

DAVID v. GOLIATH: How the Replacement of a  
Commercial Real Estate Agent’s Common Law Duty of  
Undivided Loyalty with Washington State’s More-  
Limited Statutory Obligations Advantages Landlords to  
the Detriment of Commercial Tenants

SHORT TITLE: DAVID v. GOLIATH: How Dual  
Agency Harms Commercial Tenants

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ABSTRACT

As the fastest-growing urban area in the United States—and due to its emerging national influence in commercial real estate development and leasing through transformational transactions such as Amazon’s recently completed national HQ2 search—the City of Seattle and related Washington State laws addressing the use of dual agency in commercial transactions present a unique backdrop for examining the findings and recommendations from a 2014 commercial real estate conflicts of interest research study and attendant report, described below, more than four years after its publication.

In November 2014, a published research study report made a number of key observations about the existence of adverse legal and transactional consequences from conflicts of interest in the representation of commercial tenants by full-service brokerage firms engaged in the commercial real estate services (CRES) sector actively engaged in the practice of “dual agency.” That report, published by the Center for Real Estate and Urban Analysis (CREUA) at The George Washington University School of Business in Washington, D.C., also offered a series

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\* Professor Smirniotopoulos would like to acknowledge the contribution of Hughes Marino, LLC, which provided funding for some of the legal research and analysis undertaken in support of this Article.

of key recommendations for mitigating or eliminating entirely these adverse consequences.<sup>1</sup>

In the intervening years since the mid-November 2014 publication of the conflicts of interest research report, the CRES sector has not taken any steps, in the form of industry self-regulation or otherwise, to address—much less ameliorate—these legal issues and the attendant, adverse transactional consequences for commercial tenants. Further, over the same period, (1) there has been increasing consolidation among the five largest CRES full-service brokerage firms (i.e., collectively they represent a larger share of the market for leasing commercial property than in 2014, when the CREUA conflicts of interest research report was conducted); and (2) those firms have gained traction in numerous domestic commercial property markets by taking equity positions in a substantial amount of commercial space available for lease in major markets.<sup>2</sup>

These market developments further exacerbate the negative consequences for tenants seeking independent, objective, and professional representation in commercial real estate transactions because they present the prospect that, in a dual agency scenario, the tenant representative may be acting as an undisclosed principal.<sup>3</sup> And even in cases where the tenant representative discloses the existence of a conflict where their firm is a principal in the transaction, the tenant may not be adequately equipped with the knowledge necessary to understand the significance and consequence of the self-dealing present in this transaction.

As a consequence, the problems associated with dual agency have become more acute and more pervasive in the world of commercial real estate generally, and in commercial leasing transactions in particular. Under the common law, an agent would owe the following duties to its principal:

- Unbroken service and loyalty (the “duty of undivided loyalty”);
- Confidentiality;
- Full disclosure of information necessary for the principal for to make well-informed decisions;
- Acting in the best interest of the principal;
- Reasonable care and diligence; and

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1. PETER E. SMIRNIOTOPOULOS, CTR. FOR REAL ESTATE AND URBAN ANALYSIS, CONFLICTS OF INTEREST IN COMMERCIAL REAL ESTATE TRANSACTIONS: WHO REPRESENTS THE TENANT (2014) [hereinafter SMIRNIOTOPOULOS, 2014 COI STUDY REPORT] (on file with Seattle University Law Review). For a summary of relevant sections of the report, see *infra* Part I.

2. See *infra* Part IV.

3. For further discussion, see *infra* Part IV.

- Accountability to the principal.

However, in Washington State, the legislature in 1996 replaced the common law duties agents owe to principals under state common law—such as the duty of undivided loyalty—with a statutory scheme that, at best, causes confusion about the duties an agent owes its principal,<sup>4</sup> particularly in the context of a dual agency representation of the tenant and the landlord in the same transaction.

#### INTRODUCTION

A prospective tenant seeking to lease commercial space, commonly referred to in commercial leasing as the “Premises”—or even a tenant seeking to renew a commercial lease agreement for the tenant’s existing Premises—only knows *what it knows* about the commercial real estate market at any given point in time. With the exception of tenants in the business of providing commercial real estate services to others, even tenants engaged in the business of real estate generally, or commercial real estate specifically, will have their financial and legal interests well-served by seeking out professional representation from a commercial real estate broker. However, for this to be true, that professional representation must come with the representative’s commitment to a duty of undivided loyalty to the tenant. Commercial real estate brokers “represent” a commercial tenant’s interests by leading the process of searching for and selecting new premises and negotiating the best deal possible while the prospective tenant relies upon the broker’s specialized industry knowledge and professional integrity.

Commercial leases are legal contracts documenting the conclusion of inherently complex transactions, involving dozens and dozens of moving parts or “deal points.” Each aspect of this transaction must be meticulously researched in the market or submarket in which the commercial tenant seeks to become or remain located. These deal points inevitably become the subject of often intense negotiations with one or more prospective landlords. Ultimately, the deal points to which both landlord and tenant agree, assuming they are able to do so with the skilled representation of their respective agents, will form the basis for a complex and often very lengthy commercial contract, most-frequently titled “Lease Agreement” or “Agreement of Lease.” This legal contract commonly runs between forty and sixty pages, not including referenced attachments. It is within this context that small and large business enterprises require the

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4. See *infra* Part II (discussing the statutory scheme and identifying the difficulties of taking no action adverse to a principal when an agent is acting as a dual agent).

objective, independent, and professional assistance of a commercial real estate broker to represent the best interests of their business.

Prospective tenants often assume and expect that licensing requirements and other government regulations compel, or at least require, providers of professional commercial real estate services to represent them in a manner serving the tenant's best interests at all times.

The search for new premises and the resultant leasing contract often represent an enterprise's first or second largest annual operating expense<sup>5</sup> and entail contractual commitments of anywhere between five and twenty years, sometimes even longer but rarely shorter.

Given the complexity of this process and the contractual commitments to which the "successful" prospective tenant will be subjected, it is difficult to construct a scenario under which the best interests of the tenant will be well-served by an agent or broker that also represents the landlord in the same transaction. These parties could not be more adverse: the landlord wants to command the highest possible rent for the longest period of time (i.e., the "Lease Term") with the fewest substantive obligations being owed to the tenant; the tenant, for its part, wants to secure the most competitive (i.e., least expensive) aggregate annual rental cost, the greatest amount of flexibility in terms of the tenant's ongoing commitment to pay that annual rental cost, and beyond that, wants to be left alone to conduct its business. How could the same commercial broker ever reconcile such diametrically opposed forces when presuming to represent both parties at the same time in a dual agency scenario? In the context of legal representation, this is what is known as an unwaivable conflict of interest; no amount of advance, written disclosure will "cure" the inherent conflict.

Many commercial tenants in Greater Seattle, given the ethnic, socio-economic, and cultural diversity of the area's business community and the plethora of small businesses that give the city its unique character, lack the economic bargaining power, the commercial business sophistication and acumen, and the financial wherewithal to adequately represent their business interests without expert, independent, and objective representation. Without this expert representation, these tenants may be unable to avoid dire, often personal, financial consequences, including possible personal bankruptcy, due to lease guarantees for their businesses,

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5. Although a business sector's percentage of total operating expenses devoted to real estate (i.e., facilities costs) will vary from sector-to-sector: compare, for example, a facilities-intensive, highly automated manufacturing business, on the one hand, with a place-based, human-labor-intensive business, such as a professional services firm with a physical presence or a commercial office in a central business district. Generally speaking, personnel or human capital costs and facilities costs will generally occupy the highest and second-highest percentage of a business's total operating costs.

as a result of having entered into a bad lease. As the city of Seattle and surrounding areas experience more acute pressures to grow and expand, the potential for the “retail gentrification” of the city’s most diverse and economically-challenged commercial corridors and districts will increase accordingly. This increasing pressure results in adverse economic consequences on small businesses and their individual owners from landlords’ strict enforcement of the terms of leases in buildings determined by the landlord to have a more profitable use than leasing to the current tenant. Such an increasing pressure may cause an epidemic of small business failures.

Taking into account the inherent asymmetry of both qualitative and quantitative information in the commercial real estate marketplace—as contrasted with the residential sales market, where everyone has access to the same information—the importance of objective and independent representation of tenants cannot be overstated. As posited, in pertinent part, in the 2014 Conflicts of Interest Research Report:

Regrettably, the nature of the commercial market for leased properties, as well as the process through which commercial tenants make their leasing decisions, is more like McMillan’s descriptions of transactions taking place in the bazaars of Marrakesh or Yemen and less like U.S. capital markets or the residential real estate market.<sup>6</sup>

Additionally, inasmuch as full-service CRES firms annually receive the lion’s share of their brokerage fees from landlords, it is perhaps quixotic to believe that, in a dual agency scenario, these dual agent brokers will do anything contrary to the best interests of their landlord clients. This may be true even if serving the best interests of the landlords means not serving the best interests of a firm’s tenant clients as a consequence, because of the risk that landlord clients may complain that the brokerage firm is biting the hand that feeds them and immediately terminate the professional relationship for that reason.

Washington’s Real Estate Brokerage Relationships statute<sup>7</sup> provides a statutory licensing scheme that, by intention, completely supplants the traditional, and substantial, fiduciary duties a commercial real estate agent would otherwise owe to its principal at common law.<sup>8</sup> The statute supersedes the common law of agency in a manner and under a regime in which an agent’s duties to a tenant might arguably be reduced to that of a mere matchmaker, when in fact commercial practice and a prospective tenant’s reasonable expectations is that a commercial broker would serve

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6. SMIRNIOTOPOULOS, 2014 COI STUDY REPORT, *supra* note 1, at 69.

7. WASH. REV. CODE § 18.86 (2018).

8. WASH. REV. CODE § 18.86.110 (2018).

a much larger role than a mere matchmaker. The statute is, in fact, a very poor substitute for the common law duties an agent owes its principal and appears counterintuitive, if not completely antithetical, to Washington's otherwise robust consumer protections.<sup>9</sup> And it does little, if anything, to specifically protect the best interests of a prospective tenant.

Accordingly, without doing violence to the other provisions of Revised Code of Washington section 18.86, the statute should be amended to impose an absolute ban on commercial dual agency. Further, in the context of commercial real estate, all duties that an agent would owe to a principal under common law should be reinstated to restore the full protections a principal is afforded under the common law of agency. There can be no middle ground. Advance written notice and a written waiver of the inherent conflicts of interest does nothing to address, much less ameliorate, those stark conflicts.

Part I will provide a summary of the relevant portions of the 2014 Conflicts of Interest Report and provide some information regarding the Greater Seattle Area commercial real estate market.<sup>10</sup> Part II will provide an overview of the common law of agency as it relates to real estate agents or brokers, and analysis of the legislative history of Washington's statutory codification of broker agency duties under Revised Code of Washington section 18.86. Part III will examine common law as it was applied in Washington, provide a discussion of relevant case law, and discuss various conflicts of interests that are prohibited under Revised Code of Washington section 18.86 and the potential remedies for violations of those prohibitions. Finally, Part IV will examine the emergence of brokers being principals or fiduciary managers for properties they broker, discuss the legal implications of a broker being an undisclosed principal in a transaction they broker after Revised Code of Washington section 18.86 and discuss the importance of reinstating common law fiduciary duties in commercial real estate transactions.

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9. See WASH. REV. CODE § 19.86.020 (2018) (declaring unlawful a broad range of "unfair" behavior including unfair competition, unfair business acts or practices, and deceptive acts or practices); WASH. REV. CODE § 19.86.030 (2018) (declaring contracts or conspiracies in the restraint of trade to be unlawful); WASH. REV. CODE § 19.86.040 (2018) (declaring monopolies unlawful); WASH. REV. CODE § 19.86.050 (2018) (declaring certain agreements unlawful when competition is lessened as a result); WASH. REV. CODE § 19.86.060 (2018) (declaring acquisition of stock by a corporation unlawful when it lessens competition); WASH. REV. CODE § 19.86.090 (2018) (creating a private right of action for parties injured by unlawful behavior under the statute and providing for attorney fees and treble damages for parties prevailing under Washington's Consumer Protection Act).

10. For a much more thorough and in-depth look at the conflicts of interest present in the CRES sector, see SMIRNIOTOPoulos, 2014 COI STUDY REPORT, *supra* note 1.

## PART I

As stated above, Part I of this Article provides an overview of the context within which the legal research, analysis, and arguments are presented, including a brief of the Greater Seattle Area commercial real estate market, within which the regulatory obligations of the CRES sector participants are tested on a daily basis.

*A. The 2014 Conflicts of Interest Research Report*

The 2014 research study conducted by the Center for Real Estate and Urban Analysis at The George Washington University School of Business in Washington, D.C., leading to the publication in November 2014 of a comprehensive research study report,<sup>11</sup> serves as the springboard for this Article. The purpose of the 2014 Conflicts of Interest Research Report was as follows:

[To] identify the potential conflicts of interest inherent in real estate transactions between a commercial tenant and a prospective landlord; evaluate the legal, regulatory, and industry mechanisms in place to protect the interests of commercial tenants through professional representation in these transactions; and where necessary, make recommendations for how such tenant protections might be strengthened to assure an arm's length transaction between the parties, thereby optimizing the functioning of the commercial real estate marketplace.<sup>12</sup>

The study made a number of key findings. First, the study found that, unlike other U.S. markets, the U.S. commercial leasing market lacks transparency and equal access to information for all parties.<sup>13</sup> This is due to the commercial leasing market being characterized by information asymmetry with data regarding market characteristics being almost exclusively idiosyncratic to specific CRES firms and the fact that there is no centralized or industry standard for tracking and reporting critical market data.<sup>14</sup>

Second, the study found that, to the extent that any unifying influence exists over the commercial leasing market, such influence favors landlords, with the market being driven by the supply of available premises for lease, not by the demand for premises.<sup>15</sup> The CRES sector is loosely organized such that issues relating to conflicts of interests have not been addressed in any systematic way benefiting tenants, with licensure

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11. *Id.*

12. *Id.* at 2.

13. *Id.* at 8.

14. *Id.*

15. *Id.*

requirements varying from state to state. Further, the CRES industry has openly opposed legislative and regulatory reform efforts seeking to improve the quality of representation provided to tenants through mandatory disclosure of conflicts of interest in dual agency situations. Such public opposition has created at least the appearance that full-service CRES firms dominate the CRES sector and that they would prefer not to have to make such disclosures before representing a tenant, despite countervailing, common law duties requiring full disclosure of such conflicts.

These relationships between and among various principals in a real estate development or acquisition transaction, or in the course of the normal ownership and management of commercial property—developers, institutional and other equity investors, and lenders of various types—are increasingly complex yet obscured from the public. The roles CRES firms play in providing services have become increasingly complex and convoluted, to the point that it may be unrealistic to expect the average office tenant to understand the full impact of dual agency or consenting to other conflicts of interest.

Finally, the study found that the fundamental relationship between landlords and tenants is inherently adversarial, both in the negotiation and execution of lease agreements and in the tenant's occupancy of the landlord's premises. The parties' respective interests are so inherently adverse that the conflict cannot be adequately remedied by the fully informed consent of both parties.<sup>16</sup>

This final finding raises a fundamental question for the profession: If legal ethics prohibit an attorney or a law firm from representing both the landlord and a tenant in the negotiations of a lease agreement or in a dispute over the interpretation of the terms and conditions in a lease agreement, how can the divergent interests of those same parties nonetheless be adequately represented by the same CRES firm through dual agency?<sup>17</sup>

The study also made a number of key recommendations.<sup>18</sup> The study recommended further research into the practices among full-service CRES firms as to the incidence and intensity of actual conflicts of interest in the CRES Sector,<sup>19</sup> analysis of conflicts of interests policies, procedures, practices, and possible best practices among full-service CRES firms, and

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16. *Id.*

17. *See* MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(1) (AM. BAR ASS'N 2018) (prohibiting representation of multiple current clients when the clients' interests are directly adverse to each other).

