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Traditionally, in Illinois, disappointed real estate purchasers were able to impose liability on real estate brokers[1] only for express statements that rose to the level of common law intentional fraud.[2] However, with the erosion of the doctrine of *caveat emptor*[3] and a new awareness of the reliance that purchasers place on the experience and advice of brokers, the Illinois courts and the Illinois legislature have been receptive to increasing brokers' duties to prospective purchasers. Taking advantage of such a pro-consumer environment, disappointed purchasers and frustrated prospective purchasers have tested relatively new theories of liability including fraudulent concealment, negligent misrepresentation, and violations of the Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act").[4] These relatively new theories seek to impose liability on brokers for either: (1) express statements alleg-

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1. In Illinois, a broker is statutorily defined as "an individual, partnership or corporation, other than a real estate salesperson, who for another and for compensation . . . [sells, offers to sell, lists, or a]ssists or directs in the negotiation of any transaction intended to result in the sale, exchange, leasing or rental of real estate." ILL. REV. STAT. ch. 111, para. 5804(4) (1989). The Real Estate License Act of 1983 is codified at ILL. REV. STAT. ch. 111, paras. 5801-5836.24 (1989).

2. *See, e.g.*, Pustelniak v. Vilimas, 185 N.E. 611 (Ill. 1933) (broker intentionally misrepresented the value of a gas station to prospective purchaser).

3. *Caveat emptor* means "[l]et the buyer beware. This maxim summarizes the rule that a purchaser must examine, judge, and test for himself." BLACK'S LAW DICTIONARY 222 (6th ed. 1990); *see also* Reimer v. Leshtz, 414 N.E.2d 114, 117 (Ill. App. Ct. 1980) ("the modern trend in the law is away from a strict application of the rule of caveat emptor"); Posner v. Davis, 395 N.E.2d 133, 137 (Ill. App. Ct. 1979) ("the modern trend in the law regarding the sale of a home is away from strict adherence to the doctrine of *caveat emptor*").

4. ILL. REV. STAT. ch. 121 1/2, paras. 261-272 (1989). The Consumer Fraud Act incorporates, by reference, the Uniform Deceptive Trade Practices Act, ILL. REV. STAT. ch. 121 1/2, paras. 311-317 (1989), and the Trade Act, ILL. REV. STAT. ch. 121 1/2, para. 262 (1989).

Disappointed purchasers also sought to impose liability under the Real Estate License Act of 1983, ILL. REV. STAT. ch. 111, paras. 5801-5836.24 (1989), and its predecessor, the Real Estate Brokers and Salesmen License Act, ILL. REV. STAT. ch. 111, paras. 5701-5743, *repealed by* 1983 ILL. LAWS 1700, 1728 (effective Jan. 1, 1984). The Illinois Supreme Court, in Sawyer Realty Group, Inc. v. Jarvis Corp., 432 N.E.2d 849, 852-53

edly made in violation of the broker's duty of accuracy; or (2) the broker's silence in failing to disclose material facts when such silence violates the broker's duty of disclosure. The dearth of guidance by the Illinois Supreme Court, however, has produced uncertainty regarding the scope of these recently created duties of accuracy and disclosure.

This Article examines both the scope and the appropriateness of these duties. In particular, this Article will (1) address the broker's common law and statutory obligations to disclose material facts to the purchaser, and (2) analyze the broker's common law and statutory obligations to confirm the accuracy of information conveyed to the purchaser, both when the broker acts as a conduit for the seller and when the broker speaks independently of the seller.

Part I addresses the broker's common law duties of disclosure and accuracy as developed in actions for fraudulent concealment and negligent misrepresentation. Part II discusses the broker's statutory duties of disclosure and accuracy as governed by the Consumer Fraud Act.[5] Part III summarizes the current status of a broker's common law and statutory obligations, and Part IV provides projections and recommendations for the future development of these obligations. This Article concludes that although purchasers need to be protected from misplaced reliance and from deceptive broker conduct that does not rise to the level of common law intentional fraud, a strict, literal application of the broker's statutory obligations is an unwarranted and inappropriate response to both problems. In fact, the expanded common law obligations provide equitable and adequate methods to protect purchasers from a range of broker misconduct. Moreover, the problem of purchasers' misplaced reliance should be properly redressed with consumer education.

(Ill. 1982), found that a private right of action for damages existed under the Brokers Licensing Act.

After *Sawyer*, however, the Illinois legislature amended the Real Estate License Act of 1983 to provide that "[n]othing in this Act shall be construed to grant to any person a private right of action for damages or to enforce the provisions of this Act or the rules or regulations issued under this Act." *See* ILL. REV. STAT. ch. 111, para. 5832 (1989). This amendment prevents individuals from relying upon the Real Estate License Act of 1983 for the existence of statutory obligations and forces individuals to turn to other statutory or common law obligations. *See* Stefani v. Baird & Warner, Inc., 510 N.E.2d 65, 70 (Ill. App. Ct.) ("Based on the [amendment], therefore, we hold that plaintiffs' alleged cause of action pursuant to the Real Estate License Act and rules and regulations of the Department of Registration and Education was barred and properly dismissed.") *appeal denied*, 515 N.E.2d 172 (Ill. 1987). For a further discussion of claims brought under the Brokers Licensing Act, see *infra* notes 17, 19, 43 and accompanying text.

5. ILL. REV. STAT. ch. 121 1/2, paras. 261-272 (1989).

I. COMMON LAW ACTIONS IMPOSING BROKER LIABILITY

Illinois brokers historically were liable only for express statements that rose to the level of intentional fraud. Within the past ten years, however, real estate purchasers increasingly have tried to hold brokers liable for both fraudulent concealment and negligent misrepresentation. Accordingly, this section discusses the Illinois courts' development of these two common law actions and the respective duties they impose on brokers.

A. Fraudulent Concealment and the Duty to Disclose

Liability for fraud will be imposed if a plaintiff proves the following:

> a false statement of material fact was made, that the party making the statement knew or believed it to be untrue, that the party to whom the statement was made had a right to rely on it and did so, that the statement was made for the purpose of inducing the other party to act, and that reliance by the person to whom the statement was made led to his injury.[6]

Although the existence of an affirmatively egregious statement is a crucial element of common law fraud, a plaintiff may also bring an action for fraud when a defendant remains silent. Indeed, fraud can be based not only upon egregious statements, but also upon intentional concealment[7] and upon the failure to speak when there is a duty to do so.[8] Rather than focusing on the existence of an egregious statement, as numerous authors[9] and court decisions[10]

6. Redarowicz v. Ohlendorf, 441 N.E.2d 324, 331 (Ill. 1982); *see also* Salisbury v. Chapman Realty, 465 N.E.2d 127, 132 (Ill. App. Ct. 1984) (finding a sufficient allegation of fraud when broker failed to deliver on promise to convey good title to the property at a future date).

7. *See* Obermaier v. Obermaier, 470 N.E.2d 1047, 1051 (Ill. App. Ct. 1984) ("Actual fraud is an intentional misrepresentation or intentional concealment, by one party, of a material fact which is relied on to the detriment of another party."); *see also* Zimmerman v. Northfield Real Estate, Inc., 510 N.E.2d 409, 413 (Ill. App. Ct. 1986) ("Intentional concealment of a material fact is the equivalent of a false statement of material fact.").

8. *See* Zimmerman, 510 N.E.2d at 413 ("Where a person has a duty to speak, his failure to disclose material information constitutes fraudulent concealment."); *Salisbury*, 465 N.E.2d at 132 ("Where a person has a duty to speak, his failure to disclose material information is equivalent to a fraudulent concealment.").

9. *See* Craig A. Peterson, *Tort Claims by Real Estate Purchasers Against Sellers and Brokers: Current Illinois Common Law and Statutory Strategies*, 1983 S. ILL. U. L.J. 161 (discussing liability of brokers for common law fraud and negligent misrepresentation); David F. Black, *Recovery for Defects in the Sale of Used Homes*, 64 CHI. B. REC. 118 (1982) (discussing liability of brokers for negligent misrepresentation); James S. Sinclair, *The Duty of the Broker to Purchasers and Prospective Purchasers of Real Property in Illinois*, 69 ILL. B.J. 260 (1981) (discussing liability of brokers for breach of fiduciary duty).

10. *See* cases cited *supra* note 6.

have, or on conduct that constitutes intentional concealment, this Article will focus primarily on the existence and scope of the duty to disclose material facts.

The Illinois cases examining the broker's duty to disclose material facts in a fraud action focus on two main areas of disclosure.[11] The first area concerns a broker's personal interest in the property and the second deals with defects in the condition of the property.

1. Personal Interest

The Illinois Supreme Court has decided two cases addressing the broker's common law duty to disclose personal interest. The first was *Fish v. Teninga*,[12] decided in 1928. In *Fish*, the plaintiff alleged that the broker fraudulently failed to disclose his interest in purchasing the same property that the plaintiff desired to purchase.[13] Finding the broker not liable, the *Fish* court established the rule that a "real estate broker is under no duty to disclose material facts known to him regarding property concerning which inquiry is made of him"[14] unless a principal-agent relationship is established between the purchaser and the broker.[15]

The rule announced in *Fish* stood for fifty-four years until the Illinois Supreme Court revisited the issue in *Sawyer Realty Group, Inc. v. Jarvis Corp.*[16] In *Sawyer*, the plaintiff sued the brokers under the Real Estate Brokers and Salesmen License Act ("Bro-

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11. *See infra* notes 12-44 and accompanying text. *But see* Bliesener v. Baird & Warner, Inc., 232 N.E.2d 13, 15 (Ill. App. Ct. 1967) (finding that the broker, having knowledge of its principal's inability to perform the terms of a lease, owed a duty to the plaintiff to disclose information regarding the principal's inability to perform).

12. 161 N.E. 515 (Ill. 1928).

13. *Id.* at 516. The plaintiff sought to impose a constructive trust after the broker acquired the property, but the court refused to impose the trust. *Id.* at 516-18.

14. *Id.* at 519.

