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Articles

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Examining Compliance with Fiduciary Duties: A Study of Real Estate Agents***

> The real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains. We know from our judicial records that the opportunities have not been lost.[1]

Over the last twenty years, there have been numerous revisions to the law governing the duties of residential real estate agents. Part of the impetus was provided by two lawsuits in the early 1990s involving "dual agency,"[2] which resulted in settlements totaling $19.9 million.[3] The ultimate changes were substantial.[4]

This Article provides original empirical evidence showing that a common assumption underlying these revisions—that, in conflicts between their principals and third parties, real estate agents promote their principals' interests—is erroneous. The results inform our understanding of the efficacy of the duties the law imposes on real estate agents, enhance our understanding of the efficacy of fiduciary duties generally, and inform our understanding of the proper contours of other legal principles affecting fiduciaries.

Brokerage firms participating in the sale of residential real estate perform two separate functions: the "listing" and the "selling." These two functions frequently are divided between two firms.[5] The traditional rule in the United States has been that both firms are fiduciaries of sellers.[6] Numerous commentators have asserted that buyers have misunderstood this principle, er-

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[1] Roman v. Lobe, 152 N.E. 461, 462 (N.Y. 1926) (Cardozo, J.), *quoted in* Michael K. Braswell & Stephen L. Poe, *The Residential Real Estate Brokerage Industry: A Proposal for Reform*, 30 AM. BUS. L.J. 271, 282 n.63 (1992); Joseph M. Grohman, *A Reassessment of the Selling Real Estate Broker's Agency Relationship with the Purchaser*, 61 ST. JOHN'S L. REV. 560, 586 n.165 (1987).

[2] Bokusky v. Edina Realty, Inc., No. 3-92 CIV. 223, 1993 WL 515827 (D. Minn. Aug. 6, 1993); Dismuke v. Edina Realty, Inc., No. 92-8716, 1993 WL 327771 (Dist. Ct. Minn. June 17, 1993).

[3] *See infra* note 55. Brown, Grohman, and Valcarcel state that these lawsuits **R** prompted the National Association of Realtors to seek clarification and revision of the principles governing agent obligations in the sale of residential real estate. Ronald Benton Brown et al., *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure*, 29 CREIGHTON L. REV. 25, 28 (1995) (stating that *Bokusky* and *Dismuke* "caused an uproar among brokers" and that the National Association of Realtors reacted to the cases by proposing various changes during its 1993 annual convention).

[4] *See infra* notes 57-66 and accompanying text. **R**

[5] *See, e.g.*, *infra* tbl.1 (finding the agency obligations split between two firms in 1594 of 3209, or 50%, of the sample examined in this Article).

[6] *See infra* notes 27-28 and accompanying text. **R**

roneously believing that brokerage firms performing the selling functions represent buyers.[7] Survey evidence supports this position.[8]

This Article does not take issue with the assertion that buyers and sellers in jurisdictions following the traditional rule, where selling agents have been subagents of listing agents, have been misinformed about the duties owed. Yet implicit in the critical view of the traditional rule, based on buyers and sellers being misinformed, is an expectation that the agents comply with their duties. Therefore, this Article examines whether agents act in accordance with their duties along two dimensions: First, we hypothesize that selling agents may secure business by taking actions that promote the interests of buyers to the detriment of selling agents' principals, the sellers, in ways that decrease sales prices. Second, we examine whether sellers receive worse sales prices where the selling and listing functions are divided between two firms. Such a relationship would be consistent with selling agents improperly seeking to promote buyers' interests, with intrafirm relationships restraining that misconduct better than interfirm relationships.

The results of this investigation significantly enhance the current understanding of the law governing fiduciaries at two levels. The first level is focused on residential real estate agents. Throughout the United States, jurisdictions have tailored the normal rules of agency in regulating the actions of residential real estate agents.[9] Formulation of the proper contours of that regulation benefits from understanding the extent to which these agents comply with applicable duties.

The results of this investigation are also important at a second, more general level—our understanding of the efficacy of fiduciary duties generally. Fiduciary duties are, of course, prevalent in the law, both in agency relationships outside real estate sales and in other relationships.[10] That prevalence makes it desirable for

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[7] *See infra* note 36 and accompanying text.   **R**

[8] Gerard R. Butters, Fed. Trade Comm'n, *Consumers' Experiences with Real Estate Brokers: A Report on the Consumer Survey of the Federal Trade Commission's Residential Real Estate Brokerage Investigation* 24-26, *in* L.A. REG'L OFFICE, FED. TRADE COMM'N, THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY (1983).

[9] *See, e.g.*, *infra* notes 57-66 and accompanying text.   **R**

[10] *See generally* RESTATEMENT (SECOND) OF AGENCY § 13 & cmt. a (1958) (categorizing an agent as a fiduciary and summarizing the scope of an agent's duties to the principal).

legal scholars to have evidence bearing on the efficacy of the obligations law imposes on fiduciaries. Examining compliance with fiduciary duties in a context where data are available provides some evidence that may be used to inform our intuition concerning the efficacy of fiduciary duties in other contexts where empirical evidence is not available.

The remainder of this Article proceeds as follows. Part I summarizes the legal duties owed by real estate agents in the sale of residential real estate. Next, Part II describes other literature most pertinent to our investigation. There is some evidence in the current literature that real estate agents shirk their duties. Some of that evidence is based on an examination of prices where real estate agents sell their own property. Other evidence is provided by findings that higher selling commissions are associated with higher prices. There is conflicting evidence concerning the impact that buyers' brokers have on sales prices, which, for somewhat complex reasons developed in Part II, is potentially relevant to assessing agent compliance with duties.

No prior work seeks to examine the efficacy of the duties imposed on real estate agents by investigating the relationship between sales price and selling agent specialization.[11] Although, for reasons discussed in Part II, there is some ambiguity, it appears that no prior work reports results bearing on the efficacy of duties imposed on agents by directly examining how the division of agency duties among fiduciaries of the sellers affects sales prices. After discussing that literature, Part II develops the conceptual underpinnings of our investigative approach.

Part III then details this new investigation, which examines sales prices of residential real estate in a jurisdiction at a time when it followed the traditional rule. Part III describes the data, details the model, and presents the results. The results support the conclusion that, to secure business, selling agents who are fiduciaries of sellers use actions that decrease the returns to their principals, with some evidence that the participation of a listing agent in the same firm as the selling agent partially restrains this activity. In brief, some economically significant malfeasance is not restrained by the duties imposed by law.

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[11] *See infra* note 69.

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AGENTS' DUTIES IN THE SALE OF RESIDENTIAL REAL ESTATE

Brokerage firms participating in the sale of residential real estate perform a variety of functions. Before the property is offered for sale, a firm may provide the seller advice concerning the initial asking price, any repairs to be made to the property before it is offered for sale, and the description of the property to be used in any advertising. After the property is listed, the property will be shown to various buyers, typically by agents with the listing firm and by agents with other firms. During the marketing of the property, prospective buyers may benefit from receiving tailored advice about the property and its suitability to their particular needs, such as its proximity to schools or other local services.[12]

The legal rules governing the duties applicable to agents facilitating the sale of residential real estate have garnered significant attention in legal scholarship.[13] Some scholarship examines the general issue of the transition from principles of caveat emptor to mandatory disclosure[14] and the various theories under which real

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[12] *See, e.g.*, Ronald Benton Brown & Thomas H. Thurlow III, *Buyers Beware: Statutes Shield Real Estate Brokers and Sellers Who Do Not Disclose That Properties Are Psychologically Tainted*, 49 OKLA. L. REV. 625, 645 (1996).

[13] *E.g.*, Paula C. Murray, *AIDS, Ghosts, Murder: Must Real Estate Brokers and Sellers Disclose?*, 27 WAKE FOREST L. REV. 689, 694 (1992).

[14] *E.g.*, Craig W. Dallon, *Theories of Real Estate Broker Liability and the Effect of the "As Is" Clause*, 54 FLA. L. REV. 395, 396-415 (2002); Serena Kafker, *Sell and Tell: The Fall and Revival of the Rule on Nondisclosure in Sales of Used Real Property*, 12 U. DAYTON L. REV. 57 (1986); George Lefcoe, *Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition from Caveat Emptor to "Seller Tell All,"* 39 REAL PROP. PROB. & TR. J. 193 (2004); Katherine A. Pancak et al., *Residential Disclosure Laws*, 24 REAL EST. L.J. 291 (1996); Frona M. Powell, *The Seller's Duty to Disclose in Sales of Commercial Property*, 28 AM. BUS. L.J. 245, 245-63 (1990); Florrie Young Roberts, *Disclosure Duties in Real Estate Sales and Attempts to Reallocate the Risk*, 34 CONN. L. REV. 1 (2001) (discussing the transition away from caveat emptor and the enforceability of agreements selling property "as is"); Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381 (1995) (providing a lengthy survey of then-current legislative developments); Alan M. Weinberger, *Let the Buyer Be Well Informed? – Doubting the Demise of Caveat Emptor*, 55 MD. L. REV. 387 (1996).

There is conflicting evidence concerning the efficacy of mandatory disclosure. Lahey and Redle, reporting results of a survey, find that "45.3% of the respondents reported discovery of problems after escrow had closed." Karen Eilers Lahey & David A. Redle, *The Ohio Experience: The Effectiveness of Mandatory Real Estate Disclosure Forms*, 25 REAL EST. L.J. 319, 328 (1997). Additionally, "[96%] of the responding agents did not view the disclosure form as an effective tool for negotiat-

estate agents can be liable for providing false or misleading information or for failing to disclose material information.[15] Another topic that has been particularly fashionable in the legal literature is an agent's obligation to disclose certain specific matters: alleged paranormal activities;[16] the proximity of sexual

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ing a reduced price based upon the information disclosed." *Id.* at 332. They conclude that the "purpose [of the mandatory disclosure law] may not be satisfactorily fulfilled." *Id.* at 330.

Yet two other investigations indicate mandatory disclosure can influence the sales process in significant ways. Zumpano and Johnson follow another approach in examining the efficacy of these disclosure obligations. Leonard V. Zumpano & Ken H. Johnson, *Real Estate Broker Liability and Property Condition Disclosure*, 31 REAL EST. L.J. 285 (2003). They examine the frequency with which lawsuits were brought against real estate professionals in a five-state area, focusing on any relationship with the passage of mandatory property disclosure. *Id.* at 285, 291. They conclude, "[w]hen states passed such legislation, there was a marked decline in the number of property related E&O insurance claims." *Id.* at 299.

Moore and Smolen examine the efficacy of mandatory disclosure by comparing results of surveys of 206 home buyers, 110 surveyed in 1990, most of whom (85%) did not receive written seller disclosure, and 96 who were surveyed in 1996, most of whom (90%) did receive written seller disclosure. *See* Gary S. Moore & Gerald Smolen, *Real Estate Disclosure Forms and Information Transfer*, 28 REAL EST. L.J. 319, 327 (2000). They find statistically significant decreases from 1990 to 1996 in both post-transaction buyer complaints and post-transaction buyer dissatisfaction with construction quality. *Id.* at 330-32. In addition, 19.7% of the buyers in the 1996 survey stated that the disclosure affected price negotiations. *Id.* at 335 exhibit 6.

[15] *E.g.*, Dallon, *supra* note 14, at 415-50; Lefcoe, *supra* note 14, at 213-25; Paula **R** C. Murray, *The Real Estate Broker and the Buyer: Negligence and the Duty to Investigate*, 32 VILL. L. REV. 939, 964-84 (1987) (discussing the development of broker liability in tort for erroneous disclosure or failure to disclose). Even prior to the statutory revisions to the law governing real estate agents, *see infra* notes 57-65 and **R** accompanying text, some authority approved various theories that were grounded on a duty owed by real estate brokerage firms to a nonprincipal buyer. *See infra* note 31. **R**

[16] *E.g.*, Brown & Thurlow, *supra* note 12, at 626-27; Murray, *supra* note 13, at 708 **R** (arguing against requiring disclosure to satisfy "a buyer's peculiarities, sensitivities, and prejudices"); Daniel M. Warner, *Caveat Spiritus: A Jurisprudential Reflection upon the Law of Haunted Houses and Ghosts*, 28 VAL. U. L. REV. 207, 232-45 (1993).

Discussion of this topic was precipitated by *Stambovsky v. Ackley*, 572 N.Y.S.2d 672, 677 (N.Y. App. Div. 1991) (reinstating purchaser's cause of action to rescind the sale of a house for nondisclosure of a reputation of paranormal activity, where seller "deliberately fostered the public belief that her home was possessed"). *See generally* Mark Schlueb, *Church Street Ghosts Haunt Lease Lawsuit*, ORLANDO SENTINEL, Sept. 8, 2005, at A1 ("The owners of Amura Japanese Restaurant say they don't want to move into a renovated building at Church Street Station because it's haunted, according to a lawsuit filed by the building's landlord."). The current New York statutory authority governing disclosure is N.Y. REAL PROP. LAW § 443-a (McKinney Supp. 2005) (eliminating need to volunteer that "the property is, or is suspected to have been, the site of a homicide, suicide or other death by accidental or natural causes, or any crime punishable as a felony") and N.Y. REAL PROP. LAW

predators[17]—a matter that has given rise to reported opinions in
New York,[18] Ohio,[19] and Texas[20]—or noisy neighbors;[21] notori-

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§§ 462, 465 (obligating sellers to complete a disclosure form but limiting damage for
failure to provide the form to $500). *See generally* Malach v. Chuang, 754 N.Y.S.2d
835, 846 (N.Y. Civ. Ct. 2002) (holding all remedies provided by N.Y. Real Prop.
Law §§ 462, 465, other than the $500 remedy, unenforceable for vagueness).

