

BROKERS' LIABILITY TO PURCHASERS IN VIRGINIA RESIDENTIAL REAL ESTATE TRANSACTIONS



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This article will discuss the nature and scope liability of a seller's real estate broker (also known as "Listing Broker" or "Listing Agent") to the purchaser of residential real estate in Virginia under principles of agency, contract, tort, and statutory law. The article will further discuss how Virginia courts have interpreted and applied the current legal framework in evaluating a broker's liability to the buyer.

In a typical residential real estate purchase and sale transaction, the seller of the property employs a real estate broker—such as the Multiple Listing Service—to help list the property in the open marketplace and procure a ready, willing, and able buyer. The listing agreement will establish the commission of the broker for assisting the seller in marketing and

selling the property, calculated as a percentage of the sales price (generally around six percent) which is due upon closing. The listing agreement will also disclose the different types of representation that a broker provides and seeks the seller's informed consent in selecting the appropriate representation model, including whether the broker can act as a dual agent in the transaction, representing both the seller and the buyer. By executing the listing agreement, sellers also authorize the broker to utilize the services of cooperating brokers who act as sub-agent of the broker representing the seller during the transaction.¹

The buyer may either retain the services of his own broker to find a property, enter into a dual agency

arrangement with the seller's listing broker, or execute a designated representation agreement where both buyer and seller are represented by different real estate agents affiliated with the same broker.

LIABILITY UNDER AGENCY AND CONTRACT LAW

Common Law Liability

The liability of a real estate broker was historically derived from principles of agency law. According to the Restatement (Second) of Agency section 1:

- (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
- (2) The one for whom action is to be taken is the principal.
- (3) The one who is to act is the agent.²

Furthermore, the creation of an agency relationship between the principal and the agent "causes the agent to be a fiduciary, that is, a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking."³

Thus, under the agency law framework, real estate brokers were traditionally viewed as agents and fiduciaries of the seller, the principal, who typically employed them. This notion of a fiduciary relationship under agency law encompassed several duties that the broker owed to his principal,⁴ namely:

- Duty of Care and Skill;⁵
- Duty of Good Conduct;⁶
- Duty to Give Information, or Disclosure;⁷
- Duty to Keep and Render Accounts;⁸
- Duty to Act Only as Authorized;⁹
- Duty to Not Attempt Impossible or Impracticable;¹⁰
- Duty to Obey;¹¹
- Duty to Account for Profits;¹²

- Duty Not to Act as Adverse Party without Principal's Consent;¹³
- Duty Not to Represent Adverse Party without Principal's Consent;¹⁴
- Duty Not to Compete with the Principal;¹⁵
- Duty Not to Act for One with Conflicting Interests;¹⁶ and
- Duty Not to Disclose the Principal's Confidential Information.¹⁷

No Dual Agency at Common Law

Significantly, agency law did not provide for any duties flowing from the seller's real estate broker to the buyer since they were not in privity of contract. Brokers were, as far as the law was concerned, agents and fiduciaries of the principal seller who employed them, absent any agreement to the contrary. Stated differently, dual agency was considered impossible under common law. As observed in *Ferguson v. Gooch*:

A man cannot be the agent of both the buyer and the seller in the same transaction, without the intelligent consent of both parties; nor can an agent act for himself and his principal, nor for two principals on opposite sides in the same transaction, without like consent. All such transactions are voidable, and may be repudiated by the principal without proof of injury on his part. Nothing will defeat this right of the principal except his own confirmation after full knowledge of all the facts. The object of this principle is to remove all possible temptation from the agent.¹⁸

Therefore, Virginia courts were reluctant to impose an agency relationship upon the broker in his dealings with the buyer absent any agreement to the contrary. Indeed, to imply dual agency without the consent of the principal-seller would put the broker in a difficult position of serving two masters with diametrically opposed interests in the transaction: the seller (who wishes to procure the highest sale price for the property) and the buyer (who wants to acquire it at the lowest possible price).

