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## Protecting the Real Estate Consumer: Traditional Theories of Liability Revisited, and a Look at Nebraska's Proposed Real Estate Consumers Protection Act

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# Protecting the Real Estate Consumer: Traditional Theories of Liability Revisited, and a Look at Nebraska's Proposed Real Estate Consumers Protection Act

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Beware of the scribes, which love to go in long clothing, and love salutation in the marketplaces, and the chief seats in the synagogues, . . . [and who] devour widows' houses and for a pretence make long prayers.<sup>1</sup>

## I. INTRODUCTION

Real estate brokerage is a heavily regulated industry.<sup>2</sup> Virtually all states, including Nebraska, have lengthy statutory guidelines governing the process by which one becomes a broker, and the standards

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1. *Mark* 12:38-40 (King James).

2. *See, e.g.*, NEB. REV. STAT. §§ 81-885.01 to 81-885.47 (Cum. Supp. 1984), the Nebraska Real Estate License Act of 1973, which sets up a State Real Estate Commission to supervise the activities of brokers, defines what constitutes real estate brokering, and identifies educational and licensing requirements.

to which a broker must adhere.<sup>3</sup> The regulatory schemes have a great deal of consistency between the states. One provision frequently contained in the statutes and followed in Nebraska is that members of the public not meeting the guidelines and standards of the statute are prohibited from bringing an action to recover a fee for services rendered.<sup>4</sup> The restriction on fee collection is designed to discourage the unauthorized practice of real estate brokering. Unauthorized brokering is viewed as being contrary to the public interest,<sup>5</sup> and regulation is designed to protect the public interest.<sup>6</sup>

This Article will review the role the real estate broker plays in a typical residential real estate transaction, discuss how statutory guidelines and common-law theories of liability have served to protect the real estate consumer,<sup>7</sup> and analyze Nebraska's Real Estate Consumer Protection Act to see what new protections are available to the real estate consumer.<sup>8</sup> It is the thesis of this Article that traditional theories of liability and statutory regulation have provided insufficient protection for the residential real estate consumer, and that a real estate consumers protection act is an appropriate vehicle for providing additional protection.

## II. THE REAL ESTATE TRANSACTION

### A. The Parties

#### 1. *Role of the Broker*

Who is the real estate broker? At present, in Nebraska a broker is someone having at least a high school education,<sup>9</sup> and who has com-

3. *Id.* at §§ 81-885.11 to 81-885.14 (licensing). See also LB 101, 89th Leg., 1st Sess., 1985 Neb. Laws (to be codified at NEB. REV. STAT. § 81-885.48), which sought to upgrade the educational requirements for brokers: "in each two year period, every licensee shall furnish evidence to the commission that he or she has successfully completed twelve hours of approved continuing education activities . . . ."

4. NEB. REV. STAT. § 81-885.06 (Cum. Supp. 1984). This is a common statutory restriction. See, e.g., COLO. REV. STAT. §§ 12-61-102, 12-61-119 (1973); D.C. CODE ANN. § 45-1401 (1979); FLA. STAT. § 475.42 (1981). See generally Annot., 39 A.L.R.2d 606 (1955); Annot., 169 A.L.R. 605 (1947).

5. See, e.g., *Zilchin v. Dill*, 157 Fla. 96, 98, 25 So. 2d 4, 4 (1946) (in exchange for a monopoly to engage in a lucrative business "the broker must conduct himself honestly in the business."); *Stevens v. Jayhawk Realty Co.*, 9 Kan. App. 2d 338, 677 P.2d 1019 (1984) ("the underlying purpose of the Kansas Real Estate Brokers and Salesman Act is to safeguard the interest of the public.").

6. See generally cases cited *supra* note 5.

7. The phrase "real estate consumer" will be used throughout this Article when either or both the buyer or the seller are being referred to. A real estate consumer is a consumer of residential real estate and, frequently, a consumer of the broker's services.

8. See *infra* text accompanying notes 103-28.

9. NEB. REV. STAT. § 81-885.13 (Cum. Supp. 1984).

piled at least 120 additional hours of study in courses approved by the state Real Estate Commission.<sup>10</sup> In addition, she will have served for at least two years as a licensed sales person,<sup>11</sup> and have passed a written exam dealing with real estate transactions.<sup>12</sup> After passing the exam, the broker is licensed<sup>13</sup> and can serve as a facilitator of real estate transfers.<sup>14</sup>

As the facilitator of residential real estate transfers the broker performs several tasks for both the vendor and the purchaser of the property. The relationship between the vendor and the broker is established by entering into a listing contract. This contract sets out the duties of the broker and the obligations of the seller. Even at this early stage of the real estate transfer process, the control the broker exercises over the transaction is apparent. Note that there are several distinct types of listing contracts,<sup>15</sup> but the one recommended by the

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10. *Id.*

11. *Id.* The person may avoid this requirement by additional study. *Id.*

12. *Id.*

13. *Id.*

14. As used in sections 81-885.01 to 81-885.47, unless the context requires otherwise:

(1) Real estate shall mean and include condominiums and leaseholds, as well as any other interest or estate in land, whether corporeal, incorporeal, freehold, or nonfreehold, and whether the real estate is situated in this state or elsewhere;

(2) Broker shall mean any person who for a fee, commission, or any other valuable consideration, or with the intent or expectation of receiving the same from another, negotiates or attempts to negotiate the listing, sale, purchase, exchange, rent, or lease or option for any real estate or improvements thereon, or assists in procuring prospects or holds himself out as a referral agent for the purpose of securing prospects for the listing, sale, purchase, exchange, renting, leasing, or optioning of any real estate or collects rents or attempts to collect rents, or holds himself out as engaged in any of the foregoing. Broker shall also include any person: (a) Employed by or on behalf of the owner or owners of lots or other parcels or real estate at a salary, fee, commission, or any other valuable consideration to sell such real estate or any part thereof in lots or parcels or make other disposition thereof; (b) who engages in the business of charging an advance fee in connection with any contract whereby he or she undertakes primarily to promote the sale of real estate either through its listing in a publication issued primarily for such purpose, or for referral of information concerning such real estate to brokers, or both; (c) who auctions, offers, attempts, or agrees to auction real estate; or (d) who buys or offers to buy or sell or otherwise deals in options to buy real estate.

*Id.* at § 81-885.01.

