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Easton v. Strassburger: Judicial Imposition of a Duty to Inspect on California Real Estate Brokers

Jack B. Hicks III

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EASTON V. STRASSBURGER: JUDICIAL IMPOSITION OF A DUTY TO INSPECT ON CALIFORNIA REAL ESTATE BROKERS

I. Introduction

The transfer of residential property has traditionally involved the services of a licensed real estate broker who markets the property, procures a purchaser, negotiates the purchase contract, arranges the financing and closes the escrow. The use of a broker to facilitate a real estate transaction creates a variety of rights and obligations between the broker, the seller and the purchaser. These rights and obligations are primarily governed by contract law and the law of agency.

Under general agency principles, an agency relationship is formed when one individual, the principal, authorizes another to act on his behalf in business transactions and to exercise a degree of discretion while so acting. This agency creates a fiduciary relationship between the agent and the principal. In a real estate transaction, the broker's fiduciary obligation requires that he provide the principal with the same degree of loyalty and service that a trustee provides a beneficiary. The broker's primary duty is to act in the highest good faith toward his principal.

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1. The terms "real estate agent," "real estate broker," and "real estate licensee" are used interchangeably throughout this Note. Although distinctions between these terms exist, and are significant in some situations, the distinctions are not relevant in the context of this Note.

In this Note, the term "listing broker" is used to refer to the seller's broker. See CAL. CIV. CODE § 1086(f) (West Supp. 1985) ("A 'listing agent' is one who has obtained a listing of property ... [for] which he or she is authorized by law to act as an agent for compensation."). The buyer's agent is referred to as the "selling broker" or the "cooperating broker." See CAL. CIV. CODE § 1086(g) (West Supp. 1985) ("A 'selling agent' is an agent participant in a multiple listing service who acts in cooperation with a listing agent and who sells, or finds and obtains a buyer for, the property.").


7. Id. at 675, 441 P.2d at 110, 68 Cal. Rptr. at 598. See also CAL. CIV. CODE § 2228 (West 1954) (As a trustee, the agent "is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.").

For a more detailed discussion of the duties imposed on the broker under the law of agency, see infra notes 43-47 and accompanying text.
In California, a broker's conduct is also governed by statutory guidelines. The real estate statutes impose special requirements upon a broker which may limit, redefine or supersede common law agency principles.

Depending on the facts of a particular transaction, the broker may owe duties to either the seller or the purchaser, or both. The duties owed by the broker to the seller are clearly defined by the law of agency, statutory real estate law and the contractual obligations arising from the listing agreement. The broker's failure to adhere to any of these standards may result in liability to his principal.

Conversely, it has traditionally been difficult to define the duties which the broker owes to the purchaser. The problem arises in establishing the existence of a broker-purchaser fiduciary relationship. Unlike the broker-seller relationship, a contractual agreement generally does not exist from which to establish the agency. Additionally, the broker-seller agency relationship often prevents the broker from acting for the purchaser's benefit. Rather, the rules governing conflicts of interest and sub-agency generally require the broker to act solely for the seller.

Recognizing that a home may be the single greatest investment of a purchaser's life, courts have attempted to protect purchasers in spite of the above mentioned problems. Therefore, even in the absence of a broker-purchaser agency relationship, California law prohibits the broker

9. H. Miller & M. Starr, supra note 2, § 4:1, at 3. For a more detailed discussion of the California real estate statutes, see infra notes 48-50 and accompanying text.
11. See Romero, Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine, 20 Ariz. L. Rev. 767, 769 (1978) ("Where the principal is the seller, the agency relationship is usually established by the listing agreement."). For a more detailed discussion of the duties owed by broker to seller, see infra notes 40-52 and accompanying text. The contractual rights and obligations arising from the listing agreement are not relevant in the context of this Note and are not discussed.
12. See Romero, supra note 11, at 771-73. If the broker is the listing agent, he has contractually established the agency relationship with the seller. The rules prohibiting conflicts of interest require that the broker work solely for the seller's benefit. Conversely, if the broker is the cooperating agent, the law of agency views him as the seller's agent. Thus, the fiduciary duties are owed to the seller, not to the purchaser. Id. For a more detailed discussion of the effects of dual agency and conflicts of interest, see infra notes 53-66 and accompanying text. See also H. Miller & M. Starr, supra note 2, § 4:8, at 19.
13. See Bethlamy v. Bechtel, 91 Idaho 55, 67, 415 P.2d 698, 710 (1966), where the court stated, "[t]he purchase of a home is not an everyday transaction for the average family and in many instances is the most important transaction of a lifetime."
from committing fraud on the purchaser. The broker is also obligated to disclose to the buyer all known material defects.

In early 1984, the California Court of Appeal for the First District unanimously expanded the duty which a real estate broker owes to the purchaser of residential property. In *Easton v. Strassburger*, the court held that the seller’s real estate broker has "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." This new duty is stricter than that imposed on brokers in any other state.

The *Easton* decision, which significantly extends the real estate broker’s duty and potential liability, warrants careful examination. This Note analyzes the court’s reasoning to determine whether the duty to inspect is properly placed on the seller’s broker. Further, this Note examines the potential scope of the new duty and projects the effects which the duty will have on the California real estate industry. The Note concludes that although the court’s goal of purchaser protection is a positive one, the realities of the transaction do not warrant imposing a duty to inspect on the broker. Therefore, an alternative solution is proposed which satisfies the court’s goal of purchaser protection in a more efficient and cost-effective manner.

14. See, e.g., Ford v. Courmelle, 36 Cal. App. 3d 172, 111 Cal. Rptr. 334 (1973) (brokers misrepresented to purchaser amount of rental income for an apartment building in order to induce the purchase).

15. See Cooper v. Jevne, 56 Cal. App. 3d 860, 866, 128 Cal. Rptr. 724, 727 (1976); Lingsch v. Savage, 213 Cal. App. 2d 729, 736, 29 Cal. Rptr. 201, 205 (1963). In both cases, the broker represented the seller and thus had no fiduciary relationship with the purchaser. The court in both cases nevertheless imposed on the broker the duty to disclose known defects to the purchaser.


17. Id. at 102, 199 Cal. Rptr. at 390 (footnote omitted).


California stands alone in the extent of protection provided to the purchaser, being the only state which imposes on the broker the duty to inspect (as that duty is defined in *Easton*).
II. STATEMENT OF THE CASE

Leticia Easton purchased a residential property from William and Faith Strassburger in 1976. The property included a 3000 square foot home, swimming pool and large guest house, all located on a one acre parcel of land. At the time of purchase, the home was approximately three years old. Unknown to Easton, the property had a history of soil problems and landslides. Subsequent to Easton's purchase of the property, "massive earth movement" occurred on two occasions. The resulting damage reduced the appraised value of the property from $170,000 to an estimated $20,000.

In 1976, Easton filed suit against the Strassburgers, Valley Realty and the engineers and builders of the home. The Strassburgers had listed the property for sale with two agents employed by Valley Realty. These two agents represented the Strassburgers in the negotiations with Easton and in the subsequent sales transaction. The Valley Realty

19. 152 Cal. App. 3d at 96, 199 Cal. Rptr. at 385.
20. Id., 199 Cal. Rptr. at 385.
21. The Strassburgers purchased the land in 1972 from George Sauer (one of the defendants at the trial level), and commenced construction of the home, which was completed in 1973. The Strassburgers did not obtain a soil engineer's report prior to construction of their home, as required by Contra Costa County. Brief for Respondent at 3, Easton v. Strassburger, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984) [hereinafter cited as Brief for Respondent, Easton]. They also built a swimming pool and an outside dance floor. In 1974, the Strassburgers converted a barn located on the property into the guest house. Id. at 2.
22. When grading the property, the original owner merely deposited fill dirt on the lot and ran a tractor over it. Brief for Respondent at 2, Easton. In the late 1960's, prior to the Strassburger's ownership, there were two slides on the property. When the dirt from the slides was replaced, it was not properly engineered or compacted. Id. at 2-3. In 1973, while the property was owned by the Strassburgers, there was a minor slide involving 10 to 12 feet of the filled slope. In 1975, a major slide occurred, causing the fill to drop approximately 10 feet in a circular shape, 50 to 60 feet in diameter. 152 Cal. App. 3d at 96, 199 Cal. Rptr. at 386.
23. 152 Cal. App. 3d at 96, 199 Cal. Rptr. at 385. These slides destroyed a portion of the driveway, caused the foundation of the house to settle, caused cracks in the walls and warped the doorways. Id., 199 Cal. Rptr. at 385.
24. Id., 199 Cal. Rptr. at 385. Additionally, estimates to repair the property and prevent future slides ranged as high as $213,000. Id., 199 Cal. Rptr. at 385.
25. Only Valley Realty appealed the trial court's finding of liability. Id., 199 Cal. Rptr. at 385. See infra note 37 for the apportionment of liability between defendants.
26. Id. at 96, 199 Cal. Rptr. at 385-86. Easton was represented in the transaction by an agent employed by another real estate company. Although Easton did not join her agent as a defendant, the jury found that agent five percent responsible for the loss. Id. at 97, 199 Cal. Rptr. at 386.

In most residential sales, there are two brokers involved. The selling broker obtains the
agents did not show the property to Easton, nor did they have any other contact with her during the transaction.27

Although the Strassburgers had knowledge of the previous soil problems, they did not disclose those facts to Easton.28 The Strassburgers also failed to disclose the facts to their agents or anyone else at Valley Realty.29 However, while touring and inspecting the property, the Valley Realty agents noticed several "red flags"30 which indicated potential soil problems.31 These red flag indicators included netting on the hillside, uneven floors in the guest house and a retaining wall under construction.32 The agents did not disclose their discovery of the red flags to Easton, nor did they explain the possible significance of these items.33 The agents also failed to request that tests be conducted to determine soil stability and neglected to take any further steps to determine whether there had been previous slides or soil problems.34

Easton asserted causes of action against Valley Realty for fraudulent concealment, intentional misrepresentation and negligent misrepresentation.35 The actions for fraudulent concealment and intentional misrepresentation were voluntarily dismissed during trial. At the trial's conclusion, the judge instructed the jury that real estate brokers have the purchase offer from the buyer and is often referred to as the cooperating broker. See supra note 1. For the problems raised by a cooperative sale and subagency, see infra notes 63-66 and accompanying text.

28. 152 Cal. App. 3d at 97, 199 Cal. Rptr. at 386.
29. Id. at 96, 199 Cal. Rptr. at 386. The Strassburgers did not inform the agents of the corrective actions taken after each slide. Id., 199 Cal. Rptr. at 386. These actions included replacing the dirt after each slide (without compacting the soil or obtaining engineer's reports), covering the hill with netting and planting at the top of the slope. Brief for Respondent at 3-4, Easton.
30. A "red flag" is a readily observable indicator of a potential problem. Examples of red flags include water-stained ceilings, cracks in the walls and modifications to the structure (e.g., converted garages). See Memorandum, California Association of Realtors®, The Easton Case: Further Guidance For C.A.R. Members, at 2-3 (July 5, 1984), attached as an appendix to this Note.
31. 152 Cal. App. 3d at 96, 199 Cal. Rptr. at 386. The agents' awareness of the red flags was a disputed issue at trial. The agents claimed that they "did not observe any irregularities," Brief for Appellant at 1, Easton, while Easton claimed that the agents were aware of those facts. Brief for Respondent at 11, Easton. The dispute as to the agents' actual knowledge of the red flags may have influenced the court's holding. The decision reached by the court allows the purchaser to recover despite a lack of actual knowledge by the broker. See infra notes 102-05 and accompanying text.
32. 152 Cal. App. 3d at 104, 199 Cal. Rptr. at 391; Brief for Respondent at 11, Easton. The probable use of the retaining wall was the control of soil. Id.
33. 152 Cal. App. 3d at 96, 199 Cal. Rptr. at 386.
34. Id. at 104, 199 Cal. Rptr. at 391.
35. Id. at 97-98, 199 Cal. Rptr. at 386.
duty to investigate the property they sell and to disclose any defects which are discovered.\textsuperscript{36} The jury returned a verdict for Easton, finding Valley Realty negligent for failing to investigate the property and disclose the soil defects.\textsuperscript{37}

On appeal, Valley Realty argued that the trial court had misstated the duty of real estate agents and claimed that an agent's duty is limited to the disclosure of known defects.\textsuperscript{38} The California Court of Appeal for the First District rejected Valley Realty's argument, holding that a real estate agent has a duty to investigate property which he sells and to disclose any defects to the purchaser.\textsuperscript{39}

III. THE EASTON DECISION

A. The Broker's Duties Prior to Easton

1. Broker's duty to seller

The duty owed by a real estate broker to the seller of a home has traditionally been defined by agency law. In most cases, the agency relationship between the broker and seller is established by a listing agreement.\textsuperscript{40} In the typical listing contract, the broker agrees to provide

\textsuperscript{36} The jury instructions were as follows:
A real estate broker is a licensed person or entity who holds himself out to the public as having particular skills and knowledge in the real estate field. He is under a duty to disclose facts materially affecting the value or desirability of the property that are known to him or which through reasonable diligence should be known to him.

\textsuperscript{37} \textit{Id.} at 98, 199 Cal. Rptr. at 387 (emphasis added).

\textsuperscript{38} \textit{Id.} at 97, 199 Cal. Rptr. at 386. The jury awarded Easton $197,000. Under the principles of comparative negligence, liability was apportioned among the several defendants as follows: Valley Realty—5%; Strassburgers—65%; the various builders and engineers—25%; Easton's agent (the cooperating broker)—5%. \textit{Id.}, 199 Cal. Rptr. at 386. Valley Realty was the only solvent defendant and, based on joint and several liability, was thus liable for 100% of the judgment.