15. *Id.* For cases discussing the existence of a principal-agent relationship, see Duffy v. Setchell, 347 N.E.2d 218, 221 (Ill. App. Ct. 1976) ("If a buyer requests a broker's assistance in obtaining a particular piece of property, the broker may be held to be the buyer's agent for that transaction.") and Stefani v. Baird & Warner, Inc., 510 N.E.2d 65, 69 (Ill. App. Ct.), *appeal denied*, 515 N.E.2d 172 (Ill. 1987). The *Stefani* court observed:

> Although, as defendant argues, plaintiffs did not initially contact [defendant] to purchase a *particular piece of property* on their behalf, we believe that a question of fact existed as to whether [defendant's] later representation of plaintiffs, once they made an offer to purchase the Harris property, and her participation in the ensuing negotiations between plaintiffs and Harris, rose to the level of employment of defendant as an agent, during that time, *to purchase a particular piece of property, i.e.*, the Harris property.

Id. The *requirement* of a principal-agent relationship is separate from determining whether such a relationship exists.

16. 432 N.E.2d 849 (Ill. 1982).

kers Licensing Act")[17] for the brokers' failure to disclose their interest in purchasing property that they listed for sale.[18] The *Sawyer* court found that a statutory duty of disclosure existed under the Brokers Licensing Act[19] and bolstered its conclusion by finding that a separate duty of disclosure existed under the common law.[20] Recognizing a common law duty of disclosure, the *Sawyer* court implicitly overruled *Fish* announcing that it was "no longer viable" to impose a duty to disclose material facts only in the presence of a principal-agent fiduciary relationship.[21] Instead, relying upon the Ninth Circuit Court of Appeals's holding in *Funk v. Tifft*,[22] the *Sawyer* court held that "[r]eal estate brokers occupy a position of trust with respect to the purchasers with whom they are negotiating. Brokers owe a corresponding duty to exercise good faith and disclose any personal interest they have in property they list for sale."[23] The *Sawyer* holding represents the current state of

17. ILL. REV. STAT. ch. 111, paras. 5701-5743 (repealed 1984). The Brokers Licensing Act was repealed, 1983 ILL. LAWS 1700, 1728 (effective Jan. 1, 1984), and replaced by the Real Estate License Act of 1983, ILL. REV. STAT. ch. 111, paras. 5801-5836.24 (1989). For a discussion of the Illinois legislature's removal of a private right of action from the Brokers Licensing Act, see *supra* note 4 and *infra* note 43.

18. *Sawyer*, 432 N.E.2d at 850.

19. The *Sawyer* court found that a corresponding duty of disclosure existed under rules V(A) and (C) promulgated by the Department of Registration and Education pursuant to the Brokers Licensing Act. *Id.* at 851-52. The rules, in pertinent part, state:

> V. Disclosure
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> (A) A registrant shall disclose to any and all purchasers, prospective purchasers, . . . any and all material knowledge he may have as soon as it may be practical for him so to do. This rule shall not be construed to require a registrant to violate his duties under the laws of agency.
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> . . . .
>
> (C) A registrant shall disclose to all parties in any transaction, . . . any and all interest he or it does or may have . . . in the real estate constituting the subject matter thereof . . . .

Id. at 851 (quoting DEPARTMENT OF REGISTRATION AND EDUCATION, RULES AND REGULATIONS PROMULGATED FOR THE ADMINISTRATION OF THE REAL ESTATE BROKERS AND SALESMEN LICENSE ACT V(A), (C) (rev. ed. 1979)). The *Sawyer* court, finding that a private right of action existed under the Brokers Licensing Act, concluded that the Illinois legislature intended for these rules to be enforced through private litigation. *Id.* at 854-55.

20. *Id.* at 852.

21. *Id.*

22. 515 F.2d 23 (9th Cir. 1975).

23. *Sawyer*, 432 N.E.2d at 852 (citing *Funk*, 515 F.2d at 25). The *Sawyer* court's reliance upon *Funk*, however, is suspect. It is questionable whether the Ninth Circuit correctly reasoned that a fiduciary duty of disclosure exists absent a principal-agent relationship.

In *Funk*, the plaintiffs, alleging that the brokers breached their fiduciary duties by not disclosing their interest in bidding upon and purchasing the same property that the plaintiffs had bid on through the brokers, sought to impose a constructive trust on the property. *Funk*, 515 F.2d at 25. The Ninth Circuit, relying upon case law from various

Illinois common law regarding the broker's duty to disclose personal interest.[24] Thus, if a broker remains silent about his or her personal interest, that silence, in light of the *Sawyer* good faith duty of disclosure, may constitute fraudulent concealment and may subject the broker to liability.

2. Property Condition

As with broker liability for non-disclosure of a personal interest, broker liability for non-disclosure of property defects, prior to *Sawyer*, was limited to instances in which the purchaser could establish either fraudulent statements, active concealment,[25] or that a principal-agent relationship with the broker existed.[26] The question

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jurisdictions, found that a fiduciary relationship existed between the plaintiff and the brokers, that the brokers breached their fiduciary duties, and that the imposition of a constructive trust was the proper remedy for such a breach. *Id.* at 25-26. The court found that the fiduciary relationship was formed "[w]hen a real estate broker acts as an intermediary between a seller and a prospective buyer." *Id.* at 25. However, by not exploring what it means to "act as an intermediary" in order to create a fiduciary relationship and by relying upon cases that found a breach of a fiduciary duty only after finding the existence of a principal-agent relationship, the Ninth Circuit may have reasoned incorrectly that a broker owes a fiduciary duty of disclosure to a prospective purchaser absent a principal-agent relationship. *Id.* at 28 (Wright, J., dissenting). Thus, because of the Ninth Circuit's questionable reasoning in *Funk*, the *Sawyer* court's reliance on *Funk* in overruling *Fish* may have been inappropriate. *See* Note, *Real Estate Brokers' Duties to Prospective Purchasers*—Funk v. Tifft, 1976 B.Y.U. L. REV. 513 (discussing the *Funk* court's disclosure requirement).

24. *See, e.g.*, Seligman v. First Nat'l Invs., Inc., 540 N.E.2d 1057 (Ill. App. Ct. 1989). The *Seligman* court, addressing an action for a violation of the Consumer Fraud Act, cited *Sawyer* for the proposition that brokers have a "duty to exercise good faith and to disclose any personal interest in property they list for sale." *Id.* at 1064.

25. One of the first cases to consider a broker's duty to disclose defects in the physical condition of property listed for sale was Russow v. Bobola, 277 N.E.2d 769 (Ill. App. Ct. 1972). In *Russow*, the plaintiffs brought suit against the individual salesperson, the broker, the broker's employer, and the sellers alleging that each of them, by failing to disclose basement flooding *of which they had knowledge*, fraudulently concealed material information. *Id.* at 770-71. The court found that the sellers' conduct of washing and painting the basement walls as well as the sellers' incomplete and incorrect responses to plaintiffs' questions presented sufficient evidence of active concealment. *Id.* at 771-72.

The *Russow* court made no statement regarding the broker's knowledge of the property defect, but held that the plaintiffs failed to present sufficient evidence to require the broker to defend a fraud charge absent evidence demonstrating that the broker made fraudulent statements or actively concealed the evidence of flooding. *Id.* at 772. The court affirmed the trial court's dismissal of the plaintiff's action against the broker. *Id.* The *Russow* court found that the broker "made no statement regarding the flooding or drainage of the house, and took no active steps to conceal the situation," that the brokerage company did not make "any statement as to flooding or drainage," and that the salesperson's "silence fell far short of active concealment." *Id.* The *Russow* court noted that mere "silence in a business transaction does not generally amount to fraud" and thus refused to find that the broker had a duty of disclosure that could be breached by silence. *Id.* at 771.

26. In Blocklinger v. Schlegel, 374 N.E.2d 491, 492 (Ill. App. Ct. 1978), the plaintiff

post-*Sawyer* was whether the broker's common law "duty of good faith" required disclosure, even absent a principal-agent relationship, not only of a broker's personal interest in property but also of property defects.

This question was answered in the affirmative by *Munjal v. Baird & Warner, Inc.*[27] and *Zimmerman v. Northfield Real Estate, Inc.*,[28] when both held that *Sawyer*'s common law "duty of good faith" also imposes a duty upon the broker to disclose material property defects even in the absence of a principal-agent relationship. However, both courts qualified the scope of the duty to disclose by holding that the duty only arises if a broker *has knowledge* of the material property defects.[29]

In *Munjal*, the plaintiffs encountered severe flooding in the home they purchased.[30] They sued the seller, the broker, and the brokerage company, alleging both common law fraud and a violation of the Consumer Fraud Act.[31] After the trial court found for the plaintiffs,[32] the appellate court sustained the jury's finding against the sellers, but reversed the verdict against the broker.[33] The court acknowledged, pursuant to *Sawyer*, that brokers owe prospective purchasers a duty of good faith absent a principal-agent relationship.[34] However, the court found that the broker's express statement,[35] although false, did not rise to the level of fraud.[36] The

broker brought a specific performance suit against the defendant sellers when the sellers refused to perform under a real estate sales contract. The sellers acknowledged the existence of the contract, but sought rescission because the contract terms required a sale to the plaintiff for a below-market price. *Id.* The sellers alleged that the plaintiff's use of a multiple listing service to discover the property made him their sub-agent. *Id.* at 493. Accordingly, the broker's status as the seller's sub-agent created a fiduciary duty to disclose his occupation as a realtor and his particular expertise as to land values. *Id.* The court, however, rejected the sellers' argument and held that the plaintiff's use of a multiple listing service did not make him a sub-agent of the defendants. *Id.* Relying on the *Fish* decision, the *Blocklinger* court found that "[i]n the absence of an agency relationship[,] a fiduciary duty of disclosure did not exist." *Id.*

27. 485 N.E.2d 855 (Ill. App. Ct. 1985).

28. 510 N.E.2d 409 (Ill. App. Ct. 1986).

29. *Id.* at 413; *Munjal*, 485 N.E.2d at 864; *cf.* Easton v. Strassburger, 199 Cal. Rptr. 383, 390 (Ct. App. 1984) (holding that brokers have an "affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal").

30. *Munjal*, 485 N.E.2d at 860.

31. *Id.* at 858. For a discussion of the alleged violation of the Consumer Fraud Act, see *infra* notes 117-21 and accompanying text.

32. *Munjal*, 485 N.E.2d at 861.

33. *Id.* at 867.

34. *Id.* at 863.