15. The types of listing contracts include: (1) the open listing contract, under which the vendor becomes liable for the brokerage commission only if and when the broker with a listing is the procuring cause of a ready, willing, and able buyer; (2) the exclusive agency contract, by which the vendor designates a single broker as his exclusive agent and the vendor retains the right to sell; (3) exclusive right to sell contracts, similar to the exclusive agency contract, but the vendor remains liable for the commission even if he sells without the assistance of the broker; (4) net listing contracts, under which the broker only receives a commission if the

National Association of Realtors (NAR) Code of Ethics is the exclusive listing contract.<sup>16</sup> The exclusive listing contract may be either an "exclusive agency contract" or an "exclusive right to sell contract." Under an exclusive agency contract the seller may negotiate the sale of his own property without becoming liable for a commission; however, he may not contract with other agents to sell the same property.<sup>17</sup> Under an exclusive right to sell contract, the vendor is liable for the commission on the sale of the property whether the sale is negotiated by the broker or by the vendor himself.<sup>18</sup> Although the NAR Code of Ethics does not identify which type of exclusive listing the broker should offer the vendor, the most frequently offered contract is the exclusive right to sell contract,<sup>19</sup> under which the homeowner is liable for the sales commission even if he negotiates the sale of his own home during the listing.

After the vendor and the broker have entered into a listing contract, the broker is bound to exercise his best efforts to find a ready, willing, and able buyer.<sup>20</sup> After the broker has procured such a buyer, the vendor is liable for the commission even if he no longer wants to sell<sup>21</sup> or does not want to sell to this particular buyer.<sup>22</sup>

The broker also may frequently assist the purchaser in the transaction. Such assistance may be in the form of assisting in determining

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property sells for over a specified price; (5) option listing contracts, under which the broker acquires an option to sell at a specified price and must reveal his profit upon exercise of the option and resale; and (6) the multiple listing contract, under which the broker lists the property with a local listing service that coordinates broker activities and gives wide circulation to information regarding properties to be sold. For a full discussion of these types of listing contracts, see D. BURKE, JR., *LAW OF REAL ESTATE BROKERS* 28-38 (1982).

16. "To prevent dissension and misunderstanding and to assure better service to the owner, the realtor should urge the exclusive listing of property unless contrary to the best interests of the owner." NAT. ASS'N REALTORS CODE OF ETHICS art. 6 (1982) [hereinafter cited as NAR CODE]. Article 21 prohibits a realtor from taking "any action inconsistent with the agency of another Realtor." Article 21 is designed to discourage interference with exclusive listings of other brokers.
17. See *supra* note 15.
18. See *supra* note 15.
19. *Id.* See also NEB. REAL ESTATE COMM'N, CONSUMER GUIDE TO BUYING AND SELLING HOMES (n.d.) [hereinafter cited as CONSUMER GUIDE]. The only type of listing contract suggested is the exclusive right to sell contract. *Id.* at 4.
20. D. BURKE, JR., *supra* note 15, at 196. See *Mansfield v. Smith*, 88 Wis. 2d 575, 277 N.W.2d 740 (1979). But see *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843 (1967) (court adopted minority rule that the vendor becomes liable for the commission only upon the closing of the sale). See generally Note, *The Implication of a Promise to Buy or Sell Into a Real Estate Brokerage Contract: An Analysis of the Ready Willing and Able Theory*, 114 U. PA. L. REV. 380 (1966).
21. *Rector-Phillips-Morse, Inc. v. Huntsman Farms, Inc.*, 267 Ark. 767, 590 S.W.2d 317 (1979); *Halperin v. Pine Plaza Corp.*, 180 Conn. 85, 428 A.2d 340 (1980); *Pottratz v. Ferkins*, 4 Kan. App. 2d 469, 609 P.2d 185 (1980).
22. *Pottratz v. Ferkins*, 4 Kan. App. 2d 469, 609 P.2d 185 (1980).

the amount to offer for the property,<sup>23</sup> drawing up the contract of sale,<sup>24</sup> aiding in the procurement of title insurance,<sup>25</sup> and arranging financing for the transaction.<sup>26</sup>

Litigation can arise from a break down in any stage of the process: from disputes about the construction of the listing contract, to problems in communicating the offer, to instruments involved in closing the sale, and frequently litigation has even arisen from problems discovered after the closing.

The following sections of this Article set out the expectations of the real estate consumer, review theories of liability applying to the real estate broker, and analyzes the protections provided to the real estate consumer under each theory. There are several recent scholarly articles developing these theories in detail,<sup>27</sup> and restating the arguments would be redundant. Therefore, the discussion is directed to identifying the main protections and problems with each theory of liability.<sup>28</sup> The final section reviews the Nebraska Real Estate Consumers Protection Act,<sup>29</sup> and discusses how this Act solves some of the problems facing the real estate consumer not addressed by traditional liability theories.<sup>30</sup>

## 2. Real Estate Consumers

Before discussing the theories of liability, it is useful to consider what the parties to the transaction anticipate, and the role they expect the broker to fill. Recognizing the reasonable expectations of parties entering into a transaction involving a broker will help identify the proper role of the broker. Once the proper role of the broker has been identified, liability should attach when the broker does not perform as

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23. *Haymes v. Rogers*, 70 Ariz. 257, 219 P.2d 339 (1950) (broker offering purchaser such advice denied commission). See generally Currier, *Finding the Broker's Place in the Typical Residential Real Estate Transaction*, 33 U. FLA. L. REV. 655 (1981) (law governing broker's relationship with the parties to the transaction needs to comport more closely with parties' expectations).

24. See generally Currier, *supra* note 23.

25. Stoppello, *Federal Regulation of Home Mortgage Settlement Costs: R.E.S.P.A. and Its Alternatives*, 63 MINN. L. REV. 367 (1979).

26. *Id.*

27. D. BURKE, JR., *supra* note 15, at 191-238; Currier, *supra* note 23, at 660; Payne, *Broker's Liability for Non-Disclosure of Known Defects in Sale Property—Caveat Emptor Still Applies*, 6 REAL ESTATE L.J. 341 (1977) (broker is subject to same duty to speak as principal/vendor, but imposition of liability upon broker remaining quiet is rare); Romero, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*, 20 ARIZ. L. REV. 767 (1978).

28. Readers seeking more detailed knowledge of various theories are encouraged to consult sources cited *supra* note 27.

29. L.B. 667, 89th Leg., 1st Sess. This Act is a unique piece of consumer legislation. The review of the Act is based on the amended version of March 27, 1985.

30. See *infra* text accompanying notes 102-26.

the role demands and the parties expect. Traditional liability theories will be shown to be inadequate either to determine the role of the broker or to protect either of the parties to the transaction.

When the vendor engages the real estate broker the vendor expects: (1) the broker to produce only purchasers who are ready, willing, and able to buy; (2) to have the broker advertise and show the home; (3) to obtain the best possible selling price; and (4) to be assured that the business of the transfer is proper. The buyer meanwhile anticipates that the broker will: (1) show him homes that are within his means; (2) show him homes of the type and quality and in the location he desires; (3) assist him in making an offer on the home; and (4) assist him in closing the transaction. The traditional theories of liability—agency, dual agency, and tort—provide virtually no protection for the buyer in areas he may need it most (e.g. in conducting the closing), and only limited protection for the vendor.