18. SMIRNIOTPOULOS, 2014 COI STUDY REPORT, *supra* note 1, at 10–11.

19. *See id.* at Appendix B: Conflicts of Interest survey instrument, Appendix C: Conflicts of Interest survey results.

research into tenants' depth of understanding about the types and significance of various conflicts that may and do occur within the commercial leasing marketplace. The report also recommended that the CRES sector become more and better organized, potentially modeling the National Association of Realtors. Finally, the study recommended a Model Code of Conduct be established for CRES firms.<sup>20</sup>

The report contained a primer on the CRES sector, including the identification of likely parties to commercial real estate transactions and the types of transactions in which they are typically engaged<sup>21</sup> and specifically addressed the increasingly important and diverse roles played by full-service brokerage firms in those transactions and the trend toward consolidation of market share among the largest full-service commercial real estate brokers.<sup>22</sup> Increasing consolidation that has taken place in the last few decades within the CRES sector;<sup>23</sup> as a result, it is perhaps easy to understand how the incidence of conflicts of interest in commercial leasing transactions may be on the rise.<sup>24</sup> The report detailed how, in the span of six years (from 2008 to 2013), three large tenant-only CRES firms—Julian Studley, The Staubach Companies, and Newmark Real Estate Company, Inc.—were acquired by much larger, global, full-service CRES firms, removing a substantial amount of tenant-only representation from the CRES sector in the United States, by making formerly tenant-only agents employees of full-service CRES firms.<sup>25</sup>

The report identified a number of situations that, although they may not give rise to legal claims, present significant conflicts of interests in the CRES sector.<sup>26</sup> The following scenarios could arise where the Leasing Transaction is closed by a listing broker and tenant agent employed by the same full-service CRES firm:

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20. *Id.* at 10–11.

21. *Id.* at 17–19 (Section III(B), The Role of the CRES Sector in Commercial Real Estate Transactions).

22. *Id.*

23. *Id.* at 18–19; *see also id.* at Appendix D: Profiles of the Largest Full-Service and Tenant-Only CRES Firms.

24. *Id.* at 19–22 (expanding on the reasons for why the incidents of conflicts of interest may be on the rise).

25. *Id.* at 71–78. This trend towards full-service CRES firms acquiring tenant-only firms has continued, with CBRE acquiring Global Workplace Solutions in 2015, JLL acquiring Nextpart in 2015, JLL acquiring Cresa South Florida in 2015, JLL acquiring Washington Partners in 2016, Colliers International acquiring Serten Advisors in 2017, and Newmark Knight Frank acquiring Jackson Cooksey in 2018; *see id.* at Appendix D: Profiles of the Largest Full-Service and Tenant-Only CRES Firms.

26. *Id.* at 19.

- a. The Listing Broker manipulates or otherwise influences the commission on the transaction to be paid to the Tenant's Agent to get the lease closed.
- b. Without manipulating or otherwise influencing the amount and payment of the Agent's commission, the Listing Broker offers incentives outside the commission structure but within the control of the CRES firm, including but not limited to promised increases in base salary, benefits, or future advancement within the firm.
- c. Without manipulating or otherwise influencing the amount and payment of the Agent's commission or otherwise creating specific incentives within the CRES Firm's ordinary compensation structure, the Developer or Property Owner promises the Listing Broker additional property listings if the Subject Property is fully tenanted within a specified time frame, and the Tenant Agent is promised specific opportunities, remuneration, or both if such additional property listings are awarded to the Listing Broker by the Developer or Property Owner.
- d. The Tenant Agent shares with the Listing Broker confidential information about the prospective Tenant that is not generally publicly available and which the prospective Tenant has shared with the Tenant Agent in confidence,<sup>27</sup> such as (a) the prospective Tenant's current financial condition; (b) changes in the Tenant's business or market position that could impact the prospective Tenant's future operating income and, consequently, its ability to pay rent or other obligations; (c) potential changes in the Tenant's business or industry sector; and (d) the prospective Tenant's simultaneous negotiation of one or more comparable commercial leases as a hedge against not being able to secure from the Listing Broker the terms and conditions the prospective Tenant requires or prefers regarding the Premises.<sup>28</sup>

The report provides an explanation on how U.S. commercial leasing operates as a marketplace.<sup>29</sup> Two market concepts must be understood to fully comprehend how markets function: the "workable market platform" component and the concept of "market efficiency."<sup>30</sup>

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27. See, e.g., *Advisory and Transaction Services*, CBRE, <https://www.cbre.com/real-estate-services/investor/advisory-and-transaction-services> [<https://perma.cc/8NPR-5FZD>] (CBRE, a full-service firm that represents tenants as well as landlords, boasting of its "leading-edge" services, including being able to offer investors "[p]rospective tenant profiles and strategies").

28. SMIRNIOTOPOULOS, 2014 COI STUDY REPORT, *supra* note 1, at 19–20.

29. *Id.* at 64–71 (Part V).

30. *Id.* at 65–66.

The workable market platform has five essential elements, including that (1) information flows smoothly, (2) property rights are appropriately protected, (3) people can be trusted to honor their promises, (4) externalities are minimized, and (5) competition is fostered.<sup>31</sup>

As to the concept of market efficiency, the Efficient Market Theory posits that an “informationally efficient” market *will always arrive at the correct price*.<sup>32</sup> At issue in Eugene Fama’s work is whether markets operate rationally, such that in the face of perfect information prices reflect all such information, or are they also susceptible to other forces, such as investors’ hopes and fears?

When markets are inefficient, the party in possession of and controlling the flow of information gains a superior bargaining position. Among other disadvantages to tenants caused by asymmetrical information in the U.S. commercial leasing market is the lack of a comprehensive understanding of what all relatively comparable options might be at any given point in time without exclusive reliance on the tenant agent.

The report also examined the Commercial Real Estate Services sector in the United States.<sup>33</sup> The report found that over the past nine years (preceding the publication of the Conflicts of Interest Research Study Report in November 2014), CRES firms have grown in size, geographic reach, breadth of services offered, and overall importance to and involvement in various aspects of the development and financing of commercial properties, both domestically and internationally. They have become increasingly global, and the more landlord-focused CRES firms have expanded their tenant representation capabilities primarily by acquiring U.S. national, regional, or local tenant-only brokerages. Local firms become or are swallowed-up by regional or national firms, while national firms have become or are swallowed-up by international firms. In 2013, the five largest, full-service CRES firms were involved in 150,461 commercial property transactions generating over one-half of \$1 billion in commercial property transaction revenues (\$553.3 million in the aggregate).<sup>34</sup> The five largest, full-service CRES firms also generated over \$16 billion in aggregate, total revenues in 2013.<sup>35</sup> There is a substantial

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31. *Id.* (citing JOHN MCMILLAN, *REINVENTING THE BAZAAR: A NATURAL HISTORY OF MARKETS* (2002)).

32. John H. Cochrane, *Eugene F. Fama, Efficient Markets, and the Nobel Prize*, CHI. BOOTH REV. (May 20, 2014), <https://review.chicagobooth.edu/magazine/winter-2013/eugene-fama-efficient-markets-and-the-nobel-prize> [<https://perma.cc/XB65-QJ8Y>].

33. JOHN MCMILLAN, *REINVENTING THE BAZAAR: A NATURAL HISTORY OF MARKETS* 71–77 (2002).

34. SMIRNIOTPOULOS, 2014 COI STUDY REPORT, *supra* note 1, at 17.

35. *Id.*

disparity between the size and scale of the five largest full-service CRES firms and the five largest full-service CRES firms operating in the United States in 2013.<sup>36</sup>

### *B. Deal Points*

In the negotiations between landlords and tenants in a commercial real estate context, a number of deal points exist that serve to shape the final lease conditions, including obligations on the part of each party. *Real Estate Law: Fundamentals for The Development Process* offers a thorough analysis of these deal points, devoting fifty pages to legal issues in property management and leasing of commercial properties.<sup>37</sup> A brief excerpt is included below to provide greater understanding as to the inherently adversarial nature of landlord and tenant negotiations and the inherent complexity of commercial leasing transactions:

While real estate lawyers go to great lengths to make sure real estate contract documents such as commercial lease agreements address all likely scenarios and eventualities, and are compensated handsomely to do so, inevitably reasonable parties – much less unreasonable parties – are going to have disagreements in interpreting their rights, duties, and mutual responsibilities under such documents.<sup>38</sup>

Professor Poorvu, in his chapter in *The Real Estate Game on “Operations,”* offers the following listing of commercial lease agreement sections or major clauses as his framework to understanding Property Management:

- The parties;
- Eminent domain;
- The commencement date;
- Default by tenant;
- Building and premises;
- Default by landlord;
- Use of the premises;
- Security deposit;
- Term: original and extended;

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36. JOHN McMILLAN, *REINVENTING THE BAZAAR: A NATURAL HISTORY OF MARKETS* 72 (2002).

37. PETER E. SMIRNIOTOPoulos, *REAL ESTATE LAW: FUNDAMENTALS FOR THE DEVELOPMENT PROCESS* 399–449 (2016).

38. *Id.*

- Subordination, estoppel certificates and nondisturbance;
- Base and additional rent;
- Subletting and assignment;
- Tenant's obligations;
- Consents;
- Landlord's obligations;
- Condition of premises;
- Compliance with laws;
- Tenant improvements;
- Environment;
- Landlord's work;
- Insurance Broker;
- Parking;
- Damage to premises; and
- Miscellaneous.<sup>39</sup>

Depending upon the prospective tenant, its business priorities and needs, the condition and location of the prospective Premises, and the peripatetic nature of the plethora of Greater Seattle Area's commercial corridors, districts, shopping centers, and stand-alone and pad-site buildings, any one or more of the commercial lease provisions excerpted above, more than merely a handful of these issues could prove problematic in the selection of Premises and arms-length, third-party negotiation of a Lease Agreement to that prospective tenant. Chapter Eleven of *Real Estate Law: Fundamentals of The Development Process* covers each of the typical lease provisions outlined by Professor Poorvu and excerpted above, delves into specific detail for each of these lease provisions, and also adds a few Professor Poorvu did not include in *The Real Estate Game*.<sup>40</sup> Given the myriad potential permutations of this list, and considering further that a potential tenant's list of priorities for and sensitivities to these deal points may diverge dramatically from those of the prospective landlord, it is easy to understand the inherent complexities of, and lease issues as to, which the tenant's and the landlord's interests will be at odds, in a commercial leasing transaction.

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39. *Id.* at 406 (citing WILLIAM POORVU & JEFFREY L. CRUIKSHANK, *THE REAL ESTATE GAME: THE INTELLIGENT GUIDE TO DECISION-MAKING AND INVESTMENT* 191 (1999)).

40. *Id.* at 405–19.

*C. The Greater Seattle Commercial Real Estate Market in 2018*

Included within the context provided above is a snapshot of the Greater Seattle Area commercial real estate market, within which the regulatory obligations of the CRES sector participants are tested, on a daily basis, in terms of brokers' and agents' compliance, in their day-to-day dealings with their clients, under Revised Code of Washington section 18.86. In an over-heated commercial real estate market, the professionalism and ethical performance of commercial real estate brokers and agents, whose earnings are determined by the volume and monetary sizes of their annual transactions, is continually tested. As the following statistics reveal, in this regard the Greater Seattle commercial real estate market may serve as an excellent barometer for how the foundations of the law of principal and agent are being honored, or abused, under the far less rigorous statutory regime under Revised Code of Washington section 18.86.

The Greater Seattle Area has experienced tremendous growth over the recent years; however, this growth in Seattle has slowed recently.<sup>41</sup> And despite fears of a looming recession, Seattle remains an attractive choice for investors.<sup>42</sup> This level of growth comes at a cost, with increases to the cost of living, exacerbation of wealth inequalities, and additional pressure on the infrastructure.<sup>43</sup> It is no surprise then that many cities are actively trying to avoid "Seattle-ization."<sup>44</sup> The area is home to an estimated 3.8 million people, by a 2017 estimate, with further population growth expected and having already occurred.<sup>45</sup> The labor market has seen some slowing, but is still strong with unemployment at 4.1% in March

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41. Compare PWC & URB. LAND INST., EMERGING TRENDS IN REAL ESTATE: UNITED STATES AND CANADA 2019 (2019), <https://www.pwc.com/us/en/asset-management/real-estate/assets/pwc-emerging-trends-in-real-estate-2019.pdf> [<https://perma.cc/E7AJ-TY3N>] (ranking Seattle 16th in overall real estate prospects), with Mike Wheatly, *PwC Names Seattle as Top Real Estate Market in the U.S.*, REALTY BIZ NEWS (Oct. 27, 2017), <https://realtybiznews.com/pwc-names-seattle-as-top-real-estate-market-in-the-u-s/98745046/> [<https://perma.cc/K8YT-VX88>], and Gene Balk, *Census: Seattle is the Fastest-Growing Big City in the U.S.*, SEATTLE TIMES (May 22, 2014), <http://blogs.seattletimes.com/fyi-guy/2014/05/22/census-seattle-is-the-fastest-growing-big-city-in-the-u-s/> [<https://perma.cc/UAG8-RNUK>].

42. KIDDER MATHEWS, SEATTLE OFFICE: REAL ESTATE MARKET REVIEW 1ST QUARTER 2019 (2019) [hereinafter KIDDER Q1 2019 OFFICE REPORT], <http://www.kiddermathews.com/downloads/research/office-market-research-seattle-2019-1q.pdf> [<https://perma.cc/4JMS-JYAZ>].

43. Gene Balk, *'Seattle-ization'? American Cities Fear What's Happened Here*, SEATTLE TIMES (Jan. 2, 2019), <https://www.seattletimes.com/seattle-news/data/seattle-ization-american-cities-fear-whats-happened-here/> [<https://perma.cc/P4WG-E6UR>].

44. *Id.*

45. U.S. Census Bureau, *Seattle-Tacoma-Bellevue, WA Metro Area*, CENSUS REPORTER (2017), <https://censusreporter.org/profiles/31000US42660-seattle-tacoma-bellevue-wa-metro-area/> [<https://perma.cc/AK3V-KYJE>].

2019,<sup>46</sup> with the national average at 3.8%.<sup>47</sup> The information, professional and business services, and construction sectors are experiencing the fastest growth in the Greater Seattle Area.<sup>48</sup> Also, payroll employment increased in Washington in January 2019 at a rate of 3.3%,<sup>49</sup> which is higher than the national average of roughly 1%.<sup>50</sup> CBRE, JLL, and Cushman & Wakefield, three of the world's largest full-service CRES firms, are all represented in the total payroll numbers for the region, relying on dual agency as an important revenue stream. Within the Greater Seattle market the largest firms profiled in Appendix D to the 2014 Conflicts of Interest Research Report have a strong presence, with the exception of Fischer & Company; this list includes international full-service CRES firms such as CBRE Group, JLL, Cushman & Wakefield, Newmark Knight Frank, and Savills Studley. Also included are tenant-only firms such as Cresa, Hughes Marino, and Mohr Partners, which compete in the Greater Seattle Area.<sup>51</sup> Additionally, some more-local, full-service firms have a significant presence in the marketplace, such as Kidder Matthews and NAI Puget Sound Properties.<sup>52</sup>

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46. BUREAU OF LAB. STAT., ECONOMY AT A GLANCE, SEATTLE-TACOMA-BELLEVUE (2019), [https://www.bls.gov/eag/eag.wa\\_seattle\\_msa.htm](https://www.bls.gov/eag/eag.wa_seattle_msa.htm) [<https://perma.cc/P9JP-6ZL2>].

47. *National Employment Monthly Update*, NAT'L CONF. OF ST. LEGISLATURES (June 7, 2019), <http://www.ncsl.org/research/labor-and-employment/national-employment-monthlyupdate.aspx> [<https://perma.cc/3PPS-K94N>].

48. BUREAU OF LAB. STAT., *supra* note 46; *see also* COLLIERS INT'L, RESEARCH & FORECAST REPORT: PUGET SOUND REGION Q3 2018 OFFICE REPORT (2018) [hereinafter COLLIERS Q3 2018 OFFICE REPORT], <https://www2.colliers.com/en/Research/Puget-Sound/Q3-2018-Office-Market-Report> [<https://perma.cc/QMD7-F3FR>].