35. When asked by the purchaser about evidence of water in the basement, the broker

court accepted the broker's testimony that he "was not aware" of the falsity of the statement nor was the false statement made "intentionally or in culpable ignorance of the truth."[37] Accordingly, *Munjal* may be construed as a qualification of *Sawyer*'s duty of good faith, in that, under *Munjal*, the broker's duty is to disclose *known* material defects.[38]

Further, in *Zimmerman v. Northfield Real Estate, Inc.*,[39] the court confirmed the *Munjal* court's qualification of *Sawyer*, holding that the duty of disclosure inherent in the *Sawyer* duty of good faith only applies to material information of which the broker has knowledge.[40] The *Zimmerman* court found that the plaintiffs' complaint "sufficiently alleged that the brokers had a *duty to speak* regarding *material information* of which they *had knowledge*."[41] Furthermore, the court held that the brokers' silence as to those known facts, in light of the duty of disclosure, "may constitute fraudulent concealment of material facts."[42] The *Zimmerman* court premised its holding not only on an implied duty of disclosure in the Brokers Licensing Act,[43] but also on the duty of disclo-

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told the purchaser that the water in the basement was "caused by a leaky check valve on the sump pump," as the broker had been told by the seller. *Id.* at 859.

36. *Id.* at 863-64.

37. *Id.* at 863.

38. Arguably then, the *Russow* decision, *see supra* note 25, allowing brokers to remain silent in light of known defects, is no longer controlling.

39. 510 N.E.2d 409 (Ill. App. Ct. 1986).

40. *Id.* at 413.

41. *Id.* (emphasis added).

42. *Id.*

43. *Id.* (citing ILL. REV. STAT. ch. 111, paras. 5701-5743 (repealed 1984)). In concluding that the statutory duty contained in the Brokers Licensing Act could be the basis for a common law fraud claim, the *Zimmerman* court relied upon the *Sawyer* court's holding that a private right of action existed under the Act and that the Act imposed upon brokers a duty to disclose material facts. *Id.*; *see also* Salisbury v. Chapman Realty, 465 N.E.2d 127, 132 (Ill. App. Ct. 1984) ("[The defendant] had a duty to disclose material facts under the Real Estate Brokers and Salesmen License Act . . . . Therefore, [the defendant's] silence may constitute a fraudulent concealment of a material fact.").

During the pendency of *Zimmerman*, however, the Illinois legislature repealed the Brokers Licensing Act and replaced it with the Real Estate License Act of 1983. *See supra* notes 4, 17, and 19. Thus the legislature effectively overruled this aspect of the *Zimmerman* holding.

By amending § 5832 of the Real Estate License Act of 1983 to specifically remove a private right of action, the Illinois legislature may have intended to prevent a plaintiff from using the statutory duty of disclosure as the basis for a common law fraudulent concealment action. Indeed, prior to the *Sawyer* court's creation of a private right of action under the Brokers Licensing Act, Illinois courts were unwilling to find a correlation between a statutory violation and common law fraud. *See, e.g.*, Blocklinger v. Schlegel, 374 N.E.2d 491, 493 (Ill. App. Ct. 1978). The *Blocklinger* court stated: "Further, defendants' citation to the rules and regulations promulgated by the Department of Registration and Education of the State of Illinois pursuant to the Real Estate Brokers and

sure necessary to comply with the duty of good faith imposed by *Sawyer*.[44]

B. Negligent Misrepresentation and the Duties of Accuracy and Discovery

To prevail in an action for negligent misrepresentation, a purchaser must establish the existence and subsequent breach of a preexisting duty owed to him by the broker.[45] The broker's duty in a negligent misrepresentation action is the duty of accuracy. As explained below, the duty of accuracy may arise out of specific factual situations or out of a broad, general obligation to prospective buyers. In addition, inherent in the duty of accuracy is a duty of discovery, the scope of which may vary depending on the type of statement made by the broker.

1. Pre-*Sawyer*

Prior to *Sawyer* and the Illinois courts' adoption of the duty imposed by section 552 of the *Restatement (Second) of Torts* ("section 552"),[46] there were only limited instances in which a disappointed

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Salesmen Act and plaintiff's alleged breach of those rules do not establish the existence of any fraud on plaintiff's part." *Id.* Thus, for this portion of the *Zimmerman* holding to remain intact after the repeal of the Brokers Licensing Act, the *Zimmerman* holding must be read as finding, consistent with *Munjal*, that the duty of disclosure incorporated within the *Sawyer* duty of good faith is a common law duty to disclose only known material defects.

44. *Zimmerman*, 510 N.E.2d at 413.

45. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 107, at 745-48 (5th ed. 1984). Generally, courts will find a duty when the defendant, in the course of business, makes statements specifically for the benefit of the plaintiff. *Id.* § 107, at 747.

46. Section 552 provides:

> (1) One who, in the course of his business profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
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> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
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> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
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> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

purchaser could establish the existence of a duty of accuracy.

In *Lyons v. Christ Episcopal Church*,[47] one of the first cases to consider an action against a broker for negligent misrepresentation, the plaintiffs alleged that the broker, acting as a conduit for the seller's false statement, was liable for negligent misrepresentation.[48] In finding that the plaintiffs failed to state a cause of action for negligent misrepresentation, the *Lyons* court held that "a realtor has no duty to prospective purchasers to independently substantiate the representation of a disclosed seller unless [the realtor] is aware of facts which tend to indicate that such representation is false."[49] Moreover, even if a duty of independent substantiation or accuracy exists, "there is no breach unless the realtor could have *discovered* the falsity of the representation by exercise of ordinary care."[50] Such a result, the court found, is consistent with comment b of section 348 of the *Restatement (Second) of Agency*.[51] Thus, under *Lyons*, a duty of discovery is inherent in the duty of accuracy. Therefore, if a broker knows or should know, through the exercise of ordinary care, that a seller's statements are incorrect, then that broker's duty is to "independently substantiate" the seller's statement.[52] Thus, the broker must utilize the information derived from investigation and speak accurately when acting as a conduit for the seller's statement.

The next case to consider a claim against a broker for negligent misrepresentation was *Duhl v. Nash Realty, Inc.*[53] Consistent with

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RESTATEMENT (SECOND) OF TORTS § 552 (1977).

47. 389 N.E.2d 623 (Ill. App. Ct. 1979).

48. *Id.* at 625. The trial court denied the broker's motion to dismiss the negligent misrepresentation count for failure to state a cause of action. *Id.* The broker appealed the denial of his motion, and the appellate court reversed. *Id.*

49. *Id.*

50. *Id.* (emphasis added). In addition, the court stated: "It is fundamental that there can be no liability in negligence without fault, the rule we follow would permit a finding of fault only in situations where the real estate agent knew or should have known that the representation might be false." *Id.*

51. *Id.* Comment b states:

> An agent is not liable because of misrepresentations of the principal or of another agent unless he knows or should know of them. He is not affected by the knowledge of facts which the principal or another agent has and which, if known to him, would cause his representations to be fraudulent. An agent who makes untrue statements based upon the information given to him by the principal is not liable because of the fact that the principal knew the information to be untrue. An agent can properly rely upon statements of the principal to the same extent as upon statements from any other reputable source.

RESTATEMENT (SECOND) OF AGENCY § 348 cmt. b (1958). For a discussion of the meaning of "should know," see *infra* note 94.

52. *Lyons*, 389 N.E.2d at 626.

53. 429 N.E.2d 1267 (Ill. App. Ct. 1981).

the *Lyons* decision, the *Duhl* court found that specific situations may impose upon a broker a duty of accuracy toward a purchaser.[54] In *Duhl*, the plaintiffs, deciding how much to spend on a new home, asked the defendant to appraise their existing home.[55] The defendant provided an appraisal which subsequently proved to be inaccurate.[56] The *Duhl* court held that the plaintiffs' complaint stated a cause of action for negligent misrepresentation.[57] The court reasoned that the broker, having *undertaken* the task of appraising the plaintiffs' property, had a duty to the plaintiffs to speak correctly, "to use proper care in the performance of the task,"[58] and "not to act negligently in rendering this service."[59]

The *Duhl* court buttressed its conclusion by reference to the language of section 552 of the *Restatement (Second) of Torts*,[60] since the defendant broker, having undertaken the task of supplying information to the plaintiff, was subject to liability for harm caused by the plaintiff's reliance upon the information if defendant failed "to exercise proper care and competence in obtaining the information."[61] Therefore, according to *Duhl*, if a broker affirmatively undertakes an obligation to provide information to prospective purchasers, the broker has a duty, consistent with the language of section 552, to use care and competence in speaking correctly.

Thus, the result of the *Lyons* and *Duhl* decisions, at least prior to *Sawyer* and the evolution of section 552 liability, was to provide only limited instances in which a broker owed a prospective purchaser a duty of accuracy. In particular, the duty of accuracy only arose when a broker acted as a conduit for a seller's statement and had knowledge of the statement's falsity, or when a broker affirmatively undertook an obligation to provide information.

As noted regarding fraudulent concealment actions, the Illinois Supreme Court in *Sawyer* extended the duties of brokers to require them to act "in good faith."[62] The question after *Sawyer* was to

54. *Id.* at 1275.
55. *Id.* at 1270.
56. *Id.* at 1270-71.
57. *Id.* at 1275-76.
58. *Id.* at 1275 (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 56 (4th ed. 1971)).
59. *Id.* at 1276.
60. *Id.* (citing Citizens Sav. & Loan Ass'n v. Fischer, 214 N.E.2d 612, 617 (Ill. App. Ct. 1966)). The *Fischer* court endorsed the American Law Institute's formulation of negligent misrepresentation as codified in the *Restatement (Second) of Torts* § 552. *Id.*
61. *Id.*
62. For a discussion of the scope of the *Sawyer* duty of good faith in the context of a fraudulent concealment cause of action, see *supra* notes 16-24, 30-38 and accompanying text.

what extent did this good faith duty incorporate the duty of accuracy and its inherent duty of discovery in the context of negligent misrepresentation actions?

