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ARTICLE

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INTRODUCTION

Traditionally, purchasers of real estate could expect little assistance from the real estate agent[1] with respect to defects in the real property being negotiated. The agent, as agent of the seller, generally owed no legal duties to the purchaser.[2] Consequently, under the

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1. Courts use several terms for real estate representatives including agents, brokers, and realtors. For simplicity, this article will refer to these representatives as "agents."

2. This privity requirement was articulated by Chief Judge Cardozo in the frequently

doctrine of caveat emptor, the courts repeatedly rejected claims by purchasers against agents.[3]

Over the years, however, the courts have become increasingly receptive to claims by purchasers against agents. The Supreme Court of Wyoming observed this trend in 1961: "[i]t must be noted that the doctrine of caveat emptor is employed by modern courts under new standards of business ethics which demand that statements of fact be at least honestly and carefully made."[4]

Virtually every jurisdiction has now backed away from a strict application of the doctrine of caveat emptor, as it has been found to be too harsh for modern society:

> The rule of caveat emptor . . . is a statement of the mores of medieval [times] through nineteenth-century England (and America), and apparently worked well in agricultural societies, as evidenced by its centuries of acceptance. However, the sale of farm acreage [with] simple residence — the type of transaction to which caveat emptor originally addressed itself — is very different from the sale of a modern home, with complex plumbing, heating, air conditioning, and electrical systems, which is possibly built on ground considered unsuitable for construction until recent years.[5]

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cited opinion of Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931) (holding that a public accountant was not liable to third parties for negligent misrepresentation).

> The defendants owed to their employer a duty imposed by law to make their certificate without fraud, and a duty growing out of contract to make it with the care and caution proper to their calling . . . . To creditors and investors to whom the employer exhibited the certificate, the defendants owed a like duty to make it without fraud . . . . A different question develops when we ask whether they owed a duty to these to make it without negligence. If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.

Id. at 444 (citations omitted).

3. *See, e.g.*, Traverse v. Long, 135 N.E.2d 256, 259 (Ohio 1956).

> The principle of caveat emptor applies to sales of real estate relative to conditions open to observation. Where those conditions are discoverable and the purchaser has the opportunity for investigation and determination without concealment or hindrance by the vendor, the purchaser has no just cause for complaint even though there are misstatements and misrepresentations by the vendor not so reprehensible in nature as to constitute fraud.

Id.; *see also* GEORGE W. WARVELLE, A TREATISE ON THE AMERICAN LAW OF VENDOR AND PURCHASER OF REAL PROPERTY § 259 (2d ed. 1902).

4. Lawson v. Schuchardt, 363 P.2d 90, 93 (Wyo. 1961).

5. Wilhite v. Mays, 232 S.E.2d 141, 142-43 (Ga. Ct. App. 1976), *aff'd*, 235 S.E.2d 532 (Ga. 1977); *see also* Hagar v. Mobley, 638 P.2d 127 (Wyo. 1981) (holding that an agent's

Accordingly, courts have been carving out exceptions to the doctrine of caveat emptor. Until recently, the precise contours of these exceptions were not clear. However, through expansions and innovations in the law, it has become apparent that virtually all exceptions to caveat emptor occur in misrepresentation cases.[6] Five types of misrepresentations have been recognized by courts: (1) fraudulent, (2) reckless, (3) negligent, (4) innocent, and (5) silent. This article will analyze each category in turn.

I. FRAUDULENT MISREPRESENTATION

A "fraudulent" misrepresentation is a false statement about a material fact knowingly made with the intent to deceive, and which is reasonably believed and relied upon by another to his or her detriment.[7] A broken promise will constitute a fraudulent misrepresentation where the agent makes the promise with the present intent not to perform it;[8] although "[a] fraudulent intention not to perform a promise may not be inferred as existing at the time the promise is made from the mere fact of nonperformance."[9]

Technically accurate statements about defects in real property may also constitute fraudulent misrepresentation, if they are made to create a false impression. In *Remeikis v. Boss & Phelps, Inc.*,[10] a

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representations about legal documents, if made, must be based on a personal reading of the documents and not upon the seller's statements). In *Hagar*, the sellers of a leasehold interest in a resort told the agent that the lease expired in 45 years and included options to renew every 25 years. *Id.* at 132. The agent conveyed this information to the purchasers without verifying the accuracy of the terms of the lease. *Id.* at 132, 134. Subsequently, the purchasers discovered that the lease actually expired in five years and had only one renewal option, for thirty years. *Id.* at 132. The court noted that agents cannot use the doctrine of caveat emptor to shield them from liability to purchasers:

> In this state, it is apparent that the rule of caveat emptor does not apply to those dealing with a licensed real estate agent. Though not occupying a fiduciary relationship with prospective purchasers, a real estate agent hired by the vendor is expected to be honest, ethical, and competent and is answerable at law for breaches of his or her statutory duty to the public.

Id. at 137 (quoting Dugan v. Jones, 615 P.2d 1239, 1248 (Utah 1980)); *see also infra* notes 37-111 and accompanying text.

6. *See infra* parts I. to V.

7. BLACK'S LAW DICTIONARY 662 (6th ed. 1990); *see also* Bennett v. Kiggins, 377 A.2d 57 (D.C. 1977), *cert. denied*, 434 U.S. 1034 (1978).

8. Holland v. Lentz, 397 P.2d 787, 795 (Or. 1964).

9. *Id.* (quoting Conzelmann v. Northwest Poultry & Dairy Prod. Co., 225 P.2d 757, 765 (Or. 1950)). The *Conzelmann* court went further, stating that "[o]ther circumstances of a substantial character must be shown in addition to non-performance before such inference of wrongful intent may be drawn." 225 P.2d at 765.

10. 419 A.2d 986 (D.C. 1980).

