

Law of Real Estate Brokers

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§ 10.02 Fiduciary Obligations

As an agent of an employer, a broker owes his or her client – the vendor or purchaser in a transaction – several duties that are collectively known as the broker's fiduciary obligation to the client. "The real estate broker is a fiduciary. He owes undivided fidelity and faithfulness to his principal."[\[fn5\]](#) This duty is higher than a negligence standard of due care; it is also higher than that of a professionally competent holder of a brokerage license. A broker may be professionally competent and prudent, yet fall short of the greater duty of a fiduciary.[\[fn5.1\]](#) (This is particularly true in recent years, when the licensee may act as a transaction broker or facilitator, yet fall short of the substantially higher standard required of a fiduciary.) The broker's duty is sometimes described as *uberrima fides* – that is, requiring him to act candidly, honestly, and not adversely in any aspect of a transaction, and to disclose anything material to it, any violation of the duty amounting to fraud.[\[fn6\]](#) Because the broker's breach of such a duty is patterned on a negligence action, the plaintiff's pleadings must establish the duty, its breach, and (sometimes) the injury or detriment caused by that breach.[\[fn7\]](#) Fiduciary obligations are derived from rules governing courts of equity, an old rhyme identifying the three subject matters over which such courts have jurisdiction:

These three give place in courts of conscience
Fraud, accident, and breach of confidence.[\[fn8\]](#)

It is with such a breach that a fiduciary obligation is concerned.

Such an obligation is based on a relationship with the broker's client, a relationship that involves (1) acting on behalf of the client, and (2) exercising discretion (3) with regard to the sale of the client's interests in real property.[\[fn9\]](#) The first element highlights the fact that, even though the client is

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to pay the broker a commission, the broker is acting to serve the client's best interests, not his own[\[fn10\]](#) – even though the broker incurs uncompensated costs by doing this. In short, the broker must take actions unanticipated either by the listing agreement, or indeed, by any principle of mutual gain activating any contractual relationship. In the vernacular, the first element means that the broker is not dealing at arm's length with the client. The second element highlights the fact that brokers have and must make choices while representing their clients, and that such choices pertain not just to their own performance of the listing agreement, but also to the client's performance and interests set in a larger context – typically that of the real estate transaction of which their brokerage is just a part. More generally, the third element is important because real property is traditionally one of the client's important assets or resources, to which the broker is given access and about which the broker often has confidential information.

A fiduciary duty provides a default rule. In the context of real estate brokerage, it is a default contract rule – a rule that the parties to the listing agreement would have bargained for and **agreed** to if they had the time, patience, and resources to do so. It is thus a low-cost rule. No words of art are required to incorporate it into the listing and nothing can prevent its application. Its justification also lies in an ability to speak the parties' minds: the principal, in executing the listing, runs the risk of employing sub-standard services (the broker is by definition brokering other transactions, after all), and because the broker cannot beforehand impress the client with his or her honesty in fact (how's a broker to do that without sounding self-serving? And in any event, to be *known* as honest is to be honest all the time, and the client is concerned not with the broker's past, but with future conduct). A fiduciary duty then is a means of policing the broker and at the same time helping to assure the client that he will obtain honest, competent service.

Although a fiduciary duty provides, in the sense previously discussed, a low-cost rule for contracting parties, the price paid is in intrusiveness. The rule applies regardless of the broker's and the client's intention to do so and gives rise to a cause of action to remedy the past actions of the broker that are alleged to be a duty's breach, letting the litigating parties, judges, and juries view the facts of the case with hindsight. This perspective leads them to exaggerate what could be anticipated and believe what they know *ex post facto* was knowable *ex ante*. So the

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broker's principal is likely, psychologists think, to believe that the broker should have anticipated events better than he in fact can.[\[fn11\]](#) This "hindsight bias" is thought to be a factor and feature of fiduciary duty cases.

Further, a fiduciary duty is generally uninsurable. Because a breach of this type of duty is usually also a fraud, exceptions for fraudulent conduct in brokers' professional liability policies too often apply. **Removing** these exceptions is likely to be cost-prohibitive and for insurers, problematic. Who ever heard of insurance for a category of defrauding brokers? By the time they can be thrown into this insurance pool they would likely be stripped of their license and unable to practice their trade.

A fiduciary duty is a duty over and above the conduct imposed on a broker acting as an intermediary or middleman, although such a middleman's obligations to deal fairly and honestly with parties may form a baseline and be litigated at the same time.[\[fn12\]](#) Such an obligation must be voluntarily assumed or accepted.[\[fn13\]](#) A fiduciary duty is triggered by the consent of the broker to employment. Thereafter, the law applicable to a fiduciary is in a sense, one-sided: its focus is on the conduct of the fiduciary, not as with a contract regulating all parties to it equally.