The Problem for Aggrieved Purchasers

Although agency law provided a clear framework regarding the nature of the relationship between a real estate broker and the principal seller, it was at best unclear on how to address situations where, in the absence of a contractual agreement, the seller's real estate broker did or said something that gave the appearance that the broker was also representing the buyer.¹⁹

This reality of the real estate marketplace has never been clear to the average purchaser whose first point of contact during the buying process is generally the listing broker, who also tends to become their primary source of information regarding the real estate market data, comparative sales, and related information, leading such purchaser to believe that the listing or cooperative broker is "his agent." As one commentator aptly observes:

Historically, in most jurisdictions where two real estate licensees ostensibly "represented" the parties in a residential real estate transaction, both licensees' fiduciary obligations ran to the seller only. Both realtors—including the one that "worked with" the buyer—had an obligation to obtain the best price for the seller. *Buyers were owed no duties of loyalty, confidentiality, or disclosure of material facts about the transaction or the property.* Compounding the unfairness of this lopsided contractual setting, the buyer typically was unaware that he was unrepresented. To the contrary, in most cases the unrepresented buyer believed that the licensee with whom he worked—the selling or cooperating agent he had "engaged" and who had found the property for him—was actually his agent. Indeed, seventy-four percent of buyers surveyed in the early 1980s believed the cooperating broker represented them and not the seller. Not remarkably given the practical setting, more than seventy percent of sellers held the same erroneous belief.²⁰

The confusion stemming from the lack of understanding of the role played by a listing broker in a residential real estate transaction became more

pronounced with the maturing of the real estate brokerage industry, as unwary buyers often fell victim to the unfairness of a legal paradigm that mostly protected the interests of the principal-seller, and thus, by extension, his broker.

General Duty to the Public

Over the course of the twenty-first century, courts across the nation began employing a variety of different rationales in creating a duty, thereby signaling a shift in the legal standard from the previous no-contract-no-duty standard to one that recognized at least some duty flowing from the listing broker to the purchaser. Some courts based this duty on public policy.²¹ Others found a duty in state consumer protection statutes²² and even the National Association of Realtors Code of Ethics²³ to justify the imposition of some sort of duty upon the broker.

Virginia soon followed in recognizing a "general duty to the public owed by every realtor" in *Allen v. Lindstrom*.²⁴ The plaintiff-buyer in that case sued the seller's real estate broker on a contractual third-party beneficiary theory for failing to transmit their offer to the seller, contending that the broker violated their duty established by the regulations of the Virginia Real Estate Board that provide for sanctions against brokers who fail "to promptly tender to the seller every written offer to purchase."²⁵ In rejecting the plaintiff's argument, the court pertinently observed:

The defendants' primary and paramount duty, as broker and broker's agent, was to the sellers, with whom they had an exclusive contract. While there may be some type of general duty to the public owed by every realtor, it is not the type of duty that converts into a liability against a seller's agent for improper conduct to one in the adversary position of prospective purchaser, where there is no foreseeable reliance by the prospect on the agent's actions.²⁶

The *Lindstrom* court analogized the relationship between the seller's real estate broker and purchaser to that of lawyers and adverse parties²⁷ in holding that while the broker may have owed a

duty to the seller, he owed no such duty “to the prospective purchasers to communicate an offer to the sellers.”²⁸ Under the *Lindstrom* analysis, the regulations governing brokers established by the Virginia Real Estate Board “may not provide the basis of a private cause of action under the circumstances of this case.”²⁹

Since the party customarily contracting with the listing is the seller, the import of *Lindstrom* was that an aggrieved purchaser could not rely on a contract theory for recovery of any damages against the listing broker. Nor could such a purchaser sue for violations of the Virginia Real Estate Board’s regulations or the realtor code of ethics.

REAL ESTATE BROKERS LIABILITY IN TORT

Intentional Fraud

Virginia recognizes cases of fraud based on an intentional misrepresentation made by the broker, as well as fraud based on omission where the broker conceals a material fact or remains silent about a particular material defect regarding the property he has been hired to sell.