"termite clearance report" was given to the plaintiffs at the closing, pursuant to a clause in the sales contract.[11] The report stated that there was " 'no *visible* evidence of present termite activity' and 'no *visible* evidence of structural termite damage.' "[12] In reality, however, the termite damage was fairly extensive, and the purchasers sued the real estate agent for breach of contract and fraud.[13] After reviewing the circumstances and evidence presented, although not expressing an opinion as to the merits of the case, the District of Columbia Court of Appeals found that there were issues of material fact.[14] The court, therefore, remanded the case for a jury trial,[15] but nevertheless the court did express its views on "literal truth" aspects of agent representations.[16]

Additionally, statements about future events may constitute misrepresentations if the agent has a real and significant influence over such future events and a present intention to act in a manner inconsistent with such representations. In *Executive Development, Inc. v. Smith*,[17] the agent allegedly told the buyer that there would not be any problem getting the property rezoned for townhouse development.[18] However, after the closing, the agent actively opposed and solicited others to oppose the buyer's rezoning proposal, which was ultimately disapproved.[19] The Supreme Court of Alabama held that the agent's statement (that the property was suitable for rezoning) embodied an implicit representation that the agent would not oppose the rezoning.[20] The court found enough evidence to support a finding that, at the time the statements were made, the agent intended to oppose the rezoning, and that the agent's experience with and knowledge of the rezoning process created a strong likelihood

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11. *Id.* at 988-89.
12. *Id.* at 989 (emphasis added).
13. *Id.* at 988.
14. *Id.* at 992.
15. *Id.*
16. The court stated:

> Even if Western's July 9 report was not literally false, in that it said there was no visible evidence of termite damage, a statement literally true is actionable if made to create a false impression. Furthermore, even silence about the material fact of termite damage can amount to a false representation in circumstances where [the real estate agent] would be expected to speak, as here, having undertaken an examination of the premises for appellant's protection.

Id. at 989-90 (citations omitted).
17. 557 So. 2d 1231 (Ala. 1990).
18. *Id.* at 1232.
19. *Id.*
20. *Id.* at 1233-34.

that the buyer's request would be defeated.[21]

In contrast, an agent who has no knowledge about material defects in the subject property may construct a more successful defense against a claim for fraudulent misrepresentation if the agent recommends, prior to the closing, that the buyer obtain independent advice. In *Connor v. Merrill Lynch Realty, Inc.*,[22] the agents informed the purchasers that there was no evidence of prior flooding or flood damage to the subject house.[23] The seller of the house, however, told the purchasers that "a 'small trickle' of water sometimes occurred [in the basement] during a heavy rain due to a hairline crack in the concrete foundation."[24] After the seller's explanation of the flooding, the agents stated that they could not see any evidence of flooding other than that already visible to the purchasers, and recommended that the purchasers hire a housing inspector to examine the basement for water damage.[25] Relying on these statements and observations, the purchasers bought the house, only to incur serious flooding problems very soon thereafter.[26] The Illinois appellate court affirmed a grant of summary judgment in favor of the defendant-agents on the fraudulent misrepresentation claim.[27] The court found that the purchasers did not have a legally viable claim for fraudulent misrepresentation against the agent because (1) there was no evidence the agent knew of prior flooding problems, and (2) the agent recom-

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21. *Id.* at 1234.

22. 581 N.E.2d 196 (Ill. App. Ct. 1991).

23. *Id.* at 199.

24. *Id.*

> Seller went on to explain that in 1980, the Home did experience significant flooding as a result of the Metropolitan Sanitary District mistakenly installing the wrong size pipe during the Deep Tunnel Project (Deep Tunnel flooding). Seller represented that the situation had been corrected and that the basement had never flooded again in the 20 years Seller lived in the Home.

Id.

25. *Id.* at 201. This recommendation was pursuant to an inspection rider which was part of the purchase contract. The rider gave the purchasers the right to have the house inspected within three days of the seller's acceptance "and to give written disapproval of the contract within those three days if [the purchasers] did not approve of the condition of the Home." *Id.* at 199.

26. *Id.* at 200. Not only did the house repeatedly flood with large amounts of sewage and water, but upon removal of a carpet left by the seller from the flood area, the purchasers discovered many floor tiles to be missing, and that the placement of the carpet by the seller was such that it had concealed and precluded detection of the tile damage. *Id.* It was further discovered that the neighborhood was "subject to continual periodic flooding" and that the agents had known about the flooding tendencies of the area. *Id.*

27. *Id.* at 204.

mended, and the buyer used, an independent home inspector.[28] "The trial court properly found that plaintiffs were on notice of a potential defect. 'A person may not enter into a transaction with his eyes closed to available information and then charge that he has been deceived by another.' "[29]

However, a buyer's independent investigation and discovery of defects in the property does not automatically shield the agent from liability when the agent encourages the purchaser to ignore the results of the investigation. In *In re Jogert*,[30] the buyer of a lumber yard hired some experts to independently investigate the finances of the business, resulting in a finding of near insolvency.[31] Irrespective of such finding, the buyer purchased the lumber yard when the agent insisted that he knew the business better than the experts, and that the experts' independent investigation and reading of the financial records were flawed.[32] After the closing, the buyers discovered the true financial condition of their purchase. The Ninth Circuit held that the buyer had reasonably relied upon the agent's statements, notwithstanding that an independent investigation was performed, and, therefore, had a viable claim against the agent for fraudulent misrepresentation.[33]

A purchaser's reliance upon an attorney's inspection of legal documents may also preclude a claim against the agent for fraudu-

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28. *Id.* at 201-02. The court found it important that the purchasers could have arranged for a more inclusive written inspection. *See id.* at 199. However, they chose a less expensive inspection in which the inspector merely walked through the house and orally advised the purchasers of the observed defects. *Id.*

29. *Id.* (quoting Central States Joint Bd. v. Continental Assurance Co., 453 N.E.2d 932, 936 (Ill. App. Ct. 1983)).

30. 950 F.2d 1498 (9th Cir. 1991).

31. *Id.* at 1506.

32. *Id.*

33. *Id.* at 1506-07.

> True, the Buyer's investigation was extensive and conducted by a team of professionals—including an attorney, broker, financial advisor and an accountant—over a period of eight months. However, the record also indicates that [the agent] continually told the Buyer that its own investigation was flawed because the books had been "mickey moused."
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> . . . [The agent] continually held himself out as an "expert in financial matters" with "superior knowledge of [the lumber yard's] financial condition." He insisted to the Buyer that the lawyers and other advisors did not understand the company's condition and even advised [the purchasers] to avoid seeking their expert's advice.
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> Thus, even if the Buyer's investigation was able to yield the truth, [the agent] had enormous persuasive powers over them. . . . The fact that some kind of investigation is made does not preclude reliance.

