

Real Estate Broker Liability: Who Is Whose Agent?
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Real estate brokers and their salespersons¹ solicit business from and offer services to both sellers and buyers. They offer to help sellers list and sell properties. They offer buyers assistance in locating and purchasing property. They are allowed to prepare standard form contracts for the purchase and sale of property without violating the rules against practicing law without a license.² Because of the trust and confidence both sellers and buyers place in the real estate brokers with whom each works, it is understandable that sellers would assume that “their” brokers are their agents and buyers would assume that “their” brokers were their agents.

Traditionally, though, virtually all brokers involved in residential sales were legally considered to be agents of the seller. The listing broker was clearly the seller’s agent. Where property was listed for sale on a multiple listing service (MLS), other brokers who used the MLS and shared in the commission paid by the seller if they found a buyer were considered “subagents” of the seller, even though they worked exclusively with the buyer. They were generally referred to as “selling agents.”

Brokers, who were taught, tested and licensed, presumably knew and understood that they owed fiduciary and other duties to the sellers and not to buyers. But did buyers understand that brokers working with them were legally obligated to prefer the sellers’ interests over that of buyers? A broker might spend many hours with a buyer showing numerous properties, advising the buyer about schools and neighborhoods, suggesting to the buyer how much to offer, assisting the buyer in obtaining financing and communicating with the seller or the listing broker on behalf of the buyer both before, during and after closing.

In an article in the July 1986 issue of *The Colorado Lawyer*, G. Lane Earnest³ commented on then-recent Colorado cases which he characterized as imposing “agency by surprise.”⁴ Earnest discussed a case in which the Colorado Court of Appeals affirmed a trial court’s conclusion that a selling broker was the purchasers’ agent because he had assisted the purchasers in the home-buying process. In *Little v. Rohauer*,⁵ the purchasers tried to avoid forfeiture of their earnest money deposit on the ground that they had not received a title commitment required by the purchase contract. The Court held that timely delivery of the title commitment to the broker assisting the purchasers met the contract requirement because the broker was the purchasers’ agent. Interestingly, the broker was employed by the same brokerage firm as the listing broker.

In another case discussed by Earnest, *Stortroen v. Beneficial Finance Co.*,⁶ a Jefferson County District Court held that the purchasers’ delivery of acceptance of a seller’s counteroffer was not effective because the selling, or “cooperating,” broker who obtained the acceptance was an agent of the buyer rather than the seller. The seller was thus free to sell the property to another buyer which had offered more money before the seller actually received the notice of acceptance.

The Colorado Supreme Court granted *certiorari* to review both the Court of Appeals’ decision in *Little* and the Jefferson County District Court’s decision in *Stortroen*. Chief Justice Quinn wrote

the decisions in both cases, reversing the lower courts. The Court held that, in the absence of a written agreement to the contrary, at least in MLS situations, brokers are agents or subagents of the seller even where they provide services primarily to the buyer. Thus, in *Stortroen*, notice of acceptance of the seller's counteroffer given to the broker working with the buyers was effective notice to the sellers, who could therefore not sell to a higher offeror. In *Little*, delivery of the title commitment to the broker working with the purchasers was not delivery to the purchasers. Brokers could not represent both the seller and the buyer in the same real estate transaction without the parties' knowledge and written consent to that arrangement.⁷ The prohibition against undocumented dual agency was also codified in then-current Colorado statutes and real estate commission rules.⁸

In *dictum*, Justice Quinn explained that it might not be to the buyer's benefit to have the selling broker or sales person be the buyer's agent. Quoting from Romero, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*,⁹ Justice Quinn stated:

