Nova Law Review

Volume 11, *Issue* 2 1987 *Article* 20

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Abstract

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KEYWORDS: future, housing, inspection

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I. Introduction

For many Americans, the purchase of a home is perhaps the most important legal transaction of their lives.[1] Despite this reality, however, the typical homebuyer today neither seeks representation by a licensed real estate broker nor retains legal counsel to assist in the transaction.[2] When homebuyers do retain legal counsel, very often it is only for matters concerning the transfer of title.[3] Not surprisingly, this lack of foresight has resulted in a host of sale-related legal problems - problems which will only multiply as the supply of used homes increases and the cost of residential property continues to spiral upward.[4]

In many jurisdictions, these problems are evidenced by a general increase in sale-related litigation directed at licensed real estate agents.[5] Brokers[6] are classic targets for post sale liability. They are

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1. *See* Currier, *Finding the Broker's Place in the Typical Residential Transaction*, 33 U. FLA. L. REV. 655 (1981).

2. Comment, *Dual Agency in Residential Real Estate Brokerage: Conflict of Interest and Interests in Conflict*, 12 GOLDEN GATE U.L. REV. 379, 387 (1972):

> In practice, there is seldom a written agreement between the buyer and the cooperating broker for representation in procuring a home. The cooperating broker is guaranteed a commission through the seller's listing agreement. The buyer receives free representation to the extent of the presentation of the offer. The courts, however, have generally found an agreement implied from the actions of the parties, based on reasonable expectations of the parties.

3. W. BEATON, R. BOND & J. FERGUSON, REAL ESTATE 327 (2d Ed. 1982) [hereinafter cited as BEATON]. "The fact is that buyers are usually unrepresented in the sales transaction until they hire an attorney to examine the title." *Id.*

4. Currier, *supra* note 1, at 663-77.

5. *See* Markham, *Going for Brokers*, Miami Herald, Aug. 17, 1986, § H, at 22, col. 1; Campbell, *Real Estate Industry Faces Law Suit Crisis*, L.A. Times, Sep. 7, 1980, Pt. VIII, at 1, col. 1. This note will focus specifically on the liability of the real estate broker for negligence in discovering and disclosing material defects to purchasers of residential property. It does not address broker liability for action based on fraud or deceit. That topic has seen extensive coverage. *See* RESTATEMENT (SECOND) OF TORTS § 552 (1977); 12 AM. JUR. 2D *Brokers* § 108 (1964); Annot., 55 A.L.R.2d 342 (1957); Annot., 61 A.L.R.2d 1237 (1958); Annot., 8 A.L.R.3d 550 (1966). Homebuyers have also sued brokers for breach of contract. *See, e.g.*, Bar v. Rhodes, 274 Cal. App. 2d

highly visible, postured in the center of virtually every residential sale.[7] Perhaps more importantly, the broker is a perpetually solvent defendant — still doing business when the defect is discovered; the homeseller

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852, 79 Cal. Rptr. 505 (1969). In addition, several legal theories exist that may serve as a basis for broker liability in transactions involving the broker's use of creative financing techniques. *See* Levin, *Real Estate Agent Liability for Creative Financing Failures*, 39 U. MIAMI L. REV. 429 (1985); Olson, *Real Estate Broker Liability to the Seller in California: Seller-Financed Real Estate Sales*, 58 CAL. L. REV. 1073 (1985).

6. The terms "broker" and "agent" will be used interchangeably throughout this note to represent all real estate licensees who may represent a party in a real estate transaction. Simply stated, a real estate broker is a person who brings together two or more parties for the purpose of effecting a sale in real property.

In most states, the term "broker" is defined by statute. *See, e.g.*, Florida Statutes, which define a broker as follows:

> [A] person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another, or leases, or interest therein, including mineral rights, or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor; and all persons who advertise rental property information or lists. The term "broker" also includes any person who is a partner, officer, or director of a partnership or corporation which acts as a broker.
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> (d) "Salesman" means a person who performs any act specified in the definition of "broker", but who performs such act under the direction, control, or management of another person.
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> (e) "Broker-Salesman" means a person who is qualified to be issued a license as a broker but who operates as a salesman in the employ of another.

FLA. STAT. § 475.01(1)(c) (1985).

7. *See* Levin, *supra* note 5, at 430. *See generally* Comment, *Mandatory Disclosure: The Key to Residential Real Estate Brokers Conflicting Obligations*, 19 J. MARSHALL L. REV. 201 (1985).

has often moved beyond the reach of effective judicial remedy.[8]

As a result, today's caveats are aimed at licensed real estate brokers, not at innocent homebuyers.[9] Buyers sue brokers for various reasons. Unwary purchasers, lured to the sale by the broker's assurances of affordability and security, now sue the broker when forced to lose their homes as victims of "creative" financing.[10] Disgruntled homebuyers sue the seller—and the seller's broker—for complaints which range from defects in title to leaking roofs and rusty plumbing.[11] As several authors have recently noted,[12] the modern judicial response reflects a general trend toward the expansion of sale-related liability.[13] To this end, several states have recently held homesellers liable for failing to disclose information concerning material defects in the property during pre-sale negotiations.[14]

In an effort to afford the homebuyer an even greater degree of protection, a number of states have also imposed liability upon the seller's real estate agent for failing to disclose the same type of critical information.[15] In a more extreme response, a California appellate court, in *Easton v. Strassburger*,[16] declared that state-licensed real es-

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8. *See* Levin, *supra* note 5, at 430.

9. *See* F. FISHER, BROKER BEWARE: SELLING REAL ESTATE WITHIN THE LAW 1 (1981); Murray, *Am I My Brother's Keeper? Real Estate Broker Liability for Sellers' Misrepresentations*, 46 TEX. B.J. 1374 (1983).

10. *See* Levin, *supra* note 5, at 431.

11. Bush v. Palermo Realty, Inc., 443 So. 2d 104 (Fla. 4th Dist. Ct. App. 1983) (prospective purchaser sued the seller's broker because the broker used information from the purchaser to acquire the property for himself). Schipper v. Levitt and Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (first case in New Jersey to recognize a cause of action for breach of implied warranty in connection with the sale of a new home).

12. *See* Murray, *supra* note 9 at 1374; Fossey and Roston, *The Broker's Liability in a Real Estate Transaction: Bad News and Good News for Defense Attorneys*, 12 U.C.L.A.-ALASKA L. REV. 37 (1982).

13. *See, e.g.*, Bevins v. Ballard, 655 P.2d 757 (Alaska 1982).