An examination of Virginia case law reveals that courts have no hesitation in imposing liability upon a broker in cases of intentional affirmative misrepresentations.³⁰

Concealment of a material fact may constitute fraud where a “legal obligation, or some fiduciary or confidential relationship [...] between the parties giv[es] rise to a duty to disclose.”³¹ Fraud by concealment requires a showing of intent to conceal a material fact; reckless nondisclosure is not actionable.³²

From the perspective of the purchaser, the challenge with respect to asserting a fraud claim based on concealment against the broker is that, as illustrated above, Virginia courts have historically never recognized any fiduciary or common law duty to disclose stemming from the broker to the purchaser, absent any agreement to the contrary.³³

In some cases, the broker does not affirmatively misrepresent or conceal a material fact, but merely stays silent. In Virginia, “silence does not constitute concealment in the absence of a duty to disclose.”³⁴ “A duty to disclose facts may exist under certain circumstances, such as when a confidential or fiduciary relationship exists between the parties or when disclosure would be necessary to clarify information already disclosed, which would otherwise be misleading.”³⁵

Under such circumstances, a purchaser not only has to contend with the historical problem of the lack of any duty owed by the seller’s broker, but also has to overcome Virginia’s strong caveat emptor standard under which a seller generally is under no duty to disclose a material defect on the property. Note that Virginia Code section 54.1-2131(B) now requires a broker to disclose to the purchaser all “material adverse facts” related to the physical condition of the property of which they have actual knowledge.

This principle was illustrated in *Esposito v. Chandler*, where the circuit court sustained the listing broker’s demurrer to the fraud count due to lack of any specific misrepresentations, holding that the broker did not “have a duty to disclose all facts material to the sale of the property. If they had such a duty, then the doctrine of caveat emptor would be meaningless.”³⁶

The only two exceptions to the rule regarding no common law duty to disclose were elucidated in *Bank of Montreal v. Signet Bank*:

A duty may arise (1) if the fact is material and the one concealing has superior knowledge and knows the other is acting upon the assumption that the fact does not exist or (2) if one party takes actions which divert the other party from making prudent investigations, such as making a partial disclosure.³⁷

There is no reported Virginia case that we could find that applies this exception in evaluating a listing broker’s liability to the purchaser. Nevertheless, a purchaser suing a listing broker on a fraud theory based on silence or lack of any affirmative

misrepresentation or concealment would have to provide these additional elements to prevail on such a claim.

Constructive Fraud

Virginia also recognizes a species of fraud called constructive fraud, the elements of which are “a false representation of a material fact ... made innocently or negligently and the injured party was damaged as a result of his reliance upon the misrepresentation.”³⁸ “Constructive fraud differs from actual fraud in that it requires only that one represent as true whatever is really false, however innocently or mistakenly, in such a way to induce a reasonable person to believe it, with the intent that the person will act upon this representation.”³⁹ In other words, “[c]onstructive fraud is breach of legal or equitable duty which, irrespective of moral guilt, is declared by law to be fraudulent because of its tendency to deceive others or violate confidence.”⁴⁰ Thus, liability for misrepresentation attaches even if made “innocently or negligently.”⁴¹

A national review of case law suggests that purchaser suits in this category often involve situations where the broker repeats to the buyer information provided by the seller that later turns out to be false or fails to provide information to the buyer that he was unaware of. There is no reported case in Virginia these authors could find where a purchaser has prevailed against the listing broker on a constructive fraud theory.⁴²

Negligence

An examination of Virginia case law reveals that purchaser suits in negligence against the listing broker have failed primarily because courts do not recognize any common law duty owed by the seller’s broker to the buyer due to the lack of any privity of contract.

In *Van Deusen v. Snead*, the purchasers sued the seller, the seller’s broker, and their own broker for fraud and negligence, arguing that they were aware of “differential settlement” on the property, which they had a “duty to reveal.”⁴³ The purchaser’s claims

against the seller included allegations that they hid cracks in the basement by placing materials in front and putting new mortar in cracks around the foundation. Relying on *Lindstrom*, the Virginia Supreme Court upheld the trial court’s dismissal of the negligence count against the seller’s broker. Thus, *Van Deusen* stood for the proposition that, absent any agreement to the contrary, a broker has no common law “duty to reveal” any adverse conditions on the property.⁴⁴

At least one circuit court case has held that the duties of a broker established under Article 3 of the Virginia Real Estate Brokerage Act serve as a standard of care, which could be asserted along with any common law negligence claim. In *Della Monica v. Hottel*, the purchaser sued his own broker, Weichert, for negligence.⁴⁵ The court opined that the although the statute does not serve as a basis for an independent civil action by a buyer [...] breaches of statutory duties (per se claims), along with common law duties, would support recovery in damages for negligence.⁴⁶

REAL ESTATE BROKERS STATUTORY LIABILITY

The Virginia Residential Property Disclosure Act

The Virginia Residential Property Disclosure Act (VRPDA),⁴⁷ applies to any transfer of residential realty by sale, exchange, installment land sales contract, or lease with the option to buy. The statute previously required the owner to make either a disclaimer or disclosure statement. Since 2007, the Virginia General Assembly has amended the Act, which now, subject to specific exceptions, generally places a duty of due diligence on the buyer, including specific steps necessary to prove such diligence, and requires the seller to disclose to the buyer that he makes no representations regarding certain conditions detailed under section 55.1-703(B)(1)-(17).