49. *Strong Payroll Hiring Continues into January*, WASH. STATE EMP. SECURITY DEP'T (Mar. 6, 2019), <https://esd.wa.gov/newsroom/strong-payroll-hiring-continues-into-january> [<https://perma.cc/6MEA-HH6B>].

50. *See* BUREAU OF LAB. STAT., NEWS RELEASE: THE EMPLOYMENT SITUATION—APRIL 2019 (May 3, 2019), [https://www.bls.gov/news.release/archives/empst\\_05032019.pdf](https://www.bls.gov/news.release/archives/empst_05032019.pdf) [<https://perma.cc/JRB8-5BPS>] (stating that in April, civilian employment was at 258,693,000 with an increase of 263,000 resulting in approximately a 1% increase).

51. *See Our Offices Seattle, WA*, MOHR PARTNERS, INC., <https://www.mohrpartners.com/location/seattle-wa/> [<https://perma.cc/E4T6-SZ9K>]; *Seattle*, CRESA, <https://www.cresa.com/seattle-wa> [<https://perma.cc/GD5G-NYST>]; *Seattle Commercial Real Estate*, NEWMARK KNIGHT FRANK, <http://www.ngkf.com/home/about-our-firm/global-offices/us-offices/seattle.aspx> [<https://perma.cc/3SG6-SQEY>]; *Seattle Cushman & Wakefield*, CUSHMAN & WAKEFIELD, <http://www.cushmanwakefield.com/en/offices/seattle-1> [<https://perma.cc/G8SA-SFN6>]; *Seattle Office About*, CBRE, <http://www.cbre.us/people-and-offices/corporate-offices/seattle> [<https://perma.cc/G8M6-APBA>]; *Seattle Location*, SAVILLS STUDLEY, <http://www.savills-studley.com/offices/seattle.aspx> [<https://perma.cc/P4MM-FLUQ>] (though denoting Savills-Studley as a tenant-only firm may be inaccurate given it is owned by Savills, which offers services for landlords); *West Locations*, JLL, <https://www.us.jll.com/en/locations/west> [<https://perma.cc/Z52Z-72T3>].

52. *About Us*, KIDDER MATTHEWS, <http://www.kiddermathews.com/> [<https://perma.cc/W6A9-X636>]; *Our Team*, NAI PUGET SOUND PROPERTIES, <https://www.nai-psp.com/our-team/> [<https://perma.cc/LV5B-BQM5>].

The Greater Seattle Area, often called the Puget Sound Area, is rather large and covers a number of cities, including Bellevue, Tacoma, and Redmond, and there is considerable variance in commercial market trends between these narrower markets. Although these commercial marketplaces are complex, they can largely be broken down into four discrete categories that bear directly on providing an accurate description of the Greater Seattle Area commercial property marketplace: Office Space, Industrial, Retail, and Multifamily. The market data below comprises the most recent data at the time of writing.

#### *D. Office Space*

The tech, life sciences, and co-working fields are all powerhouses in the office space market, with Amazon, WeWork, Stripe, T-Mobile, and Seattle Genetics all signing notable leases in 2018<sup>53</sup> and Facebook and Seattle CBD reflecting sizeable transactions in 2019.<sup>54</sup> Demand has also increased on the Eastside, with Amazon leasing 377,000 square feet of the proposed Summit III development in Bellevue.<sup>55</sup> The Greater Seattle Area as a whole has seen a positive absorption rate (a measurement of demand in the market) with a high estimate at 271,536<sup>56</sup> square feet and a low estimate at 6,095 square feet.<sup>57</sup> The differences in estimates likely reflect differing definitions of the geographical boundaries of the Puget Sound or Greater Seattle Area. The vacancy rate for office space has declined, reaching the lowest rate since the Great Recession.<sup>58</sup> The first quarter vacancy rate for office space in the Seattle Area was below 10 points at 8.1%.<sup>59</sup> By way of contrast nationwide:

Vacant office space in the U.S. increased slightly by 10 basis points (bps) during the fourth quarter of 2017 (Q4 2017) to 13 percent, according to the latest analysis from CBRE. For the year, vacancy inched up 10 bps, marking the first year-over-year increase in vacancy since 2010.

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53. COLLIERS INT'L, RESEARCH & FORECAST REPORT, PUGET SOUND REGION, Q2 2018 OFFICE (on file with the Seattle University Law Review); NEWMARK KNIGHT FRANK, RESEARCH Q3 2018, PUGET SOUND OFFICE MARKET (on file with the Seattle University Law Review).

54. NEWMARK KNIGHT FRANK, RESEARCH 1Q 2019 PUGET SOUND OFFICE MARKET [hereinafter NEWMARK Q1 2019 OFFICE REPORT], <http://www.ngkf.com/Uploads/FileManager/Market%20Reports/1Q19-Seattle-Office-Market.pdf> [<https://perma.cc/7C9P-W7CJ>].

55. *Id.*

56. *Id.*

57. KIDDER Q1 2019 OFFICE REPORT, *supra* note 42.

58. NEWMARK Q1 2019 OFFICE REPORT, *supra* note 54.

59. *Id.*; see also KIDDER Q1 2019 OFFICE REPORT, *supra* note 42 (estimating vacancy rates at 6.48%).

The vacancy rate in suburban markets increased 10 bps, to 14.2 percent and downtown vacancy ticked up 10 bps to 10.7 percent. Vacancy continued to fall in a majority of U.S. office markets, and the national office vacancy rate remains near its post-recession low.<sup>60</sup>

And rents are forecast to continue rising.<sup>61</sup> Availability of space is estimated to be at 8.8%<sup>62</sup> on the low end or at 12.7% on the high end.<sup>63</sup> However, large spaces of greater than 100,000 square feet have become increasingly scarce.<sup>64</sup>

Average rents have again reached all-time highs, despite Amazon leases setting records in the third-quarter of 2018.<sup>65</sup> The U.S. index for commercial office leases was \$34.06 per square foot as of the third quarter of 2018;<sup>66</sup> yet, the estimate price per square foot per year for office space within the city of Seattle is about \$42 per square foot.<sup>67</sup> When taking the Greater Seattle Area into account as a whole, the average asking rental price per square foot ranges between \$33.16<sup>68</sup> and \$37.14.<sup>69</sup> 7.3 million square feet of new space is currently under construction, and 62% of the office space being constructed has been pre-leased.<sup>70</sup> Finally, investor confidence in the region for office space has remained strong, with a particular emphasis in Seattle and Bellevue.<sup>71</sup>

Given the remarkable and meteoric rise in Seattle market office rents and historically low vacancy rates—particularly when compared to a

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60. *U.S. Office Vacancy Ends 2017 at 13 Percent*, CBRE (Jan. 11, 2018), <https://www.cbre.com/about/media-center/us-office-vacancy-ends-2017-at-13-percent> [<https://perma.cc/D7DT-GVQ9>].

61. NEWMARK Q1 2019 OFFICE REPORT, *supra* note 54.

62. KIDDER Q1 2019 OFFICE REPORT, *supra* note 42.

63. SAVILLS RESEARCH, Q1 2019 SEATTLE (2019) [hereinafter SAVILLS RESEARCH, Q1 2019 REPORT], <https://pdf.euro.savills.co.uk/usa/market-reports/research-mim-seattlewa2019q1.pdf> [<https://perma.cc/52CA-TKTS>].

64. SAVILLS STUDLEY RESEARCH, SAVILLS STUDLEY REPORT: SEATTLE OFFICE SECTOR Q3 2018 (2018) [hereafter SAVILLS STUDLEY RESEARCH Q3 2018 REPORT], <https://pdf.euro.savills.co.uk/usa/market-reports/3q18-seattle-office-market-report.pdf> [<https://perma.cc/7QUE-QKBL>].

65. *Compare* SAVILLS RESEARCH, Q1 2019 REPORT, *supra* note 63 (noting steady increase in rents since third quarter 2018), *with* SAVILLS STUDLEY RESEARCH Q3 2018 REPORT, *supra* note 64 (noting all-time high average rents).

66. SAVILLS STUDLEY RESEARCH Q3 2018 REPORT, *supra* note 64.

67. NAI PUGET SOUND PROPERTIES, MARKET REPORT Q1 2019 OFFICE, INDUSTRIAL & RETAIL, PUGET SOUND REGION, WASHINGTON [hereinafter PSP Q1 2019 REPORT] (on file with the Seattle University Law Review) (estimating yearly rental price per square foot at \$40.83 for Seattle); KIDDER Q1 2019 OFFICE REPORT, *supra* note 42 (estimating yearly rental price per square foot in Seattle at \$42.00); NEWMARK Q1 2019 OFFICE REPORT, *supra* note 54 (estimating yearly rental price per square foot at \$43.31).

68. PSP Q1 2019 REPORT, *supra* note 67.

69. NEWMARK Q1 2019 OFFICE REPORT, *supra* note 54; *see also* SAVILLS RESEARCH, Q1 2019 REPORT, *supra* note 63 (estimating rental rates at \$38.85).

70. KIDDER Q1 2019 OFFICE REPORT, *supra* note 42.

71. *Id.*

national average vacancy rate of almost double—combined with an accelerating consolidation among the largest, international CRES sector firms with a substantial market presence in Greater Seattle, which consolidation has included the absorption of well-established, tenant only brokerages in the marketplace such as Washington Partners (by JLL in March 2016),<sup>72</sup> the question must be posed whether the landlord’s market in Greater Seattle is, at least in part, a consequence of too much concentration at the top?

#### *E. Industrial*

The industrial commercial real estate market in the Greater Seattle Area has an average annual rental price per square foot of \$10.39 and a vacancy rate of approximately 4.2%.<sup>73</sup> This sector has seen negative absorption of 109,577 square feet, though demand remains strong with 5.8 million square feet of space under construction.<sup>74</sup> This square footage is up from the 4.34 million square feet that were under construction at the end of the third quarter of 2018.<sup>75</sup> One of the driving forces behind warehouse demand has been e-commerce.<sup>76</sup>

#### *F. Retail*

The retail commercial real estate market in the Greater Seattle Area has an average annual rental price per square foot of \$20.81 and a vacancy rate of approximately 3.2%.<sup>77</sup> The absorption rate is positive year-to-date at 88,217 square feet.<sup>78</sup> Although retail absorption as a whole has remained positive, malls have seen negative absorption of late.<sup>79</sup> This negative trend

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72. As with the Savills acquisition of pioneering, tenant-only brokerage firm Julian J. Studley in 2008, detailed in the 2014 conflicts of interest research study report, the market absorption by the former of the latter enterprise did not make Savills a tenant-only brokerage firm. Quite to the contrary: The acquisition by a full-service CRES firm of an exclusively tenant-only commercial brokerage merely eliminates another tenant-only brokerage from the range or representation options afforded to prospective tenants in a given marketplace and allows the acquiring full-service CRES firm to market its tenant-only services while further proliferating in that market the practice of dual agency. As the saying goes: “When you dance with the devil, the devil doesn’t change. The devil changes you.”

73. PSP Q1 2019 REPORT, *supra* note 67.

74. KIDDER MATHEWS, 1ST QUARTER 2019 REAL ESTATE MARKET REVIEW: SEATTLE INDUSTRIAL, [https://kidder.com/wp-content/uploads/market\\_report/industrial-market-research-seattle-2019-1q.pdf](https://kidder.com/wp-content/uploads/market_report/industrial-market-research-seattle-2019-1q.pdf) [<https://perma.cc/RJ9X-WTRA>].

75. *Id.*

76. COLLIERS INT’L, RESEARCH & FORECAST REPORT, PUGET SOUND REGION, Q3 2018 INDUSTRIAL (2018) (on file with the Seattle University Law Review).

77. PSP Q1 2019 REPORT, *supra* note 67.

78. *Id.*

79. COLLIERS INT’L, RESEARCH & FORECAST REPORT, PUGET SOUND REGION, Q3 2018 RETAIL (2018) [hereinafter COLLIERS Q3 2018 RETAIL REPORT] (on file with the Seattle University Law Review).

for malls will likely continue into 2019, with the closing of several large chains such as Macy's, Sears, and JC Penny.<sup>80</sup>

"Mom and Pop" stores operating in truly urban locations, sometimes owned by and serving mostly ethnic minorities, are not reflected by the negative mall absorption rate because their customer base is not as mobile and such tenants typically seek and occupy walkable neighborhood retail. Fitness chains have continued to drive demand for retail generally, along with Amazon opening two Amazon Go stores in the Seattle Area in 2018.<sup>81</sup> Note, however, it will take some time nationwide to see where brick and mortar stores end up against "e-tailers," with the latter beginning to show an interest in brick and mortar stores.

### G. Multifamily

The multifamily commercial real estate sector has also seen growth, though this sector of commercial real estate is subject to more significant regional variance. Year-to-date absorption for Seattle was 13,455 square feet, with the average asking rent at \$1,545 in the last quarter of 2018.<sup>82</sup> Urban King County "set a record for price per square foot" despite transaction volumes being 20% lower than in 2016.<sup>83</sup> New construction of multifamily units has also increased year over year.<sup>84</sup> In spring 2018, a University of Washington study estimated the average King County rent to be at \$1,741 or \$2.18 per square foot.<sup>85</sup> The vacancy rate for Seattle is estimated to be at 5.4%,<sup>86</sup> with a 3.8% estimate for King County as a whole.<sup>87</sup>

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80. *Id.*; KIDDER MATHEWS, REAL ESTATE MARKET OVERVIEW, SEATTLE RETAIL, 1ST QUARTER 2019 [hereinafter KIDDER Q1 2019 RETAIL REPORT], [https://kidder.com/wp-content/uploads/market\\_report/retail-market-research-seattle-2019-1q.pdf](https://kidder.com/wp-content/uploads/market_report/retail-market-research-seattle-2019-1q.pdf) [https://perma.cc/2NGS-LCDJ].

81. COLLIERS Q3 2018 RETAIL REPORT, *supra* note 79; KIDDER Q1 2019 RETAIL REPORT, *supra* note 80.

82. KIDDER MATHEWS, REAL ESTATE MARKET OVERVIEW, SEATTLE MULTIFAMILY, 4TH QUARTER 2018 [hereinafter KIDDER Q4 2018 MULTIFAMILY REPORT], [https://kidder.com/wp-content/uploads/market\\_report/multifamily-market-research-seattle-2018-4q.pdf](https://kidder.com/wp-content/uploads/market_report/multifamily-market-research-seattle-2018-4q.pdf) [https://perma.cc/EV7Q-LDM4].

83. COLLIERS INT'L, *New Market Research Sheds Light on Puget Sound Apartment Sales* (Feb. 21, 2019), <https://www2.colliers.com/en/News/Puget-Sound/2019-Apartment-Market-Study> [https://perma.cc/5FY7-3JJG].

84. KIDDER Q4 2018 MULTIFAMILY REPORT, *supra* note 82.

85. U. OF WASH. RUNSTAD DEP'T OF REAL ESTATE, WASHINGTON STATE APARTMENT MARKET REPORT – SPRING 2018 (2018) [hereinafter UW SPRING 2018 STUDY], <http://realestate.washington.edu/wp-content/uploads/2018/05/2018SpringApartmentMarketReport.docx.pdf> [https://perma.cc/T4AZ-JKR8].

86. KIDDER Q4 2018 MULTIFAMILY REPORT, *supra* note 82.

87. UW SPRING 2018 STUDY, *supra* note 85.

## PART II

Part I provided the context and market realities within which commercial real estate brokers and agents operate in 2019 under the statutory licensing scheme initially enacted by the legislature in 1968. The below Part II provides a detailed examination and analysis of the state of the law of principal and agent in Washington at the time the legislature considered moving from a common law regime of duties, obligations, rights, and expectations among the parties in an agency relationship to a statutorily defined relationship between real estate brokers and agents, on the one hand, and their clients—buyers and sellers; tenants and landlords—on the other. Additionally, Part II examines the legislative history of Washington’s statutory codification of broker agency duties under Revised Code of Washington section 18.86 and posits, if it wasn’t broken, why did the legislature seek to fix it?