Id.

lently misrepresenting the contents of the documents. In *Amplicon, Inc. v. Marshfield Clinic*,[34] the agent incorrectly told the lessee that no deposit was required on the lease at issue and that only a certain number of payments would be due.[35] The district court held, however, that even though the agent misrepresented the terms of the lease agreement, the lessee's reliance on the agent's representations was unreasonable and unjustified where the lessee's attorney independently analyzed and reviewed the lease.[36] Thus, in some circumstances, even when the agent has an intent to deceive, the plaintiff may be unable to succeed in an action for fraudulent misrepresentation.

II. RECKLESS MISREPRESENTATION

A "reckless" misrepresentation is a factual misrepresentation made without concern for its truth or falsity.[37] Similar to fraudulent misrepresentations, a reckless misrepresentation requires some intent to mislead on the part of the speaker.[38] Additionally, as in the case of a negligent misrepresentation, there is no requirement that the agent know that the representation is inaccurate.[39]

Courts may treat an agent's pretense of knowledge as the legal equivalent of actual knowledge that the statement is false. In *Sodal v. French*,[40] the agent represented that a well which constituted the home's water supply was adequate for the water needs of the purchasers.[41] In fact, the agent had no knowledge of whether this statement was true or false.[42] The purchasers sued the agent for fraud when they later discovered that the well was insufficient to meet their domestic water needs.[43] The Colorado Court of Appeals held that the agent had acted in a reckless manner, which was equivalent to fraudulent intent and knowledge:

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34. 786 F. Supp. 1469 (W.D. Wis. 1992) (involving an action for alleged misrepresentations involving a lease for computers).

35. *Id.* at 1477.

36. *Id.* at 1478.

37. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 741-42 (5th ed. 1984) [hereinafter PROSSER & KEETON].

38. *Id.* Scienter or fraudulent intent is present when the representation is made without any belief as to its truth, or with reckless disregard to whether it is true or false. *Id.*

39. *See* Sodal v. French, 531 P.2d 972 (Colo. Ct. App. 1974), *aff'd, sub nom.*, Slack v. Sodal, 547 P.2d 923 (Colo. 1976); *see also infra* part III.

40. 531 P.2d 972.

41. *Id.* at 973.

42. *Id.*

43. *Id.*

> It is not necessary, in order to constitute a fraud, that the party who makes a false representation should know it to be false. He who makes a representation as of his own knowledge, not knowing whether it be true or false, and it is in fact untrue, is guilty of fraud as much as if he knew it to be untrue. In such a case he acts to his own knowledge, falsely, and the law imputes a fraudulent intent.[44]

Additionally, in an action for reckless misrepresentation, it may be irrelevant that an agent lacks knowledge of concealed defects, or that an agent's statement is not deliberately deceptive,[45] if the agent shows some pretense of knowledge.[46] In *Spargnapani v. Wright*,[47] the agent represented that the house in question could be heated for "a little over a hundred dollars a year."[48] In fact, a defect in the boiler made it impossible to heat the house at all.[49] The Municipal Court of Appeals for the District of Columbia held that the purchasers could recover without proving a deliberate deception:[50]

> Here the broker displayed a "pretense of knowledge," conveyed to plaintiffs in the form of a representation . . . . Innocent though the pretended knowledge may have been, it was in fact baseless. The law does not, in such a situation, withhold its aid from one who has been led into a contract to his detriment.[51]

Thus, recklessness may be imputed without proof of deliberate deception.

Moreover, since an agent's reckless misrepresentation may involve "legal malice,"[52] courts may award punitive damages against

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44. *Id.* (quoting Stimson v. Helps, 10 P. 290, 291 (Colo. 1885)).
45. *See* Spargnapani v. Wright, 110 A.2d 82, 83-84 (D.C. 1954).
46. *Id.* at 84.
47. 110 A.2d 82.
48. *Id.* at 84.
49. *Id.*
50. *Id.*

> If the broker innocently represented that the heating plant was in workable condition and was mistaken in that representation, or made the representation without knowing whether it was true or false, the injured party may recover in an action for fraud. [citations omitted].
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> . . . [O]n the defendant's own evidence their selling agent did not disclaim such knowledge; on the contrary she represented that there was no defect when the opposite was true. . . . "Fraud includes the pretense of knowledge when knowledge there is none."

Id. at 83-84 (citations omitted).

51. *Id.* at 84.
52. *See* Ackmann v. Keeney-Toelle Real Estate Co., 401 S.W.2d 483, 489 (Mo. 1966). The court defined "legal malice" as " 'the intentional doing of a wrongful act without just

the agent. In *Ackmann v. Keeney-Toelle Real Estate Co.*,[53] the agent advertised that the water supply for a new housing development under construction was "state approved" despite the fact that it was not, and, in addition, the water had a heavy mineral content.[54] The purchasers, relying on the taste of the water and advertisements touting that the water was state approved, bought a house in the development.[55] After experiencing problems with the water,[56] the buyers brought suit against the agent. The Missouri Supreme Court held that punitive damages were warranted because the "water situation at the subdivision was not as stated in the advertisements and . . . the representations were made intentionally for the wrongful purpose of inducing the public, including plaintiffs, to believe that good and sufficient water was available for residence purposes."[57]

A misrepresentation may not be reckless, however, if it is made without the intent to deceive and the agent believes it to be true, through reliance on the seller's statements.[58] In *Suzuki v. Gateway Realty of America*,[59] the agent incorrectly represented the house's square footage and incorrectly stated that the house was well constructed.[60] The Supreme Court of Nebraska held that this was not a reckless misrepresentation because the agent merely repeated the seller's representations; reasonably believed the representations to be true; had informed the purchasers of a variance in the figures; and had not made the representations with the intent to deceive.[61] Thus, in certain circumstances where the agent has not deliberately

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cause or excuse [without] . . . the necessity [of] showing . . . spite or ill will, or that this particular act was willfully or wantonly done.' " *Id.* (quoting Brown v. Sloan's Moving & Storage Co., 296 S.W.2d 20, 26 (Mo. 1956)).

53. 401 S.W.2d 483.

54. *Id.* at 485-86.