## B. Theories of Liability

### 1. Agency

The law of agency is so engrained in the field of real estate brokerage that the broker is frequently referred to as a real estate agent. The agent and principal relationship almost always exists between the broker and the vendor, since the relationship arises from the signing of the listing contract.<sup>31</sup> The characteristic feature of an agency/principal relationship is that the agent is the fiduciary of his principal. The agent acts on behalf of his principal, not for his own profit, and is subject to the control of his principal.<sup>32</sup> The duties of the broker to the principal vendor are frequently identified as the duties of good faith and loyalty, reasonable care and diligence, and disclosure.<sup>33</sup>

31. *Eckrich v. DiNardo*, 283 Pa. Super. 84, 423 A.2d 727 (1980). See also *Judd Realty Inc. v. Tedesco*, 400 A.2d 952 (R.I. 1979) (broker's right to commission is established by listing contract initiating principal and agent relationship); D. BURKE, JR., *supra* note 15, at 38.

32. RESTATEMENT (SECOND) OF AGENCY § 387 (1958) ("[A]n agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.").

33. *Schepers v. Lautenschlager*, 173 Neb. 107, 112 N.W.2d 767 (1962). The court stated that:

The duties and liabilities of a broker to his employer are essentially those which an agent owes to his principal. A broker owes to his employer the duty of good faith and loyalty, and is required to use such skill as is necessary to accomplish the object of his employment . . . .

. . . .  
The rule requiring a broker to act with the utmost good faith towards his principal places him under a legal obligation to make a full, fair, and prompt disclosure to his employer of all facts within his knowledge which are or may be material.

*Id.* at 117-18, 112 N.W.2d at 773 (citations omitted).

These duties require the broker to not disclose information that would harm the vendor,<sup>34</sup> properly advertise the property,<sup>35</sup> and to communicate all offers to the vendor.<sup>36</sup>

Under the theory of agency many of the seller's expectancies are met when the real estate broker properly performs the duties outlined in the listing contract. Agency theory provides solutions when the broker does not produce an able buyer,<sup>37</sup> or when the seller changes his mind after the broker has expended substantial effort in marketing the property,<sup>38</sup> or when the broker enters into a secret contract with a buyer to buy the property himself at lower than the best price.<sup>39</sup> All of these problems can be resolved under the traditional theory of agency law. Damages are limited to recovery of the commission amount and to any unfair profit gained at the principal's expense.<sup>40</sup>

In many ways, however, the real estate vendor is not protected by the law of agency. The seller may be offered only the exclusive right

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34. *Haymes v. Rogers*, 70 Ariz. 257, 219 P.2d 339 (1950) (broker denied commission for revealing seller might consider lower price than that listed in the offer).

35. *Kimball Bridge Rd. v. Everest Realty Corp.*, 141 Ga. App. 835, 234 S.E.2d 673 (1977) (negligence of a broker in listing an inadequate description of realty in sales contract resulted in the unenforceability of the contract).

36. NEB. REV. STAT. § 81-885.24(19) (Cum. Supp. 1984). *But see Carroll v. Action Enter.*, 206 Neb. 204, 292 N.W.2d 34 (1980) (broker's failure to communicate all underlying facts and circumstances of the offer creates no cause of action for the prospective purchaser).

37. *D. BURKE, JR.*, *supra* note 15, at 97-99 (broker failing to produce prospective purchaser is not entitled to any payment absent a different agreement with seller).

38. *Blank v. Borden*, 11 Cal. 3d 963, 524 P.2d 127, 115 Cal. Rptr. 31 (1974) (*en banc*) (vendor and broker entered into a contract allowing broker to recover commission if vendor withdrew the property from the market during the term of the listing agreement; court enforced broker's right to commission). Nothing prohibits brokers from inserting clauses that allow for recovery of at least expenses. The dissent in *Blank v. Borden* would not have granted the broker the entire commission believing this amount to be a penalty. *Id.* at 975, 524 P.2d at 134, 115 Cal. Rptr. at 38 (Burke, J., dissenting).

39. *Vogt v. Town & Country Realty Inc.*, 194 Neb. 308, 231 N.W.2d 496 (1975); *Schepers v. Lautenschlager*, 173 Neb. 107, 112 N.W.2d 767 (1962) (broker sold vendor's property to broker's uncle who resold at substantial profit within one month).

40. *Schepers v. Lautenschlager*, 173 Neb. 107, 120, 112 N.W.2d 767, 775 (1962) ("An agent . . . who deals with the subject matter of the agency so as to make a profit for himself will be held to account in equity as trustee for all profits and advantages acquired by him in such dealings." (quoting *Ericson v. Nebraska-Iowa Farm Inv. Co.*, 134 Neb. 391, 399, 278 N.W. 841, 845 (1938))). In *Vogt*, the plaintiff vendor was allowed recovery of the broker's commission and improper profit, but could not recover the appreciation in the value of the property that was due to the broker's improvements. *Vogt v. Town & Country Realty Inc.*, 194 Neb. 308, 322, 231 N.W.2d 496, 504 (1975).



to sell contract by the broker,<sup>41</sup> instead of a more advantageous form of listing agreement.<sup>42</sup> The seller may not be informed that the percentage commission is a negotiable amount.<sup>43</sup> The seller may believe that the agent will read and interpret all offers and transfer instruments, and protect the vendor's security interest in the property to be sold.<sup>44</sup> Such an expectation is reasonable considering that the vendor retains the broker because she does not understand the real estate transfer process. The broker is designated by statute as the party to manage such transactions,<sup>45</sup> and may neglect to suggest that the party consult with an attorney if she does not understand the instruments.<sup>46</sup>

According to the Code of Ethics of the NAR, the broker shall "not engage in activities that constitute the unauthorized practice of law and [shall] . . . recommend that legal counsel be obtained when the interest of any party to the transaction requires it."<sup>47</sup> This statement contemplates the existence of real estate transactions that do not require the services of an attorney. Additionally, the Code grants the broker the discretion to determine when a party needs an attorney's services. A party anticipating that the broker will read and understand the transfer instruments is not served by the law of agency. The agent is not required to disclose that he does not undertake to perform this service, nor is it necessary that he recommend one who does.

Even simple real estate transactions may require an understanding of the concepts of mortgages, due-on-sale clauses, or the intricacies of an installment land contract. The real estate broker who provides forms to facilitate these transactions is engaging in a practice requir-

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41. See *supra* notes 15-16 for a discussion of the types of listing contracts available and the wide usage of the exclusive listing contract.

42. Arguably, most vendors would benefit by retaining the right to negotiate the sale of their own home without becoming liable for the broker's commission. Admittedly, there are problems with the exclusive agency contract because vendors may negotiate secretly with prospective purchasers presented by the broker in order to avoid liability for the commission. Also, it is questionable how useful an open listing arrangement is if one's broker belongs to a multiple listing service. Any broker belonging to the multiple listing service who procures a purchaser for the property can share in the commission at sale. D. BURKE, JR., *supra* note 15, at 14. A vendor would probably have his property equally advertised by listing with a single broker belonging to the multiple listing service as by listing with several brokers.