\textsuperscript{39} \textit{Id.} at 97, 199 Cal. Rptr. at 386. See \textit{infra} note 68 and accompanying text for discussion of the broker's duty to disclose known defects.

\textsuperscript{40} Romero, supra note 11, at 769. \textsc{Cal. Civ. Code} § 1086(e) (West Supp. 1985) defines a listing agreement as "a written contract between an owner of property and an agent by which the agent has been authorized to sell the property or to find or obtain a buyer." See \textit{also} \textsc{Restatement (Second) of Agency} § 377 (1957) ("A person who makes a contract with another to perform services as an agent for him is subject to a duty to act in accordance with his promise.").
competent service facilitating the sale of property in return for the seller's promise to pay a commission upon successful completion of the sale.

An agency relationship may also be established in the absence of a written listing agreement. An oral agreement between the parties may suffice, or the parties' conduct may imply the relationship. For example, the payment of a commission by the seller to the broker often indicates that an agency relationship exists.

Once the agency relationship is established, the broker becomes a fiduciary with respect to matters within the scope of his agency. The broker has the general duty to act in the highest good faith toward the seller, who is his principal.

Various specific duties imposed on the broker pursuant to the agency include: (1) the obligation to make full and complete disclosure to the principal of all facts material to the pending transaction; (2) the duty to account to the principal for all monies or

41. See, e.g., Anderson v. Thacher, 76 Cal. App. 2d 50, 65, 172 P.2d 533, 541 (1946) ("An agency may be created not only by written instrument or by word of mouth but may be implied from the conduct of the parties.").

42. H. MILLER & M. STARR, supra note 2, § 4:6, at 15. In Angus v. London, 92 Cal. App. 2d 282, 206 P.2d 869 (1949), the court found that the broker was the sellers' agent despite the absence of a listing agreement. The existence of an agency relationship was based solely on escrow instructions authorizing payment of a commission by the sellers. The fact that the broker was the buyer's father was insufficient to establish a broker-purchaser agency relationship. Id. at 285, 206 P.2d at 870-71.

43. RESTATEMENT (SECOND) OF AGENCY § 13 (1957). See also supra notes 5-7 and accompanying text.

44. See, e.g., Timmsen v. Forest E. Olson, Inc., 6 Cal. App. 3d 860, 871, 86 Cal. Rptr. 359, 366 (1970). However, one commentator has noted that:

[T]he broker's interest is by its very nature somewhat adverse to the seller's. When the broker, as negotiator between the contracting parties, works for a contingent fee payable only if the realty is actually sold, he favors any sale to earn his fee with a minimum time investment rather than risking loss of the sale and commission by fully prosecuting the seller's interest to obtain the highest price.

Comment, supra note 10, at 1344 (analogizing the real estate broker to an attorney working under a contingent fee arrangement).

For further discussion of the conflict between the broker's duty of good faith and his desire to earn a commission, see Stambler & Stein, The Real Estate Broker—Schizophrenia or Conflict of Interests, 28 J. B.A.D.C. 16 (1961); Note, Brokers—Dual Agency—Separable Transactions, 8 U. KAN. L. REV. 462 (1960).

45. See, e.g., McPhetridge v. Smith, 101 Cal. App. 122, 139, 281 P. 419, 426 (1929) ("agent shall make known to his principal every material fact concerning his transactions and the subject matter of his agency that comes to his knowledge"). See also CAL. CIV. CODE § 2020 (West 1954) ("An agent must use ordinary diligence to keep his principal informed of his acts in the course of the agency."); RESTATEMENT (SECOND) OF AGENCY § 381 (1957) ("agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which . . . the principal would desire to have and which can be communicated without violating a superior duty to a third person").

A fact is material if "it is one which the agent should realize would be likely to affect the judgment of the principal in giving his consent . . . or [is] likely to have a bearing upon the
other property which he receives from, or on behalf of, the principal; and (3) the duty to refrain from making any misrepresentation to the principal.

In California, many of the broker’s duties to the seller arising under the common law of agency have been codified in the Business and Professions Code. Section 10176 of this code provides that the real estate commissioner may revoke the license of any agent guilty of making misrepresentations or false promises. The legislative purpose in passing this statute was to provide the public with greater protection in real estate transactions. As a result of this code section, a real estate broker who breaches the specified duties may be subject to civil liability as well as to disciplinary action brought by the real estate commissioner.

An additional obligation which the broker owes to the seller is to desirability of the transaction from the viewpoint of the principal.” Fisher v. Losey, 78 Cal. App. 2d 121, 124, 177 P.2d 334, 336 (1947) (quoting Restatement of Agency § 390 comment a (1933)).

Among the facts which California courts have found to be material, and thus subject to disclosure, are: (a) offers to purchase the property, regardless of whether the broker considers the offers attractive (Simone v. McKee, 142 Cal. App. 2d 307, 312, 298 P.2d 667, 671 (1956)); (b) the identity of the purchaser (where the purchaser is the broker, or a relative, friend or associate) (Batson v. Strehlow, 68 Cal. 2d 662, 675, 441 P.2d 101, 110, 68 Cal. Rptr. 589, 598 (1968); Smith v. Zak, 20 Cal. App. 3d 785, 794, 98 Cal. Rptr. 242, 247 (1971)); and (c) the fact that the broker is acting for more than one party to the transaction without the parties’ informed consent (Smith, 20 Cal. App. 3d 785, 793, 98 Cal. Rptr. 242, 247 (1971)).


The [real estate] commissioner may . . . revoke a real estate license at any time where the licensee . . . in performing . . . any of the acts within the scope of this chapter has been guilty of any of the following:

(a) Making any substantial misrepresentation.
(b) Making any false promises of a character likely to influence, persuade or induce.
(c) A continued and flagrant course of misrepresentation or making of false promises through real estate agents or salesmen.
(d) Acting for more than one party in a transaction without the knowledge or consent of all parties thereto.

(ii) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

Compare § 10176 to the common law agency duties discussed supra at note 45 and accompanying text.

49. See Burch v. Argus Properties, Inc., 92 Cal. App. 3d 128, 131-32, 154 Cal. Rptr. 485, 487 (1979); Rylander v. Karpe, 60 Cal. App. 3d 317, 321, 131 Cal. Rptr. 415, 417 (1976) (“A key purpose in enacting the Real Estate Law was to upgrade the standards of the profession and also to insure, as far as possible, that real estate brokers and salesmen will be honest and truthful with their clients.”).

50. H. Miller & M. Starr, supra note 2, § 4:15, at 34-35. Section 10177 of the Business and Professions Code authorizes the commissioner to suspend or revoke the license of a licen-
exercise reasonable skill and care to avoid negligent acts. This standard has been interpreted as requiring the agent to use reasonable skill and care to effect a sale to the best advantage of the seller.\textsuperscript{51} An agent who fails to use the requisite skill and care may be held liable for any losses which the principal sustains as the result of a breach of such duty.\textsuperscript{52}

2. Broker’s duty to purchaser

Under general agency principles, the terms of the parties’ agreement define the extent and existence of fiduciary obligations.\textsuperscript{53} In real estate transactions, there are several problems in establishing the existence of a broker-purchaser agency relationship. Therefore, it is difficult to precisely define the extent of the fiduciary duties which the broker owes to the buyer.

First, unlike the seller, the purchaser of a home rarely has a contractual relationship with the broker.\textsuperscript{54} The buyer’s offer to purchase the property is communicated to the seller either by the listing broker or cooperating broker.\textsuperscript{55} In either situation, the purchaser’s relationship with the broker is non-contractual.

California courts have found that a broker-purchaser agency rela-
tionship may arise from the circumstances surrounding the transaction. For example, in *Ramey v. Myers*, the court inferred a broker-purchaser agency relationship from the broker's friendship with the purchaser and the fact that the broker gave the purchaser advice on the transaction.

From the buyer's viewpoint, this approach is not entirely satisfactory. While the listing agreement specifically creates a broker-seller agency relationship, the purchaser must rely on the hindsight of a judge or jury to infer the agency from circumstances surrounding the transaction. If the existence of an agency relationship is not found, no fiduciary obligations are owed to the purchaser.

The second problem is that the rules prohibiting conflicts of interest often prevent the purchaser from receiving the benefit of fiduciary obligations. In a transaction where the listing agent is the only broker involved, a conflict arises when the agent attempts to negotiate the conflicting interests of the purchaser and the seller. By definition, an agent is unable to "act in the highest good faith" toward both parties. Because the listing agreement establishes the broker-seller agency and

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56. See, e.g., *Ramey v. Myers*, 111 Cal. App. 2d 679, 245 P.2d 360 (1952). *See also* *Quinn v. Phipps*, 93 Fla. 805, 113 So. 419 (1927), where the court found that the broker's fiduciary duties to the purchaser arose from the buyer's reliance on the broker's oral promise to communicate an offer to the seller. The court stated that a fiduciary relationship may "exist whenever one man trusts in and relies upon another." *Id.* at 809-10, 113 So. at 421.


58. *Id.* at 685-86, 245 P.2d at 364.

59. *Restatement (Second) of Agency* § 387 (1957) states that "an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency" (emphasis added).

60. See *supra* note 55 and accompanying text.

61. Related to the duty to disclose all material facts, *supra* note 45, is the obligation "not to use or to communicate information confidentially given him by the principal or acquired by him during the course of . . . his agency . . . to the injury of the principal." *Restatement (Second) of Agency* § 395 (1957) (emphasis added).

An example of such information is the disclosure of a defect to the purchaser. While the prospective buyer wishes to know of any defects, disclosure may injure the seller's interests by preventing him from obtaining the maximum price for the property. Ignoring the fact that the seller's non-disclosure constitutes fraud upon the buyer, "the conclusion is inescapable that when the broker is under a duty to disclose material defects to the buyer, it is at the expense of the duty of loyalty to the seller." Comment, *supra* note 10, at 1352.

Despite the fact that disclosure conflicts with the duty owed to the seller, California courts have imposed on the broker the duty to disclose known material defects to the purchaser. This disclosure is not based on an agency relationship but rather is founded on public policy. See *infra* note 69 and accompanying text for a discussion of this issue.

62. One commentator stated that "[i]t is unrealistic to expect the broker in a real estate transaction to be able to fulfill these fiduciary duties of utmost loyalty, care, and complete disclosure to both the buyer and the seller." Note, *Real Estate Brokers' Duties to Prospective Purchasers*, 1976 B.Y.U. L. Rev. 513, 527.
agency law prohibits actions adverse to the principal, it can be seen that the purchaser's interests will not be protected.

Finally, in the situation where the purchaser is represented by a cooperating broker, the rules of subagency may prevent the establishment of a broker-purchaser agency relationship. The law views this cooperating broker as a subagent of the seller. As a subagent, the cooperating broker has the same fiduciary obligations to the seller as those which are imposed on the listing agent. In many transactions, the purchaser may spend many hours with, and place much confidence in, the cooperating broker. In spite of this, the subagency relationship with the seller generally precludes the establishment of a broker-purchaser agency relationship.

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63. When an agent lists a property for sale, the seller commonly authorizes the agent to place the listing with the local real estate board's multiple listing service. This agreement expressly authorizes other agents to procure a purchaser in accordance with the terms of the listing. See H. Miller & M. Starr, supra note 2, § 4:8, at 18-19. Typically, the selling broker uses the multiple listing service to obtain a list of suitable properties, all or some of which may be shown to the prospective purchaser.

This arrangement is advantageous to the seller, as it facilitates a quicker sale of the property. The multiple listing service enables the listing to be distributed to all other real estate offices which are members of the local Board of Realtors. This distribution greatly expands the pool of potential purchasers and thus increases the likelihood that the property will be sold.

64. See Restatement (Second) of Agency § 5(1) (1957) ("A subagent is a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal . . . ."); see also Romero, supra note 11, at 722 ("[A]ny broker who is not the listing broker but is attempting to effect a sale of the property in cooperation with the listing agent is considered a subagent.").

65. See Kruse v. Miller, 143 Cal. App. 2d 656, 300 P.2d 855 (1956). In Kruse, the court found that although the cooperating broker had no contact with the seller, the broker was nevertheless acting as a subagent and thus had "the same duty [as the listing agent] to act in the utmost good faith." Id. at 660, 300 P.2d at 857-58.

See also Cal. Civ. Code § 2351 (West 1954) ("[a] sub-agent . . . represents the principal in like manner with the original agent"); Restatement (Second) of Agency § 5 comment d (1957) ("subagent stands in a fiduciary relation to the principal, and is subject to all the liabilities of an agent to the principal"); Comment, supra note 10, at 1353 ("The result of this [subagency] arrangement is that both brokers represent the seller and neither represents the buyer."); Romero, supra note 11, at 772.

66. See Romero, supra note 11, at 772 & n.29 ("A buyer can never benefit from a broker's knowledge as to defects, unless he hires an outside broker having no other connection with the transaction."); Comment, supra note 10, at 1353.

One California court judge, noting the inherent conflicts in the subagency relationship and the precarious position in which it leaves the purchaser, has called for clarification of the obligations of the cooperating broker. See Cook v. Westersund, 179 Cal. Rptr. 396 (1981) (The California Supreme Court granted a hearing in Cook in early 1982, but later dismissed the appeal. Thus, there is no official citation to the case.). There, Associate Justice Regan stated:

The confusion as to which party a broker represents is altogether too common.