14. *See* Flakus v. Schug, 213 Neb. 491, 329 N.W.2d 859 (1983)(basement flooding); Thacker v. Tyree, 297 S.E.2d 885 (W.Va. 1982)(cracked walls and foundation problems); Maguire v. Masino, 325 So. 2d 844 (La. Ct. App. 1975)(termite infestation); Weintraub v. Krobatsch, 64 N.J. 445, 317 A.2d 68 (1974)(roach infestation); Cohen v. Vivian, 141 Colo. 443, 349 P.2d 366 (1960)(soil defect).

15. *See, e.g.*, Johnson v. Davis, 449 So. 2d 344, 350 n.1 (Fla. 3d Dist. Ct. App. 1984); *see generally* Annot., 8 A.L.R.3d 550 (1963) and cases cited within.

16. 152 Cal. App. 3d 90, 199 Cal. Rptr. 3d 383 (1984); *see also* Gauerke v. Rozga, 112 Wis. 2d 271, 332 N.W.2d 804 (1983), where the Supreme Court of Wisconsin held the defendant-real estate broker strictly liable for innocent misrepresentation — not only as to facts of which a broker would normally be expected to know

tate brokers now have an affirmative duty to perform inspections on all listed property and to inform prospective purchasers of any defects that might prove material to the transaction.[17] A closer analysis of this last approach, however, reveals that it is not the most judicious solution to the problem.

The purpose of this article is to expose the flawed reasoning behind the imposition on brokers of a "duty to inspect" and to propose an alternative solution to some of the problems associated with the sale of defective residential property. A brief historical survey provides the background necessary to an informed analysis and forecast of the future of the issue in Florida and other jurisdictions. A critical examination of the broker's duty to inspect reveals the technical inadequacies and costliness of imposing such an obligation on the real estate industry. Finally, the author offers a plan for greater homebuyer representation as an alternative to the imposition of mandatory housing inspections. It is an unavoidable truth that today's homebuyer is in need of greater protection. Adequate representation during pre-sale negotiations can provide the homebuyer with that protection and will do so without the increased costs of mandatory inspection and expanded broker liability.

The initial examination of the history of the issue reveals that in recent years, courts in Florida, as in other states, appear to be following the general trend toward the expansion of sale-related liability.[18] In 1985, Florida became the eighth state to hold that a homeseller has an affirmative duty to disclose to potential buyers any material defect of which he has knowledge.[19] It is conceivable that Florida and other states will confront the question of whether real estate brokers must perform mandatory inspections on all listed property in the very near

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without having conducted an investigation of the property — but as to *any* fact that a "broker" should be expected to know.

17. *Easton*, 152 Cal. App. 3d at 102, 199 Cal. Rptr. 3d at 390.

18. For a general discussion of the problems resulting from the conflicts created by the modern dual agency relationship, *see* Stambler & Stein, *The Real Estate Broker - Schizophrenia or Conflict of Interest*, 28 J. B.A. D.C. 16 (1961); *see generally*, Currier, *supra* note 1 at 655; Comment, *supra* note 2; Gulitz, *Broker's Responsibility in Co-Op Sales: Whose Agent is He?*, 10 REAL EST. L.J. 126 (1981); Comment, *Unprofessional Conduct by Real Estate Brokers: Conflict of Interest and Conflict in the Law*, 11 PAC. L.J. 978 (1979).

19. *Johnson*, 480 So. 2d at 625 (Fla. 1985). For an extensive analysis of the *Johnson* decision, *see* Note, *Johnson v. Davis: New Liability for Fraudulent Nondisclosure in Real Property Transactions*, 11 NOVA L. REV. 145 (1986).

future. That question will not be answered easily.

II. Case Law Analysis

A. *Historical Perspective*

Until thirty years ago, decisions throughout the country upheld the rule of caveat emptor[20] (let the buyer beware) in transactions involving the sale of real property.[21] The delivery and acceptance of the deed terminated the relationship between buyer and seller, and the language of the deed alone determined their rights and responsibilities.[22] Absent a showing of fraud, the buyer of a defective home was without judicial remedy.[23] In recent years, however, several jurisdictions have relaxed these rules, and, as a result, today's homebuyer now has a number of remedies available for the purchase of defective housing, including actions brought under theories of implied warranty,[24] strict liability[25] and negligence.[26]

The liability of the licensed real estate broker has expanded within the framework of this general trend.[27] Historically, the seller's real estate agent was not accountable to the homebuyer for the sale of defective property unless the buyer could produce evidence of actionable

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20. For an interesting treatment of the history and development of caveat emptor, *see* Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1113 (1931).

21. *See, e.g.*, Levy v. C. Young Constr. Co., 46 N.J. Super. 293, 134 A.2d 717 (N.J. Super. Ct. App. Div. 1957), *aff'd on other grounds*, 26 N.J. 330, 139 A.2d 738 (1958). *See also* Grand, *Implied and Statutory Warranties in the Sale of Real Estate: The Demise of Caveat Emptor*, 15 REAL EST. L.J. 44 (1986).

22. Grand, *supra* note 21, at 44.

23. *Id.* The purchaser could, of course, sue for breach of warranty, but such a claim required a showing that the parties expressly agreed to such a warranty at the time of the sale.

24. *Id.* at 45-46. "Today, most states recognize a cause of action against builder-vendors of new homes for breach of an implied warranty of habitability, good workmanship, or both." *Id. See also* Annot., 25 A.L.R.3d 383 § 6 (Supp. 1985).

25. *See Gauerke*, 112 Wis. 2d at 271, 332 N.W.2d at 804.

26. Easton v. Strassburger, 152 Cal. App. 3d 90, 199 Cal. Rptr. 3d 383 (1984). *See also* King, *Broker Liability After Easton v. Strassburger: Let the Buyer Be Aware*, 25 SANTA CLARA L. REV. 651 (1985); Comment, *Protecting the Real Estate Consumer: Traditional Theories of Liability Revisited, and a Look at Nebraska's Proposed Real Estate Consumer's Protection Act*, 65 NEB. L. REV. 189, 199 (1986).