43. Typically the broker's commission is five to seven percent of the sale price. D. BURKE, JR., *supra* note 15, at 3. In recent years, the commission is likely to be near seven percent. Whitman, *Home Transfer Costs: An Economic and Legal Analysis*, 62 GEO. L.J. 1311, 1336 (1974). Some commentators have expressed concern that such lack of variation in the cost of service constitutes a restraint of trade. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325, 1338 (1970).

44. See *infra* notes 73-75 and accompanying text.

45. See *supra* note 14.

46. See *infra* note 48.

47. NAR CODE, *supra* note 16, at art. 17.

ing knowledge of law.<sup>48</sup> The agent who neither explains the impact of these different instruments, nor recommends that legal counsel be retained, nor explains that he does not guarantee these instruments, leaves the unwary vendor at great risk.<sup>49</sup> Since the broker is making the decision when to recommend legal counsel, the broker should be bound in her fiduciary capacity to explain to the vendor whether she assumes responsibility for understanding the documents. The broker will most likely not be liable for damages for failure to construe correctly the instruments of transfer. She will not have breached any of her duties as an agent. The law of agency does little to assist a vendor in this instance.<sup>50</sup>

The law of agency offers the buyer of residential real estate less protection than the seller. Typically, the broker is the agent of the vendor and not the seller; therefore the broker owes *no* fiduciary duty to the buyer.<sup>51</sup> The buyer may suffer even greater detriment since he may be unaware that the broker is not representing his interests.<sup>52</sup>

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48. *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 135 Colo. 398, 312 P.2d 998 (1954) (en banc) (preparation of real estate instruments constituted unauthorized practice, but court did not enjoin). The standard practice in most localities is for brokers to use standardized forms prepared by the local bar association. D. BURKE, JR., *supra* note 15, at 361.

The issue of the unauthorized practice of law has a long and muddled history. Just what constitutes unauthorized practice has been subject to debate, much of it fruitless. See Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 A.B.A. FOUND. RESEARCH J. 159, 169-201 (1980). It is not my intent to suggest utilizing the concept of the unauthorized practice of law to restrict the practice of real estate brokers. I am not at all sure that such a restriction would be either in the public interest or enforceable. See, e.g., *Romero*, *supra* note 27, at 785, wherein the author discusses the landslide vote in support of constitutional amendment allowing real estate brokers to draft transfer instruments in Arizona. Nonetheless, it should be obvious that legal education does address many of the issues arising in real estate transfer. Whether the broker's education sufficiently addresses the issues that arise remains to be seen.

49. See *infra* notes 73-75.

50. See *infra* notes 73-75.

51. *Carroll v. Action Enter.*, 206 Neb. 204, 208-09, 292 N.W.2d 34, 36 (1980); *Eggerling v. Cuhel*, 196 Neb. 745, 748, 246 N.W.2d 199, 201 (1976). See also *Buffington v. Haas*, 124 Ariz. 36, 601 P.2d 1320 (1979) (vendor not able to recover against broker purchasing property for a real estate partnership when vendor's interest was not protected by a mortgage—unable to prove agency relationship).

52. See *Currier*, *supra* note 23, at 658-59. Currier describes the broker buyer relationship as follows:

The broker-home buyer relationship often begins outside the context of the sale of a particular home. The home buyer often calls a broker recommended by a friend or business associate . . . . The relationship thus begins on a positive and personal basis as well as a professional one. No contract is signed which evidences the broker's loyalty and confidence to the buyer, nor does the broker discuss his legal obligations and responsibilities in the transaction . . . . The broker generally requests a considerable amount of private information . . . . The intimate and

Some commentators have suggested that the manner in which the buyer-broker relationship develops encourages the buyer to believe that the broker is representing his interests in the transaction.<sup>53</sup> The buyer, believing himself represented, may neither actively protect his own interest, nor seek representation from another. If in fact the broker were to represent the buyer's interest, he would be in breach of the fiduciary duty owed to his principal, the seller.<sup>54</sup>

The law of agency has protected only partially the real estate vendor, and provided virtually no protection to the purchaser. Nonetheless, some commentators have suggested that expanding the law of agency to create duties owed to the purchaser would be beneficial to the public.<sup>55</sup> To create these duties they have utilized the concept of the dual agent.

## 2. Dual Agency

Occasionally brokers charged with breach of fiduciary duty have attempted the defense that they were acting as agent of both the buyer and the seller.<sup>56</sup> As a dual agent the broker serves as the agent of both vendor and purchaser. Either the broker is simultaneously the agent of both parties, or during the course of the transaction the broker's allegiance switches. The broker would serve as the seller's agent in advertising and in showing the property, but at some point would switch and become the agent of the purchaser and assist the purchaser in completing the transaction, e.g., by assisting in procuring financing and settlement services.

There are several problems with making the broker a dual agent. The seller would have to consent to the broker becoming a dual agent.<sup>57</sup> There is no obvious point in time at which the broker would become the agent of the buyer.<sup>58</sup> The relationship of agency between

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helpful nature of these discussions reinforces the buyer's attitude that the broker is friendly and worthy of trust.

*Id.* See also Raushenbush, *Who Helps the Home Buyer*, 1979 ARIZ. ST. L.J. 203 (1979). But see CONSUMER GUIDE, *supra* note 19, at 2 ("The licensee, who has [the listing contract on the property] is working for the seller . . .").

53. See *supra* note 52.

54. Haymes v. Rogers, 70 Ariz. 257, 219 P.2d 339 (1950).

55. See, e.g., Comment, *A Reexamination of the Real Estate Broker-Buyer-Seller Relationship*, 18 WAYNE L. REV. 1343, 1356-63 (1972). See also Natelson, *Colorado "Buyer Brokerage": Does It Still Exist After Velten v. Robertson?*, 55 U. COLO. L. REV. 83 (1983).

56. Vogt v. Town & Country, Inc., 194 Neb. 308, 313, 231 N.W.2d 496, 500 (1975).

57. NEB. REV. STAT. § 81-885.24(22) (Cum. Supp. 1984), prohibits the broker from "acting for more than one party in a transaction without the knowledge of all parties for whom he or she acts." The seller may not want to give up any perceived advantages of having his or her own agent and as a result may not consent to the broker becoming a dual representative.