The VRPDA limits a real estate brokers liability to “any party” for “a violation of this chapter or for any failure to disclose any information,” as long as the broker has “inform[ed] each such purchaser of the purchaser’s rights and obligations under this chapter.”⁴⁸ Virginia courts have adopted different

interpretations of this provision of the VRPDA in evaluating the liability of a listing broker to the purchaser.

In *Atkinson v. Davis*, the plaintiff sued the seller and his broker after discovering termite damage on the property for, among other things, “intentional/negligent misrepresentation.”⁴⁹ The broker demurred to the complaint, arguing that the VRPDA⁵⁰ “confers upon them an immunity from further liability surrounding this transaction” once they fulfill their obligation to disclose to the buyer under this statute.⁵¹ In rejecting this argument, the court held that the broker’s action in affirmatively misstating the condition of the property with respect to the termite damage was not shielded by the statute.⁵²

On the other hand, in *Beamon v. Green*, the purchasers alleged misrepresentation and concealment of a material defect in asserting a claim against the listing broker for violations of the VRPDA. The circuit court denied the claim on the basis that “[u]nlike the savings clause which preserves common law remedies against the owners in § 55–24, there is no savings clause which applies to real estate agents.”⁵³

Article 3 of the VREBA

In 1995, the Virginia General Assembly promulgated Article 3 (Duties of Real Estate Brokers and Salespersons) to Chapter 21 of title 54.1 of the Virginia Code, which significantly altered the common law landscape that had, up until now, struggled to define the exact nature and scope of the duties flowing from a seller’s real estate broker to the purchaser.⁵⁴ Among its many significant changes to the common law, the VREBA codified the statutory concept of dual agency under section 54.1-2139, previously considered impossible, and placed affirmative duties on the broker in his dealings with the purchaser.⁵⁵

Until the 1995 amendment to the VREBA, Articles 1 and 2 of Chapter 21 were primarily concerned with the licensing and regulatory requirements for brokers. With the addition of Article 3 to Chapter 21, the legislature made several significant changes to the common law.

Violations of Article 3 of the VREBA do not create a statutory right of action for an injured purchaser against any party’s broker. This issue was conclusively resolved in the 2016 amendments by the Virginia General Assembly to Article 3, which eliminated a right of action by specifically providing that “nothing in this article shall create a civil cause of action against a licensee.”⁵⁶ Before such amendment, courts were split on this issue.⁵⁷ This amendment also functionally overruled any prior case law that held to the contrary.

Are the duties of a real estate broker in Virginia now governed solely by the VREBA, or do common law duties still apply in determining the extent of their liability to the purchaser? Many conflicting interpretations have been put forth on the exact legal import of the language under section 54.1-2144, which states: “The common law of agency relative to brokerage relationships in real estate transactions to the extent inconsistent with this article shall be expressly abrogated.”

A 2002 publication argued that the real estate brokers duties under common law have been entirely replaced by the statutory duties provided under Article 3, which provide the only source of any duty upon brokers.⁵⁸ Conversely, another author has suggested that common law still applies, notwithstanding the “expressly abrogated” language because:

it is intended to reconcile direct conflicts between the common law and the statutory creation of new brokerage concepts introduced by the 1995 amendment, such as “dual agency” and certain mandatory disclosures to opposing parties in the transaction. Because these new concepts directly contravene previously well-established agency duties, the statute’s “express abrogation” of any inconsistencies was necessary. However, when there is no direct conflict, the safest approach is to assume that the existing common law applies.⁵⁹

While these authors agree with the latter analysis, the post-1995 case law on this issue does not reflect such a consensus among Virginia courts.⁶⁰ ■