It would behoove real estate brokers to follow the advice of various authors to pro-
California courts have recognized that the difficulty of establishing
an agency relationship and the problems of conflicting fiduciary responsi-
bilities often leave the purchaser unprotected in real estate transactions.
In the absence of other duties, the rules of agency would often preclude
the broker from owing any obligation to the purchaser. Accordingly,
the courts have sought to provide additional protection to the purchaser.
Specifically, the courts require that:

[W]here a real estate broker or agent, representing the seller,
knows facts materially affecting the value or desirability of
property offered for sale and these facts are known or accessible
only to him and his principal, and the broker or agent also
knows that these facts are not known to or within the reach of
the diligent attention and observation of the buyer, the broker
or agent is under a duty to disclose these facts to the buyer.

It has been suggested that “express provisions in listing agreements and deposit
receipts should (1) establish the cooperating broker as an independent representative
of the buyer; (2) establish a single fiduciary duty of the cooperating broker to the
buyer; (3) remove the subagency relationship between the cooperating broker and
listing broker; and (4) remove liability of a seller for acts of the cooperating broker.”

Id. at 400 n.4 (citations omitted).

The California Legislature has recently taken the first step in remedying this confusion.
Proposed legislation would require every broker to act within defined limits and to disclose
those limits in writing to the parties in the transaction. The statute is designed to ensure that
both the buyer and seller understand the fiduciary obligations which they are owed by the
broker. See A.B. 1125, Reg. Sess. (1985) (introduced by Assembly Member Connelly on Feb-

uary 28, 1985).

67. See supra notes 53-66.

Lingsch v. Savage, 213 Cal. App. 2d 729, 735-36, 29 Cal. Rptr. 201, 205 (1963)).

In Cooper, the sales agents of a condominium project had knowledge that the project was
constructed in a substandard manner and violated minimum requirements of the Uniform
Building Code. Despite this knowledge, the agents described the condominiums as “luxuri-
ous” and as “outstanding investments.” The court stated that the agents were reckless in
stating those opinions in light of their knowledge and that the failure to disclose that knowl-
edge to the purchaser constituted “negative fraud or deceit.” Id. at 866, 128 Cal. Rptr. at 727
(emphasis in original).

In Lingsch, the seller’s broker allegedly knew that the property was in a state of disrepair,
that the units were illegal and that the building had been condemned. The court found that
the broker’s knowledge, and failure to disclose the subject of that knowledge, constituted

It should be noted that in both cases the broker was found to be the agent of the seller, yet
the court imposed an affirmative obligation in favor of the purchaser. As the Lingsch court
The foregoing rule mitigates the purchaser’s lack of protection caused by the broker’s fiduciary obligations to the seller. This rule is not based on agency principles but instead on a policy of protecting the purchaser by preventing broker fraud.69

In addition to the duty to disclose known material facts, the broker must not make representations to the purchaser without knowing the truth of those representations.70 A real estate broker who undertakes to speak on a matter, either voluntarily or in response to a question, is bound to speak truthfully and not conceal any material facts.71 Once the broker speaks, he must make a full disclosure.72 The broker is obliged to obtain information regarding any matter on which he speaks in order to avoid the possibility of misrepresenting the facts.73 The courts have reasoned that the purchaser, who generally relies on the broker, should receive only that information which the broker knows is accurate and truthful.74

explained, “[i]t is not necessary that there be a contractual relationship between the agent or broker and the buyer . . . [because] ‘[a]n action for deceit does not require privity of contract.’” 213 Cal. App. 2d at 736, 29 Cal. Rptr. at 205 (citations omitted).

Examples of other material facts requiring disclosure to the purchaser are: improvements made to the property without a building permit and in violation of zoning regulations (Barder v. McClung, 93 Cal. App. 2d 692, 209 P.2d 808 (1949)); construction of a house in violation of building codes (Curran v. Heslop, 115 Cal. App. 2d 476, 252 P.2d 378 (1953)); and construction of a house on filled land (Burkett v. J.A. Thompson & Son, 150 Cal. App.2d 523, 310 P.2d 56 (1957)).

69. Rylander v. Karpe, 60 Cal. App. 3d 317, 321, 131 Cal. Rptr. 415, 417 (1976) (“A key purpose in enacting the Real Estate Law was to upgrade the standards of the profession and also to assure, as far as possible, that real estate brokers and salesmen will be honest and truthful with their clients.”).

70. See Brady v. Carman, 179 Cal. App. 2d 63, 3 Cal. Rptr. 612 (1960). See also Spargnapani v. Wright, 110 A.2d 82 (D.C. Cir. 1954). There, the broker made representations to the purchaser regarding the capabilities of the heating system, despite the fact that the broker had no actual knowledge of the true facts. In actuality, the home’s boiler was inoperative. The court stated that “‘[f]raud includes the pretense of knowledge when knowledge there is none.’” Id. at 83-84 (quoting Ultramares Corp. v. Touche, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931) (Cardozo, J.).

71. 179 Cal. App. 2d at 68, 3 Cal. Rptr. at 615. In Brady, the purchasers questioned the broker about the presence of an easement across their property. Although the purchasers were aware that the easement existed, they did not understand its significance. In answer to their inquiries, the broker told the purchasers that the easement was “nothing . . . to worry about.” The court found that the broker’s evasive answers discouraged further investigation by the purchasers and thus constituted a fraudulent act. Id., 3 Cal. Rptr. at 615-16.

72. Id., 3 Cal. Rptr. at 615.
73. Id. at 68-69, 3 Cal. Rptr. at 616.
74. One commentator has noted that:

Often, the broker has been in the company of the purchaser for many hours and has conducted some fairly confidential interviews with the prospective purchaser. Given such extensive conduct with the buyer, . . . [the purchaser] is justified in believing that the agent will do his best to obtain the property for the buyer at the lowest
California courts have also held that a broker who voluntarily assumes a relationship with an individual has a duty to exercise reasonable care to avoid negligently injuring that person. However, cases which discuss broker negligence often include allegations of intentional misrepresentation or failure to disclose, making analysis of the negligence duty difficult.

Romero, supra note 11, at 772-73 (footnotes omitted).

Another author has stated that:

The buyer usually expects the broker to protect his interests. This trust and confidence derives from the potential value of the broker's service; houses are infrequently purchased and require a trained eye to determine value and fitness. In addition, financing is often complex. . . . [T]he buyer relies heavily on [the agent's] acquired skill and knowledge, first because of the complexity of the transaction and second because of his own dearth of experience.

Comment, supra note 10, at 1343 (quoted in Easton v. Strassburger, 152 Cal. App. 3d 90, 100, 199 Cal. Rptr. 383, 388 (1984)).

However, because of the conflict of interest arising from subagency and dual representation, this reliance may be misplaced. See supra notes 59-66. One author has stated that:

In the typical residential real estate transaction, however, the buyer . . . may be intentionally or inadvertently led . . . to believe the broker will represent his interest even where he is aware the broker has a listing agreement with the seller. Since the broker's commission is generally paid as a percentage of the sales price, the broker's interest is more closely identified with that of the seller than of the buyer. Where the buyer is unappreciative of the potentially divided loyalty of the broker, he may be lulled into relying on the broker to his significant detriment. Misplaced reliance by the buyer can extend beyond the issue of price to questions regarding quality of title, condition of the premises, and proration of closing costs, property taxes, recording fees, and other expenses.


75. One example of a voluntary relationship assumed by the broker is when he shows property to the purchaser. See infra note 76.

76. See, e.g., Merrill v. Buck, 58 Cal. 2d 552, 375 P.2d 304, 25 Cal. Rptr. 456 (1962). In Merrill, the defendant real estate agent showed property to a potential renter. Despite the agent's knowledge of the hazardous conditions of the basement stairs (no landing at the top, eight-inch drop from hallway to top step, no handrails and poor lighting), she did not point them out to the client, nor did she disclose the existence of the basement door, which was partially hidden. Upon renting the property, the tenant discovered the door. Assuming it led into a closet, she opened the door and fell seven feet into the basement. The court stated that:

[H]aving affirmatively undertaken to show the house to [the prospective lessee] in the regular course of their business with the purpose of earning a commission if she decided to rent it, these defendants were under a duty of care to warn her of a concealed danger in the premises of which they were aware and from which her injury might be reasonably foreseen if she did become a tenant.

Id. at 562, 375 P.2d at 310, 25 Cal. Rptr. at 462.

77. See, e.g., Wilson v. Hisey, 147 Cal. App. 2d 433, 305 P.2d 686 (1957) (The broker's failure to obtain a title search was not, by itself, a negligent act. However, when combined
B. Reasoning of the Easton Court

In *Easton v. Strassburger,* the California Court of Appeal held that in a residential real estate transaction, the seller's broker is under a duty to conduct a reasonable and competent inspection of residential property and to disclose to the purchasers all material facts discovered in that investigation. In reaching its conclusion, the court reviewed the duty which a real estate broker owes to the purchaser of residential property. The court noted that California law, propounded in *Lingsch v. Savage* and *Cooper v. Jevne,* requires the seller's broker to disclose to the purchaser all material defects which are known to the broker, but which are unknown to and unobservable by the buyer. The court observed that the judgment against Valley Realty was for negligence, while the cases cited as authority for the duty to disclose were based on fraud. However, the court reasoned that implicit in the holdings of *Lingsch* and *Cooper* is a duty to search for defects which a broker could reasonably discover. The *Easton* court explained that those cases did not discuss the implicit duty to investigate because such a duty is "superfluous to the issue of fraud."
The court made three arguments in support of adopting the affirmative duty to inspect. First, the *Easton* court reasoned that purchaser protection would be enhanced by requiring the seller's agent to inspect property for the purchaser's benefit. Conversely, a rule limiting disclosure to facts actually known by the broker would result in decreased protection for the purchaser. The court determined that such a rule would provide a disincentive for brokers to make any property inspections. This disincentive would adversely affect the purchaser, who relies on the seller's broker for information.

Second, the court justified the imposition of a duty to inspect under a cost-benefit analysis. The court noted the "relative ease with which the burden [of a duty to inspect] can be sustained by brokers." Weighing this relative ease against the substantial benefit obtained by the purchaser, the court concluded that adoption of the duty was amply warranted.

The broker may acquire this knowledge from the seller or through independent means. In the case of fraud, imposition of a duty to inspect would be superfluous, as knowledge of the defects already exists. Thus, in cases such as *Lingsch* and *Cooper*, it was unnecessary to discuss a duty to inspect. Such a discussion becomes relevant only where, as in *Easton*, it cannot be proven that the broker had actual knowledge of the defects.

87. *Id.* at 99-100, 199 Cal. Rptr. at 388. In previous cases, the duty to disclose known defects was imposed to protect the unwary and inexperienced purchaser from the "unethical broker and seller." *Id.* at 99, 199 Cal. Rptr. at 388. The policy of disclosure insures "that the buyer is provided sufficient accurate information to make an informed decision whether to purchase." *Id.*, 199 Cal. Rptr. at 388.

The purchaser of residential property has traditionally been characterized as unwary, unsophisticated and uneducated. It has been stated that the "unsophisticated buyer" must rely upon the broker's skill and knowledge "because of his own dearth of experience." Comment, *supra* note 10, at 1343.

88. 152 Cal. App. 3d at 99-100, 199 Cal. Rptr. at 388. The court reasoned that limiting the duty of disclosure to known defects would provide the "unscrupulous broker the unilateral ability to protect himself." *Id.* at 100, 199 Cal. Rptr. at 388. By making no inspection, the broker would not discover any material facts, and thus the duty to disclose would not arise. Similarly, the uneducated broker, having insufficient experience to discover defects, would be relieved of the duty to disclose known material facts. Therefore, his own incompetence would shield him from liability. *Id.*, 199 Cal. Rptr. at 388.

The court, in requiring the seller's broker to disclose defects to the purchaser, did not address the problem of conflicting interests. Under the *Lingsch* and *Cooper* cases, California courts have ruled that the seller's interest in fiduciary confidentiality is outweighed by the purchaser's need to avoid being defrauded. See *supra* notes 68-69. The *Easton* decision has expanded that policy, such that the seller's interest in fiduciary confidentiality is outweighed by the purchaser's need to acquire knowledge of all property defects.

89. *Id.*, 199 Cal. Rptr. at 388 ("[I]n residential sales transactions the seller's broker is most frequently the best situated to obtain and provide the most reliable information on the property and is ordinarily counted on to do so.").

90. *Id.* at 101, 199 Cal. Rptr. at 389.
91. *Id.*, 199 Cal. Rptr. at 389.
92. *Id.* at 100-01, 199 Cal. Rptr. at 389.
Third, the court found support for its holding in the Code of Ethics of the National Association of Realtors (NAR). The code states that “[t]he REALTOR® shall avoid exaggeration, misrepresentation, or concealment of pertinent facts. He has an affirmative obligation to discover adverse factors that a reasonably competent and diligent investigation would disclose.” In a footnote, the court quoted and discussed a code hypothetical which was analogous to the facts of the Easton case. The court inferred that the hypothetical’s conclusion, that the Realtor violated the code by failing to conduct a reasonably diligent search, was correct. The court reasoned that adopting the duty to inspect did noth-

93. The Code of Ethics is a compilation of the standards and rules of conduct which the National Association of Realtors imposes on its members. The members voluntarily agree to assume these obligations, which are in addition to the obligations imposed by the courts and real estate statutes. See H. MILLER & M. STARR, supra note 2, § 6:37, at 164.

94. NATIONAL ASSOCIATION OF REALTORS®, INTERPRETATIONS OF THE CODE OF ETHICS, Article 9 at X (7th ed. 1978) [hereinafter cited as INTERPRETATIONS I].