58. See Currier, *supra* note 54, at 656-58 (discussing how the relationship of the bro-

the broker and seller arises upon the signing of the listing contract, but there is no comparable agreement establishing the relationship between the buyer and broker. In addition, if the broker attempted to act as a dual agent throughout the transaction, his usefulness to either party would be substantially reduced. He could not assist either party in negotiation, because to gain an advantage for one party is to lose the advantage for other. The broker would technically be reduced to the status of a middleman who brings the parties together. Furthermore, making the broker the agent of both parties does not guarantee that the parties will receive the information they need to conduct the transaction wisely.<sup>59</sup> Either party signing a contract who does not protect his legal interests may have no redress even when the broker is his agent.<sup>60</sup>

Dual agency does not resolve the difficult role the broker must play.<sup>61</sup> Instead, it becomes even more confused.<sup>62</sup> The broker's duties to the seller are not increased under the concept of dual agency. The buyer may be as well served by reliance on tort law and the broker's duty not to misrepresent when seeking redress for any injuries suffered as by reliance on dual agency.

### 3. *Misrepresentation*

The broker owes to the buyer the duty not to misrepresent material facts about the property being sold.<sup>63</sup> The tort of misrepresentation occurs when the broker makes: (1) statements of fact; (2) that are untrue and known by the broker to be untrue or recklessly made; (3) that are made with the intent to deceive for the purpose of inducing the purchaser to act upon them; (4) that in fact induced the purchaser to act; and (5) in so acting legally injures the purchaser.<sup>64</sup>

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ker and prospective purchaser extends over time, even though a contract is not signed establishing their relationship).

59. See *supra* note 48. See *infra* notes 82-83 and accompanying text.

60. *Id.*

61. See generally Currier, *supra* note 23.

62. *Id.* See also Stambler & Stein, *The Real Estate Broker-Schizophrenia or Conflict of Interest*, 28 J.B.A.D.C. 16 (1961).

63. NEB. REV. STAT. § 81-885.24(21) (Cum. Supp. 1984) (prohibits the broker from making any "substantial misrepresentations").

64. Suzuki v. Gateway Realty, 207 Neb. 562, 567, 299 N.W.2d 762, 767 (1980); Ames Bank v. Hahn, 205 Neb. 353, 355, 287 N.W.2d 687, 689 (1980). Cf. Carrel v. Lux, 101 Ariz. 430, 420 P.2d 564 (1966). In *Carrel* the court lists nine factors constituting the tort of misrepresentation: (1) a representation, (2) which is false, (3) which is material, (4) which is known by the agent to be false, (5) the agent intends that the purchaser act on the representation, (6) the purchaser is ignorant of the falsity, (7) the purchaser relies on its truth, (8) the purchaser's right to rely on the representation, and (9) injury proximately caused by the representation. *Id.* at 434, 420 P.2d at 568.

The purchaser cannot, by avoiding inquiry into a possible defect, later void the

A broker may not misrepresent the value of the property,<sup>65</sup> or any facts that the buyer considers material to the transaction.<sup>66</sup> A misrepresentation can be an omission to speak when a party's failure to speak would mislead the purchaser.<sup>67</sup> However, it is quite difficult for the purchaser to recover when his theory of recovery is misrepresentation through failure to speak.<sup>68</sup>

If the broker misrepresents the value of the property or material facts about the property, the purchaser has the right to an election of remedies. The purchaser may either affirm the contract and sue for damages or disaffirm the contract and be reinstated to her position before entry into the contract.<sup>69</sup>

#### 4. *Negligence or Malpractice*

The application of negligence theory to brokers' activities has been sporadic. It is difficult to draw any general rules defining under what circumstances a broker will be found to have acted negligently.<sup>70</sup> Negligence is a breach of the duty of due care exercised by a reasonable person acting in like circumstances.<sup>71</sup> Some commentators and courts have suggested that the malpractice liability of brokers is quite broad.<sup>72</sup> Brokers have been held liable for drafting a provision in a

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contract by claiming misrepresentation by concealment or omission. *See, e.g.,* Christopher v. Evans, 219 Neb. 51, 361 N.W.2d 193 (1985).

65. Smith v. Carroll Realty Co., 8 Utah 2d 356, 335 P.2d 67 (1959). *See generally* Annot., 81 A.L.R.3d 717 (1977).

66. *Supra* note 65.

67. *See* Hauck v. Samus, 212 Neb. 25, 28, 321 N.W.2d 68, 70 (1982) (vendor is not liable for fraud for failure to disclose material latent defects, unless evidence shows that vendor was in fact aware of defects); Wolford v. Freeman, 150 Neb. 537, 545, 35 N.W.2d 98, 102-03 (1948) (dispute is over whether reasonably diligent observation on part of purchaser would have discovered defects; if so, no recovery). *Cf.* Christopher v. Evans, 219 Neb. 51, 361 N.W.2d 193 (1985) (discussion of what constitutes concealment by vendor).

68. Wolford v. Freeman, 150 Neb. 537, 35 N.W.2d 98 (1948).

69. Christopher v. Evans, 219 Neb. 51, 54, 361 N.W.2d 193, 195 (1985).

70. *See, e.g.,* Annot., 94 A.L.R.2d 468 (1964):

[N]o rules of uniform application may be stated other than that, generally speaking, the broker is liable for all losses directly resulting from his failure to exercise the standard of skill and care imposed on him by law . . . diverse results [are] reached dependent on the particular facts involved.

*Id.* at 473.

71. W. PROSSER, TORTS § 30 at 143 (4th ed. 1971).

72. *See* Romero, *supra* note 27, at 789-90 (agent may have a duty to explain the implication of all documents to all parties in the transaction). *See also* Morley v. J. Pagel Realty & Ins., 27 Ariz. App. 62, 550 P.2d 1104 (1976). *But see* Buffington v. Haas, 124 Ariz. 36, 601 P.2d 1320 (1979) (court limits the *Morley* decision discussed in the Romero article: the duty to explain the impact of documents is limited to that owed by an agent to his principal). *See also* Brink v. Martin, 50 Wash. 2d 256,

contract that has unintended legal consequences,<sup>73</sup> for failing to draft a provision necessary to protect one of the parties' interests,<sup>74</sup> or for failing to inform a purchaser of important facts about the property.<sup>75</sup>

The number of cases holding a broker liable for malpractice is actually quite limited.<sup>76</sup> Part of the limited liability stems from failure to define clearly the broker's duties, so that establishing a breach of duty is difficult.<sup>77</sup> Additionally, part of the limitation on liability of brokers stems from the long standing dispute between attorneys and brokers regarding the proper province of each profession.<sup>78</sup> Some courts have expressed reluctance to hold anyone except an attorney liable when the person advises a party about legal rights.<sup>79</sup> Since giving advice or drafting documents are considered the province of attorneys, others typically have no duty to do it properly.<sup>80</sup>

Although courts like to trot out the phrase "regulation in the public interest" with regard to the activities of both brokers and attorneys,<sup>81</sup> the question may legitimately be asked: how much regulation is actually designed to protect the economic status of two powerful professions?<sup>82</sup>

310 P.2d 870 (1979) (broker owed no duty to the prospective purchaser to prepare an enforceable contract of sale).

73. *Wisnieski v. Harms*, 188 Neb. 721, 199 N.W.2d 405 (1972) (broker negotiated contract for sale improperly included additional property).