With the seller-selling agent relationship established, the seller may become liable to the buyer in tort for any misrepresentations of his agent through the ratification doctrine. See *Restatement (Second) of Agency* §§ 82, 92-93, 98-100, 218 (1957). Such liability allows the remedy of rescission against the seller. If there is no agency relationship between the seller and the selling broker, but the agency relationship is between the buyer and the selling broker, this remedy of rescission is no longer available to the buyer because the ratification doctrine would not be applicable, and the buyer's only recourse may be a suit against the broker for damages. In such a situation, the finding of agency between buyer and selling broker may be more harmful to the buyer than beneficial, because the buyer would lose his action for rescission and restitution against the seller. See *Restatement (Second) of Agency* §§ 82, 92-93, 98-100, 218 (1957). Furthermore, if the agent breaches his fiduciary duty to his principal, one of the remedies available to the principal is a return of compensation paid. If the selling broker is the agent of the buyer, it could be argued that the buyer did not pay any compensation to the agent, because the agent was paid by the seller through the listing broker. Again, the finding of an agency relationship between the selling broker and the buyer may not enhance the buyer's legal position.

Justice Quinn also pointed out that even without an agency relationship between the buyer and broker, the purchaser is protected because the broker may still be held liable for wrongful acts and for failing to deal fairly and honestly with the purchaser, citing a number of cases from Colorado and other jurisdictions and Colorado statutes.¹⁰

Although *Stortroen* and *Little* may have clarified the brokers' agency relationships for the real estate and legal communities, the cases likely did little to disabuse purchasers of the notion that the selling agents with whom they worked owed them fiduciary duties, such as loyalty and confidentiality, and were acting for them rather than the sellers.

The 1994 Act

In 1993, the Colorado legislature enacted a statute, effective January 1, 1994, “to govern the relationships between real estate brokers and sellers, landlords, buyers and tenants in real estate transactions.”¹¹ The legislation, entitled “Brokerage Relationships” (1994 Act), was at least in part a response to the continuing discrepancy between the public’s perception of the role of brokers and statutory and case law. The 1994 Act divided real estate brokers into four major categories: single agents of either buyers or sellers, subagents, dual agents and transaction brokers.¹² Colorado Revised Statute § 12-61-808 requires disclosures to parties to be assisted of the brokerage relationships available and of the particular role to be played by the broker. Specific written agreements for single agency or dual agency containing a statement that the principals may be vicariously liable for the acts of their agents or subagents is required. A broker assisting a buyer as an agent or a subagent of the seller must provide a written disclosure informing the buyer that the broker represents the seller and is not an agent for the buyer and listing the tasks that the subagent intends to perform.

Any broker who is not a seller’s agent or subagent, buyer’s agent or subagent, or a dual agent falls into the new category of transaction broker and is not an agent for either party. A transaction broker must also disclose in writing to the party to be assisted that the transaction broker is not acting as an agent for that party.

A. Transaction Brokers

The 1994 Act provides that a transaction broker is “a broker who assists one or more parties throughout a contemplated real estate transaction with communication, interposition, advisement, negotiation, contract terms and the closing of such real estate transaction without being an agent or advocate for the interests of any party to such transaction.”¹³ Unless a single or dual agency relationship is established in writing, a transaction broker relationship is presumed.¹⁴ This presumption has been said to eliminate the “agency by surprise” problem by creating a default non-agency relationship.¹⁵

The statute sets out the transaction broker’s duties in some detail. It also specifies some things a transaction broker is not required to do and other things the transaction broker is permitted to do.¹⁶ The broker must disclose all actually known adverse material facts to both parties, but may not disclose information which would give one party a bargaining advantage over the other.

Other significant differences between the duties of broker-agents and transaction brokers are listed in the statute. Transaction brokers have no duty to conduct an independent inspection of the property or verify the accuracy or completeness of statements made by the seller.¹⁷ Transaction brokers do not have any duty to conduct an independent investigation of the buyer’s financial condition or to verify the accuracy or completeness of any statement made by the buyer.¹⁸ Transaction brokers may list properties which compete with that of the seller and show properties in which the buyer is interested to other buyers.

The 1994 Act states that there shall be no imputation of knowledge between any party and the transaction broker or among persons within an entity engaged as a transaction broker.