95. 152 Cal. App. 3d at 101-02 n.6, 199 Cal. Rptr. at 398-90 n.6. Case #9-10 of INTERPRETATIONS I, supra note 94, discusses the obligation to ascertain pertinent facts, using the following hypothetical:

Shortly after REALTOR® A negotiated the sale of a home to Buyer B a complaint came to the Board charging REALTOR® A with failure to disclose a substantial fact concerning the property. The charge was that the house was not connected to the city sanitary sewage system, but had a septic tank, whereas the buyer claimed he had every reason to believe the house was connected with the sewer line.

In a statement to the Board’s Grievance Committee, Buyer B agreed that the subject was not discussed during his various conversations with REALTOR® A about the house. However, he pointed out that his own independent inquiries had revealed that the street on which the house was located was “sewered” and he had naturally assumed the house was connected. He had since determined that every other house on the street for several blocks in both directions was connected. He stated that REALTOR® A, in not having disclosed the exceptional situation, had failed to disclose a pertinent fact.

REALTOR® A’s defense in a hearing before the Board’s Professional Standards Committee was (1) that he did not know that this particular house was not connected with the sewer; (2) that in advertising the house he had not represented it as being connected; (3) that at no time did Buyer B concede, had he orally stated that the house was connected; that the fact under discussion was not a “pertinent fact” within the meaning of the Code of Ethics.

The Committee determined that the absence of sewer connection in an area where other houses were connected was a substantial and pertinent fact in the transaction; that the absence of any mention of this fact in advertising or oral representation made it no less pertinent; that ascertaining the failure of previous owners to connect with the available sewer line was within REALTOR® A’s obligation under Article 9 of the Code; that he was, therefore, in violation of Article 9.

INTERPRETATIONS I, supra note 94, Case #9-10, at 74. The Easton court stated that “[i]t may be observed that the defect in this example—the lack of a conventional sewage connection—would not in the circumstances described likely be as apparent to a broker as the defect at issue in the case at bar.” 152 Cal. App. 3d at 102 n.6, 199 Cal. Rptr. at 390 n.6.

It should be noted that the court cited an older edition of the Code of Ethics. For the language of the newer edition, and the effect of the amended language on the court’s reasoning, see infra notes 153-56.

96. 152 Cal. App. 3d at 102 n.6, 199 Cal. Rptr. at 390 n.6.
ing more than judicially impose an obligation which Realtors had previously imposed upon themselves.\textsuperscript{97}

Additionally, the \textit{Easton} court based the imposition of a duty to inspect on precedent, stating that "[t]his implicit duty of all real estate agents . . . is reflected in the law."\textsuperscript{98} In support of this position, the court quoted language from \textit{Brady v. Carman},\textsuperscript{99} where it was stated that the broker "was obliged as a professional man to obtain information about the easement and make a full disclosure of the burdens it imposed on the land."\textsuperscript{100} The court acknowledged that the action in \textit{Brady} was based on fraud rather than negligence, but reasoned that the broker's obligation to obtain information should not "be allowed to vary with the cause of action."\textsuperscript{101}

In discussing the future application of its decision, the \textit{Easton} court noted the vital importance of distinguishing between fraud and negligence causes of action.\textsuperscript{102} The duty to disclose required in cases such as \textit{Lingsch} and \textit{Cooper} arises only when the broker has actual knowledge of material facts, or they are "accessible only to the broker and his principal."\textsuperscript{103} Conversely, if the cause of action is for negligence, as in \textit{Easton}, the purchaser need not allege nor prove that the broker had actual knowledge of the material facts.\textsuperscript{104} Also, the buyer need not show that the material facts were accessible \textit{only} to the broker or the seller.\textsuperscript{105}

Finally, the court explained that the broker's duty to inspect applies even in situations where the defects are not beyond the "diligent attention and observation of the buyer."\textsuperscript{106} However, the court expressly provided for the application of comparative negligence principles to an \textit{Easton}-type situation.\textsuperscript{107} The court stated that the comparative negli-

\textsuperscript{97} The \textit{Easton} court stated that "the duty to disclose \textit{that which should be known} is a formally acknowledged professional obligation that it appears many brokers customarily impose upon themselves as an ethical matter." \textit{Id.} at 101, 199 Cal. Rptr. at 389. See \textit{infra} note 152 for a discussion of the use of the code's provisions as a standard of negligence.

\textsuperscript{98} 152 Cal. App. 3d at 102, 199 Cal. Rptr. at 390 (footnotes omitted).

\textsuperscript{99} 179 Cal. App. 2d 63, 3 Cal. Rptr. 612 (1960).

\textsuperscript{100} 152 Cal. App. 3d at 102, 199 Cal. Rptr. at 390 (emphasis in original) (quoting \textit{Brady}, 179 Cal. App. 2d at 68-69, 3 Cal. Rptr. at 616).

\textsuperscript{101} \textit{Id.} at 102, 199 Cal. Rptr. at 390.

\textsuperscript{102} \textit{Id.} at 103, 199 Cal. Rptr. at 390.

\textsuperscript{103} \textit{Id.,} 199 Cal. Rptr. at 390. If the facts are accessible \textit{only} to the broker, the court stated, that broker "may constructively be deemed to have had actual knowledge." \textit{Id.,} 199 Cal. Rptr. at 390.

\textsuperscript{104} \textit{Id.,} 199 Cal. Rptr. at 390.

\textsuperscript{105} \textit{Id.,} 199 Cal. Rptr. at 390.

\textsuperscript{106} \textit{Id.,} 199 Cal. Rptr. at 390.

\textsuperscript{107} \textit{Id.} at 103, 199 Cal. Rptr. at 391 (citing \textit{Li v. Yellow Cab Co.,} 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975)).
gence doctrine provides "adequate protection to a broker who neglects to explicitly disclose manifest defects." Thus, the court cautioned that the prospective purchaser must continue to exercise reasonable care to protect himself, explaining that if a defect is so clearly apparent that the buyer's own inspection should reveal the flaw, "the buyer's negligence alone would be the proximate cause of any injury he suffered."

Concluding that real estate brokers have an affirmative duty to inspect property for the benefit of the purchaser, the court of appeal held that Valley Realty breached that duty. Therefore, the decision of the trial court was affirmed.

IV. ANALYSIS

A. Critique of the Decision

In Easton v. Strassburger, the court's primary goal was to provide the purchaser of residential property additional protection against buying a defective home. The Easton court's holding, requiring the seller's broker to inspect property for the purchaser's benefit, will undoubtedly provide that protection. In that respect, the Easton decision is a positive one. However, the court-imposed duty is unwarranted by the realities of the transaction and fails to provide the protection necessary to prevent loss. Despite the court's laudable goal, flaws in the opinion suggest that the court adopted the duty to inspect merely as a means of insuring recovery under the particular facts of Easton.

The first problem with the Easton court's imposition of a duty to inspect is that the cases which were relied upon as support for such a duty are distinguishable. The court candidly admitted that the cited cases dealt with broker fraud, not broker negligence. Nevertheless, the Easton court relied heavily on those cases in imposing a negligence standard.

The Easton court cited Lingsch v. Savage and Cooper v. Jevne as support for the duty to inspect, reasoning that that obligation is "im-

108. Id., 199 Cal. Rptr. at 391 (emphasis in original).
109. Id., 199 Cal. Rptr. at 391 (emphasis in original). If the defect in the property is obvious, "as a matter of law a broker would not be negligent for failure to expressly disclose it, as he could reasonably expect that the buyer's own inspection of the premises would reveal the flaw." Id., 199 Cal. Rptr. at 391.
110. The breach occurred because the agents "did not request that the soil stability of the property be tested" and they did not inform the purchasers "that there were potential soils problems." Id. at 96, 199 Cal. Rptr. at 386.
111. Id. at 99, 199 Cal. Rptr. at 387.
licit” in the duty not to commit fraud. The court stated that the rule articulated in Lingsch and Cooper “speaks not only to facts known by the broker, but also and independently to facts that are accessible only to him and his principal.” The Lingsch and Cooper rule was interpreted as requiring the broker to disclose a material defect either when he has knowledge of the defect or when that fact is accessible only to the broker, not to the purchaser.

The Easton court’s interpretation of the rule in Lingsch and Cooper holds the broker liable, under a theory of constructive fraud, whenever a defect is accessible only to the broker, regardless of the broker’s actual knowledge. This interpretation provides two separate theories of broker liability, based on either actual or constructive fraud, and enabled the court to logically “imply” a duty to inspect from the existing law.

However, the Easton court misinterpreted the Lingsch and Cooper rule in implying a duty to inspect. The precise language used to articulate the rule in Lingsch and Cooper states that “where a real estate broker . . . knows facts materially affecting the value . . . of property . . . and these facts are known or accessible only to him and his principal . . . the broker . . . is under a duty to disclose these facts to the buyer.” Interpreted literally, the rule requires that the broker have knowledge of the material fact and that the fact be known by or accessible to only the broker, not to the purchaser. The two requirements are conjunctive. The accessibility requirement is not an independent means of imposing liability, as suggested by the Easton court. There were no facts in either case which indicate that accessibility alone is sufficient to impose liability upon the broker.

Thus, Lingsch and Cooper stand solely for the prop-

114. 152 Cal. App. 3d at 99, 199 Cal. Rptr. at 388.
115. Id., 199 Cal. Rptr. at 388 (emphasis partially in original). Later in the opinion, the court emphasized its interpretation that the rule defines two separate means of liability, stating that the “duty to disclose . . . has application only where it is alleged that the broker either had actual knowledge of the material facts in issue or that such facts were ‘accessible only’ to him and his principal.” Id. at 103, 199 Cal. Rptr. at 390 (emphasis partially in original) (quoting Cooper v. Jevne, 56 Cal. App. 3d 860, 866, 128 Cal. Rptr. 724, 727 (1976)).
116. Id. at 99, 199 Cal. Rptr. at 388. See infra note 122 and accompanying text.
117. Id. at 103, 199 Cal. Rptr. at 390.
118. It required only a small leap in logic for the court to imply a duty to inspect from a constructive knowledge—constructive fraud rule. Holding the broker liable for not discovering that which would have been discovered with a reasonably diligent inspection is the same as holding the broker liable for something he did not actually know but could have discovered (constructive knowledge).
120. In Cooper, the purchasers alleged that the agents knew of the defects but that they did
osition that the broker must disclose facts actually known. This view leaves little room to interpret the rule as implicitly imposing a duty to inspect.

The Easton court also relied on Brady v. Carman in reaching its decision.121 Although admitting that Brady involved broker fraud as opposed to negligence, the court quoted language indicating that brokers had an existing duty to inspect: The broker "'was obliged as a professional man to obtain information about the easement and make a full disclosure of the burdens it imposed on the land.'"122 However, analysis of the Brady case indicates that this language was quoted out of context. In Brady, the broker made affirmative representations in response to the purchaser's questions, and the court held that the agent committed fraud by not verifying the truth of those statements.123 Thus, Brady stands for the proposition that the duty to “obtain information” arises as a result of a broker's representation, not as an independent obligation.124 In contrast to the broker in Brady, Valley Realty's agents made no affirmations or representations to Easton regarding the soil. Therefore, Brady offers little support for the Easton court's statement that the duty to inspect, independent of an affirmative act, is "reflected in the law."125

The Easton court also cited Merrill v. Buck126 as support for the contention that “a real estate agent is clearly under a duty to exercise reasonable care to protect those persons whom the agent is attempting to induce into entering a real estate transaction for the purpose of earning a

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121. 152 Cal. App. 3d at 102, 199 Cal. Rptr. at 126. The material facts were known only by the broker and were accessible only to him. Thus, both prongs of the test were fulfilled and liability ensued.

122. Id. at 102, 199 Cal. Rptr. at 390 (emphasis in original) (citing Brady, 179 Cal. App. 2d at 68-69, 3 Cal. Rptr. at 615). The Easton court stated that “[t]his implicit duty of all real estate agents [to inspect the property which they sell] . . . is reflected in the law,” and then quoted Brady as an example of a case reflecting that duty. Id. at 102, 199 Cal. Rptr. at 390.

123. Brady, 179 Cal. App. 2d at 68-69, 3 Cal. Rptr. at 615-16.

124. In quoting Brady, the Easton court deleted the following language defining the prerequisites to disclosure: “The inquiry having been made [by the purchaser], and the defendant having undertaken to answer, he was obliged as a professional man to obtain information . . . .” Brady, 179 Cal. App. 2d at 68, 3 Cal. Rptr. at 616 (emphasis added). The Easton court emphasized Brady's discussion of real estate agents as professionals and their duty to obtain information. 152 Cal. App. 3d at 102, 199 Cal. Rptr. at 390. However, the court ignored the fact that the duty only arose subsequent to some affirmative act by the agent.

125. 152 Cal. App. 3d at 102, 199 Cal. Rptr. at 390.

commission."\textsuperscript{127} However, the Merrill court emphasized that the duty of due care arose from the voluntary relationship which the agent assumed with the prospective tenant.\textsuperscript{128} In Easton, Valley Realty was admittedly the seller's agent. There was no contractual relationship with Easton, nor did Valley Realty assume a voluntary relationship with her.\textsuperscript{129} Also, while the agent in Merrill had actual knowledge of the hazardous condition,\textsuperscript{130} the agents in Easton possessed no such knowledge.\textsuperscript{131} Thus, the reasons for which the Merrill court imposed a duty of due care on the broker were not present in Easton.

Because the cited cases may be distinguished from the facts in Easton, the decision is not merely an extension of old law. Rather, by requiring the seller's broker to inspect property for the benefit of the purchaser, the court imposed a new duty.\textsuperscript{132} The court advanced several policy arguments to justify the imposition of this novel duty. The court noted

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\textsuperscript{127} 152 Cal. App. 3d at 98 n.2, 199 Cal. Rptr. at 387 n.2 (citing Merrill v. Buck, 58 Cal. 2d 552, 375 P.2d 304, 25 Cal. Rptr. 456 (1962)).