2. Post-*Sawyer*

One of the first cases to utilize the *Sawyer* duty of good faith in the context of negligent misrepresentation was *Richmond v. Blair*.[63] The *Richmond* court acknowledged that the existence of a duty is a critical element of negligent misrepresentation[64] and cited *Sawyer* for the proposition that realtors owe prospective purchasers "a duty to exercise good faith in their dealings with such [purchasers] even absent the existence of an agency relationship."[65] The *Richmond* court then held that "based on *Sawyer*, . . . an action for negligent misrepresentation can lie against a realtor who negligently makes a misrepresentation of a material fact."[66] This duty of accuracy, however, was expressed by the *Richmond* court as the "duty . . . to be knowledgeable and accurate in giving [the purchaser] information regarding the property."[67]

The *Richmond* court went on to find that the duty to be knowledgeable and accurate can be breached if a broker makes statements negligently, that is, "without actual knowledge of their truth or falsity."[68] Thus, according to *Richmond*, the *Sawyer* duty of good faith incorporates a stringent duty to be knowledgeable and accurate, and this duty of accuracy may impose liability on brokers for making an independent statement[69] without actual knowledge

63. 488 N.E.2d 563 (Ill. App. Ct. 1985). In *Richmond*, the broker, relying upon statements made to her by the seller, told the plaintiff that although the house experienced water seepage problems in the past, the problems had been corrected and the house, after the closing, would be free of water leaks and seepage. *Id.* at 564-65. Her statement turned out to be incorrect and the plaintiff sued the broker alleging both intentional and negligent misrepresentation. *Id.* at 565.

64. *Id.* at 566.

65. *Id.* at 566-67 (citing Sawyer Realty Group, Inc. v. Jarvis Corp., 432 N.E.2d 849, 852 (Ill. 1982)).

66. *Id.* at 567.

67. *Id.*

68. *Id.*

69. Note that in promulgating its duty of accuracy, the *Richmond* court made no distinction between a broker's statements made as a conduit for a seller and a broker's statements made independently. In fact, the *Richmond* court rejected the broker's contention that, based upon Lyons v. Christ Episcopal Church, 389 N.E.2d 623 (Ill. App. Ct. 1979), she, as a mere conduit, owed no duty to the plaintiff to independently substantiate the seller's statements. *Richmond*, 488 N.E.2d at 566-67. The *Richmond* court, through questionable reasoning based only on a portion of the *Lyons* holding, held that *Lyons* was not applicable because *Lyons* only addressed the issue of negligent misrepresentation whereas the case before it involved both negligent misrepresentation and intentional misrepresentation. *Id.* at 566. It is unclear why the *Lyons* holding should not have applied

of the statement's veracity. Moreover, this duty of accuracy, breachable by making statements without actual knowledge of their truth or falsity (as opposed to being breachable by making statements that the broker knew or should have known[70] to be false), appears to impose upon brokers a stringent duty to discover, investigate, and obtain actual knowledge prior to making any statements.[71]

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to the negligent misrepresentation elements of the *Richmond* case. Arguably, however, without the *Richmond* court's express rejection of the *Lyons* holding, the *Richmond* decision should be read as consistent with the *Lyons* holding. Thus, after *Richmond*, although brokers appear to have a stringent duty to be accurate and truthful in their independent statements, they should still be afforded the protection of *Lyons* in a negligent misrepresentation action and, when they act merely as a conduit for the seller, should be afforded greater protection and should not have a duty of accuracy absent knowledge of the seller's incorrect statement.

Note further, however, that Zimmerman v. Northfield Real Estate, Inc., 510 N.E.2d 409, 415 (Ill. App. Ct. 1986), differs from the *Richmond* decision because the *Zimmerman* court was unwilling, as was the *Lyons* court, to impose a duty of discovery when a broker acts as a conduit unless, through the exercise of ordinary care, the broker had reason to believe that the principal's statements were false. Indeed, the *Zimmerman* court stated, "The misrepresentation may result from . . . providing information which is false . . . . [However, a] realtor has no duty to prospective buyers to independently substantiate the representations of a seller unless the realtor is aware of facts which tend to indicate that such a representation is false." *Id.* at 414-15 (citing *Lyons*, 389 N.E.2d at 623).

70. *See supra* notes 49-52, *infra* note 93 and accompanying text.

71. The *Richmond* court's formulation of the duty of discovery as incorporated in the duty of accuracy appears to be in conflict with both the *Lyons* holding and with dicta in Munjal v. Baird & Warner, Inc., 485 N.E.2d 855 (Ill. App. Ct. 1985). In *Munjal*, although the court initially held that the broker's false statement did not rise to the level of fraud, the court went on to indicate that the broker's statement did not even rise to the level of negligent misrepresentation. *Id.* at 864-65. Indeed, the *Munjal* court recognized that the broker's statement was made without actual knowledge of its truth or falsity, and stated:

> in the absence of any case law to the contrary, we are *unwilling to find a duty on the part of a real estate broker to discover any latent material defects* on property which a seller has not disclosed to him prior to sale. To do so would place an unwarranted burden on real estate brokers as a whole. Thus, we do not think that defendants brokers, in this case, were obligated to make a full investigation as to whether there was an actual flooding problem in the house without clear evidence of same or without disclosure by the seller.

Id. at 864 (emphasis added). Thus, at least in dicta, the *Munjal* court would appear to qualify the scope of the duty of accuracy by finding that it only incorporates a duty to discover if a broker has knowledge, obtained either through disclosure by the seller or through clear evidence of a latent material defect.

However, the *Munjal* court did not indicate what type of investigation and subsequent disclosure would be required of the broker if the broker became aware of latent defects, either by viewing clear evidence or by the seller's disclosure. In addition, if the broker only becomes aware of a latent defect because of "clear evidence," such evidence should be equally apparent to the purchaser and, therefore, the broker's obligation to make an investigation or a disclosure should be limited if not completely eliminated. *See, e.g.*, Posner v. Davis, 395 N.E.2d 133 (Ill. App. Ct. 1979). In *Posner*, the court, deciding an

After *Richmond*, the court in *Zimmerman v. Northfield Real Estate, Inc.*[72] further addressed the scope of the duty of accuracy and its inherent duty of discovery in the context of a negligent misrepresentation action. In *Zimmerman*, the plaintiffs alleged that the brokers "had a duty to act with a reasonable degree of care to ascertain, disclose and not conceal the material facts regarding the lot size, flooding and other defects."[73] Addressing the alleged duties, the *Zimmerman* court, in language similar to the language of section 552, observed that "[t]he test of negligent misrepresentation involves the breach of a duty to use due care in *obtaining and communicating* information upon which others may reasonably be expected to rely in the conduct of their economic affairs."[74]

If *Zimmerman* is read literally, it establishes that a broker has a duty to use due care in "obtaining and communicating" information which can be breached by providing information that is false. Therefore, as a practical matter, the *Zimmerman* decision reaffirms both the *Lyons* and *Richmond* decisions and incorporates within the duty of accuracy a duty of discovery. Indeed, if a broker is to satisfy the duty of accuracy, such a formulation imposes upon a broker a duty of discovery or investigation sufficient to confirm the accuracy of the broker's statements.[75] However, the ques-

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action for fraud against the seller, adopted the following description of the seller's duty to disclose:

> "where the seller knows of 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 137 (emphasis added) (quoting Lingsch v. Savage, 29 Cal. Rptr. 201, 204 (Ct. App. 1963)); *see also* Salisbury v. Chapman Realty, 465 N.E.2d 127, 132 (Ill. App. Ct. 1984) ("The question of whether the plaintiffs had a right to rely on [defendant's] silence . . . must be answered in light of all of the facts of which the plaintiffs had actual knowledge as well as those which they might have discovered by the exercise of ordinary prudence."); Russow v. Bobola, 277 N.E.2d 769, 772 (Ill. App. Ct. 1972) ("[T]he plaintiffs had a duty of inquiry regarding the premises and are chargeable with all knowledge which an examination conducted with ordinary care would provide.")

72. 510 N.E.2d 409 (Ill. App. Ct. 1986).

73. *Id.* at 414.

74. *Id.* (emphasis added). For the text of § 552, see *supra* note 46.

75. Indeed, comment e to § 552 provides:

> Since the rule of liability . . . is based upon negligence, the defendant is subject to liability if, but only if, he has failed to exercise the care or competence of a reasonable man in obtaining or communicating the information. What is reasonable is, as in other cases of negligence, dependent upon the circumstances.
>
> . . . .
>
> When the information concerns a fact not known to the recipient, he is entitled to expect that the supplier will exercise that care and competence in its ascertainment which the supplier's business or profession requires and which,

tion after *Zimmerman* is whether the scope of the duty of discovery is the less stringent one indicated in the *Lyons* holding and by *Munjal* in dicta or the more stringent one promulgated in *Richmond*.[76]

The First District Illinois Appellate Court, in *Harkala v. Wildwood Realty, Inc.*,[77] took a step, at least in the context of a negligent misrepresentation action,[78] toward answering this question. In *Harkala*, the plaintiffs purchased a home infested with termites.[79] They alleged that by making broad, general statements that the house was in "good condition" and "structurally sound," the defendant brokers were liable for negligent misrepresentation[80] and for breaching a fiduciary duty.[81] The plaintiffs' theory of liability for both actions was that the brokers had an obligation not only to speak correctly, but also to investigate to ensure that their statements were accurate.[82] Consistent with *Zimmerman*, the *Harkala* court acknowledged that "Illinois courts have adopted the tort of negligent misrepresentation from the formulation of the Restatement (Second) of Torts."[83] Relying upon *Zimmerman*, the *Harkala* court stated that the "test of negligent misrepresentation involves the breach of a duty to use care in *obtaining* and *communicating* information upon which others reasonably may be expected to rely."[84]

However, even though the express representations by the brokers were made independently and were false,[85] the *Harkala* court affirmed the verdict for the brokers on the negligent misrepresenta-

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> therefore, the supplier professes to have by engaging in it. Thus the recipient is entitled to expect that such investigations as are necessary will be carefully made and that his informant will have normal business or professional competence to form an intelligent judgment upon the data obtained.

RESTATEMENT (SECOND) OF TORTS § 552 cmt. e (1977) (citations omitted).

76. Lyons v. Christ Episcopal Church, 389 N.E.2d 623, 626 (Ill. App. Ct. 1979); *see supra* text accompanying notes 47-52; Munjal v. Baird & Warner, Inc., 485 N.E.2d 855, 864 (Ill. App. Ct. 1985); *see supra* note 71; Richmond v. Blair, 488 N.E.2d 563 (Ill. App. Ct. 1985); *see supra* notes 70-71.