*A. Law of Principal and Agent under the Common Law (Master and Servant)*

In order to understand the impact of Revised Code of Washington section 18.86 on the practice of commercial brokerage at the time of its enactment, it is critical to understand the breadth and depth of the system it purported to replace at the time of its introduction: The common law of principal and agent.

Unless superseded by state statute, real estate agents are subject to the common law of agency. Both agents and brokers in the real estate industry are licensed professionals according to the state law in the state wherein their principal place of business is located, and according to any other state in which they do business, depending on such other states’ laws.<sup>88</sup> The licensure and testing requirements, if and when applicable, for an “agent” are less-onerous than for a “broker.” Agents are allowed to engage in commercial real estate services such as office leasing only under the direction and supervision of a licensed broker. Someone who holds a broker’s license but is working under another licensed broker in a supervisory role is commonly referred to as an associate broker in order to

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88. For a comprehensive analysis of how nine states and the District of Columbia treat real estate “brokers” or “agents,” see generally SMIRNIOTOPOULOS, 2014 COI STUDY REPORT, *supra* note 1, at Appendix E: Comparison of Disparate Commercial Brokerage Regulatory Frameworks. In Washington State, all professionals must be licensed as “brokers” with more requirements to be a managing or designated broker with the ability to supervise other brokers. WASH. REV. CODE §§ 18.85.101, 18.85.111, 18.85.121 (2019).

distinguish that associate broker from the role of the supervisory broker having liability over the associate brokers and agents in that office.<sup>89</sup>

Under the common law, an agent owes to its principal a duty of undivided loyalty from which all other fiduciary duties emanate or, at a minimum, all other duties should be interpreted and evaluated. “An agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.”<sup>90</sup>

An agent’s more specific duties of loyalty include a duty not to acquire a material benefit from a third party in connection with transactions or other actions taken on behalf of the principal or otherwise through the agent’s use of position; a duty not to deal with the principal as or on behalf of an adverse party; a duty not to compete with the principal or assist the principal’s competitors during the duration of the agency relationship; and a duty not to use property of the principal, and not to use or communicate confidential information of the principal, for the agent’s own purposes or those of a third party. A principal may consent to conduct by the agent that would otherwise breach a duty of loyalty, but in obtaining the principal’s consent, the agent must act in good faith and fully disclose material information to the principal.<sup>91</sup>

An agent also owes its principal a duty of confidentiality. “An agent is obligated to safeguard his principal’s confidence and secrets. A real estate broker, therefore, must keep confidential any information that might weaken his principal’s bargaining position if it were revealed.”<sup>92</sup> However, this duty does not include an obligation to withhold material facts concerning the condition of the property.<sup>93</sup>

Agents owe a duty of full disclosure to facilitate well-informed decisions by the principal. “An agent is obligated to disclose to his principal all relevant and material information that the agent knows and that pertains to the scope of the agency.”<sup>94</sup> Agents must also exercise reasonable care and diligence in pursuing the affairs of the principal:

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89. For a comparison of the testing and licensure requirements for real estate agents and brokers in nine states and the District of Columbia, see generally SMIRNIOTOPOULOS, 2014 COI STUDY REPORT, *supra* note 1, at Appendix E: Comparison of Disparate Commercial Brokerage Regulatory Frameworks.

90. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

91. Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1052–53 (2007); see also RESTATEMENT (THIRD) OF AGENCY §§ 8.01–8.06 (2006).

92. NAT’L ASS’N OF REALTORS: RISK MGMT. & LICENSE LAW FORUM, FIDUCIARY DUTIES (May 15, 2013), <http://www.realtor.org/sites/default/files/handouts-and-brochures/2014/nar-fiduciary-duty-032213.pdf> [<https://perma.cc/2AT2-SDDP>].

93. *Id.*

94. *Id.*

The standard of care expected of a real estate broker representing a seller or buyer is that of a competent real estate professional. . . . This duty includes an obligation to affirmatively discover facts relating to his principal's affairs that a reasonable and prudent real estate broker would be expected to investigate. Simply put, this is the same duty any professional, such as a doctor or lawyer, owes to his patient or client.<sup>95</sup>

Finally, an agent has a duty of accountability to the principal and must account for all money or property a principal has entrusted to the agent.<sup>96</sup>

*B. The Legislative History of Revised Code of Washington Section 18.86 and the Statutory Scheme Superseding the Common Law of Duties of Agency for Brokers*

As demonstrated above, the prevailing common law of Principal and Agent in Washington afforded the clients of professional real estate services a comprehensive set of affirmative duties owed by real estate brokers and their agents, whether for commercial property or residential services, to the sellers and buyers, and owners and renters, respectively, of real property interests. The questions remain, then, what improvements did the legislature intend to make to the common law of Principal and Agent in the enactment of Revised Code of Washington section 18.86?

*C. 1995–1996, House Bill 1659 and Senate Bill 5554*

In 1996, the Washington State Legislature passed House Bill (HB) 1659, codified as Revised Code of Washington section 18.86.<sup>97</sup> The express purpose of this bill was to clarify the duties of real estate agents for brokers and consumers and, for dual agency, to require express disclosure as to who the real estate agent is representing.<sup>98</sup> However, the Washington Association of Realtors (WAR), the agency that proposed the legislation, provided the House Commerce and Labor Committee with a memorandum that noted two other objectives of the bill were to eliminate imputed knowledge and vicarious liability and to “reduce instances of dual agency.”<sup>99</sup> After several drafts and amendments, the bill was passed unanimously.

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95. *Id.*

96. *Id.*

97. See *Bill Information > HB 1659 - 1995-96*, WASH. STATE LEGISLATURE, <https://app.leg.wa.gov/billsummary?BillNumber=1659&Initiative=false&Year=1995> [<https://perma.cc/RYV8-4AAD>].

98. H.R. 54-2EHB 1659, Reg. Sess., at 1–2 (Wash. 1996).

99. Memorandum from Wash. Ass'n of Realtors to House Commerce and Labor Comm., at 1 (Jan. 23, 1996) (on file with the Washington State Archives, House of Representatives Commerce and Labor Committee, Meeting Files Jan. 29, 1996).

The bill, in its original form, superseded all common law duties—not just those inconsistent.<sup>100</sup> “This chapter applies to the exclusion of common law duties and responsibilities of principal and agent which have to this date been applied to real estate brokers affiliated licensees and their principals.”<sup>101</sup> A similar senate version of this bill with the same language was described as “supersed[ing] all case law establishing the duties and responsibilities owed by a licensee to a principal.”<sup>102</sup> After negotiations among stakeholders, the complete exclusion of common law was amended to supersede common law only to the extent inconsistent with the duties in the statute.<sup>103</sup>

In a committee hearing for HB 1659, a representative of the Real Property section of the Washington State Bar Association expressed concern that, while well meaning, the drafters of the bill “went too far.”<sup>104</sup> He highlighted the risk that unscrupulous people would put blanket waivers in their forms, waiving duties that were intended to substitute for the common law duties.<sup>105</sup> While this testimony does offer limited insight into a concern regarding the exclusion of common law in the final bill, the final bill directly addressed these concerns by making most duties non-waivable.<sup>106</sup> Further, negotiations and further discussion among the stakeholders appear to have occurred outside the legislative history of the bill.<sup>107</sup> This reduces to mere speculation the reason or reasons why the “not inconsistent with” exception to existing common law was added before passage of the legislation.

In HB 1659, as originally introduced, a dual agent did not have a duty to abstain from actions adverse or detrimental to either party’s interests in a transaction. Instead, the duty was limited to a specific transaction. A broker would have had a duty to “take no action that is adverse or detrimental to the transaction” only after a purchase and sale agreement or lease was entered into.<sup>108</sup> Further, in the original form of the bill, the dual agent had a duty, owed separately to each party, to buy, sell, or lease a property at a “price, terms, and conditions acceptable” to the respective

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100. H.R. 1659, 54th Leg., Reg. Sess. § 11 (original bill, Wash. Feb. 03, 1995).

101. H.R. 1659, 54th Leg., Reg. Sess. § 11 (Wash. 1995).

102. S. 54-SB 5554, Reg. Sess., at 1. (Wash. 1995).

103. H.R. 1659, 54th Leg., Reg. Sess. § 11 (engrossed bill, Wash. 1996).

104. *Regulating Real Estate Brokerage Relationships: Hearing on H.R. 1659 Before House Comm. On Commerce and Labor*, 54th Leg., Reg. Sess., at 36:00–40:40 (Wash. 1997).

105. *Id.*

106. H.R. 1659, 54th Leg., Reg. Sess. §§ 4–6 (engrossed bill, Wash. 1996).

107. *See Regulating Real Estate Brokerage Relationships: Hearing on Engrossed H.R. 1659 Before House Comm. on Commerce and Labor*, 54th Leg., Reg. Sess., at 20:50 (Wash. 1996) (statement of Sen. Dwight Pelz).

108. H.R. 1659, 54th Leg., Reg. Sess. §§ 4(1)(c), 5(1)(c), 6(2)(c) (Wash. 1997).

party.<sup>109</sup> Both of these portions were significantly changed between the first and the second version. For dual agents, the duty regarding taking no adverse action was changed to “take no action adverse or detrimental to either party’s interest in a transaction.”<sup>110</sup> The “price, terms, and conditions” duty was removed completely.<sup>111</sup>

The effect of these changes arguably brings a dual agent’s duty to take no action detrimental or adverse to the other party’s interests to the act of negotiating the deals; however, it is difficult to imagine a situation where a dual agent is not acting adverse to one side or the other in a negotiation; negotiating upwards or downwards on the price alone would be detrimental to the other party. Additionally, if this duty of a tenant representative is only actuated once the Premises have been selected through a completed search process undertaken by the tenant representative under a dual agency scenario, many if not all of the common law duties an agent owes its principal may have already been breached prior to that triggering point. Accordingly, imposing quasi-fiduciary duties on a dual agent only in the context of negotiating and documenting a Lease Agreement for Premises, and only after the selection of Premises through a process in which the tenant representative’s fiduciary duties at common law have been violated appears a half-measure, at best, toward protecting tenants in these transactions. When offering advice or negotiation tactics to one party to the transaction, the agent is inherently taking action detrimental to the other side.

It is then ironic that, in seeming to attempt to provide slightly more protections for principals in the statutory scheme, inherent inability to satisfy the statutory duties is created. If the duty only applied after a purchase and sale agreement had been entered into, as contemplated under the original language of the proposed legislation, an agent would have no difficulty satisfying the duty to “take no action adverse or detrimental” to either party during negotiations. If the duty to take no action adverse or detrimental was limited to after the purchase and sale agreement or lease was entered into, the negotiations would have been completed and would not implicate this duty. And if the agent’s duty is to find, sell, or lease a property at a “price, terms, and conditions acceptable” to the principal, language which was also removed, the duty can logically be complied with during negotiations so long as the ultimate deal is acceptable to both parties. Regardless of the logical difficulties of this reimagining of the duty of loyalty, the contours of this duty have not been amended since the statute was enacted.

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109. *Id.* at §§ 6(2)(f)–(g).

110. H.R. 1659, 54th Leg., Reg. Sess. § 6(2)(a) (second engrossed bill, Wash. 1996).

111. *See id.* at §§ 4–6.

*D. 1997–1998, House Bill 1955*

In 1997, the legislature made worse the inherent inadequacies of, and inequities visited upon tenants through, the original enactment of HB 1659 by enacting an emergency amendment to the statute through HB 1995.<sup>112</sup> This amendment clarified some language and added that different brokers within the same firm representing buyers competing for a single seller or sellers competing for a single buyer does not by itself create a conflict of interest.<sup>113</sup> The underlying reason for this amendment was to give parties the ability to terminate an agency relationship by notice, instead of just by expiration, completion, or mutual agreement; something that has nothing to do with this “clarification” of the conflict of interest rules in a way that makes dual agency representation easier for the commercial brokerage community.

*E. 2013, Substitute Senate Bill 5352 and House Bill 1487*

In 2013, the legislature again amended Revised Code of Washington section 18.86, this time through Substitute Senate Bill (SSB) 5352. This amendment had two purposes. The first purpose was to bring the statute in line with the new language used in the recently amended real estate broker licensing statute, Revised Code of Washington section 18.85.<sup>114</sup> To this end, the word licensee was replaced with broker throughout the statute and other language was amended.

The second purpose was to provide and clarify that the statute superseded all common law fiduciary duties. As such, the legislature made the following changes to Revised Code of Washington section 18.86.110, with underlined text being added and strike-through text being removed:

The duties under this chapter are statutory duties and not fiduciary duties. This chapter supersedes ~~((only the duties of the parties under the common law, including))~~ the fiduciary duties of an agent to a principal ~~((, to the extent inconsistent with this chapter))~~ under the common law. The common law continues to apply to the parties in all other respects.<sup>115</sup>

This intent was echoed by the public testimony during a Senate committee on commerce and labor hearing of the bill.

The Appellate Court in Division II made a decision that flew in the face of agency law regarding the fiduciary duty of real estate brokers

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112. H.R. 1955, 55th Leg., Reg. Sess. (Wash. 1997).

113. H.R. 55-HB 1955, Reg. Sess., at 3 (Wash. 1997).

114. S. 5352, 63rd Leg., Reg. Sess., at 4 (substitute senate bill, Wash. 2013); *see also* H.R. 63-HB 1487, Reg. Sess. (Wash. 2013).

115. S. 5352, 63rd Leg., Reg. Sess., at 11 (substitute senate bill, Wash. 2013).

to clients. The Supreme Court corrected the issue in a recent decision and said the agency law speaks for itself and the statutory duties control. The Court also said a broker owes a statutory fiduciary duty. This bill clarifies the duty owed by a broker to a consumer.<sup>116</sup>

The public testimony above was likely referring to *Jackowski v. Borchelt*,<sup>117</sup> and the Division II Court of Appeals decision *Jackowski v. Borchelt*,<sup>118</sup> although references to these two cases do not appear explicitly in the legislative history of Substitute Senate Bill (SSB) 5352. The Court of Appeals in *Jackowski* stated that “[f]or clarity, we reiterate that chapter 18.86 RCW does not abrogate professional and fiduciary duties of real estate agents.”<sup>119</sup> The correction on this point from the Washington Supreme Court came when it stated the following: “Since the language of the statute, RCW 18.86.110, is not ambiguous, we will not construe it to mean anything different from what it says: common law duties continue only to the extent they have not been limited by or are not otherwise inconsistent with the statute.”<sup>120</sup>

Although the stated purpose was to correct a “misconception” that the statutory duties superseded common law fiduciary duties, the amendment to Revised Code of Washington section 18.86.110 went further than simply correcting any misconceptions. It removed the language “to the extent inconsistent with this chapter.” This change superseded all common law duties and related case law a real estate agent would owe to their principals under the common law of agency.<sup>121</sup>

The significant removal of the “to the extent inconsistent” language was treated as a “housekeeping” matter in the public testimony for HB 1487, a similar bill that was not ultimately passed but under which most of the meaningful public testimony relating to SSB 5352 actually took place. Public testimony indicated that this bill merely clarified the existing relationships and duties under Revised Code of Washington section 18.86 and did not change the effect of the law as it was originally passed in

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116. S. 63-SB 5352, Reg. Sess., at 4 (Wash. 2013) (summary of public testimony); see also *Clarifying the Terminology and Duties of the Real Estate Agency Relationship Law to Be Consistent with Other Existing Laws: Hearing on SB 5352 Before Senate Commerce and Labor Comm.*, 63rd Leg., Reg. Sess., at 48:45 (Wash. 2013).

117. See *Jackowski v. Borchelt*, 278 P.3d 1100 (Wash. 2012).

118. See *Jackowski v. Borchelt*, 209 P.3d 514 (Wash. Ct. App. 2009).

119. *Id.* at 520 (emphasis added).

120. *Jackowski*, 278 P.3d at 1107.