Such a duty often attracts special judicial attention: for example, courts are likely to preserve a cause of action based on it for a separate trial and, for purposes of such a trial, not accept as proven facts that are adduced in other forums.[\[fn14\]](#) On the other hand, once the factual basis for a breach of duty is admitted, the attorney who persists in **denying** liability for a client is subject to sanction and a fine over and above the opposite party's attorneys' fees.[\[fn15\]](#) Similarly, a breach of duty is likely to give rise to the use of a discovery rule when

dealing with the statute of limitations on claims

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for breach of this obligation.[\[fn16\]](#) In the appropriate case, the breach may be pled as an equitable cause of action, as with an accounting, so eliminating the necessity of a jury trial and making the chancellor the finder of fact.[\[fn17\]](#) Moreover, the breach of a fiduciary obligation is often grounds for disciplinary action by state regulators,[\[fn18\]](#) and the definition of a fiduciary duty in a regulatory code can sometimes imply a private right of action to enforce it.[\[fn19\]](#) This regulatory forum may become more appealing as legislatures provide a shortened statute of limitations for judicial actions with regard to the provision of professional services and apply such statutes to causes of actions for breach of a fiduciary obligation.[\[fn20\]](#)

The establishment of this fiduciary obligation with the client requires two elements: first, an agency relationship,[\[fn21\]](#) and second, a fiduciary duty.[\[fn22\]](#) In this regard, one court has said: "While mere payment of a commission is not determinative of an agency relationship, the fact of such payment is sufficient here to defeat defendant's motion for summary judgment."[\[fn23\]](#) Finding an agency relationship is otherwise a question of fact, and when in dispute, precludes summary judgment.[\[fn24\]](#) When there is a

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question of fact, claims based on breach of a fiduciary duty will often be combined with those of professional negligence, negligent misrepresentation, and unjust enrichment.

The first of the two elements, the agency relationship, is generally shown in the listing agreement.[\[fn25\]](#) The rule is: no agency relationship, no fiduciary duty.[\[fn26\]](#) Thus the listing agreement serves two purposes: first, it provides the best evidence of the relationship, and, second, its execution marks the point of beginning for a fiduciary duty.[\[fn27\]](#) Prior to the execution of the agreement, the broker is not generally considered to have a fiduciary duty to his or her client, primarily because that would subject the broker to such a duty while at the same time negotiating and arranging for his or her compensation.[\[fn28\]](#) Later, a vendor might cut back a duty, as when a broker is a stakeholder who holds earnest money or a down payment that must, under the terms of a sales contract, be returned to the purchaser; then disregarding a vendor's instructions not to return the money unless the purchaser **agrees** not to sue, is no breach of duty.[\[fn29\]](#)

As to that first purpose, some elaboration is in order because to say that the listing agreement is the best evidence of a duty leaves open the possibility of other proof. In situations in which the broker's performance has not yet been substantial, that agreement may not constitute a binding contract.[\[fn30\]](#) For such occasions, the listing agreement is an incident, but not the whole of the fiduciary relationship existing between broker and client.[\[fn31\]](#) In the absence of a binding listing agreement, courts have accepted an oral contract as the basis of the agency,[\[fn32\]](#) inferred an agency from the conduct of the parties,[\[fn33\]](#) or found a confidential relationship to

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exist between the broker and the vendor or purchaser claiming its benefit.[\[fn34\]](#)

In a similar way, the regulatory statutes and regulations for brokerage can serve as a benchmark for establishing a fiduciary duty, but at the same time, not define the duty exhaustively or fully. Educational requirements for obtaining a broker's license might, for example, provide evidence of the degree of knowledge a broker must possess and thus show the degree of diligence and disclosure required of a broker. The fiduciary duty is ultimately distinct from both the listing agreement and the licensing statutes controlling a broker's conduct.[\[fn35\]](#) One court noted the pressure the industry puts on the land resources of a region this way,

The need for stringent controls governing the conduct of the real estate business has never been greater. We are not unmindful that speculation in land in Montana in the last several years has skyrocketed, with no apparent end in sight. This sale of land as a limitless commodity, rather than as one of our most precious and irreplaceable resources, has also given birth to a burgeoning real estate industry. The area is bustling with those who are either getting directly into the act of buying and selling for speculative reasons, or indirectly by acting as brokers and real estate agents. The rapid turnover of property is relentlessly encouraged by the brokers and agents. They are not, however, without their responsibilities to the public. . . . The duty of a real estate broker or agent to deal fairly with his client ultimately arises from a separate fiduciary relationship between them, and not because of the existence of a licensing act. While a breach of a duty may also be a violation of the licensing act, it may also constitute an independent reason to **deny** a commission to the broker or agent – perhaps the most effective deterrent of all.[\[fn36\]](#)

As to the second purpose of the listing agreement, it is tempting to think that because the fiduciary duty is often very generally worded and its application to specific facts remains a matter of legal uncertainty, the duty lives and dies with the listing agreement, however it is shown to have

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arisen. This rule has a black-letter certainty and crispness to recommend it. (Its crispness is not dulled by a caveat to the effect that facts requiring disclosure may occur well before the listing agreement is executed.[\[fn36.1\]](#))

As previously discussed, the duty often arises with the listing agreement,[\[fn37\]](#) if only because it jump-starts the agency.[\[fn38\]](#) Generally, therefore, the broker is not subject to a fiduciary duty in negotiating for a listing agreement.[\[fn39\]](#) However, if during those negotiations the broker represents himself as an expert in land development, misrepresents the development value of the listed property, and does not disclose the difficulties of gaining zoning approvals necessary for the development, the representations may be the subject of a cause of action for breach of duty, even though there has as yet been no formal execution of a listing.[\[fn40\]](#) Here the effect of the misrepresentations continues into and beyond the time that the duty arises. Once the listing agreement is negotiated and terms for the broker's compensation are complete, any change in those terms must be disclosed – secret arrangements for pooling commission with another broker, for instance – and nondisclosure will result in the broker's forfeiture of his or her commission.[\[fn41\]](#) This forfeiture occurs though there is no injury to the vendor.