74. *Townsend v. Doss*, 2 Ark. App. 195, 618 S.W.2d 173 (1981) (broker assured owner that if balance of downpayment was not made owner could get her house back, but failed to secure note by mortgage); *Kimball Bridge Rd. v. Everest Realty Corp.*, 141 Ga. App. 835, 234 S.E.2d 673 (1977) (inadequate description of land to be sold resulted in unenforceability of contract for sale; owner stated claim upon which relief could be granted).

75. *Monty v. Peterson*, 85 Wash. 2d 956, 540 P.2d 1377 (1975) (broker failed to inform principal-purchaser of significance of private restrictive covenants).

76. See cases cited, Annot., *supra* note 70.

77. See *supra* notes 47-51 and accompanying text.

78. See *infra* notes 82-83 and accompanying text.

79. *Janssen v. Guaranty Land Title Co.*, 571 S.W.2d 702 (Mo. Ct. App. 1978).

80. *Id.*

81. See *supra* note 5. See also *Janssen v. Guaranty Land Title Co.*, 571 S.W.2d 702 (Mo. Ct. App. 1978) ("The intentment of Rule 5 . . . is to protect the public and those charged with the administration of justice from individuals who are not qualified and duly licensed attorneys . . . . The main purpose is not punishment and certainly not punishment through the device of punitive damages."). *Id.* at 706.

82. Broude, *Foreword*, in D. BURKE, JR., *supra* note 15, at xviii-xix:

Nor does his text ignore somewhat more mundane issues such as the ongoing battle between brokers and attorneys over the question of what constitutes the practice of law, authorized or otherwise. While such arcane contests may not be of much importance to the consumers of brokerage activities, they do have quite an economic impact on the income of two of our more pervasive professions.

See also Johnstone, *The Unauthorized Practice Controversy, A Struggle Among Power Groups*, 4 U. KAN. L. REV. 1 (1955).

Reasonable arguments can be made as to whether brokers are competent to handle residential real estate transfers.<sup>83</sup> However, it is difficult to frame an argument that grants brokers and lawyers a monopoly in dealing in the instruments of transfer,<sup>84</sup> yet holds only the attorney liable for malpractice in the use of these instruments. Arguably, the lawyer's economic status is protected because members of the public will realize that only attorneys will be liable for improperly drawn instruments. But the public interest is not protected by allowing only realtors, not laypersons, to facilitate real estate transfers and yet not be liable when this is done improperly. If brokers execute transfers competently, as some have suggested they do,<sup>85</sup> then they have little to fear from malpractice liability. It is only the incompetent broker who will be liable in any case. Were malpractice liability expanded to hold the broker liable when the reasonable

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83. See generally Christensen *supra* note 48, at 208:

Competency may be a legitimate question. It is argued in the cases that the field of real estate law is technical and difficult, requiring the special skills of a trained lawyer. While this is so, it may also be argued with some justification that a real estate broker who works full time with real estate transactions might acquire sufficient command of that field of law to function effectively in the drafting of those instruments. There are some indications, to be discussed later, which suggest that realtors may indeed be competent to perform those services that they seek to perform in real estate transactions.

Conflict of interest is also of concern here. Potential for injury to the client does exist by virtue of the fact that the broker's primary objective is to make the sale and earn a commission. This might cause him, in the drafting of the instruments and in the giving of advice to the client, to ignore serious legal problems that might interfere with the sale. And this would appear to constitute fairly serious risk of injury to the public. Again the ultimate question is whether this risk justifies depriving the public of the freedom to elect, nevertheless, to have these services performed by the real estate broker in the course of putting together the transaction.

*But cf.* State v. Haas, 138 Ariz. 413, 675 P.2d 673 (1983). Haas was a criminal fraud action. Haas represented real estate purchasers involved in a "Ponzi" scheme. The purchasers entered into purchase agreements granting the vendors security in "money assignments," "agreement assignments," or "trust deed beneficial interests." None of these terms were recognized terms creating a security interest. The court found that "most of the agents who attended and graduated from [real estate schools in Arizona] were not taught the meaning of the terms [Haas] used. In fact, most of the seller's agents who testified at the trial had not appreciated the meaning of the phrases used in the offers." *Id.* at 419-20, 675 P.2d at 680. Yet the defendant Haas had successfully made *hundreds* of such sales, and in four of the five in which he was found guilty of fraud neither the agent nor the seller were aware no lien was preserved. Fraud on such a massive scale as this, and undetected by so many participants to the transfers, hardly speaks for the sufficiency of education of brokers, at least in the state of Arizona.

84. See *supra* note 4 and accompanying text.

85. Johnstone, *supra* note 82, at 12 (brokers possess legal knowledge in areas closely connected to their business, and they can easily communicate such knowledge to the public in the course of the transaction).

expectations of the principal are not protected by the instruments of transfer, brokers might be of more assistance to real estate consumers.

Malpractice liability does not, however, solve the problem of to whom the duty is owed. In Arizona, where by constitutional amendment brokers are allowed to draft documents for residential real estate transfers, brokers can be held liable for malpractice.<sup>86</sup> The initial application of the law of malpractice in Arizona suggested that brokers could be liable if their malpractice injured one who was not their principal.<sup>87</sup> This broad application of the doctrine has subsequently been narrowed. Presently the broker is only liable in malpractice to his principal.<sup>88</sup> Therefore, the doctrine of malpractice will be of little assistance to one who is not the principal but is relying on the broker's expertise.

The preceding analysis has revealed the shortcomings of traditional theories of liability when applied to real estate brokers. Despite heavy regulation of the brokerage industry,<sup>89</sup> the real estate consumer is offered few protections, and even fewer remedies. Agency theory fails to protect the purchaser as well as the seller. The real estate purchaser may be unaware of his need of representation because he may believe the broker represents his interests<sup>90</sup> or he may view many costs as fixed that are actually negotiable.<sup>91</sup> While some com-

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86. *Morley v. J. Pagel Realty & Ins.*, 27 Ariz. App. 62, 550 P.2d 1104 (1976). Arizona is not alone in allowing malpractice recovery. *See also* *Townsend v. Doss*, 618 S.W.2d 173 (Ark. App. 1981) (realtor had duty to inform seller to secure purchase price by use of a mortgage).

87. *Morley v. J. Pagel Realty & Ins.*, 27 Ariz. App. 62, 550 P.2d 1104 (1976) (brokers bear the "responsibility and duty of explaining to the persons involved the implications of the documents"). *Id.* at 66, 550 P.2d at 1108 (emphasis added).

88. *Buffington v. Haas*, 124 Ariz. 36, 38, 601 P.2d 1320, 1322 (1979) (in the absence of an agency relationship no duty to explain documents).

89. *Supra* notes 2-4.

90. *See supra* note 52.

