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Agency Law and Real Estate Brokerage

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by H. Glenn Boggs[2]

I. INTRODUCTION

The real estate brokerage industry in the United States has a significant liability exposure problem. The liability exposure arises from both the application of agency law principles and judicially imposed duties regarding treatment of parties opposite a broker's principal. If you think the foregoing characterization is extreme, examine at least the evidence presented here and then draw your own conclusions. The facts are convincing that the brokerage industry faces substantial problems in the area of agency affecting not only financial liability, but also public confidence. The intent of this

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article is to carefully identify the problems, marshall the facts, and propose a solution to avoid further dislocations in the industry.

II. THE NATURE OF THE PROBLEM

The two main dimensions of the agency law problem confronting the real estate brokerage industry are distinct, yet sometimes overlap. The first dimension is best described as a "subagency" problem, and the second involves problems concerning the broker's duties to a "nonprincipal".

The difficulty of subagency problems usually develops in the context of a multiple listing service (MLS) transaction. Initially, a broker reaches agreement with an owner to sell the owner's property. After a listing contract is signed, the owner (seller) becomes a principal in an agency relationship with the listing broker who, because of the agency relationship, owes the seller a "fiduciary duty" of loyalty and service.

Frequently, a listing broker does not personally locate a buyer for specific properties listed in the MLS. Real estate sales usually result from another broker's efforts in working with a potential buyer after identifying an MLS listed property that satisfies the buyer's needs. The other broker, or "selling broker", has often been regarded as an agent, or subagent, of the listing broker. In these instances, the selling broker, like the listing broker, owes a fiduciary duty of loyalty and service to the seller.

Unfortunately, this legal entanglement leaves unsuspecting buyers without an agent in the transaction and, consequently, more vulnerable. Buyers with some knowledge of the subagency principles involved become frustrated. Selling brokers are also placed at risk because they may either fail to adequately represent the seller, whom they may have never met, or allow an unintended agency relationship to develop with the buyer. In the latter situation, an unintended dual agency is created. Dual agency relationships present numerous legal problems. These will be examined later in more detail.

The second dimension of agency law problems plaguing the real estate brokerage industry concerns brokers' duties to a "nonprincipal". Many states impose a legal duty on brokers to treat

parties opposite their principal in an honest and fair manner. Florida courts, for example, have imposed this duty whose parameters appear to be expanding as new conflicts arise. Delineations between a broker's fiduciary duty to its principal and court-imposed obligations of honesty, fairness, and disclosure to the principal's opposite party are becoming increasingly blurred. Persons disappointed with a transaction on the basis of a broker's alleged failure to adequately fulfill the broker's duties to the nonprincipal are suing more brokers more often.

In short, the law governing real estate brokerage and agency lacks clarity as to the responsibilities shouldered by brokers. Improvements in this area of law will result in better service to the consuming public. If it were not for the fact that many readers may be skeptical of what has been said so far, this discussion could end now and statutory language could be proposed to cure the ills identified. However, many readers want more than broad generalizations and insist on detailed facts and proof.

One of the most widely cited authorities in this area is a Federal Trade Commission Report publication entitled *The Residential Real Estate Brokerage Industry*.[3] This report provides a wealth of statistical information about the brokerage business, including the industry's performance, structure and practices. It also contains consumer information on sellers and buyers. For example, consumer information on a buyer's knowledge about the role of a broker indicates that buyers are appallingly mistaken about who the broker represents. The report states:

> Buyer Question 31 asked: "Who do you think the agent who handled the purchase of your house was representing?" A total of 57% of the buyers believed that the broker with whom they were dealing was representing them. A total of 66% of all buyers believed the broker was representing either the buyer, or the buyer and the seller, in the transaction.

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[3] FED. TRADE COMMISSION STAFF REP., *The Residential Real Estate* Brokerage Industry (1983). This two-volume report is the result of a cooperative effort coordinated by the Los Angeles Regional Office, the Seattle Regional Office, and the Bureau of Economics under the joint sponsorship of the Bureaus of Competition and Consumer Protection.

> Thus nearly two-thirds of all buyers in our study believed that representation was being provided to the buyer.
>
> Where a cooperating broker was involved, 72% of the buyers believed that the cooperating broker was representing the buyer and not the seller. Even 31% of the buyers in transactions where only one broker was involved believed that the broker represented the buyer.[4]

Researchers, aware of prior Federal Trade Commission studies, published yet another study on this same issue in 1988.[5] They surveyed 1,000 randomly-selected active Georgia real estate licensees to determine if they were complying with fiduciary agency law rules when acting as a listing or selling broker.

These researchers were also aware of the National Association of Realtor's 1986 Agency Task Force study on brokerage and agency problems. They quoted from this study advising readers of the Task Force's conclusion that "states should mandate written disclosure of agency status."[6] Real estate licensees are now required to disclose their agency status in a majority of states.[7]

Although desirable, disclosure of agency status alone is insufficient to solve the agency problems currently faced by the real estate brokerage industry. Authors of the Georgia survey reached this same conclusion after evaluating their data:

> Instead of accepting the notion that the residential real estate marketplace is comprised of many ignorant consumers and duplicitous agents, an alternative conclusion can be drawn from studies of real estate buyers and sellers--seller agency is simplistic in modeling the role of real estate agents in residential sales. The present study further supports this alternative.

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[4] *Id.* at 69 (footnotes omitted).

[5] Ball & Norse, *Testing the Conventional Representation. Model for Residential Real Estate Brokerage*. 3 J. REAL EST. RES. 119 (1988).

[6] *Id.* at 120.

[7] For example, Florida law mandates written agency disclosures by a licensee to the opposite party prior to the signing of a contract or a lease by the non-principal. FLA. STAT. § 475.25(1)(q) (1992).

The responses to the survey of Georgia licensees indicate that real estate licensees perceive that (a) buyers are loyal to the selling agent, (b) sellers often withhold confidential price information from listing agents, (c) listing agents and selling agents often do not share confidential price information with each other in a co-op, (d) listing agents often do not inform sellers of buyers' confidences, (e) buyers often repose with and receive from selling agents confidential information, and (f) the statement of the five given in the questionnaire which best reflects the role of the selling agent is the one that describes a dual agent (or, arguably, mediator):

> Having the best knowledge of what the property is worth, the selling agent promotes a sale at what the agent considers to be fair in price and terms so that both the buyer and seller end up with a good deal. It is now evident why consumers, at least in Georgia, do not realize the roles of the agents in a co-op sale are that of exclusive agents/ subagents of sellers--it is not realized by the practitioners themselves![8]

Based on the evidence presented, it is clear that changes must be made in agency law as applied to the real estate brokerage industry.

III. UNDERSTANDING AGENCY

The theory of agency is applicable to many different professional and business relationships; it is not unique to real estate brokerage. The Second Restatement of Agency defines agency and principal as follows:

> (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

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[8] Ball & Norse, *supra* note 5, at 129.