Correlatively, the termination of the listing agreement often marks a fiduciary duty's end, but that rule is less certain because of the confidential information that the broker may have acquired in the meantime.[\[fn42\]](#) Thus a

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fiduciary duty, once arising, may be open-ended as to the information arising during it. Although a broker might create a new relationship with a client – becoming, for example, a trustee on a purchaser's purchase money deed of trust – traces of the preexisting duty might still remain.

[\[fn43\]](#) In the course of serving a principal, a broker may come into possession of information that it remains his or her duty to continue to treat confidentially even after the expiration of the listing.[\[fn44\]](#)

Market studies, feasibility studies, and financial *pro forma* statements are examples, but the effects of a less than candid discussion of a listed property's development value – or lack thereof – may linger afterward.[\[fn45\]](#) Further, while serving as a purchaser's mortgage broker, confidential information might come into the broker's hands during the underwriting process for the mortgage, and thus the broker's utilizing that information in bidding at a later foreclosure sale for that mortgage would violate a duty of good faith and loyalty, particularly if the broker was bidding against her former client. On the other hand, the underwriting information might involve information on the public records, so even if the client regarded telling the broker as a matter of confidence, the broker's status as a bidder might be sufficiently and independently grounded to justify the broker's action. Likewise, brokering the listed property twice, in quick succession and at greatly increased prices has justified **remanding** a case to explore further the possibility of a breach of duty.[\[fn46\]](#)

In contrast to what a broker learns during the course of a listing, what the same broker learns after the relevant document is executed, or the

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transaction is closed or completed, is not subject to the duty. One court stated that none of the opinions cited by the plaintiff found a duty to disclose facts coming into the broker's possession after the transaction was completed.[\[fn46.1\]](#) To do so would attach to the broker a duty to disclose facts that can no longer affect the transaction the broker was employed to bring to closure.

The statute of limitations on a fiduciary duty is that which applies to the contract, here the listing agreement, on which the duty is founded, even when there is a shorter statute providing specially for breaches of a fiduciary duty.[\[fn47\]](#) Quite often, the shorter statute is enacted for the protection of professional fiduciaries, such as trustees, and so their application is likely to be limited to specific trades and industries. Even when there is a shorter statute for professionals, a court's application of a discovery rule for accruing a claim for breach of duty can lengthen the time a fiduciary is exposed to liability for breach of duty.[\[fn47.1\]](#) When this is done, the rationale for the use of the discovery rule is that the latter rule is appropriate for fraud claims. It must be sufficient to overcome the legislative intent of the statute. The rationale may be refined, to the effect that the fiduciary should not have the benefit of the statute's general rule when learning material facts, using them to advantage, and then compounding the initial breach with a second one by failing to disclose information material to the client.[\[fn47.2\]](#) Such a rationale can devolve into a theory of

on-going or continuous breach, or a theory that a secret breach should not be compounded or squared by another, independent and separate breach without the discipline of the discovery rule being applied. Either way, it should be limited to **affirmative** breaches of duty: it should not be used where the breach is the broker's failure to discover facts material to a client where the broker should have done so because those facts were discoverable.

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Otherwise, the failure to discover becomes a failure to disclose and, absent malice or extraordinary circumstances, such a double negative omission should not continue to delay accrual of the action. In short, the breach in the latter instance is negligence and the (usually shorter) statute of limitations for such an action should control. Whether or not the discovery rule controls, questions of fact will arise for the jury or trier of fact.[\[fn47.3\]](#) These questions make clear that the breach of a fiduciary duty gives rise to a stand-alone, common law cause of action, separate from underlying contract, negligence, or professional malpractice claims.

When the listing agreement is unwritten, then the statute controlling the underlying claim might control – that is, if the breach of duty was a broker's failure to disclose the limitations of a restricted access easement, then the claim might lie based on either the property interest or the sales contract provision involved.[\[fn48\]](#) In some states, the statute of limitations for breach of an oral or implied contract may be shorter than that for a written contract. As previously discussed, considerations of whether or not to apply the discovery rule to the statute often hinge on analogies between the breach of a fiduciary duty and a claim for fraud or negligence; they are just that, however – analogies. The claim of a breach of fiduciary duty is (again) a stand-alone claim.