121. See *Pence v. John L. Scott, Inc.*, No. C13-5837 RBL, 2013 WL 6096233, at \*1 (W.D. Wash. Nov. 20, 2013) (“In place of common law fiduciary duties, the Washington State legislature has prescribed statutory duties that real estate brokers owe their clients.”); see also *Shahbazian Family Tr. v. O’Neil*, No. C16-5477 BHS, 2017 WL 2964821, at \*22–23 (W.D. Wash. July 12, 2017) (citing *Pence v. John L. Scott, Inc.*, 2013 WL 6096233, to support its ruling that summary judgment was appropriate denying a claim of breach of fiduciary duty on the basis of no fiduciary duty being owed).

1996.<sup>122</sup> Further, the testimony indicated that the bill did not lessen the duties owed to consumers by brokers.<sup>123</sup> The comment relating to duties not being lessened was likely referring to duties brokers owed to consumers after 1996 and not the duties brokers would owe to principals under the common law.

The full effect of SSB 5352 removing the “to the extent not inconsistent” language is unclear. Washington courts have not significantly interpreted the scope of the statutory duties provided in Revised Code of Washington section 18.86 since the 2013 amendment. Further, the legislature’s removal of the words “to the extent not inconsistent with this chapter” and the additional text stating that duties under Revised Code of Washington section 18.86 are statutory in nature and not fiduciary seems to suggest that Washington’s case law interpreting such fiduciary duties is not applicable to interpreting these statutory duties.

However, during public testimony, Representative Zack Hudgins stated that the bill would ideally capture all duties under common law and codify them as statutory duties.<sup>124</sup> This statement, when combined with the public testimony that the bill would not lessen duties brokers owed, seems to suggest that agency case law is still useful and applicable in determining the scope of a broker’s duties.

It is beyond peradventure, viewing in totality the legislative history of Revised Code of Washington section 18.86 since the legislature’s 1996 introduction of these new statutory provisions, that the legislature has sought to favor commercial property owners and the commercial brokerage firms that serve as listing brokers for those properties. This was recognized by one real estate broker whose written testimony for a hearing was that “WAR is pushing agency regulation reform, primarily at the behest of the large big-city offices. But this particular legislation has **not** been shown to Realtors in general—the people who will have to deal with its effects daily.”<sup>125</sup> This favoritism works to the significant disadvantage of tenants seeking commercial space in the marketplace, when the legal relationships of these disparate and adverse parties are viewed in the context of what came before that statute: a legal regime governed by the well-established and long-standing common law of principal and agent. Moreover, it would not be unreasonable to conclude, given the lack of

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122. *Clarifying the Terminology and Duties of the Real Estate Agency Relationship Law to Be Consistent with Other Existing Laws: Hearing on HB 1487 Before H. Comm. on Bus. & Fin. Serv.*, 63rd Leg., Reg. Sess., at 38:00–39:30 (Wash. 2013).

123. *Id.* at 39:15–25.

124. *Id.* at 42:08–42:50.

125. Letter from Thorn Ward, Century 21 Ocean Shores, to Labor, Commerce & Trade Comm. Members (Feb. 15, 1996) (on file in the Washington State Archives, Senate Labor, Commerce, & Trade Committee Meeting Files Feb. 15, 1996) (emphasis in original).

transparency as reflected in the dearth of documentation and lack of transcripts of meetings among special interests and legislators in the legislative history, that the legislators and special interests involved, including the commercial real estate services sector participants active in Washington in the Greater Seattle Area, Washington's most-active commercial market, that these changes were intended to benefit large full-service CRES firms to the detriment of commercial tenants.

Additionally, beyond the above speculation—albeit well-reasoned—regarding the business motivations prompting the enactment of and subsequent amendments to Revised Code of Washington section 18.86, a perplexing question remains unanswered for dual agency: When the legislature clearly did not want the duty of loyalty in its common law form to be present in the statutory framework, but also wanted agents to exercise some level of loyalty, *how much loyalty does a broker owe to a client under the statutory scheme?* And how can a dual agent take no action adverse to either party in the transaction during negotiations or at other stages of the representation? Then-Representative Cyrus Habib noted this conflict in a question during public testimony for SB 5352, but the question was not fully answered.<sup>126</sup> Instead, the answer to this question appeared to conflate the duty to take no action adverse or detrimental to either side in a dual agency representation with the duty to not disclose confidential information and the duty to disclose a conflict.<sup>127</sup>

This question is poorly, but partially answered, by the statute providing for the case of a commercial brokerage firm where two separate agents represent the commercial tenant and the commercial landlord. In this situation, the designated broker and the supervising managing broker(s) would be the dual agent(s).<sup>128</sup> As such, the duty to take no action adverse to either party in the transaction would be likely be fulfilled by taking nearly no action. Yet, if the managing broker is actively supervising, it is likely that an individual will be faced with the same ethical issues with which a single dual agent representing both sides would be faced.

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126. *Clarifying the Terminology and Duties of the Real Estate Agency Relationship Law to Be Consistent with Other Existing Laws: Hearing on HB 1487 Before H. Comm. on Bus. & Fin. Serv.*, 63rd Leg., Reg. Sess., at 39:40–42:05 (Wash. 2013).

127. *Id.*

128. WASH. REV. CODE § 18.86.020(2) (2019) states that:

In a transaction in which different brokers affiliated with the same firm represent different parties, the firm's designated broker and any managing broker responsible for the supervision of both brokers, is a dual agent, and must obtain the written consent of both parties as required under RCW 18.86.060. In such case, each of the brokers shall solely represent the party with whom the broker has an agency relationship, unless all parties agree in writing that the broker is a dual agent.

*Id.*

## PART III

Part I provided the context and market realities within which commercial real estate brokers and agents operate in 2019 under this statutory licensing scheme initially enacted by the legislature in 1968. Part II of this Article examined the status of the Law of Principal and Agent at the time Revised Code of Washington section 18.86 was enacted to supplant these common law principles, as well as the statute's legislative history. Part III will explore the common law of Principal and Agent as applied to relevant real estate transactions in Washington, including a discussion of relevant case law; address various conflicts of interests prohibited under Revised Code of Washington section 18.86; and review potential remedies for violations of those prohibitions.

*A. Washington's Common Law of Agency for Real Estate Brokers Prior to Being Superseded*

Before the legislature's enactment of HB 1659, creating Revised Code of Washington section 18.86, Washington common law offered a comprehensive and very robust set of legal principles applying to the relationships of agents and principals, and governing the behaviors of agents towards their principals in instances where those behaviors run contrary to those principles.

These common law duties an agent owes to a principal in the commercial real estate context, though superseded by Revised Code of Washington section 18.86, were, and continue to be despite being superseded, vital for tenants to receive the representation they need and expect in a commercial leasing context. To better understand the genuine importance of these common law duties, consider a relevant analogy: The relationship between a harried mother (the principal) seeking a specific gift her son has asked Santa to bring him for Christmas and the Macy's Toy Department Santa (the agent).

Devotees of Valentine Davies' *Miracle on 34<sup>th</sup> Street*—not any of the disappointing remakes and not the version where they have added color, mind you—will already have recognized the movie from the above brief description of one of the pivotal scenes in the movie. For those unfamiliar with *Miracle on 34<sup>th</sup> Street*, Mr. Kris Kringle (Santa Clause) decides to live among us in New York City between Thanksgiving and Christmas Eve because he's concerned about the annual evaporation of Christmas spirit and its deleterious impact on the holiday itself, which Mr. Kringle, of course, holds sacrosanct (naturally).<sup>129</sup> Not having a plan for how he is going to blend in while in New York—as you might imagine, regardless

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129. MIRACLE ON 34TH STREET (20th Century Fox 1947).

of how he dresses, he still looks very much like Santa Clause—Mr. Kringle opportunistically takes a job as the Toy Department Santa at the Flagship Macy's on 34<sup>th</sup> Street in Manhattan after the Santa in the Christmas float for the Macy's Thanksgiving Day Parade is found quite inebriated.<sup>130</sup>

In posing as Macy's Toy Department Santa, Mr. Kringle quickly learns his job responsibilities focus primarily on hoodwinking young children sitting on Santa's lap into desiring toys which are overstocked in the store. Mr. Kringle's "Santa orientation" takes place in the employee locker room with Mr. Schelhammer, who heads Macy's Toy Department.<sup>131</sup> During this orientation, Mr. Schelhammer counsels Mr. Kringle in "how to be a good Santa," and the audience unknowingly gets a lesson in the Law of Principal and Agent.<sup>132</sup>

As soon as Mr. Schelhammer departs the locker room, Alfred, the janitor, offers a brief soliloquy on the perils of "bad isms," with "commercialism" being the "woist," in his very thick Brooklyn accent. On the one hand, in his role as the Macy's Toy Department Santa, Mr. Kringle owes Mr. Schelhammer a duty of loyalty to follow the direction to hoodwink children.<sup>133</sup> On the other hand, Kris Kringle has a competing duty to serve Christmas, and at the behest of Alfred, Mr. Kringle clearly rejects the notion of serving Mr. Schelhammer at the expense of Christmas, thereby rejecting being the principal in a principal-and-agent relationship.

In the second, seminal but subtler scene from *Miracle on 34<sup>th</sup> Street* with lessons on the Law of Principal and Agent, Mr. Kringle is chatting with Peter, who is sitting on his lap and telling Santa that he wants a red fire engine that squirts real water (which Peter promises Santa he'll never use inside the house).<sup>134</sup> Meanwhile, Peter's mother (played to perfection by Martha Raye), who has steadfastly remained within earshot of this otherwise charming exchange, is doing her best to clandestinely signal to Santa that she's been all over Manhattan and *no one* sells the coveted red fire engine.<sup>135</sup> Imagine her shocked exasperation when, despite her efforts to get Santa to persuade Peter that he'd like a different toy for Christmas, Mr. Kringle promises Peter that red fire engine is *precisely* what he'll be getting for Christmas.<sup>136</sup> When Peter's mother sends him off to the side because she "wants to have a word with Santa Clause," she dresses Mr.

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130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

Kringle down for promising Peter a toy that doesn't exist in New York City.<sup>137</sup> To her complete dismay, Mr. Kringle pulls a small notebook out of his red suit, opens it up, and let's Peter's mother know she "can get that fire truck, at Schoenfeld's on Lexington Avenue," and for a great price, which he quotes.

Still flabbergasted by Mr. Kringle unselfishly sending her to another store to get precisely what her son wants for Christmas, Peter's mother buttonholes Mr. Schelhammer in the Macy's Toy Department, who is equally flabbergasted because he has just witnessed first-hand Mr. Kringle sending a number of Macy's customers to other stores, including arch rival Gimbel's across the street, to find precisely what they want.<sup>138</sup> This scene sets up the central narrative of the movie, with Mr. Macy deciding to implement Mr. Kringle's policy of "giving customers exactly what they want" storewide and, eventually, nationwide.<sup>139</sup>

So what exactly do these scenes have to do with commercial leasing, the common law of principal and agent, and Revised Code of Washington section 18.86? Plenty. In the first scene recalled above, where Mr. Schelhammer is instructing Kris Kringle on "how to be a good Santa," his guidance is much like the relationship between a tenant representative and a listing broker in a full-service CRES firm. It is incumbent on the tenant representative to help the listing broker to lease the empty building spaces in the building(s) of the landlord who has hired the full-service brokerage firm, just as Mr. Schelhammer needs his agent, Kris Kringle, to help Macy's empty out their overstocked inventory of toys for Christmas. In Mr. Schelhammer's world, just as in that of the listing agent, the most important duty is to the firm—not the customer.

In the second scene recalled above, Kris Kringle demonstrates what all prospective tenants want and believe they have a right to expect in the principal and agent relationship entered into between a client and a commercial leasing agent: that the agent is going to represent the principal objectively, professionally, and diligently, exercising a duty of undivided loyalty with an exclusive focus on securing a premises and on terms that are all in the tenant's best interests. No self-dealing; no hidden agenda; and no serving another master, disclosed or otherwise, other than the client. This is what the common law of principal and agent commands, this is what tenants expect in commercial leasing transactions, and this is how commercial leasing should operate every time, in every transaction.

Given the intention of the Washington State Legislature to replace the common law duties agents owe their principals in 1996 through the

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137. *Id.*

138. *Id.*

139. *Id.*

passage of House Bill 1659, codified as Revised Code of Washington section 18.86, *Sing v. John L. Scott, Inc.*, which was decided in 1997 on facts existing prior to the effective date of the statute, offers one of the best expositions of Washington's common law duties as they existed prior to being superseded by statute.<sup>140</sup> And the dissenting opinion of Justice Philip A. Talmadge, in which Chief Justice Durham and Justice Alexander concurred, contains much of this exposition.<sup>141</sup> *Sing* involved John L. Scott representing both a prospective buyer, Sing, and a seller, with a third John L. Scott agent competing with, and ultimately prevailing over the prospective buyer.<sup>142</sup> The majority viewed this as a case where the firm's primary fiduciary duties were owed to the seller, with any duties owed to the prospective buyer, Sing, being secondary.<sup>143</sup> The relevant facts of the case and majority decision are addressed in greater detail later in this Article under the analysis of relevant cases.

In his dissenting opinion, Justice Talmadge deviated from the majority's view principally by viewing the facts presented as fundamentally an "insider-trading" or self-dealing case.<sup>144</sup> He then proceeded to apply the fact pattern to the common law and statutory duties an agent owes its principal, as well as to the general duties that real estate brokers and agents owe to the integrity of the marketplace.<sup>145</sup> His perspective embraced the notion that without the commitment and obligations of real estate brokers and agents to the integrity of the marketplace, the entire marketplace would collapse because the participants that the marketplace is intended to serve—prospective sellers and purchasers—could have no reasonable expectations of the integrity of each transaction in that marketplace.<sup>146</sup> Justice Talmadge also made an argument regarding the fiduciary duties of all parties to contractual arrangements of good faith and fair dealing.<sup>147</sup> In making these arguments against the majority opinion and in favor of a different outcome determined by the Supreme Court of Washington, Justice Talmadge relied on three seminal cases as precedent supporting his dissenting opinion: *Mersky v. Multiple Listing Bureau*,<sup>148</sup> *Cantwell v. Nunn*,<sup>149</sup> and *Badgett v. Security State Bank*.<sup>150</sup>

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140. See generally *Sing v. John L. Scott, Inc.*, 948 P.2d 816 (Wash. 1997).

141. *Id.* at 821 (Talmadge, J., dissenting).

142. *Id.* at 817–19 (majority opinion).

143. *Id.* at 820.

144. *Id.* at 821 (Talmadge, J., dissenting).

145. *Id.* at 822–26.

146. *Id.* at 826.

147. *Id.* at 824.

148. *Mersky v. Multiple Listing Bureau of Olympia, Inc.*, 437 P.2d 897 (Wash. 1968).

149. *Cantwell v. Nunn*, 88 P. 1023 (Wash. 1907).

150. *Badgett v. Security State Bank*, 807 P.2d 356 (Wash. 1991).

*B. Common Law Fiduciary Duties Real Estate Brokers Owe Their Principals*

In his dissenting opinion in *Sing*, Justice Talmadge cited *Mersky v. Multiple Listing Bureau* for its statements about the fiduciary duties of real estate brokers, which in the commercial leasing context would be owed to prospective tenants if the broker represented the tenant.<sup>151</sup> Specifically in this regard, Justice Talmadge quoted from the *Mersky* case as follows:

[T]here flows from this agency relationship [of a property owner and the listing broker] and its accompanying obligation of utmost fidelity and good faith, the legal, ethical, and moral responsibility on the part of the listing broker, as well as his subagents, to exercise reasonable care, skill, and judgment in securing for the principal the best bargain possible; to scrupulously avoid representing any interest antagonistic to that of the principal in transactions involving the principal's listed property, . . . to make, in all instances, a *full, fair, and timely* disclosure to the principal of all facts within the knowledge or coming to the attention of the broker or his subagents which are, or may be, material in connection with the matter for which the broker is employed, and which might affect the principal's rights and interests or influence his actions.<sup>152</sup>

Intentionally excluded from the above excerpt from Justice Talmadge's dissenting opinion is the common law prohibition against a broker and its "subagents" engaging in self-dealing with regard to the principal's property entrusted to the broker. This was a significant aspect in the *Sing* case, and is omitted here only because it is taken up separately in the section of this Article addressing situations in which, through the broker's ownership of other properties and property interests, a broker may be engaging in self-dealing to the broker's benefit and potentially to the tenant client's detriment without the latter's advance knowledge and consent in the dual agency context.<sup>153</sup>

The duties highlighted in the *Sing* case are fundamentally the same duties an agent owes its principal as stated in in the Restatement (Third)

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151. See *Sing v. John L. Scott, Inc.*, 948 P.2d 816 (Wash. 1997) (Talmadge, J., dissenting).