[17] *E.g.*, Philip Lucrezia, *New York's Property Condition Disclosure Act: Extensive
Loopholes Leave Buyers and Sellers of Residential Real Property Governed by the
Common Law*, 77 St. John's L. Rev. 401, 425-28 (2003) (discussing disclosure of
the proximity of sex offenders); Shelley Ross Saxer, *"Am I My Brother's Keeper?":
Requiring Landowner Disclosure of the Presence of Sex Offenders and Other Crimi-
nal Activity*, 80 Neb. L. Rev. 522, 556-61 (2001); Tracey A. Van Wickler, *H.B. 2564:
The Real Estate Disclosure Act Threatens Arizona's Children with Becoming
"Megan" Victims*, 32 Ariz. St. L.J. 367, 390 (2000) (discussing Ariz. Rev. Stat.
Ann. § 32-2156 (2002), which contains no obligation to disclose that property sold is
"located in the vicinity of a sex offender," and arguing that prospective buyers
should be given greater access to this information); Flavio L. Komuves, Comment,
*For Sale: Two-Bedroom Home with Spacious Kitchen, Walk-in Closet, and Pervert
Next Door*, 27 Seton Hall L. Rev. 668, 696-707 (1997); Thomas D. Larson, Com-
ment, *To Disclose or Not to Disclose: The Dilemma of Homeowners and Real Estate
Brokers Under Wisconsin's "Megan's Law,"* 81 Marq. L. Rev. 1161, 1182-99 (1998).

[18] Glazer v. LoPreste, 717 N.Y.S.2d 256, 257-58 (N.Y. App. Div. 2000) (affirming
dismissal of claims concerning nondisclosure of a convicted sex offender in the
neighborhood, notwithstanding allegations that the sellers and their agents repre-
sented that the house was "a good place to raise children," on the basis that, inter
alia, the statement was an opinion and that proof of an intent to deceive was absent).

[19] Spinelli v. Bair, No. 1999CA00399, 2000 WL 34335853, at *1-2, *5 (Ohio Ct.
App. July 3, 2000) (affirming summary judgment for the sellers on claims alleging
fraud and negligence in the sale of a house for failure to disclose prior criminal
actions that allegedly previously occurred on the property on the basis that the his-
tory "was not material to the transaction because a psychological stigma is not a
material defect" and the buyers "knew of the . . . history several days prior to closing
on the property"); Van Camp v. Bradford, 63 Ohio Misc. 2d 245, 249-50, 259-60
(Ohio Ct. Common Pleas 1993) (denying seller's motion for summary judgment on
claim that the seller, who stated that a break-in had occurred sixteen years earlier,
fraudulently induced the sale by omitting reference to recent rapes on and near the
premises). *See generally* State of Ohio, Dep't of Commerce, Residential
Property Disclosure Form 4 (2004), *available at* http://www.com.state.oh.us/real/
realform.htm (stating that the "[o]wner makes no representations with respect to
any offsite conditions" and referencing the buyer's ability to obtain information con-
cerning the state's sex offender registration).

[20] Sanchez v. Guerrero, 885 S.W.2d 487, 489, 492 (Tex. App. 1994) (affirming a
judgment for the buyers of a house in which the seller had allegedly molested sev-
eral children, where the agent falsely stated that he did not know the seller's iden-
tity). Texas law currently subjects to discipline a real estate agent who makes a
"material misrepresentation to a potential buyer concerning a significant defect, in-
cluding a latent structural defect, known to the license holder that would be a signifi-
cant factor to a reasonable and prudent buyer in making a decision to purchase real
property," with a similar prohibition on omissions of that information when known
to the agent. Tex. Occ. Code Ann. § 1101.652(b)(3)-(4) (Vernon 2004 & Supp.
2005). The Texas Occupations Code specifically provides, however, that a real es-
tate agent need not disclose that "a death occurred on a property by natural causes,

ous crimes having occurred on the premises;[22] and the AIDS status of occupants.[23] Of course, disclosure of more mundane matters, such as environmental issues, has also been examined.[24]

This Article focuses on another controversial part of the duties of real estate agents that is more prominent in practice than some

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suicide, or accident unrelated to the condition of the property." *Id.* § 1101.556(2). A Texas administrative rule provides that "[a] real estate broker or salesperson has a special obligation to exercise integrity in the discharge of the licensee's responsibilities, including employment of prudence and caution so as to avoid misrepresentation, in any wise, by acts of commission or omission." 22 TEX. ADMIN. CODE § 531.2 (West, Westlaw through Oct. 31, 2005). This rule was in effect at the time of *Sanchez v. Guerrero* except for changes making the language gender-neutral implemented in 1998. 23 Tex. Reg. 1568 (Feb. 20, 1998).

[21] *E.g.*, Marianne M. Jennings, *Buying Property from the Addams Family*, 22 REAL EST. L.J. 43, 48-49 (1993); Roberts, *supra* note 14, at 9.   **R**

[22] *See, e.g.*, Brown & Thurlow, *supra* note 12, at 629-44 (providing a summary of **R** the disclosure obligations in thirty states); Murray, *supra* note 13, at 698-701; **R** Warner, *supra* note 16, at 232-45; Ronald Basso, Note, Reed v. King*: Fraudulent* **R** *Nondisclosure of a Multiple Murder in a Real Estate Transaction*, 45 U. PITT. L. REV. 877 (1984) (discussing *Reed v. King*, 193 Cal. Rptr. 130 (Cal. Ct. App. 1983)); *cf.* Jennings, *supra* note 21 (discussing disclosure of assorted circumstances, including **R** crime, having potential psychological impact). *Reed v. King*, 193 Cal. Rptr. 130, which reversed the dismissal of a complaint seeking rescission of and damages for a sale of a house where the seller failed to disclose the house had been the site of a multiple murder ten years previously, gave rise to this scholarship. *See generally* CAL. CIV. CODE § 1710.2 (West 1998) (limiting the obligation to disclose deaths on the premises and their manner that occurred more than three years previously and the obligation to disclose an occupant's AIDS status).

[23] *E.g.*, Brown & Thurlow, *supra* note 12, at 629-44 (providing a summary of the **R** disclosure obligations in thirty states); *id.* at 647 (recommending future legislation governing the matter provide for disclosure that "psychologically stigmatizing events will not be disclosed"); Murray, *supra* note 13, at 694-98, 701-07; Warner, *supra* note **R** 16, at 234-45; Ross R. Hartog, Note, *The Psychological Impact of AIDS on Real* **R** *Property and a Real Estate Broker's Duty to Disclose*, 36 ARIZ. L. REV. 757, 773 (1994) (advocating mandatory disclosure); Michael D. Isacco, Jr., Note, *A Massachusetts Real Estate Broker's Duty to Disclose: The Quandary Presented by AIDS Stigmatized Property*, 27 NEW ENG. L. REV. 1211 (1993).

This list of matters giving rise to disputes in residential real estate transactions is intended to be illustrative, not exhaustive.

[24] *See, e.g.*, Frank B. Cross & Paula C. Murray, *Liability for Toxic Gas in Residential Home Sales*, 66 N.C. L. REV. 687, 722-24 (1988) (examining potential liability in fraud); Paul A. Locke & Patricia I. Elliott, *Caveat Broker: What Can Real Estate Licensees Do About Their Potentially Expanding Liability for Failure to Disclose Radon Risks in Home Purchase and Sale Transactions?*, 25 COLUM. J. ENVTL. L. 71, 110-14 (2000) (proposing strategies to protect real estate professionals); Joanna L. Guilfoy, Note, *Home Not-So-Sweet Home: Real Estate Broker Liability in the Sale of Previously Contaminated Residential Property: Has Broker Liability Gone Too Far?*, 21 RUTGERS L.J. 111 (1989); Robert Kwong, Comment, *Fraud and the Duty to Disclose Off-Site Land Conditions: Actual Knowledge vs. Seller Status*, 24 B.C. ENVTL. AFF. L. REV. 897 (1997) (examining disclosure of off-site environmental problems, focusing on New Jersey law).

of the more piquant subjects of potential disclosure—whose interests real estate agents promote.[25] At the root of this controversy is the ability to divide the listing component (advice given before the property is listed and advice on similar matters, e.g., whether a seller should reduce the asking price or accept an offer) and the selling component between two different real estate brokerage firms. Although the firm providing the listing services, the "listing brokerage firm," is selected by the seller, it is the buyer who typically identifies the "selling brokerage firm"— the firm responsible for showing the house to the buyer.

Before statutory revisions in the 1990s,[26] general principles of agency law, supplemented by the terms of a local multiple listing service, commonly governed the activities of real estate agents assisting in the sale of residential property in the United States.[27] The typical default rule produced by following these principles in the sale of residential property included in a multiple listing service treated a brokerage firm selling another firm's listing as a subagent of the listing firm and thus a fiduciary of the seller.[28]

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[25] Grohman, *supra* note 1, at 563 n.17; Valerie M. Sieverling, *The Changing Face of the Real Estate Professional: Keeping Pace*, 63 Mo. L. Rev. 581, 581-82 (1998); *cf., e.g.*, Patricia A. Wilson, *Nonagent Brokerage: Real Estate Agents Missing in Action*, 52 Okla. L. Rev. 85, 88 (1999) (noting confusion concerning the duties owed).

[26] *See infra* notes 57-65 and accompanying text.

[27] Braswell & Poe, *supra* note 1, at 272, 277-78 (providing a relatively thorough analysis of the issue).

[28] *See, e.g.*, D. Barlow Burke, Jr., Law of Real Estate Brokers § 1.5, at 1:17, § 1.6.1 (2d ed. 1992 & Supp. 2006); Braswell & Poe, *supra* note 1, at 274-78; Brown et al., *supra* note 3, at 34; Dallon, *supra* note 14, at 415-16; Grohman, *supra* note 1, at 561-63; Murray, *supra* note 15, at 948-49; Katherine A. Pancak et al., *Real Estate Agency Reform: Meeting the Needs of Buyers, Sellers, and Brokers*, 25 Real Est. L.J. 345, 346-48 (1997); Matthew M. Collette, Note, *Sub-Agency in Residential Real Estate Brokerage: A Proposal to End the Struggle with Reality*, 61 S. Cal. L. Rev. 399, 406-18 (1988) (providing a detailed discussion of authority). *See generally* Restatement (Second) of Agency § 5 cmt. d (1958) ("[T]he subagent stands in a fiduciary relation to the principal . . . ."). *Stortroen v. Beneficial Finance Co. of Colorado*, 736 P.2d 391 (Colo. 1987), is commonly cited for this proposition. *See, e.g.*, Braswell & Poe, *supra* note 1, at 284-85; Brown et al., *supra* note 3, at 37 & n.37; Dallon, *supra* note 14, at 415 & n.113; Grohman, *supra* note 1, at 565-66; Pancak et al., *supra*, at 349; Collette, *supra*, at 410-12; Brett L. Hopper, Comment, *The Selling Real Estate Broker and the Purchaser: Assessing the Relationship*, 1992 BYU L. Rev. 1135, 1145 & n.41 (1992). Braswell and Poe note that in the early 1990s, a number of jurisdictions also had express statutory provisions providing for the selling agent to be a subagent of the listing agent, absent an express contrary agreement. Braswell & Poe, *supra* note 1, at 291.

Where these principles apply, the fact that a purchaser was a real estate professional could be viewed as inherently creating agency conflicts. *See, e.g.*, Frisell v.

This treatment was not universal, however.[29] Some decisions

Newman, 429 P.2d 864, 866, 869 (Wash. 1967) (determining internal multiple listing service rules did not alter traditional principle under which the selling brokerage firm, one of whose employees was a joint purchaser, was a fiduciary of the seller). *See generally* WASH. REV. CODE ANN. § 18.86.020 (West 2002) (currently providing, as a default, that "[a] licensee who performs real estate brokerage services for a buyer is a buyer's agent"). Yet some authority held that a buyer's financial interest in the selling brokerage firm would not cause the buyer to become an undisclosed agent. *See, e.g.*, Lageschulte v. Steinbrecher, 344 N.E.2d 750, 752-55 (Ill. App. Ct. 1976) (affirming both (1) a trial court's conclusion that a buyer under a contract to purchase land had met the standards required to be awarded equitable relief and (2) the award of specific performance to the buyer, who owned the selling brokerage firm that received a portion of the commission, even though the seller was unaware of the relationship when the contract was formed); Zoda v. Eckert, Inc., 674 P.2d 195, 198-200 (Wash. Ct. App. 1983) (purchaser, who was also a real estate agent, was not liable to the seller for failure to inform the seller of the purchaser's interest as a real estate agent, and the purchaser was not a "selling agent," even though a portion of the commission was ultimately paid to the purchaser).

One commentator describes the development of the subagency framework somewhat derisively. Sandra Nelson asserts, "In the 1970s, Bill North, general counsel for the National Association of Realtors, 'concocted the unilateral offer of subagency' in order to maintain the exclusiveness of realtor multiple listing services (MLS) without violating antitrust laws." Sandra Nelson, Note, *The Illinois Real Estate "Designated Agency Amendment": A Minefield For Brokers*, 27 J. MARSHALL L. REV. 953, 961-62 & n.64 (1994) (quoting "an Illinois attorney well-versed in agency law and very well acquainted with the Designated Agency Amendment, who wishes to remain anonymous").