(2) The one for whom action is to be taken is the principal.
(3) The one who is to act is the agent.[9]

In plain English, agency has the following four components: (1) A freely given, consensual agreement between two parties; (2) one party is the principal who can control the conduct (within legal parameters) of the agent; (3) the other party is the agent who can affect the principal's legal relations with others; and (4) the agent owes the principal a fiduciary duty. These agency relationships can be created without being reduced to a written document. They may be expressed orally or implied through the actions of the parties. The parties, then, may negate the need for an oral agreement if their actions create an agency relationship. That is why real estate licensees must be careful not to fall inadvertently into unwanted agency relationships.

Examples of agents other than real estate brokers and salespersons are not difficult to find. Lawyers often act as agents for their clients. A businessperson can form an agency relationship with another person to handle one or more series of tasks. As stated in *Florida Real Estate Brokerage and Agency Law*:[10]

> [T]he law of agency often applies when one person undertakes to perform a service for the benefit of another person. Normally, the service to be performed involves dealing with a third party to the transaction. . . . Often, the principal will pay the agent for the services received as a normal part of the agency relationship, and also the principal may be legally liable for actions of the agent within the scope of the agency [but payment is not absolutely required].
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> The key to understanding agency is that the principal and agent reach an understanding under which the agent serves the principal on mutually agreeable terms. Once this happens, and a legal agency arises, there is a special duty or obligation on the agent. This special obligation is called a

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[9] Restatement (Second) of Agency § 1 (1958).

[10] H.G. Boggs, Florida Real Estate Brokerage and Agency Law (1990)(Copies available from the Florida Real Estate Commission).

"fiduciary duty," and understanding this duty is at the heart of understanding agency. Basically, the fiduciary duty requires the agent to serve the principal loyally and faithfully within the agency relationship. This means that, if necessary, the agent must put his or her own interests (whether financial or otherwise) second in importance to the interests of the principal where the agency relationship is concerned.[11]

IV. AGENCY LAW AND REAL ESTATE TRANSACTIONS

A basic and fundamental function of a real estate broker is to bring the buyer and seller together. Because the real estate marketplace is generally local in nature and does not have a national stock or commodities exchange to help buyers and sellers find each other, the role of the broker is very useful.

Brokers often create the agency relationship with the seller pursuant to a listing agreement. Brokers are free to form agency relations with either buyers or sellers as long as the applicable requirements of law are satisfied. If a listing contract and agency relationship between the broker and seller are secured, the broker should try to sell the property subject to the listing terms. Deviation from the terms is possible but any changes must be approved by the seller. Even though several different types of listing contracts are used in the brokerage business, once the broker is the seller's agent, then he or she should try to advance the seller's interests using the legal means available. The broker should safeguard the seller's interests by following legal instructions and by keeping the seller informed regarding any transactions. Most brokers also have licensed salespeople associated with them. This three party relationship between the broker, the salesperson and the principal deserves special attention.

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[11] *Id.* at 1.

V. BROKERS AND SALESPERSONS

Most states require that both real estate brokers and salespeople be licensed by the state before handling any sale transactions. Unless an exception applies, a salesperson will be affiliated with a broker. Generally, salespeople are hired as independent contractors or they are employed by their brokers. In either case, it is helpful to analyze the relationship between the salesperson and the broker's principal.

Primarily, the broker and not the salesperson, is directly related to the principal as agent. Even if the salesperson deals personally with the seller (assuming the more usual scenario where the seller, not the buyer, is the principal) and negotiates the listing contract, the agency relationship typically goes through the broker in order to reach the salesperson. This does not mean that the listing broker's salesperson has no obligations to the seller. On the contrary, the listing broker's salesperson, like the broker, owes a fiduciary duty of loyalty and service to the broker's principal. From a legal standpoint, however, the salesperson's agency connection to the principal normally goes through the broker.

VI. THE LISTING BROKER AND OTHER BROKERS

While it is true that the listing broker sometimes finds the buyer for the listed property, it is more likely that another brokerage firm, separate from the listing broker, will locate a buyer. The widespread use and operation of the multiple listing service (MLS) concept contributes to this fact.[12] Significant questions arise regarding the

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[12] A multiple listing service is typically an arrangement in which member brokers share listing information. The following quotation from Florida Real Estate Brokerage and Agency Law explains the concept.

> To understand how a multiple listing service works, imagine that you are seated in a room with 25 or 30 other persons. Pretend that each is a licensed real estate broker in your community actively operating a brokerage business in competition with each other. Further imagine that a potential buyer walks into your office looking for a three bedroom, two bath house, in the northeast area of town, priced at about $95,000. Naturally, you check the listings of houses for sale in your office to see if there is anything similar to the house wanted by the buyer. If there is, great. You would then show the buyer the property, hope he or she likes it, and try to sell it. On the other hand, if you don't have anything in your listings

status of the nonlisting broker or "selling broker" who brings the buyer to the transaction. In most cases, the selling broker makes a separate agreement with the listing broker to share the listing broker's commission (which is paid by the seller) if the purchaser procured by the selling broker completes the transaction.

Notice that in this example the selling broker does not deal with the seller but goes directly through the listing broker. The selling broker is unlikely to contact the seller directly if the listing broker has either an "exclusive" or an "exclusive-right-to-sell" listing contract with the owner. This type of listing typically grants the listing broker a commission if a sale occurs during the listing period even if another broker procures the sale. In either case, if the listing broker is going to receive a commission from the seller, even though the selling broker created the sale, the selling broker's financial and practical incentives suggest that she maintain contact and cooperate with the listing broker.[13]

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which might appeal to the buyer, what would you do?

Obviously, if you knew what the other brokers in your area had listed in their offices, maybe there would be something for sale which matched your buyer's needs. At this point, the simple genius of the multiple listing service becomes apparent. Think what would happen if all the brokers in the community shared their listing information. Now you might be able to match your buyer's needs with a house that is for sale, and you and the listing broker could share the commission. From your standpoint, the opportunity to close a sale, even though you only share the commission, appears to be much better than the position you were previously in when no sale seemed possible because you had no listings of your own which interested the buyer. The same logic also applies to the position of the listing broker if he or she has no potential buyers for the listing. More importantly, both the buyer and seller can benefit from the operation of the multiple listing service since they may now have the opportunity to complete a transaction which might not otherwise have occurred without the exchange of listing information made possible by the service.

Id. at 4-5.

[13] Theoretically, at least, the selling broker could contact the seller directly and attempt to bypass the listing broker. This may mean that the selling broker acquires a full commission from the seller, but could leave the seller legally obligated to pay *two* commissions, one to the listing broker under the listing and one to the selling broker pursuant to a sales contract clause provided by the selling broker. This result would probably lead to a very dissatisfied seller and could easily end up in litigation. Also, if the selling broker belongs to the MLS, he or she may have contractually given up the right to attempt to bypass the listing broker if an MLS is used.

