaser.

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77. See cases cited *supra* note 3.