77. 558 N.E.2d 195 (Ill. App. Ct. 1990).

78. For an examination of this question in the context of a fraudulent concealment action, see the discussion of the *Munjal* decision, *supra* notes 30-38 and accompanying text.

79. *Harkala*, 558 N.E.2d at 197.

80. *Id.*

81. *Id.*

82. *Id.* at 201.

83. *Id.* at 202.

84. *Id.* (emphasis added).

85. This fact alone arguably would make the brokers liable for negligent misrepresentation pursuant to the *Richmond* holding. *See supra* notes 68-71 and accompanying text.

tion action.[86] The court apparently held as it did because it found that the brokers, absent knowledge of the specific defect and absent affirmative inquiry as to the specific defect, did not breach the duty of accuracy either by making statements that ultimately proved to be false or by failing to discover the specific defect.[87] Indeed, the *Harkala* court stated:

> no allegations were made, nor evidence of the *brokers' knowledge* demonstrated, nor concealment of reports shown, *nor specific reassurances communicated* to plaintiffs by the brokers.
>
> The testimony adduced at trial here produced no evidence to support the Harkalas' allegations that *defendants knew or should have known* of the termites and their damage *without tearing down the walls and conducting tests.* Nothing in the record indicates that, in the *absence of some reason to do so,* the brokers should have undertaken such action. *We are unwilling to impose that burden upon them under the facts of this case.*[88]

The *Harkala* holding may be seen as a synthesis of prior case law concerning negligent misrepresentation. After *Harkala,* the *Lyons* and *Duhl* decisions still stand for the respective propositions that if a broker has knowledge of the falsity of a statement made as a conduit,[89] or if a broker affirmatively undertakes to provide infor-

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86. *Harkala,* 558 N.E.2d at 203.

87. *Id.*

88. *Id.* (emphasis added). Moreover, the *Harkala* court found such a result to be consistent with prior Illinois case law. *Id.* at 200.

In addition, in considering the plaintiffs' claim that the brokers breached a fiduciary duty, the *Harkala* court held, based on *Munjal,* that a duty to discover latent material defects "would place an unwarranted burden on brokers." *Id.* at 201. The *Harkala* court found inapplicable several out-of-state decisions concerning negligent misrepresentation actions that the plaintiffs relied upon. In fact, the court noted:

> [The plaintiffs] cite several out of state decisions as authority for their position, among them Hoffman v. Connall. There, the appellate court ruled that a broker could be liable for making *negligent misrepresentations* to [a] buyer; however, this holding was later reversed by the Washington Supreme Court, which found that a broker is not liable if the sellers give no indication that there is a need to confirm the representations. In Bevins v. Ballard, the court held that, *under the theory of negligent misrepresentation,* a duty arises when a broker becomes aware of facts contrary to his representations or when a buyer makes an affirmative inquiry and the broker fails to check the accuracy of his response . . . . Finally, in Gouveia v. Citicorp Person-to-Person Financial Center, Inc., the court recognized that if a broker exercising reasonable care should have had actual knowledge of defects in the property, he may be *liable for negligent failure to discover and disclose them.*

Id. (emphasis added) (citing Hoffman v. Connall, 718 P.2d 814 (Wash. Ct. App. 1986), *rev'd,* 736 P.2d 242 (Wash. 1987); Bevins v. Ballard, 655 P.2d 757 (Alaska 1982); Gouveia v. Citicorp Person-to-Person Fin. Ctr., Inc., 686 P.2d 262 (N.M. 1984)).

89. Lyons v. Christ Episcopal Church, 389 N.E.2d 623, 625 (Ill. App. Ct. 1979); *see supra* text accompanying note 52.

mation,[90] then that broker has a duty of accuracy to the prospective purchaser.[91] In addition to these specific instances that create a duty of accuracy upon a broker, all brokers have, pursuant to *Sawyer*, a general duty of good faith which, pursuant to *Richmond* and *Zimmerman*, includes the duty to use due care in obtaining and communicating information even when making independent statements.[92]

Moreover, as indicated by *Lyons*, *Munjal*, *Richmond*, *Zimmerman*, and *Harkala*, a duty of discovery is inherent in the duty of accuracy. According to the *Harkala* court, the scope of the duty of discovery is the less stringent one promulgated by the *Lyons* court and indicated by *Munjal* in dicta.[93] Indeed, the duty of accuracy can be breached only if: (1) a broker knew or should have known[94] of conditions that make the broker's statements false; or (2) the broker fails to obtain the knowledge necessary to confirm the accuracy of the statements after specific inquiry from a prospective purchaser. Thus, with respect to a broker's statements not made in response to a specific inquiry of a purchaser, the duty of discovery inherent in the duty of accuracy is the duty to use reasonable diligence to ascertain the veracity of such statements.[95] Further, with respect to a broker's statements made in response to

90. Duhl v. Nash Realty, Inc., 429 N.E.2d 1267, 1272-73 (Ill. App. Ct. 1981); *see supra* text accompanying note 61.

91. *Duhl*, 429 N.E.2d at 1272-73; *Lyons*, 389 N.E.2d at 625; *see supra* notes 47-62 and accompanying text.

92. Sawyer Realty Group, Inc. v. Jarvis Corp., 432 N.E.2d 849, 852 (Ill. 1982); Zimmerman v. Northfield Real Estate, Inc., 510 N.E.2d 409, 414-15 (Ill. App. Ct. 1986); Richmond v. Blair, 488 N.E.2d 563, 567 (Ill. App. Ct. 1985); *see supra* notes 69-71, 73-75 and accompanying text.

93. Note that although the *Harkala* court found that the brokers' express statements fell within the "conduit" exception in the Consumer Fraud Act, *see infra* notes 141-44 and accompanying text, the court did not expressly determine whether the brokers' statements with respect to the negligent misrepresentation claim were made independently or as a conduit. Thus, it is unclear whether the duty of discovery from *Richmond*, *see supra* note 71 and accompanying text, still applies to a broker's independent statements.

94. *See* RESTATEMENT (SECOND) OF TORTS § 12(2) (1977). Section 12(2) states:

> The words "should know" are used throughout the Restatement of this Subject to denote the fact that a person of reasonable prudence and intelligence or of the superior intelligence of the actor would ascertain the fact in question in the performance of his duty to another, or would govern his conduct upon the assumption that such fact exists.

Id. Comment a to § 12 further states:

> "Should know" indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty.

Id. § 12 cmt. a.

95. *Id.* § 12.

a specific inquiry by a purchaser, the duty of discovery is more stringent and obligates the broker to investigate the property for latent defects.

II. STATUTORY DUTIES OF DISCLOSURE AND ACCURACY

Section 2 of the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act") provides, in pertinent part:

> the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act" . . . in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.[96]

As noted, the Consumer Fraud Act incorporates by reference the Uniform Deceptive Trade Practices Act ("Uniform Act")[97] and thus section 2 of the Uniform Act.[98] Section 2 of the Uniform Act provides that a deceptive practice occurs when a person "engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding,"[99] although a plaintiff does not have to prove "actual confusion or misunderstanding."[100]

Thus, a literal reading of the Consumer Fraud Act would impose, regardless of actual reliance, a duty of accuracy that is nearly absolute and a duty of disclosure that, if the requisite intent is shown, is also nearly absolute. The initial cases construing the Consumer Fraud Act interpreted it literally.[101] However, potentially influenced by a 1982 amendment to the Consumer Fraud Act that essentially codified the less stringent common law,[102] later cases have been reluctant to follow a literal interpretation and have avoided imposing liability under the Consumer Fraud Act absent the existence of common law duties.

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96. Consumer Fraud and Deceptive Business Practices Act, ILL. REV. STAT. ch. 121 1/2, para. 262 (1989).

97. Uniform Deceptive Trade Practices Act, ILL. REV. STAT. ch. 121 1/2, para. 312(12) (1989).

98. ILL. REV. STAT. ch. 121 1/2, para. 262 (1989); *see supra* note 4.

99. ILL. REV. STAT. ch. 121 1/2, para. 312(12) (1989).

100. *Id.*

101. *See infra* notes 103-16 and accompanying text.

102. ILL. REV. STAT. ch. 121 1/2, para. 270(b)(4) (1989); *see infra* text accompanying note 133.

One of the early cases to interpret the Consumer Fraud Act was *Beard v. Gress*.[103] In *Beard*, the plaintiffs alleged that the broker incorrectly stated the interest rate in the mortgage assumed by them, thereby violating the Consumer Fraud Act.[104] Finding the Consumer Fraud Act applicable to real estate transactions,[105] the *Beard* court held: "By the express terms of the section a misrepresentation made by a broker for a party as to a material fact in a real estate sale constitutes an actionable violation of the Consumer Fraud Act."[106] Moreover, relying upon prior case law, the *Beard* court found "neither the mental state of the person making a misrepresentation nor the diligence of the injured party to check as to the accuracy of the misrepresentation to be material to the existence of a cause of action for that misrepresentation under" the Consumer Fraud Act.[107] Thus, according to *Beard*, the Consumer Fraud Act should be interpreted literally. Under such a literal construction, a broker has potential liability for even an innocent misrepresentation regardless of whether the broker has knowledge of the falsity of the representation or whether the falsity is easily discoverable by the purchaser.[108]

In *Duhl v. Nash Realty, Inc.*,[109] the court not only affirmed the *Beard* decision but also noted the broad purpose behind the Consumer Fraud Act supporting a strict, literal interpretation of the Act.[110] Citing *Beard*, the *Duhl* court rejected the broker's assertion that the plaintiff was required to allege intent to deceive and stated that "it is well established that under the Act . . . [intention] is not

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103. 413 N.E.2d 448 (Ill. App. Ct. 1980).

104. *Id.* at 449.

105. *Id.* at 452. The *Beard* court, through questionable reasoning, concluded:

> [T]he broadened scope of section 2 now covers real estate transactions and permits purchasers of real estate to sue for violations of that section even though they still do not come within the definition of "consumers" set forth in the act. Any other interpretation would give the obviously unintended result of protecting businessmen who purchase real estate but giving no such protection to other citizens who do so.

Id.

106. *Id.* at 451.