How, under these circumstances, should the courts construe the agency relationship between the selling broker, the seller, and the buyer? As previously noted, authorities confronted with this problem have often concluded in the past that the selling broker is considered to be a subagent of the listing broker and, therefore, the selling broker's principal is the seller.[14] It is also clear that the selling broker is not absolutely required to be a subagent of the listing broker and may take steps to thwart the subagency relationship, even in states where the general rule applies.[15]

If the latter were the case, the selling broker would take the position that his or her preferred role is as the buyer's agent. Therefore, the selling broker should clearly apprise both the listing broker and the seller of this fact to avoid inadvertently creating an agency relationship with the seller. Otherwise, the selling broker could end up in a dual agency situation, owing a fiduciary duty to both the buyer and the seller. Although dual agencies are not illegal per se, the broker must give full and complete disclosure to both principals and receive their informed consent to the arrangement.[16]

Conversely, if the selling broker is content to be a subagent of the listing broker, then steps should be taken to prevent the buyer from developing an agency relationship with the selling broker, unless a dual agency is contemplated. To achieve this goal the selling broker should fully disclose this agency relationship to the buyer at an early point in the selling broker's contact with the buyer. In many states, real estate licensees are required to make full disclosure of their principal's identity to the other party in the transaction.[17]

Once the selling broker has established a subagency relationship with the seller through the listing broker, or alternatively, an agency relationship with the buyer, and has taken steps to insure that no agency relationship develops with the opposite party, then the position of any salesperson associated with the selling broker should

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[14] John W. Reilly, *Agency Relationships in Real Estate*, REAL ESTATE EDUCATION COMPANY, 35-38, 167 (1987). See also, Matthew M. Collette, *Subagency in Residential Real Estate Brokerage: A Proposal to End the Struggle with Reality*, 61 S. CAL. L. REV. 399, 403 (1988).

[15] *Id.*

[16] *Id.* at 62-65.

[17] *See supra*, note 7.

be considered. As with the listing broker, it is the selling broker, not the selling broker's salesperson, who has the more direct agency relationship to the principal. As before, the broker links the selling broker's salesperson to the principal. The salespeople continue to have the fiduciary duty to the principal just as their broker does. To summarize, if the selling broker is a subagent of the listing broker, then the agency relationship would run from the seller to the listing broker and then to the selling broker.

Determination of the identity of a real estate broker's principal is far from an academic exercise. To illustrate, consider the facts of a recent Arkansas case *Fennell v. Ross*.[18] In this litigation, the buyers, a veterinarian and his wife, were looking for a site where he could set up his office and veterinary practice. The sellers contracted with the listing broker who in turn placed a reference to the property in the MLS publication. This information included a statement which said the property had "Commercial Potential! Any type business!"[19] Meanwhile, the buyers had been working with a salesperson from another brokerage firm for some months. Although the property was currently zoned residential, this salesperson "assured" the buyers that "they would have no trouble getting the zoning changed."[20]

Unfortunately, the property was located in the "100 year flood plain" and the trial court found that the salesperson making "assurances" to the buyers knew about the flood plain facts.[21] After the buyers signed a binding contract, but before the closing, the buyers learned about the flood plain problem. They were advised by city employees that "rezoning would be very difficult to obtain,"[22] and therefore, the buyers refused to close the transaction. When sued by the sellers for breach of contract, the buyers contended that the failure of the sellers and the seller's real estate agents to disclose the flood plain information resulted in a legal right for the buyers to avoid the contract and receive their deposit money.

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18 711 S.W.2d 793 (Ark. 1986).

19 *Id.* at 794.

20 *Id.*

21 *Id.* at 795.

22 *Id.*

The trial judge agreed with the buyers' argument ruling that the flood plain information and development restrictions should be legally characterized as a material fact and that the sellers should have disclosed this to the buyers.[23] Still the trial court did not grant the buyers relief because the court ruled that the salespeople who had been showing property to the buyers for months knew about the flood plain situation; and since this other salesperson was also implicitly the buyers' agent, this knowledge was legally imputed to the buyers.[24]

The sellers won at the trial level and the buyers appealed. On review, the Arkansas Supreme Court agreed with the trial judge, except for one key fact. The appellate court focused on the determinative issue of whether the "selling" agent was legally the buyers' agent or, the sellers' agent. The court discussed the MLS situation, cited a law review article, and reviewed precedent from other states. Finally, the court reversed the trial judge and ruled that "in an MLS transaction like this one" the salesperson who had shown the buyers property for months was a "subagent of the sellers."[25]

In essence, the salesperson's knowledge concerning the flood plain could not be "imputed" to the buyers because the salesperson was no longer the buyers' agent. Accordingly, the case was remanded.

The *Fennell v. Ross* case illustrates the fact that important legal consequences in a particular transaction can be determined by agency relationship decisions. Therefore, it behooves the real estate broker or salesperson to initially determine under applicable state law who is her principal and then to behave accordingly.

VII. SUBAGENCY PROFILED

At this point the legal effect of a selling broker embracing a subagency relationship to the seller through the listing broker should be relatively well understood. Taken in the abstract, the legal logic producing the subagency concept is not unreasonable. The *Fennell*

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23 *Id.*

24 *Id.* at 794-795.

25 *Id.* at 796.

court cited a 1978 law review article that explained the logic pattern as follows:

> [T]he agency relationship is usually established between the seller and the listing agent through the listing contract, an agreement that acts as an employment contract for the listing agent. An agency relationship between the seller and the selling broker is often created by express language in the listing agreement. The clause that creates this agency relationship expressly authorizes or requires the listing agent to utilize the services of other brokers as subagents. Therefore, any broker who is not the listing broker but is attempting to effect a sale of the property in cooperation with the listing agent is considered a subagent. Consequently, when the listing contract contains such a provision, the selling broker has the duties of agency imposed upon him as a subagent of the listing broker . . . .[26]

This analysis, concluding that the selling broker is a subagent (with a fiduciary duty to the seller) makes sense. However, this result is not without its deficiencies. In the law review article cited in *Fennell*, the author also stated:

> This subagency relationship with the seller, which generally precludes an agency relationship with the buyer, seems to be ignored by, if not unknown to, many selling agents. In addition, most buyers are probably unaware of its existence much less its legal ramifications. In practice, if the selling broker ever meets the seller, it is usually either when showing the property to a prospective purchaser or upon presentation of a purchase offer to the seller. However, the selling broker's relationship with the buyer is quite different. Often, the broker has been in the company of the purchaser for many hours and has conducted some fairly confidential interviews with the prospective purchaser. Given such

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[26] *Id.* at 795, 796 (citing, Romero, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*, 20 ARIZ. L. REV. 767, 771-773 (1978)) (footnotes omitted).