[29] *See, e.g.*, Cashion v. Ahmadi, 345 So. 2d 268, 270-71 (Ala. 1977) (holding, in connection with a sale "treated as if it were a multiple listing" in which the selling agent allegedly advised the buyers that the asking price was excessive, that whether the selling agent was an agent of the buyers was a question of fact for the jury); Buffington v. Haas, 601 P.2d 1320, 1321 (Ariz. 1979) (stating, in a lawsuit concerning the selling agent's failure to provide in the contract of sale that the seller would have a mortgage to secure deferred payments, "[i]n the usual situation where one real estate broker secures a listing to sell real estate and another broker presents a buyer who makes an offer for the listed property, an agency relationship between the seller and the broker who presents a buyer is not established"); Wise v. Dawson, 353 A.2d 207, 208, 210 (Del. Super. Ct. 1975) (granting listing brokerage firm summary judgment in claim seeking to hold that firm liable for alleged misrepresentations of the selling agent); Menzel v. Morse, 362 N.W.2d 465, 475-76 (Iowa 1985) (holding that selling agent for a house under construction included by another firm in a multiple list was, as a matter of law, an agent of the buyers). *See generally* Grohman, *supra* note 1, at 589 ("When one examines the legal principles for finding an implied agency in the typical real estate transaction, one recognizes that all of the elements necessary for an agency relationship exist between the selling broker and the purchaser."). Some of the principles articulated in those jurisdictions have been subsequently modified or addressed by statute or administrative rule. *See, e.g.*, ALA. CODE § 34-27-82 (2002) (providing for agency, subagency, dual agency, and transaction brokerage and establishing that agency relationship shall not be created absent a written agreement); DEL. CODE ANN. tit. 24, § 2931 (1997) (requiring written disclosure of whom a licensee represents); IOWA CODE §§ 543B.62-.63 (1997) (preempting application of the common law and stating that "[a] licensee is not considered to be a subagent of a client of another licensee solely by reason of mem-

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focused on particular circumstances as a basis for reaching a different conclusion.[30] In addition, some decisions built on theories other than fiduciary relationships as bases to impose liability on a brokerage firm or agent.[31]

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bership or other affiliation by the licensee in a multiple listing service or other similar information source, and an offer of subagency shall not be made through a multiple listing service or other similar information source"); ARIZ. ADMIN. CODE § R4-28-1101(A) (Westlaw, current through Sept. 30, 2004) (requiring a licensee to "deal fairly" with nonclients); IOWA ADMIN. CODE r. 193E-11.3(1)(a) (Westlaw, current through Iowa Administrative Bulletin, Volume XXVII, Number 23, May 25, 2005) (requiring disclosure in listing agreement of terms under which other agents may cooperate); *see also* Fisher v. Comer Plantation, Inc., 772 So. 2d 455, 464 n.5 (Ala. 2000) (declining to give retroactive application to legislation regulating real estate agency).

[30] ARTHUR R. GAUDIO, REAL ESTATE BROKERAGE LAW § 293, at 349 (1987). For example, Illinois authority held that a selling agent may be the buyer's agent where the agent was contacted concerning a particular piece of property. *See* Stefani v. Baird & Warner, Inc., 510 N.E.2d 65, 68-69 (Ill. App. Ct. 1987) (reversing the dismissal of a count, stating that even where the agent was not initially contacted concerning particular property, the agent's subsequent statements and participation in the contracting could create a buyer agency). *See generally* Messler v. Phillips, 867 P.2d 128, 132 (Colo. Ct. App. 1993) (affirming trial court determination that real estate agent breached a duty of care after the agent, who had the listing of the plaintiff's property, created the duty by advising the plaintiff that she would represent the plaintiff's interests at a simultaneous closing of the plaintiff's purchase of another property for which the agent was the listing agent); GAUDIO, *supra*, § 293, at 346-47 (describing a buyer's agent as one employed "to find and arrange the purchase of property meeting certain specifications"). Illinois subsequently altered its principles governing real estate professionals. *See* 225 ILL. COMP. STAT. ANN. 454/15-10 (West Supp. 2005) (providing as a default that "[l]icensees shall be considered to be representing the consumer they are working with as a designated agent for the consumer"); *id.* at 454/15-5 (stating legislative intent to abrogate application of common law agency principles to real estate brokers and salespersons).

[31] Even if a real estate firm is not the agent of a prospective buyer, it may owe various duties to the prospective buyer. The source of this duty may be identified as state licensing requirements or a categorization of real estate brokerage as being in the nature of a public service enterprise. *See* Murray, *supra* note 15, at 960-64. For example, assorted authority construing agent duties before the statutory revisions of the 1990s examines competition between agents and purchasers. *See, e.g.*, Funk v. Tifft, 515 F.2d 23, 24-26 (9th Cir. 1975) (construing Idaho law to order transfer to prospective purchasers of property purchased by an affiliate of the selling agent where the selling agent, after mailing the prospective purchasers' offer, had outbid the prospective purchasers without notice to them); Harper v. Adametz, 113 A.2d 136, 139-40 (Conn. 1955) (seller's agent, who gave false information to both the seller and the prospective buyer in order to acquire a portion of the offered property for himself at a bargain price, obligated himself to convey the portion he had bought to the buyer of the other portion of the premises upon payment of the remainder of what the buyer originally offered for the whole); Stevens v. Jayhawk Realty Co., 677 P.2d 1019, 1025 (Kan. Ct. App. 1984) (holding president of listing brokerage firm not a fiduciary of a prospective buyer and therefore not liable to a prospective buyer for being a principal in making a competing offer on commercial property), *aff'd*, 689 P.2d 786 (Kan. 1984); Allen v. Lindstrom, 379 S.E.2d 450, 456 (Va. 1989) (re-

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A real estate professional in a traditional agency relationship with a buyer or seller is obligated to "procur[e] the greatest advantage to his client."[32] Some examples preceding the statutory revisions of the last decade illustrate the contours of the duties this relationship imposes on a real estate professional acting as an owner's fiduciary. The agent cannot properly advise a prospective buyer of the lowest price the owner would take.[33] Addi-

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jecting the creation of a private cause of action for the prospective buyer against a real estate professional for violation of an administrative rule obligating the real estate professional to forward offers to sellers); Klotz v. Fauber, 189 S.E.2d 45, 45 (Va. 1972) (determining that the rule in other jurisdictions that seller's real estate agent "is liable to a prospective buyer when the agent fails to transmit the prospective buyer's offer and buys the property for his own account at a price equal to or less than the price the prospective buyer agreed to pay" will not be extended in that jurisdiction to create a cause of action applicable where there is not an allegation that the agent's price was not equal or more than what the prospective buyer/plaintiff offered); GAUDIO, *supra* note 30, § 293, at 349 (stating that where a selling agent receives an offer, fails to transmit it, and purchases the property for himself, "[t]he courts generally hold in these cases that the broker has breached his fiduciary duty of loyalty and disclosure to the buyer").   **R**

Some of this authority has been superseded or refined by legislation or administrative rule. *See, e.g.*, IDAHO CODE ANN. § 54-2086 (2003) (requiring that, in performing ministerial acts to assist a buyer or seller whom a real estate professional does not represent, the professional act "with honesty, good faith, reasonable skill and care"); VA. CODE ANN. §§ 54.1-2130, -2131(B) (West 2001) ("Unless a licensee enters into a brokerage relationship with [the] person, it shall be presumed that such person is a customer of the licensee rather than a client," and requiring licensees to "treat all prospective buyers honestly"); CONN. AGENCIES REGS. § 20-325d-2 (West, Westlaw through Nov. 8, 2005) (agency disclosure form stating, "[a]ll real estate agents, whether representing you or not, are obligated by law to treat all parties to a real estate transaction honestly and fairly," which furthers CONN. GEN. STAT. § 20-314(a) (West 1999), restricting the grant of licenses to "persons who bear a good reputation for honesty, truthfulness and fair dealing"). This discussion of authority is intended to be illustrative, not exhaustive. Reference may be made to Olazábal's work for a recent survey of the law. *See* Ann Morales Olazábal, *Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses*, 40 HARV. J. ON LEGIS. 65, 100-10 (2003).

[32] Vogt v. Town & Country Realty of Lincoln, 231 N.W.2d 496, 501 (Neb. 1975). *See generally* NEB. REV. STAT. § 76-2417 (1996) (codifying the duties of a seller's agent).

[33] *See, e.g.*, Rohauer v. Little, 736 P.2d 403, 408 (Colo. 1987) ("Information concerning the lowest price a seller might accept would clearly be useful to a prospective purchaser, but the disclosure of that information to the purchaser by a broker or salesperson would not be in the seller's interests since it would clearly enable the purchaser to avoid 'over-bidding.' . . . On the other hand, disclosure to the purchaser of this information would clearly render the broker or salesperson liable to the seller for breach of the fiduciary duty of loyalty."); *cf.* Haymes v. Rogers, 222 P.2d 789, 789-90 (Ariz. 1950) (holding that it was a jury question whether an agent had forfeited his right to a commission by stating to buyers who ultimately purchased property for $8,500 that they might be able to purchase at that price property

tionally, these duties would be violated by an agent who possessed two different offers but revealed to the owner only the worse (less favorable) one.[34] The agent's unauthorized disclosure of personal circumstances obligating the owner to sell quickly also would be prohibited.[35]

The typical traditional legal treatment (selling firm subagency) has been criticized as not reflecting the expectations of the parties.[36] Support for that criticism is provided by a widely cited[37] survey prepared for the Federal Trade Commission in 1983.[38] That survey reports the beliefs of buyers and sellers of previously occupied homes concerning whom the agents were representing. Where the individual responsible for acquiring the listing, called the "listing agent," and the individual agent acting on behalf of the selling brokerage firm, called the "selling agent," were different individuals, 74% of the buyers believed that the selling agent represented the buyer.[39] In those sales, only 8% of the buyers believed that the selling agent represented the seller.[40] Consistent with this belief, 80% of the buyers in the survey indicated that an agent "played a major role in negotiating with the seller or the seller's agent,"[41] and 62% indicated that an agent "told [the buyer] how low [the agent] thought the seller would go."[42] Seventy-three percent of the buyers told an agent the highest price they would pay; 82.5% felt that this information would be

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listed at $9,500); BURKE, *supra* note 28, § 7.2, at 7:6 (describing *Haymes v. Rogers* as **R** "the leading case"); *see also infra* note 61 and accompanying text. **R**

[34] Mason v. Bulleri, 543 P.2d 478, 481 (Ariz. Ct. App. 1975).

[35] Beckwith v. Clevenger Realty Co., 360 P.2d 596, 597-98 (Ariz. 1961) (holding agent unable to recover commission because he advised the buyer that the seller was in bad health and wanted to sell quickly).

[36] *See, e.g.*, Braswell & Poe, *supra* note 1, at 277; Grohman, *supra* note 1, at 573- **R** 79 (noting, inter alia, that the selling agent may recommend a home inspection firm and a title company to the buyer and summarizing assorted authority); Pancak et al., *supra* note 28, at 349-50; Molly Moore Romero, *Theories of Real Estate Broker Lia-* **R** *bility: Arizona's Emerging Malpractice Doctrine*, 20 ARIZ. L. REV. 767, 772-73 (1978); Collette, *supra* note 28, at 419, 423; *cf.* Braswell & Poe, *supra* note 1, at 273 **R** (identifying the concern that agents will reveal to sellers secrets buyers tell them).

[37] Dallon, *supra* note 14, at 416; *see, e.g.*, Collette, *supra* note 28, at 419 n.103. **R**

[38] Butters, *supra* note 8. A survey for the California Department of Real Estate **R** examining the significance of conflicts of interest in real estate sales preceded this report by a few years. CAL. TECHNICAL ASSISTANCE ASSOCS., INC., DUAL AGENCY PROBLEMS IN CALIFORNIA REAL ESTATE TRANSACTIONS (1981).

[39] Butters, *supra* note 8, at 24-25.

[40] *Id.* at 25.

[41] *Id.* at C-25.

[42] *Id.* at C-24.

kept confidential.[43]

Another survey, one of 265 Georgia real estate professionals, also identifies various ways in which agents did not promote the interests of sellers.[44] The respondents estimated that when a selling agent knew the highest price a buyer would pay, only half the time would the selling agent forward that information to the listing agent.[45] Additionally, the respondents estimated that a selling agent who knew the lowest price a seller would accept would tell the buyer this information 48% of the time.[46] These activities can obviously decrease the prices realized by sellers and, where unauthorized, can violate agents' duties.

A 1993 survey for the National Association of Realtors suggests that ten years after the first survey, a substantial portion of home buyers continued to be uninformed.[47] It found that only "65% of home buyers . . . either had knowledge or were informed of agency representation by the first contact with the agent with whom they were working."[48]

Brown, Grohman, and Valcarcel note[49] that concern over the contours of these legal principles was heightened in 1993 by two Minnesota cases: *Dismuke v. Edina Realty, Inc.*,[50] and *Bokusky v. Edina Realty, Inc*.[51] Both cases involved "dual" agency, where Edina Realty simultaneously represented the buyers and the sellers.[52] The sellers in *Dismuke*,[53] and both the buyers and the sell-

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[43] *Id.* at C-25.

[44] Jay N. Ball & Hugh O. Nourse, *Testing the Conventional Representation Model for Residential Real Estate Brokerage*, 3 J. REAL EST. RES. 119 (1988).

[45] *Id.* at 125 & exhibit 4. A contemporaneous judicial opinion indicates that, at that time, it was the general understanding that Georgia followed the traditional rule, i.e., selling agent subagency. Jim Royer Realty, Inc. v. Moreira, 363 S.E.2d 10, 13 (Ga. Ct. App. 1988) (Deen, P.J., concurring) ("As explained by the *Stortroen* court, and as understood and practiced by the real estate industry in this state until now, the legal consequence of a multiple listing arrangement is that the selling broker or agent is an agent of the listing broker and subagent of the seller. This is an unequivocal, hardfast, and workable rule, something definite and concrete that brokers, agents, sellers, and buyers can chew on.").

[46] Ball & Nourse, *supra* note 44, at 125 exhibit 4.

[47] *See* Pancak et al., *supra* note 28, at 353 (discussing the 1993 survey by the National Association of Realtors).   **R**

[48] *Id.*

[49] Brown et al., *supra* note 3, at 28.   **R**

[50] No. 92-8716, 1993 WL 327771 (Dist. Ct. Minn. June 17, 1993).

[51] No. 3-92 CIV. 223, 1993 WL 515827 (D. Minn. Aug. 6, 1993).

[52] *Id.* at *1; *Dismuke*, 1993 WL 327771, at *1.

[53] 1993 WL 327771 at *1.

ers in *Bokusky*,[54] challenged the adequacy of the disclosure made by Edina Realty of the dual capacity in which it had acted. Brown, Grohman, and Valcarcel state that those cases, which were ultimately settled for a total of $19.9 million,[55] prompted the National Association of Realtors to seek clarification and revision of the principles governing agency in the sale of residential real estate beyond the narrow issue of the disclosure required in a dual agency.[56]

In response to these and other factors, statutory changes to the principles governing actions of residential real estate professionals have been either proposed or adopted since the early 1990s in many states.[57] Some jurisdictions now provide that absent an agreement to the contrary, a salesman working with the buyer is the buyer's agent.[58] Other jurisdictions created what Professor Olazábal calls a "two-tiered" model in which a brokerage firm owes heightened duties to "clients" and some lesser level of obligations to mere "customers."[59] A decrease from the normal fiduciary duties can also arise in a jurisdiction whose law contemplates the creation of a "transaction" brokerage relationship, which may but need not be the default relationship.[60]

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[54] 1993 WL 515827 at *1.