\textsuperscript{128} 58 Cal. 2d at 561, 375 P.2d at 310, 25 Cal. Rptr. at 462.

\textsuperscript{129} Unlike Merrill, where the broker showed the property to the renter, Valley Realty's agents did not show property to Easton, nor did they have any other contact with her.

\textsuperscript{130} 58 Cal. 2d at 561, 375 P.2d at 310, 25 Cal. Rptr. at 462.

\textsuperscript{131} See supra note 31.

\textsuperscript{132} The Easton court, admitting that it was imposing a novel duty, altered long standing fiduciary rules. In so doing, the court bypassed the lawmaking powers of the legislature. With its superior fact-finding resources and the ability to weigh the effects of a particular course of action, the legislative branch has the responsibility of enacting long range policy procedures. See Moran v. Harris, 131 Cal. App. 3d 913, 921, 182 Cal. Rptr. 519, 523 (1982) ("[The court] may not encroach upon the lawmaking branch of government in the guise of public policy unless the challenged transaction is contrary to a statute or some well-established rule of law.").

The California Legislature, in enacting § 10176 of the Business and Professions Code, did not impose an affirmative duty to inspect property. Implicit in this legislative inaction was a finding either that the realities of real estate transactions do not justify imposing that duty on brokers, see infra notes 134-37 and accompanying text, or that the effects of such a duty would be detrimental to the market. See infra notes 214-19 and accompanying text. Section 10176, as enacted, requires disclosure of known defects under a policy of preventing fraud. Although requiring the broker to disclose known defects is contrary to the seller's position, public policy warrants such disclosure. Thus, the legislature impliedly determined that preventing fraud outweighs the broker-seller fiduciary relationship. However, the legislature has not spoken on imposing a duty to inspect on the seller's broker. There has been no legislative finding that the purchaser's need to know discoverable defects outweighs the broker's fiduciary relationship with the seller. Therefore, the Easton court enacted its own public policy law at the expense of the broker-seller agency relationship.

It should be noted that recently proposed legislation, see supra note 66, which deals with the broker's duties to both seller and purchaser, does not require the broker to make an affirmative investigation for the buyer's benefit. Although this legislation was proposed subsequent to the Easton decision, Assemblyman Connelly defined the broker's duty to the purchaser under the Lingsch and Cooper standard: "A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within
that the rules regulating broker conduct are enacted for the public's protection and that the new duty is commensurate with that goal.\textsuperscript{133} However, the policy arguments advanced by the \textit{Easton} court are problematic, as many of the assumptions underlying these arguments are incorrect.

First, the court stated that the broker is often in the best position to "obtain and provide the most reliable information on the property."\textsuperscript{134} This is not always true. It is often more likely that the seller, who lives on the property and is thus more familiar with it, will have superior knowledge regarding material facts.\textsuperscript{135} Accordingly, it is unreasonable to conclude that the broker can provide more reliable information than the seller. Although the \textit{Easton} court correctly stated that the purchaser is in the \textit{worst} position to know material facts regarding the property,\textsuperscript{136} this observation does not justify imposing the duty on the seller's broker,\textsuperscript{137} as he is not in a materially better position to know those facts.

A second concern implicit in the court's decision is that the broker may be the only party with the financial ability to satisfy a judgment.\textsuperscript{138}

\textsuperscript{133} 152 Cal. App. 3d at 99-100, 199 Cal. Rptr. at 388.
\textsuperscript{134} Id. at 100, 199 Cal. Rptr. at 388.
\textsuperscript{135} See Bevins v. Ballard, 655 P.2d 757, 764 (Alaska 1982) (Connor, J., dissenting) ("[A] broker often has little personal knowledge of the property which he offers for sale.” Further, “[s]ellers . . . are normally in the best position to know the facts [about their property].”).
\textsuperscript{136} 152 Cal. App. 3d at 100, 199 Cal. Rptr. at 388 (citing Comment, \textit{supra} note 10, at 1343).
\textsuperscript{137} The court's holding expressly states that the duty of disclosure is imposed on the agent representing the seller. \textit{Id.} at 102, 199 Cal. Rptr. at 390. One of the many questions remaining after \textit{Easton} is the effect of the decision on the cooperating broker. Arguably, because the subagency theory makes the cooperating broker an agent of the seller, the cooperating broker has the same affirmative duty to inspect as the seller's broker. Conversely, the lack of time that the typical cooperating broker spends at the property, coupled with the lack of a confidential relationship with the seller, makes it unrealistic to impose a duty of inspection on that broker.

One possible way to resolve this conflict is to divide any costs of inspection between the brokers. See \textit{infra} notes 180-82 and accompanying text for a discussion of the monetary burden of inspection. This division would prevent the cooperating broker from receiving the windfall benefit of having the seller's broker shoulder the entire cost of protecting the buyer, who is theoretically the cooperating broker's client.

\textsuperscript{138} In \textit{Easton}, of the five parties sued, only Valley Realty was solvent. See \textit{supra} note 37. \textit{See also} Jacobson, \textit{Broker's Liability for Sale of Defective Homes—The Decline of Caveat Emptor}, 52 L.A.B.J. 346 (1977), where the author stated that:

The first person [the injured purchaser] will look to [for recovery of money] is the seller. However, the seller has no doubt taken the money he has received . . . and reinvested in another home . . . . The seller may also have relocated too far away to comfortably be reached by legal process. This leaves the real estate broker as the most likely target. Because the real estate broker is highly visible, continues to be in business, and is easily reached by service of process, he often becomes the eventual target of a lawsuit.
In *Easton*, the sellers' intentional concealment of the soil defects caused severe economic loss, but their insolvency prevented the purchaser from recovering any money from them. Additionally, Valley Realty's agents were not liable for fraud or misrepresentation, preventing *Easton* from recovering under those traditional theories.\textsuperscript{139} Imposing the duty to inspect in this particular case allowed the court to reach the broker's "deep pocket" and provided the purchaser with an avenue for recovery. Therefore, it appears that the court's concern for one purchaser's economic welfare induced it to impose an industry-wide duty, with the underlying reason simply being that the broker has the ability to pay.

The *Easton* court's third policy argument concerned the effects of a contrary holding.\textsuperscript{140} The court correctly reasoned that if the broker is liable only when he has actual knowledge of a material defect, a disincentive to inspect properties would result.\textsuperscript{141} The "ostrich effect" produced by such a holding would cause brokers to make minimal property inspections, thereby avoiding the acquisition of knowledge which would trigger the duty to disclose.\textsuperscript{142} However, this disincentive to inspect would not produce the drastic results predicted by the court.

The court was concerned that "unscrupulous" and "incompetent" brokers would receive a windfall if required to disclose only known defects.\textsuperscript{143} However, the court did not discuss the fact that these brokers would still be liable under the *Brady* rule.\textsuperscript{144} That rule requires the broker to obtain all available information regarding any representations he makes to the purchaser to ensure the truthfulness and accuracy of such representations.\textsuperscript{145} The *Brady* rule, combined with the *Lingsch* and *Cooper* rule,\textsuperscript{146} prevents the broker from making an affirmative statement regarding the property without knowledge of the statement's veracity. Further, market realities prevent the unscrupulous or incompetent broker from remaining in business.\textsuperscript{147}

\textsuperscript{139} See *supra* note 35 and accompanying text.
\textsuperscript{140} 152 Cal. App. 3d at 99-100, 199 Cal. Rptr. at 388. See also *supra* notes 88-89 and accompanying text.
\textsuperscript{141} *Id.*, 199 Cal. Rptr. at 388.
\textsuperscript{142} *Id.*, 199 Cal. Rptr. at 388.
\textsuperscript{143} *Id.* at 100, 199 Cal. Rptr. at 388.
\textsuperscript{144} *Id.*, 199 Cal. Rptr. at 388.
\textsuperscript{145} 179 Cal. App. 2d at 68, 3 Cal. Rptr. at 615.
\textsuperscript{146} See *supra* note 68 and accompanying text.
\textsuperscript{147} According to the Department of Real Estate's licensing statistics department, as of January 2, 1985, there were a total of 289,924 agents and brokers licensed in California. The abundance of brokers creates intense competition to maintain a profitable business. This competition is an incentive to act with diligence and honesty. A broker with a negative reputation
A final flaw in the court’s opinion is its reliance on the National Association of Realtors’ (NAR) Code of Ethics as precedent for a duty to inspect. The court cited the 1978 edition of article nine of the code, which requires the Realtor to discover adverse factors, and a hypothetical case explaining that code section. The interpretive hypothetical stated that the Realtor violated his duty to the purchaser by failing to ascertain the absence of a sewer hook-up. The Easton court stated that the hypothetical situation was analogous to the case at bench. Thus, the court found that because Realtors had imposed the duty to inspect on themselves, the code supported a judicial imposition of that duty.

However, the Easton court failed to cite the most recent edition of the code. In 1982, NAR amended the case interpretation which was cited by the Easton court. The amended interpretation limited the duty to discover adverse facts to those which are a “matter of public

in the community will find it very difficult to successfully compete. As with other occupations, the unscrupulous or incompetent broker will be forced out of the market if the public refuses to do business with him. In addition, the broker’s license may be revoked for particular acts of dishonesty or incompetence, thereby ensuring his removal from business. See CAL. BUS. & PROF. CODE §§ 10176-10177 (West Supp. 1985).

It should be noted that there was no moral culpability on the part of Valley Realty, as all allegations of fraud and misrepresentation were dismissed. Nor was it claimed that Valley Realty’s agents were incompetent or ignorant. Additionally, the trial jury’s finding that Valley Realty was only five percent responsible for Easton’s loss suggests that Valley Realty’s actions were not excessively unreasonable.


149. 152 Cal. App. 3d at 101-02 & n.6, 199 Cal. Rptr. at 389-90 & n.6.

150. See supra note 95 for text of hypothetical case interpreting article 9 of the code.

151. 152 Cal. App. 3d at 101-02 n.6, 199 Cal. Rptr. at 389-90 n.6.

152. Id., 199 Cal. Rptr. at 389-90 n.6. A Realtor may be sanctioned by NAR for violating a code provision. H. MILLER & M. STARR, supra note 2, § 6:37, at 164-68. The code is also properly used as evidence of the requisite standard of care owed by the broker. See Pepper v. Underwood, 48 Cal. App. 3d 698, 714, 122 Cal. Rptr. 343, 355 (1975). By imposing a duty to inspect based on the code, it appears that the court created a negligence cause of action for breach of a code provision.

The Easton decision appears to transform the code into a negligence standard analogous to the theory finding negligence for violation of a statute. Under the Easton court’s reasoning, violation of a code section raises a presumption that the broker breached his duty of due care to the purchaser. If the violation caused injury to the purchaser, that presumption will be sufficient to support a judgment against the broker. See generally 46 CAL. JUR. 3d, Negligence §§ 92-110 at 278-305 (1978).

In view of the fact that the court used the wrong version of the code in deciding the case, see infra notes 153-56 and accompanying text, use of the code to create a rebuttable presumption of negligence would appear to be improper under the rationale posited by the Easton court.

153. NATIONAL ASSOCIATION OF REALTORS®, INTERPRETATIONS OF THE CODE OF ETHICS, Case #9-10 (8th ed. 1982) [hereinafter cited as INTERPRETATIONS II].
Contrary to the Easton court's assertion, Realtors do not impose on themselves the duty to discover every adverse factor affecting property. Rather, the duty to discover applies only to those factors of which there is constructive notice. Consequently, the court used outdated material to impose on Realtors a mandatory rule which they had declined to make mandatory upon themselves.

B. Implications of the Decision

1. The broker's fiduciary duties after Easton

As a result of the Easton decision, the broker's fiduciary duties to the seller are no longer clearly defined. The court imposed an affirmative obligation on the listing broker to inspect property for the benefit of the purchaser. However, this duty ignores the broker-seller fiduciary relationship established in the listing contract and the obligations to the seller which arise from that relationship.

As stated previously, the listing agent has the obligation to the seller to sell property at the best possible price and terms, and agency law prohibits any action by the broker which is adverse to his principal's interests. The duty imposed by the Easton court requires the broker to affirmatively act for the purchaser's benefit, despite the lack of an agency relationship, thereby requiring the broker to act contrary to the seller's interests.

This new duty is very different from the obligation previously im-
posed on the seller’s broker, which only required the disclosure of known defects. That duty is not adverse to the seller’s interests, as the seller himself must disclose known defects.\textsuperscript{162} Thus, the broker is merely being held to the same standard as his principal. Also, while that duty is premised on a policy of preventing fraud, the duty imposed by the \textit{Easton} court does not depend on the broker’s moral culpability.

The broker’s fiduciary obligations to the purchaser remain as confusing subsequent to \textit{Easton} as they were before the decision. Prior to \textit{Easton}, no fiduciary duties were owed to the purchaser unless the broker was found to be his agent.\textsuperscript{163} The only obligations owing to the purchaser were to disclose known material facts and to refrain from fraudulent acts.\textsuperscript{164} However, after \textit{Easton}, the listing broker must act for the purchaser’s benefit.\textsuperscript{165}

The decision creates a difficult conflict of interest for the listing broker. He is required to act diligently for the seller’s benefit because of the established agency relationship. The broker is also required to act diligently for the purchaser, despite the lack of an agency relationship. As stated previously, it is exceedingly difficult for an agent to act with the highest good faith to parties with adverse interests, yet this is the requirement imposed by the \textit{Easton} court.\textsuperscript{166}

Beyond the court’s apparent disregard for established fiduciary law, the \textit{Easton} decision could ultimately result in the imposition of a strict liability standard on brokers. In \textit{Bevins v. Ballard},\textsuperscript{167} the Alaska Supreme Court found the seller’s broker liable for innocent misrepresentation.\textsuperscript{168} The dissenting justices argued that such a holding is akin to imposing strict liability, making the broker “the insurer of the seller’s representation.”\textsuperscript{169}

\textsuperscript{162} \textit{See}, e.g., Ashburn v. Miller, 161 Cal. App. 2d 71, 326 P.2d 229 (1958) (court held that vendor, who knew that lot consisted of fill but represented to purchaser that land was solid, was liable for fraud and misrepresentation).