Notes

- 1 “In a residential context, listing property in the multiple listing service, absent a written agreement to the contrary, is thus an offer of subagency, and therefore, cooperating brokers are agents of the listing brokers and in a line of agency with the seller.” 12 C.J.S. Brokers § 109.
- 2 See also Rest. (Second) of Agency § 1 (comment b) (1958):

The relation which the law calls agency does not depend upon the intent of the parties to create it, nor their belief that they have done so. To constitute the relation, there must be an agreement, but not necessarily a contract, between the parties; if the agreement results in the factual relation between them to which are attached the legal consequences of agency, an agency exists although the parties did not call it agency and did not intend the legal consequences of the relation to follow.
- 3 See *id.* § 13 (cmt. (a)).
- 4 See also Paul Bellegarde, *Duties of Brokers and Salespersons* § 17.4, in *Real Estate Transactions in Virginia*, (Neil S. Kessler and Paul H. Melnick eds., 2019); Arthur R. Gaudio, *Real Estate Brokerage Law* § 262 (West, 1987) (“These duties are the duties of loyalty, full disclosure, good faith, and due care.”).
- 5 See Rest. (Second) of Agency § 379.
- 6 *Id.* § 380.
- 7 *Id.* § 381.
- 8 *Id.* § 382.
- 9 *Id.* § 383.
- 10 *Id.* § 384.
- 11 *Id.* § 385.
- 12 *Id.* § 388.
- 13 *Id.* § 389.
- 14 *Id.* § 391.
- 15 *Id.* § 393.
- 16 *Id.* § 394.
- 17 *Id.* § 395.
- 18 94 Va. 1, 26 S.E. 397 (1896).
- 19 See, e.g., *Klotz v. Fauber*, 213 Va. 1, 189 S.E.2d 45 (Va. 1972) where the Virginia Supreme Court held that the seller’s real estate broker was not liable to the buyer for breach of any duty owed, even though the broker did not transmit the buyer’s offer to the seller, and bought the property for himself but left the question open on whether it should adopt a rule holding a “real estate agent is liable to a prospective buyer when the agent fails to transmit the prospective buyer’s offer and buys the property for his own account at a price equal to or less than the price the prospective buyer agreed to pay.”
- 20 See Ann Morales Olazabal, *Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses*, 40 *Harv. J. on Legis.* 65 (2003), at 4 and footnote 3 (emphasis added) (citing L.A. Reg’l Off., Fed. Trade Comm’n, *Residential Real Estate Brokerage Industry* at 7, 9 (Dec. 1983), the landmark 1983 Federal Trade Commission study that noted, among other things, that 71 percent of buyers of residential real estate surveyed erroneously believed that the seller’s agent showing them the property was actually “their” agent).
- 21 *Hagar v. Mobley*, 638 P.2d 127 (Wyo. 1981) (held that a real estate brokers duty is, to a certain extent, determined by public policy).
- 22 See also *Young v. Joyce*, 351 A.2d 857 (Del. Super. Ct. 1975) (holding that real estate broker owes duty to purchaser based on state consumer protection statute);
- 23 See *Easton v. Strassburger*, 199 Cal. Rptr. 383, 392 (Cal. Ct. App. 1984) (affirming judgment against broker and stating that broker’s duty to purchaser supported in part by the fact that the National Association of Realtor’s Code of Ethics imposes such duty upon a broker in his dealings with the purchaser. The “primary purposes [of imposing a duty] are to protect the buyer from the unethical broker and seller and to insure that the buyer is provided sufficient accurate information to make an informed decision whether to purchase”).
- 24 *Allen v. Lindstrom*, 379 S.E.2d 450, 237 Va. 489, 496 (Va. 1989).
- 25 *Id.* at 456; “The plaintiffs contended that “pursuant to the rules and regulations of the Virginia Real Estate Commission [now Virginia Real Estate Board], the Defendants had a duty to convey the Plaintiffs’ offer to purchase the real property to the Sellers.” The regulation relied upon by the plaintiffs provides for sanctions against real estate professionals who fail “to promptly tender to the seller every written offer to purchase.” § 3.5.15, Regulations of the Virginia Real Estate Commission (1984), now § 3.5.16, Virginia Real Estate Board Licensing Regulations (1987), available at https://www.dpor.virginia.gov/sites/default/files/boards/Real_Estate/A490-02REGS.pdf (October 1, 2022).
- 26 *Id.*
- 27 *Id.* (quoting *Ayyildiz v. Kidd*, 220 Va. 1080, 266 S.E.2d 108 (1980)). “We said that an attorney’s liability generally is to his client if the attorney has been guilty of some dereliction of duty to the client. We noted that the attorney’s primary and paramount duty is to the client. While lawyers owe a general duty to the judicial system, it is not the type of duty that translates into liability to an adversary for negligence when there is no foreseeable reliance by the adversary on the attorney’s actions.”
- 28 *Id.*
- 29 *Id.* at 498. See also *Messer v. Re/Max Properties, Inc.*, 15 Va. Cir. 15 (1985) (holding with respect to the realtor’s code of ethics and other regulations that “Such professional standards and ethics may not be used as the basis for a personal cause of action. They are meant for internal regulation of conduct, and do not set the standard of care toward third parties”); Two years after *Lindstrom*, the Circuit Court of Spotsylvania addressed this same issue in the context of a purchaser of a warehouse suing the