[55] The claims in federal court were settled for $12.3 million (plus an additional $1.7 million to persons who had additional relationships with an affiliated title firm or an affiliated bank). Scott Carlson, *Plaintiffs Win Cash in Agency Case*, Chi. Trib., Feb. 12, 1995, at 7V. The settlement of the claims brought in state court, which was valued at $5.9 million, included coupons for discounts on future services from Edina Realty and options to purchase stock of Edina Realty's former parent company. Neal Gendler, *Edina Realty Suit Checks Received: Federal Suit Payment Mailed; State Suit Payment Coming in Early 1996*, Star Trib., Dec. 23, 1995, at 1D.

[56] Brown et al., *supra* note 3, at 28-29. Judicial decisions imposing liability for **R** nondisclosure similarly prompted the National Association of Realtors to seek statutory revision of the law governing property disclosure. *See* Dallon, *supra* note 14, at **R** 428; Lahey & Redle, *supra* note 14, at 322; Lefcoe, *supra* note 14, at 197, 213-14, **R** 218, 250; Katherine A. Pancak et al., *Residential Disclosure Laws: The Further Demise of Caveat Emptor*, 24 Real Est. L.J. 291, 310 (1996); Washburn, *supra* note 14, **R** at 383; Leroy Gatlin II, Note, *Reforming Residential Real Estate Transactions: An Analysis of Oklahoma's Disclosure Statute*, 22 Okla. City U. L. Rev. 735, 743 (1997); Carolyn L. Mueller, Legislative Note, *Ohio Revised Code Section 5302.30: Real Property Transferor Disclosure—A Form Without Substance*, 19 U. Dayton L. Rev. 783, 786 (1994). *See generally* L.A. Reg'l Office, Fed. Trade Comm'n, *supra* note 8, at 98 ("State officials have offered the opinion that virtually no pro- **R** posed legislation relating to real estate has a chance of passage unless it is approved by the state association of Realtors.").

[57] Pancak et al., *supra* note 28, at 353. **R**

[58] Olazábal, *supra* note 31, at 93 (noting certain exceptions in three states). **R**

[59] *Id.* at 85-87.

[60] *Id.* at 96 (identifying five states as providing transaction brokerage as the de-

In codifying the duties owed by real estate professionals, a number of jurisdictions have expressly prohibited unauthorized disclosure by a real estate professional representing a seller of the seller's willingness to accept less than the listed price[61] or the seller's motivation for selling.[62] Some jurisdictions also have sought to provide expressly some limited set of duties owed to nonprincipals.[63] Other jurisdictions simply enhanced obligations to disclose the nature of the parties' legal relationships.[64]

Olazábal notes that states now generally mandate some disclosure about agency relationships.[65] She states:

> A major, if not the primary, impetus for agency disclosure laws is the danger that consumers may be unaware that the agent with whom they are working is actually an agent for the other party. The concern is that it is possible, if not likely, that a buyer will reveal his top offer (or a seller his lowest acceptable price) to a licensee who has a fiduciary obligation to convey that information to the other party to the transaction.[66]

Enhanced disclosure focuses on agents' legal obligations. The concern underlying increased agency disclosure, of course, focuses on misinformed buyers. Putting aside cases of dual agency, sellers will not likely be harmed by a misunderstanding of the

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fault). Pancak, Miceli, and Sirmans note that an October 1993 survey for the National Association of Realtors (NAR) found that 72% of sellers believed that professionals acting as nonagent transaction facilitators should receive lower compensation than agents. Pancak et al., *supra* note 28, at 357. They also note that, based on this and other factors, an NAR Presidential Advisory Group recommended that the NAR should not promote the nonagent-transaction-facilitator concept. *Id.* at 357-58.

[61] *See, e.g.*, COLO. REV. STAT. §§ 12-61-804(2)(a), -805(2)(a) (2004) (providing corresponding obligations on agents representing sellers and buyers, respectively); IND. CODE ANN. § 25-34.1-10-10(b)(1) (West 2001); MD. CODE ANN., BUS. OCC. & PROF. §§ 17-528(h)(1), -532(c)(2) (West 2002) (providing for obligations on agents representing sellers and buyers, respectively); WYO. STAT. ANN. §§ 33-28-303(b)(i), -304(b)(i) (2005) (providing for obligations on agents representing sellers and buyers, respectively).

[62] *See, e.g.*, COLO. REV. STAT. §§ 12-61-804(2)(b), -805(2)(b) (providing for obligations on agents representing sellers and buyers, respectively); IND. CODE ANN. § 25-34.1-10-10(b)(2) (West 2001); MD. CODE ANN., BUS. OCC. & PROF. §§ 17-528(h)(3), -532(c)(2) (West 2002) (same); WYO. STAT. ANN. §§ 33-28-303(b)(ii), -304(b)(ii) (2005) (same).

[63] Olazábal, *supra* note 31, at 101-02. Pancak, Miceli, and Sirmans provide a somewhat older fifty-state survey of the law. Pancak et al., *supra* note 28, at 373-77 tbl.1.

[64] Pancak et al., *supra* note 28, at 353.

[65] Olazábal, *supra* note 31, at 112; *accord* Dallon, *supra* note 14, at 416; Pancak et al., *supra* note 28, at 353.

[66] Olazábal, *supra* note 31, at 113-14.

applicable law. This is because an agent selected by a seller will not owe fiduciary duties to the buyer; it is only buyers who select agents who owe fiduciary duties to opposing parties.

This Article provides original evidence that allows an assessment of the current regulation of residential real estate agency on a number of dimensions. Requiring enhanced disclosure of agency obligations is sensible if real estate agents act in accordance with their legal obligations. If they do not, however, there is less value to enhancing the understanding buyers and sellers have of the duties imposed by law; in fact, enhanced disclosure may be counterproductive. The survey evidence indicating that buyers in traditional jurisdictions believed selling agents represented buyers[67] and the 1988 survey of real estate professionals' beliefs concerning customary practices[68] raise the possibility that the agents frequently have not complied with the applicable duties. That evidence, however, does not quantify the impact, if any, of agent malfeasance. One issue our empirical investigation addresses is whether real estate agents act in ways having a quantifiable adverse impact on their principals. More generally, the fashioning of the rules governing residential real estate agents, or agents of all types, may benefit from an enhanced understanding of the extent to which agents do not heed their fiduciary duties.

II

Theoretical Framework for Investigating Performance of Agent Duties

This Article examines two aspects of how real estate agents perform their fiduciary duties in a regime in which agents formally owe fiduciary duties to sellers: (1) whether the participation of a selling agent who specializes in selling is associated with a worse outcome for the principal (the seller), and (2) whether agency duties are performed better where all agents are within the same firm. The general contours of the hypotheses being investigated are as follows: Selling agents have incentives to deviate from their duties to sellers. Actions that help buyers, at the expense of sellers, can be used to secure business because failure to promote the interests of a buyer can cause a buyer to change the agent with whom the buyer is working. It is also possible that

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[67] *See supra* note 40 and accompanying text.   **R**
[68] *See supra* notes 45-46 and accompanying text.   **R**

relationships within brokerage firms may restrain this misconduct. This analysis yields two predictions that can be tested empirically: First, the participation of a selling agent who specializes in selling will be associated with a lower sale price. Second, a seller may realize a lower sales price where the selling agent is with a firm that is not the listing brokerage firm.

A. Prior Investigations

Our investigation appears to be the first directly examining our first hypothesis—selling agent specialization and whether acts inconsistent with agent obligations can be used to secure business.[69] There is, however, some existing evidence bearing on the second hypothesis. Before turning to a more detailed development of our empirical modeling, it is helpful to put our investigation in context by reviewing the results of some of the rich existing empirical literature examining real estate agency.[70]

1. Return to the Agent

It would be anomalous to expect real estate agents to be impervious to variations between their personal interests and the best interests of their principals, i.e., to be impervious to "agency" problems.[71] Recent evidence provides one example: A

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[69] Our initial results were discussed with Professor Geoffrey Turnbull, who, with Professor Jonathan Dombrow, subsequently was able to find results confirmatory of ours in a different sample using a different modeling technique. Geoffrey K. Turnbull & Jonathan Dombrow, Identifying Agent-Specific Influences in the Brokerage Process 15-17, 33 (Feb. 22, 2005) (unpublished manuscript, on file with authors). Their sample, from January 1996 through September 1997, does not directly address the issue of compliance with fiduciary duties because a statutory change in the middle of the period they study eliminated a statutory provision providing subagency as a default. *See* LA. REV. STAT. ANN. § 13:1467(A) (West, Westlaw LA-STANN95 Database through 1994 Fourth Extraordinary Session) ("Notwithstanding the provisions of Civil Code Arts. 2985 through 3034 or any other provisions of law, a licensee engaged in any real estate transaction is the agent or subagent of the seller unless there is a written agreement to the contrary and that agreement is disclosed to all parties."), *amended by* H.B. 200, 1997 Leg., Reg. Sess., 1997 La. Acts 32.

[70] An excellent survey of the literature is provided in John D. Benjamin et al., *What Do We Know About Real Estate Brokerage?*, 20 J. REAL EST. RES. 5 (2000).

[71] J.D. House provides anecdotal evidence of agency problems:

> The customers' needs are taken into account. Of course, only up to a point. After all, it's his decision. . . . If you looked at five or six houses and then decided on one and asked me if it was good, I'd be a fool not to say yes, even though I'd never buy it for myself.

J.D. HOUSE, CONTEMPORARY ENTREPRENEURS: THE SOCIOLOGY OF RESIDENTIAL REAL ESTATE AGENTS 5-6 (1977) (quoting a manager at a Canadian firm).

study of 98,038 house sales in the Chicago area[72] finds that agents selling their own houses realize 3.7% higher sales prices compared to other sales.[73]

Another basic aspect of agency problems is whether the fees paid to agents affect their performance—in the absence of "agency" problems, agent compensation would not influence agent performance. Zietz and Newsome find some evidence that increasing the selling agent's commission increases the sales price, particularly in sales of small- to medium-sized houses.[74] Thus, there is some evidence of agency problems in the acts of selling agents that can be mitigated by increasing their commission rates.

Two prior works examine the structure of listing agent compensation. Interesting results are found by Munneke and Yavas, who examine sales prices of houses listed with a firm (a RE/MAX affiliate) that allows the individual agent with the listing to keep an unusually large portion of the listing component of the

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[72] Steven D. Levitt & Chad Syverson, *Market Distortions When Agents Are Better Informed: The Value of Information in Real Estate* tbl.2 (Nat'l Bureau of Econ. Research, Working Paper No. 11053, 2005).

[73] *Id.* at 19.

[74] Joachim Zietz & Bobby Newsome, *Agency Representation and the Sale Price of Houses*, 24 J. Real Est. Res. 165, 186-87 (2002). The listing brokerage firm typically shares between 40% and 60% of the total commission with the selling brokerage firm. Thomas J. Miceli, *The Multiple Listing Service, Commission Splits, and Broker Effort*, 19 AREUEA J. 548, 549 tbl.1 (1991) (reporting that, in sales of used residential property, 69.1% of the sales involved commission splits in that range); *see also* Patrick J. Rohan et al., Real Estate Brokerage Law and Practice § 2.02[1] (2005) ("These 'internal splits' vary among firms, communities, and according to market conditions. Typically they range from ten percent to thirty percent to the listing broker, forty percent to sixty percent to the selling broker or cooperating firm, and the remainder to the firm. They are also frequently progressive—that is, as a broker produces more listings or more sales per year, the percentage he or she receives increases. A successful broker who sells his or her own listing can sometimes receive seventy percent of the total commission."); Joachim Zietz & Bobby Newsome, *A Note on Buyer's Agent Commission and Sale Price*, 21 J. Real Est. Res. 245, 246 (2001) (stating that an equal split is usual).

The causation, however, could go the other way. Consider a property that has been on the market for some time. The seller may convince the listing agent to decrease the commission when the seller drops the asking price. *See generally* Thomas J. Miceli, *Renegotiation of Listing Contracts, Seller Opportunism and Efficiency: An Economic Analysis*, 23 Real Est. Econ. 369, 371 (1995) (noting that during the negotiation of an extension of a listing agreement, an owner may seek to negotiate a lower commission); *cf., e.g.*, Guild Mgmt. Co. v. Oxenhandler, 541 S.W.2d 687 (Mo. Ct. App. 1976) (involving a defendant who attempted to renegotiate the broker's commission on commercial property when it became clear a sale would realize less than the originally contemplated asking price). One coauthor personally experienced this phenomenon.

commission (95% in that case); i.e., in this location, only 5% of the listing portion of the commission is kept by the listing brokerage firm.[75] They find no statistically significant relationship between sales price and either the listing being with that firm or with the fact that the agent was the principal of the listing brokerage firm and, therefore, effectively did not share the commission.[76]

There is, however, some evidence that agents shirk their duties when they have exclusive agency but are not given the exclusive right to sell (meaning no commission is owed on a sale arranged by the owner). Rutherford, Springer, and Yavas find that use of this form of contract (exclusive agency) for moderately priced houses results in lower sales prices compared to sales where the commission is earned regardless of who arranges the sales.[77] That suggests agents use less diligence under exclusive agency contracts compared to their efforts for listings providing an exclusive right to sell. Use of less diligence would be inconsistent with fulfilling their contractual duties (unless, of course, either they had contracted to provide lesser diligence, which the authors of that article do not reference and which seems implausible, or they provide in exclusive-right-to-sell listings more service than they are obligated to provide).