> extensive contact with the buyer, and such minimal contact with the seller, the buyer is justified in believing that the agent will do his best to obtain the property for the buyer at the lowest possible price and on the most advantageous terms. Of course, for the agents to attempt to do so is a violation of the agent's duty to the seller. However, it would be unrealistic to expect the buyer to feel that a broker who has worked with him extensively is attempting to obtain the highest possible price for the seller, which, in actuality, is the agent's duty.[27]

This observation of the reality of the selling broker's situation in a subagency correctly focuses on the attitudes and reasonable expectations of the parties. Does it really make sense to require a broker who spends weeks or even months working with a buyer to set aside that actual relationship in favor of a fiduciary duty to a seller who the broker probably did not meet? Add to that question the fact that the seller already has the listing broker under a fiduciary obligation and when the selling broker is also legally bound to the seller as a subagent, the buyer is left without the benefit of fiduciary duties from either broker. On balance, the legal result of seller subagency does not fit very well with the actual personal relationships found in the marketplace, nor does it satisfy the reasonable expectations of the parties.

Some states, like Alabama and Colorado, have made a factual analysis on a case by case basis to determine whether a selling broker is the seller's agent or the buyer's agent. Other states, like Arizona, have concluded that a selling broker is more properly characterized as the buyer's agent.[28]

Naturally, rules such as these are subject to change and interested parties must check for current case decisions or other changes in law in these and other states. Also, contractual agreements between the parties can affect whether the selling broker is legally an agent of the seller or of the buyer. In addition, in early 1992, the National

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[27] 711 S.W.2d 793 (Ark. 1986) (citing Romero) (footnotes omitted).

[28] For the Alabama Rule *see* Cahhion v. Ahmadi, 345 So. 2d 268 (Ala. 1977). For the Colorado Rule, *see* Stortroen v. Beneficial Fin. Co., 736 P.2d 391 (Colo. 1987). For the Arizona rule, *see* Buffington v. Haas, 601 P.2d 1320 (Ariz. 1979).

Association of Realtors released a report designed in part to minimize confusion regarding agency relationships between brokers and principals.[29] Implementation of changes contemplated in this report, especially in the operation of MLS systems should lead brokers to more clearly identify their principal in a transaction.

A. Duties to the Principal

At this point, consideration should be given to the specific nature of the duties a real estate licensee owes to both the principal and to the nonprincipal in an agency relationship. Once an agency relationship is established, the principal has a right to expect the agent to behave along the lines defined by the traditional concepts of fiduciary duty. Historically, words such as loyalty, trustworthiness, and honesty were used to describe a fiduciary duty. Obedience plays a role, too, because the agent should obey all lawful instructions given by the principal within the scope of the agency. Basically, a good rule of thumb is that the agent should advance the principal's interests using lawful means. If the agent's and principal's interests conflict, then the principal must receive priority in agency matters.

The following quotations from selected court decisions show the flavor and judicial gloss which courts might use when describing the duties a real estate licensee owes to his or her principal in an agency relationship.

In *Quinn v. Phipps*, the Florida Supreme Court stated, "[h]e is the agent of his principal in every sense, and, when that relation is undertaken, a fiduciary relation is created which bars the agent from becoming interested in the business or property antagonistic to his principal without his knowledge or consent."[30] Later, in *MacGregor v. Florida Real Estate Commission*, the court held,

> [T]hat in the relationship of a real estate broker to his principal, . . . appellant, was under the duty of informing his principal of any circumstance that might reasonably be expected to influence the complete loyalty of the agent to the

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[29] National Association of Realtors Report of the Presidential Advisory Group on Agency, March, 1992.

[30] 113 So. 2d 419, 425 (Fla. 1927).

> interest of his principal, or that might reasonably be expected to influence his principal in the negotiation.[31]

Still, in *Hershey v. Keyes Company*, the court ruled that "[a]ny concealment from the principal of material facts known to the agent will forfeit the agent's right to compensation for his services."[32]

Once the concept of the fiduciary duty is clear, it is then time for a more detailed consideration of the duties an agent owes to the parties opposite from the agent's principal in the transaction. It is here that the application of agency law to real estate brokerage may vary more from state to state.

It will soon be apparent that describing the approaches taken by various jurisdictions regarding a real estate licensee's duties to the *non*principal is considerably more complex than formulating a general rule concerning duties to the principal. Yet it is in this area that much confusion and misunderstanding exists and it is here that much work remains to be done. Nevertheless, before discussing an agent's duties to nonprincipals, brief mention should be made of the concept of dual agency.

B. Dual Agency

Dual agency occurs where a broker has two principals at the same time and the principals have adverse interests. Since the broker is the agent of both, they are both owed a fiduciary duty. This situation is normally permissible only upon full and complete disclosure to both principals, and upon an informed consent by both parties to the dual agency.

Dual agency representation has many potential pitfalls for real estate agents. Often it will be impossible to simultaneously honor the fiduciary duties to both parties and withdrawal from the transaction may become necessary. Licensees may find it expedient not to enter intentional dual agencies except under extreme or unusual circumstances, and even then, only after advice of legal counsel. It is also important for licensees to avoid the trap of falling into an *un*intentional dual agency by allowing an agency relationship to

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[31] 99 So. 2d 709, 712 (Fla. 1958).

[32] 209 So. 2d 240, 243 (Fla. 1968).

develop with both buyer and seller. Many negative consequences can flow from a dual agency when the principals do not give an informed consent after full disclosure.

Even with appropriate consent and disclosure, a dual agency is hazardous for licensees since it is often very difficult, or perhaps impossible, to be loyal to both buyer and seller and advance each of their interests simultaneously. A minority rule applicable in at least one state simply prohibits real estate licensees from engaging in dual agencies altogether.[33]

VIII. DUTIES TO THE NONPRINCIPAL

A difficult question to be resolved in the area of real estate brokerage and agency law is how a broker or salesperson must treat the party who is opposite from the principal. For example, in Florida, as in many other states, courts impose minimum standards of conduct on brokers and salespeople for dealing with a nonprincipal. The Florida rule can be traced back to *Zichlin v. Dill.*[34] In *Zichlin*, the Florida Supreme Court held nonprincipals could expect that real estate licensees would operate with at least "[t]he requisites of an honest, ethical man."[35] The court disregarded the old rule of "let the buyer beware" and created this new duty because real estate brokers were licensed and regulated by the state under a "high standard of qualifications."[36] In subsequent cases, since 1946, Florida courts continue to adhere to the rule announced in *Zichlin.* The facts of each new case paint a picture of what is an "honest, ethical man." The rule, however, is somewhat elastic and a real estate licensee's conduct is judicially deemed to be proper or improper on an ad hoc basis. More modern cases tend to describe acceptable broker or salesperson conduct as meeting an obligation of honesty, candor, and fair dealing toward the nonprincipal.[37]

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[33] *See, e.g.*, Proctor v. Holden, 540 A.2d 133 (Md. App. 1988).

[34] 25 So. 2d 4 (Fla. 1946).

[35] *Id.* at 5.

[36] *Id.* at 4-5.

[37] *See, e.g.*, Gerber v. The Keyes Co., 443 So. 2d 199, 200 (Fla. Dist. Ct. App. 1983); Ellis v. Flink, 301 So. 2d 493 (Fla. Dist. Ct. App. 1974).