B. Single Agents

The 1994 Act expressly provides for single agents. A single agent is “a broker who is engaged by and represents only one party in a real estate transaction.”¹⁹ A seller’s broker has the duties traditionally required of a real estate agent in that the broker is required to perform the terms of the written agreement, exercise reasonable skill and care for the seller, and promote the business interests of the seller with the utmost good faith, loyalty and fidelity. In exercising those duties, the statute expressly requires the agent to do the following:

- a. seek a price and terms which are acceptable to the seller;
- b. present all offers to the seller in a timely manner;
- c. disclose material adverse facts actually known by the broker;
- d. counsel the seller as to any material risks or benefits to the transaction which are actually known to the broker;
- e. timely account for all money received by the broker; and
- f. inform the seller that the seller may be vicariously liable for the acts of the seller’s agent or any subagent when the broker is acting within the scope of the agency relationship.²⁰

In addition to the affirmative requirements, the seller’s broker is obligated not to disclose the following:

- a. that a seller is willing to take less than the asking price;
- b. motivating factors behind the decision to sell;
- c. that the seller will agree to financing terms other than those offered;
- d. any material information about the seller unless failure to do so would be fraud;
or
- e. any facts or suspicions regarding circumstances which could psychologically affect or stigmatize the property.²¹

The seller’s broker does not have any obligation to the buyer, except that the broker must disclose adverse material facts actually known by the broker. Examples of such required disclosures include adverse material facts pertaining to the title, material defects in the property and any environmental hazards which must be disclosed by law.²²

Buyer’s agents have essentially the mirror image of duties the seller’s agents have. Buyer’s agents are limited agents who must exercise reasonable skill, and promote the interests of the buyer with the utmost good faith, loyalty and fidelity.²³ In dispatching this duty, the broker must, *inter alia*, seek a price and terms acceptable to the buyer, present all offers in a timely fashion, disclose actually known material adverse facts, and inform the buyer that the buyer may

be vicariously liable for the broker's acts as well as the acts of the broker's subagent, if any are engaged.²⁴

Like the seller's agent, the buyer's agent also has a duty not to disclose certain information. The broker *may not* disclose, *inter alia*, that the buyer is willing to pay more than the asking price, the buyer's motivation for wanting to purchase, or any material information about the buyer unless such disclosure is otherwise required by law.²⁵ Again mirroring the seller's broker's duties, the buyer's broker owes no duty to the seller except that the buyer must disclose adverse material facts actually known to the broker such as whether the buyer can afford the house or whether the buyer actually intends to use the house as the buyer's primary residence.²⁶

On its face, the most significant change in the statute from common law is that the single agent broker need only disclose to his or her principal adverse material facts *actually known* to the broker.²⁷ However, as discussed below, the duty to exercise reasonable skill and care may still require the broker to disclose adverse facts he or she should have known.

C. Dual Agents

A dual agent is defined as a broker is engaged as "a limited agent for both the seller and buyer . . ."²⁸ A broker may act as a dual agent only with informed consent of all of the parties, evidenced by a written agreement pursuant to C.R.S. § 12-61-808(2)(e).²⁹ In the case of a dual agency relationship, both the seller and buyer must be informed that they may both be vicariously liable for the acts of the dual agent.

In a dual agency relationship, the agent has the duties of both a seller's and buyer's agent, as listed above, with certain exceptions. The statute starts with a position that the dual agent may disclose any information to one party that the agent gains about the other party, and then continues with exceptions to that broad rule of permissive disclosure.³⁰ Among the information that cannot be disclosed is the following:

- a. that a buyer is willing to pay more than the purchase price;
- b. that the seller is willing to accept less than the asking price;
- c. the buyer's or seller's motivation;
- d. that the buyer or seller is willing to accept financing terms different from those proposed; and
- e. any facts or suspicions regarding circumstances which could psychologically affect or stigmatize the property.³¹