A breach of a fiduciary duty arises out of an agency relationship and so is typically measured by the conduct of an individual broker toward an individual client.[\[fn49\]](#) "A real estate broker, as the agent for the seller of real estate, has a fiduciary duty to the seller with respect to matters within the scope of the agency."[\[fn50\]](#) On this account, and because often a confidential relationship must be established by the facts of the case, a motion to **dismiss** the claim for a breach of duty is likely to fail before the conduct of some discovery.[\[fn50.1\]](#)

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Sometimes, however, a breach of duty is alleged to lie in a policy of a brokerage firm, and when this is the case a class action certification may be sought on behalf of all clients affected by the firm's policy.[\[fn51\]](#) Although there need not be pecuniary damages, and although the potential members of the class need not know of the breach, there must be a means of identifying the class before certification.[\[fn52\]](#) When for example a broker utilizing her firm's policy, splits "up to 50% of the commission" with an adverse party or agent and does not disclose this to the client, a firm's clients, dealt with in a similar fashion, may constitute a class, although their knowledge of the split could still become a basis for **denying** certification[\[fn53\]](#) or splitting the class into those who knew and those who did not. In the example, permitting commission splits "up to" a certain amount implies a non-uniform policy and may itself be a basis for **denying** class certification. MLS policies may similarly provide a basis for certifying a class, particularly when discount brokerage firm clients are adversely affected.

The fiduciary duties themselves are three in number, each one the result of classifying a line of cases by their particular facts.[\[fn54\]](#) One court has defined these duties this way:

The duties of a real estate broker as agent for a seller are well established. A real estate agent owes a duty of utmost good faith and loyalty to the principal, and one employed to sell property has the
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specific duty of exercising reasonable due care and diligence to effect a sale to the best advantage of the principal – that is, on the best terms and at the best price possible. . . . He is also under a duty to disclose to his client information he possesses pertaining to the transaction in question.[\[fn55\]](#)

Another court put it this way:

A broker owes to his employer the duty of good faith and loyalty, and is required to use such skill as is necessary to accomplish the object of his employment. . . . It is also his duty to give his client the fullest information concerning his transactions and dealings in relation to the property with reference to which he is employed. . . . This requirement not only forbids conduct on the part of the broker which is fraudulent or adverse to his client's interests, but also imposes upon him the positive duty of communicating all information he may possess or acquire which is, or may be, material to his employer's advantage.[\[fn56\]](#)

There are thus three well established duties imposed on a broker. They are good faith and loyalty,[\[fn57\]](#) reasonable care and diligence, and disclosure.[\[fn58\]](#) Sometimes the last duty is said to grow out of the first two.[\[fn59\]](#)

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Sometimes that last is elaborated and more detailed.[\[fn60\]](#) Each will be considered in turn, following discussion of a leading case, *Haymes v. Rogers*.

Haymes v. Rogers

In the leading case,[\[fn61\]](#) a broker sued the listing vendor to recover a 5 percent brokerage commission. A salesman of the plaintiff's brokerage firm, after a day of house inspections with the prospective purchasers, told them the location of the defendant's house, that there were other offers on it, and the range within which the salesman thought their bid might successfully purchase the property. The salesman said that the vendor would probably accept \$8,500.

The listing contract provided for a sales price of \$9,500 and for a 5 percent brokerage fee. At the time the vendor talked to the purchasers, he did not know that they came through the plaintiff's firm. That knowledge did not come to him until after the contract of sale was signed.

Thus the broker, initiating a sale at \$8,500, failed to sell at the price in the listing agreement. Nonetheless, after the sale, he sued for his commission. At trial, the jury rendered a verdict in his favor. This judgment was first **reversed** by the Arizona Supreme Court, which held that the broker had breached his fiduciary duty of loyalty to his principal and that this breach, as a matter of law, barred any recovery of his

commission. It was then **modified** after a rehearing, leaving the issue of whether the broker acted in bad faith a question of fact for the jury to decide.[\[fn62\]](#)

In defense of the broker's statement that the purchasers could obtain the property for \$8,500, it might be argued that the statement was no more than an attempt to bring the parties together and that the broker left it to his principal to negotiate the best deal he could.[\[fn63\]](#)

If the salesman had only disclosed the other offers, or if he had given the purchasers a suggestion that an acceptable price might range up to the listing price of \$9,500, the court would probably not have regarded this as a

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breach of fiduciary duty.[\[fn64\]](#) Both of these disclosures only set the parameters for negotiations by the principals. A majority of the court would not have regarded this as a breach of fiduciary duty.[\[fn65\]](#) Justice Udall **dissented**, stating that

all the appellee intended by his statements to the purchasers was to hold their interest in the property until he could show it to them and the parties could be brought together. . . . Will not the court's opinion be construed as holding that if a broker states to a purchaser or even indicates in any manner that property might be acquired for less than the listed price his right to a commission is thereby forfeited? If such be the declared law of this state it will certainly give a wide avenue of escape to unscrupulous realty owners from paying justly what is owed to agents who have been the immediate and efficient cause of the sale of their property. . . .[\[fn66\]](#)

The first opinion's holding was that, as an objective matter, this broker's statement constituted a violation of his fiduciary duty at law. This might mean one of two things: either that the broker's duty was to bring in a price at least that stated in the listing agreement, or else that the broker had a duty to obtain the highest price possible for his or her client. A subsequent Arizona Court of Appeals opinion **rejected** the latter duty.[\[fn67\]](#) Although it would have provided a firm rule, the Court of Appeals noted that some Arizona cases stated otherwise,[\[fn68\]](#) but found no such language in *Haymes* and noted that *Haymes* cited an Alabama opinion requiring only that the broker "must exact from the purchaser the price, the terms, and

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conditions of sale which his employer has fixed".[\[fn69\]](#) Repeated use of *dicta* did not make it the law of the state. Indeed, the court continued:

There is a variety of reasons why a seller would be willing to sell property for a price under the optimum price available. Among these are tax considerations, quicker liquidity, concession from the purchaser, or a simple wish to expedite a sale. The facts of this case were considered by the jury in arriving at their determination of whether a breach had occurred and they may have found, on the facts presented, that the desirability of obtaining an immediate backup offer was preferable to re-listing and advertising the property at a higher price, particularly as the original contract had not been **rescinded** at the time the backup was entered into.[\[fn70\]](#)

These same reasons might also justify **rejection** of a rule requiring the broker to bring in the listing agreement's price. In both instances, a

broker might as easily be liable for overstating the price in the listing agreement.