27. In jurisdictions which apply the rule of joint and several liability, the broker can expect to be named as a defendant. F. FISHER, BROKER BEWARE: SELLING REAL ESTATE WITHIN THE LAW 12 (1981).

fraud on the part of the broker.[28] To maintain a cause of action in fraud, the homebuyer had to establish that the broker knowingly made a false representation as to a material fact and that the homebuyer relied on that information to his detriment.[29] In effect, the broker had to know about the defect and lie about it.[30] The licensed real estate broker was not held liable for simple nonfeasance or material non-disclosures.[31] For a number of years, Florida followed the traditional rule of nonfeasance,[32] particularly in transactions carried on at arm's length.[33] Accordingly, until only recently, courts in Florida consistently ruled that in residential transactions, where a presumption exists that buyer and seller are dealing at arm's length with an equal opportunity to examine the facts, mere non-disclosure did not constitute actionable fraud.[34]

Thus, in 1963, in *Ramel v. Chasebrook*,[35] the Florida Second District Court of Appeal embraced the rule that in the absence of a fiduciary relationship, the non-disclosure of a material defect would not support an action for misrepresentation.[36] Over twenty years later, in *Banks v. Salina*,[37] the Fourth District Court of Appeal reaffirmed the rule stated earlier in *Ramel*. In *Banks*, the purchasers of a fifteen-year-old house brought suit against the sellers, claiming that the sellers were

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28. Diaz v. Keyes Co., 143 So. 2d 554 (Fla. 3d Dist. Ct. App. 1962).

29. *Id. See also* Potakar v. Hurtak, 82 So. 2d 502 (Fla. 2d Dist. Ct. App. 1955). For a clear definition of the elements of fraud, see Huffstetler v. Our Home Life Ins. Co., 67 Fla. 324, 65 So. 1 (1914). The court stated that under Florida law, relief for fraudulent misrepresentation may only be granted when the following elements are present: (1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on representation.

30. *See* Johnson v. Davis, 480 So. 2d 625 (Fla. 1985); *Huffstetler*, 67 Fla. at 324, 65 So. at 1.

31. *Fowler*, 229 Md. at 571, 185 A.2d at 344; *Vendt*, 210 S.W.2d at 692; *Diaz*, 143 So. 2d at 554.

32. *Diaz*, 143 So. 2d at 554.

33. Banks v. Salina, 413 So. 2d 851 (Fla. 4th Dist. Ct. App. 1982).

34. *Id.*

35. Ramel v. Chasebrook Constr. Co., 135 So. 2d 876 (Fla. 2d Dist. Ct. App. 1961).

36. *Id.* at 882. The court stated, "In the absence of a fiduciary relationship, mere nondisclosure of all material facts in an arm's length transaction is ordinarily not actionable misrepresentation unless some artifice or trick has been employed to prevent the representee from making further independent inquiry." *Id. See also* 14 FLA. JUR. *Fraud and Deceit* §§ 28-30 (1957).

37. 413 So. 2d at 851.

aware that the swimming pool was defective and that they failed to disclose its defective condition at the time of the sale.[38] Judge Letts, writing for the majority, cited to *Ramel*[39] and held that the defendant-homeseller had no duty to disclose the defective condition of the pool, as the parties were presumed to be dealing at arm's length.[40] Hence, as late as 1982, under Florida law, neither the broker nor seller of residential property was under any legal duty to disclose defects to prospective purchasers, even if aware of the existence of such defects prior to the sale.[41]

It was an earlier decision, however, that laid the foundation for future liability. In 1946, in *Zichlin v. Dill*,[42] the Supreme Court of Florida confronted the issue of real estate broker liability. *Zichlin* posed the question of what duty, if any, the seller's broker owed to prospective purchasers. Here, the defendant-broker had intentionally misrepresented the selling price of the seller's property, using the buyer's funds to purchase the property for himself.[43] The broker then resold the property to the buyer at a fraudulently inflated price.[44] The court reasoned that because state-licensed brokers enjoy a monopoly in the real estate industry and are statutorily required to be of good character, a real estate broker owes a legal duty to both buyer and seller.[45] Unfortunately, *Zichlin* did not give a clear definition of that duty, except to state that anyone who deals with a licensed broker may naturally assume that the broker possesses the requisites of an honest, ethical man.[46] This decision not only left the real estate industry without a clear definition of the broker's legal duty, but also left open the possibility for its future expansion.

Whatever the limits of that duty, it apparently did not include any obligation to perform inspections on listed property. In 1963, in *Diaz v. Keyes Co.*,[47] the Florida Third District Court of Appeal held that a licensed real estate broker, as an agent for the seller, did not have any

38. *Id.* at 852.
39. *Id.*
40. *Id.*
41. *Id.*
42. 157 Fla. 96, 25 So. 2d 4 (1946).
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 96, 25 So. 2d at 5.
47. 143 So. 2d at 554.

duty to inspect property on behalf of the prospective purchasers.[48] The majority refused to impose such a duty on the broker, despite the fact that the plaintiff-purchaser was residing in Cuba at the time of the sale and had bought the defective property sight unseen, relying on a descriptive brochure supplied by the broker.[49]

It is clear from the preceeding analysis that courts in Florida were once in agreement with traditional rules of non-disclosure.[50] Recently, however, several jurisdictions have begun to rethink the laws regarding material non-disclosure in transactions involving the sale of real property. As a result, a number of states, including Florida, now hold the homeseller liable for the non-disclosure of material defects.[51] Several decisions indicate that licensed real estate brokers should be subject to the same risks of liability.[52] It is this legal framework which provides the underpinnings of the *Easton* rule.

B. Easton v. Strassburger: *The Broker's Duty to Inspect*

In the 1985 case of *Easton v. Strassburger*,[53] the California First District Court of Appeal held that a real estate broker representing a homeseller has an affirmative duty to make an investigation of all listed property and to disclose to prospective purchasers all material facts pertaining to the sale.[54] Prior to the *Easton* decision, California only required that a broker disclose those facts of which he had knowledge.[55] Moreover, in order to establish broker liability for material non-disclosure, the plaintiff-homebuyer had to establish that the facts in question were accessible only to the broker.[56] In effect, California law limited the broker's duty to disclose to either those facts of which the broker had actual knowledge or, in the alternative, to facts which the broker had exclusive access. Interestingly, this is the current state of

48. *Id.*
49. *Id.*
50. *Johnson*, 480 So. 2d at 628.
51. *See* cases collected, *supra* note 14.
52. *See, e.g., Lingsch*, 213 Cal. App. 2d at 733, 29 Cal. Rptr. at 205; Cooper v. Jenne, 56 Cal. App. 3d 860, 128 Cal. Rptr. 724 (Cal. 2d Ct. App. 1976).
53. 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984).
54. *Id.*
55. Note, *Real Estate Broker's Liability for Failure to Disclose: A New Duty to Investigate*, 17 Pac. L.J. 327, 336-38 (1985).
56. *Lingsch*, 213 Cal. App. 2d at 734, 29 Cal. Rptr. at 206; *Cooper*, 56 Cal. App. 3d at 860, 128 Cal. Rptr. at 724. *See generally* King, *supra* note 26.

the law in several jurisdictions, including Florida.