55. *Id.* at 486. While contemplating purchasing a home, the buyers were shown a model home in the development, during which time the agent had given them a glass of water. *Id.* After drinking it, the plaintiff said " '[t]hat's one thing we don't have to worry about. We got good drinking water here.' " *Id.* The agent knew that the water for the model home had been trucked in from the City of St. Charles, yet said nothing. *Id.* Had the purchasers known that the water supply was not State approved, they would not have purchased the home. *Id.*

56. The buyers and their neighbors in the subdivision all experienced the same problems with the water: it was extremely salty, unsuitable for drinking, and smelled like rotten eggs. *Id.* Additionally, children in the area got diarrhea from the water. *Id.*

57. *Id.* at 489.

58. *See* Suzuki v. Gateway Realty of America, 299 N.W.2d 762 (Neb. 1980).

59. 799 N.W.2d 762.

60. *Id.* at 766-67. Although the discrepancies complained of were not readily apparent, the agents had informed the purchasers of the inaccuracy of the square footage figure supplied by the sellers. *Id.* at 767.

61. *Id.*

deceived the purchaser-plaintiff, the agent may escape liability for reckless misrepresentation.

III. NEGLIGENT MISREPRESENTATION

An agent may be liable for misrepresentation even when intent to mislead is not proven, as is required in actions for fraudulent or reckless misrepresentation. A "negligent" misrepresentation is an inaccurate statement which a reasonably careful and competent agent should have known was false.[62] Under this standard, agents have constructive knowledge of all defects they *should* have discovered.[63] Thus, to avoid liability, agents must perform a reasonable investigation of the premises prior to asserting that there are no defects.[64]

Courts frequently utilize the formulation for negligent misrepresentation found at section 552 of the *Restatement (Second) of Torts*:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[65]

The commentary to section 552 further states that the amount of information required to be supplied depends upon the circumstances of the transaction.[66] The recipient of the information "is entitled to expect that the supplier [of the information] will exercise that care and competence in its ascertainment which the supplier's business or profession requires and which therefore, the supplier professes to have by engaging in it."[67] Consequently, the purchaser is arguably justified in relying upon the information imparted by the agent because of the agent's possession of superior expertise and knowledge.

This "reasonable care" standard, as verbalized in *Restatement (Second) of Torts*, permeates the case law in this area and imposes a duty on agents in a variety of situations. One such situation arises when pending construction may affect the value of the subject prop-

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

63. *See id.*

64. *See id.* § 552 cmt. e. "[T]he recipient is entitled to expect that such investigations as are necessary will be carefully made . . . ." *Id.*

65. *Id.* § 552(1).

66. *See id.* § 552 cmt. e.

67. *Id.*

erty. *Powell v. Wold*,[68] involved an agent who claimed to be unaware of any factors that might negatively affect the property value.[69] In fact the agent knew or should have known that highway construction, which was about to be commenced next to the property, would have a negative affect on the value of the property.[70] When the purchasers subsequently learned of the pending highway construction, they brought suit against the agent.[71] The Court of Appeals of North Carolina found that the purchasers asserted a legally viable claim for negligent misrepresentation because North Carolina had adopted the requirements set forth in the *Restatement (Second) of Torts* for a cause of action sounding in negligent misrepresentation.[72]

Even when an agent has a genuine, honest belief that a particular fact is true, his or her sincerity may be irrelevant if that belief is not based upon a reasonable inspection of the premises. In *Rodgers v. Johnson*,[73] the purchaser was assured by the agent that problems in connection with the foundation of the house had been corrected.[74] Nevertheless, after the closing, serious problems regarding the foundation developed, precipitating a lawsuit.[75] The Louisiana Court of Appeals found that questions of credibility arose when it was unclear whether the agent knew or should have known of the continuing problems, and, therefore, remanded the case for trial on the issue of negligent misrepresentation.[76]

By the same token, the agent might not be insulated from liability when she passes on information from the seller without checking its accuracy. In *Tennant v. Lawton*,[77] the agent, in sole reliance upon seller's representations,[78] told the purchasers that the subject property's septic tank had previously passed the required tests in order to

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68. 362 S.E.2d 796 (N.C. Ct. App. 1987).

69. *Id.* at 797.

70. *Id.* at 797, 799.

71. *Id.* at 796.

72. *Id.* at 799. After the complaint was filed, the defendants made a motion to dismiss, on the grounds that the complaint failed to state a claim upon which relief could be granted. *Id.* at 797. After a review of the allegations and North Carolina case law pertinent to the fraud cause of action, the court of appeals reversed the trial court, reinstated the complaint, and remanded on the issues of negligent misrepresentation, fraud and unfair trade practices. *Id.* at 800.

73. 557 So. 2d 1136 (La. Ct. App. 1990).

74. *Id.* at 1139.

75. *Id.* at 1137.

76. *Id.* at 1139-40.

77. 615 P.2d 1305 (Wash. Ct. App. 1980).

78. *Id.* at 1308.

obtain a permit.[79] After the closing, the purchasers discovered that the property had not, in fact, passed such test.[80] The failure to pass the required test resulted in a reduction of the value of the land, and prevented the purchasers from obtaining the necessary permit.[81] The Court of Appeals of Washington held that the agent had negligently misrepresented a material fact to the purchasers and was, therefore, liable to the purchasers for their damages.[82] "[The agent] failed to take the simple steps within her area of expertise and responsibility which would have disclosed the absence of any health district approved site on the subject property."[83] The court explained the public policy behind imposing a duty of reasonable care on agents, as follows:

> The underlying rationale of [the agent's] duty to a buyer who is not his client is that he is a professional who is in a unique position to verify critical information given him by the seller. His duty is to take reasonable steps to avoid disseminating to the buyer false information.[84]