91. *U.S. Dep't of Housing and Urban Development & Veterans Administration, Mortgage Settlement Costs* (1972), reprinted in *Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings on H.R. 13337 Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 92d Cong., 2d Sess. 735 (1972). Among other items, the joint report found:

The Buyer seldom decides who will provide settlement services for him. If there is a choice, he usually depends upon advice of the broker, escrow agent, seller, or settlement attorney. Often the buyer is or believes he is required to deal with a particular source for some or all settlement services.

Competitive forces in the conveyancing industry manifest themselves in an elaborate system of referral fees, kickbacks, rebates, commissions and the like as inducements to those firms and individuals who direct the placement of business. These practices are widely employed, rarely inure to the benefit of the homebuyer, and generally increase total settlement costs.

Settlement charges often are based on factors unrelated to the cost of



mentators have suggested that the real estate agent should act as an agent of both the buyer and the seller,<sup>92</sup> such an approach is plagued by practical and theoretical complexities.<sup>93</sup> Malpractice theory does not adequately serve the real estate consumer suffering an unnecessary loss because the standard of care of real estate agents is not well defined, agents may have no liability for poorly drafted instruments,<sup>94</sup> or the person injured is not their principal.<sup>95</sup>

Only the theory of dual agency attempts to address the problem of the uninformed purchaser by allowing the broker to assist the purchaser in closing the transaction. However, all the theories—agency, misrepresentation and malpractice—are post hoc remedies involving litigation, high costs to the parties, and few benefits to the general public as a real estate consumer.

The following section of this Article reviews the proposed Real Estate Consumers Protection Act.<sup>96</sup> Although much has been written about protecting the real estate consumer,<sup>97</sup> and federal legislation has been enacted<sup>98</sup> and rapidly repealed,<sup>99</sup> the real estate consumer has not been granted any significant right to information regarding the transaction in which he is about to engage.<sup>100</sup> The Nebraska Act represents an attempt to grant the consumer greater control over the real estate transaction by providing information about the process.<sup>101</sup>

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providing the services. The overall level of charges tends to be significantly lower when the charge for a service is not directly related to the sale price of the property.

Minimum or recommended fee schedules by local legal or real estate groups often do not reflect the actual work done and tend to increase settlement costs.

*Id.* at 738-39 (numbers of paragraphs omitted).

92. *Supra* note 55.

93. Currier, *supra* note 23, at 674-77.

94. *Supra* notes 72-76 and accompanying text.

95. *Id.*

96. L.B. 667, 89th Leg., 1st Sess.

97. See, e.g., Note, *Conveyancing—The Role of the Real Estate Broker and the Lawyer in Ordinary Real Estate Transactions—Wherein Lies the Public Interest?*, 19 DEPAUL L. REV. 319 (1969). See also Stoppello, *supra* note 25, at 368.

98. Real Estate Settlement Procedures Act (RESPA) of 1974, Pub. L. No. 93-533, 88 Stat. 1724 (codified at 12 U.S.C. §§ 2601-2617 (1976)). The law was repealed little more than six months after its enactment.

99. Real Estate Settlement Procedures Act Amendments of 1975, Pub. L. No. 94-205, 89 Stat. 1157 (1976) (codified at 12 U.S.C. §§ 2602-2604, 2607, 2609, 2616, 2617 (1976)).

100. Stoppello, *supra* note 25, at 369 (describing what remained of RESPA as "a regulatory scheme that requires mortgage lenders to estimate settlement costs and to disclose these costs to homeowners in a form that is of little value and that denies homebuyers the right to know all of their actual settlement costs until the date of settlement.").

101. See *infra* note 105 and accompanying text.

### III. THE NEBRASKA REAL ESTATE CONSUMERS PROTECTION ACT

The Act is a joint effort of the State Real Estate Commission and the Nebraska Unicameral.<sup>102</sup> Section 2 of the Act notes that: "[d]uring the lifetime of most individuals and families, the largest dollar-transaction in which they ever become involved is the sale or purchase of a home. Experience has shown that for many people the transaction is mystifying, complex, and perhaps misunderstood."<sup>103</sup> The purpose of the Act is "to inform consumers of their rights in real estate transaction[s]"<sup>104</sup> at such a time that they might utilize the information to make choices in how they will conduct the transaction.<sup>105</sup>

The Act is a long overdue step in the direction of providing consumers with vital information. In some instances, however, it perhaps does not go far enough. The following discussion will review the information required to be given and suggest what additional information should be proffered.

The requirement that the information form be given before any contracts are signed or before any real estate is shown<sup>106</sup> is an excellent requirement. As a practical matter the purchaser should be encouraged to take the form home, read through it, and then return to the agent if he has any question. Acknowledging by signature that one has received the form<sup>107</sup> also serves to impress upon the consumer the importance of the information form he has received.

The Act also requires that the purchaser be told that the broker is not acting as his agent.<sup>108</sup> This statement is printed in capital letters and clearly communicates to the purchaser that the broker is not his agent. This requirement should dispel the criticism frequently leveled at brokers that they have failed to make their relationship to the parties clear.<sup>109</sup> Informing purchasers of their role initially should allow the broker to avoid the awkward position of being asked what amount constitutes a proper offer to the seller.<sup>110</sup>

The Act also informs the seller that he has the right to choose his own insurer for the property and the right to refuse to insure the

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102. L.B. 667, § 2, 89th Leg., 1st Sess.

103. *Id.*

104. *Id.* at § 5: "Every real estate agent [and homeowner who sells his own home] shall give every consumer a written statement of his or her rights. . . . The form shall be given prior to signing of any contractual agreements and before any real estate is shown whether or not the real estate is for sale."

105. *Id.* at § 6.

106. *Id.* at § 5.

107. *Id.* at § 6.

108. *Id.* at § 7(1).

109. See, e.g., Currier, *supra* note 23, at 662-63.

110. See *supra* note 52 and accompanying text.

property if he is paying cash.<sup>111</sup> The statute does not require that the purchaser be told he should purchase insurance covering the executory period—the time between signing the contract for sale and the transfer of the deed—but arguably such detail would clutter up the statute. The discussion of insurance should trigger the buyer's awareness of the issue and the buyer could then inquire as to when insurance should be purchased.

The Act further informs the buyer that he has the right to choose his own title insurer,<sup>112</sup> his own abstractor,<sup>113</sup> how costs are typically allocated for these services,<sup>114</sup> and even defines points and informs the buyer that these are typically negotiated.<sup>115</sup> These costs, known as settlement costs,<sup>116</sup> may add substantially to the amount of cash the purchaser needs to close the deal. Although the Act makes no provision that the real estate agent serve as a clearinghouse of information about the costs of these services, this additional requirement could be of real benefit to the purchaser. It is useful for the purchaser to know that these costs, e.g., points and title insurance, are negotiable with the buyer; however, these costs may also vary among service providers. The prospective home purchaser may be informed that there are settlement costs in addition to a down payment, but he may be at loss as to how to lower these costs. If the real estate agents were required to provide the prospective purchaser with costs of various abstractors, insurers and lending companies, then the purchaser would be able to ascertain the closing costs of a real estate purchase during the early stages of the transaction. It is unlikely that many prospective buyers would call several service providers to obtain price quotations. If, however, the providers gave the brokers this price information, the brokers could easily dispense it to the prospective purchasers. The overall effect of this might drive down settlement costs. Service providers would not be assured of recommendations from lenders and would be willing to provide price quotations to brokers in order to be considered by the purchasers.<sup>117</sup>

Providing the purchaser with the knowledge that cost and allocation of costs may vary, although useful to the prospective purchaser by

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111. L.B. 667, § 7(2), 89th Leg., 1st Sess.