\textsuperscript{163} \textit{See supra} notes 53-57 and accompanying text.

\textsuperscript{164} \textit{See supra} notes 68-73 and accompanying text.

\textsuperscript{165} The broker must undertake actions for the purchaser despite the fact that there is no broker-purchaser relationship. For example, Valley Realty’s agents did not have any contact with Easton. \textit{See supra} note 129.

\textsuperscript{166} \textit{See supra} notes 61-62 and accompanying text.

\textsuperscript{167} 655 P.2d 757 (Alaska 1982). In \textit{Bevins}, the court found that the brokers, who merely conveyed to the purchasers representations made by the sellers, were liable for innocent misrepresentation. The court stated that brokers have no general duty to inspect, but that public policy favors imposing liability whenever a misrepresentation is made, regardless of whether the broker does so innocently.

\textsuperscript{168} \textit{Id}.

\textsuperscript{169} \textit{Id}. at 764 (Connor, J., dissenting). Justice Connor, joined by Justice Rabinowitz, stated:
The *Easton* court moves even closer to imposing strict liability than did *Bevins*, since under *Easton* the broker need not make a representation to the purchaser. Instead, the broker may be held liable, despite a diligent inspection of the property, if he overlooks a defect which the jury in hindsight believes should have been discovered. The broker is not merely "insuring" the seller's representation. Rather, he is insuring, for the purchaser's benefit, that the property will be free from defects.

2. Scope of the *Easton* duty

The *Easton* standard, requiring a "reasonably competent and diligent" inspection by the seller's broker, has created much uncertainty for real estate brokers and has left many questions unanswered.

The first question concerns what the agent will be required to discover. The factual circumstances of *Easton* indicate that the "reasonable broker" is required to possess a high level of expertise regarding the structural qualities of residential property. If the reasonable broker is required to discover defects in soil compactness, he may also be required to discover defects in the roofing, plumbing, heating and electrical systems. Although a broker should possess a general knowledge of typi-
cal problem areas, the duty to inspect may ultimately require expertise in many diverse areas. Until future cases establish and define the limits of the new duty, brokers will remain unsure of how much expertise is necessary to escape liability.

Second, the *Easton* decision is unclear as to when the duty to inspect will be triggered. In *Easton*, the court found that because the agents had notice of certain problems, they should have taken additional steps to determine the extent of those problems. However, in its precise statement of the rule, the court did not limit the duty to inspect to facts of which an agent has notice. Thus, regardless of whether there are any indications of potential problems, it appears that the agent must make a diligent inspection of the property.

“do not deal with, and no one need know anything about, hidden defects in soil or structures, or inspecting for them.” Amicus Brief for the California Association of Realtors at 7-8, *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984) [hereinafter cited as Amicus Brief for CAR, *Easton*].

Thus, because brokers are not required to have expertise in soil analysis, it appears that the Valley Realty brokers were required to possess greater knowledge than that of the typical broker. Similarly, the licensing requirements do not require particular expertise regarding the roofing, plumbing, heating or electrical systems, nor of other structural components of the house. Yet, after *Easton*, these may become part of the knowledge requirement of a “reasonable broker.”

The *Easton* court was concerned that the real estate broker “would be shielded by his ignorance of that which he holds himself out to know.” 152 Cal. App. 3d at 100, 199 Cal. Rptr. at 388. The court stated that the real estate broker “holds himself out to the public as having particular skills and knowledge in the real estate field.” *Id.* at 103-04, 199 Cal. Rptr. at 391. However, real estate brokers usually do not hold themselves out as having any particular skill or knowledge in soil engineering or structural fitness. The average broker holds himself out as an expert “in bringing together buyers and sellers, in the mechanics of escrows and transferring titles, possibly in financing. [He is] not [an expert] in building houses or testing them or the soil on which they rest for defects.” Amicus Brief for CAR at 8, *Easton*. The broker who does hold himself out as an expert in structural matters would be governed by the *Brady* rule. See supra notes 71-73 and accompanying text. Thus, the court’s concern that a broker will be shielded by his ignorance of that which he holds himself out to know is undermined by the realities of the real estate industry.

173. See supra notes 171-72. A broker who is required to be an expert in many diverse areas will be forced to spend a great deal of money and time acquiring that knowledge. Also, due to the many diverse structural components in a residence, it may be impossible for the broker to acquire an expertise in all of them. See infra notes 210-19 and accompanying text for discussion of a possible solution to the problem of requiring the broker to be an expert in structural matters.

174. 152 Cal. App. 3d at 104, 199 Cal. Rptr. at 392.

175. *Id.* at 102, 199 Cal. Rptr. at 390 (Real estate brokers have 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 investigation would reveal.”).

176. Logically, the duty to investigate should be limited to situations where a red flag is present, because the agent would then have some indication that a problem existed.

Arguably, the court unnecessarily imposed the duty to inspect in deciding the case. A
The third question concerns how the broker may satisfy the duty to inspect. If the seller's broker does not perceive any red flags on the property, will the duty to inspect be discharged, or is additional action required? If the broker asks the seller whether any problems exist with the property and receives a negative answer, may he accept the answer at face value or must he insist on further inspection? If the broker discovers a red flag during his inspection, may he satisfy the duty of disclosure by pointing out the indicator to the purchaser and explaining its potential ramifications, or must he order a complete inspection to precisely determine the extent of the problem? The courts must attempt to answer these questions in future cases interpreting the Easton duty.

decision more limited in scope would have satisfied the court's goal of protecting the purchaser while avoiding many of the problems generated by the duty to inspect.

The opinion specifically noted that the sellers' agents had knowledge of red flags regarding the soil condition. Under the rule of Lingsch and Cooper, requiring a broker to disclose known facts, the court could have imposed liability on Valley Realty based solely on the agents' failure to disclose knowledge of the red flags. Although the agents may have been unaware of the ramifications of these particular red flags, the decision could have limited the duty to disclosing their existence. The definition of a "material fact" could have been expanded to include a red flag, requiring only minimal departure from existing law. In this manner, Easton would have recovered her loss without imposing the duty to inspect, making it unnecessary to depart from previous case law.

If the broker does not see any red flags in his walk-through, he will have no indication where or how to begin a more thorough investigation. Some problems will not be discovered by the broker unless there are red flags. The agent's ability to discover a defect on a walk-through is dependent in large part on his expertise in structural systems. Thus, the issue becomes the level of expertise that courts will require the broker to possess.

Requiring the broker to "discover" facts which are in all likelihood already known by the sellers is a needless expenditure of the broker's time and efforts. If the seller knows of a defect and fails to disclose its existence, he is liable for fraud under existing law. Ashburn v. Miller, 161 Cal. App. 2d 71, 326 P.2d 229 (1958). The purchaser would therefore be protected in such a situation. If the seller in good faith answers that the property has no defects, yet the broker insists on ordering an inspection, the implication will be that the seller is lying. Thus, requiring the broker to inspect despite his principal's answer will be detrimental to the fiduciary relationship between the two parties. Additionally, if the seller never discovered any defects while living in the house, and truthfully answers to that effect, it is highly improbable that the broker would be able to discover any defects during his inspection.

The Easton court hinted that disclosing the existence of the red flags would have been sufficient to avoid liability. See 152 Cal. App. 3d at 96, 199 Cal. Rptr. at 386 ("Despite [their knowledge of the red flags], the agents did not . . . inform [the purchaser] that there were potential soil problems."). Conversely, the court also stated that the agents should have requested a soil report or taken other steps to determine the extent of the problems. Id. at 104, 199 Cal. Rptr. at 391.

The best resolution of this issue would be to allow the broker to discharge his duty simply by disclosing the existence of red flags to the prospective purchaser. As the person merely bringing the buyer and seller together, the broker should not be required to order tests and obtain expert opinions. That is an item properly negotiated between the principals.
Fourth, it is not clear which party must pay for the cost of inspections which are beyond the broker's expertise. In Easton, complicated tests were necessary to determine the extent of the soil problems. The court stated that the brokers should have ordered the tests, but did not explain which party would be liable for the costs. After Easton, the seller has no incentive to voluntarily pay these costs. If the seller is aware of a problem and wants to prevent its discovery, he may not desire any inspection. Similarly, if the seller has not discovered any material defects after living in his home for many years, he may not wish to pay an inspector to verify what he already "knows." Because Easton makes the broker liable for any defects which are not discovered, the seller has no reason to pay for inspection costs. In fact, the seller may require the broker to pay for an inspection as a condition of obtaining the listing, knowing that the broker is not in a position to bargain over that condition.

Finally, in future cases similar to Easton, the role of comparative negligence is uncertain. The Easton court stated that, under the principle of Li v. Yellow Cab Co., a broker will not be held liable if the defect is so "clearly apparent" that it should have been discovered by the buyer. However, the court did not define "clearly apparent," stating only that this determination was to be made as a "matter of law." Because the court characterized the typical residential purchaser as unwary and inexperienced, it is arguable that most defects will be found to be beyond the perception of the typical purchaser.

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180. See 152 Cal. App. 3d at 104, 199 Cal. Rptr. at 391.
181. The seller would, of course, be subject to liability for fraud in this situation. See, e.g., Ashburn v. Miller, 161 Cal. App. 2d 71, 326 P.2d 229 (1958) (seller may not knowingly make false statements regarding condition of his property).
182. Because of the large number of brokers in California, see supra note 147, a broker may be forced to accept the seller's terms or lose the listing to another broker. Also, the broker who accepts a listing will be forced to pay for an inspection, knowing that if a defect surfaces he will be liable for damages. Although Easton makes the broker liable only for damages which could have been reasonably discovered, this standard does not offer much protection to the broker. This is especially true in light of the complex facts which were found to be reasonably discoverable in Easton. See Amicus Brief for CAR at 4, Easton ("Hindsight being invariably perfect, juries would regularly find that any problem learned for the first time after a sale, would have been discovered by a 'reasonably competent and diligent inspection.'").
183. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (court held that contributory negligence would no longer bar recovery by the plaintiff, adopting instead comparative negligence, which assesses liability in proportion to fault).
184. 152 Cal. App. 3d at 103, 199 Cal. Rptr. at 391.
185. Id., 199 Cal. Rptr. at 391.
186. Id. at 100, 199 Cal. Rptr. at 388.
The *Easton* jury found no negligence on the part of Easton. 187 This fact is puzzling, as she apparently was aware that the property was located on fill soil. 188 Because knowledge of the condition was not sufficient to impose comparative negligence, the *Easton* duty implicitly requires that the purchaser have *both* notice of the red flag and awareness of its consequences. If this is the standard of comparative negligence which future cases will apply, that standard will provide the broker with very little protection. 189

V. RESPONSE OF THE CALIFORNIA ASSOCIATION OF REALTORS

The California Association of Realtors (CAR) has expressed much concern about the effect which *Easton* will have on the real estate industry. The uncertainty caused by the decision, and the potential liability it imposes on California brokers, has attracted much attention from CAR. The organization filed an amicus curiae brief in Valley Realty's unsuccessful appeal to the California Supreme Court and, subsequent to that court's denial of a hearing, published a guidance memorandum to the state's Realtors. 190

187. *Id.* at 97, 199 Cal. Rptr. at 386. Because the judgment imposed 100% of the loss on the defendants, the jury must have concluded that Easton was 0% at fault for the loss.

188. *See* Brief for Respondent at 12, *Easton*, where plaintiff admitted this knowledge: "Even though Mr. Easton knew that the lot was cut and fill, he was not aware of the dangers of fill." The Eastons were divorced prior to the lawsuit, but the husband's knowledge can reasonably be imputed to his wife.

Additionally, the red flags were as equally visible and accessible to the purchasers as they were to Valley Realty's agents.

189. The doctrine of comparative negligence will necessarily result in the broker's participation in a costly trial. The duty imposed in *Easton* allows a purchaser to state a cause of action by alleging that the property contains a defect which the broker failed to discover. The broker will be unable to successfully move for summary judgment, as liability under this duty is a question of fact. The issues at trial will be the proximate cause of the injury and apportionment of fault between the parties. 152 Cal. App. 3d at 103, 199 Cal. Rptr. at 391. Although the *Easton* court stated that a purchaser's comparative fault could be determined as a matter of law, this is a question of fact that must be decided at trial. Thus, the broker will be forced to undertake a costly defense even in situations where, as in *Easton*, the purchasers had access to the red flags and the broker was only minimally at fault.

The *Easton* court stated that the broker receives additional protection because he is entitled to indemnification by the seller. *Id.* at 111-12, 199 Cal. Rptr. at 396-97. However, indemnification under these circumstances offers little real protection to the broker. Underlying the court's decision to impose liability on the broker was the concern that the seller may be insolvent and unable to satisfy a judgment. *See supra* notes 138-39 and accompanying text. If this is true, then the broker's ability to indemnify his loss is nonexistent. The broker, like the purchaser, will be unable to recover money from an insolvent seller.