In addition to lawsuits based on a breach of the duty of honesty, candor, and fair-dealing, nonprincipals may also file civil fraud suits against brokers and salespersons representing the opposite party. It is fair to state that a real estate licensee guilty of civil fraud would not be acting as "an honest, ethical man," and would be breaching the duty of honesty, candor, and fairness, as well.

What is probably not well known, however, is that in some states civil fraud can be proven by facts and circumstances other than an intentional false statement concerning the transaction. The Florida Supreme Court expressed this rule of law in *Joiner v. McCullers*:

> A false representation of a material fact, made with knowledge of its falsity, to a person ignorant thereof, with intention that [it] shall be acted upon, followed by reliance upon and by action thereon amounting to substantial change of position, is a fraud of which the law will take cognizance.[38]

There is no difficulty with the notion that real estate brokers should be held legally accountable if and when they make a false statement of material fact about a transaction with "knowledge of the falsity." Clearly, the duty of honesty, candor, and fairness to the nonprincipal would be breached by such behavior. The Florida Supreme Court, however, did not limit the prospect liability to only intentional conduct of this type. The court further explained that the criteria of "knowledge of falsity" could be established in two additional ways, besides actual knowledge.[39] These are that the false statement was made: (a) "Without knowledge of its truth or falsity," or (b) "under circumstances in which the person making it ought to have known, *if he did not know*, of its falsity."[40] The court articulated this rule by stating that category (a) could be satisfied by showing that the speaker stated an "absolute, unqualified, and positive assertion on a subject of which he was ignorant, and that he had no knowledge whether his assertion in reference thereto was true or false;"[41] and that category (b) could be satisfied by showing that

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38 Joiner v. McCullers, 28 So. 2d 823, 824 (Fla. 1947).

39 *Id.*

40 *Id.* (emphasis added).

41 *Id.*

the speaker, "occupied such a special situation or possessed such means of knowledge as made it his duty to know as to the truth or falsity of the representation made."[42]

Based on these principles of law, it seems clear that a real estate broker or salesperson could be legally liable to the nonprincipal by making an unintentional mistake about a material fact concerning the property. Whether the courts assess liability depends on whether the facts of a particular case demonstrate that the broker or salesperson recklessly made the false statement (category (a)) or whether the broker's or salesperson's "position" in the transaction causes the court to impose a "duty" on the broker or salesperson to know the truth (category (b)). Moreover, in each of these situations, liability only attaches if the false statement is about a "material" fact.

Generally speaking, the courts consider a material fact to be an important fact regarding the transaction and not what is generally mere "sales talk." The courts also refer to "sales talk" as "puffery" or "mere puffery" and statements of this nature would normally be outside the realm of material facts. Examples of sales talk would probably include: "Isn't this backyard just beautiful! You'll never get tired of this view!" or "This house would be wonderful to live in." Although the line of demarcation between sales talk and statements of material fact is a fine one, brokers representing sellers are, after all, in the business of selling real estate and, accordingly, some latitude in extolling a property's virtue is allowed without liability unless the statements are false and relate to material facts. Thus, unintentional false statements of material fact should result in liability if the court applies caselaw like that used in Florida.[43]

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[42] *Id.* (citation omitted).

[43] *See* Boggs, *supra* note 10. *Florida Real Estate Brokerage and Agency Law* explains this problem.

Things get somewhat more difficult to sort out when the broker makes statements about the property which he or she believes to be true, but which actually are not. Examples of these kinds of statements are almost limitless but certainly would include things like: (1) This house is hooked up to the sewer line (but it really is on a septic tank); (2) The lot is 100 ft. x 300 ft. (when it really is 85 ft. x 300 ft.); or (3) This roof is watertight (when it actually leaks). Remember that in each of these cases the real estate licensee making the statement truly believes that his or her information is correct, and therefore, at least arguably, has not violated the duty of honesty, candor, and fairness to the buyer.

On the other hand, look at the position of the buyer. If he buys because of the broker's incorrect statements, his actual damages are not reduced simply because the broker did not

intend to make a false statement. So, the real question at law is: When should a broker (or salesman) have to pay money damages to the buyer or receive disciplinary penalties from the Real Estate Commission when he or she makes unintentional, untrue statements of material fact about the seller's property to the buyer. One class of cases like this can be dealt with quickly and easily. If the broker is reckless in making statements of material fact about the property, then most Florida courts would probably let the buyer recover damages. The term reckless, as used here, generally means that the licensee made the statements without caring whether they were true or false, and generally, he or she has no basis to support the statements made. An honest, ethical person would not behave this way, and this kind of behavior would not constitute fair dealing with the buyer.

Once cases involving unintentional, untrue statements of material fact made recklessly are disposed of, a large number of factual situations are left where line drawing is very difficult. Traditionally, Florida courts have been reluctant to hold brokers financially liable to buyers when unintentional false statements of material fact were made without recklessness, and under circumstances where a reasonably diligent broker *should not* have known about the falsity.

For example, in 1978, Bauer v. Vanguard Realty, Inc., 365 So. 2d 196 (Fla. Dist. Ct. App. 1978) decided that a broker would not be liable to a buyer because of the broker's failure to correctly state the square footage of a house. The facts are fairly simple and straight-forward. The broker was the agent of the seller. The broker's listing said the house had 1,980 square feet. The buyer alleged that the broker verbally said that the house had "just under 2,000 square feet." The buyer further alleged that the house actually had 1,837 square feet in it, but failed to allege that this discrepancy was a material fact causing him to contract to purchase the house. The appellate court agreed with the trial court judge who said,

Florida courts have consistently put a burden upon the purchasers to ascertain for themselves those facts which are easily ascertainable. The gross square footage of a home is such an easily ascertainable fact that *strict reliance on a representation by a broker can be misplaced.* (emphasis added) *Id.* at 197.

In 1985, a similar case, Miller v. Sullivan, 475 So. 2d 1010 (Fla. Dist. Ct. App. 1985), the facts were fairly simple. The seller placed property for sale with a listing broker. The listing broker stated that the house had 1,417 square feet in both the listing agreement and the multiple listing service book. The buyer alleged that he bought the house relying on this information and also relying on an alleged statement by the selling broker that the 1,417 square feet was "heated and cooled area." Later, after purchasing, the buyer learned that his house actually contained only 1,092 square feet, and he sued the brokers and the seller.

Predictably, the court said that for the buyer to prove that the listing broker was negligent, the buyer would have to prove that the listing broker breached the duty of "honesty, candor, and fair dealing." *Id.* at 1011 (citation omitted). In a departure from the holding of the other appellate court in 1978, this court now said that there was "a dispute" about whether a listing broker "had a duty to double-check by measuring the square footage figure" given by the seller. *Id.* at 1012. This, along with some other disputed matters, caused the court to send the case back to the trial level for further proceedings.