112. *Id.* at § 7(5).

113. *Id.* at § 7(7).

114. *Id.* at § 7(6).

115. *Id.* at § 7(8).

116. Settlement services, the cost of which vary by location include: (1) negotiating and preparing the contract for sale; (2) arranging for financing, including negotiating points; (3) searching, examining, and assuring the title. Some commentators suggest that a fourth cost should be added: meeting statutory charges, e.g., back taxes. Although such charges are not technically a cost of transfer, they may fall due upon the transfer. Payne, *Ancillary Costs in the Purchase of Homes*, 35 Mo. L. Rev. 455, 460 (1970).

117. Stoppello, *supra* note 25, at 440.

allowing him to estimate his costs, will not serve to drive down settlement costs for real estate consumers in general. Decreasing the cost of settlement is not one of the purposes to the Act,<sup>118</sup> although such an attempt would dovetail with many of the provisions already in place in the Act. The broad purpose of the Act is to encourage consumers to make informed decisions,<sup>119</sup> and price information is certainly helpful to informed decision making. Increasing the competitiveness of real estate service providers may result in lower overall closing costs. This would be an additional benefit of the Act that is achieved without imposing substantially more responsibility on the broker.

Section 7(9) of the Act allows the purchaser to receive upon request, and at least ten days before closing, a list from the seller "identifying, insofar as possible, by make, model, and general description all appliances included in the sale and to receive a descriptive list of all personal property included in the sale."<sup>120</sup> This provision would be of greater value to the purchaser were the seller required to comply with its terms in an earlier stage of the transaction. In normal practices ten days before closing will be after a purchase offer has been made and accepted. In theory, the purchase offer was based on the belief that certain fixtures and personal property were or were not to be included in the sale, i.e., the purchase price reflected the belief that certain items were being sold. The statute does not clearly define what the buyer can do upon discovering he is not getting what he anticipated. A reasonable modification of this provision would allow the buyer to request and receive a list from the seller prior to making an offer to purchase. The seller should have little difficulty in complying with this requirement, since the seller presumably already knows what he intends to transfer with the property.

Section 7(10) allows the purchaser to receive a reasonable estimated closing statement upon request, listing "all debits you are required to pay and all credits you are to receive."<sup>121</sup> This is a much needed provision because most home purchasers are simply not aware of the numerous costs incurred upon a closing, and may not be prepared to cover these costs in addition to any down payment. The provision falls short, however, in not providing a remedy for the purchaser when actual costs significantly exceed estimated costs. In order to discourage underestimation, with the possible ensuing delay at closing arising from higher actual costs, the broker responsible for making the disclosure should be required to advance the purchaser the excess amount over a certain percentage, e.g., ten to fifteen percent, in order to allow the purchaser to complete the transaction as

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118. See *supra* text accompanying note 105.

119. *Id.*

120. L.B. 667, § 7(9), 89th Leg., 1st Sess.

121. *Id.* at § 7(10).

planned.<sup>122</sup>

The purchaser would be responsible for repaying the broker in a timely manner. The effect of the addition to the provision would be to encourage the broker to monitor the settlement cost estimates for reasonableness. This is something the prospective purchaser is simply unable to do, but relatively easily done by the broker who performs these transactions with the same service providers on a routine basis.

Section 7(13) informs the buyer that "this is a legal transaction and that [he] would be wise to consult with an attorney of [his] choice before signing any agreement."<sup>123</sup> This is a significant difference from the NAR Code of Ethics requirement that at the broker's discretion, he "shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it."<sup>124</sup> After reading the twelve provisions discussing title insurance, points, home insurance, and the need to negotiate many items, the home buyer should begin to have a sense of the complexity and difficulty of the transaction he is going to attempt. His awareness of the possible need for legal counsel may be awakened.

Theoretically, since the amendment of the Code of Professional Ethics rules on advertising in 1978,<sup>125</sup> the attorney could provide brokers with a fee estimate for the "specific legal service" of conducting a residential real estate closing. The list of attorneys would be those interested in conducting practices involving residential real estate. The public may in turn rely on receiving legal counsel and avoid the messy malpractice attempts directed at real estate brokers. Finally, the price for legal assistance in real estate closings could reach a competitive level. There exists the possibility of substantial benefit from increased participation of attorneys in residential real estate transactions.<sup>126</sup>

#### IV. CONCLUSION

The Act is a much needed step in resolving the difficult role the broker has been requested to play in the transaction,<sup>127</sup> and in providing necessary information to the purchaser in a timely manner.<sup>128</sup>

122. Stoppello, *supra* note 25, at 444-45, suggests that federal law be applied to brokers to require them to advance costs in excess of estimated settlement costs.

123. L.B. 667, § 7(13), 89th Leg., 1st Sess.

124. NAR CODE, *supra* note 16, at art. 17. See *supra* text accompanying notes 46-51.

125. ABA Model Code of Professional Responsibility and Code of Judicial Conduct DR 2-101(B) (25) (1980). The Code authorized advertising "[f]ixed fees for specific legal services." *Id.* A footnote to 2-101(B)(25) notes that "the agency having jurisdiction under state law may desire to issue appropriate guidelines defining 'specific legal services.'" *Id.* (emphasis deleted).

126. See *supra* note 83-84.

127. See *supra* notes 53-58 and accompanying text.

128. See *supra* notes 102-06.

The Act also points a way to walk free of the swamp of unauthorized practice of law. The broker serves an essential role as a facilitator and negotiator in the transaction. But the real estate consumer should be left with the definite and firm conviction after reading the disclosure form that the transfer of residential real estate is a relatively complex transaction. Any consumer not willing or able to negotiate points, or understand the exceptions in a title insurance policy, should know he can and should consult an attorney.

The Act requires the individual homeowner selling his own property to provide the same information as the broker provides. It would not be reasonable for the homeowner to be required to gather and disseminate information about settlement service provider's fees; consequently, the broker's role in the transaction would be enhanced. The broker would not only be a source of information about properties for sale, but also about the entire process of conducting a residential real estate transaction. The purchaser would be encouraged to deal with a broker because the broker could provide substantial money saving information to the prospective purchaser.

*Rose McConnell, '85*