Prior to the California Supreme Court's denial of a hearing, CAR published a temporary
The CAR memorandum consists of questions and answers concerning the effects of the decision. The guide describes a five-step approach to "minimizing and possibly avoiding Easton liability." 191

First, CAR advises the broker to ask the seller if there are past or existing problems with the property. These questions should be asked when the broker takes the listing for the property. If the seller's response indicates that there have been problems, the broker should determine what steps, if any, were taken to remedy the situation. 192

The second step is for the broker to carefully inspect the property for red flags. 193 Examples of red flags include water-stained ceilings, sagging ceilings and peeling plaster, all of which would indicate roof damage. 194

Third, the broker should point out any red flag indicators to the seller. 195 The broker should also inquire about the red flags to determine their cause and whether the indicated conditions continue to exist. 196

Fourth, the broker should recommend that a professional inspector be hired to investigate the problem. 197 The inspector should be retained to determine whether a defect actually exists and, if so, what it will cost to repair. 198

The final step is for the broker to disclose to the buyer the information discovered by the inspector. 199 In the event that neither buyer nor seller wishes to conduct the inspection, the broker should obtain a written release stating that he advised that the inspection be conducted. 200

CAR admits that neither its suggested procedure, nor any other ap-
proach, will “absolutely guarantee the avoidance of liability.” At best, these steps will minimize liability until further court decisions define the precise requirements of the duty. Finally, included among CAR’s future plans to limit the impact of \textit{Easton} is a proposal to investigate the possibility of developing legislation to define guidelines for the duty to inspect.

\section*{VI. An Alternative Solution}

After \textit{Easton}, the costs of residential real estate transactions will undoubtedly increase. The primary cause for this increase will be higher premiums charged to the broker for his errors and omissions insurance. The broker will also bear the financial burden of obtaining the education necessary to adequately inspect the property he is attempting to sell. Third, the broker will have to spend additional time at the property in order to conduct a sufficiently thorough inspection. Finally, should an expert be required, the broker will be forced to incur the costs of hiring an inspector.

As a result of these increased costs, the broker will increase the commission charged to the seller. This increase will enable the broker to

\footnotesize

201. \textit{Further Guidance, supra} note 190, at 3.
202. \textit{Id.} The CAR Memorandum states:

\begin{quote}
The facts and circumstances in each case must be examined carefully to assess the legal duty now required under the \textit{Easton} decision. Therefore, it is incumbent upon each licensee to carefully examine each set of facts and to consult with his or her own attorney in those questionable situations . . . .
\end{quote}

\textit{Id.} The CAR Memorandum focuses on the issue of red flags. CAR believes that the broker’s duty should be limited to the discovery of these red flags, with an expert being consulted if any such indicators are found. \textit{See supra} note 198. In this way, the broker is not required to possess any special expertise to fulfill the duty. Limiting the broker’s duty in this manner seems warranted by the realities of the transaction. \textit{See supra} notes 176-77.

203. \textit{Further Guidance, supra} note 190, at 7-8. Additionally, CAR plans to publish an \textit{Easton} compliance manual with standard forms and checklists, develop a continuing education program incorporating further developments of the duty to inspect, and offer legal advice to brokers with specific factual questions. \textit{Id.}

204. Errors and omissions policies have traditionally protected the broker against negligence liability while excluding coverage for fraudulent or intentional acts. Because \textit{Easton} greatly expands the broker’s potential negligence liability, there is a corresponding expansion of the insurer’s potential responsibility to indemnify that liability. Therefore, the insurance companies will either increase the premiums charged on that coverage, in order to cover their expanded potential losses, or discontinue writing errors and omissions policies altogether.

205. A real estate broker is not currently required to possess any specific knowledge regarding structural analysis. \textit{See supra} note 172. However, in effect, the \textit{Easton} court found the brokers liable for not possessing the expertise necessary to analyze soil defects. Therefore, after \textit{Easton}, brokers must obtain additional education in order to acquire that expertise.

206. \textit{See supra} note 182 and accompanying text for reasons why the broker will be the party who must incur the cost of inspection.

207. Prior to \textit{Easton}, the typical commission rate was six percent of the sales price, paid
maintain his profit margin while adequately providing the required services. The seller will in turn raise the sales price of his home to compensate for his increased cost. Therefore, the Easton duty will result in an increase in residential home prices, with the ultimate financial burden falling on the purchaser.208

The purchaser will receive, at best, questionable protection in return for the additional price he will pay for the home. Because the broker is not an expert in structural analysis,209 it is not certain that he will discover the defect and thus prevent any loss. Rather, Easton protects the purchaser by providing a party to sue should the home prove defective.

Any alternative to the Easton duty must meet the court's concern for protecting the residential home purchaser, but should do so with greater efficiency. The alternative should provide protection which will prevent the purchaser's loss, thereby justifying any increase in the property's sales price. Additionally, the realities of real estate transactions must be taken into account.

One possible alternative which affords the purchaser the additional protection desired by the Easton court and recognizes the realities of real estate transactions is the implementation of a system of state licensed "home inspectors."210 These inspectors would be regulated by the state, much like the termite inspectors currently utilized in many residential transactions.211 The home inspector, employed by the seller, would in-

from the proceeds at the close of escrow. It is not yet known how great an increase will be necessary to cover the broker's additional costs.

The increased costs resulting after Easton will prevent individual real estate offices from charging a reduced commission in order to attract bargain conscious sellers. All brokers are required to make a diligent inspection, and are therefore forced to bear the costs arising from that duty. Thus, the increase in commissions will be uniform throughout California.

208. In this respect, the duty to inspect acts as a forced negotiation between the seller and the purchaser. The purpose of the new duty is to allow buyers to purchase a home without hidden defects, or to at least provide them a means of recovery in the event that a defect later surfaces. Prior to Easton, a purchaser who wanted this protection had to bargain with the seller for a warranty insuring that there were no defects. Thus, the buyer's costs were increased in return for additional protection. After Easton, the result is the same, but it occurs in an indirect, non-negotiated manner.

209. See supra note 173 and accompanying text.

210. A similar system is currently being developed in Canada. See Nixon, Protection for the Purchaser Against Defects in Used Housing: The Emerging Home Inspection Profession, 20 Osgoode Hall L.J. 155 (1982). Canada's laws vary significantly from California's in regard to the duties owed to the purchaser, making the rationale for home inspections in Canada different than that proposed here. However, the logistics of the Canadian system could prove informative in the adoption of an inspection system in California.

211. See CAL. BUS. & PROF. CODE §§ 8500-8697.6 (West 1975), which describe the licensing procedures and educational requirements for termite inspectors. The educational requirements and state regulatory scheme ensure that these inspectors will be experts in that field. A similar system would ensure expertise in structural systems analysis.
spect a property listed for sale and issue a "certificate of fitness," warranting that no defects exist in the property.212

There are several advantages to such a system. First, these inspectors would possess the specific expertise and knowledge necessary to complete a thorough investigation of the property. Thus, the inspector would discover hidden defects more readily than a broker. This arrangement allows the broker to concentrate on activities at which he is an expert—namely, the negotiation and supervision of the actual real estate transaction. This alternative recognizes the fact that the broker is not a "jack-of-all-trades" expert in the structural analysis of real estate, leaving such analysis to persons specifically trained for the job.

Second, a "fitness certificate" issued by a state licensed inspector would assure potential purchasers that the home is free of defects, thereby increasing the saleability of the subject property. By making the fitness certificate a condition of the escrow, the purchaser would receive knowledge of a discovered defect before purchasing the house.213 Should a defect be discovered, the seller could either repair the defect or lower the sale price to reflect the property's value in its defective condition. In either circumstance, the purchaser has the ability to bargain for the property with complete knowledge of all relevant facts. He will no longer pay the full price for property with a defect only to be forced into court to recover his losses.

Third, if the inspector failed to locate a defect which was reasonably discoverable, he would be liable for any loss. Although this liability appears very similar to that which Easton imposed on the broker, there is a crucial distinction. The broker does not present himself to the public as an expert in structural analysis nor, prior to Easton, did he undertake an inspection for the benefit of the purchaser. Conversely, the state licensed inspector would be an expert in structural analysis, and would present

212. Potential collusion between the seller and inspector could be prevented by requiring the inspectors to be bonded. Section 8697 of the Business and Professions Code requires termite inspectors to post a bond in favor of the State of California for the benefit of any person who is damaged by the fraud or dishonesty of the inspector.

213. The Easton decision provides the purchaser a party to sue should the home prove to be defective. However, because the broker is not an expert in the home's structural systems, the duty imposed does not improve the buyer's opportunity to learn of the defect before the home is purchased. If the broker fails to discover the defect, the buyer's only recourse is to bring suit after the fact. Although the purchaser may ultimately recover his damages, he did not bargain for the inconvenience and emotional strain of a lawsuit. Additionally, as occurred in Easton, the defect may prevent the buyer from the full use and enjoyment of his property. Conversely, a licensed inspector, trained in structural systems analysis, is more likely to discover a defect prior to the purchase. Thus, the purchaser will not be forced into court to enforce his rights and will receive what he bargained for—namely, a home free from defects.
himself to the public as such. Furthermore, as a paid employee, the inspector would be expected to exercise greater care than the seller's broker, who is not compensated for inspection services.

The costs of utilizing a home inspector would, in the long run, be less than the costs which will result after *Easton*. Therefore, although the seller may increase the property's selling price due to the cost of an inspector, the increase to the purchaser would be less than the increase resulting from the broker's costs after *Easton*. Moreover, that increase is amply justified by the increased protection provided to the purchaser by the inspector.

The purchaser protection provided by home inspectors could be complimented by requiring the seller to provide the purchaser with a home protection insurance policy. Home protection policies insure against the failure of items such as the heating, plumbing and electrical systems. These policies are relatively inexpensive and provide complete coverage for the purchaser's first year of ownership. These policies do not protect against defects existing at the time of purchase, such as the soil problems present in *Easton*. However, as a result of the fitness certificate provided by the home inspector, the purchaser should have knowledge of those defects. In addition, the rules prohibiting fraud would provide additional protection against purchasing a home without knowledge of existing defects.

By providing a home protection policy, the seller further enhances

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214. The *Easton* decision will increase broker costs due to the broker's additional expenditures in acquiring the necessary knowledge of structural systems, the additional time spent making an adequate inspection, the cost of hiring an expert for investigations beyond the broker's knowledge, the large increase in premiums for errors and omissions insurance and the cost of defending an anticipated increase in negligence lawsuits. To compensate for these increased costs, the broker will charge the seller a higher commission rate, and the seller will in turn raise the sales price of his home. *See supra* notes 204-08 and accompanying text.

Conversely, the costs of utilizing a system of licensed inspectors would be lower. Possessing greater expertise, the inspectors would discover more defects, and consequently prevent loss to the purchaser. Loss prevention would in turn eliminate subsequent litigation and its attendant costs.

215. The Standard Plan insurance policy, issued by Ticor Home Warranty, Los Angeles, California, covers the plumbing, heating and electrical system, water heater, built-in kitchen appliances, dishwasher, garbage disposal, microwave oven, range and oven, trash compactor, and hot water dispenser.

The No-Strings Comprehensive Plan, issued by American Home Shield, Dublin, California, offers a similar plan which covers everything insured by Ticor's Standard Plan, plus the air conditioning and pool, and items such as shower enclosures, holding tanks, fixtures and air filters.

216. Ticor's Standard Plan costs $295.00 for one year. For an additional $35.00, the central air conditioning system is covered. Coverage for a swimming pool and spa is included for an extra $110.00. American Home Shield's plan costs $395.00 for thirteen months.
the home's desirability to prospective purchasers and decreases the possibility of a future lawsuit. Additionally, the concern that a seller or broker will be insolvent, preventing recovery by an innocently injured purchaser, is alleviated.  

Finally, the risk of loss is removed from the broker, who receives no compensation to assume that risk. The insurer assumes the risk of loss as part of its business and can reflect it in the premiums charged to the public.

This proposed alternative constitutes a comprehensive protection system for the purchaser. However, hypothetical situations can be posed in which the defect would neither be discovered by the inspector nor covered by the home protection policy. It is impossible to guarantee that the buyer will never purchase a home with a defect. However, this risk will be minimized by utilizing home inspectors combined with home insurance policies. The purchaser will receive a benefit of definite quality, as opposed to the unknown quality of the protection provided by the *Easton* duty.

### VII. Conclusion

In *Easton v. Strassburger*, the California Court of Appeal imposed on real estate brokers the affirmative duty to inspect residential property which they sell. The court enacted this duty to provide the purchaser with substantial protection against purchasing a defective home.

Although protecting the unwary purchaser is a laudable objective, the court failed to adopt the most efficient means of achieving that goal. In imposing the duty to inspect, the court greatly expanded the broker's obligation to the purchaser. Several factors indicate that this expansion was unwarranted.

First, because the cases cited as supporting the decision are distinguishable, no precedent exists for imposing this duty. Second, the court failed to recognize that the seller is in the best position to know of defects and is the party benefitting most in the transaction. Thus, the seller, rather than the broker, should bear the responsibility of inspection. Third, the new duty ignores the fact that the broker is not an expert in

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217. Unless the insurance company becomes insolvent, the purchaser is assured of recovering money for any loss suffered.

218. The purchaser is protected against known defects by the rules prohibiting fraudulent misrepresentations by the broker and seller; he is protected against defects in the property which are discovered by the home inspector; and he is protected against defects occurring after the purchase by the home protection policy.

219. If an expert could not discover the defect, and it took longer than one year to surface (so that the home protection insurance policy expired), it is unreasonable to assume that a broker inspecting the property would have had the ability to discover that defect.
EASTON V. STRASSBURGER

structural analysis and is ill-equipped to provide thorough and efficient inspections. The duty will require the broker to become a "jack-of-all-trades," preventing him from focusing his expertise on the sale transaction. Fourth, the Easton duty will result in increased brokerage commissions, primarily resulting from increased premiums for errors and omissions insurance. This increase will be reflected in higher home prices, but is not justified by the quality of protection provided. Finally, the court ignored existing agency law, imposing on the seller's broker a fiduciary obligation to the purchaser despite the lack of a relationship between those parties. That obligation prevents the broker from fulfilling his duty to the seller, and makes the broker a virtual insurer of the purchaser.