Compare the two cases just discussed. In 1985, a Florida appellate court, faced with an apparently unintentional, false statement made by a broker about the square footage of a house, sent the matter to trial rather than dismiss the buyer's claims without a trial, as had been done before in 1978. Can this difference be explained because the 1985 court felt that

The problem, at least from the broker's point of view, is that this area of the law is dynamic and the legal consequences of making an unintentional false statement to the nonprincipal about a material fact can expand as the court articulates new decisions. A good illustration of this is the issue of whether a broker or salesperson has a duty to double-check the accuracy of factual information produced by the principal.[44]

At this stage, it appears that brokers and salespersons in many states face the very real prospect of being personally liable for communicating unintentional errors regarding material facts of a transaction to the nonprincipal. This is true when the broker merely repeats information originating from the principal even when the broker has no reason to doubt the veracity of the principal's comments. If courts continue along the trends indicated by current case law, the role of the broker will effectively be transformed from that of a salesperson to an insurer of the accuracy of material facts concerning a transaction whenever the broker or salesperson communicates information. This could include advertising materials and MLS data. For example, the selling broker owing a fiduciary

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even though the listing broker did not intend to make a false statement, and apparently was not reckless, nevertheless a trial might decide that a broker in the position of the listing broker should have determined the true square footage in spite of what the seller told him? If this is true, do Florida brokers and salesmen who are agents of the seller now have a duty to double-check facts told to them by the seller before passing this information along to the buyer?

Consider the outcome of a Florida case which went to trial in early 1989. The buyers complained that the broker, who was the seller's agent, incorrectly stated the zoning of the property. The buyers learned the true zoning only after the closing and argued that the broker and the seller should be liable because they could not use the property for their intended purpose.

The broker (and salesman) argued that they had only repeated the zoning status given to them by the sellers (although the sellers disputed this). It is important to take note of two of the instructions given by the judge to the jury to guide them in reaching their verdict. Again predictably, the court said the broker (and salesman) owed the buyer a duty of honesty, candor, and fair dealing. But the judge went further by adding in another instruction that the broker (and salesman) also, "have a statutory duty to be competent and qualified to make real estate transaction(s) and conduct negotiations therefore with safety to investors and to those with whom he may undertake a relationship of trust and confidence" (quoting FLA. STAT. § 475.17(1)(a) (1991)).

When the jury returned, they found liability for money damages against both the sellers and the broker, although a much larger amount was lodged against the sellers. *Id.*

[44] *See* Boggs, *supra* note 43.

and MLS data. For example, the selling broker owing a fiduciary duty to the seller can be liable to the buyer for incorrect material facts passed on to the buyer from the MLS data compiled by the listing broker. If the selling broker becomes liable to the buyer in a situation like this, the selling broker may seek indemnification from the listing broker. This, however, may be a fruitless act if the listing broker is insolvent or uninsured.

A. Duty to Inspect

Some states have gone further regarding duties brokers and salespersons owe to the nonprincipal than the results of the cases just discussed. One widely cited case in this area is *Easton v. Strassburger*,[45] decided in California in 1984. In that case, the court found the listing broker liable to the buyer on a theory of negligence.[46]

The facts involve buyers purchasing a residence for $170,000, with the involvement of a selling (or cooperating) broker in the transaction. After the closing, severe earth slides occurred and badly damaged the house. The property value "was estimated to be as low as $20,000.00."[47] Although the sellers knew that there had been earth slides before the property was listed for sale, they did not tell the listing broker or salesperson anything about this problem.[48]

First the court recounted the California rule requiring the listing broker to tell the buyer about this material defect if they had known about it. Then the court addressed the main issue of the case; whether the listing broker owed the buyer a duty "to disclose defects which he should have discovered through reasonable diligence."[49]

After discussing this point thoroughly, the court held:

> In sum, we hold that the duty of a real estate broker, *representing the seller*, to disclose facts . . . includes the affirmative duty to conduct a reasonably competent and diligent

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45 199 Cal. Rptr. 383 (Cal. Ct. App. 1984).
46 *Id.* at 385.
47 *Id.*
48 *Id.* at 386.
49 *Id.* at 387.

> inspection of the *residential property* listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal.[50]

The court affirmed the finding of liability against the listing broker because the "soil stability" of the property was not tested and the broker was aware of certain so-called "red flags" which "should have indicated to them that there were soil problems."[51]

The listing broker, who was legally the seller's agent, failed to arrange a soil test designed to benefit the buyer, and the California court concluded that this conduct was a negligent breach of duty to the *buyer*, the broker's nonprincipal. It should also be noted that a listing broker in this situation may well have a viable cause of action against the seller if the facts of the case show the seller's concealment of material facts related to the property's defects. However, this may or may not do the listing broker any practical good depending on the solvency of the seller. In a subsequent 1988 California case *Smith v. Richard*,[52] the court followed the rule of *Easton* yet made it clear that the listing broker's affirmative duty to inspect for the buyer's benefit included only residential property and not commercial property.[53]

California is not alone in imposing a duty on listing brokers to protect residential buyers through affirmative inspections. In the New Mexico case of *Gouveia v. Citicorp Person-to-Person Financial Center, Inc.*,[54] a buyer working with a selling broker brought suit against the listing broker based on alleged misrepresentations in the "computer listing sheet" which the listing broker prepared.[55] The appellate court reviewing this matter stated, "[u]nder some circumstances, a broker may have a duty to disclose defects that an inspection would reveal."[56] The court then cited *Easton* as authority to undergird its position.

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50 *Id.* at 390 (emphasis added) (footnotes omitted).
51 *Id.* at 386.
52 254 Cal. Rptr. 633 (Cal. Ct. App. 1988).
53 *Id.* at 638.
54 686 P.2d 262 (N.M. Ct. App. 1984).
55 *Id.* at 265.
56 *Id.* at 266.

Likewise, courts in Washington held that listing brokers may owe buyers certain duties regarding affirmative inspections of the listed property. In *McRae v. Bolstad*,[57] a disappointed buyer brought suit against the listing broker because of drainage and sewage problems the buyer experienced at the newly-purchased residence. First, the reviewing court applied the state's Consumer Protection Act to the transaction. Then, the court disposed of disputes surrounding the trial judge's jury instructions, stating:

> It is argued that instruction 6 purports to place an affirmative duty to use care to ascertain the condition of real property before listing it. . . . Court's instruction 12 properly states that a real estate broker must exercise that degree of care that a reasonably prudent real estate broker would use under all the circumstances . . . .[58]
>
> In the sale of real estate, a broker or seller has a duty to disclose all material facts not reasonably ascertainable to the buyer. Failure to disclose a material fact, where there is a duty to disclose is fraudulent.[59]

Since this Washington case was decided before the California decision in *Easton*, no reference was made to the California rule. Nevertheless, the Washington court's decision and the language articulated appears to place the law in Washington in a posture similar to that of California's law.