152. *Id.* at 822–23 (Talmadge, J., dissenting) (emphasis added) (citing *Mersky*, 437 P.2d at 898–99).

153. While referring to and excerpting from Justice Talmadge's dissenting opinion in *Sing*, above, for the propositions for which Justice Talmadge, in each specific instance, set them forth in his dissenting opinion, the authors of this Article make clear, regarding the specific language from *Mersky* upon which Justice Talmadge relied, that advance disclosure and signed, written consent do not fully, from a policy standpoint, overcome the inherent conflicts of interest presented where the same broker represents the interests of adverse parties on both sides of the same transaction.

of Agency,<sup>154</sup> as well as in the 2014 Conflicts of Interest research study report: unbroken service and loyalty (also referred to as the “duty of undivided loyalty”); confidentiality; full disclosure of information to allow well-informed decisions by the principal; acting in the best interest of the client; reasonable care and diligence; and accountability to the principal.

It is difficult to imagine a set of principles, rules, regulations, or statutory provisions that would better protect a principal in an agency relationship. Yet in enacting, and then subsequently amending, Revised Code of Washington section 18.86, the Washington State Legislature has consistently eroded the scope and extent of these common law protections previously afforded commercial tenants in their business relationships with their real estate brokers.

In challenging the court’s majority in *Sing*, Justice Talmadge also took specific note of statutory precedent under the Washington State Legislature’s 1941 Real Estate Brokers and Salespersons Act that said it was supposed “to protect the general public from negligent, unscrupulous, or dishonest real estate operators.”<sup>155</sup> Justice Talmadge concluded that the agent of the real estate brokerage firm engaged to market and sell, as the “listing broker” or record for the property owner’s home, who purchased that home using information only available to that agent as a consequence of her employment with and by the listing broker, violated both common law fiduciary duties and statutory duties under Washington law.<sup>156</sup> Justice Talmadge determined that the agent of the listing broker, in participating in the transaction for her own and her husband’s personal interests, “had a statutory duty to conduct herself *in a way free of bad faith, dishonesty, or untrustworthiness*. She owed this duty both to the [sellers and the aggrieved, potential buyer of seller’s home].”<sup>157</sup>

### *C. The Duty of Good Faith and Fair Dealing Under Common Contract Law*

Beyond both the fiduciary duties of agents to their principals under Washington common law applicable to the broker and its agents in the *Sing* case, as well as the existing statutory duties of agents to their principals under the state’s applicable statutes, parties owe general duties of good faith and fair dealing in a contractual relationship. Justice Talmadge’s dissenting opinion invited the majority’s attention to these

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154. Although Justice Talmadge’s dissenting opinion, in relevant part, relied upon Restatement (Second) of Agency in order to bring these arguments forward into the 21st Century, the authors have chosen to excerpt, above, the most recent edition of the Restatement of Agency.

155. *Sing v. John L. Scott, Inc.*, 948 P.2d 816, 824 (Wash. 1997) (Talmadge, J., dissenting) (citing *Nuttall v. Dowell*, 639 P.2d 832, 838 (Wash. 1982)).

156. *Id.* at 825–26.

157. *Id.* at 824 (emphasis added).

common law contract principles applicable to the questionable transactions the broker and its agents entered into, or allowed to transpire, to the detriment of the plaintiff, and potentially to the detriment of the seller of the property. Had the interested buyers been encouraged or even allowed to compete for the purchase of the seller's property, the final sales price might well have been greater than the sales price reflected in the final purchase contract between the seller and the agent of the listing broker acting in her own interests. Specifically, Justice Talmadge noted that under common law principles of contract, in this instance applicable because the property owner had a signed contract with the listing broker, the latter, and by extension to the broker's agents, were subject to the "implied duty of good faith and fair dealing in every contract."<sup>158</sup>

*D. The Duty of Undivided Loyalty: How Washington Case Law Has Interpreted a Broker's Duty of Loyalty to a Client at Common Law and Under Revised Code of Washington Section 18.86*

The fact that the professional practice of real estate representation has been governed since the enactment of HB 1659 in 1996 notwithstanding, understanding how Washington courts have interpreted and applied the common law of Principal and Agent to specific fact patterns is critical to understanding how the common law principles applied to the representation of principals by agents prior to Revised Code of Washington section 18.86, and equally as critical to understanding how the duties and obligations agents owe to their principals changed fundamentally under the new statutory licensure and regulatory scheme.

*E. Mersky v. Multiple Listing Bureau*

In *Mersky v. Multiple Listing Bureau*, Alyce Thompson, a broker, represented the sellers of a home.<sup>159</sup> The house was listed for \$39,750, and the sellers rejected an offer of \$32,500.<sup>160</sup> Mrs. Thompson then showed the property to her sister and brother-in-law, who offered \$33,000.<sup>161</sup> Mrs. Thompson urged the seller to accept the offer and advised the sellers that accepting the offer would be wise, even though it would mean a financial loss for the sellers.<sup>162</sup> The sellers accepted the offer and the deal closed.<sup>163</sup> Sometime later, after the buyers made improvements to the property, the

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158. *Id.* (citing *Badgett v. Security State Bank*, 807 P.2d 356, 360 (Wash. 1991)).

159. *Mersky v. Multiple Listing Bureau of Olympia, Inc.*, 437 P.2d 897, 898 (Wash. 1968).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

property was resold for \$46,000.<sup>164</sup> The sellers sued the broker alleging that the failure to disclose kinship ties to the purchaser amounted to a breach of the duty of loyalty.<sup>165</sup>

The Washington Supreme Court held that such failure to disclose kinship ties amounted to fraud in law or constructive fraud because the agent had a duty of undivided loyalty to the principal.<sup>166</sup> This constructive fraud would exist regardless of whether the broker could show that the breach was not intentional or deliberate.<sup>167</sup> The court reasoned that the remedy for such a breach was “to rescind the transaction, recover any profit gained by the broker from the transaction, or recoup the commission paid to the broker by virtue of the transaction.”<sup>168</sup> In support of this holding, the court reasoned that the purpose behind the rule and the remedies was the following:

The rule and the available remedies, instead, are designed as much to prevent fraud as to redress it, and follow directly upon the heels of the broker’s deliberate or innocent failure to timely and fully disclose to his principal the fact of the interdicted relationship, for the reason that the very existence of the relationship may have corroded the broker’s obligation of undivided loyalty, may have been a material circumstance to the principal, or may have affected his actions or decisions in the course of the transaction involved.<sup>169</sup>

The court noted that this principle was recognized in *Hay v. Long*, where an agent leased a principal’s property to the agent’s wife.<sup>170</sup> The court also noted that *Frissel v. Newman* implemented this principle.<sup>171</sup> The *Frissel* court discussed a real estate agent’s “duty to fully inform his principal of the indirect acquisition by a subagent of an interest in the listed property.”<sup>172</sup>

#### F. *Sing v. John L. Scott*

In *Sing v. John L. Scott*, the Rudds listed residential property through Jody Prongay, an agent of John L. Scott, a residential brokerage firm licensed as such in Washington.<sup>173</sup> The plaintiff, Sing, was represented by Bob Pennock, another agent of the John L. Scott residential brokerage.

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164. *Id.*

165. *Id.*

166. *Id.* at 900.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 899 (citing *Hay v. Long*, 139 P. 761 (Wash. 1914)).

171. *Id.* at 901.

172. *Id.* at 901 (citing *Frissel v. Newman*, 429 P.2d 864, 868 (Wash. 1967)).

173. *Sing v. John L. Scott, Inc.*, 948 P.2d 816, 817 (Wash. 1997).

Sing saw the Rudds' listed property and put in an offer for \$41,000 through his agent, Pennock.<sup>174</sup> In response to Sing's offer, the Rudds sent a counteroffer at \$45,000 with other changes.<sup>175</sup> Sing stated he would sign the counteroffer, but also that he was going out of town and would prefer to sign it on Sunday evening.<sup>176</sup> On Sunday, yet another agent with the John L. Scott firm, Maureen Buckley, along with her husband, put in an offer for the listed property at \$42,000 with a shorter feasibility study time and sooner closing date than Sing's offer.<sup>177</sup> Prongay, the Rudds' agent, called Pennock, Sing's agent, to ask whether the counteroffer had been accepted, and Pennock informed Prongay that Sing had not yet come back into town.<sup>178</sup> Prongay informed Pennock that the sellers would be withdrawing their still extant counteroffer to Sing, inasmuch as it had yet to be accepted. In response to learning this new information, the Rudds, who had access to the listing agent's files and may have reviewed the history of the offers previously made on the house, presented an offer of purchase to the Buckleys at \$45,000, which was accepted.<sup>179</sup>

Among other claims, Sing sued John L. Scott and the Buckleys for violations of the Washington Consumer Protection Act (CPA).<sup>180</sup> The jury returned a verdict finding John L. Scott, instead of the Buckleys, in violation of the CPA.<sup>181</sup> The appellate court, in upholding the jury verdict, reasoned that the jury could infer: "(1) that Buckley had access to the listing file for the Rudd property, (2) that Buckley had seen the Sing offer, and (3) that Buckley had an unfair advantage over Sing because she could craft her offer so it was slightly more appealing than Sing's offer."<sup>182</sup>

The Washington Supreme Court reversed. Under the common law of agency in Washington, it reasoned that John L. Scott's primary fiduciary duty was to the seller. This reasoning was despite the undivided duty of loyalty an agent owed to its principal. As such, any duty to keep a buyer's offer confidential could not be reconciled with a broker's duty to obtain for the seller the best possible deal, and the duty to the seller took precedence.<sup>183</sup>

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174. *Id.*

175. *Id.*

176. *Id.* at 818.

177. *Id.* (the shorter feasibility study time was offered as one of the reasons why the sellers rejected Sing's offer, but this proffered reason was not found to be dispositive).

178. *Id.*

179. *Id.*

180. *Id.* at 819.

181. *Id.*

182. *Id.* at 820.

183. *Id.* at 821.

In a strongly worded dissent,<sup>184</sup> Justice Talmadge opined that there were breaches of duties amounting to self-dealing.<sup>185</sup> Alternatively, the dissent argued that a fraud on the market theory could be applied to this fact pattern.<sup>186</sup> The fraud being the misappropriation of Sing's confidential information for the benefit of a John L. Scott agent.<sup>187</sup>

Although Revised Code of Washington section 18.86 was not in effect at the time of the agency relationship in *Sing v. John L. Scott*, the court seemed to imply that the statute would have made a difference under this fact pattern.<sup>188</sup>

### G. Jackowski v. Borchelt

In *Jackowski v. Borchelt*, Timothy Jackowski and Eri Takase purchased a home from David and Robin Borchelt in 2014.<sup>189</sup> The parties were represented by separate brokerages.<sup>190</sup> In 2016, the Jackowski and Takase's home was damaged by a landslide, and the Jackowskis sued the Borchelts for rescission of the contract, or alternatively for fraud, fraudulent concealment, negligent misrepresentation, and breach of contract.<sup>191</sup> The Jackowskis sued the brokers, alleging similar fraud-based claims including breach of common law fiduciary duties related to the property being in a landslide zone.<sup>192</sup> The trial court dismissed most of the claims on summary judgment, with the exception of fraudulent concealment claims based on the sellers and the sellers' broker allegedly covering cracks in the foundation with carpet.<sup>193</sup> The court of appeals affirmed the trial court's ruling, with the exception of statutory and common law breach of fiduciary duty.<sup>194</sup>

The Washington Supreme Court partially reversed the court of appeals, holding, in part, that sufficient evidence existed to survive summary judgment as to whether the brokers violated Washington's statutory duty to refer clients to experts for matters beyond the scope of the broker's expertise. Notably, the court recognized that Washington had

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184. For a more detailed discussion of Justice Talmadge's dissent, see *supra* Part II.

185. *Sing*, 948 P.2d at 825 (Talmadge, J., dissenting).

186. *Id.* at 825–26.

187. *Id.*

188. See *id.* at 820 n.3 (majority opinion) (discussing the dual agency duties established under Revised Code of Washington section 18.86 of confidentiality and to take no action adverse or detrimental to either party, but ultimately concluding that Revised Code of Washington section 18.86 was not in effect at the time).

189. *Jackowski v. Borchelt*, 278 P.3d 1100, 1102–03 (Wash. 2012).

190. *Id.*

191. *Id.* at 1103.

192. *Id.*

193. *Id.* at 1103–04.

194. *Id.*

superseded common law fiduciary duties. In support of its reasoning, the court interpreted Revised Code of Washington section 18.86 as allowing a dual agent broker to take actions that may not be in one of the principal's best interests.<sup>195</sup> This is despite Revised Code of Washington section 18.86.060(a), which prohibits dual agent brokers from taking any action that is adverse or detrimental to either party's interest in a transaction.

#### H. Vertical World v. Colliers International

In *Vertical World*, Colliers International acted as a dual agent, with an agent from the firm representing *Vertical World* and an agent from the firm representing the commercial property owner, Jack Lothrop.<sup>196</sup> Lothrop moved to evict his tenant, Big Bear, in September 1996, and hired a broker from Colliers International to list the property that same month. Vertical World learned of the property in January 1997 and put in a proposal on January 31st.<sup>197</sup> Lothrop countered on February 5th and renovations began on March 4th, a month before closing.<sup>198</sup> However, Vertical World alleged that if the agent had informed Vertical World about the property four months earlier, when it first went on the market, they would not have needed to spend extra money accelerating construction and extending memberships while its Fremont location was undergoing renovations.<sup>199</sup>

Although this case arose from a summary judgment motion, the facts give rise to a conflict of duties. Lothrop testified that although he was evicting the prior tenant, he was giving them some grace because he hoped they would be bought out or be able to come up with the past due rents, and he testified that he asked his agent to slow down on showing the building in the fall of 1996.<sup>200</sup> Finally, Lothrop testified that he would not have considered leasing the property to Vertical World until January 1997.<sup>201</sup> The trial court granted summary judgment in favor of Colliers International.<sup>202</sup>

The court noted that there was equivocal evidence that suggested Lothrop may have leased the building to Vertical World earlier.<sup>203</sup> As such,

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195. *Id.* at 1106–07 (“[A] single broker may represent multiple sellers and buyers at the same time even though their interests may conflict.”).

196. *Vertical World, Inc. v. Colliers Int’l Prop. Consultants, Inc.*, No. 44718-1-I, 2000 WL 1144980, at \*1–2 (Wash. Ct. App. Aug. 12, 2000).

197. *Id.* at \*4.

198. *Id.* at \*5–6.

199. *Id.* at \*6.

200. *Id.* at \*9–10.

201. *Id.* at \*7.

202. *Id.* at \*7–8.

203. *Id.* at \*9–10.

the court reversed the summary judgment and remanded the case for a trial.<sup>204</sup> However, no trial took place and the parties settled.<sup>205</sup>

The seller appears to have asked his agent to take a slow approach to marketing the property in the fall but did not ask the agent to take the property off the market, which is what the claim of injury arises from. Because the property was still on the market, the interests of the landlord in taking a slow approach to marketing the property were placed in direct conflict with the interests of the ultimate tenant, Vertical World. By executing the landlord's wishes, Colliers International arguably took action to the detriment of Vertical World in contravention of the statutory duties provided by Revised Code of Washington section 18.86.