On rehearing the *Haymes* court stated, "The evidence in this case presents a close question as to good or bad faith on the part of the broker. The trial court should have submitted that issue to the jury to decide."[\[fn71\]](#) The judgment was **reversed** and the case **remanded** for a new trial with directions to submit to the jury the question of the broker's bad faith.

This **reversal** means that in "close cases," the trier of fact will decide. In other cases, when the breach of duty appears flagrant, the court will still treat the question of good or bad faith as a matter of law. If the broker came to the vendor and said that the price of the listed property would have to be reduced, but then sold at the original listing price and pocketed the difference, his request would be tainted by the later facts, enough to warrant a legal implication of bad faith.[\[fn72\]](#) Although little discussed, the issues of the *Haymes* case lie at the heart of litigation over the fiduciary duties of brokers.

Issues similar to those in *Haymes* might be equally relevant to a broker's statement that "this offer is not negotiable" or "a final one" when the fact is the vendor is willing to negotiate further.[\[fn73\]](#)

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Silences may be important to a client, as when a prospective purchaser is negotiating for adjacent property as well as the client's. If the broker knows of the larger context of the negotiations, does she have a duty to disclose these other negotiations to her client?[\[fn74\]](#)

[\[fn5\]](#) See *Stevens v. Beegle*, 1994 Tenn. App. LEXIS 438, *6 (1994) (involving vendors' post-contract discovery that purchasers intended to raise pit bulldogs, and fears for the safety of relatives and neighbors, but finding no breach of duty).

[\[fn5.1\]](#) See *Michel v. Moore & Assocs., Inc.*, [67 Cal. Rptr. 3d 797](#), [801](#) (Cal.App.Ct. 2007) (**rejecting** a jury instruction stating otherwise).

[\[fn6\]](#) See *Jenkins v. Strauss*, [931 A.2d 1026](#), [1032-1033](#) (D.C. 2007); *Wheat v. Lindsley*, [906 So. 2d 782](#), [786](#) (Miss.App., 2004). See also *ARK Assocs. of Nassau, Inc. v. Hill*, 2005 N.Y. Misc. LEXIS 591 (N.Y.Sup.Ct., App. Term, Mar. 31, 2005).

[\[fn7\]](#) See *Hornung v. Fletcher*, 2005 Ohio App. 7078, *7 (Ohio App., Dec. 22, 2005).

[\[fn8\]](#) See Frederick W. Maitland, *Equity* 7 (1909).

[\[fn9\]](#) These three elements are based on a discussion in Gordon Smith, "The Critical Resource Theory of Fiduciary Duty," 55 *Vand. L.Rev.* 1399, 1402 (2002).

[fn10] See *Hornung, op. cit.*, at *6 (stating that the fiduciary acts "primarily for the benefit of another").

[fn11] See, e.g., Gregory Alexander, "A Cognitive Theory of Fiduciary Relationships," 85 *Corn. L. Rev.* 767, 782 (2000), and Jeffrey Rachlinski, "A Positive Psychological Theory of Judging in Hindsight," 65 *U. Chi. L. Rev.* 571 (1998).

[fn12] See *Givan v. Aldemeyer/Stegman/Kaiser, Inc.*, [788 S.W.2d 503](#) (Ky.App. 1990) (holding so, absent an agency relationship with vendor and purchaser, as to a broker, salesperson, or subagent).

[fn13] See *Ernst v. General Sec. Corp.*, 2002 Cal. App. Unpub. LEXIS 11391, *28 (Cal.App., Dec. 10, 2002) [quoting *Pierce v. Lyman*, [1 Cal. App. 4th 1093](#), [1101-1102](#) (Cal.App. 1991) (emphasizing this aspect of the obligation)].

[fn14] See *Goldkind v. Snider Bros.*, [467 A.2d 468](#) (D.C. 1983) (discussing collateral estoppel and *res judicata* defenses to an intentional misrepresentation action arising out of prior suit).

[fn15] See *Gibson v. Coldwell Banker Burnet*, [659 N.W.2d 782](#), [788](#) (Minn.App. 2003) (as to a duty of disclosure).

[fn16] See, e.g., *Ross v. Century 21 Bill Pike Realty*, 2003 Cal. App. Unpub. LEXIS 3571, **38-39 (Cal.App.Ct., Apr. 10, 2003).

[fn17] See *Re/Max Real Estate Partners, Inc. v. Lindsley*, [840 So. 2d 709](#) (Miss. 2003).

[fn18] See *Wisdom v. State of North Dakota ex rel. North Dakota Real Estate Comm'n*, [403 N.W.2d 19](#), [21-22](#) (N.D. 1987) (a broker's self-dealing established by the evidence and supported a suspension of license).