In *Easton*, the property in question consisted of a three thousand square foot house, a swimming pool, and a guest house, all located on a one acre plot of land.[57] The area was geophysically unstable and had a documented history of landslide activity.[58] In fact, the defective condition of the soil had been responsible for previous damage to the home which the sellers had since repaired.[59] When the sellers listed the property with a state-licensed real estate broker, they did not disclose the defective condition of the soil to the listing agent.[60] The evidence presented at trial, however, indicated that the broker had conducted an independent investigation of the property and was aware of certain "red flags" which should have alerted him that there were soil problems.[61] In any event, the agent did not request that the soil stability be tested and did not inform prospective purchasers of the potential for soil problems.[62]

Shortly after the sale there were several landslides which resulted in substantial damage to the home and surrounding property.[63] The damage was extensive: experts appraised the value of the property at $170,000.00 before the slide and $20,000.00 after.[64] The homebuyer filed suit against the seller, the seller's broker, and three firms involved in the faulty construction of the home.[65] In the action against the broker, the homebuyer alleged causes of action for fraudulent concealment, intentional misrepresentation and negligent misrepresentation.[66] At trial, the court dismissed the counts of concealment and intentional misrepresentation, and instructed the jury only as to claims of negligent misrepesentation and *simple negligence*.[67] The court found the defendant-real estate broker liable for simple negligence, and the broker appealed.[68]

As noted earlier, when this case reached the California Court of

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57. *Easton*, 152 Cal. App. 3d at 96, 199 Cal. Rptr. at 385.
58. *Id.* at 96, 199 Cal. Rptr. at 386.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*, 199 Cal. Rptr. at 385.
64. *Id.*
65. *Id.* at 97, 199 Cal. Rptr. at 386.
66. *Id.*
67. *Id.*
68. *Id.*

Appeal, a broker only needed to disclose only such facts of which he had actual knowledge or exclusive accessibility.[69] The court stated that implicit in that legal obligation, however, is the separate and distinct duty to perform a reasonable and diligent inspection of all listed property.[70]

The majority in *Easton* relied heavily on *Lingsch v. Savage*,[71] a similar non-disclosure case decided over twenty years earlier. In *Lingsch*, the homebuyer sued both the seller and the seller's broker for their failure to disclose that the property had been illegally constructed and targeted for condemnation by city officials.[72] The court held the broker liable for fraud based on the fact that he had been aware of the defective condition of the property.[73] Somewhere in the *Lingsch* decision, the California First District Court found the workings of a new and expanded rule of broker liability premised on the slimmest notion of constructive awareness: the broker's duty to inspect had arisen.

The opinion focused on the language in *Lingsch*, which only required disclosure of those facts known and "accessible to" the broker.[74] From this language, the court somehow concluded that brokers should be charged with constructive knowledge of all facts material to the transaction.[75] Thus, in cases where broker negligence is alleged, actual knowledge need not be shown. The homebuyer need only show that the broker (or his principal) had exclusive knowledge or access to such facts.[76] In essence, the broker's duty to inspect is nothing but a simple judicial construction.

The court premised the broker's duty to inspect on the "pertinent realities" which surround the traditional agency relationship.[77] The court reasoned that many homebuyers justifiably believe that the broker is acting to protect their interests, and that even if such reliance is misplaced, the potential for injury is too great to ignore.[78] The opinion also noted that the burden to brokers would be minimal,[79] but did not

69. *See* King, *supra* note 26, at 655.
70. *Easton*, 152 Cal. App. 3d at 99, 199 Cal. Rptr. at 388.
71. 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1963).
72. *Id.* at 730-31, 29 Cal. Rptr. at 203.
73. *Id.*
74. *Easton*, 152 Cal. App. 3d at 99, 199 Cal. Rptr. at 388.
75. *Id.*
76. *Id.* at 104, 199 Cal. Rptr. at 390.
77. *Id.* at 101, 199 Cal. Rptr. at 389.
78. *Id.* at 102, 199 Cal. Rptr. at 389.
79. *Id.* at 100, 199 Cal. Rptr. at 389.

reveal much authority in support of that proposition. In fact, the majority cited to the code of ethics of a professional organization, The National Association of Realtors, a group with which many real estate brokers have no affiliation, to suggest that real estate brokers are already under an ethical obligation to inspect property.[80]

The only other support given by the court in this regard was another California appellate decision, *Brady v. Carmen*.[81] Curiously enough, *Brady*, like *Lingsch*, was a case involving intentional fraud, not simple negligence.[82] Moreover, in *Brady*, the undisclosed "defect" took the form of an easement across the property, not that of a latent physical defect, like the underlying soil condition in *Easton*.[83]

In response to the *Easton* decision, the California Legislature acted quickly to provide a statutory definition of the broker's duties regarding pre-sale housing inspections.[84] Interestingly, that response has primarily shifted the burdens associated with inspection back to the homebuyer.[85] Since the decision, *Easton* has been the focus of much attention and the subject of much criticism,[86] but one thing is certain: In each state where the question arises, the expansion of broker liability will be measured against the high water mark left by *Easton*.

C. *The Current Trend: Is The Rule of Easton v. Strassburger in Florida's Future?*

In October of 1985, the Supreme Court of Florida expanded sale-related liability when it affirmed the ruling of the Florida Third District Court of Appeal in *Johnson v. Davis*.[87] Overturning previous case law, the supreme court decided that a homeseller has an affirmative duty to disclose to a prospective purchaser any latent defects of which he has knowledge.[88] The failure to disclose such defects leaves the

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80. *Id.*
81. 179 Cal. App. 2d 63, 3 Cal. Rptr. 612 (1960).
82. *Id.*
83. *Id.*
84. *See supra* note 18.
85. *Id.*
86. *See* King, *supra* note 26; note, *supra* note 55.
87. Johnson v. Davis, 449 So. 2d 344 (Fla. 3d Dist. Ct. App. 1984), *aff'd*, 480 So. 2d 625 (Fla. 1985).
88. *Johnson*, 480 So. 2d at 629. The court agreed with the reasoning of the California Court of Appeal, Second District, in Lingsch v. Savage, 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1963), and the rule stated therein: "[W]here the seller knows of

homeseller liable to the buyer for damages caused as a result of the sale.[89]