*I. Potential Remedies for Conflicts of Interest Violating  
a Commercial Real Estate Broker's Duties Under  
Revised Code of Washington Section 18.86*

1. Prohibitions Against Conflicts of Interest Under Revised Code of  
Washington Section 18.86

A number of provisions exist within Washington's statutory broker duty scheme addressing, directly or indirectly, conflicts of interest when representing tenants or buyers. The duties a broker owes to a principal under Washington's statutory scheme vary depending on whether the broker is acting as a dual agent, or solely as a buyer or selling agent. Regardless of which side the broker represents, among other duties, the broker must deal honestly and in good faith, present all written offers in a timely manner, and "disclose in writing to all parties to whom the broker renders real estate brokerage services, before the party signs an offer in a real estate transaction handled by the broker."<sup>206</sup> However, an agent may not act as a dual agent until a broker has received "written consent of both parties to the transaction," and the "consent must include a statement of the terms of compensation."<sup>207</sup>

As a buyer or tenant's agent a broker additionally has the following relevant duties:

- (a) [t]o be loyal to the buyer by taking no action that is adverse or detrimental to the buyer's interest in a transaction;
- (b) [t]o timely disclose to the buyer any conflicts of interest;

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204. *Id.* at \*17.

205. In *Re Vertical World Inc.*, No. 98-2-03767-9 (Wash. Super. Ct. Feb. 06, 1998).

206. WASH. REV. CODE § 18.86.030(1)(g) (2019).

207. WASH. REV. CODE §§ 18.86.060(1)(a)–(b), (d) (2019).

. . . [and]

(d) [n]ot to disclose any confidential information from or about the buyer, except under subpoena or court order, even after termination of the agency relationship[.]<sup>208</sup>

However, when a broker is acting as a dual agent, the relevant duties are as follows:

(a) [t]o take no action that is adverse or detrimental to either party's interest in a transaction;

(b) [t]o timely disclose to both parties any conflicts of interest;

. . . [and]

(d) [n]ot to disclose any confidential information from or about either party, except under subpoena or court order, even after termination of the agency relationship.<sup>209</sup>

Notably, the “loyalty” framing that is present in the buyer or tenant’s agent duties is not present in the dual agent’s duties.

Although The Revised Code of Washington section 18.86 establishes duties brokers owe to principals, superseding the common law, it does not provide any causes of action for breach of those duties. As such, “common law tort causes of action remain the vehicle through which a party may recover for a breach of statutory duties set forth in chapter 18.86 RCW.”<sup>210</sup> Even though the legislature amended Revised Code of Washington section 18.86 in 2013, one year after *Jackowski v. Borchelt*, stating that a broker’s duties are statutory only and that the common law relating to the duties was entirely superseded, *Jackowski* is likely still applicable in this respect because the statute only supersedes the fiduciary duties, not the common law entirely.<sup>211</sup>

Thus, the statutory scheme supplies the duty underlying common law torts claims such as fraud and negligent misrepresentation. However, these common law torts are limited by the scope of the duty supplied in the statute. For example, a claim of negligent misrepresentation flowing from the breach of a broker’s duty can be made, but the claim is limited by the statute providing the broker owes no duty “to independently verify the

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208. WASH. REV. CODE § 18.86.050(1) (2019).

209. WASH. REV. CODE §§ 18.86.060(2)(a)–(b), (d) (2019).

210. *Jackowski v. Borchelt*, 278 P.3d 1100, 1108 (Wash. 2012).

211. WASH. REV. CODE § 18.86.110 (2019) (“The common law continues to apply to the parties in all other respects.”).

accuracy or completeness of any statement made . . . by any source reasonably believed by the broker to be reliable.”<sup>212</sup>

### *J. Fraud*

A claim for common law fraud can be made in Washington upon showing all nine elements by clear, cogent, and convincing evidence. These are as follows: (1) “a representation of an existing fact”; (2) “its materiality”; (3) “its falsity”; (4) “the speaker’s knowledge of its falsity”; (5) “[the speaker’s] intent that it shall be acted upon by the person to whom it is made”; (6) “ignorance of its falsity on the part of the person to whom it is addressed”; (7) “the latter’s reliance on the truth of the representation”; (8) “his [or her] right to rely upon it”; (9) “and his [or her] consequent damage.”<sup>213</sup> The duty not to commit fraud is not a fiduciary duty and thus is not superseded by statute in Washington. Fraud requires a showing that the speaker knew the statement was false, which can be difficult to prove if there is no physical evidence showing the speaker’s knowledge or when a motion to dismiss is granted before discovery allows the uncovering of information that would show knowledge.

### *K. Constructive Fraud*

Prior to Washington’s codification of broker duties in statute, a doctrine of constructive fraud existed where a failure to disclose a broker’s interest, or a kinship relationship between the broker and the property owner, amounted to constructive fraud.<sup>214</sup> This doctrine has not been cited with respect to a real estate broker in a Washington since the enactment of Revised Code of Washington section 18.86 in 1996, but no case law has stated that the doctrine has been superseded by statute. Given that brokers still have a duty to disclose conflicts of interest under Revised Code of Washington section 18.86, it is possible that such a claim for constructive fraud still exists despite the statute superseding common law duties; however, there remains uncertainty as to whether it would be seen as a valid claim.

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212. WASH. REV. CODE § 18.86.030(2) (2019); *See Bloor v. Fritz*, 180 P.3d 805, 815 (Wash. 2008) (holding a broker’s exemption from verifying the accuracy of statements does not apply when the broker has actual knowledge).

213. *Beckendorf v. Beckendorf*, 457 P.2d 603, 606–07 (Wash. 1969); WASH. PATTERN JURY INSTR. CIV. WPI 160.01 (6A WASH. PRAC. 2019).

214. *Mersky v. Multiple Listing Bureau*, 437 P.2d 897, 901 (Wash. 1968).

*L. Fraudulent Concealment*

A failure to disclose a material fact constitutes fraudulent concealment when the individual had a duty to disclose the fact.<sup>215</sup> Although claims of fraudulent concealment are most commonly analyzed from the standpoint of the seller or landlord, real estate brokers are also subject to fraudulent concealment claims when they had independent knowledge of the defect.<sup>216</sup> This tort is also equally applicable to commercial properties.<sup>217</sup> The duty to disclose information arises when (1) the property has a concealed defect; (2) the seller, landlord, or agent has knowledge of the defect; “(3) the defect presents a danger to the property, health, or life of the purchaser; (4) the defect is unknown to the purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser.”<sup>218</sup> Fraudulent concealment, similar to fraud, requires a showing of knowledge on the part of the seller. Also, the requirement that the defect would not be disclosed by careful, reasonable inspection can be a barrier for some claims when, in hindsight, a more thorough inspection should have been done.

*M. Negligent Misrepresentation*

Two types of negligent misrepresentation exist in Washington tort case law, an affirmative misstatement and a failure to disclose. The two often share the same label of negligent misrepresentation in case law, despite the two claims possessing different elements. The tort of negligent misrepresentation has been applied to commercial brokers in Washington.<sup>219</sup>

*N. Negligent Affirmative Misstatements*

An affirmative misstatement requires showing that (1) the broker supplied information to guide the principal that was false, (2) the broker knew or should have known that the information was supplied to guide the business transaction, (3) the broker was negligent in obtaining or communicating the false information, (4) the principal relied on the false information, (5) the reliance was reasonable, and (6) the false information proximately caused damages to the principal.<sup>220</sup> However, as noted above,

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215. Bullinger v. Lilla, No. 68446-9-I, 2014 WL 1286328, at \*9 (Wash. Ct. App. Mar. 31, 2014) (citing *Obde v. Schlemeyer*, 353 P.2d 672, 674 (Wash. 1960)).

216. See *Svensen v. Stock*, 23 P.3d 455, 460–61 (Wash. 2001).

217. *Shu-Chin Wang v. Kidder, Mathews & Segner, Inc.*, No. 62034-7-I, 2010 WL 3311866, at \*1 (Wash. Ct. App. Aug. 23, 2010).

218. *Alejandre v. Bull*, 153 P.3d 864, 872 (Wash. 2007).

219. See *Key Dev. Inv., LLC v. Port of Tacoma*, 292 P.3d 833, 835 (Wash. Ct. App. 2013).

220. WASH. PATTERN JURY INSTR. CIV. WPI 165.01 (6A WASH. PRAC. 2019).

brokers are exempt from verifying the accuracy of information obtained from sources they deem trustworthy.

*O. Negligent failure to disclose*

To establish negligent misrepresentation under a failure to disclose theory, the plaintiff must prove that (1) the broker had a duty to disclose information, (2) such information was not disclosed, (3) the broker was negligent in failing to disclose such information, (4) had the information been disclosed, the principal would have acted differently, and (5) the principal was damaged by the failure to disclose the information.<sup>221</sup>

*P. Washington Consumer Protection Act*

A principal must establish five elements to prevail on a claim against a broker or firm under Washington's Consumer Protection Act (CPA). The principal must establish: an "(1) unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff in his or her business or property, and (5) causation."<sup>222</sup>

For the first element, the deceptive act or practice must have the capacity to deceive a substantial portion of the public.<sup>223</sup> The act cannot be an isolated incident affecting an individual but rather must have the potential to deceive others. However, this element can be met by a broker or firm marketing or showing a property while engaging in the deceptive behavior.<sup>224</sup>

The third element, the public interest impact, requires showing a likelihood that additional plaintiffs have been or will be injured in the same manner. A factor test has been established for this element, with no single factor being necessary or most important. The factors are as follows: "(1) whether the acts were committed in the course of defendant's business, (2) whether the defendants advertised to the public, (3) whether the defendant actively solicited the plaintiff, and (4) whether the parties occupied unequal bargaining positions."<sup>225</sup> This factor test may be particularly difficult to meet in a commercial setting because, even if a dual agent is involved, parties may often be deemed more sophisticated and have equal bargaining positions, though many commercial tenants are not as sophisticated as commonly misconceived to be.

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221. *Bloor v. Fritz*, 180 P.3d 805, 815 (Wash. Ct. App. 2008); *see also* WASH. PATTERN JURY INSTR. CIV. WPI 165.01 (6A WASH. PRAC. 2019).

222. *Bloor*, 180 P.3d at 815 (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 532 (Wash. 1986)).

223. *Id.*

224. *See id.* at 816 (holding that "[l]isting and showing the property without disclosing its history" met the first element of a CPA claim).

225. *Id.* at 736–37 (citing *Svensden v. Stock*, 23 P.3d 455 (Wash. 2001)).

Another potential theory that can satisfy the requirements of the CPA is fraud on the market, as introduced by the dissent in *Sing v. John L. Scott*.<sup>226</sup> However, this theory has not been adopted by Washington case law nor analyzed after the 2013 amendment to the broker liability statute. Under this theory, the unfair or deceptive practice is the misappropriation of the principal's confidential information for the agent's distinct advantage.<sup>227</sup> Self-dealing can constitute fraud on the market if the self-dealing uses confidential information for the agent or firm's distinct advantage.<sup>228</sup>

Regardless of the claim, the principal must prove damages, which can be especially difficult in a commercial leasing context. The most likely harm that could result from a dual agency representation in a commercial leasing context is not getting the best deal possible; however, proving that a better deal would have resulted is incredibly difficult, especially when the landlord could simply testify that the deal the tenant received was the best the landlord would have agreed to. However, when damages can be quantified, a tenant could recover for breach of broker duties in tort or under the CPA.

#### PART IV

Part I provided the context and market realities relevant to the issue of conflicts of interest in commercial brokerage under Washington law, focusing on Greater Seattle. Part II examined the Law of Principal and Agent impacting commercial brokerage, as well as the statutes' legislative history of the statute that supplants the common law with a statutory licensing regime. Part III explored the common law of Principal and Agent as applied in relevant Washington real estate transactions, including an exposition of relevant case law, addressing various conflicts of interests prohibited under Revised Code of Washington section 18.86, and reviewed potential remedies for violations of those prohibitions. Finally, in Part IV the Article examines the emerging trend of brokers being principals or fiduciary managers for properties they broker, fundamentally changing the nature of their conflicts of interest, and addressing the legal implications of a broker being an undisclosed principal in a transaction they broker after Revised Code of Washington section 18.86, and concludes with the importance of a return to the status quo: reinstating common law fiduciary duties in commercial real estate transactions for the benefit and protection of all commercial tenants and to ensure the integrity of the market and of all future commercial real estate transactions.

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226. *Sing v. John L. Scott, Inc.*, 948 P.2d 816, 826 (Wash. 1997) (Talmadge, J., dissenting).

227. *Id.*

228. *See id.*

*A. CRES Firms Have Increasingly Become Principals in the Transactions They Broker in Washington*

Large CRES firms are increasingly taking ownership interests in commercial real estate or managing investment funds creating fiduciary management roles for the firm as to commercial real estate. These ownership interests and fiduciary relationships typically arise from a purchase or acquisition of a property, management of the investments of others, and from sponsoring investment opportunities where a firm invests its funds alongside the funds of its investors. This sponsorship also takes place in the development context where a firm developing a property will partner with an investor by contributing its own funds to the project.

As firms expand their commercial development businesses and their investment management businesses, the likelihood that a firm will be a principal in a transaction they broker, either through an ownership interest or as a fiduciary, will continue to increase. This is also true for dual agency situations where the firm could represent both parties and have an ownership interest or be a fiduciary manager of the property.

The firms engaged in this practice tend to have separate ownership structures for the real estate and investment arms. Often the firm owning the real estate or managing the funds will be a wholly owned subsidiary of the CRES firm. When firms comingle assets with investors, further companies may be created to hold such property. This separation can make it difficult to identify exactly how prevalent and how frequently firms are principals in the transactions they broker.

Firms vary on the amount of separation between the CRES firm and the subsidiary managing investments or developing property. For example, JLL's investment management subsidiary, LaSalle, indicates that JLL may "from time to time . . . provide services to assets in LaSalle funds in the ordinary course of business."<sup>229</sup> Similarly, CBRE's investment management subsidiary, CBRE Global Investors, has a policy of putting its clients above those of CBRE and CBRE must compete with other service providers.<sup>230</sup> Additionally, CBRE states that it "does not engage in favoritism for the benefit of its Subsidiary."<sup>231</sup> However, CBRE's development arm, Trammell Crow, receives a discount on CBRE

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229. JLL, THINKING BEYOND: 2017 ANNUAL REPORT: JONES LANG LASALLE INCORPORATED 11 (2017) [hereinafter JLL, 2017 ANNUAL REPORT], [https://s22.q4cdn.com/446208711/files/doc\\_financials/annual/JLL-2017-Annual-Report.pdf](https://s22.q4cdn.com/446208711/files/doc_financials/annual/JLL-2017-Annual-Report.pdf) [<https://perma.cc/HT38-MFTT>].

230. CBRE GROUP, INC., MANAGING CONFLICTS OF INTEREST 7 n.4 (2015) (on file with the Seattle University Law Review).

231. *Id.* at 7 n.3.

brokerage services,<sup>232</sup> ensuring that CBRE will more likely be chosen over other competitors to represent Trammell Crow.

The practice of a CRES firm having an ownership interest or fiduciary management relationship with a property it is brokering has continued to become more prevalent since the 2014 Conflicts of Interest Research Report was published. CBRE currently has approximately 5 billion square feet of space under management.<sup>233</sup> This square footage is nearly three times higher than it was in 2013.<sup>234</sup> And Hughes Marino estimates CBRE either owns or is a fiduciary manager of 2.5 billion square feet of commercial space.<sup>235</sup> Put in perspective, the western half of the United States only has about 2.4 billion square feet of office space.<sup>236</sup> This value, in part, reflects the \$107 billion in assets CBRE Global Investors has under management.<sup>237</sup> To its credit, CBRE does have a policy to disclose such conflicts and obtains consent when it or a subsidiary “owns” the property, though it does not define what constitutes “ownership” and it is not clear that a sponsored investment fund or a subsidiary comingling funds and creating a separate entity would constitute ownership under CBRE’s definition. It is also unclear what procedures and protocols CBRE has in place to self-monitor whether it is meeting the intent and letter of this policy, such that it is possible the policy is intended primarily to put investors at ease about how the company is addressing conflicts of interest as a Risk Factor in its SEC reporting documents.<sup>238</sup>

JLL has similarly continued to increase its presence as a fiduciary manager of real estate assets. LaSalle, JLL’s investment arm, currently has \$60.1 billion in assets under management,<sup>239</sup> of which \$376.2 million are

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232. *Id.* at 7 n.5.