107. *Id.* at 452 (citing Grimes v. Adlesperger, 384 N.E.2d 537 (Ill. App. Ct. 1978)).

108. *Id. But see* Perkins v. Collette, 534 N.E.2d 1312 (Ill. App. Ct. 1989). Contrary to a strict, literal interpretation of the Consumer Fraud Act, the *Perkins* court held that in considering a cause of action for violation of the Consumer Fraud Act, it is a question of fact whether "plaintiffs could have discovered [the alleged misrepresentations] . . . by merely reviewing local zoning or building ordinances" and as such the trial court improperly dismissed the cause of action. *Id.* at 1317. For a discussion of other cases that refused to follow a strict, literal interpretation of the Consumer Fraud Act, see *infra* notes 117-46 and accompanying text.

109. 429 N.E.2d 1267 (Ill. App. Ct. 1981).

110. *Id.* at 1277.

important and a plaintiff can recover under the Act for innocent misrepresentations."[111] The court noted that this holding was consistent with the Illinois legislature's intent that the Consumer Fraud Act be utilized "to the utmost degree in eradicating all forms of deceptive and unfair business practices and [to] grant appropriate remedies to injured parties."[112]

The court in *Buzzard v. Bolger*[113] further reaffirmed a literal interpretation of the Consumer Fraud Act. The *Buzzard* court noted that the "Consumer Fraud Act provides an even broader consumer protection than does the common law action of fraud or negligent misrepresentation since the Act also prohibits any 'deception' or 'false promise.' "[114] In *Buzzard*, the court found that although the brokers' representations were "a mixture of opinion and promises of future action" that could not be the basis of a negligent misrepresentation action, the representations nevertheless created a "likelihood of misunderstanding."[115] Accordingly, the *Buzzard* court held that such representations constituted "a deceptive trade practice as defined in Section 2 of the Uniform Act" and thus an actionable violation of the Consumer Fraud Act.[116]

However, in *Munjal v. Baird & Warner, Inc.*,[117] the court refused to find the broker liable for a violation of the Consumer Fraud Act for what the broker claimed was an innocent misrepresentation.[118] In *Munjal*, the defendant broker falsely stated, based

111. *Id.*

112. *Id.*

113. 453 N.E.2d 1129 (Ill. App. Ct. 1983).

114. *Id.* at 1132.

115. *Id.* at 1131. In *Buzzard*, the court stated:

> the alleged material facts which were purported to be misrepresented were that plaintiffs need not concern themselves with the condition of the property; that in view of the fact that plaintiffs were applying for V.A. financing, they would not be required to purchase the property unless the Veteran's Administration appraisal was approved; and that any substantial material defects would be required to be repaired or replaced by the sellers. An additional alleged misrepresentation was to the effect that the services of an attorney were not necessary for plaintiffs' representation in connection with the purchase of the residence. These representations are not representations of existing facts, rather they constituted a mixture of opinion and promises of future action. . . . The allegations . . . as they presently stand are insufficient to state a cause of action for negligent misrepresentation.

Id.

116. *Id.* at 1132. *But see* Perkins v. Collette, 534 N.E.2d 1312, 1315 (Ill. App. Ct. 1989) (considering the defendant broker's contention that "the Act only applies to misrepresentations of material fact and that the alleged misrepresentations of [the defendant] were ones of law, not fact").

117. 485 N.E.2d 855 (Ill. App. Ct. 1985).

118. *Id.* at 864. The court noted the broad coverage of the Consumer Fraud Act and

upon information provided by the seller, that the cause of basement flooding was a leaky check valve on a sump pump.[119] Yet, the court refused to find that the broker's statement was a misrepresentation under the Consumer Fraud Act because the court was unwilling "to find a real estate broker liable for latent or hidden defects of which he had no prior knowledge."[120] Thus, because it refused to find a common law duty of accuracy absent knowledge of latent defects, the *Munjal* court refused to find the broker liable for a statutory violation of the Consumer Fraud Act. As such, the *Munjal* decision parts with prior court decisions that gave a strict, literal interpretation to the Act. By declining to examine the statutory obligations of the Consumer Fraud Act absent common law duties, the *Munjal* decision greatly vitiates the purported legislative intent of the Consumer Fraud Act[121] and provides the broker added protection through the introduction of common law theories in the consideration of statutory obligations.

Similarly, the court in *Stefani v. Baird & Warner, Inc.*[122] continued the erosion of a literal interpretation of the Consumer Fraud Act by relying on the presence or absence of common law duties in interpreting broker liability under the Act. In *Stefani*, the plaintiffs alleged that the broker violated section 2 of the Consumer Fraud Act and section 2 of the Uniform Act by failing to disclose that it had delivered to the seller a competitive bid by prospective purchasers.[123]

The *Stefani* court reversed the trial court's dismissal and held that disposition of the count could not be made "in the absence of a determination of whether an agency relationship existed."[124] In addition, the court stated in dicta that if a principal-agent relationship existed between the broker and the plaintiff, it would then become a factual question as to the broker's liability under the Consumer Fraud and Uniform Acts.[125] Therefore, although making its ruling post-*Sawyer*, the *Stefani* court intimated that a plain-

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acknowledged that the *Beard* decision would hold a broker liable for even an innocent misrepresentation. *Id.* Nevertheless, the *Munjal* court held that a latent defect undisclosed to the broker could not form the basis of that broker's liability. *Id.*

119. *Id.* at 861.

120. *Id.* at 864.

121. *See supra* text accompanying note 112.

122. 510 N.E.2d 65 (Ill. App. Ct.), *appeal denied*, 515 N.E.2d 127 (Ill. 1987).

123. *Id.* at 67.

124. *Id.* at 71.

125. *Id.* at 70-71. The factual questions would be: 1) whether the defendants concealed their representations of the competitive purchasers "with the intention to deceive under circumstances creating an opportunity and duty to speak" that violates § 2 of the Consumer Fraud Act; and 2) whether the defendants' concealment "resulted in confusion

tiff would be precluded from bringing a cause of action under the Consumer Fraud Act for a broker's failure to disclose its representation of a competitive purchaser unless a principal-agent relationship existed.

The *Stefani* court's reasoning, however, is contrary to the plain language and purported legislative purpose of the Consumer Fraud Act. The existence of a principal-agent relationship is irrelevant to whether a material fact was concealed, suppressed, or omitted with the intent that others rely upon such concealment, suppression, or omission. Moreover, the existence of an agency relationship is equally irrelevant to whether the failure to disclose the representation of a competitive purchaser was conduct that created a likelihood of confusion or misunderstanding. Finally, the *Stefani* court's holding that an actionable section 2 concealment or omission must be done with the intent to deceive at a time when there is a duty to speak requires a plaintiff to prove common law fraud, which is contrary to the purported legislative purpose of the Consumer Fraud Act.[126]

Continuing the trend of *Munjal* and *Stefani*, the court in *Seligman v. First National Investments, Inc.*[127] again relied upon common law theories in interpreting the statutory obligations imposed by the Consumer Fraud Act and furthered the erosion of a literal interpretation of the Act. In *Seligman*, the plaintiff alleged that one of the brokers failed to disclose: (1) that he was not the owner of the property that the plaintiff sought to purchase; and (2) that he was competing with the plaintiff to purchase the property from the actual owner at a lower price, in violation of the Consumer Fraud Act.[128] Relying on *Sawyer*, the *Seligman* court held that brokers have a common law "duty to exercise good faith and to disclose any personal interest in property they list for sale."[129] The court then held that the logical extension of *Sawyer* is that the broker's failure to "disclose such self dealing . . . constitutes consumer fraud"[130] under the Consumer Fraud Act.

Unlike the *Stefani* court, the *Seligman* court did not require the existence of a principal-agent relationship prior to a consideration of the elements underlying an action under the Consumer Fraud

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or misunderstanding" that violates § 2 of the Uniform Act and thus § 2 of the Consumer Fraud Act. *Id.*

126. *See supra* text accompanying notes 111-12.

127. 540 N.E.2d 1057 (Ill. App. Ct. 1989).

128. *Id.* at 1058-59.

129. *Id.* at 1064.

130. *Id.*

Act. *Seligman* did rely, however, upon the existence of the *Sawyer* common law duty of disclosure to support its conclusion that the defendants violated the Consumer Fraud Act.[131] The *Seligman* court correctly reasoned that if the plaintiff could prove common law fraud, such fraudulent activity also would be a violation of the Consumer Fraud Act.[132] However, like the *Munjal* and *Stefani* courts, the *Seligman* court did not consider the language of the Consumer Fraud Act until it examined the brokers' common law obligations of accuracy and disclosure. Since the plain language of the statute should control regardless of the existence of other statutory or common law obligations, the analysis used by the above courts deviates from a literal interpretation of the Consumer Fraud Act.

During the pendency of *Munjal*, the Illinois legislature effectively overruled the *Beard* decision by amending the Consumer Fraud Act to prohibit liability for innocent misrepresentations. The amendment specifies that the Consumer Fraud Act will not apply to

> communication of any false, misleading or deceptive information, *provided by the seller of real estate located in Illinois*, by a real estate salesman or broker licensed under "The Real Estate Broker License Act", *unless the salesman or broker knows of the false, misleading or deceptive character of such information*. This provision shall be effective as to any communication, whenever occurring.[133]

Through this amendment, the Illinois legislature effectively codified the common law duty expressed in *Lyons* that brokers, passing along information *provided by the seller*, are not liable for misstatements unless they have knowledge of the statement's falsity.[134] The courts that have interpreted this paragraph of the Consumer Fraud Act, however, have been reluctant to limit its scope and may have expanded its protections to statements made independently by brokers.

Indeed, in *Zimmerman v. Northfield Real Estate, Inc.*,[135] the court broadly interpreted paragraph 270(b)(4) of the Consumer Fraud Act and found that for a broker to be liable for a Consumer

131. *Id.*

132. *See* Duhl v. Nash Realty, Inc., 429 N.E.2d 1267, 1277 (Ill. App. Ct. 1981) ("Since the [Consumer Fraud Act] affords even broader consumer protection than does the common law action of fraud, it is clear that plaintiffs suing under the [Consumer Fraud Act] need not establish all of the elements of fraud.").