In May of 1982, the Davises entered into a contract to purchase the Johnsons' three-year-old home for $310,000.00.[90] The contract required a $5,000.00 deposit payment and an additional deposit payment of $26,000.00 within five days.[91] The Davises put down the $5,000.00 deposit, but before they had paid out the additional $26,000.00, Mrs. Davis noticed stains on the ceilings in both the family room and kitchen.[92] When Mrs. Davis inquired about the stains, Mr. Johnson replied that there had once been a minor problem with the window which had long since been corrected.[93] Several days after paying the remainder of the deposit, Mrs. Davis entered the home to find water "gushing" in from around that same window frame, the ceiling in the family room, the light fixtures, the glass doors, and even from the stove in the kitchen.[94]

The Davises sued the Johnsons, claiming breach of contract, fraud and misrepresentation.[95] The trial court entered judgment for the Davises as to the $26,000.00 payment, but refused to allow recovery of the initial $5,000.00 deposit.[96] Both parties took exception, and the case then came before the First District Court of Appeal.[97]

The $5,000.00 deposit, actually tendered before the Johnsons had made any affirmative representation concerning the roof, provided the major issue on appeal.[98] The district court first acknowledged the traditional rule of non-liability found in *Ramel* and *Banks*. The court then

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facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer." *Id.* at 231, 29 Cal. Rptr. at 204. The court also noted that the same duty applies to the licensed real estate broker. *Id.* at 232, 29 Cal. Rptr. at 205.

89. *Johnson*, 480 So. 2d at 626.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* According to Mrs. Davis' testimony, employees of the Johnson's real estate agent were "scurrying" around trying to mop up the water.
95. *Id.* The Johnsons counterclaimed seeking the deposit as liquidated damages.
96. *Id.* at 627.
97. *Johnson*, 449 So. 2d 344 (Fla. 3d Dist. Ct. App. 1984), *aff'd*, 480 So. 2d 625 (Fla. 1985).
98. *Id.* at 347.

reached back to *Kitchen v. Long*,[99] a case decided in 1914, for authority to support the proposition that the seller's liability might be premised on mere non-disclosure.[100] *Johnson* abolished earlier distinctions drawn between the sale of real and personal property and left the door open for the expansion of sale-related liability.

Perhaps even more significant to the real estate industry, however, is the footnote added by the district court on the last page of the decision.[101] Here, the majority indicated its reluctance to limit non-disclosure liability to the homesellers; in effect, real estate agents may be subject to such liability as well.[102] In California, the imposition on the broker of a duty to disclose was the last judicial step taken before the imposition of the duty to inspect.[103]

The Supreme Court of Florida affirmed the decision of the district court.[104] In a lengthy discussion[105] of the California court's decision in *Lingsch*, the majority noted the general tendency toward the restriction of the doctrine of caveat emptor through the imposition of a duty to disclose.[106] In view of the reasoning in *Lingsch* and similar decisions, the majority held that if a seller has knowledge of facts which would materially affect the value of the property and those facts are not known and readily observable to the buyer, the seller is under a duty to disclose them to the buyer.[107] Florida has now clearly indicated that

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99. 67 Fla. 72, 64 So. 429 (Fla. 1914).

100. In *Kitchen*, the seller of a "fine looking mule" intentionally concealed an organic defect in the animal from the buyer. When the mule died a few days after the sale, the buyer sued for recission. Relying on authority drawn from a number of defective animal cases, the court granted recission of the sale. It is important to realize, however, that the rule cited in *Kitchen* applies only in situations where the buyer does not have adequate opportunity to examine the merchandise being sold, i.e., a transaction not at arm's length. *Kitchen*, 67 Fla. at 72, 64 So. at 429.

101. *Johnson*, 449 So. 2d at 350.

102. *Id.* The court noted, "Although our holding is limited by the facts before us to the sellers of used homes, we realize that this duty is equally applicable to real estate brokers and all forms of real property, new and used." The Florida court once more looked to a California decision for support of this proposition. *See* Saporta v. Barbagelata, 220 Cal. App. 2d 463, 33 Cal. Rptr. 661 (1963).

103. *Easton*, 152 Cal. App. 3d at 99, 199 Cal. Rptr. at 387.

104. *Johnson*, 480 So. 2d at 625.

105. *Id.* at 628.

106. *Id.*

107. *Id.* at 629. The court stated, "We are of the opinion, in view of the reasoning and results in *Lingsch*, *Posner*, and the aforementioned cases decided in other jurisdictions, that the same philosophy regarding the sale of homes should also be the law in the state of Florida."

both seller and broker can be held accountable for non-disclosure of material defects in residential property.[108]

This was not the only significant case decided on this issue in 1985. Just one month earlier, in *Miller v. Sullivan*,[109] the First District Court of Appeal indicated that there is now a legal dispute as to whether a listing agent has a duty to double check the square footage figure provided by the sellers of residential property. In *Miller*, the purchaser sued the seller and the two brokers who cooperated in the sale for negligent misrepresentation.[110] The Sullivans' broker listed the house in the multiple listing service as having been "measured" at 1,417 square feet when, in fact, the home had less than eleven hundred square feet of usable living space.[111] The buyers, the Millers, discovered the error a year later when they attempted to sell the house.[112]

The trial court granted summary judgment for all defendants, and the purchasers appealed.[113] The Florida First District Court of Appeal upheld the summary judgment in favor of the sellers, but questioned the ruling of the trial court on the issue of broker negligence.[114] The court described the duty of the listing broker as one of honesty, candor, and fair dealing. The court then went on to state that a disputed issue of fact existed as to whether the broker had a duty to verify the square footage figure provided by the Sullivans.[115] As a result, the appellate court reversed summary judgment and remanded the case back for a determination on that issue and several other disputed issues of fact.[116]

In February of 1986, in *Horn v. First Orlando Realty Corp.*, Florida's First District Court of Appeal confronted the issue of broker negligence head on.[117] In *Horn*, the plaintiff-homebuyer brought an action

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108. *Id.*

109. 475 So. 2d 1010 (Fla. 1st Dist. Ct. App. 1985).

110. *Id.* at 1011. In the original action, the Millers filed suit against both listing and selling brokers for breach of contract, fraud and negligence. They sued the sellers for breach of contract and fraud.

111. *Id.* at 1011. At trial, there was an issue as to whether the representation in the listing agreement that the square footage had been "measured" meant that such measurement had been made by the listing agent or simply provided by the seller.