A final example involves sales where the listing agent and the selling agent have a positive prior personal relationship. This is pertinent because it may show how a nonmonetary increase in an agent's utility affects the agent's performance. Halpern found that the sales prices in transactions in which there was a positive relationship[78] between the agents were $11,390 further from (i.e.,

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[75] Henry J. Munneke & Abdullah Yavas, *Incentives and Performance in Real Estate Brokerage*, 22 J. REAL EST. FIN. & ECON. 5, 5 (2001). *See generally* RE/MAX Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1001, 1003 (6th Cir. 1999) (stating, "Re/Max requires that its franchisees adopt the 'Re/Max 100% Concept' which allows real-estate sales agents to receive 95% to 100% of their share of sales commissions," and examining an alleged antitrust violation arising from other brokerage firms allocating 20 to 25 percentage points less of the commission to the selling firm when the selling agent was a Re/Max agent). Munneke and Yavas state that the shared portion typically is between 40% and 60%. Munneke & Yavas, *supra*, at 5.

[76] Munneke & Yavas, *supra* note 75, at 15, 16 tbl.3.   **R**

[77] Ronald C. Rutherford et al., *The Impact of Contract Type on Broker Performance: Submarket Effects*, 26 J. REAL EST. RES. 277, 295 exhibit 4 (2004).

[78] She defines a positive relationship as one where the agents had jointly participated in at least one prior transaction, had known each other at least five years, and had viewed the relationship as "positive." Jennifer J. Halpern, *The Effect of Friendship on Decisions: Field Studies of Real Estate Transactions*, 49 HUM. REL. 1519,

less than) the original listing price compared to transactions where there was not such a relationship.[79] The results were significant at the 10% level.[80] However, because Halpern examined only thirty-two house sales,[81] it is difficult to draw firm conclusions from her investigation.

In sum, there is some evidence that the sales process is influenced by agent shirking or other malfeasance. Higher prices are received where real estate agents are selling their own houses. There is some evidence that selling agents do not always put forth their normal level of diligence. Evidence for this is provided by findings that increased commissions can yield increased prices and that agents may not work as hard where sellers have retained the right to compete in selling. However, we do not have evidence that internal compensation arrangements within a listing brokerage firm affect pricing.

2. Buyers' Brokers

Another way to review compliance with duties imposed on agents is to examine the consequences of the use of a buyer's broker (i.e., an agent owing duties to the buyer). The theory is that if agents comply with their duties, the use of a buyer's broker will yield a lower price than the use of an agent owing duties to the seller.[82] Prior investigations of the consequences of the use of a buyer's broker provide ambiguous results. Elder,

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1531 tbl.1 (1996). Her sample was limited to transactions involving two agents in different offices. *Id.* at 1527. Her investigation, therefore, does not bear on intraoffice relationships.

[79] *See id.* at 1531. There is some ambiguity in that article concerning the size of the price differential. The article states that the mean difference between listing price and sales price was $20.26 in sales where the agents were business friends and $8.87 where the agents were "unacquainted." *Id.* at 1531. She reports a *t*-statistic of 1.70. *Id.* An accompanying table in the article reports average sales prices for houses of $225.00 and $286.60. *Id.* at 1532 tbl.2. The average sales price of the houses in the area at the time examined was approximately $300,000. *Id.* at 1524-25. It appears, then, that Halpern's article states those dollar amounts ($20.26 and $8.87) in thousands.

[80] *Id.* at 1531.

[81] *Id.* at 1526-27.

[82] *See generally* Grohman, *supra* note 1, at 588 ("Presumably, the purchaser represented by a broker should fare better in negotiations for the purchase of property."). *But see generally* Collette, *supra* note 28, at 419 ("Assuming brokers act according to their beliefs and expectations, one must conclude that cooperating brokers actually negotiate on behalf of their buyers. This conclusion is supported by empirical evidence." (citing L.A. REG'L OFFICE, FED. TRADE COMM'N, *supra* note 8)). **R**

Zumpano, and Baryla provide a direct investigation, examining the relationship between sales prices and the use of buyers' brokers in a nationwide survey of house purchases.[83] They found no statistically significant change in sales prices in transactions where buyers' brokers are used compared to sales where all brokers represent the sellers.[84] That is the result that would be expected if selling agents owing fiduciary duties to buyers fully disregarded their duties and promoted buyers' interests (and acted as if they were buyers' brokers).

A second approach, taken by Curran and Schrag, examines changes in house prices following a statutory change that increased the frequency with which buyers' brokers were used.[85] Reviewing residential sales prices in the Atlanta area from 1993 to 1995, they found that, following the effectiveness of such a statutory change,[86] there was a negative, generally statistically

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[83] Harold W. Elder et al., *Buyer Brokers: Do They Make a Difference? Their Influence on Selling Price and Search Duration*, 28 REAL EST. ECON. 337 (2000).

[84] *Id.* at 356 tbl.5, 357. Black and Nourse also find no statistically significant relationship between sales price and the participation of a buyer's broker. Roy T. Black & Hugh O. Nourse, *The Effect of Different Brokerage Modes on Closing Costs and House Prices*, 10 J. REAL EST. RES. 87, 95 exhibit 2, 96 (1995). These results are not particularly persuasive, however, because they examined a set of only eighty house sales. *Id.* at 93. As could be expected, the ninety-five percent confidence interval for their estimated impact of the use of a buyer's broker includes economically significant relationships, in the range of -$13,900 to $10,486 (computed as: -1707 ± 2.0 x (-1707/-0.28)), compared to the average house price—$146,140 in their sample. *See id.* at 93 & exhibit 1.

Black and Nourse do, however, find that in the purchase of relatively more expensive houses, the use of a buyer's broker is associated with lower cash charges at closing. *Id.*

[85] Christopher Curran & Joel Schrag, *Does It Matter Whom an Agent Serves? Evidence from Recent Changes in Real Estate Agency Law*, 43 J.L. & ECON. 265 (2000). Less formal evidence is provided in a third approach by Brown, Grohman, and Valcarcel. They discuss a survey made of 232 relocating employees of a particular firm, which reported that those who engaged buyers' brokers paid, on average, 91% of a home's list price, whereas those using traditional agents paid 96.5% of the list price. Brown et al., *supra* note 3, at 44; *see also* Carla A. Fried, *House Hunting? Save by Hiring Your Own Broker*, MONEY, Apr. 1993, at 20 (reporting the results of the survey). Their discussion, however, does not provide any indication of any statistical significance of that finding, nor does it identify the extent to which the survey controlled for other attributes. *See* Brown et al., *supra* note 3, at 44.   **R**

[86] Brokerage Relationships in Real Estate Transactions, 1993 Ga. Laws 376 (codified as amended at GA. CODE ANN. §§ 10-6A-1 to -16, 43-40-25 (West, Westlaw through 2005 Special Sess.)) (providing, inter alia, that multiple listing membership will not by itself create a subagency and that absent a written agreement, "[a] broker who performs services under a brokerage engagement for another is a limited agent"—a limited agent not subject to traditional fiduciary duties). The statutory change was effective January 1, 1994. *Id.* Of course, sales activity will span the

significant predicted decrease in houses priced over $175,000, with the predicted decreases for houses priced under $175,000 not statistically significant.[87] They assert the results "suggest that the change in Georgia's real estate law improved buyers' relative bargaining power in their negotiations with sellers, particularly in the market for relatively expensive homes."[88]

Our investigation does not seek to resolve the tension between these two articles. Rather, these articles collectively provide some evidence that the duties imposed on real estate agents for the benefit of their principals may affect how real estate agents perform their duties,[89] which provides context to our investigation.

3. Division of Agent Duties Between Firms

One prior investigation fully reports results examining the con-

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effective date for some houses. To identify sales under the former regime, they use a dummy variable showing the impact for sales closed before April 1, 1994. Curran & Schrag, *supra* note 85, at 275.

[87] Curran & Schrag, *supra* note 85, at 281 & tbl.2.

[88] *Id.* at 282.

[89] One might criticize these investigations on a number of bases. Consider first the work of Elder, Zumpano, and Baryla. As a statistical matter, the absence of a statistically significant relationship does not mean that there is not a relationship; it simply means that the confidence interval being used includes zero. For example, in estimating the logarithm of the sales price, they find an estimated coefficient of -0.02 for the presence of a buyer's broker, with a *t*-statistic of 0.74. Elder et al., *supra* note 83, at 356 tbl.5. Assuming, as the magnitudes of their coefficients suggest, that they used the natural logarithm, the corresponding estimated impact of the use of a buyer's broker from this evidence is almost $3,000 for a house otherwise selling at $150,000. That result is computed as follows: $\ln(150,000) = 11.9184$; $e^{11.8984} = 147,031$. (This represents only a rough (in this case, a biased) estimate; the methodology for providing an unbiased estimate is described *infra* note 128). Moreover, sales prices corresponding to the 95% confidence interval are in the range of $139,441 to $155,034—a very wide range containing economically significant deviations from $150,000 (the range is computed as follows: $e^{11.9184 - 0.02 \pm [1.965(0.02/0.74)]}$). Their study, then, does not allow one to reject the existence of price impacts that are economically significant.

Other concerns might be raised with Curran and Schrag's analysis. They examine house prices in Atlanta for the period from July 1993 through June 1995. Curran & Schrag, *supra* note 85, at 273. The statistical problem is that, as they note, *id.* at 275 n.20, this type of empirical analysis cannot segregate the impact of other changes in the market that occur at the same time as the statutory change. For example, Atlanta hosted the 1996 Summer Olympics. The area's preparations for that event or anticipated inconvenience arising from associated crowds could have affected housing prices. Thus, Curran and Schrag's evidence does not really allow one to reach a conclusion concerning whether a selling agent's performance is affected by the role (buyer or seller) of the party who is the selling agent's principal.

sequences of dividing agent duties between two firms,[90] which is one of the two matters we investigate. Zietz and Newsome examine a set of 1334 home sales from mid-1999 through mid-2000 in the Orem/Provo, Utah, area.[91] Their article is not entirely clear concerning some of the specifics of their investigation; some detail is therefore required in explaining their investigation to give a sense of the reasons why their article may be considered to be ambiguous.

Zietz and Newsome trifurcate their sample of sales into the following three categories: sales where only one agent is involved,[92] sales where two agents with one firm are involved,[93] and sales involving two agents from two different firms.[94] We are interested in how agents perform their fiduciary duties to their principals. In the third case, where two brokerage firms are involved, they describe the selling agent as "the buyer's agent,"[95] which seems to imply that the selling agent owes some heightened duties to the buyer. And they indicate that the transactions they examine are governed by what they call the "designated agency principle,"[96] which they distinguish from "the phased-out agency/subagency representation."[97] Utah law, however, in this

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[90] Zietz & Newsome, *supra* note 74. In addition, Levitt and Syverson ran regressions estimating price with independent variables that included the presence of two agents and the presence of two agents with the same firm. Levitt & Syverson, *supra* note 72, at 18. They do not, however, report the estimates for both coefficients; they only report the former. *Id.*

Tangentially relevant work has been done by Jud and Winkler, who, in examining sales prices of a sample of houses, bifurcate house sales based on whether the listing firm is the selling firm. G. Donald Jud & Daniel T. Winkler, *What Do Real Estate Brokers Do: An Examination of Excess Returns in the Housing Market*, 3 J. HOUS-ING ECON. 283, 287, 291 tbl.II (1994) (finding a positive, statistically significant relationship between sales price and the listing and selling offices being the same). Those results are not directly relevant to our inquiry because they treat as equivalent sales involving two agents in the same firm and sales involving only one agent.

[91] Zietz & Newsome, *supra* note 74, at 168.   **R**

[92] This circumstance includes one they describe as follows: "only listing agent is involved in sale, no buyer's agent." *Id.* at 171 exhibit 1.

[93] They describe this circumstance as one where the broker is a "limited dual broker." *Id.* at 167. In this case, the "buyer's agent and listing agent come from the same firm." *Id.* at 169 (defining the variable "BASFIRM," which they use to indicate this circumstance).

[94] *See id.* at 167.

[95] *Id.* at 169.

[96] *Id.* at 166.

[97] *Id.* at 167. The language provides (in full): "Designated agency representation has been challenged on the grounds that, in everyday practice, buyers have gained little if anything relative to the phased-out agency/subagency representation." *Id.*

time period continued to allow selling agent subagency.[98] Unfortunately, Zietz and Newsome are not explicit in identifying how they determine to whom selling agents in their sample owed duties. Because their article does not describe how they determine (whether by reviewing the local multiple listing service agreement, by reviewing the documents from actual transactions, or by some other means) that the set of transactions in their sample excludes those where a selling agent represented the seller as a subagent, there is some uncertainty concerning what they actually investigate.

Zietz and Newsome's results are significant in setting the context of our investigation, however, whether or not their sample includes selling agents owing fiduciary duties to sellers. They find in sales of medium-to-large houses a negative, statistically significant relationship between sales price and the participation of two agents within the same firm compared to the participation of two agents with different firms.[99] They estimate the magnitude of the price impact at 3.7%.[100] They do not find statistically significant results for other-sized houses[101] or for all houses generally.[102]

These results are somewhat puzzling. It is not clear why separating the duties between two firms should produce higher sales prices. One possibility is that the selling agents in their sample sought to represent buyers, and their familiarity with agents within their own firms allowed them to bargain more effectively against listing agents in the same firms.[103]

If Zietz and Newsome's description of their data is accurate, and the selling agents were supposed to represent buyers, this interpretation of their results does not imply a violation of fiduci-

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[98] *See* UTAH ADMIN. CODE r. 162-6-1.11.4 (2000) (imposing specified disclosure and other obligations on selling agents who act as subagents of sellers).

[99] *See* Zietz & Newsome, *supra* note 74, at 178 exhibit 3, 185.

[100] *Id.* at 185.

[101] *See id.* at 178 exhibit 3.

[102] *See id.* at 174 exhibit 2.

[103] Their favored interpretation is that "the agents . . . act to pressure the seller to give in to a lower sale price." *Id.* at 185.

Their interpretation of part of their results is curious. They assert, "For all . . . size classes [other than medium-to-large houses], the firm affiliation of buyer's and listing agents makes no difference to the sale price." *Id.* at 185. This is, of course, inaccurate as a statistical matter. The absence of a statistically significant relationship does not prove that there is not a relationship; rather, it merely means that the 95% confidence interval (or some other interval if a confidence level other than 5% is used) includes zero.

ary duties. It would mean, however, that Zietz and Newsome's evidence does not address our second hypothesis concerning performance of selling agents who owe fiduciary duties to sellers.