[fn19] See *Sawyer Realty Group, Inc. v. Jarvis Corp.*, [432 N.E.2d 849](#) (Ill. 1982).

[fn20] See *Hulse v. BHJ, Inc.*, [71 P.3d 262](#) (Wyo. 2003). See also *Binswanger of Pa., Inc. v. TRU Serv. Corp.*, 2003 U.S. Dist. LEXIS 9793, *15 (E.D. Pa., May 21, 2003).

[fn21] See *Victorio Realty Group, Inc. v. Ironwood IX*, [713 P.2d 424](#), [425](#) (Colo.App. 1985) (material fact dispute over agency of broker and accompanying duty of disclosure by failing to disclose third-party offer for property, self-dealing, and refusal to disclose identity of co-defendant purchasers from whom broker received a fee the equal of that plaintiff paid broker). See also *Miller v. Berkowski*, [297 N.W.2d 334](#), [338](#)

(Iowa 1980).

[fn22] See *Batson v. Strehlow*, 68 Cal. Rptr. 989, [441 P.2d 101](#) (Cal. 1968) (**distinguishing** between a broker with fiduciary duties and a finder without them). See also *Norville v. Palant*, [545 P.2d 454](#) (Ariz.App. 1976); *Monrose, Inc. v. Baldrige*, [423 So. 2d 467](#) (Fla.App. 1982); *Secan v. Dunbar*, [679 P.2d 526](#) (Ariz.App. 1983). See generally Romero, "Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine," 20 Ariz. L.Rev. 767, 769 (1978) (providing a review of the case law on fiduciary duty, *id.* at 769-779).

[fn23] See *Victorio Realty Group, Inc., op. cit.* [citation omitted, citing *Velten v. Robertson*, [671 P.2d 1011](#) (Colo.App. 1983)].

[fn24] See *Kirkruff v. Wisegarver*, 697 N.E.2d 406 (Ill. 1998), followed in *Bank One Okla., N.A. v. Trammel Crow Servs., Inc.*, 2003 U.S. Dist. LEXIS 23120 (N.D. Ill., Dec. 23, 2003) (so holding).

[fn25] See *Holtzman v. Blum*, [726 A.2d 818](#) (Md.App. 1999) (holding that the broker has, upon the vendors' cancellation of a sales contract, no fiduciary duty to point out its terms providing for the payment of a commission when the vendor defendants executed it, since the vendor is legally presumed to know its terms and so is estopped to **deny** them).

[fn26] See *Taylor v. Maile*, [127 P.3d 156](#), [161](#) (Idaho 2005).

[fn27] See *Action Real Est. Corp. v. Bulechek*, [309 N.W.2d 502](#) (Iowa 1981) (hereafter *Bulechek*).

[fn28] *Id.* at 504 [citing the Restatement, Agency, Second, § 390E and *Larson v. Thoma*, 121 N.W. 1059, 1061 (Iowa. 1909)].

[fn29] See *Panfel v. Boyd*, [367 S.E.2d 54](#) (Ga.App. 1988).

[fn30] See *Circle T Corp. v. Deerfield*, [444 P.2d 404](#) (Colo. 1968).

[fn31] *Id.* (withholding of a commission from a third party constitutes a secret profit violating a broker's duty of good faith and loyalty).

[fn32] See *Miller v. Boeger*, [405 P.2d 573](#) (Ariz.App. 1965).

[fn33] See *Anderson v. Thacher*, [172 P.2d 533](#) (Cal.App. 1966). See also *Bay Shore Props., Inc. v. Drew Corp.*, [565 So. 2d 32](#) (Ala. 1990) (if there is no meeting of minds as to the scope of broker's employment or if vendor has no control over the broker's actions, payment of commission

alone does not create an agency relationship).

[fn34] See *Circle T Corp. v. Deerfield*, [444 P.2d 404](#) (Colo. 1968) (recognizing that a fiduciary relationship encompasses technical fiduciaries as well as those, such as brokers, whom another trusts or confides in).

[fn35] See *Cornell v. Watson*, [578 P.2d 308](#) (Mont. 1978).

[fn36] *Id.* at 312.

[fn36.1] See *Michel v. Moore & Assocs., Inc.*, [67 Cal. Rptr. 3d 797](#), [801](#) (Cal.App.Ct. 2007) (defects in property noted years before listing subject of action for breach).

[fn37] See *Bulechek*, [309 N.W.2d at 504](#).

[fn38] See *Barrows v. Martin*, 2002 Cal. App. Unpub. LEXIS 4093, **10-11 (Cal.App., Feb. 7, 2002) (holding that broker's knowledge that others might be interested in property did not preclude his purchasing it, absent agency relationship).

[fn39] See *Kirkruff v. Wisegarver*, [697 N.E.2d 406](#) (Ill.App. 1998) (reviewing Illinois cases).

[fn40] *Id.* (where the vendor later decided to sell the listed property to the broker). See also *Roberts v. Lomanto*, [5 Cal. Rptr. 3d 866](#), [875-876](#) (Cal.App. 2003) (broker does not cease to be a fiduciary because she becomes a party to the transaction); *Perlman v. Snitzer*, 198 N.W. 879 (Neb. 1924) (broker violated duty when he procured net listing with prospect willing to pay more than listing price already identified). And sometimes a broker who represents that he or she can easily sell a property without any knowledge that it can be done, is found to have breached a duty of due diligence when the attempt later fails (thus demonstrating if not proving the lack of knowledge). And see *Lee v. Brodbeck*, [243 N.W.2d 331](#) (Neb. 1976).