112. The inflated figure was attributed to the inclusion of the space contained within the garage and utility room, where there were no facilities for heating or air-conditioning. *Id.* at 1011.

113. *Id.*

114. *Id.*

115. *Id.* at 1012.

116. *Id.*

117. Horn v. First Orlando Realty Management Corp., 483 So. 2d 80 (Fla. 5th

against the seller's agent for negligent misrepresentation.[118] During pre-sale negotiations, the agent had assured the buyer that she could use the attic of the home as a storage area.[119] After the sale, the buyer attempted to use the attic and fell through a weak spot in the floor, breaking her back.[120] The district court found that the complaint had adequately alleged a claim of negilgent misrepresentation and held the defendant-broker liable to the homeowner. The court reached this conclusion despite the lack of any evidence which might have indicated that the broker had been aware of the defective condition of the attic floor prior to the time of the sale.[121]

Decisions like *Johnson*, *Miller*, and *Horn* indicate that Florida courts are in harmony with the current national trend toward greater consumer protection in residential land transactions.[122] To that end, the expansion of sale-related liability will probably continue as property values increase and dissatisfied homebuyers become aware of the increasing number of remedies available. It is conceivable that the question of whether Florida law requires real estate brokers to perform pre-sale housing inspections will soon arise.[123]

In an area of increasing consumer awareness and protective legislation, mandatory housing inspections would appear to be an appropriate remedy to an intolerable situation. Upon closer examination, however, the broker's duty to inspect reveals itself only as a temporary stop-gap: a post-hoc judicial remedy which can only lead to increased housing costs and excessive litigation. The broker's duty to inspect is a simplistic approach to a complicated problem, and one which places an unnecessarily harsh burden on the agent for the seller.

III. Misdirected Liability: A Critical Analysis of the Broker's Duty to Inspect

The imposition of a duty to inspect upon the seller's agent is not an appropriate response to the increasing number of problems relating to the sale of residential real estate. There are several reasons for this.

Dist. Ct. App. 1986).

118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Johnson*, 480 So. 2d at 628. *See also* sources cited *supra* notes 14 and 15.
123. *More Changes in 1986?*, 5 LAW ALERT 107 (1986).

First, the state-licensed broker does not ordinarily possess the skills necessary to conduct a comprehensive pre-sale inspection.[124] Most states prescribe statutory requirements to practice in the real estate industry and home inspection skills are rarely included within such requirements. For example, under current Florida law, a candidate for a real estate salesman's license must be eighteen years of age, a resident of the state, and of good character.[125] In addition, that candidate must complete a statutorily defined educational program and pass a statewide licensing examination.[126] The candidate for a broker's license must have held an active salesman's license in the year preceding the application and must complete a second, more comprehensive, course and exam.[127]

Neither of these state prescribed educational courses incorporate investigation technique. While many brokers might possess a rudimentary knowledge of housing construction and could spot obvious defects, the individual broker's personal experience limits the extent of such knowledge. The real estate agent's statutorily defined training requirements do not, in any way, involve the investigation of more complicated problems, such as the possibility of structural defects in the foundation or questions of soil integrity.[128] This latter problem might prove to be of particular significance in Florida, where a number of homes have collapsed into sinkholes which suddenly appeared without warning.[129] The licensed real estate broker simply does not possess the skill and expertise necessary to conduct independent housing inspections. As a result, brokers will undoubtedly look to costly inspection services to reduce their risk of liability.[130] Inevitably, they will pass that cost on to

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124. For a persuasive analysis of the real estate broker's lack of inspection skills, see King, *supra* note 26 at 658. *See also* Note, *supra* note 55, at 340.

125. FLA. STAT. § 475.17(1)(a)(1985).

126. FLA. STAT. § 475.17(2)(1985).

127. *Id.*

128. There is no specific language in the statute that requires such skills; however, "[a]n applicant for an active broker's license or a salesman's license shall be competent and qualified to make real estate transactions and conduct negotiations therefor with safety to investors and to those with whom he may undertake a relationship of trust and confidence." FLA. STAT. § 475.17(1)(a)(1985). *See also* Levin, *supra* note 5, at 437; King, *supra* note 26 at 658.

129. For an enlightening discussion concerning the unpredictability of sinkhole occurrence, *see* Vimmer v. Aetna Ins. Co., 383 So. 2d 92, 94 (Fla. 5th Dist. Ct. App. 1980). *But cf.* Vogel v. Larson Constr. Co., 156 So. 2d 181 (Fla. 2d Dist. Ct. App. 1963).

130. King, *Broker Liability After Easton v. Strassburger: Let the Buyer Be*

the ultimate consumer, the homebuyer.[131]

A second flaw in the *Easton* analysis concerns the changing role of the seller's real estate agent. The duty to inspect places the broker in a precarious position in terms of his agency relationship with the seller. As a consequence, both buyers and sellers will pay the price for the continuing expansion of the broker's legal duties. As courts expand the duty of the seller's broker to afford the homebuyer greater protection, they force the broker deeper into a dual agency relationship.[132] In effect, the broker must now represent the interests of both buyer and seller, two parties with obviously conflicting interests. This suggests an argument that traditional agency theory fails to provide either the buyer or the seller of residential property with adequate protection.[133] The imposition of a duty to inspect will only complicate matters further.

It must be emphasized that in the typical residential transaction, the real estate broker is the agent of the seller, not the buyer.[134] Under such an arrangement, the broker's primary fiduciary duty is to the seller.[135] Traditionally, the seller's broker also owed a duty to the buyer,[136] but until only recently that duty was simply one of fair dealing and honesty.[137]

Nevertheless, recent decisions have based broker liability upon the homebuyer's misguided reliance on the broker's advice and posture

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Aware, 25 SANTA CLARA L. REV. 662 (1985).

131. *Id.* at 663.

132. Dual agency is created when two essentially adverse principals, i.e., vendor and purchaser, are represented by a single entity. Comment, *supra* note 2, at 388.

133. *See supra* note 18.

134. Comment, *Broker - Real Estate Broker's Duties to Prospective Purchasers—Funk v. Tifft, 515 F.2d 23 (9th Cir. 1975)*, 4 B.Y.U. L. REV. 513 (1976). *See also* Comment, *Protecting the Real Estate Consumer: Traditional Theories of Liability Revisited, and a Look at Nebraska's Proposed Real Estate Consumer's Protection Act*, 65 NEB. L. REV. 188, 193 (1985).

135. *See* Funk v. Tifft, 515 F.2d 23, 25 (9th Cir. 1975). *See also* Gulitz, *supra* note 18, at 127; Comment, *supra* note 2, at 387.