B. The Theory of This Investigation

A traditional tool for aligning the interests of agents with those of their principals is the adoption of compensation contingent upon the outcome.[104] Selling brokerage firms typically receive a fee based on a percentage of the sales price,[105] which might appear to align the incentives of selling brokerage firms and their agents with the interests of sellers. However, it is not novel to note that the magnitude of the fee customarily charged in real estate sales—typically in the range of 6%-7%,[106] with only a portion going to each of the listing agent and the selling agent[107]— may be insufficient to align agents' incentives with those of the sellers. For example, if the selling brokerage firm and its employees received a total of 3% of the sales price, an increase in sales price of $5,000 would only increase their fees by $150. Except in the sale of very expensive homes, increases in the number of transactions in which an agent participates are more likely to be a source of increased commission revenue than actions taken in a particular sale that increase the sales price.[108] The use of per-

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[104] *See, e.g.*, Saul Levmore, *Commissions and Conflicts in Agency Arrangements: Lawyers, Real Estate Brokers, Underwriters, and Other Agents' Rewards*, 36 J.L. & ECON. 503 (1993).

[105] *See supra* note 74 and accompanying text.   **R**

[106] *See, e.g.*, CARYL A. YZENBAARD, RESIDENTIAL REAL ESTATE TRANSACTIONS § 2:15 (West, Westlaw through Sept. 2005); *cf.* BURKE, *supra* note 28, § 2.3.1 (5%-   **R** 7%). Although rates in this range are typical, various factors may cause variations. *See, e.g.*, William C. Goolsby & Barbara J. Childs, *Brokerage Firm Competition in Real Estate Commission Rates*, 3 J. REAL EST. RES. 79, 83 (1988) (finding that "[h]igher-valued houses are sold with lower commission rates"); C.F. Sirmans & Geoffrey K. Turnbull, *Brokerage Pricing Under Competition*, 41 J. URBAN ECON. 102, 116 (1997) (finding empirical evidence consistent with the hypothesis that "a decline in the demand for houses relative to supply tend[s] to increase the equilibrium [real estate agent] commission rate"). Moreover, there currently is substantial competitive pressure on this business model from discount brokers—competition that may be enhanced by access to information through the Internet. *See generally* James R. Hagerty & Ruth Simon, *Realtor Commissions Face New Pressure*, WALL ST. J., May 10, 2005, at D1 (discussing, inter alia, discount brokers and commission rebate practices); Jennette Smith, *Discount Brokerages Gain Popularity Among Home Sellers*, CRAIN'S DETROIT BUS., Nov. 3, 2003, at 24 (discussing discount brokers).

[107] *See supra* notes 74-75 and accompanying text.   **R**

[108] Levmore makes an interesting observation concerning an advantage of uniform commissions. He notes that an agent having uniform commissions (e.g., all

centage compensation thus may not assure that selling agents comply with the fiduciary duties owed to sellers. These suspicions are confirmed by prior literature discussed above[109] indicating that agency problems affect selling agents.

This Article supplements the current understanding of whose interests selling agents promote by investigating two statistical relationships. One involves agent specialization. The basic principle is that deviation from fiduciary duties may facilitate a selling agent in securing business. In the marketing of houses by a selling agent whose principal is the seller, there is not an express obligation that binds a prospective buyer to continue to work with a particular selling agent. Prospective buyers may contact several agents.[110] A selling agent may keep a prospective buyer's allegiance by providing valuable information or other services. Providing some of these services may be consistent with the agent's duties to the prospective seller, e.g., the prompt relaying of inquiries to the seller or the listing agent and providing positive, factually accurate public information. On the other hand, a selling agent may provide a prospective buyer with information where doing so is inconsistent with promoting the seller's interests, e.g., by providing information that need not be disclosed and whose disclosure decreases the ultimate sales price. For example, in order to keep a customer, a selling agent may advise a prospective buyer that a prospective seller may be willing to accept a lower price or that a particular house is, in the agent's opinion, overpriced. Prospective buyers typically will be very interested in making sure they are not looking at overpriced houses, and a selling agent who refuses to identify overpriced houses may lose customers.

On this theory, this Article examines the relationship between sales price and whether the selling agent specializes in acting as a selling agent. Real estate agents will vary in the extent to which they are willing to disregard the duties imposed on them by law in order to secure business. An empirical investigation of a jurisdiction where selling agents typically are supposed to represent

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houses listed with it are at 6%) "mitigates the problem of conflicts among principals because joint revenue maximization is much more certain if an agent receives similar compensation from several principals." Levmore, *supra* note 104, at 505.   **R**

[109] *See supra* notes 71-74 and accompanying text.   **R**

[110] *See* Moshe Adler, *Disclosure and the Buyer-Broker Relationship*, REAL EST. REV., Winter 1982, at 94, 99 (discussing the frequency of contacts with multiple agents).

sellers may find that the participation of a selling agent who specializes in selling is associated with lower prices. That finding would support the view that selling agents secure business by adversely affecting the prices realized by sellers—their principals.

The second approach to investigating agent performance involves examining the number of brokerage firms involved in each transaction. The basis of this approach is to find a circumstance that might inhibit agents in deviating from the duties imposed by law. A focus on the importance of interpersonal relationships (discussed above)[111] suggests that a selling agent is less likely to take a position contrary to the seller if the selling agent is in the same firm as the listing agent. For example, a selling agent may be more reluctant to tell a prospective buyer that a house is overpriced if the listing agent is in the same firm. Such an observation may be implicitly critical of the listing agent; it might imply that the listing agent secured the listing by indicating that the agent could secure an unrealistically high price. Cooperation with agents in other firms also may be important. However, an agent generally may be expected to deal more frequently with another agent in the same firm than with a particular agent in another firm.[112] An agent, therefore, may be more hesitant to criticize implicitly another agent in the same firm for fear of poisoning an important relationship. Consequently, we would find support for the view that selling agents who are fiduciaries of sellers promote the interests of buyers if we find that the separation of the listing and selling duties between two firms is associated with lower sales prices.

III

EMPIRICAL EXAMINATION OF SELLING AGENT PERFORMANCE

A. Data

To assess real estate broker performance in a traditional jurisdiction, this Article examines a sample of 3209 single-family dwelling sales during 1995 in a particular portion of a single metropolitan statistical area (MSA). As was the case in a number of

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[111] *See supra* notes 78-79 and accompanying text. For example, a selling agent **R**
may steer a prospective buyer away from houses listed with disfavored brokers.
L.A. REG'L OFFICE, FED. TRADE COMM'N, *supra* note 8, at 185.   **R**

[112] *See generally* HOUSE, *supra* note 71, at 59-60, 64-67 (discussing cooperation   **R**
between agents within a firm and "incipient cliques").

jurisdictions in the 1990s,[113] the jurisdiction had a statute providing that absent a written agreement to the contrary, a selling agent was the subagent of the listing agent and thus an agent of the seller.

A review of a sample of transactions indicates that, during 1995 in this portion of the MSA, it was unusual for the parties to deviate from the default relationship provided by law. We randomly selected 437 transactions in which the largest firm in the multiple listing service (MLS) participated in some capacity, and for each, we reviewed the documents on file with that firm to determine whether a buyer's broker was involved. We could classify only 11, or 2.5%, of the transactions as involving the participation of a buyer's broker. Three, or 0.7%, additional transactions may have involved a dual agency, although the documents reviewed raise a significant suggestion that the parties erroneously completed the forms. In four other transactions, or 0.9%, the purchaser was, or was a relative of, the selling agent. In six additional transactions, or 1.4%, it appeared that no buyer's broker was involved, although various levels of inconsistency in the fashion in which the forms were prepared raise some uncertainty.

The local MLS reported 4227 single-family dwelling sales during 1995. In addition to listing and selling brokerage firm information, the data contain dwelling and market characteristics. This set of transactions was first reduced to 3899 transactions in which there was a single listing agent and a single selling agent. In 3209 of the transactions, the MLS reported all information necessary for our models.

Prices of housing within the MSA vary tremendously, reflecting the different neighborhoods, ranging from opulent dwellings (which need not be large) to very modest accommodations lacking central heat. Only some of these variations are reflected in the dwelling characteristics reported by the MLS. The portion of the MSA covered by the MLS has been divided into a number of different MLS areas. The housing within six of these MLS areas is more homogeneous, i.e., the prices of the dwellings in these neighborhoods are more closely correlated with those aspects of the improvements that are identified by and reported by the MLS. The 3209 transactions were then reduced to 1247 transactions, consisting of all transactions within those six MLS areas.

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[113] *See supra* note 28.   **R**

Table 1 provides descriptive statistics, as reported by the MLS, of the dwellings included in the sample of 3209 transactions and the subsample of 1247 transactions within those six MLS areas. Reflecting the greater uniformity of housing within those six MLS areas, the standard deviation of the sales prices for dwellings within those six MLS areas was $51,296, while the standard deviation of the sales prices for all 3209 transactions was $71,387.

There are many real estate brokerage firms operating in the portion of the MSA covered by the MLS. One hundred nine firms participated as listing brokerage firms in the subset of 3899 transactions reported by the MLS for 1995 that involved no more than one listing agent and no more than one selling agent.[114] Within the MLS, the real estate brokerage business is somewhat concentrated. The five firms that acted most frequently on the selling side participated in that capacity in 28%, 5%, 5%, 5%, and 4% of the transactions. The five firms that acted as the listing brokerage firm most frequently did so in 31%, 6%, 5%, 4%, and 4% of the transactions. The same firm led in both categories. On the other hand, twenty-three brokerage firms acted as the selling brokerage firm in only one of these 3899 transactions, and fourteen acted as the listing brokerage firm in only one of those transactions.

Because we hypothesize that specialization as a selling agent may be related to how agents fulfill their duties,[115] we compiled participation statistics for each individual real estate agent. Nine hundred fifty-three individual agents were a listing agent or a selling agent in one or more transactions. For each of these individual agents, we computed the number of times the agent was either a listing agent or a selling agent in a transaction reported by the MLS in 1995, a statistic we call the agent's *level of participation*. For example, if the agent acted as a selling agent on the sale of one house and the listing agent on the sale of a second house, that agent's level of participation equals two.[116] A second

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[114] All offices of a firm located within the MSA (based on the trade name used by the firm, as reported through the MLS) are considered as one firm for purposes of this Article, with offices geographically located outside the MSA considered as different firms.

[115] *See supra* Part II.B.

[116] The computations of the level of agent participation in transactions are based on all 4227 transactions reported by the MLS, including those in which more than one agent acted as the listing agent or the selling agent. In sales where there are two listing agents, neither of whom is a selling agent for the transaction in question, the

agent who acted as both the listing agent and the selling agent in a single house sale also would have a level of participation equal to two. During 1995, there was a wide range of frequencies with which individual agents participated in sales reported by the MLS. The highest level of agent participation was 192. Only 5% (47) of the agents achieved a level of participation greater than 27, while the participation of 20% (191) of the agents was not more than one. The level of participation of 60% (578) of the agents was less than seven.

For each agent, we computed a fraction representing the portion of that aggregate number of transactions accounted for by that agent's participation as a selling agent. If that fraction is greater than or equal to 0.75, the agent is categorized in our investigation as "specializing" as a selling agent. If the fraction is less than or equal to 0.25, the agent is categorized as "specializing" as a listing agent.[117] This definition is not affected by whether the agent attempts to hold himself out to the public as specializing as a listing agent or a selling agent.

B.   *Empirical Methodology*

1.   *Primary Modeling of Agent Specialization and Separation of Duties Between Two Firms*

To examine whose interests selling agents promote and the different impacts intrafirm and interfirm agent relationships have on the sales process, we prepared ordinary least squares regressions estimating the natural logarithm of sales price (quoted sales price less concessions) of each house in the data set based on property-specific characteristics reported by the MLS and listing agent and selling agent characteristics. The functional form of the initial model (Model 1) is:

$\ln P = constant + \beta_1$ *dwelling age* $+ \beta_2$ *dwelling age*$^2 + \beta_3$ *living area* $+ \beta_4$ *days on market* $+ \beta_5$ *1/[1+days on market]* $+ \beta_6$ *fireplace* $+ \beta_7$ *tenant* $+ \beta_8$ *no air* $+ \beta_9$ *no heat* $+ \beta_{10}$ *carport* $+ \beta_{11}$ *garage* $+ \beta_{12}$ *two brokerage firms* $+ \beta_{13}$ *one agent* $+ \beta_{14}$ $\ln($*selling agent's participation level*$) + \beta_{15}$ $\ln($*listing agent's participation level*$) +$

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transaction increases by 0.5 the level of participation of each listing agent, with a corresponding computation for transactions that involve two selling agents.

[117] The description of this computation is rendered somewhat complex because an agent may participate as both the selling agent and the listing agent in respect of the sale of a particular house.

β_{16} *selling agent specializes in selling* $+ \beta_{17}$ *listing agent participates in listing* $+ \varepsilon$,

where:

ln$P$ is the natural logarithm of the sales price (less concessions)

dwelling age is the age of the dwelling, in years

dwelling age^2 is the dwelling age, squared

living area is the living area, in square feet

days on market equals the time from listing to the property being under contract, in days

1/[1+*days on market*] equals the reciprocal of 1 + days on market

fireplace equals 1 if the property has at least 1 fireplace, 0 otherwise

tenant equals 1 if the property is nonowner occupied, 0 otherwise

no air equals 1 if the property has no central or window air conditioning, 0 otherwise (included only in those models estimating price of all 3209 transactions, because all properties in the subsample have air conditioning)

no heat equals 1 if the property has no central heat, 0 otherwise

carport equals 1 if the property has a carport, 0 otherwise

garage equals 1 if the property has a garage, 0 otherwise

two brokerage firms equals 1 if the listing brokerage firm is not the selling brokerage firm, 0 otherwise

one agent equals 1 if the listing agent and the selling agent are the same individual, 0 otherwise

ln(*selling agent's participation level*) equals the natural logarithm of the selling agent's level of transaction participation

ln(*listing agent's participation level*) equals the natural logarithm of the listing agent's level of transaction participation

selling agent specializes in selling equals 1 if at least 75% of the selling agent's participation level arose from transactions where the agent acted as a selling agent, 0 otherwise

listing agent participates in listing equals 1 if no more than 25% of the listing agent's participation level arose from transactions where the agent acted as a selling agent, 0 otherwise

$\hat{a}_i$ is the coefficient in the model for the ith independent variable.