The vagueness of the new standard and the resulting unanswered questions indicate that imposing this novel duty was best left to the legislature. A decision based primarily on social policy concerns should be the responsibility of the branch of government best equipped to make that decision. The courts lack the legislature's fact-finding capacity and ability to fully consider all possible ramifications of imposing the new duty. The Easton duty is shortsighted and will not prevent loss to the purchaser, but will instead provide only a party which the purchaser can sue after the loss occurs.

This Note has proposed the use of a system of state licensed inspectors in conjunction with home protection insurance policies. The proposed alternative provides more efficient protection for the purchaser than the Easton duty. The inspector, as a trained expert in structural analysis, will be better equipped than the broker to discover hidden defects. Thus, the purchaser will learn of the defect prior to the purchase. The proposed alternative places financial responsibility on the seller, the party who receives the greatest benefit in the transaction. The benefits accruing to the buyer justify the increase in the purchase price caused by payment of the inspection and insurance fees. This alternative, however, can be enacted only by the legislature. Until that time, Easton's duty of inspection will be imposed on the seller's broker at a greater cost to all the parties involved.

Jack B. Hicks III*

* The author has been a licensed California real estate agent since 1981.
THE EASTON CASE: FURTHER GUIDANCE FOR C.A.R.

On February 22, 1984, the California Court of Appeals decided the case of *Easton v. Strassburger*. A petition for hearing was subsequently filed in the California Supreme Court. On May 31, 1984, the California State Supreme Court refused to hear the *Easton* case. Following their refusal to hear it, the *Easton* case is now law in California and may be cited by attorneys as authority in posing what is becoming known as "*Easton*" liability.

On April 11, 1984, a set of Questions & Answers setting forth "Interim Guidance" for C.A.R. members was distributed to all BOARDS OF REALTORS® in California. The same Interim Guidance Question & Answer series was also published in the June issue of the *California Real Estate* magazine in the Legal Lines column.

The set of Questions & Answers which follow are designed to provide further assistance in assessing "*Easton*" type liability and practical suggestions to avoid such liability. Additionally, the Questions & Answers contain possible approaches which will be pursued by C.A.R.

**Question:**

1. What are the facts in *Easton v. Strassburger*?

**Answer:**

The listing agents had a listing on a home built on fill that had not been properly engineered and compacted. The owners did not disclose to the agents or buyers past slide activity and the corrective action they had taken. The buyers purchased unaware of any soils problems or the past history of slides and subsequently suffered excessive damages.
The evidence before the court indicated that:

- At least one of the listing agents knew the property was built on fill ("red flag");
- The listing agents had seen netting ("red flag") on a slope which had been placed there to repair the slide that had occurred most recently prior to the sale;
- One of the listing agents testified that he had observed that the floor of the guest house was not level ("red flag") while the other agent testified that uneven floors were "red flag" indicators of soils problems.

**Question:**
2. How did the court rule?

**Answer:**
The court held "... 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."

**Question:**
3. How is the holding in the *Easton* case different from prior law?

**Answer:**
Prior to *Easton*, a real estate broker or agent representing the seller had an obligation to disclose known material facts affecting the value or desirability of the property offered for sale. Under *Easton* not only is the broker obligated to disclose known material facts, but he is now obligated to disclose "reasonably discoverable facts" (those which he should have known) affecting the value or desirability of the property offered for sale.

**Question:**
4. What is a reasonably competent and diligent inspection?

**Answer:**
In *Easton* the court tells us that a reasonably diligent and competent inspection of the property includes something "... more than a casual visual inspection and a general inquiry of the owners". In order to deter-
mine what in fact is required under this standard we must keep in mind the facts of the Easton decision; the brokers were aware of the "red flags" and did not make recommendations with respect to appropriate testing to ascertain what problems may underlie the "red flags"; neither did they inform the buyers that there were potential problems.

**Question:**

5. What is a red flag?

**Answer:**

A red flag is a readily observable "sign" (indicator) of a potential problem. Some examples of "red flags" are:

- Water stained ceilings
- Cracks in walls, ceilings and floors
- Obvious additions or modifications to the structure (e.g., converted garages, room additions, etc.)
- Others (the above is obviously not an all inclusive list of what could be potential "red flags").

Brokers must be aware of the facts and circumstances (unique in each case) concerning the property in question and follow their instincts in pointing out all "red flags". Also, brokers should not hesitate to make recommendations that buyers in such situations seek "professional" assistance.

**Question:**

6. Once the broker is aware of the "red flag", i.e., following the "reasonably competent and diligent inspection", what should the broker do?

**Answer:**

The broker should point out the "red flag" to his principal and not venture an opinion (in effect a guess if the broker lacks the expertise to venture such an opinion) as to what problem may underlie the "red flag". By venturing such a "guess" the broker may be holding himself out as having expertise that in fact he does not possess. To do so, would invite a court to judge the broker by the standard of expertise so represented.

Note: It also goes without saying that all disclosures in any transactions should be in writing to not only protect the broker involved but also to best serve the consumer interest.
Question:
7. Did the court limit its decision and rationale to listing brokers only?

Answer:
Not necessarily; although the facts of this case involved a listing broker (the cooperating broker was not sued), the new duty of care created by the court and its rationale would appear to be equally applicable to all agents in a transaction whether acting as listing agents, subagents, or buyer’s agents (under contract to the buyer).

Question:
8. Is there one simple approach to completely avoiding Easton liability?

Answer:
No; although there are procedures which can be implemented to minimize Easton liability, no one approach will absolutely guarantee the avoidance of liability. The facts and circumstances in each case must be examined carefully to assess the legal duty now required under the Easton decision. Therefore, it is incumbent upon each licensee to carefully examine each set of facts and to consult with his or her own attorney in those questionable situations, or to contact C.A.R.’s Legal Services Plan for specific advice on a specific set of facts.

Question:
9. Is it possible to utilize a written DISCLAIMER to avoid Easton liability?

Answer:
Generally no; in most cases negligence liability (the new standard created by the Easton court) cannot be avoided by a disclaimer (a written statement in which the broker states that he is not responsible or liable for his acts or failures to act) of negligence.

Question:
10. Will a broker be relieved of liability under Easton if the broker pays for a home inspection or a home inspection is otherwise obtained for the property in question?

Answer:
Not necessarily; the Easton case does not specifically address this issue.
The case does not suggest that a home inspection, in and of itself, satisfies the new duty created by the court. Additionally, a broker should proceed conservatively in making a referral for a home inspection to avoid any liability arising out of a less than honest, full and complete inspection.

Note: Although some home inspectors are licensed contractors and may hold other licenses, home inspectors are not required to be licensed under California law. It, therefore, may be difficult in some instances to objectively verify a provider's competence.

Question:
11. Can Easton liability be avoided by the use of an "as is" clause?

Answer:
Generally no; a provision in a contract for the sale of real property which states that the property is being sold in its "present condition" or "as is" is commonly used in REO (lender acquired property), probate, and other situations. Although the clause does effectively limit the liability the seller may have as far as warranting the condition of the property, it does not relieve the seller or the broker from the duty to disclose known material facts or those facts which "should be known" (Easton type liability standard).

Question:
12. Does the Easton decision apply to all types of real property?

Answer:
No; in Easton the facts involved a personal residence. The court in Easton made it very clear that it was not expressing an opinion as to whether a broker would be obligated to the same standard involving the sale of commercial real estate. The court noted that a purchaser of commercial real estate is likely to be more experienced and sophisticated in his dealings in real estate.

From a preventive legal perspective, good business practice would dictate adopting prudent practices regardless of the type of property involved.

Question:
13. What is a preventive legal approach to minimizing and possibly avoiding Easton liability?
Answer:

It would appear that Easton type liability can be minimized and possibly avoided by following the guidelines (implicitly set forth) in the Easton decision.

The Easton decision would appear to suggest the following five step approach as a liability avoidance procedure:

Step 1: INQUIRE

ASK THE SELLER IF THERE ARE ANY PROBLEMS ("RED FLAGS")?

For example, the listing broker is in the process of writing up the listing and asks the seller if there are any problems with the property. The seller responds that the roof did leak, but has been repaired. Given this representation by the seller, the broker should ask the following:

- When was the repair made?
- Where did the roof leak?
- How serious was the roof leak and how extensive were the repairs?
- Is there a warranty, if so what are the terms of such warranty?
- Any other questions deemed appropriate in light of all the facts and circumstances.

Step 2: INSPECT

DOES THE BROKER SEE ANY PROBLEMS ("RED FLAGS")?

The listing broker has completed Step 1, and now with the seller goes on a visual walk through inspection of the property. The listing broker must conduct more than a casual visual inspection of the property and should therefore carefully look for "red flags".

For example, in the course of the inspection the listing broker would be looking for any problem areas and in light of the seller’s mention of past roof leaking would be specifically looking for water stained ceilings, peeling plaster at the top of the walls, sagging ceilings, and any other indications of water damage to the premises. During the inspection the broker notices stained ceilings and also comes upon what the broker believes to be a room addition.

Step 3: POINT OUT

POINT OUT/DISCLOSE ANY PROBLEMS ("RED FLAGS")?
Having completed Steps 1 and 2, the broker is now aware of “red flags”, e.g. the water-stained ceiling as well as what appears to be a room addition. The listing broker points out to the seller the water stained ceiling (apparently already known to seller) and additionally questions the seller concerning what the broker perceives to be a room addition. The listing broker might ask the following questions:

- Is the water-stained ceiling the result of past water damage or is this stain unrelated to past leaks?
- Does the roof still leak?
- Is the room addition built with a permit and to code?
- Who constructed the room addition?
- Any other question deemed appropriate in light of all the facts and circumstances.

Step 4: RECOMMEND

ADVISE THE SELLER OR BUYER TO HAVE A [APPROPRIATE "PROFESSIONAL" INSPECTOR i.e., roofing inspector; general contractor, etc.] COME OUT TO INSPECT.

Following Steps 1, 2, and 3 the listing broker would recommend to the seller that a roof inspector and perhaps a general contractor come out to the property to inspect the roof to assure that it does not leak and to inspect the room addition to assure that the room addition is in fact built to code and with required permits.

Additionally, if the seller has informed the listing broker that the room addition has been built to code and with permits the broker would be well advised to check with the local planning department to ascertain whether required permits were obtained and whether the city “signed off” on the completed construction.

Step 5: DISCLOSE

DISCLOSE THE APPROPRIATE INFORMATION TO BUYER AND SELLER, E.G.:

- [INSPECTOR] FOUND [SPECIFIC PROBLEMS].

For example, “the roofing inspector found that the roof still leaks” above the area where the water-stained ceiling appears. Additionally, the general contractor found that the “room addition was built with permits and to code and has no problems.”

- THE PARTY OR PARTIES DID NOT WANT TO CONDUCT AN INSPECTION AND ARE AWARE OF
THE RECOMMENDATIONS MADE BY THE BROKER FOR SUCH AN INSPECTION TO DISCOVER ADVERSE FACTORS.

For example, if in fact the seller or buyer did not want to conduct an inspection to ascertain whether any continuing problems exist with the roof, nor did they want a general contractor to advise them concerning the room addition, the broker should confirm in writing that the parties did not want to conduct an inspection, and are aware of the recommendations made by the broker for such inspections as necessary to discover adverse factors.

- THE INSPECTION REPORT IS ATTACHED OR PROVIDED AS PART OF THE AGREEMENT BETWEEN THE PARTIES.

In a situation where the inspection report or reports have been completed by the appropriate "professional" they should be attached and made a part of the agreement between the parties. This can be done initially when the deposit receipt is offered to the seller if in fact seller already has such reports completed; or can be tendered subsequently in escrow after buyer purchases the property "contingent upon such investigative reports being completed."

Note: The foregoing example is offered from the prospective of the listing broker. The same analysis and 5 step approach can be utilized by the selling broker with slight modification.

Steps 1 & 2 become reversed so in effect the selling broker would first "inspect" the property (generally done when the property is shown to the buyer) and as Step 2 would inquire of the seller or listing broker as to whether any problems (or "red flags") exist. Steps 3 through 5 would be completed as set forth above with the appropriate disclosures and recommendations being made to the principal buyer as opposed to the seller.

Question:

14. What does C.A.R. plan to do to minimize and/or limit the impact of the Easton decision?

Answer:

C.A.R. will do the following:
- Be sensitive to potential and actual litigation concerning
Easton-type issues and consider possible test cases to be funded by the Legal Action Fund.

- Investigate the possibility of developing legislation which, among other things, may provide a more precisely defined set of guidelines which would not only be more practicable, but easier to implement.

- Investigate the possibility of developing an Easton-Compliance Manual in conjunction with standard forms for disclosure and possibly buyer/seller checklists.

- Develop a Continuing Education program which could incorporate materials from the Easton-Compliance Manual. Additionally, the educational program would include Legal Services Plan Outreach presentations as well as Continuing Education courses.

- As legislation or further case legal developments clarify the Easton rule, continue to develop further questions and answers to keep members abreast of Easton-type liability issues and preventive legal avoidance techniques.

- Encourage members with specific factual situations to contact C.A.R.’s Legal Services Plan for preventive legal counseling.

**Question:**

15. In summary—what is the recommended 5 Step Easton liability avoidance procedure?

**Answer:**

- INQUIRE
- INSPECT
- POINT OUT
- RECOMMEND
- DISCLOSE