Additionally, the dual agent must disclose information detailed in C.R.S. § 12-61-804(3) and § 12-64-805(3). No cause of action shall accrue for disclosing this information, nor does the broker relationship terminate because the broker has made any required disclosure.³²

In the single and dual agency contexts, omitting the "knew or should have known" standard in favor of an actual knowledge standard seems to conflict with the requirement that the broker

exercise reasonable skill and satisfy a duty of loyalty. By acting skillfully and loyally to either or both parties, a broker exercising reasonable care may have a duty to investigate claims made by the buyer or the seller with respect to material aspects of the property, ability to satisfy financing terms, title restrictions and the like, particularly before making any representations to the seller or buyer based upon statements by the buyer or seller, respectively.

BROKER LIABILITY SINCE THE 1994 ACT

Only a few cases have applied the 1994 Act in the context of real estate broker liability for wrongful acts or omissions.

In *Broderick v. McElroy & McCoy, Inc.*,³³ the Colorado Court of Appeals dealt with a case in which the transaction arose before the 1994 statute. In that case, the buyers sought assistance from the brokers in finding a certain type of property. There was no written or oral agreement regarding agency. The brokers solicited the sellers to sell property which was not yet on the market. “When brokers approached sellers, it was unclear whether brokers were representing sellers or buyers.”³⁴ The subsequent September 1993 purchase and sale contract recited that the brokers represented the sellers and owed “duties of trust, loyalty and confidence”³⁵ exclusively to the sellers. When the appraisal obtained in connection with a financing application valued the property for less than the sale price, the buyers decided to find other property. The brokers assisted the buyers in finding and closing on another property. The sellers sued the buyers for breaching the contract and the brokers for breaching fiduciary duties to the sellers. The trial court found that the brokers had breached their fiduciary duties by transferring their loyalty from sellers to buyers and entered judgment against the brokers for damages. The Court of Appeals affirmed that part of the judgment.

In *Telluride Real Estate Co. v. Penthouse Affiliates, LLC*,³⁶ a case involving a broker’s claim for commission, the plaintiff showed the purchaser a property which the purchaser ultimately bought. However, the purchaser worked directly with the listing broker, who entered into a transaction broker agreement with the purchaser and worked with the transaction broker to acquire and close on the property. The purchaser and defendant brokers argued that the 1994 Act replaced the common law concept of “procuring cause” by completely supplanting prior law pertaining to brokerage relationships. The trial court and Court of Appeals both held that the 1994 Act did not abrogate the common law, particularly the law pertaining to commissions or compensation earned by brokers. Rather, it was intended to protect the public. Plaintiff was therefore awarded a commission under the “procuring cause” doctrine. The Court explicitly did not reach the issue of whether plaintiff had acted as a transaction broker or in some other agency capacity in the absence of any written disclosure or written agreement required by C.R.S. § 12-61-808(2).

In *Baumgarten v. Coppage*,³⁷ the plaintiff purchasers sued defendant real estate brokers, who acted as sellers’ agents under C.R.S. § 12-61-804(3)(a), which provides that a seller’s agent owes no duty to the buyer except the duty to disclose all adverse material facts actually known by the broker. The buyers also asserted claims of deceptive practices under the Colorado Consumer

Protection Act. The trial court dismissed plaintiffs' claims because plaintiffs failed to file a certificate of review under C.R.S. § 13-20-602. The Court of Appeals reversed in part, holding that the certificate of review was required only for claims alleging that defendants breached a standard of care premised on what they should have known, as opposed to their actual knowledge. Colorado Revised Statute § 12-61-804(3)(a) requires proof of material facts "actually known" by the broker. Colorado Revised Statute § 6-1-105(1) includes as deceptive trade practices both knowingly making false representations and making representations that defendant knows or should know are false. The Court held that expert testimony would be necessary to establish the "should know" standard and thus upheld the dismissal only of claims involving allegations that the defendants should have known that their representations were false. Claims of knowing misrepresentations do not require expert testimony and thus do not require a certificate of review.