[fn41] See *Devine v. Hudgins*, 163 A.2d 83, 84 (Me. 1932).

[fn42] See *Swallows v. Laney*, [691 P.2d 874](#), [877](#) (N.M. 1984) ("We conclude that the fiduciary relationship between a real estate broker or salesperson and his principal may, under certain circumstances, exist in the absence or after the expiration of a written listing agreement.").

[fn43] See *Stephens, Partain & Cunningham v. Hollis*, [242 Cal. Rptr. 251](#) (Cal.App. 1987) (as to a mortgage broker becoming such a trustee).

[fn44] See *Bush v. Palermo Realty, Inc.*, [443 So. 2d 104](#) (Fla.App. 1983) (in action by prospective purchaser for breach of fiduciary duty, **grant** of summary judgment for broker **reversed**, citing *Zichlin, infra*, this chapter, after broker with open listing used a copy of purchaser's feasibility study as basis for his own successful offer to purchase property under study; and containing a short discussion of the leading cases).

[fn45] See *Letsos v. Century 21-New W. Realty*, [675 N.E.2d 217](#), [226-227](#) (Ill.App. 1996) (continuing duty breached by broker's low-balling the listed property's development value after listing vendor decided to sell property to broker), noted at 22 S. Ill. U.L.J. 995, 1015-1019 (1998). See also *Mabry v. Tom Stanger & Co.*, [33 P.3d 1206](#) (Colo. 2001) (holding that a duty of loyalty does not terminate at the end of the listing period, but applies during the extension period as well when the broker exerts undue pressure on the vendor to sell).

[fn46] See *Bruce v. Owens*, 2000 Tex. App. LEXIS 4294 (Tex.App., June 28, 2000) (involving first \$11,500 and second \$27,500 prices).

[fn46.1] See *Blickman Turkus, L.P. v. MF Downtown Sunnyvale, LLC*, [76 Cal. Rptr. 3d 325](#), [335](#) (Cal.App.Ct. 2008).

[fn47] See *Armstrong v. Guigler*, [652 N.E.2d 355](#), [356](#) (Ill.App. 1995) (**reversing** a trial court and permitting a suit brought nine years and ten months after the fact for a breach of a fiduciary duty implied by law in a listing agreement, and stating: "We hold that when a fiduciary relationship is created in a written document, claims for a breach of fiduciary duty are governed by the ten-year statute of limitations for written contracts.").

[fn47.1] See *Ross v. Century 21 Bill Pike Realty*, 2003 Cal. App. LEXIS 3571, **25-29 (Cal.App.Ct., Apr. 10, 2003) (involving a failure to disclose land use restrictions).

[fn47.2] *Id.* at **37-38. See also *Rossmann v. Lazarus*, 2008 U.S. Dist. LEXIS 68408 (E.D. Va., Sept. 3, 2008) (a real estate and mortgage brokerage opinion) (refusing to use the discovery rule unless clearly directed to do so by Virginia law).

[fn47.3] See *TTAP Inv. Co., Inc. v. Bojanowski*, 2008 Phila. Ct. Com. Pl. LEXIS 190, *8 (Pa. Common Pleas, July 31, 2008) (as to the issue of whether the facts at issue were reasonably discoverable by the plaintiff).

[fn48] *Cf. Hulse v. BHJ, Inc.*, [71 P.3d 262](#) (Wyo. 2003).

[fn49] See *Daubman v. CBS Real Estate Co.*, [573 N.W.2d 802](#), [811](#) (Neb.App. 1998).

[fn50] See *Goldberg Realty Group v. Weinstein*, [669 A.2d 187](#), [190](#) (Me. 1996) [citing *Devine v. Hudgins*, [163 A. 83](#), [84](#) (Me. 1932), *Desfosses v. Notis*, [333 A.2d 83](#), [87](#) (Me. 1975), and the Restatement (Second), Agency, § 13 (1957)].

[fn50.1] See *Century Land Dev., L.P. v. FFL Dev., L.L.C.*, 2008 U.S. Dist. LEXIS 33871, 33873 (S.D. Fla., Apr. 24, 2008) (two separate, related opinions **dismissing** many claims, but not those for breach of fiduciary duty).

[fn51] See *DeBaggis v. Smythe Cramer Co.*, 1995 Ohio App. LEXIS 2392 (Ohio App., Cuyahoga Cty., June 8, 1995) (**affirming** the refusal to certify a class).

[fn52] *Id.*

[fn53] *Id.*

[fn54] See *Daubman v. CBS Real Estate Co.*, [573 N.W.2d 802](#), [811-812](#) (Neb.App. 1998), **rev'd**, [580 N.W.2d 552](#) (Neb. 1998) (concluding that the defendant broker violated fiduciary duties in misrepresenting that the purchasers were pre-approved for financing, in contacting the landlord of an apartment vendors could rent, and in pressuring vendors to sign a lease, as well as by advocating sale when it was not in the vendors' interest to sell).