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79. *Id.* at 1310.
80. *Id.* at 1308.
81. *See id.*
82. *Id.* at 1310.
83. *Id.*
84. *Id.* at 1309. Another case illustrating the danger faced by agents volunteering unverified information to prospective buyers is Mertens v. Wolfeboro Nat'l Bank, 402 A.2d 1335 (N.H. 1979). Therein, the agent informed the prospective purchasers that the subject property's septic system was in good repair. *Id.* at 1336. After signing the purchase agreement, but prior to the closing, the purchasers discovered that the septic system was defective and needed to be replaced. *Id.* The purchasers proceeded with the closing and subsequently sued the agent for the cost of replacing the septic system. *Id.* The Supreme Court of New Hampshire, finding that the evidence supported a conclusion that the agent had negligently misrepresented the condition of the septic system, remanded for trial on that issue, stating that " 'one who volunteers information to another not having equal knowledge, with the intention that he will act upon it, [has a duty] to exercise reasonable care to verify the truth of his statements before making them.' " *Id.* at 1337 (quoting McCarthy v. Barrows, 384 A.2d 787, 788 (N.H. 1978)); *see also* Bevins v. Ballard, 655 P.2d 757 (Alaska 1982). In *Bevins*, the sellers told the agent that a well on the property was in good condition. *Id.* at 759. The agent conveyed this information to the purchasers when, in fact, the well did not provide adequate water, requiring the purchasers to deepen the well. *Id.* The Supreme Court of Alaska held the agent to be strictly liable, stating that "[a]ny other rule would permit brokers to use misleading statements in selling the property, yet remain immune from liability by simply remaining ignorant of the property's true characteristics." *Id.* at 763. The *Bevins* court cited with approval RESTATEMENT (SECOND) OF TORTS § 552C(1) (1977):

> One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

When an agent owes a duty of disclosure, the agent's failure to investigate before making such a disclosure may constitute a negligent misrepresentation. The leading case combining the duty to disclose with the duty to investigate is *Easton v. Strassburger*.[85] In *Easton*, the court held that the special expertise and knowledge of the agent in his position as a real estate broker required him to disclose to the purchaser all material defects that were "reasonably discoverable."[86] Additionally, the California appellate court held that the agent had a duty to exercise reasonable care in making a predisclosure investigation of the property's defects:

> Definition of the broker's duty to disclose as necessarily including the responsibility to conduct a reasonable investigation thus seems to us warranted by the pertinent realities. Not only do many buyers in fact justifiably believe the seller's broker is also protecting their interest in securing and acting upon accurate information and rely upon him, but the injury occasioned by such reliance, if it be misplaced, may well be substantial . . . . It seems relevant to us, in this regard, that the duty to disclose that which should be known is a formally acknowledged professional obligation that it appears many brokers customarily impose upon themselves as an ethical matter . . . .[87]
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> . . . .
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> In sum, we hold that the duty of a real estate broker, representing the seller, to disclose facts . . . includes the affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal.[88]

Therefore, real estate agents should perform a reasonable inspection of the property before making representations about its fea-

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Id. at 762. In Gauerke v. Rozga, 332 N.W.2d 804 (Wis. 1983), the sellers told the listing agent that a resort hotel had five and one-half acres of land with six hundred feet of river frontage. *Id.* at 805. The listing agent, without verifying its accuracy, conveyed this information to the selling agent, who in turn conveyed it to the purchasers. *Id.* at 805-06. Later, when they discovered that the property had only two and seven-tenths acres and four hundred fifteen feet of river frontage, the purchasers commenced an action for damages. *Id.* at 806. The Supreme Court of Wisconsin held both agents strictly liable to the purchasers for the representations because they professed or implied to have personal knowledge of the facts. *Id.* at 809-10. Whether the plaintiff purchasers could have discovered the facts through an investigation was irrelevant. *Id.; see also infra* part IV.

85. 199 Cal. Rptr. 383 (Ct. App. 1984).

86. *Id.* at 387-88.

87. *Id.* at 389-90 (citations omitted).

88. *Id.* at 390.

tures. The prudent agent will also shift the responsibility for inspecting the property to the seller and purchaser by obtaining a defect-disclosure statement[89] from the seller and recommending that the purchaser hire an independent inspector.[90]

IV. INNOCENT MISREPRESENTATION

An "innocent" misrepresentation is any false statement made by the agent, regardless of his or her knowledge about its truth or falsity.[91] Under this standard, an agent has constructive knowledge of *all* defects, whether or not discoverable by a reasonable investigation.[92]

As demonstrated by the cases below,[93] Alaska, Wisconsin, Minnesota and Ohio have adopted the innocent misrepresentation standard for real estate agents. Additionally, *Prosser and Keeton on the Law of Torts*[94] cites innocent misrepresentation cases from eight other states: New Mexico, Michigan, Alabama, Washington, Nebraska, Texas, Kentucky, and Tennessee.[95] While these cases do not deal directly with misrepresentations made by real estate agents to prospective buyers, they involve relationships similar to that of agent and buyer, where the innocent misrepresenter had superior expertise and access to information:

> [T]he cases involving innocent misrepresentation disclose situations in which the defendant professes complete knowledge of the facts or normally could be expected to know them without any special investigation . . . . [Often the representation] is given and accepted as the reasonable belief of the person supplying it after a reasonably careful and skillful investigation.[96]

The courts, therefore, are inclined to find an innocent misrepre-

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89. In general terms, a defect disclosure statement is a form completed by the seller wherein specific questions are answered and specific statements are made regarding defects in the subject property. Defect disclosure statements are required in some jurisdictions and the buyer would be well advised to check local rules.

90. *See, e.g., supra* notes 28-29 and accompanying text.

91. *See* PROSSER & KEETON, *supra* note 37, at 742; *see also* RESTATEMENT (SECOND) TORTS § 552C(1) (1977). Like reckless misrepresentations, innocent misrepresentations are legally actionable because the speaker pretends to have knowledge but, in fact, does not. *See* PROSSER & KEETON, *supra* note 37, at 742.

92. *See supra* note 91 and accompanying text.

93. *See also supra* note 84 and the cases cited therein.

94. PROSSER & KEETON, *supra* note 37.

95. *Id.* at 748-49.