*Mabry v. Tom Stanger & Co.*³⁸ involved a seller's broker's appeal of dismissal of its counterclaim for commissions against plaintiff sellers. Two groups of sellers marketed property as a single parcel. Because of their separate interests in the property, the broker entered into two separate listing contracts with slightly different expiration dates. The broker obtained a full price offer for the property shortly after one of the listing agreements expired. He then contacted the sellers who had executed the expired listing agreement and, without alerting them to the expiration date, told them that they would have to pay him a commission whether or not they accepted the offer. They accepted the offer with minor changes. The broker then told the second selling group that the first sellers had accepted the offer and that the second group would have to pay a commission whether or not they accepted the offer.

With further modifications, a contract was entered into by all the parties, but the buyer ran into problems with a subdivision application. The contract ultimately terminated because the sellers and buyer could not agree on further extensions of the closing date. After the buyer recorded a notice of claim of interest in the property, the sellers sued the buyer for declaratory and quiet title relief, breach of contract and slander of title. They sued the broker for breach of contract and breach of fiduciary duty. The broker counterclaimed for his commission. The buyer asserted counterclaims for specific performance and breach of contract. Although the trial court awarded the buyer damages, finding that the sellers' conduct amounted to anticipatory repudiation of the contract, it refused to award a commission to the broker. It found, and the Court of Appeals agreed, that the broker, as the listing agent, had breached fiduciary duties of good faith, loyalty and fidelity, and his duties to exercise skill and care on behalf of the seller. By playing one seller against the others and pressuring them to accept the buyer's offer, particularly at a time when the listing contract had expired, and claiming a right to a commission after expiration of the listing agreement, the broker breached his duty of loyalty and forfeited his right to a commission.

The broker also made the imaginative argument that upon expiration of the listing agreements, he had become a transaction broker rather than a seller's agent and thus had no further fiduciary duties to the seller. The Court held that the broker's fiduciary duties did not terminate on the expiration date of the listing agreements, but continued until the deal was completed, pursuant to

the express language of C.R.S. § 12-61-809, which states that the relationships set forth in the statute continue until the performance or completion of the agreement by which the broker was engaged.

The last case in which the 1994 Act plays a significant role is *Sussman v. Stoner*.³⁹ In that case, the Sussmans sold 230 acres of land in Larimer County together with 68 shares of water from the North Poudre Irrigation Company and two acre feet of Weld County water, to Stoner and Company. Stoner was a principal in Stoner and Company and also a real estate developer and real estate agent. The purchase agreement included a 3% commission to the broker and firm which employed Stoner because Stoner acted as a broker in the transaction. The agreement, apparently entered into in September 1999, contained a contingency period for Stoner and Company's determination that the property was suitable for development. The buyer could waive the contingency on or before December 3, 1999. Closing was set for February 29, 2000.

Without the Sussmans' knowledge, the value of the Poudre water began to rise precipitously after the contract was executed. On November 9, 1999, Stoner and Company asked for an extension of the contingency waiver to December 10, 1999. Neither Stoner nor the Sussmans' broker told the Sussmans of the increases in water share prices or the risks or benefits of extending the contract. The Sussmans agreed to the requested modification on November 11, 1999, at which time the Poudre water shares were worth twice the \$952,000 at which the Sussmans' agent had valued them in July 1999. On the closing date, February 29, 2000, the shares had risen to about \$2,856,000.