136. *See* 7 FLA. JUR. 2D *Brokers* § 64 (1975).

137. *See, e.g.*, Zichlin v. Dill, 157 Fla. 96, 25 So. 2d 4 (1946); Shelton v. Florida Real Estate Comm., 120 So. 2d 191 (Fla. 2d Dist. Ct. App. 1960); Lerer v. Arvida Realty Co., 134 So. 2d 798 (Fla. 2d Dist. Ct. App. 1961); United Homes Inc. v. Moss, 154 So. 2d 351 (Fla. 2d Dist. Ct. App. 1963). If the seller acts as the agent for the buyer then he owes the duty of fair dealing to the prospective vendor. *See, e.g.*, Ellis v. Fink, 301 So. 2d 493 (Fla. 2d Dist. Ct. App. 1974).

during pre-sale negotiations.[138] Plaintiffs argue that real estate brokers are often the only source of information available to the homebuyer.[139] They contend that more often than not, the broker has an influential effect on the homebuyer due to his ability to access market information and his superior level of expertise concerning the housing industry itself.[140]

Several writers have also suggested that a gratuitous agency is formed between the seller's broker and the prospective purchaser.[141] Thus, courts might predicate the broker's duty to inspect on the relationship between the broker and buyer as independent from the broker's relationship with the seller.[142] The approach dovetails neatly with the *Easton* decision which held the obligation to perform mandatory housing inspections implicit in the broker's duty to disclose.[143]

Unfortunately, however, decisions like *Easton*, *Johnson*, and *Miller* have expanded the broker's duty to the homebuyer at the expense of the representation afforded the seller. *Johnson* based the broker's liability on principles of fraud.[144] In *Miller*, as in *Easton*, the court would have based liability upon a negligence theory.[145] In either case, the results are similar. In effect, such decisions require that licensed brokers provide professional assistance to separate parties with obviously conflicting interests. Both theories of liability premise the broker's duty on his relationship to the homebuyer, and regretably, that relationship lies in direct conflict with the interests of the broker's principal.[146] Thus, while it is true that a duty to the buyer may arise under the principles of gratuitous agency or through the homebuyer's misguided reliance, that duty is not absolute. It must be considered in light of the fact that real estate brokers ordinarily receive compensation for their services from the seller and that, in any event, the interests of the

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138. *See, e.g., Easton*, 152 Cal. App. 3d at 100, 199 Cal. Rptr. at 389.

139. *Id.* at 100, 199 Cal. Rptr. at 388.

140. *Id.*

141. RESTATEMENT (SECOND) OF AGENCY § 378 (1978). For an interesting discussion of this argument, see Levin, *Real Estate Agent Liability for Creative Financing Failures*, 39 U. MIAMI L. REV. 429, 432-33 (1985).

142. *See* Currier, *supra* note 1, at 658-59.

143. *Easton*, 152 Cal. App. 3d at 100, 199 Cal. Rptr. at 389.

144. *Johnson*, 480 So. 2d at 628. *See* Saporta v. Barbageleta, 220 Cal. App. 2d 463, 33 Cal. Rptr. 661 (Cal. 1st Dist. Ct. App. 1963).

145. *Miller*, 475 So. 2d at 1011.

146. *See* authorities collected, *supra* note 18.

seller are unquestionably the listing broker's primary responsibility.[147]

Adding to this confusing conflict of interest, the typical residential transaction ordinarily involves two licensed brokers, both of whom receive substantial compensation from the seller.[148] Ordinarily, the broker who lists the property — the *listing broker* — deals directly with the homeseller.[149] The listing agreement creates an agency[150] relationship between the broker and the seller and provides a vehicle for the seller's representations as to the property, most often through the authorization of some form of access to a multiple listing service.[151] Theoretically, as well as in practice, the *listing* agent will then promote the seller's interests as if they were his very own: If the listed property fails to sell, the seller pays no commission.[152]

The broker who cooperates in the sale — the *selling broker* — is the agent who most often assumes the position in the transaction as the apparent representative of the buyer.[153] In reality, however, the *selling* broker is not the buyer's agent at all, but simply one more agent working for the seller.[154] It is the *selling* broker upon whom the homebuyer most often relies to his detriment.[155] Thus, the *selling* broker, who may have had no previous contact with the seller, and who may have no greater knowledge of the seller's property than the buyer himself, can be held liable for failing to provide the buyer with information which may in fact work against the seller's best interests.

Considering the state of confusion which surrounds the current

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147. *See, e.g.*, Bush v. Palermo Realty, Inc., 443 So. 2d 104 (Fla. 4th Dist. Ct. App. 1983). The court, citing an earlier decision by a sister court, noted that the broker's primary fiduciary duties to the seller were not undermined by the broker's obligation of fair dealing to the buyer.

148. Comment, *Dual Agency in Residential Real Estate Brokerage: Conflict of Interest and Interests in Conflict*, 12 GOLDEN GATE U.L. REV. 379, 383 (1982).

149. In the typical residential real estate transaction, the seller lists his real estate for sale with a real estate broker by way of a salesman (listing salesman) representing the broker (listing broker). Gulitz, *supra* note 18, at 126.

150. Agency is a consensual relationship between two persons wherein one of them (the principal) empowers the other (the agent) to act and the agent assumes to so act. RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

151. For a discussion of the marketing advantages of multiple listing services, see Currier, *supra* note 11, at 661. *See also* Gulitz, *supra* note 18, at 126.

152. *See* BEATON, *supra* note 3, at 328.

153. *Id.* at 327.

154. *See, e.g.*, Hale v. Wolfson, 276 Cal. App. 2d 285, 290, 81 Cal. Rptr. 23, 27 (Cal. 1st Ct. App. 1969). *See also* Comment, *supra* note 134, at 193.

155. *See* Comment, *supra* note 2, at 387.

real estate agency arrangement, it is clear that imposition of a duty to inspect on the seller's broker will only complicate matters further. The requirement that an agent for the seller perform inspections for the benefit of the buyer can only serve to increase the pressure on the real estate brokers in their attempt to avoid the conflict of interest which already exists. In effect, the duty to inspect forces the broker into a dual agency relationship, an arrangement where both the seller and buyer suffer from inadequate representation.