133. ILL. REV. STAT. ch. 121 1/2, para. 270(b)(4) (1989) (emphasis added).

134. *See supra* text accompanying note 49.

135. 510 N.E.2d 409 (Ill. App. Ct. 1986).

Fraud Act violation, the "broker must know of the false, misleading or deceptive character of the information he communicates."[136] Although the court did not decide whether the plaintiff has to allege knowledge,[137] it nevertheless indicated that, contrary to the express language, paragraph 270(b)(4) of the Consumer Fraud Act does apply to *all* statements made by brokers, *whether independently or as a conduit.*[138]

Contrary to *Zimmerman*, however, the court in *Harkala v. Wildwood Realty, Inc.*[139] examined this issue and, although it too was not required directly to decide the issue, agreed with the plaintiffs' literal interpretation of paragraph 270(b)(4).[140] Nevertheless, the *Harkala* court reached a conclusion that potentially affords brokers the protection of paragraph 270(b)(4) for their independent statements.

In *Harkala*, the plaintiffs argued that paragraph 270(b)(4) of the Consumer Fraud Act did not apply to the defendant brokers' statements that the property was in "good condition" and "structurally sound" because such statements were made independently of any information provided by the seller.[141] Although agreeing with the literal interpretation of paragraph 270(b)(4), the court found that the brokers should be afforded its protection because the sellers concealed termite damage and such concealment "served to make a *sufficient, albeit non-verbal, misrepresentation so as to come within the policy of the Act's provisions in this case.*"[142] Consequently, although the *Harkala* court approved of a literal interpretation of paragraph 270(b)(4), it construed the facts consistently with the

136. *Id.* at 417. The court did not limit its interpretation, however, to instances in which a broker's statements are made as a conduit. *Id.*

137. Since the plaintiff's complaint alleged knowledge on the part of the brokers, the *Zimmerman* court did not have to decide whether a plaintiff must allege knowledge in connection with a broker's independent statements. *Id.* at 413.

138. *Id.* at 417-18; *see also* Perkins v. Collette, 534 N.E.2d 1312 (Ill. App. Ct. 1989). Considering a cause of action for violation of the Consumer Fraud Act against an individual who was both the seller of the property and the broker who listed it for sale, the *Perkins* court stated, noting *Zimmerman*, that in order for there to be a violation of the Consumer Fraud Act, the "broker must have knowledge of the false, misleading, or deceptive nature of the information he conveys." *Id.* at 1315. It is unclear, however, whether the court found that ¶ 270(b)(4) of the Consumer Fraud Act applied because the broker, who was also the seller, was, in making his statement, conveying information "provided by the seller" or whether ¶ 270(b)(4) of the Consumer Fraud Act applied to statements made independently by brokers.

139. 558 N.E.2d 195 (Ill. App. Ct. 1990).

140. *Id.* at 200.

141. *Id.*

142. *Id.*

policy of the paragraph[143] to find that the brokers' statements were made as a conduit of the seller's non-verbal misrepresentation.[144]

The court did not rule on the scope of paragraph 270(b)(4), however, because, consistent with *Munjal*, *Stefani*, and *Seligman*, the *Harkala* court refused to examine the brokers' statutory obligations under the Consumer Fraud Act absent a corresponding common law duty.[145] Indeed, the *Harkala* court affirmed the circuit court's grant of the brokers' motion for summary judgment for violation of the Consumer Fraud Act stating:

> Neither *Munjal* nor *Lyons* create a duty for realtors to undertake an investigation for hidden or latent defects. We hold that in the absence of any reason to do so, as in this case, there was no duty imputable to defendant brokers that would have compelled them to investigate plaintiffs' home for concealed impairment of its structure.
>
> *The identification of duty is a matter of law to be determined by the court; and, where an issue is solely one of law, as here, summary judgment is proper.*[146]

Thus, as in *Munjal*, *Stefani*, and possibly *Seligman*, the *Harkala* court construed the Consumer Fraud Act contrary to the legislative intent to require the existence of a common law duty prior to a consideration of the brokers' statutory obligations. Moreover, both the *Zimmerman* and *Harkala* decisions may have further circumvented the Consumer Fraud Act by their indications that, even if a court is to consider the broker's statutory obligations under the Consumer Fraud Act, a literal interpretation, at least with respect to paragraph 270(b)(4), either is not mandated, as in *Zimmerman*, or mandated but easily circumvented, as in *Harkala*.

III. Status of Current Law

To summarize, a broker may be liable to a prospective purchaser either for silence or for incorrect express statements. Depending upon the circumstances, a broker may be liable for silence pursuant to both a common law action for fraudulent concealment and a statutory action for violation of the Consumer Fraud Act.

Regarding the common law actions, the *Sawyer*, *Munjal*, and *Zimmerman* decisions provide that a broker has a duty to disclose

143. Discussing the "policy" or intent of ¶ 270(b)(4) of the Consumer Fraud Act, the *Harkala* court stated "[t]his is persuasive evidence that the Act was not intended to impose liability upon a broker for latent or hidden defects." *Id.*

144. *Id.*

145. *Id.*

146. *Id.* (emphasis added).

known material defects. However, a broker does not have a duty to investigate to obtain knowledge of such material defects absent clear evidence of or disclosure of the defects by the seller. Further, in connection with the statutory action for broker omissions, if the Illinois courts follow a literal interpretation of the Consumer Fraud Act, a broker may violate the Act by either: (1) failing to disclose a material fact with the intent that others rely upon the omission; or (2) failing to disclose a material fact, the omission of which creates a likelihood of confusion or misunderstanding.

In addition, a broker's express statements may impose liability under both a common law action for negligent misrepresentation and a statutory action for violation of the Consumer Fraud Act. In connection with negligent misrepresentation actions, the *Lyons*, *Duhl*, *Richmond*, *Zimmerman*, and *Harkala* decisions suggest that, in addition to a general duty of accuracy, there are specific duties of accuracy that arise out of special circumstances. These specific duties of accuracy arise: (1) when a broker acts as a conduit for a seller's statements and the broker knows, or should have known through the exercise of due care, that the seller's statement is false; and (2) when a broker specifically undertakes an obligation to provide information.

As previously discussed, the general duty of accuracy initially arose out of the *Sawyer* duty of good faith and obligates a broker to be knowledgeable and accurate in statements made independently or as a conduit. The source of the general duty, however, eventually shifted from the *Sawyer* duty of good faith to the language of section 552 of the *Restatement (Second) of Torts* and obligates a broker to use due care in obtaining and communicating information. This obligation potentially requires a broker to investigate or at least confirm the accuracy of his or her statements.

The scope of the duty of discovery inherent in the duty of accuracy differs depending upon the circumstances of the statement. If a broker makes an independent statement in response to a specific inquiry from a prospective purchaser, *Harkala* imposes a stringent duty of discovery that may require investigation for latent defects. If a broker makes a statement that is not in response to a specific inquiry, *Harkala* imposes a lesser duty of discovery that requires the use of reasonable diligence to ascertain the veracity of the statement. What is not clear after *Harkala*, however, is whether this less stringent duty of discovery applies only to a broker's statements made as a conduit.

Further, in connection with a statutory action for a broker's ex-

press statements, the *Munjal*, *Stefani*, *Zimmerman*, *Seligman*, and *Harkala* decisions illustrate that Illinois courts are reluctant to find liability unless the broker's misrepresentation or statement was made in violation of a common law duty. These cases stand in contrast to a literal interpretation of the Consumer Fraud Act, which would make brokers liable for misrepresentations of material facts and statements that create a likelihood of confusion or misunderstanding. In addition, consistent with their reluctance to impose liability in accordance with a literal interpretation of the Consumer Fraud Act, Illinois courts are willing to extend the limited protection afforded brokers under the Act when acting as conduits to situations in which they act independently.

IV. FUTURE DEVELOPMENT OF BROKER LIABILITY

A. Common Law Liability

During the past decade, Illinois courts shifted from the extreme of the *caveat emptor* doctrine to almost strict liability and now have returned to a middle ground. Such a shift in the courts' position may reflect the Illinois legislature's removal of a private right of action from the Real Estate License Act of 1983 and the legislature's efforts to afford brokers added protection, at least for statements made as conduits, in the Consumer Fraud Act. Thus, unless the Illinois legislature retracts its recent protective enactments, it is unlikely that Illinois courts will impose more stringent obligations on a broker. Rather, it is more likely that the Illinois courts will continue to find reasons to limit the scope of section 552 and the *Sawyer* duty of good faith.[147]

Notwithstanding the general movement of Illinois courts towards narrowing the scope of a broker's common law liability, there is another theory of liability to which disappointed purchasers may have access. If a broker's misrepresentation results in physical harm rather than pecuniary loss, then the harmed purchaser may seek to impose liability on the broker pursuant to section 311 of the *Restatement (Second) of Torts* ("section 311").[148] Section 311 is similar to section 552 in that it incorporates a duty of discovery into the duty of accuracy. It is, however, dissimilar to

147. *See Harkala*, 558 N.E.2d at 200 (limiting the duty of accuracy contained in § 552); Munjal v. Baird & Warner, Inc., 485 N.E.2d 855, 864 (Ill. App. Ct. 1985) (limiting the duty of disclosure contained in the *Sawyer* duty of good faith).

148. RESTATEMENT (SECOND) OF TORTS § 311 (1977). Section 311 provides:

(1) One who negligently gives false information to another is subject to liabil-

section 552 since it imposes broader liability.[149] With respect to a duty of discovery under section 311, a broker is required "to exercise the care of a reasonable man under the circumstances to ascertain the facts . . . [and h]is negligence may consist of *failure to make a proper inspection or inquiry*."[150] With respect to a duty of accuracy, section 311 requires brokers to exercise "the judgment of a reasonable man in determining whether, in light of the discovered facts, the information is accurate [and h]is negligence may consist of failure . . . after proper inquiry to recognize that the information given is not accurate."[151] In addition, a broker is required to "exercise reasonable care to bring to the understanding of the recipient of the information the knowledge which he has so acquired" and his negligence may "consist[ ] in the lack of reasonable care to furnish accurate information."[152]

Although section 311 is of benefit to a party who suffers physical harm, it is also of benefit to all prospective purchasers because of the existence of potential broker liability. For example, because a broker can never know when his or her incorrect statements concerning the absence of defective electrical wiring or flooding will be reasonably relied upon by another who suffers physical harm rather than pecuniary loss, the obligations imposed by section 311, and not section 552, may control the broker's conduct.[153] Thus, if a broker decides to make such statements,[154] the broker must exer-

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ity for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) to such third persons as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated.