Model 3 estimates the same relationship in the full sample.

The importance of most of the independent variables that control for property attributes is self-explanatory. One unusual variable is 1/[1+*days on market*] (the reciprocal of days on market plus one). If a listing agent realizes that the seller is highly motivated to sell the property and thus expects that a quick sale may be consummated with little effort by the selling agent, the listing agent might concentrate efforts on also acting as the selling agent for that property.[118] This variable was included to isolate any such effect. To some extent, the inclusion of this variable may reflect excessive precaution, as Sirmans, Turnbull, and Dombrow found no statistically significant relationship between sales price of a house and the fact that a contract for its sale was entered into prior to the time the listing of the house was reported on the multiple listing service.[119]

The primary variables of interest in this model are *selling agent specializes in selling* and *two brokerage firms*. Finding a negative relationship between *selling agent specializes in selling* and sales price would support the hypothesis that selling agents secure business through means that disadvantage their principals, the sellers.

As a complement to the variable *selling agent specializes in selling*, the model includes a variable reflecting that the *listing agent specializes in listing*. The results for that variable do not directly bear on our hypotheses. It is included for purposes of symmetry in the model formulation. Other agent-specific controls whose results do not directly bear on our hypotheses are the ln(*selling agent's participation level*), i.e., the natural logarithm of the selling agent's level of participation (volume of transactions), and the ln(*listing agent's participation level*).[120]

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[118] Sirmans, Turnbull, and Benjamin, empirically examining a sample of house sales in the mid-1980s, assert, "[i]ndirect evidence reveals that brokers apparently do not systematically hold listings back from the MLS, regardless of incentives to do so." C.F. Sirmans et al., *The Markets for Housing and Real Estate Broker Services*, 1 J. Housing Econ. 207, 217 (1991). We expect that a listing agent is unlikely to provide an unduly negative description of the property in order to limit competition from other prospective selling agents.

[119] C.F. Sirmans et al., *Quick House Sales: Seller Mistake or Luck?*, 4 J. Housing Econ. 230, 241 (1995). The coefficient estimate is in fact positive, 0.009 or 0.019, depending on the model used. *Id.* at 239 tbl.II (providing results estimating the natural logarithm of the selling price).

[120] Other work has yielded varying conclusions concerning the impact of the latter. *See, e.g.*, Jud & Winkler, *supra* note 90, at 291 tbl.II (finding what they describe as a "marginally significant," negative relationship in one model for the listing agent

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The variable *two brokerage firms* shows the estimated relationship compared to the circumstance that is "held-out," i.e., the case for which no dummy variable is present, which is the participation of one brokerage firm where the selling agent and the listing agent are different individuals. Finding a negative estimated coefficient for *two brokerage firms* supports the hypothesis that selling agents seek to promote the interests of buyers, but they are restrained in doing so where the listing is with another agent in the same firm.

Although not directly relevant to the hypotheses of this Article, Model 1 also addresses the extent to which retaining the duties of listing agent and selling agent within a single individual is correlated with changes in the price realized by the seller. The listing agent and the selling agent perform different aspects of the aggregate duties performed on behalf of the seller. It may be that some agents are particularly skilled in performing either the listing agent duties or the selling agent duties. For example, some agents may be particularly adept at (or patient in) locating properties that may be of interest to prospective buyers, whereas other agents may be particularly skilled at describing the property in promotional literature (e.g., the MLS listing). Alternatively, where the prospective selling agent is the listing agent, the prospect of receiving both the listing and the selling commissions may cause the agent to be more aggressive in convincing the parties to agree. That one individual performs all the agent duties may therefore affect the price compared to sales in which two agents in the same brokerage firm participate. For this reason Model 1 includes a variable reflecting the participation of a single agent.

There is a potential criticism of this model formulation. We do not have data on the sharing of the commission between the selling brokerage firm and the selling agent, which may affect selling agent performance. Munneke and Yavas indicate that some firms allow an agent to retain more of the fee in sales of the firm's own listings.[121] Although Munneke and Yavas find no statistically significant relationship between sales price and the list-

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sales and an insignificant relationship between sales price and selling agent sales); Levitt & Syverson, *supra* note 72, at 11 (finding a positive, statistically significant relationship for logarithm of listing agent sales); Munneke & Yavas, *supra* note 75, at 12, 16 tbl.3 (finding no statistically significant relationship for listing agent volume).   **R**

[121] Munneke & Yavas, *supra* note 75, at 12.   **R**

ing being with a firm that allows the listing agents to keep substantially all the listing commission,[122] the nature of the split between the *selling* agent and the selling agent's firm may influence pricing. Yavas and Yang find no general relationship between the time a property is listed and the fact that the listing brokerage firm is the selling brokerage firm,[123] which is consistent with concluding that agents do not generally make special efforts to sell their firms' own listings.[124] In any case, this concern would be limited to interpretation of the variable *two* brokerage firms; it would not directly affect interpretation of our other variable of interest, *selling agent specializes in selling*.

2. Large Firm Effects and the Interrelationship Between Firm Size and Participation of Only One Brokerage Firm

As noted above,[125] one firm, which we identify by the name "Firm *A*," has a much greater share of the market than any other firm. Sales involving two agents in the same firm are more likely to involve Firm *A* than any other firm. In the subsample of 1247 transactions involving the more homogeneous housing, Firm *A* participated in 68% of the transactions involving two different agents affiliated with the same brokerage firm. This percentage is materially higher than the percentage of those 1247 transactions involving two different brokerage firms in which Firm *A* was the listing brokerage firm (33%) and the percentage of transactions involving two different brokerage firms in which Firm *A* was either the listing brokerage firm or the selling brokerage firm (56%).

Because prior work has found a positive relationship between sales price and the size of the firm, i.e., the number of listings, that has the listing,[126] it is desirable to control separately for the presence of the largest firm. Model 2 controls for the participation of the largest firm in the MSA and the combination of selling agent specialization with whether the agency duties are split

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[122] *Id.* at 16 tbl.3.

[123] *See* Abdullah Yavas & Shiawee Yang, *The Strategic Role of Listing Price in Marketing Real Estate: Theory and Evidence*, 23 Real Est. Econ. 347, 363 tbl.3 (1995).

[124] *But cf. id.* at 363 tbl.3, 364 (finding a negative relationship for very expensive houses).

[125] *See supra* note 114 and accompanying text.

[126] *See* William T. Hughes, Jr., *Brokerage Firms' Characteristics and the Sale of Residential Property*, 10 J. Real Est. Res. 45, 46 (1995).

between two firms. Model 2 first adds variables reflecting the capacity in which Firm *A* participates: there are two firms and one is Firm *A*; two agents with Firm *A* participate; and there is one agent that participates, and that agent is with Firm *A*. Model 2 also adds variables combining agent specialization and separation of duties between two firms. These variables reflect the participation of a selling agent who specializes in selling and either the participation of two brokerage firms, the participation of a single agent, or the participation of two agents in the same firm. Model 4 estimates the same relationship that Model 2 estimates, but it does so in the full sample.

The first of these three variables (*two firms*; *selling agent specializes in selling*) is the variable of particular interest. The rationale is as follows: If selling agent specialization is associated with lower prices, and the separation of agency duties between two agents in different firms is associated with lower prices, we may find that the combination of both is also associated with lower sales prices.

3. Robustness of the Results

It is helpful to confirm the results of empirical estimations of relationships by reestimating the relationships in slightly different ways. Doing so provides assurance that the results identified are not anomalies arising from the particular specifications of the models, i.e., reestimating the relationships confirms that the results are "robust" to alternative model specifications.

The robustness of the results is examined in two different ways. First, the models are reestimated excluding houses that are less than two years old. This eliminates new houses, which may be marketed differently and which may have atypically informed sellers. Second, the models are reestimated changing the definition of agent specialization. In these estimations, agents are classified as specializing in selling where the aggregate number of transactions accounted for by that agent's participation as a selling agent is greater than or equal to 0.66, and agents are classified as specializing in listing if that fraction is less than or equal to 0.34.

C. Results

1. Primary Results

The basic relationship between selling agent specialization and

sales price is shown in Models 1 and 3 in Table 2. For the variables of interest, the estimations in the subsample and the full sample are qualitatively similar. In both the subsample and the full sample, there is a negative relationship, statistically significant at the 5% or the 1% level, between sales price and the participation of a selling agent who specializes in selling. These results support the hypothesis that selling agents retain business by assisting buyers in ways that decrease sales prices, i.e., in ways that adversely affect their principals. The magnitude of the estimated coefficient (0.034) is economically significant as well. It is 35% of that of the estimated coefficient for the presence of a garage, 0.097 (43% in the full sample). A rough estimate of the impact on the sales price of the participation of a selling agent who specializes in selling is -3.3% (-4.8% in the full sample).[127]

The results of Model 1 set forth in Table 2 provide some evidence that splitting the selling agent and listing agent duties between two firms decreases selling price. The relationship is statistically significant at the 10% confidence level in the subsample. The estimated relationship with price, approximately a 2.2% decrease in the subsample,[128] is economically significant relative to the fee charged by a broker.[129]

These results concerning separation of duties between two firms thus provide some additional support for the hypothesis that selling agents promote the interests of buyers even where the selling agents owe fiduciary duties to sellers. Zietz and Newsome found the opposite relationship[130] in sales of medium-to-large houses that they describe as involving "buyer's agent[s]."[131] Assuming their description of their data is accurate, one might

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[127] That is, $1 - e^{-0.034} = 0.033$, and $1 - e^{-0.049} = 0.048$ in the full sample.

[128] $1 - e^{-0.022} = 0.022$. This percentage estimate is slightly biased. If one wished to be hyperprecise, for an estimated coefficient for a dummy variable that is negative, the estimated percentage change in the dependent variable arising from the dummyvariable being equal to one may be represented by the following expression:

$$100\left\{\exp\left(\hat{\beta} - \frac{1}{2}\hat{V}(\hat{\beta})\right) - 1\right\},$$

where $\hat{\beta}$ represents the estimated coefficient for the dummy variable and $\hat{V}(\hat{\beta})$ represents the estimate of the variance of $\hat{\beta}$. *See* Peter E. Kennedy, *Estimation with Correctly Interpreted Dummy Variables in Semilogarithmic Equations*, 71 AM. ECON. REV. 801, 801 (1981).

[129] Of course, other factors not captured in our data may contribute to the magnitudes of these relationships. That is inherent in this type of model.

[130] *See supra* notes 99-100 and accompanying text.

[131] *See supra* note 93.

conclude that whom an agent formally represents matters in a
rather complex way or that standards of conduct vary across
communities. The latter interpretation could apply even if Zietz
and Newsome's description of their data is inaccurate. Another
possible difference involves their failure to control for firm
size,[132] which we do control for in Models 2 and 4.

2. Controlling for Firm Size

Models 2 and 4 control for firm size by including three vari-
ables reflecting the participation of Firm *A,* based on whether
two firms, one being Firm *A*, participate; whether one agent par-
ticipates, and that individual is with Firm *A*; and whether two
agents, both with Firm *A*, participate. We are interested in
whether, after controlling for the capacity in which the largest
firm participates, selling agent specialization is negatively related
to sales price. In both the full sample and the subsample, the
coefficient estimate for the variable reflecting the participation of
two brokerage firms is not statistically significant. The estimated
magnitude of each also has decreased materially. In fact, the sign
of the relationship changes in the full sample. This does not
mean that there is not a general relationship between splitting
brokerage duties between two firms and sales price. It merely
means that the confidence interval includes zero, and we there-
fore cannot reject the hypothesis that there is not a relationship.

Of particular interest, however, are the results of interacting
selling agent specialization with the three categories of types of
agency representation (two firms, one agent, or two agents with
the same firm). There is a negative, statistically significant rela-
tionship between the logarithm of sales price and the participa-
tion of a selling agent who specializes in selling when the listing
agent is with a different firm. That is the case in both the full
sample and the subsample. On the other hand, we do not find a
statistically significant relationship between the logarithm of
sales price and the participation of a specialized selling agent
when the listing agent is another person in the same firm. In the
full sample, the difference in the coefficients of *two firms*; *selling
agent specializes in selling* and *two agents*, *one firm*; *selling agent*

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[132] *See* Zietz & Newsome, *supra* note 74, at 170-71 exhibit 1 (not including vari-   **R**
ables reflecting brokerage firm size in exhibit providing variable definitions and ba-
sic statistics).

specializes in selling is statistically significant.[133]

In sum, after controlling large firm effects, we find selling agent specialization is associated with lower sales prices where the selling agent and the listing agent are with different firms. The results support our hypothesis that to secure business, selling agents who are fiduciaries of sellers use actions that decrease the returns to their principals, with some evidence that the participation of a listing agent in the same firm as the selling agent partially restrains this activity.[134]

3. Robustness of the Results

The robustness of our results to alternative model specifications can be reviewed by examining the results presented in Tables 3 and 4. Table 3 presents results estimated in subsamples that exclude houses that are less than two years old. Table 4 presents results using an alternative definition of agent specialization. In Table 4, an agent is categorized as specializing in selling if at least 66% of that agent's participation level arises from selling, and an agent is categorized as specializing in listing if no more than 34% of that agent's participation level arises from selling.

The results for the variables of interest in Tables 3 and 4 are qualitatively similar to those in Table 2. Of minor note is the fact that the separation of agency duties between two firms (*two firms*) becomes significant at the 10% level in the full sample (Model 3) as well as the subsample (Model 1); that is, the results are somewhat stronger. In addition, the significance of listing agent specialization—a variable not directly bearing on our hypotheses—is sensitive to the definition of specialization. In general, however, Tables 3 and 4 indicate that our results of interest are not produced by anomalies in the marketing of new houses, and they are not produced by the particular definition of agent specialization.

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[133] The *p*-value for rejecting equality is 0.02.