Courts in jurisdictions like these place a heavy burden on real estate licensees. Remember that the listing broker is, almost without exception, considered to be the seller's legal agent. The listing broker therefore owes a fiduciary duty to the seller, her principal under agency law. These kinds of court decisions thrust confusion into that well-defined relationship. Thus, the broker's incentive is to approach the principal and tell her that the premises must be affirmatively inspected to search out possible material defects. If found, these defects must be reported to potential buyers.

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[57] 646 P.2d 771 (Wash. Ct. App. 1982).

[58] *Id.* at 775.

[59] *Id.* at 774.

How do most sellers react to this? Are they offended? Do they wonder who the broker is really working for? Clearly this situation is unlikely to enhance the relationship of trust and confidence between sellers and their real estate agents. One has to wonder if this is good public policy, or if perhaps it would be better to place the responsibility for inspecting property on those who have traditionally borne it, buyers or their agents.

B. The Slippery Slope

After the California court decision in *Easton*, the state completely embraced the concepts regarding listing broker inspections. Presumably with the goal of protecting residential real estate buyers, the California Legislature codified the holding of *Easton* into the state's statutes in 1985.[60] The Legislature noted that its intent in adopting the statute was to clarify the duties owed by brokers to facilitate the ready availability of professional liability insurance coverage for real estate licensees.[61] In any event, the California Civil Code then provided, in part:

> It is the duty of a real estate broker . . . to a prospective purchaser of residential real property . . . to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that such an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer or is a broker who acts in cooperation with such a broker to find and obtain a buyer.[62]

The language of the statute makes clear that the duty of inspecting residential real estate for the buyer's benefit binds not only the listing broker, but also the selling broker. The statutory language appears to be based on the usual scenario in which the listing broker and the

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60 Cal. Stat. ch. 223 (1985); Civil Code § 2079.

61 *Id.*

62 *Id.*

selling broker are agent and subagent of the seller, respectively, and both owe a fiduciary duty to the seller under agency law principles.

Unfortunately, both the *Easton* decision and the statute failed to address the question of how to successfully integrate a broker representing the buyer into a residential real estate transaction. *Easton* discussed in considerable lengths the plight of most residential buyers who do not appreciate the notion that both the listing broker and the selling broker are normally agents of the seller.[63] Since the *Easton* court felt that many buyers "*justifiably* believe the seller's broker is also protecting their interest,"[64] the court also found it reasonable and logical to place the burden on the seller's brokers. However, the court failed to anticipate what would happen when a bona fide buyer's broker was part of the transaction.

That situation subsequently arose in California and presented the courts with the interesting challenge of resolution. In the 1989 decision of *Murray v. Hayden*,[65] the court heard the claims of a disappointed residential purchaser who allegedly "suffered damages as a result of concealed defects in a single family residence they purchased."[66] Ironically, the alleged defects of the house in *Murray*, like those in the *Easton* case, related to soil conditions and foundation problems causing the buyers to complain about "cracks, distress, and deterioration."[67] Like the plaintiffs in *Easton*, the buyers in *Murray* brought suit naming the sellers and the brokers.

Unlike *Easton*, however, the buyers in *Murray* also sued a real estate licensee who was their *own* agent.[68] This individual asked the trial court to dismiss him from the case. The trial court agreed finding "no duty on the part of Hayden, acting as the buyer's broker, to conduct an inspection."[69]

When the buyers appealed, the appellate court characterized their claim as one seeking "to extend the holding in *Easton* to include a duty on the part of the real estate broker representing the buyer to

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63 Easton v. Strassburger, 199 Cal. Rptr. 383, 388-389 (Cal. Ct. App. 1984).

64 *Id.* at 389 (emphasis added).

65 259 Cal. Rptr. 257 (Cal. Ct. App. 1989).

66 *Id* at 257.

67 *Id.*

68 *Id.* at 258-259.

69 *Id.* at 258.

conduct a reasonably competent and diligent inspection."[70] The court analyzed this issue in light of the facts and referred to both the *Easton* precedent and the applicable statute. In the end, the court apparently based its decision on a desire to avoid duplication of inspection duties in the brokerage industry. The court stated:

> In the final analysis, we can find no compelling reason for extending the duty to conduct an inspection to a broker representing the buyer. . . . The seller's broker is in a better position to conduct an inspection, and there would be a duplication of effort were such a duty imposed on the buyer's broker.[71]

When the results of the *Easton* decision, its subsequent codification, and the *Murray* decision are viewed together, a rather surprising picture emerges. Real estate licensees who were the legal agents of the seller were under obligations to conduct inspections for the benefit of the buyer. Real estate licensees who were legal agents of the buyer were relieved from obligations to inspect the premises for the benefit of their principals. This result was unfortunate at best and ridiculous at worst. Perhaps the *Murray* court should not be blamed too vigorously; it probably did not want to upset the *Easton* precedent or attack the relevant statute. This decision in California can be blamed on the ad hoc, piecemeal approach to decision making. A state which adopts a comprehensive real estate brokerage/agency statute might avoid circumstances such as those.

C. Intentional Misrepresentation

Similar to the case law previously discussed, a great majority of states hold real estate licensees liable to those who can prove that the licensee engaged in an intentional misrepresentation of a material fact in the transaction. Holding real estate brokers and salespersons to a standard of honesty and truthfulness in their dealings seems entirely reasonable. The brokerage business should not tolerate those who

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[70] *Id.*

[71] *Id.* at 259.

willfully engage in fabrications in order to make a sale, and both disciplinary sanctions and civil liability should attach to licensees engaged in such conduct. Sometimes even criminal liability is appropriate for willful fraud.

Although a general consensus exists proscribing willful lying about material facts by real estate licensees, what about the licensee who just keeps quiet about a material defect regarding the property being sold?

D. Duty to Disclose

It was long the rule under the old legal concept of caveat emptor that real estate sellers did not have a duty to speak up and disclose material defects unless questioned by the buyer. In a 1985 landmark case, *Johnson v. Davis*,[72] the Florida Supreme Court abruptly changed this rule. After considering the history and judicial construction of the caveat emptor doctrine, the Florida court looked to other states to see how they approached this problem. The court first referred to a California decision which required sellers to disclose material defects unknown to and not readily discernible by the buyer. The court then cited similar precedents from several other jurisdictions and concluded that Florida law on this point should be changed. The court stated:

> Accordingly, we hold that where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer. This duty is equally applicable to all forms of real property, new and used.[73]

In subsequent appellate court decisions since *Johnson v. Davis*, the duty to disclose assigned to sellers in that case has been extended to real estate brokers representing the seller.[74] The duty imposed on Florida real estate brokers representing sellers to treat buyers

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[72] 480 So. 2d 625 (Fla. 1985).

[73] *Id.* at 629.

[74] *See, e.g.*, Rayner v. Wise Realty Co., 504 So. 2d 1361 (Fla. Dist. Ct. App. 1987).

fairly, honestly, and candidly now includes a duty to disclose material defects not known to or readily observable by those buyers. Florida is not alone in requiring real estate licensees to disclose these kinds of material defects; a minority of states now have a rule substantially similar to Florida law.