seller's real estate broker for "breach of real estate agents' duty" for representations regarding a grandfather clause in the county zoning regulations in *Unity Farm Constr., Inc. v. Slabtown L.P.*, 24 Va. Cir. 242 (1991) (adopting the same reasoning as in *Lindstrom*, but pertinently noting that fraud claims were not predicated upon any duty analysis or upon the fact that the perpetrators of such fraud were brokers).

- 30 See, e.g., *McDaniel v. Hodges*, 176 Va. 519, 11 S.E.2d 623 (1940) (evidence of broker's false representations of a material fact justified rescission of contract of purchase notwithstanding that vendor knew nothing of representations made by his agent); *Murphy v. McIntosh*, 199 Va. 254, 99 S.E.2d 585 (1957) (buyers who repudiated their contract with the sellers due to fraudulent representations and concealments of the seller's real-estate broker concerning termites in the property were awarded their \$2,000 deposit); *Tillman v. Tayloe Dev. Corp.*, 5 Va. Cir. 137 (1984) ("This Court is satisfied that the defendant agent had a duty to refrain from making fraudulent misrepresentations and is liable to the plaintiffs for a breach of that duty"); *Boykin v. Hermitage Realty*, 234 Va. 26, 360 S.E.2d 177 (1987) (evidence supported jury determination that real estate broker's agent's repeated assurances that area behind condominium units would remain undeveloped were deliberate misrepresentations, made to induce purchasers to pay premium price for property).
- 31 *W. Cap. Partners, LLC v. Allegiance Title & Escrow*, 520 F. Supp. 2d 777, 782 (E.D. Va. 2007) (citing *Mountain Venture P'ship v. Town of Lovettsville*, No. 18525, 1997 WL 1070433, at *10 (Va. Cir. Ct. Oct. 14, 1997) (unreported opinion) (citing cases)).
- 32 See *Norris v. Mitchell*, 255 Va. 235, 495 S.E.2d 809, 812 (1998). At common law "concealment may be the equivalent of a false representation." *Spence v. Griffin*, 236 Va. 21, 28 (1988); accord *Van Deusen v. Snead*, 247 Va. 324, 328(1994). However, proof of misrepresentation by nondisclosure requires "evidence of a knowing and a deliberate decision not to disclose a material fact." *Norris*, 255 Va. at 241; see also *In re Volkswagen "Clean Diesel" Litig.*, 94 Va. Cir. 189 (2016) ("the Supreme Court of Virginia has continuously held that "[c]oncealment of a fact that is material to the transaction, knowing that the other party is acting on the assumption that no such fact exists, is as much fraud as if existence of the fact were expressly denied." *Metrocall of Delaware v. Continental Cellular Corp.*, 246 Va. 365, 374 (1993) (citing *Clay v. Butler*, 132 Va. 464, 474 (1922)). As such, those claims that assert fraud by means of intentional concealment of a material fact of the transaction may be maintained even without asserting an affirmative false representation").