96. Fowler V. Harper & Mary Coate McNeely, *A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 988 (1938).

sentation in situations where the agent has superior expertise or access to information. In *Berryman v. Riegert*,[97] wherein the prospective purchasers were only interested in purchasing a house without water problems,[98] the agent showed them a house which supposedly conformed to their wishes.[99] After the closing, however, the purchasers discovered that the basement and backyard had flooding problems.[100] The Supreme Court of Minnesota held the agent strictly liable to the purchasers for the diminished value of the house:[101] "[i]t is not necessary that the statement be recklessly or carelessly made. It makes no difference how it was made if it is made as an affirmation of which defendant has knowledge and it is in fact untrue."[102] The court based its application of this strict standard on the agent's superior expertise and access to information:

> It would seem that such information [about water problems] should be available to an experienced real estate broker, who should know his merchandise . . . . The parties were not on an equal footing. [The agent] had superior knowledge or at least the opportunity for knowledge of the problems which might be encountered in the purchase of the . . . home. Because of the [purchasers'] inexperience in this field, they had a right to rely upon the representations of [the agent].[103]

An innocent misrepresentation also may occur when the agent makes representations based on appearances. In *Pumphrey v. Quillen*,[104] the agent told prospective purchasers that the walls of a house were constructed of tile, when in fact, they were made of clay designed to look like tile.[105] The Supreme Court of Ohio held that the agent may be liable to the purchasers for their damages, and remanded for trial on that issue.[106] "When one asserts a fact as of his own knowledge, or so positively as to imply that he has knowledge, when he knows that he has not sufficient information to justify it, he may be found to have the intent to deceive."[107]

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97. 175 N.W.2d 438 (Minn. 1970).
98. *Id.* at 441.
99. *Id.*
100. *Id.* at 441-42.
101. *Id.* at 442-43.
102. *Id.* at 442.
103. *Id.* at 442-43.
104. 135 N.E.2d 328 (Ohio 1956).
105. *Id.* at 329, 331.
106. *Id.* at 332.
107. *Id.* at 330.

The agent is not insulated from liability by the fact that he or she passed on information that could not reasonably have been verified. In *Reda v. Sincaban*,[108] the agent unintentionally misrepresented the size of the lot to the buyer.[109] Notwithstanding the fact that there was no evidence of the agent's negligence in exercising reasonable care when informing the buyer about the size of the lot,[110] the Court of Appeals of Wisconsin held that the agent was strictly liable under the theory of innocent misrepresentation:

> The [purchasers] were not required to prove that [the agent] "ought to have known" the lot size. They submitted evidence that he represented to them that he had personal knowledge of the lot size. Strict responsibility does not depend upon the source of the speaker's knowledge.[111]

Thus, realtors have a duty to reasonably investigate before making assertions, or else face an action for innocent misrepresentation.

V. SILENT MISREPRESENTATION

Recent case law has recognized that people may be defrauded through silence as well as through words. However, it is clear that silence about material information will only constitute fraud when there is a duty to disclose. As demonstrated by the following cases, agents owe prospective purchasers a duty to disclose material information in four situations: (1) when the agent is the purchaser's agent;[112] (2) when the agent has access to information that is not available to the purchaser;[113] (3) when the agent has already disclosed part of the truth;[114] and (4) when disclosure is required by statute.

A. *Purchaser's Agent*

Normally, both listing and showing agents are considered the seller's agent, because the seller pays their fee.[115] However, in recent

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108. 426 N.W.2d 100 (Wis. Ct. App. 1988), *appeal denied*, 430 N.W.2d 918 (Wis. 1988).

109. *Id.* at 102.

110. *Id.* at 102-03.

111. *Id.* at 103.

112. *See infra* part V.A.

113. *See infra* part V.B.

114. *See infra* part V.C.

115. *See* ARTHUR R. GAUDIO, REAL ESTATE BROKERAGE LAW §§ 261, 291 (1987). A listing agent is the person the seller retains to list and otherwise advertise the property. The selling agent is the person the buyer retains to show properties listed by a number of sellers.

years, as the following cases illustrate, the courts have been increasingly willing to view the showing agent as the purchaser's agent, thereby imposing a fiduciary obligation on the showing agent to disclose all material information to the purchaser.

Courts will examine various factors when determining whether the selling agent is the purchaser's agent as well. For example, in *Lewis v. Long & Foster Real Estate, Inc.*,[116] the Maryland court found two factors significant: (1) whether a different agent listed the property, and (2) whether the agent and purchaser had a pre-existing, rather that an arm's length, relationship.[117] The purchasers, who had previously provided day care for the agent's child, asked the agent to find a house suitable both as a residence and as a day-care center.[118] The agent showed the purchasers a townhouse, but failed to disclose that the townhouse association prohibited the conducting of business in the subdivision.[119] After the closing, when the association sought an injunction to prevent the purchasers from operating the day care center, the purchasers brought suit against the agent for misrepresentation.[120] The plaintiff purchasers argued that the agent owed them a duty to "investigate and report" on the restriction on use of the subject property.[121] The Court of Special Appeals of Maryland held that the purchasers stated a viable claim where the pre-existing relationship between the parties resulted in a transaction not at arm's length and another agent had listed the property.[122] Both facts supported a finding that the seller's agent was also the purchaser's agent, thus imposing a fiduciary duty to "investigate and report on defects which might exist" in the property.[123]

Similarly, in *Forbes v. Par Ten Group, Inc.*,[124] the Court of Appeals of North Carolina recognized the principle of a fiduciary duty to disclose, but found insufficient evidence of an agency relationship to support the finding of such a duty.[125] When a brokerage firm and

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Thus, ordinarily, only the listing agent has a significant long-term business relationship with the seller.

116. 584 A.2d 1325 (Md. Ct. Spec. App. 1991), *appeal denied*, 591 A.2d 250 (Md. 1991).

117. *Id.* at 1330.

118. *Id.*

119. *Id.* at 1327.

120. *Id.*

121. *Id.* at 1328.

122. *Id.* at 1330.

123. *Id.*

124. 394 S.E.2d 643 (N.C. Ct. App. 1990).

125. *Id.* at 648, 650.

its agents failed to disclose to purchasers the improper escrow practices of the developer,[126] the court noted that an agent can be a purchaser's agent, creating a fiduciary duty to disclose.[127] The only evidence of agency offered by the purchasers was an out-of-court statement by one of the agents that he would "assist" the purchasers in arranging financing.[128] The court, however, held this uncorroborated statement to be insufficient proof of an agency relationship.[129]

If the agent is deemed to be the purchaser's agent, the agent may be liable for inaccurate opinions as well. In *Seal v. Hart*,[130] the agent told the purchasers that particular resort units and a cabin could be rented on a short-term basis to vacationers.[131] Subsequent to the closing, county officials informed the purchasers that they could not rent the units or the cabin for the desired length of time.[132] The purchasers then sued the agent, claiming that the agent was their agent.[133] The Court of Appeals of Colorado held that the purchasers had a legally viable claim against the agent, even though misrepresentations of law are not ordinarily actionable.[134] Consequently, inaccurate opinions may lead to a cause of action against an agent who is determined by the courts to be the purchaser's agent.