The Sussmans alleged that Stoner was a transaction broker under the 1994 Act and that C.R.S. § 12-61-807(2) required him to disclose to them the increased value of the water shares and the effect of the increase on the contract modification. Chief Judge Babcock granted Stoner and his brokerage firm's motion to dismiss the Sussmans' claims for breach of the statutory duty of brokers, fraudulent concealment and professional negligence claims. The Court recognized the statutory characterization of a transaction broker as not being an agent for either party. Although the transaction broker must disclose "adverse material facts actually known by the broker," there is nothing in the statute which addresses whether transaction brokers "have a duty to inform one party that market forces have swung in their favor, and advise on ways to take advantage of that change."⁴⁰ To the contrary, the statute says that a transaction broker is not an agent for either party and may not advocate the interests of any party to the transaction. Judge Babcock's order dismissing claims against Stoner and the brokerage firm does not address the Sussmans' claims against the remaining defendants, including their listing broker and an attorney hired to analyze the market and advise them regarding the sale.

THE 2003 AMENDMENTS

On June 1, 2002, Governor Owens signed into law Senate Bill 02-196, amending the 1994 Act, to become effective January 1, 2003 (the Amended Act). The legislation eliminates the categories of subagents and dual agents, leaving only single agents and transaction brokers.⁴¹ It further limits relationships with a buyer or seller to a specific "designated broker,"⁴² defined as,

“an employing broker or employed broker who is designated in writing by an employing broker to serve as a single agent or transaction broker . . .”⁴³ The brokerage firm may designate one or more brokers to work with a seller and one or more other brokers to work with the buyer.⁴⁴ Under the 1994 Act, as it currently exists, dual agency is established where brokers in the same firm represent both buyer and seller. Under the Amended Act, there is no dual agency.⁴⁵ Moreover, none of the “duties, obligations, and responsibilities” of the individual relationships extends to the brokerage firm or any other brokers within the firm who have not been designated as single agents or transaction brokers for a specific transaction.⁴⁶

An individual broker may be designated to work for both seller and buyer in the same transaction as a transaction broker for both, but can only be a single agent for either the buyer or the seller, but not both, as is currently the case.⁴⁷ As previously, a designated broker may work with the seller in one transaction and the buyer in another.⁴⁸

The Amended Act also provides that the knowledge of a designated broker will not be imputed to any non-designated employing or employed broker.⁴⁹ However, other provisions confirm that an employing broker or firm remains responsible for supervision of its employed brokers and may still have vicarious liability for their acts.⁵⁰

Also added is a specific provision that a buyer’s agent “owes no duty to conduct an independent inspection of the property for the benefit of the buyer or tenant and owes no duty to independently verify the accuracy or completeness of statements made by the seller, landlord, or independent inspectors . . .”⁵¹ As before, the buyer’s agent still has the duties to exercise reasonable skill and care for the buyer and to promote the buyer’s interest with the utmost good faith, loyalty, and fidelity.⁵²

Another significant change to the statute is that buyers and sellers are no longer vicariously liable for their broker’s acts or omissions unless they were “approved, directed, or ratified.”⁵³ This provision seems to stand the law of agency on its head. Would a seller be entitled to specific performance of a contract, even if the buyer had been fraudulently induced by the seller’s broker to enter into the deal? If brokers knowingly make material misrepresentations which benefit their principals, and if the brokers, for whatever reason, are not able to pay damages to the defrauded party, should the principal be entitled to retain the benefit conferred as a result of the broker’s wrongdoing?

CONCLUSION

The dearth of reported cases interpreting and applying the 1994 Act leaves open a number of questions concerning responsibilities and liabilities of brokers to buyers and sellers using their services. Because a transaction broker appears to have the fewest agent responsibilities and the most disclaimers, it seems logical that brokers will steer buyers in the direction of choosing that relationship. Based on broker advertising and personal relationships developed in the course of looking for and buying a home, buyers will likely continue to expect even transaction brokers to alert them to potential problems and help protect their interests in transactions with sellers and

their brokers. Under the statute, there is probably still liability for failing to assist parties with timely title commitments, loan applications, seller's disclosure requirements and other components of transactions.