- 33 See Va. Code Ann. § 54.1-2131(B) requiring broker to "disclose to prospective buyers all material adverse facts pertaining to the physical condition of the property" of which they have actual knowledge; Va. Code Ann. § 54.1-2132(B) (requiring the same duty of disclosure for brokers engaged by the buyer). See also, *Pittman v. Walter*, 100 Va. Cir. 57 (2018) (demurrer sustained to buyer claims for actual fraud and conspiracy to defraud against seller and his broker for not providing report indicating presence of wood destroying insects, and for presenting another report omitting presence of infestation, based on the doctrine of caveat emptor and the rationale that there is no "independent common law duty ... owed by these defendants [seller and broker] to the plaintiffs [buyers]"). See e.g. *Norris*, 495 S.E.2d at 812-813 (1998) (claim for fraud by concealment by purchaser against seller rejected, in part, because of holding that defendant-sellers had no duty to disclose, and "there is no allegation of a deliberate decision to conceal from the purchasers the limitations of use noted on the construction permit. Indeed, the construction permit was an official record...and required to be posted on the property before the work began ... And the purchasers do not allege that the sellers did anything to divert them from inspecting the permit").
- 34 *Doe by & Through Doe v. Baker*, 299 Va. 628, 655, 857 S.E.2d 573, 589-90 (2021) (quoting from *Bank of Montreal v. Signet Bank*, 193 F.3d 818, 827 (4th Cir. 1999); see also *Restatement (second) of Torts* § 551 (1997) ("One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the non-existence of the matter and he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question").
- 35 *Doe*, 857 S.E.2d at 590 (quoting *Jane Doe 43C v. Diocese of New Ulm*, 787 N.W.2d 680, 687 (Minn. Ct. App. 2010) (quoting *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989)).
- 36 24 Va. Cir. 143 (1991).
- 37 193 F.3d 818, 826 (4th Cir.1999).
- 38 *Mortarino v. Consultant Eng'g Servs., Inc.*, 251 Va. 289, 295 (1996); see also *Evaluation Research Corp. v. Alequin*, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994); accord *Nationwide Mut. Ins. Co. v. Hargraves*, 242 Va. 88, 92, 405 S.E.2d 848, 851 (1991); *Kitchen v. Throckmorton*, 223 Va. 164, 171, 286 S.E.2d 673, 676 (1982).
- 39 *Langmaid v. Lee*, 86 Va. Cir. 118 (2013) (quoting *Evaluations Research Corp. v. Alequin*, 247 Va. 143, 148 (1994).
- 40 *Webb v. Webb*, 16 Va. App. 486, 431 S.E.2d 55 (1993).
- 41 *Id.*
- 42 See, e.g., *Walton v. Aguilier*, 90 Va. Cir. 482 (2010) (Buyer constructive fraud claim against seller who was also his own realtor in the transaction denied because of caveat emptor); *Denton v. Browntown Valley Assocs. v. Weichert Co. of Virginia*, 98 Va. Cir. 486 (2015) (Demurrer to constructive fraud by concealment claim sustained because broker's duty to disclose any material facts related to the property must arise under the contract and the incorporated statutory provision found in Virginia Code § 54.1-2132(A)(6), not in tort); see also *McGlen v. Barrett*, 78 Va. Cir. 90 (2009) ("Plaintiff merely asserts the deletion of a clause in the Regional Sales Contract and Defendants' failure to deliver a correct disclaimer. Even in the light most favorable to the pleader, these facts do not give rise to the inference that defendants made a deliberate and knowing decision.").