Agents selling multiple-listed[135] property may implicitly agree to be the purchaser's agents. For example, in *Menzel v. Morse*,[136] the agent arranged for the sale to the purchasers of a new multiple-listing house, assuring the purchasers that all defects "would be taken care of" by the contractor.[137] After the closing, however, the purchasers discovered numerous uncorrected defects.[138] The Su-

126. *Id.* at 645.

127. *Id.* at 650.

128. *Id.*

129. *Id.*

130. 755 P.2d 462 (Colo. Ct. App. 1988).

131. *Id.* at 463.

132. An attempt to rent the upper unit in the main building would have been a violation of the local zoning regulations. *Id.*

133. *Id.* at 464. The agent, if found to have a dual relationship with the seller and purchaser, would owe a duty to purchaser as well. *Id.*

134. *Id.* Misrepresentations of law are actionable where (1) the misrepresenting party has or claims to have superior knowledge which is unavailable to the recipient of the information or (2) where there exists a confidential or trust relationship between the parties. *Id.*

135. A "multiple listing service" is an ongoing contractual relationship between member agencies, in which listings are pooled and available to their agents showing properties. *See* discussion in GAUDIO, *supra* note 115, at §§ 218-20 (1987).

136. 362 N.W.2d 465 (Iowa 1985).

137. *Id.* at 467-68.

138. *Id.* at 468.

preme Court of Iowa held that the agent implicitly agreed to act as the purchasers' agent, and that he owed them a fiduciary duty to discover and disclose material defects.[139] The court focused on the fact that the agent's first contact occurred with the purchasers, not the seller of the property: "a real estate broker is the agent of the party who first employs him or her, and this may be the buyer even though it is anticipated the fee will be received from the seller."[140]

Thus, seller's agents should be wary of the recent trend to extend liability. The agent may believe she is acting as the seller's agent, but, in fact, be deemed by the court to be the purchaser's agent.

B. *Special Knowledge*

Agents frequently learn of latent property defects or other material information from the seller through their own observations, or from other sources. Often, the purchaser lacks easy access to this information, and, under such circumstances, courts may impose a duty to disclose on the agent. Louisiana adhered to this view in *Ditcharo v. Stepanek*,[141] where agents, who knew that a house was infested with termites, failed to disclose that fact to the purchasers.[142] The purchasers sued the agents after discovering the termite problem. The appellate court held that the agents had breached their duty to disclose their special knowledge of the infestation — a duty that stems from the agent's duty "to the public at large."[143]

Tennessee applied the same principle in *Gray v. Boyle Investment Co.*[144] There, the agent knew that foreclosure proceedings were in progress against the property, but failed to disclose that information to the purchasers.[145] The purchasers learned, after closing, that the property had been foreclosed upon and sold to another party.[146] The Court of Appeals of Tennessee held that the agent breached her duty to inform the purchasers of the foreclosure proceedings because the lender had directly informed the agent of the pending foreclosure, giving the agent special knowledge of the risk.[147] In contrast,

139. *Id.* at 475.
140. *Id.*
141. 538 So. 2d 309 (La. Ct. App. 1989), *appeal denied*, 541 So. 2d 858 (La. 1989).
142. *Id.* at 311-12.
143. *Id.* at 313.
144. 803 S.W.2d 678 (Tenn. Ct. App. 1990).
145. *Id.* at 681.
146. *Id.*
147. *See id.* at 683.

the purchasers would not have had access to that information without searching the foreclosure notices published in the various trade papers.[148]

Illinois has applied the special-knowledge rule to conflicts of interest. In *Seligman v. First National Investments, Inc.*,[149] the agent failed to tell the purchaser that a co-worker was negotiating with the sellers to purchase the subject property at a price lower than that offered by the purchaser.[150] The Court of Appeals of Illinois held that the agent breached his duty by failing to disclose his brokerage house's interest in the property.[151]

In *Pacific Northwest Life Ins. Co. v. Turnbull*,[152] the Court of Appeals of Washington emphasized an agent's unique access to information.[153] When the purchasers discovered that the property had previously been used as a garbage dump and was unsuitable for commercial development, they sued the listing and selling agents.[154] They claimed that the agents were liable because they "failed to discover the true state and condition of the property" after the seller repeatedly represented that the property would sustain commercial use.[155] The court held that the agents had breached their duties to "disclose all material facts not readily ascertainable to the buyer."[156] The court noted that an agent, as a professional, is "in a unique position to verify critical information given him by the seller."[157]

Pennsylvania has also utilized the special-knowledge rule. In *Roberts v. Estate of Barbagallo*,[158] the purchasers discovered, after closing, that their new house had formaldehyde-based foam insulation.[159] Although the agent knew of the existence of the insulation and the potential health risks it posed, she failed to disclose this information to the purchasers.[160] The purchasers sued the agent, and the court held that the agent had breached her duty to disclose ma-

148. *Id.*
149. 540 N.E.2d 1057 (Ill. App. Ct. 1989).
150. *Id.* at 1057-58.
151. *Id.* at 1064.
152. 754 P.2d 1262 (Wash. Ct. App. 1988).
153. *Id.*
154. *Id.* at 1265.
155. *Id.*
156. *Id.* at 1266.
157. *Id.* at 1265.
158. 531 A.2d 1125 (Pa. Super. Ct. 1987).
159. *Id.* at 1128.
160. *Id.*

terial information.[161] By not disclosing the type of insulation and its potential health risks, the purchasers were denied the opportunity to investigate the matter before the closing.[162]

Perhaps the strongest application of this special-knowledge disclosure requirement may be found in the California case of *Easton v. Strassburger*.[163] The *Easton* case involved a parcel of land prone to massive earth movements and subsequent soil slides.[164] This problem, known to the owners of the property, was not conveyed to the agent.[165] Soon after the sale, a "slide" occurred destroying part of the driveway, creating cracks in the walls, and warping the doorways.[166] The resulting damage was so severe that the value of the property decreased significantly, from the original $170,000 to $20,000.[167] Evidence presented at trial demonstrated that the real estate agents were aware of certain facts which should have placed them on notice of soil related problems.[168] However, soil stability tests were not requested, and the buyers were not informed of the possibility of soil related problems.[169] In its opinion, the Court of Appeals of California quoted Judge Cardozo:

> 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 . . . . He is accredited by his calling in the minds of the inexperienced or the ignorant with a knowledge greater than their own.[170]

Alabama, Minnesota, Missouri, New Jersey, and Ohio have also applied this special-knowledge rule to agents.[171] Many other states

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161. *Id.* at 1130.