[134] One might be interested in the economic significance of this variable relative to the participation of Firm A. A rough estimate can be derived from the results for Model 2 for transactions in the subsample of more homogeneous housing. That model predicts that the participation of a selling agent who specializes as a selling agent involving two different brokerage firms is associated with an estimated 3.6% decrease in the sales price (which is computed as follows: $e^{-0.037} - 1 = -0.0363$). The estimated magnitude of the impact that the participation of Firm A has on sales price in a transaction involving two different brokerage firms is slightly smaller—a 3.0% increase in sales price ($e^{0.030} - 1 = 0.0305$).

Conclusion

A recent working paper identifies agency problems in the residential real estate market, finding higher sales prices for houses owned by the agents themselves.[135] This Article examines more subtle agency problems: whether real estate agents secure business by acting contrary to the interests of their principals and whether division of duties between two firms affects agent performance.

For this purpose, we examine sales prices of houses in an MSA within a jurisdiction that followed the traditional rule under which selling agents and listing agents are fiduciaries of the sellers unless there is an agreement to the contrary (and where deviation from that default was rare). We hypothesize that deviations from duties owed to sellers may assist selling agents in securing business. We test this hypothesis by examining whether the participation of a selling agent who specializes in selling is associated with a lower sales price. We also hypothesize that intrafirm relationships may limit agent misconduct better than interfirm relationships. We test this hypothesis by examining whether a seller receives a better sales price when the selling agent is with the same firm as the listing agent.

We find that sellers receive lower prices when the selling agents specialize in selling. There is some evidence that the effect is particularly pronounced when selling agent duties are split between two firms. The results support the view that to secure business, selling agents use actions that decrease the returns to their principals, with some evidence that the participation of a listing agent in the same firm as the selling agent partially restrains this activity.

States generally now require some form of disclosure of the nature of agents' obligations in the sale of residential real estate.[136] Our results support skepticism concerning the efficacy of those obligations. The results suggest that in various ways, agents formally owing obligations to sellers were acting in ways that benefited buyers. Mandating enhanced disclosure of duties formally owed may be counterproductive if, as suggested by our results, duties formally owed do not fully dictate agent conduct.

Our results are also relevant to assessing the traditional sub-

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[135] *See supra* note 72 and accompanying text.
[136] *See supra* note 65 and accompanying text.   **R**

agency relationship for selling brokerage firms. The results suggest agency problems can have economically significant consequences to principals in these jurisdictions. Appropriate responses to this concern could involve enhanced regulatory enforcement and, as has occurred in some jurisdictions, modification of the duties to restrict fiduciary obligations.

Table 1—Summary Statistics

Summary statistics for 1247 transactions in one of six specified MLS areas (the subsample) and for all 3209 transactions for which complete data are available (the full sample).

	Subsample 1247 Transactions		Full Sample 3209 Transactions	
	mean	**st. dev.**	**mean**	**st. dev.**
Price	113,806	51,296	111,528	71,387
Age (years)	15.3	13.3	15.0	16.1
Living area (square feet)	1961	613	1882	664
Days on market	66.7	77.8	72.4	80.6
Selling agent's participation level	18.6	16.5	22.3	29.3
Listing agent's participation level	25.4	23.5	30.5	36.5
	mean	**freq.**	**mean**	**freq.**
Fireplace	0.767	956	0.701	2248
Tenant	0.038	48	0.048	153
No air	0.000	0	0.009	28
No heat	0.009	11	0.033	106
Carport	0.770	960	0.740	2375
Garage	0.214	267	0.201	644
Two brokerage firms	0.529	660	0.497	1594
One agent	0.201	251	0.243	779
Selling agent specializes in selling	0.196	245	0.211	678
Listing agent specializes in listing	0.133	166	0.151	483
Two firms, Firm *A* participates	0.298	371	0.234	750
Two agents, both with Firm *A*	0.183	228	0.128	410
One agent with Firm *A* participates	0.059	73	0.056	181
Selling agent specializes in selling and:				
two firms	0.136	169	0.141	454
one agent	0.010	12	0.012	40
two agents, one firm	0.051	64	0.057	184

TABLE 2—REGRESSION RESULTS ESTIMATING NATURAL LOG OF SALES PRICE

Ordinary least squares regressions of natural logarithm of dwelling sales price (*t*-statistics computed using Huber/White robust standard errors in brackets under coefficients; scale factors for certain variable coefficients in brackets under corresponding variable name; ***, **, and * indicate significance at 1%, 5%, and 10% levels (two-tailed), respectively).

	1247 sales (subsample)		3209 sales	
	Model 1	Model 2	Model 3	Model 4
Constant	10.583	10.578	10.438	10.427
	[229.37]***	[211.82]***	[282.04]***	[281.15]***
Age	-0.019	-0.019	-0.013	-0.013
	[12.09]***	[12.12]***	[10.26]***	[10.77]***
Age^2	2.210	2.233	1.051	1.097
[x10^4]	[5.98]***	[5.99]***	[4.69]***	[4.88]***
Living area	5.178	5.169	5.523	5.460
[x10^{-4}]	[33.01]***	[32.86]***	[33.18]***	[32.48]***
Days on market	-6.015	-6.129	-3.599	-3.659
[x10^{-5}]	[0.70]	[0.72]	[0.30]	[0.31]
1/[1 + days on market]	0.048	0.049	0.074	0.074
	[1.90]*	[1.99]**	[3.22]***	[3.29]***
Fireplace	0.045	0.046	0.093	0.090
	[2.82]***	[2.88]***	[6.60]***	[6.47]***
Tenant	-0.048	-0.047	-0.068	-0.070
	[1.53]	[1.53]	[2.42]**	[2.53]**
No heat	-0.221	-0.234	-0.280	-0.282
	[2.40]**	[2.60]***	[6.55]***	[6.57]***
No air			-0.434	-0.417
			[4.08]***	[3.85]***
Carport	0.089	0.088	0.052	0.049
	[3.15]***	[3.16]***	[2.66]***	[2.56]**
Garage	0.097	0.098	0.114	0.112
	[3.48]***	[3.56]***	[5.40]***	[5.35]***
Two firms	-0.022	-0.013	-0.015	0.011
	[1.74]*	[0.51]	[1.41]	[0.75]
One agent	-0.018	-0.006	-0.037	0.000
	[1.16]	[0.24]	[2.53]**	[0.01]
ln(selling agent's participation level)	0.007	0.005	0.005	0.004
	[0.94]	[0.68]	[0.91]	[0.76]
ln(listing agent's participation level)	0.012	0.009	0.014	0.012
	[2.11]**	[1.52]	[3.20]***	[2.64]***
Selling agent specializes in selling	-0.034		-0.049	
	[2.42]**		[3.93]***	
Listing agent specializes in listing	0.015		0.023	
	[1.09]		[1.96]*	
Two firms; Firm *A* participates		0.030		0.054
		[2.14]**		[4.36]***
Two agents, both with Firm *A*		0.033		0.079
		[1.40]		[4.40]***
One agent, with Firm *A*		0.048		0.043
		[1.93]*		[1.81]*
Two firms; selling agent specializes in selling		-0.037		-0.062
		[2.25]**		[4.27]***
One agent; selling agent specializes in selling		-0.057		-0.068
		[1.23]		[1.81]*
Two agents, one firm; selling agent specializes in selling		-0.016		-0.003
		[0.54]		[0.13]
R^2	0.81	0.81	0.77	0.77

TABLE 3—REGRESSION RESULTS ESTIMATING NATURAL LOG OF SALES PRICE OF HOUSES AT LEAST TWO YEARS OLD

Ordinary least squares regressions of natural logarithm of dwelling sales price (t-statistics computed using Huber/White robust standard errors in brackets under coefficients; scale factors for certain variable coefficients in brackets under corresponding variable name; ***, **, and * indicate significance at 1%, 5%, and 10% levels (two-tailed), respectively).

	1018 sales (subsample)		2415 sales	
	Model 1	Model 2	Model 3	Model 4
Constant	10.535	10.528	10.363	10.358
	[213.64]***	[199.68]***	[251.11]***	[249.53]***
Age	-0.015	-0.015	-0.008	-0.008
	[8.18]***	[8.21]***	[6.23]***	[6.58]***
Age^2	1.796	1.809	0.632	0.663
[x10^{-4}]	[4.94]***	[4.96]***	[3.42]***	[3.58]***
living area	5.077	5.072	5.311	5.269
[x10^{-4}]	[31.07]***	[31.15]***	[28.22]***	[27.76]***
Days on market	-24.575	-23.415	-21.069	-19.895
[x10^{-5}]	[1.98]**	[1.87]*	[1.13]	[1.07]
1/[1 + days on market]	0.044	0.051	0.065	0.068
	[1.10]	[1.29]	[1.81]*	[1.88]*
Fireplace	0.059	0.060	0.115	0.113
	[3.71]***	[3.78]***	[7.43]***	[7.39]***
Tenant	-0.046	-0.045	-0.061	-0.063
	[1.54]	[1.51]	[2.19]**	[2.28]**
No heat	-0.272	-0.285	-0.298	-0.300
	[3.07]***	[3.30]***	[7.00]***	[6.98]***
No air			-0.431	-0.414
			[3.96]***	[3.74]***
Carport	0.096	0.095	0.067	0.064
	[3.25]***	[3.28]***	[3.26]***	[3.15]***
Garage	0.115	0.114	0.120	0.116
	[3.92]***	[3.95]***	[5.33]***	[5.21]***
Two firms	-0.025	-0.019	-0.024	-0.003
	[1.75]*	[0.67]	[1.90]*	[0.15]
One agent	-0.024	-0.015	-0.064	-0.036
	[1.31]	[0.49]	[3.47]***	[1.47]
ln(selling agent's participation level)	0.009	0.007	0.008	0.006
	[1.15]	[0.87]	[1.14]	[0.88]
ln(listing agent's participation level)	0.013	0.010	0.019	0.015
	[2.14]**	[1.59]	[3.50]***	[2.77]***
Selling agent specializes in selling	-0.035		-0.053	
	[2.22]**		[3.66]***	
Listing agent specializes in listing	0.016		0.031	
	[0.96]		[1.84]*	
Two firms; Firm *A* participates		0.034		0.052
		[2.19]**		[3.57]***
Two agents, both with Firm *A*		0.032		0.064
		[1.20]		[2.95]***
One agent, with Firm *A*		0.050		0.047
		[1.61]		[1.56]
Two firms; selling agent specializes in Selling		-0.037		-0.069
		[2.00]**		[4.06]***
One agent; selling agent specializes in Selling		-0.062		-0.054
		[1.23]		[1.34]
Two agents, one firm; selling agent specializes in selling		-0.016		-0.010
		[0.46]		[0.37]
R^2	0.80	0.80	0.75	0.75

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TABLE 4—REGRESSION RESULTS ESTIMATING NATURAL LOG OF SALES PRICE USING MODIFIED DEFINITION OF AGENT SPECIALIZATION

Ordinary least squares regressions of natural logarithm of dwelling sales price (t-statistics computed using Huber/White robust standard errors in brackets under coefficients; scale factors for certain variable coefficients in brackets under corresponding variable name; ***, **, and * indicate significance at 1%, 5%, and 10% levels (two-tailed), respectively).

	1247 sales (subsample)		3209 sales	
	Model 1	Model 2	Model 3	Model 4
Constant	10.614	10.594	10.480	10.444
	[232.65]***	[215.78]***	[285.97]***	[283.71]***
Age	-0.018	-0.018	-0.013	-0.013
	[12.19]***	[12.24]***	[10.45]***	[10.74]***
Age^2	2.202	2.219	1.058	1.080
[x10^{-4}]	[6.09]***	[6.22]***	[4.78]***	[4.89]***
Living area	5.162	5.150	5.501	5.441
[x10^{-4}]	[32.78]***	[32.69]***	[33.01]***	[32.36]***
Days on market	-5.194	-5.968	-2.999	-3.866
[x10^{-5}]	[0.61]	[0.70]	[0.25]	[0.33]
1/[1 + days on market]	0.051	0.053	0.076	0.076
	[2.02]**	[2.12]**	[3.32]***	[3.35]***
Fireplace	0.045	0.047	0.091	0.089
	[2.81]***	[2.91]***	[6.51]***	[6.48]***
Tenant	-0.050	-0.052	-0.072	-0.072
	[1.61]	[1.72]*	[2.55]**	[2.61]***
No heat	-0.222	-0.236	-0.281	-0.281
	[2.47]**	[2.70]***	[6.53]***	[6.54]***
No air			-0.432	-0.423
			[3.99]***	[3.89]***
Carport	0.087	0.087	0.052	0.050
	[3.13]***	[3.14]***	[2.71]***	[2.63]***
Garage	0.093	0.095	0.113	0.112
	[3.37]***	[3.49]***	[5.36]***	[5.38]***
Two firms	-0.023	-0.004	-0.018	0.022
	[1.79]*	[0.18]	[1.70]*	[1.40]
One agent	-0.025	0.001	-0.051	-0.003
	[1.63]	[0.04]	[3.50]***	[0.15]
ln(selling agent's participation level)	0.003	0.001	0.001	0.000
	[0.39]	[0.18]	[0.23]	[0.03]
ln(listing agent's participation level)	0.011	0.008	0.014	0.012
	[1.86]*	[1.39]	[3.08]***	[2.81]***
Selling agent specializes in selling—alt. def'n	-0.048		-0.068	
	[3.74]***		[6.10]***	
Listing agent specializes in listing—alt. def'n	0.000		-0.007	
	[0.02]		[0.76]	
Two firms; Firm A participates		0.030		0.049
		[2.13]**		[4.04]***
Two agents, both with Firm A		0.034		0.077
		[1.45]		[4.31]***
One agent, with Firm A		0.047		0.042
		[1.88]*		[1.76]*
Two firms; selling agent specializes in selling—alt. def'n		-0.052		-0.083
		[3.41]***		[6.14]***
One agent; selling agent specializes in selling—alt. def'n		-0.094		-0.062
		[2.72]***		[2.32]**
Two agents, one firm; selling agent specializes in selling—alt. def'n		-0.018		-0.020
		[0.79]		[1.12]
R^2	0.81	0.81	0.77	0.77