The preceeding analysis has revealed flaws in the reasoning behind the imposition of a duty on licensed real estate brokers to perform mandatory housing inspections on all listed property. It is clear that today's homebuyer is in need of protection; what is not clear, however, is whether that protection should come at the expense of the seller, or through the imposition of such an unnecessary burden on the seller's agent. It would appear that an alternative solution to the homebuyer's lack of adequate representation might be found by shifting fiduciary responsibilities and giving legal recognition to a proposition which many homebuyers already believe to be true: that the *selling broker* is the agent of the buyer.

IV. An Alternative Solution: Representation for the Homebuyer

Considering the nature and importance of the residential land transaction, it is nothing short of incredible that the modern homebuyer is under-protected and ill-advised. The purchase of a home is a relatively complex transaction.[156] It is imperative that the buyer be provided with adequate representation during the pre-sale negotiations. The deceptive appearance of the traditional agency relationship, however, has fostered a general misconception that leads homebuyers to believe they are receiving that representation.[157] As previously discussed,[158] it is this misconception which provided the element of reli-

156. *See* S. CEIDELL, HOUSING COSTS AND GOVERNMENT REGULATION 261-77 (1978); *See generally* Greshin, *The Residential Real Estate Transfer Process: A Functional Critique*, 23 EMORY L.J. 421 (1974).

157. W. BEATON, *supra* note 3, at 327. *See also* Comment, *Mandatory Disclosure: The Key to Residential Real Estate Broker's Conflicting Obligations*, 19 J. MARSHALL L. REV. 201 (1985); Owen, *Kickbacks, Specialization, Price Fixing, and Efficiency in Residential Real Estate Markets*, 29 STAN. L. REV. 931, 944-45 (1977).

158. *See supra* notes 142 to 146 and accompanying text.

ance necessary to the reasoning behind the *Easton* rule.[159] By expanding sale-related liability, today's courts are simply responding, albeit after the fact, to the problems generated by the pre-sale inequities of the traditional agency arrangement. A better solution would be to see the traditional agency arrangement undergo a simple, yet fundamental, readjustment.

As the problems relating to the sale of defective residential property so often revolve around the homebuyer's lack of representaton prior to the sale,[160] this provides the focal point of the solution.[161] The fact that homebuyers do not obtain adequate representation during presale negotiations works to increase the risks associated with the purchase of defective property.[162] Homebuyers mistakenly — maybe even justifiably — rely on the seller's agent for information regarding the sale. This misplaced reliance is at least partially responsible for the favorable judicial treatment now afforded the homebuyer after the sale. Ultimately, it may result in the imposition of a duty on the part of the seller's agent to perform mandatory housing inspections on behalf of potential buyers.[163] In this way, the significance of the problem becomes painfully apparent. The seller, the buyer, and any agent involved in a real estate transaction risks potential liability due to the homebuyer's current lack of adequate representation.[164]

Not surprisingly, Florida homebuyers could acquire that representation from the same pool of professional assistance now available to any homeseller — the states's 322,331 licensed real estate agents[165]

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159. *Easton*, 152 Cal. App. 3d at 101, 199 Cal. Rptr. 3d at 389.

160. Presumably, by the time the homebuyer brings his claim to court, he has arranged for adequate representation.

161. It is important to note that the court in *Easton* recognized that the broker's duty to inspect does not necessarily apply to transactions involving the sale of commercial real estate, where a purchaser is likely to be more experienced and sophisticated in his dealings and is usually represented by an agent who represents only the buyer's interest. *Easton*, 152 Cal. App. 3d at 103, 199 Cal. Rptr. at 390.

162. *Id. See also* Comment, *supra* note 2, at 383.

163. *Easton*, 152 Cal. App. 3d at 101, 199 Cal. Rptr. 3d at 389.

164. The homebuyer purchases an economic headache; the homeseller risks post-sale liability; the broker walks a legal tightrope, where high visibility and perpetual solvency can lead to actions filed by both buyers and sellers.

165. Telephone interview with Barbara Rhloff, Data Entry Supervisor, Division of Real Estate, Department of Professional Regulation, Orlando, Florida (Jan. 15, 1987). As of March, 1985, licensed brokers and salespersons in the state of Florida numbered 135,549. FLORIDA STATISTICAL ABSTRACT 436 (1985).

and 39,989 practicing attorneys.[166] Moreover, the expense of that representation might be kept to a minimum by simply shifting the responsibilities of the *selling broker* to provide the homebuyer with a greater degree of protection.

While many people mistakenly believe that the seller is entitled to the services of two brokers by virtue of the fact that the seller is the one who pays the broker's commission, this is not, in fact, wholly true. In reality, the broker's commission is simply a transactional cost, a cost which is ultimately passed on to the *homebuyer* in the form of a higher purchase price.[167] In effect, today's homebuyer already pays for assistance from at least *two* licensed real estate professionals; but the inherent inequities built into the traditional arrangement have unnecessarily limited the extent of that assistance, and have left the homebuyer unprotected.

Lawmakers could eliminate many of the current problems surrounding residential land transfers by offering the services of the *selling broker* to the buyer. In effect, the *selling* agent would become the transactional representative of the buyer, not the seller. A state-licensed real estate broker would then represent every homebuyer. The seller would, of course, retain the services of the *listing* broker, and the parties would be dealing at arm's length.[168] Both brokers may then work to negotiate terms agreeable to all. If an agent for the buyer feels that a particular inspection is necessary, he can advise the homebuyer to insist that the purchase and sale agreement provide for it. If the homebuyer does require legal counsel or the assistance of a professional inspection service, the *selling broker* could arrange for such assistance during the course of pre-sale negotiations. As the courts would then consider the homebuyer as the principal of the *selling* agent, the failure to provide the homebuyer with adequate representation would still leave brokers open to liability, but would do so without imposing a duty to perform costly inspections on all residential transactions.

The traditional agency arrangement will require a fundamental re-

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166. Telephone interview with Virginia Hardison, Supervisor of Membership Records, Florida Bar, Tallahassee, Florida (Jan. 15, 1987). As of June 3, 1985, members in good standing in the Florida Bar numbered 36,389. FLORIDA STATISTICAL ABSTRACT 545 (1985).

167. It is for this reason that homebuyers who purchase property from sellers without brokers expect a lower purchase price.

168. It is important to remember that the holding in *Easton* did not apply to commercial real estate transactions, where the parties are considered to be dealing at arm's length. *Easton*, 152 Cal. App. 3d at 104, 99 Cal. Rptr. at 391.

in existence. The traditional agency arrangement must undergo a fundamental change, whereby the selling broker acts as the agent for the buyer. Until then, real estate brokers must exercise extreme caution in listing property for sale, as any home can prove to be a potential liability.

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