162. *Id.* at 1131; *see supra* notes 22-25, 84 and accompanying text; *see also supra* part III.

163. 199 Cal. Rptr. 383 (Ct. App. 1984); *see also* notes 85-88 and accompanying text.

164. 199 Cal. Rptr. at 386.

165. *Id.*

166. *Id.* at 385.

167. *Id.*

168. *Id.* at 386, 391 (noting that there were several "red flags" which should have put the agents on notice of the soil conditions: they had conducted a limited investigation of the property; netting was present on a slope of the property to repair the slide which had occurred most recently; and the floor of a guest house on the property was not level).

169. *Id.* at 386.

170. *Id.* at 388 (quoting Roman v. Lobe, 152 N.E. 461, 462-63 (N.Y. 1926)).

171. *See* Cashion v. Ahmadi, 345 So. 2d 268 (Ala. 1977); Raach v. Haverly, 269 N.W.2d 877 (Minn. 1978); Maples v. Porath, 638 S.W.2d 337 (Mo. Ct. App. 1982); Neveroski v. Blair, 358 A.2d 473 (N.J. Super. Ct. App. Div. 1976); Crum v. McCoy, 322 N.E.2d 161 (Franklin County Ohio Mun. Ct. 1974).

also recognize the general rule that a party with superior access to information must disclose it to the other party,[172] and would presumably apply the same rule to agents.

C. *Partial Disclosure*

Agents are frequently tempted to disclose only "good" information about property. However, misleading half-truths can, nonetheless, be fraudulent misrepresentations.[173] Therefore, an agent's voluntary disclosure of positive information may create a duty to disclose related negative information.

Florida applied this rule in *Revitz v. Terrell*,[174] where a seller had obtained federal flood insurance (FEMA) for $350 annually by falsely representing that the first floor of the house was fourteen feet above sea level.[175] In fact, it was four feet above sea level.[176] Although the agent knew the house did not meet the FEMA requirements, she only told the purchaser about the $350 annual premiums.[177] After the closing, the purchaser learned that flood insurance premiums would actually cost $36,000 per year.[178] The court held that the agent's disclosure of the FEMA premiums created a duty to disclose the "complete truth" that the house did not qualify for FEMA and that alternate insurance would be prohibitively expensive.[179]

Likewise, in *Fennell Realty Co., Inc. v. Martin*,[180] the Supreme Court of Alabama held that an agent's vague but positive statement about a condition required disclosure of specific defects.[181] The agent

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172. *See, e.g.*, Federal Deposit Ins. Corp. v. W.R. Grace & Co., 877 F.2d 614, 619 (7th Cir. 1989), *cert. denied*, 484 U.S. 1056 (1990) (holding a natural gas developer, as borrower, had a duty to disclose to the lender that a gas field was non-producing, because lender would find that information "either impossible or very costly to discover himself"); Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517 (D. Minn. 1989) (holding that a manufacturer with special knowledge had a duty to disclose to patients the dangers of using an intrauterine device); White v. Peppin, 561 A.2d 94 (Vt. 1989) (imposing a duty on seller of business to disclose to buyer all material information about the company where the seller imposed time constraints on buyer).

173. RESTATEMENT (SECOND) OF TORTS § 529 (1977).

174. 572 So. 2d 996 (Fla. Dist. Ct. App. 1990).

175. *Id.* at 997.

176. *Id.* In addition, the agent was "familiar with local building ordinances" and "knew that the property was located in a flood zone." *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 998.

180. 529 So. 2d 1003 (Ala. 1988).

181. *Id.* at 1005.

knew of defects in the house's heat and air conditioning unit.[182] However, when asked about the unit, the agent said "everything was working."[183] The court held that this voluntary general statement created a duty to make "full disclosure" of all material defects in the unit.[184]

Many other states recognize the general rule that voluntary disclosure of favorable information creates a duty to disclose unfavorable information as well.[185]

CONCLUSION

Real estate agents can no longer hide behind the shield of "caveat emptor" when they make material misrepresentations to purchasers. Even in jurisdictions not recognizing innocent misrepresentations, real estate agents expose themselves to considerable liability when making representations to purchasers. Any material misstatements about the property will likely constitute reckless or negligent misrepresentations, and any material nondisclosure of property defects will likely constitute silent misrepresentations. The resulting lawsuits are expensive, time-consuming, and damaging to the agent's reputation.

Therefore, real estate agents engaged in selling must carefully protect themselves from misrepresentation claims. They should disclose to purchasers, in writing, all material defects of which they are aware. Additionally, they should have the seller complete a standard disclosure form, and provide a copy to prospective purchasers. Finally, they should place the responsibility on the independent purchasers to discover defects by recommending that they hire an independent inspector. These simple preventative measures are easily effected and constitute a minimal expenditure of time and money

182. *Id.* at 1004.

183. *Id.* at 1006.

184. *Id.*

185. *See, e.g.*, Baskin v. Hawley, 807 F.2d 1120 (2d Cir. 1986) (union's disclosure to employee of information about retirement benefits claim created duty to also disclose related collective-bargaining information essential to the claim); Zimpel v. Trawick, 679 F. Supp. 1502 (D. Ark. 1988) (where the subsequent purchaser and owner of land had discussed the depressed land values in the area, the purchaser also had the duty to disclose that gas had been discovered in a recently-drilled well in the area); Uptegraft v. Dome Petroleum Corp., 764 P.2d 1350, 1353-54 (Okla. 1988) ("Although a party may keep absolute silence and violate no rule of equity, yet, if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to disclose the whole truth."); PROSSER AND KEETON, *supra* note 37, at 738 ("half of the truth may obviously amount to a lie, if it is understood to be the whole").

when compared to the overwhelming consumption of resources that accompanies litigation.