If buyers choose to use single agent buyer brokers, they have a right to expect them to exercise "reasonable skill and care" and "good faith, loyalty and fidelity" on their behalf. Even though single agent brokers for either buyers or sellers are required by the statute to disclose adverse material facts or material benefits or risks of the transaction "actually known by the broker," the duties to exercise reasonable skill and care and to promote the interests of the buyer or seller with utmost good faith, loyalty and fidelity surely imply a duty to disclose misrepresentations, omissions, or risks which a competent broker should recognize or know in the exercise of reasonable care. No reported case has yet addressed such issues.

The *Colorado Real Estate Manual* prepared by the Colorado Real Estate Commission and published by the Department of Regulatory Agencies contains a good discussion of agency relationships in Chapter 12. It emphasizes that an agent has the duty to use reasonable skill and can be held liable to the principal for any loss caused by lack of care. Importantly, it states that,

An agent holding out to the public as possessing certain abilities and skills is presumed to possess a level of competence above a non-licensee, and suitable to the agency undertaken. Thus a residential broker must possess specialty skills, or seek the assistance of others, before agreeing to perform commercial or property management agency duties. An agent cannot escape responsibility for negligence or lack of ability by pleading ignorance.⁵⁴

The *Manual* also says that the agent has a duty to keep the principal fully informed of material facts, giving as an example informing the principal of a proposed zoning change which might enhance the property's value.⁵⁵

The *Manual's* provisions and expert testimony regarding standards of care for real estate brokers should support claims for negligence or breach of fiduciary duty under a "should have known" standard, even in light of the 1994 Act's provisions relating only to disclosure of material facts "actually known" by the broker.

The 1994 Act's mandate to clarify and reduce to writing the broker-customer relationship would, however, appear to resolve issues of the type raised in *Stortroen* and *Little*. In the *Stortroen* situation, the question of whether delivery of an acceptance of an offer or counteroffer is effective upon receipt by a broker will be answered by looking at the broker's classification. However, the Act has provisions requiring each type of broker to present or deliver offers and counteroffers in a "timely manner." "Timely manner" is not defined, and there may be potential liability for not getting an offer or counteroffer to the appropriate party before the deal is lost to someone else. In the *Little* situation, delivery of documents to any broker other than that party's single agent would probably not be effective delivery to a party. The statute provides that

knowledge or information will not be imputed between any party and a transaction broker or between any party and a dual agent.

In *Stortroen*, the Colorado Supreme Court held that a broker properly could act as a listing/seller's broker for a customer and at the same time act as a subagent for another seller in helping the first seller find a new home. The 1994 Act expressly allows brokers to act in those two distinct roles with respect to the same customer. The 2003 Amendments appear to limit the duties, and therefore the liabilities, of brokerage firms by eliminating dual agency and legally isolating the "designated broker" from the broker's firm and other brokers in the firm. Statutorily absolving buyers and sellers from liability for acts or omissions by their brokers may cause some serious injustices. Even where the principal has no knowledge of, or involvement in, the wrongdoing by an agent, any burden or damage should be borne by the principal rather than the other party. The Amended Act may shift the risk of loss unfairly away from the principal to the party misled by the agent.

It is not hard to imagine that a customer would place trust and confidence in the listing/seller's broker even though that broker is also acting as a transaction broker or other seller's subagent. The broker, too, may feel more loyalty to the first customer than to the second seller. It would not be unreasonable, in appropriate circumstances, for courts to impose liability on brokers for breaches of duties assumed by brokers, even where such duties exceed what the statute requires.

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Endnotes

1. For convenience, brokers and salespersons will be referred to collectively as "brokers" in this article.
2. *Conway-Bogue Realty Inv. Co. v. Denver Bar Asso.*, 135 Colo. 398, 312 P.2d 998 (1957); C.R.S. § 12-61-803(4).
3. Known to many as "Earnie the Attorney."
4. G. Lane Earnest, "Agency by Surprise:" *the Disclosure Dilemma in Real Estate*, 15 *Colo. Law No.* 7, p. 1185 (July 1986).
5. *Little v. Rohauer*, 707 P.2d 1015 (Colo. App. 1985), *aff'd in part and rev'd in part Rohauer v. Little*, 736 P.2d 403 (Colo. 1987).