E. Negligent Misrepresentation

Expressing a general rule when examining negligent misrepresentation by a real estate licensee to the nonprincipal is much more difficult than formulating a general rule for intentional misrepresentation. The Florida rule on this point was explained earlier when considering *Joiner v. McCullers*.[75] Recall that Florida courts can hold the licensee liable for unintentional misrepresentations if they were made either (1) not knowing whether the statement was true or false, or (2) when the speaker should have known the truth. This is an area of developing and uncertain case law in which the decisions are very fact specific. Other states are also wrestling with these same issues.

For example, consider Alaska. In the 1982 case *Bevins v. Ballard*, a dissatisfied buyer sued the sellers, their listing broker and the broker's salesperson.[76] The buyer purchased a lot with an unfinished house supplied with well water. The salesperson told the buyer the well was "good" and the trial court found that this information originated with the sellers.[77] Unfortunately, the well was not "good" and, after closing, the buyer had to spend nearly $7,000 improving the well to secure an adequate water supply.[78] The court formulated the issue by stating, "[t]he question presented in this case is whether or not liability for innocent misrepresentation should extend to the owner's agent, the real estate broker, where that party serves as a conduit for the owner's misinformation."[79]

After discussing the problem in general and commenting on the broker's status as a "licensed professional" the court concluded,

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[75] 28 So. 2d 823 (Fla. 1947).

[76] 655 P.2d 757 (Alaska 1982).

[77] *Id.* at 759.

[78] *Id.*

[79] *Id.* at 762.

"[a]ccordingly, we hold that a purchaser who relies on a material misrepresentation, even though innocently made, has a cause of action against the broker originating or *communicating* the misrepresentation."[80]

Notice the effect of this decision on the broker and salesperson. In order to avoid potential liability to a nonprincipal, the listing broker and salesperson must verify information obtained from the principal before communicating it to the buyer. Remember that this rule does not apply to situations where the broker or salesperson knows that the information supplied by the seller is false; that is another theory of liability. Here liability can attach even when the broker or salesperson believes the owner's statements are true. In effect, this rule makes the broker an insurer of the accuracy of material facts about the property communicated to the nonprincipal.

IX. WHAT SHOULD BE DONE?

1. A considerable amount of confusion exists in the real estate brokerage marketplace, particularly on the part of buyers, regarding who a licensee represents in a transaction;
2. Most buyers working with a selling broker (or salesperson) tend to think of that individual as their advocate. Mandatory disclosure of agency status does not eliminate this attitude;
3. To at least some extent, selling brokers and salespersons share the attitude of buyers discussed in paragraph 2;
4. The traditional rules of agency law regarding seller subagency are not reasonable and logical when applied to the modern real estate brokerage market which is heavily driven by multiple listing service arrangements; and
5. The court-imposed duties on real estate licensees for the benefit of nonprincipals should be carefully reviewed and evaluated to preclude turning licensees into insurers of each transaction.

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[80] *Id.* at 763 (emphasis added).

The most desirable way to address these concerns is by legislative enactment of a state statute resolving all these issues simultaneously rather than depending on the case-by-case approach utilized by the judicial system.

X. CONCLUSION

The law of agency as applied to modern real estate brokerage is out of harmony with the reasonable expectations of real estate licensees and the consuming public. Instead of trying to force the behavior of licensees, buyers, and sellers into the mold of precedent-bound concepts, agency law warrants reform. Accordingly, the states should consider adopting the proposed model statute contained in Appendix A. If adopted, this legislation would benefit both the public and the real estate brokerage industry. Buyers would achieve greater representation and protection. Further, legal duties and responsibilities would more closely conform to the desires and expectations of the parties to real estate transactions. The brokerage industry would achieve greater certainty regarding the nature of its legal obligations to both buyers and sellers.

XI. PROPOSED MODEL STATUTE

A. *Summary for Proposed Model Statute*

I. The proposed statute attached hereto provides definitions for the terms used therein.

II. It also sets up new presumptions in the law regarding whom a broker represents. These are specified in section 2.

III. Any multiple listing services *requirements* that the selling broker be the seller's subagent are prohibited, but selling brokers could still be sellers' subagents at their option.

IV. Buyers' agents may be compensated from the seller's agent if full disclosure occurs.

V. When both the seller and buyer are represented by their own agents, the duties owed by the respective brokers to their nonprincipals are more *narrow* than when only one side has an agent.

VI. The scope of duty owed by a broker to the nonprincipal is specified in section 2, paragraphs (5) and (6).

B. Statutory Language

A bill to be entitled:
An act relating to real estate brokerage; providing definitions; providing real estate brokerage and agency principles, presumptions, and duties for agents; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:
Section 1. A section entitled Definitions to read:
(1) As used in this chapter, terms have the following meanings: *Note*: The following terms (and others which may be appropriate) should be listed and defined using the existing statutory nomenclature or case law terminology as may be appropriate in a particular state: (1) Regulatory Commission, (2) Broker, (3) Salesperson, (4) Real property or real estate, (5) Agent, (6) Agency Relationship, (7) Subagent, (8) Principal, and (9) Nonprincipal.

Section 2. A section entitled Real Estate Brokerage and Agency Principles to read:
(1) The following presumptions, which may be rebutted by competent, substantial evidence shall apply in all real estate transactions in this state. It is presumed that:
   (a) a broker securing a listing from a seller is the seller's agent, and

(b) a broker procuring a buyer for a transaction is the buyer's agent, unless the broker is also the seller's listing broker, in which case the broker is the seller's agent.

(2) A broker may be the subagent of a principal provided the principal gives express consent.

(3) It is against public policy for multiple listing services or any other form of real estate listing data sharing arrangements in this state to require brokers participating in the service or arrangement to be subagents of the listing broker when procuring the buyer. Any such requirement created after the effective date of the act is deemed to be void.

(4) Brokers who are buyer's agents may legally and ethically receive compensation from seller's agents for procuring the buyer in a transaction so long as the receipt of such compensation is fully and completely disclosed to the buyer.

(5) When both the buyer and the seller in a transaction are served by their own agents, then the duties of either broker to the party opposite from their principal shall be limited to conduct that is fair, honest, and candid and shall specifically exclude:

(a) any duty to inspect the property for the benefit of the nonprincipal,

(b) any duty to advise the nonprincipal about the advantages or disadvantages of any of the contractual terms of the transaction, and

(c) any duty to verify any facts communicated to the nonprincipal unless the broker either knows or reasonably should suspect that such facts are false.

(6) When there is no broker serving as the opposite party's agent in a transaction, the duties of the broker to the nonprincipal are not limited as set forth in subparagraph (5) and may include matters specifically excluded therein when such an inclusion would be consistent with fair, honest, candid, and competent

conduct on the part of an agent toward the nonprincipal.

(7) A broker serving as an agent or subagent shall be liable to the principal for any negligence in the discharge of duties to the principal.