233. *CBRE Group, Inc. Ranked #207 on the Fortune 500*, CBRE (May 21, 2018), <https://www.cbre.com/about/media-center/cbre-ranked-207-on-the-fortune-500> [<https://perma.cc/T8TZ-FL8V>].

234. CBRE GROUP, INC., ANNUAL REPORT 2013, at 6 (2013), [http://www.annualreports.com/HostedData/AnnualReportArchive/c/NYSE\\_CBG\\_2013.pdf](http://www.annualreports.com/HostedData/AnnualReportArchive/c/NYSE_CBG_2013.pdf) [<https://perma.cc/ZU8F-DKCD>] (“As of December 31, 2013, we managed approximately 1.7 billion square feet of commercial space for property owners and occupiers in the Americas, which we believe represents one of the largest portfolios in the region.”).

235. *Hughes Marino Settles Lawsuit with CBRE*, THE REGISTRY: PUGET SOUND REAL ESTATE (Mar. 22, 2018), <https://news.theregistry.com/hughes-marino-settles-lawsuit-with-cbre/> [<https://perma.cc/32KX-QMVQ>].

236. *Id.*

237. *About Us*, CBRE GLOBAL INVESTORS, <https://www.cbreglobalinvestors.com/company-2/> [<https://perma.cc/46ZA-EAPG>].

238. CBRE GROUP, INC., MANAGING CONFLICTS OF INTEREST (2015) (on file with the Seattle University Law Review).

239. LASALLE INVESTMENT MANAGEMENT, <https://www.lasalle.com/> [<https://perma.cc/JN3V-QLXR>].

LaSalle's own funds.<sup>240</sup> In 2013, LaSalle only had \$47.6 billion in assets under management.<sup>241</sup>

This practice is not limited to CBRE and JLL. Instead, Newmark Knight Frank and Colliers International have moved in this direction as well. Newmark Knight Frank owns a controlling interest in Newmark Holdings, which was recently renamed GFP Real Estate.<sup>242</sup> GFP Real Estate is one of the largest holders of real estate in New York.<sup>243</sup> Similarly, Colliers International recently acquired Harrison Street, an investment management firm.<sup>244</sup>

These increasing incidents of ownership and fiduciary responsibility also appear in the development services full-service CRES firms may offer. For example, CBRE's development arm and real estate investment arm is a wholly owned subsidiary called Trammell Crow. Trammell Crow develops properties for others. In addition, it will sometimes partner with investors and clients by contributing its own funds for projects, while purchasing and developing property for profit on occasion with only its own funds.<sup>245</sup> An example of this is Trammell Crow's recent purchase of a development site in Washington, D.C. for \$12 million.<sup>246</sup>

CBRE and Trammell Crow were recently the subject of a lawsuit where CBRE represented both Trammell Crow, the owner of the property, and the government seeking to lease the property.<sup>247</sup> In this case, CBRE properly disclosed both the dual agency and the ownership conflict to the government, and the government consented to the representation continuing upon finding that the organizational conflict of interest had been mitigated.<sup>248</sup> Although the court found the appellant failed to show that an unmitigated organizational conflict of interest existed with respect

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240. JLL, 2017 ANNUAL REPORT, *supra* note 229, at 12.

241. JLL, 2014 ANNUAL REPORT (2014), [https://s22.q4cdn.com/446208711/files/doc\\_financials/annual/JLL-2014-Annual-Report.pdf](https://s22.q4cdn.com/446208711/files/doc_financials/annual/JLL-2014-Annual-Report.pdf) [<https://perma.cc/N77R-56TK>].

242. GFP Real Estate, *Newmark Holdings Becomes GFP Real Estate*, CISION: PR NEWSWIRE (Oct. 3, 2017), <https://www.prnewswire.com/news-releases/newmark-holdings-becomes-gfp-real-estate-300529743.html> [<https://perma.cc/77ER-QHJ7>].

243. *Id.*

244. *Colliers International to Make Transformational Strategic Investment in Harrison Street Real Estate*, COLLIER'S INT'L (May 14, 2018), <https://corporate.colliers.com/Newsroom/Colliers-International-to-make-transformational-strategic-investment-in-Harrison-Street-Real-Estate> [<https://perma.cc/ZFQ5-HXSF>].

245. CBRE, 2017 ANNUAL REPORT 5 (2017), [http://www.annualreports.com/HostedData/AnnualReportArchive/c/NYSE\\_CBRE\\_2017\\_59b5118388204899b7214d0b24290f76.pdf](http://www.annualreports.com/HostedData/AnnualReportArchive/c/NYSE_CBRE_2017_59b5118388204899b7214d0b24290f76.pdf) [<https://perma.cc/FR64-AMZJ>].

246. Jon Banister, *Trammell Crow Buys Brookland Development Site For \$12M*, BISNOW (June 26, 2018), <https://www.bisnow.com/washington-dc/news/land/trammell-crow-buys-brookland-development-site-for-12m-89997> [<https://perma.cc/LN56-P7AG>].

247. *Parcel 49C Ltd. P'ship v. United States*, 31 F.3d 1147 (Fed. Cir. 1994).

248. *Id.* at 124.

to Trammell Crow and CBRE,<sup>249</sup> this case represents how increasingly common it is for a large CRES firm to have an ownership interest or a fiduciary management relationship with a property it is acting as a dual broker for.

*B. The Legal Implications of a Broker as an Undisclosed Principal in a Commercial Real Estate Transaction*

Reiterating from the Abstract, Washington common law principles of the Law of Principal and Agent are instructive here. The problems associated with dual agency have become more acute and more pervasive in the world of commercial real estate generally, and in commercial leasing transactions in particular. Under the common law, an agent would owe the following duties to its principal:

- Unbroken service and loyalty (the “duty of undivided loyalty”);
- Confidentiality;
- Full disclosure of information necessary for the principal to make well-informed decisions;
- Acting in the best interest of the principal;
- Reasonable care and diligence; and
- Accountability to the principal.

It seems beyond peradventure that a commercial real estate professional holding herself out as a tenant’s representative of an agent serving a tenant as principal, who is, in fact, an undisclosed principal in the transaction to which that agent has steered the principal, is in direct violation of more than half of the above common law duties an agent owes to its principal. In fact, other than the duty of confidentiality, in discharge of which the agent must maintain the confidentiality of the principal’s information, the actions of the agent serving its own interests appears to violate the five remaining common law duties: undivided loyalty; full disclosure; acting in the principal’s best interests; reasonable care and diligence, and accountability to the principal. Justice Talmadge’s dissenting opinion in *Sing*, cited above in Part II, made clear how an agent breaches their common law duties to its principal when that agent acts in its own selfish interests, and not in the interests of the agent’s principal.

Referring to the extensive hypothetical scenarios presented in the 2014 Conflicts of Interest study, it is hard to fathom how full disclosure of an agent’s conflicts of interest and securing the principal’s advance, informed written consent serves to actually protect the principal’s best interests. Moreover, and perhaps more to the point, a principal’s advance

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249. *Id.* at 123–24.

written consent to accept a dual agency representation constitutes a waiver of the principal's enforcement rights under other recovery theories, such as in tort, as described above, under a theory similar to that of contributory negligence.

It seems a principal's waiver of such fundamental rights as those owed by an agent to its principal is an intentionally self-destructive act to that principal's best interests, tantamount to a statement by the principal that "I am aware I am entering into a relationship in which my agent owes me no fiduciary duties whatsoever and accept, in advance, any consequences adverse to my interests that follow from this flawed relationship." Perhaps if the necessary written waiver was cast in such stark terms, more principals would better comprehend the potential, inevitably adverse consequences of accepting a dual agency relationship, and refuse to consent as a consequence.

Further, when an agent acts in its own interests in a transaction in which it owes fiduciary duties to its principal in that transaction, the broker is held to an imputed knowledge standard, and is also held to higher standards of conduct than the standard fiduciary duties an agent owes to a principal at common law.<sup>250</sup> Although this imputed knowledge standard was altered by Revised Code of Washington section 18.86.100, the statute merely limits a broker's imputed knowledge of facts known by a sub-agent to those actually known by the broker and does not change imputed knowledge for managing and supervising brokers.<sup>251</sup> This was the fact pattern in the *Sing* case, where three agents, all working under the same brokerage firm that also served as the listing broker for the seller, with one agent acting as the agent for a prospective buyer and another acting solely in the interest of herself and her husband.<sup>252</sup> Although the majority opinion largely disregarded the conflict of interests present in the facts, Judge Talmadge's dissenting opinion addressed this aspect of the facts in far greater detail with a scathing analysis of the "self-dealing" of the agent who used her access to otherwise confidential information regarding an extant counteroffer from the aggrieved, prospective purchaser to gain an advantage in making a competing offer for the same property on terms the self-dealing agent knew would be attractive to the sellers.<sup>253</sup>

Relying on *Mersky*, Justice Talmadge stated, in pertinent part, that

[F]rom this agency relationship [between a property owner seeking to list and sell its property and a listing broker,] springs the duty and the obligation upon the part of the listing broker, *as well as on the*

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250. *Sing v. John L. Scott, Inc.*, 948 P.2d 816, 826 (Wash. 1997) (Talmadge, J., dissenting).

251. WASH. REV. CODE § 18.86.100(2) (2019).

252. *Sing*, 948 P.2d at 819–20.

253. *Id.* at 825–28 (Talmadge, J., dissenting).

*part of his subagents, to exercise the utmost good faith and fidelity toward his principal, the seller, in all matters falling within the scope of his employment. . . . [And] there flows from this agency relationship and its accompanying obligation of utmost fidelity and good faith, the legal, ethical, and moral responsibility on the part of the listing broker, as well as his subagents, to exercise reasonable care, skill, and judgment . . . ; to scrupulously avoid representing any interest antagonistic to that of the principal in transactions involving the principal's listed property, or otherwise self-dealing with that property, without the explicit and fully informed consent of the principal . . . .*<sup>254</sup>

Justice Talmadge's dissenting opinion went on to note, by way of excerpt from the *Cantwell* decision:

The law exacts of every agent *the utmost fidelity* to his principal. He must keep him fully informed as to all his transactions, and the state of the business or interests entrusted to him. *Any departure from these rules is a fraud in law. An agent to sell cannot become the purchaser, and an agent to buy cannot be himself the seller.* Equity removes from the trustee every temptation to violate his trust by declaring in advance that all such transactions are null and void at the option of the principal[.]<sup>255</sup>

If a tenant representative in the employ, and working under the brokerage license, of a large, full-service CRES firm shows his prospective tenant client a commercial space in which that brokerage firm has a direct or indirect ownership interest, and makes no disclosures whatsoever to that tenant client regarding such ownership conflict of interest, the brokerage firm, if not the tenant representative himself, would benefit economically from the negotiation and execution of a lease of the premises through that tenant representative. Under these facts, it seems clear that an actionable conflict of interest claim under the common law principles of principal and agent should exist, especially given the specific prohibitions enunciated in Justice Talmadge's dissenting opinion.

Yet by superseding the common law of agency and its attendant fiduciary duties, the Washington Legislature has made it far more difficult to remedy an undisclosed conflict of interest. Certainly, Revised Code of Washington section 18.86 created a statutory duty requiring disclosure of conflicts, but it did not provide any remedies. Instead, injured tenants must rely on theories of tort and the CPA for relief, each type of claim with its own distinct challenges and hurdles, as discussed above.

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254. *Id.* at 822–23 (majority opinion) (emphasis added) (citing *Mersky v. Multiple Listing Bureau*, 437 P.2d 897, 899 (Wash. 1968)).

255. *Id.* at 823 (emphasis added) (citing *Cantwell v. Nunn*, 88 P. 1023, 1025 (Wash. 1907)).

This conflict of interest exists in an environment where commercial tenants may not be especially sophisticated and be able to understand the ramifications of dual agency and the attendant conflicts.<sup>256</sup> Rather it is a common misconception that commercial tenants are sophisticated, a point that was emphasized during California's discussion of Senate Bill 1171 in 2014:

There is a common misconception that parties involved in commercial real estate transactions are (1) sophisticated; (2) of equal bargaining power; or (3) equally knowledgeable and experienced in real estate as the other party or the brokers involved. This is not always the case. For example, a small business owner whose only real estate transaction over the next five years will be his/her office lease is not going to be as sophisticated as a landlord whose primary business is real estate and who is negotiating multiple leases a year with the help of a team of sophisticated professionals. That business owner is at a severe disadvantage at the bargaining table and should be educated on the duties or limited duties the licensed real estate professionals involved in the transaction owe to all parties.<sup>257</sup>

Given this potential significant lack of sophistication, commercial tenants are severely underserved by the current tort and CPA claims offered in Washington law. Compare these, often difficult to pursue, claims with the previous standard discussed in *Merksy* where such an undisclosed conflict would amount to fraud in law, with no requirement to show knowledge or intent. Even though there are many statutory parallels between a broker's common law duties "to conduct [oneself] *in a way free of bad faith, dishonesty, or untrustworthiness*,"<sup>258</sup> enforcement of these duties has been made much more difficult.

It is clear that Revised Code of Washington section 18.86 eroded protections tenants previously enjoyed under the common law. With the difficulties of pursuing claims under the CPA or in tort, tenants can only be fully protected by prohibiting the practice of dual agency in commercial real estate transactions in Washington. And, tenants can only fully be protected by reinstating to its full extent the common law of agency in these transactions.

#### CONCLUSION

In retrospect, and after examining carefully in this Article the common law duties an agent owes its principal, and the legislative history

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256. See generally SMIRNIOTOPOULOS, 2014 COI STUDY REPORT, *supra* note 1.

257. S. 1171, 2013–14 Leg. Sess., Senate Floor Analysis 5–6 (Cal. 2014).

258. *Sing*, 948 P.2d at 824 (emphasis added).

and subsequent interpretation by the courts of Revised Code of Washington section 18.86, it is incomprehensible why the Washington State Legislature enacted a licensure scheme to regulate commercial real estate brokers and, in the process, supplanted the well-established and long-standing common law duties agents owe their principals, thereby substantially weakening the protections principals, such as prospective tenants, previously had against various forms of harmful conduct by commercial property brokers. The legislature repeatedly, following the initial enactment of HB 1659 in 1996, amended the statutory provisions of Revised Code of Washington section 18.86, further weakening the already limited statutory protections. Those subsequent amendments, offered under the pretext of providing needed “clarifications” of the original language, rendered the entire scheme almost meaningless in the context of dual agency; marginalizing and, to some extent, completely undermining the duties a tenant representative owes to a prospective tenant of commercial space. These changes raise a number of questions about the true motivations underpinning their substance and timing; more than a mere inference of favoring the commercial brokerage industry generally, and full-service CRES firms in particular, may be drawn from the legal research and analysis presented in this Article.

The damage done—leaving aggrieved tenants without adequate recourse against unscrupulous and self-serving practices through dual agency by full-service CRES firms, as perpetrated by their tenant representatives—may still be reversed, at least for prospective participants in these transactions. The best—and only adequate—way to fully and properly protect commercial tenants from unfair advantages enjoyed by landlords through their commercial brokers is to prohibit altogether the practice of dual agency in commercial real estate transactions and restore fully all of the protections previously afforded tenants under the common law of principal and agent in the commercial real estate transaction context. At the bare minimum, the practice of dual agency in commercial real estate transactions must be stopped. Otherwise, we risk continuing to subordinate the expectations and interests of commercial tenants in favor of full-service CRES firms and their commercial landlord clients.