6. *Stortroen v. Beneficial Finance Co.*, 736 P.2d 391 (Colo. 1987).
7. *Finnerty v. Fritz*, 5 Colo. 174, 175-176 (1879).
8. *Stortroen*, 736 P.2d at 398.
9. *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*, 20 ARIZ. L. REV. 767, 773 n.33 (1978).
10. *Stortroen*, 736 P.2d at 400-401.
11. C.R.S. § 12-61-801(2).
12. The 1994 act applies to brokers for landlords and tenants as well as for sellers and buyers. In this article, the term “buyer” includes “tenant” and “seller” includes “landlord.”
13. C.R.S. § 12-61-802(6).
14. C.R.S. § 12-61-803(2)(a) & (b).
15. G. Lane Earnest and J. Marcus Painter, *The New Brokerage Legislation: The Demise of “Agency by Surprise,”* 22 COLO. LAWYER No. 9, p. 1919 (Sept. 1993).
16. C.R.S. § 12-61-807.
17. C.R.S. § 12-61-807(4).
18. C.R.S. § 12-61-807(5).
19. C.R.S. § 12-61-802(4).
20. C.R.S. § 12-61-804(1)(c)(I)-(VII).
21. C.R.S. § 12-61-804(2)(a)-(e).
22. C.R.S. § 12-61-804(3)(a).
23. C.R.S. § 12-61-805(1)(c).
24. C.R.S. § 12-61-805(1)(c)(I)-(VII).
25. C.R.S. § 12-61-805(2)(a)-(e).
26. C.R.S. § 12-61-805(3)(a).
27. C.R.S. § 12-61-804(1)(c)(III).

28. C.R.S. § 12-61-806(2).
29. C.R.S. § 12-61-806(1). Approved forms containing the required provisions in written consent are available in the *Colorado Real Estate Manual*.
30. C.R.S. § 12-61-806(3).
31. C.R.S. § 12-61-806(4)(a)-(e).
32. C.R.S. § 12-61-806(5)(b) & (c).
33. *Broderick v. McElroy & McCoy, Inc.*, 961 P.2d 504 (Colo. App. 1997).
34. *Id.* at 505.
35. *Id.*
36. *Telluride Real Estate Co. v. Penthouse Affiliates, LLC*, 996 P.2d 151 (Colo. App. 1999).
37. *Baumgarten v. Coppage*, 15 P.3d 304 (Colo. App. 2000).
38. *Mabry v. Tom Stanger & Co.*, 33 P.3d 1206 (Colo. App. 2001).
39. *Sussman v. Stoner*, 143 F. Supp. 2d 1232 (D. Colo. 2001).
40. *Id.* at 1238.
41. Amended Act, C.R.S. § 12-61-803(1).
42. Amended Act, C.R.S. § 12-61-803(6)(a).
43. Amended Act, C.R.S. § 12-61-802(1.5).
44. Amended Act, C.R.S. § 12-61-803(6)(c).
45. Amended Act, C.R.S. § 12-61-806(1).
46. Amended Act, C.R.S. §§ 12-61-803(6)(b) and 12-61-808(2)(g)(I).
47. Amended Act, C.R.S. § 12-61-803(6)(d).
48. Amended Act, C.R.S. § 12-61-803(6)(e).
49. Amended Act, C.R.S. § 12-61-803(6)(f).
50. Amended Act, C.R.S. §§ 12-61-803(8) and 12-61-808(2)(g)(II).

51. Amended Act, C.R.S. § 12-61-805(5).
52. Amended Act, C.R.S. § 12-61-805(1)(c).
53. Amended Act, C.R.S. § 12-61-803(7).
54. *Colorado Real Estate Manual*, July 2001, at 12-3.
55. *Id.*