[fn55] See *Vivian Arnold Realty Co. v. McCormick*, [506 P.2d 1074](#), [1078-1079](#) (Ariz.App. 1973), as quoted in *Norville v. Palant*, [545 P.2d 454](#) (Ariz.App. 1976). See also *Yogt v. Town & Country Realty of Lincoln, Inc.*, [231 N.W.2d 496](#), [501](#) (Neb. 1975) ("A real estate agent owes a fiduciary duty (1) to use a reasonable care, skill, and diligence in procuring the greatest advantage to his client, and (2) to act honestly and in good faith, making full disclosures to his client of all material facts affecting his interests.").

[fn56] See *Schepers v. Lautenschlager*, [112 N.W.2d 767](#), [773](#) (Neb. 1962). See also *Firmature v. Brannon*, [388 N.W.2d 119](#), [121](#) (Neb. 1986) (emphasizing the duty of reasonable care, skill, and diligence). And see *Rose v. Showalter*, [701 P.2d 251](#), [252](#) (Idaho 1985).

[fn57] See *Barta v. Kindschuh*, [518 N.W.2d 98](#) (Neb. 1994).

[fn58] See *Zwick v. United Farm Agency*, [556 P.2d 508](#) (Wyo. 1976) (discussing all three generally).

[fn59] See *Daubman v. CBS Real Estate Co.*, [580 N.W.2d 552](#), [559](#) (Neb. 1998) ["More specifically, a real estate agent owes the principal a fiduciary duty to use reasonable care, skill, and diligence in performing her or his obligations and to act honestly and in good faith. The rule requiring an agent to act with utmost good faith toward the principal places the agent under a legal obligation to make a full, fair, and prompt disclosure to the principal of all facts within the agent's knowledge which are or may be material to the matter in connection with which the agent is employed, which might affect the principal's rights and interests or influence the principal's action in relation to the subject matter of the employment, or which in any way pertain to the discharge of the agency which the agent has undertaken." (citations omitted)]. See also *Brezina v. Hill*, [277 N.W.2d 224](#) (Neb. 1979).

[fn60] See *Daubman*, [573 N.W.2d at 802](#) ("In summary, . . . a broker or agent owes his or her principal the following duties: (1) to utilize the skill necessary to accomplish the task undertaken, (2) to be honest and act in good faith, (3) to be loyal, (4) to disclose all material facts, (5) to possess no undisclosed adverse interests, and (6) to be obedient to the principal."), *rev'd* as to result, [580 N.W.2d 552](#) (Neb. 1998).

[fn61] See *Haymes v. Rogers*, [219 P.2d 339](#) (Ariz. 1950), *rev'd* and *remanded* on rehearing, [222 P.2d 789](#) (Ariz. 1950), noted at 4 Vand. L. Rev. 349 (1951).

[fn62] See *Haymes*, [222 P.2d 789](#), 17 A.L.R.2d 902 (Ariz. 1950).

[fn63] See *Wolf v. Casamento*, [185 So. 537](#) (La.App. 1939).

[fn64] If the broker had told the purchaser that he was authorized to sell property for \$6,500, when in fact he was authorized to sell at \$6,000 if the vendor gave his permission, has the broker misrepresented his authority, and is he liable in tort to the purchaser? An Arizona court held that he was not, unless the purchaser could show that he had acted on the representations to his injury. See *Sanders v. Stevens*, 23 Ariz. 370, 203 P. 1083 (1922).

[fn65] See *Haymes*, [219 P.2d 339](#).

[fn66] *Id.* at 343. See also *Bay Shore Props., Inc. v. Drew Corp.*, [565 So. 2d 32](#) (Ala. 1990) (if there is no meeting of the minds as to the scope of broker's employment or if vendor has no control over the broker's actions, payment of commission alone does not create an agency relationship).

[fn67] See *Musselman v. Southwinds Realty, Inc.*, [704 P.2d 814](#), [816](#) (Ariz.App. 1985) (broker has no duty to obtain the highest price for listed property and stating: "Nor can we find any other authority for the

proposition that the broker is obligated as a matter of law to obtain the highest price possible for the property.").

[fn68] See, e.g., *Vivian Arnold Realty Co. v. McCormick*, [506 P.2d 1074](#) (Ariz.App. 1973) (dicta).

[fn69] See *Haymes*, [219 P.2d 339](#), [341](#) [citing *Alford v. Creagh*, 62 So. 254 (Ala.App. 1913)].

[fn70] See *Musselman*, *op. cit.*, [704 P.2d at 816](#).

[fn71] [222 P.2d 789](#), [790](#) (1950).

[fn72] See *Pawlowic v. Pearce*, [207 N.E.2d 155](#) (Ill.App. 1965).

[fn73] Cf. *Marbuger v. Seminole Pipeline Co.*, [957 S.W.2d 82](#) (Tex.App. 1997) (finding such language merely assertive of a bargaining position and not such as to create a cause of action for misrepresentation).

[fn74] See *Olsen v. Vail Assocs. Real Estate, Inc.*, [935 P.2d 975](#) (Colo. 1997) (holding not, but indicating that if the broker knew the sales price of the adjacent property or that a contract of sale had been executed for it, she would have a duty to disclose that price or contract).