Id.

149. Comment a to § 311 provides:

The rule stated in this Section represents a somewhat broader liability than the rules stated as to liability for pecuniary loss resulting from negligent misrepresentation, stated in § 552, to which reference should be made for comparison.

Id. § 311 cmt. a.

150. *Id.* § 311 cmt. d (emphasis added).

151. *Id.*

152. *Id.* § 311 cmt. e.

153. Of course, there will be brokers who decide that the risk of physical injury is slight compared to the cost, not only of making a sufficient investigation to comply with § 311, but also of lost sales commissions. These brokers undoubtedly will forego structuring their conduct around § 311 and possibly even § 552.

154. An option for all brokers, of course, is that they either: (1) do not make any statements to prospective purchasers; or (2) if they do make statements, to qualify such statements as to (a) their source—for example, the seller; or (b) their accuracy—for ex-

cise reasonable care in making a proper inspection, in interpreting the results of the inspection, and in communicating accurate information.

B. Statutory Liability

In the past several years, the Illinois legislature has taken an active role in limiting the statutory obligations of brokers and in limiting the private enforcement of those obligations. A private individual can no longer bring a cause of action under the Real Estate License Act of 1983 or, arguably, a cause of action under any of the common law theories of liability based upon the obligations contained in the Real Estate License Act.[155] In addition, a purchaser bringing an action under the Consumer Fraud Act can no longer simply allege that the broker's statement was false, deceptive, or misleading. Instead, the purchaser must now allege, at least as to statements made by the broker as a conduit, that the statements were false, deceptive, or misleading and that the broker *knew* that such statements were false, deceptive, or misleading. By requiring knowledge on the part of the broker for a violation of the Consumer Fraud Act, the Illinois legislature is moving in a direction already initiated by the Illinois courts—that is, that there can be no liability under the Consumer Fraud Act without a violation of a common law duty. The Illinois legislature may follow the lead of the Illinois courts and either further soften the interpretation of the Consumer Fraud Act or, what would be more unlikely, prevent its application to real estate transactions.[156]

C. Recommendations

The expanded common law and statutory obligations imposed on brokers were initiated to protect purchasers both from a broker's unscrupulous behavior that does not rise to the level of common law fraud and from the purchaser's own misplaced reliance on

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ample, that the statement is the result of the broker's cursory inspection of the property or that the statement is made without the broker's actual knowledge. In either event, such statements should not be relied upon by prospective purchasers.

155. *See* Sawyer Realty Group, Inc. v. Jarvis Corp., 432 N.E.2d 849, 851-52 (Ill. 1982); *supra* notes 4, 17, 19, 43.

156. Although the *Beard* court's rationale in finding the Consumer Fraud Act applicable to real estate transactions is questionable, *see* Beard v. Gress, 413 N.E.2d 448, 452 (Ill. App. Ct. 1980); *supra* notes 103-08 and accompanying text, the Illinois legislature implicitly confirmed such application when it specifically amended the Act to limit its application only to a broker's statements made as a conduit, ILL. REV. STAT. ch. 121 1/2, para. 270(b)(4) (1989); *see* relevant portion of amendment quoted *supra* text accompanying note 133.

brokers who have conflicting fiduciary obligations to their principals. Despite warnings to the contrary by brokers,[157] purchasers continue to assume incorrectly that brokers can divest themselves of their fiduciary obligations to their principal and fully represent the purchasers' interests in what is possibly the purchasers' most expensive investment.[158]

Consumer education, not expanded common law and statutory liability, is the appropriate solution for a purchaser's misplaced reliance. Regardless of the scope and severity of brokers' common law and statutory obligations to prospective purchasers, brokers will always have conflicting fiduciary obligations to their principals. The expansion of brokers' obligations to prospective purchasers places brokers in the unenviable and unworkable situation of serving two masters. Accordingly, there always will be situations when brokers will act in accordance with their fiduciary obligations to their principals and adversely to prospective purchasers. As a result, such purchasers may be harmed by their misplaced reliance on brokers. Although a harmed purchaser will be able to recover from the broker if the broker's obligations to the purchaser are extensive and severe enough, such a result is not an appropriate solution to misplaced reliance. Indeed, rather than removing the cause of the purchaser's misplaced reliance, the increased common law and statutory obligations perpetuate the purchaser's misplaced reliance by allowing the purchaser redress for the harm suffered.

Instead, the appropriate solution for misplaced reliance is to educate purchasers that there are independent sources upon which they can and should rely in their purchase of property. First, purchasers can rely upon the inspections of electricians, engineers, architects, contractors, and other professionals regarding the condition of the property. Second, purchasers can rely upon attorneys to insure that the purchase contract contains a contingency that allows for a thorough inspection of all aspects of the property.

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157. The Real Estate License Act of 1983 provides:

> Persons licensed under this Act shall disclose in writing to prospective buyers the existence of an agency relationship between the licensee and the seller, or shall disclose in writing to sellers, or their agent, the existence of an agency relationship between the licensee and a prospective buyer at a time and in a manner consistent with regulations established by the Department.

ILL. REV. STAT. ch. 111, para. 5818.2 (1989).

158. *See, e.g.*, Lyons v. Christ Episcopal Church, 389 N.E.2d 623, 628 (Ill. App. Ct. 1979) (Moran, P.J., dissenting) ("Real estate brokers and their agents hold themselves out to the public as having specialized knowledge with regard to housing, housing conditions and related matters. The public is entitled to and does rely on the expertise of real estate brokers in the purchase and sale of its homes.").

Third, purchasers can rely on representations and warranties by the seller that confirm the condition of the property or expose problem areas that may necessitate further investigation. And finally, purchasers may be able to enter into an agreement with the growing number of brokers willing to be "buyer brokers" who work for and are compensated by, prospective purchasers.[159]

In addition to being inappropriate, the expanded statutory obligations also are inefficient. The statutory obligations, and to a certain extent the expanded common law obligations, are inefficient because brokers are not the cheapest and most efficient suppliers of information.[160] In fulfilling the obligations of discovery, disclosure, and accuracy, a broker must be compensated not only for time spent investigating a particular property, but also for the expenses of any independent inspection service, as well as for the broker's increased liability risk. In contrast, a purchaser obtaining adequate information about the property he or she seeks to purchase only incurs the cost of a qualified independent inspection service. That cost may be less than the broker's cost for an inspection because the purchaser is free to determine both the type and scope of the inspection.

Further, the statutory obligations are inequitable because they apply only to brokers and not to individual sellers.[161] In essence, these obligations allow a seller and a broker to make an identical incorrect statement to a purchaser, and although neither of them may be liable for negligent misrepresentation, if the statement is made independently and relates to a material fact, the broker will be liable for a statutory violation.

Finally, the statutory obligations are unwarranted. The expanded common law protections, although themselves problematic because they put brokers in the position of serving two masters, are more than adequate to protect purchasers. If a broker fails to disclose a material defect, a purchaser can, based on *Sawyer*, bring either a fraudulent concealment or a negligent misrepresentation

159. *See For Some, Buyer Agents a Hard Sell*, CHI. TRIB., Sept. 29, 1991, § 16, at 1.

160. *But see, e.g.*, Note, *Imposing Tort Liability on Real Estate Brokers Selling Defective Housing*, 99 HARV. L. REV. 1861 867-71 (1986) (arguing that brokers are the most efficient providers of housing information).

161. *See* Zimmerman v. Northfield Real Estate, Inc., 510 N.E.2d 409, 418 (Ill. App. Ct. 1986) ("We find no support in Illinois law for the proposition that an individual selling his own home is liable to a purchaser under the Consumer Fraud Act. . . . We decline to extend the scope of the Consumer Fraud Act to individual sellers of single family dwellings."). *But see* Grimes v. Adlesperger, 384 N.E.2d 537 (Ill. App. Ct. 1978) (allowing a purchaser to rescind a sales contract because the vendor violated the Consumer Fraud Act).

action. And if a broker fails to accurately communicate material information, a disappointed purchaser can, based upon *Lyons*, *Duhl*, *Sawyer*, section 552, and potentially section 311 of the *Restatement (Second) of Torts*, bring a negligent misrepresentation action. The common law theories present the most equitable method for adequately protecting purchasers from unscrupulous broker behavior because they require proof of culpability.[162] Accordingly, the protection provided by these common law theories makes it unnecessary to impose strict and nearly absolute statutory obligations upon brokers.

V. CONCLUSION

The expanded common law and statutory obligations imposed on brokers were initiated to protect purchasers from brokers' unscrupulous behavior and from their own misplaced assumptions about the role of a broker in a real estate transaction. Although unscrupulous behavior and purchaser reliance are both problems that should be addressed, the current statutory obligations provide an unwarranted and inappropriate response. Further, although the expanded common law obligations are inadequate to address the problem of a purchaser's misplaced reliance, they are the most equitable way to address the problem of unscrupulous broker conduct. Consequently, until further guidance from the Illinois Supreme Court, purchaser reliance should be addressed through consumer education and unscrupulous broker behavior should be remedied by the current common law actions.

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162. Although the expanded common law obligations are more equitable than the statutory obligations, they too present a potential problem for the broker that, ironically, arises out of the very latitude that makes them more equitable. As mentioned previously, brokers are placed in the unenviable position of balancing their fiduciary obligations to their principal-seller with their common law and statutory obligations to the prospective purchaser. Such balancing means that the broker will be concerned about potential suits by both a disappointed purchaser and a disappointed principal.

A disappointed principal may allege that the broker, in attempting to comply with duties to the purchaser, discovered and disclosed more information than was necessary to satisfy those duties and in doing so, breached a fiduciary obligation to obtain the highest and best price for the principal's property. The broker, by doing more than is required, may not be able to raise as a defense to a breach of duty to the principal the conflicting duty to the purchaser. Thus, the broker may be liable to the principal for a breach of fiduciary duty. Notwithstanding this potential conflict, the expanded common law obligations provide the most equitable and adequate means by which prospective purchasers are protected from unscrupulous broker conduct.