- 43 247 Va. 324 (1994).
- 44 See also *Exec. Homes Realty Corp. v. Mathews*, 38 Va. Cir. 486 (1996) (allowing claim for buyer fraud against seller real estate broker based on affirmative misrepresentations, and denying claim for negligence and breach of fiduciary duty predicated upon notion that the broker had a duty of good faith and fair dealing toward the purchaser. “Without such [an agency] relationship,” the court held, “there is no basis of potential liability.”); *McGlen v. Barrett*, 78 Va. Cir. 90 (2009) (denying the purchaser’s claim for negligence based on a failure to disclose theory against the listing broker was denied by the Circuit Court of Fairfax County based on the economic loss rule. “Without privity of contract,” the court reasoned, “plaintiff may not recover her economic losses against [the seller’s agent] based on a theory of tort.”).
- 45 64 Va. Cir. 439 (2004). “It is alleged that the defendant acting through its agents and employees, violated the standard of care owed plaintiffs by failing to fulfill its duties or obligations or exercise good faith when it did not disclose to them the status of the subdivision process for the property, including the sale of the property to one of the defendants; by failing to exercise good faith to the plaintiffs when it did not remain informed of the subdivision approval process important to the contract; by failing to disclose material facts in a timely manner to the plaintiffs when it did not inform them of the purchase of the property by one of the defendants; by failing to exercise ordinary care when it failed to remain informed of the progress of the subdivision approval; and by failing to disclose material facts and exercise ordinary care.”
- 46 *Id.* at 1.
- 47 Act of Apr. 4, 1992, Chapter 717, 1992 Va. Acts 1096 (codified at Va. Code Ann. §§ 55.1-700 et seq.).
- 48 Va. Code Ann. § 55.1-712 (Duties of Real Estate Licensees). Note that the majority of the case law in this section pertains to an earlier version of this provision, § 15.1-523.
- 49 34 Va. Cir. 139 (1994). The seller and his broker were alleged to have actively concealed the termite damage on the property by not providing purchaser with two reports prepared by different pest control companies, and instead hiring a third company whose report indicated that there was no termite damage on the property.
- 50 This case dealt with an earlier version of the statute, which has since been amended.
- 51 *Id.*
- 52 *Id.* “While our legislature has not inserted such an obvious statement of its intention directly into its statutory language, this court opines that with Code of Virginia ‘ 15.1-523, the Virginia legislature merely intended to establish a particular right and remedy, and did not intend to preempt every other possible cause of action against a real estate licensee.”
- 53 41 Va. Cir. 195, 198 (Fairfax Cir. Ct. 1996). Further noting that, “524 of the Act specifically preserves all remedies at law or equity otherwise available against an owner in the event of an owner’s intentional or willful misrepresentation of the condition of the subject property.” Compare with *Nathan v. Long & Foster Real Estate, Inc.*, No. CL09000493–00, 2009 Va. Cir. LEXIS 135, at*9 (Roanoke Cir. Ct. Nov. 20, 2009) (holding that a realtor’s failure to accurately inform purchasers regarding the presence of radon prevented the realtor from obtaining the protection of section 55–523); but see *McGlen v. Rosenfeld*, 82 Va. Cir. 108 (2011) (“Not only does the VRPDA provide a cause of action against real estate licensees, Plaintiffs Amended Complaint states such a cause of action by alleging that the Realtors did not advise her of her rights and obligations under the VRPDA”).
- 54 Va. Code Ann. § 54.1-2130 et seq.
- 55 See *id.* § 54.1-2131; 2132.
- 56 See 2016 Session H 567 available at <https://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+CHAP0334&161+ful+C HAP0334>.
- 57 Compare *Della Monica*, 64 Va. Cir. 439 (“Nothing in the statute’s regulation of a licensee’s conduct manifests a legislative intent to create such an action. Instead, breaches of statutory duties (per se claims), along with common law duties, would support recovery in damages for negligence.”) with *Walton v. Aguilier*, 90 Va. Cir. 482 (2010) (Virginia Code 54.1-2131 “was enacted to protect the public from fraud by licensees; as such, it is a remedial statute and should be liberally construed to prohibit harms that, while not specifically addressed, are within the spirit and purpose of the legislation”).
- 58 *Bradley D. McGraw, Professional Liability of Real Estate Agents After Polyzos*, 23 *The Fee Simple* 1, at 4, Va. State Bar, Real Prop. Section (Nov. 2002).
- 59 *Bellagarde*, supra note 4.
- 60 Compare *Della Monica*, 64 Va. Cir. 439 (“To the extent imposed by law, plaintiffs may recover in tort for damages that proximately result from a failure by the defendant to conform its conduct to the standard of care imposed upon agents by statute and common law.”) and *Steffan v. Freemason Assocs., Inc.*, 60 Va. Cir. 216 (2002) (“The common law is abrogated only to the extent that it is inconsistent with the article referred to. Va. Code § 54.1–2144.”) with *Foster v. Wintergreen Real Est. Co.*, 81 Va. Cir. 353 (2010) (finding “no cause of action for breach of a fiduciary relationship independent of the contractual relationship between the parties” provided by Va. Code §§ 54.1–2131 and 54.1–2132.) and *Prudential Residential Servs., Ltd. P’ship v. Cash*, 70 Va. Cir. 27 (2005) (“Code § 54.1–2144 expressly states that the common law of agency in real estate brokerage relationships is expressly abrogated. Thus, the common law fiduciary relationship between client and real estate broker no longer exists.”).