Trust, Expert Advice, and Realtor Responsibility

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Abstract: The general legal rule that a homebuyer may not reasonably rely upon his real estate agent’s opinion as to a property’s value or investment potential is at odds with psychological propensity of individuals to trust perceived experts. This discrepancy creates a genuine moral hazard in which real estate agents benefit from the trust associated with portraying themselves as real estate experts, yet avoid responsibility for the advice that they give. This moral hazard fueled the housing market bubble and contributed to the suffering of homeowners whose real estate agents encouraged them buy as the market began to burst. In response to this problem, this article proposes a new regulatory regime requiring real estate agents to choose between two paths: (1) accept legal liability when they negligently, recklessly or intentionally make inaccurate or misleading pronouncements about a home’s value or investment potential; or (2) embrace their role as “salespersons” and refraining from offering advice or opinions about the real estate market to their customers.

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Introduction

As the housing crisis enters its fourth year, national home prices are down over 30%, more than 14 million homeowners are underwater on their mortgages, and over 6.5 million homeowners have already lost or given up their homes to foreclosure. Over 4 million more homes are in the pre-foreclosure process - and most economists predict that the crisis has yet to run its course.

Public discussions over the causes and responsibility for the housing crisis have focused primarily on homeowners, who are said to have bought homes that they could not afford; lenders, who are alleged to have been irresponsible in their lending practices; and the government, which is alternatively accused of meddling too much in the mortgage market or failing to regulate the market when it should have. Largely lost in this discussion has been the role of the real estate brokerage industry in both stoking the housing bubble and then delaying public recognition that the bubble had burst.

Moreover, while homeowners, lenders, and the government - and by extension taxpayers - have all taken significant losses due to the housing meltdown, those in the real estate brokerage industry have borne no financial responsibility for its role in creating the housing bubble and burst. This includes not only the National

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5 Id.
9 Id.
Association of Realtors (NAR), but also individual real estate agents. Indeed, even real estate agents who knowingly conveyed overly-optimistic forecasts for the housing market and intentionally gave misleading advice to their clients have escaped responsibility for the financial suffering caused by their actions in the wake of the housing collapse. While such real estate agents may be a small minority, even the most unscrupulous agents escape responsibility - as courts generally treat real estate agents as mere salespersons, who are simply not responsible for their advice or opinions.

Courts’ treatment of real estate agents as mere salespersons is at odds with most agents’ self-description as professionals who have specialized expertise on the housing market and who owe a fiduciary duty to their clients. Court decisions are also detached from the concrete reality of real estate transactions in which buyers hire and trust real estate agents to guide them through the complex process of purchasing a home. Indeed, literature from the cognitive sciences suggests that, because homebuyers are generally novices making complex decisions on the basis of limited information, real estate transactions are exactly the type of situation where individuals are most likely to hire and trust a perceived expert.

This discrepancy between homebuyers’ psychological propensity to trust perceived experts and the legal rule that a buyer may not reasonably rely upon his real estate agent’s advice, creates a genuine moral hazard in which real estate agents benefit from the trust associated with portraying themselves as real estate experts, yet avoid responsibility for the advice that they give. This discrepancy is made more problematic by the fact that many buyers are likely unaware that their real estate agents bear no legal responsibility for their advice and opinions, and buyers are thus likely to place undue reliance upon their agents’ recommendations.

In response to this problem, this article suggests two possible paths: (1) fully professionalizing the real estate agent’s role, including regulations subjecting agents to legal liability when they negligently, recklessly or intentionally make inaccurate or misleading pronouncements about a home’s value or investment potential; or (2) de-professionalizing the real estate agent’s role by requiring mandatory disclosures to buyers that real estate agents are “mere salespersons” and barring real estate agents from offering advice or opinions as to a home’s value or investment potential. But - as the housing meltdown has shown - the middle path, in which real estate agents may represent themselves as professional experts but are

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treated as mere salespersons when it comes to legal liability, is both untenable and unfair.

The Rhetoric of Homeowner Responsibility

Looking back to 2005 and 2006, when the United States was in the throes of the housing bubble, it seems remarkable – if not downright foolish - that so many people in overpriced markets were willing to pay hundreds of thousands more for average-sized homes than those same homes would have sold for just a few years before. Moreover, in order to do so, these home buyers were willing to take on mortgage payments that frequently required all of their disposable income and were two to three times more than they would have paid to rent a similar home. Now that home prices have come crashing down, many of these homeowners find themselves throwing all of their disposable income into homes worth much less than they owe.

Any sympathy for these homeowners aside, they made the decision to purchase their homes. Thus, the common view holds, they must bear the consequences of their actions. They should have known that paying three times more for a mortgage than they could have paid to rent the same house was simply unwise. They should have foreseen that hugely inflated home prices might decline. And they shouldn’t have been so careless in taking on the burden of a mortgage payment that required all or most of their disposable income. If they now find themselves in a terrible predicament, it’s one of their own making. They signed their mortgage knowing full well that they were taking on a huge financial responsibility – and, if they now regret that decision, they have no one to blame but themselves.

This argument has great emotional appeal, as it ties into the American ethos of personal responsibility and the angst in some quarters that Americans are increasing losing sight of this value. This American ethos holds that ultimate decision-making responsibility lies with self. Messages of personal responsibility are big winners when it comes to the public dialogue related to underwater homeowners.12

Indeed, many underwater homeowners themselves believe that they should accept responsibility for their mistake in buying at the wrong time. They blame themselves for being foolish - for not seeing this coming. If they hadn’t been in such a rush to buy a home, if they had listened to that voice inside themselves telling them that housing prices seemed crazy, if they had done some more research about the state of the housing market before making such a big

decision, if they had bought a more modest home and not put all their eggs in the homeownership basket, and – better yet – if they had just rented instead, they wouldn’t find themselves in this mess.

The “Buyers Agent”

Such self-recrimination aside, it’s not typically the case that homebuyers make their decisions in isolation. While the ultimate decision may be their call, potential homebuyers are subject to a variety of outside influences including family, friends, and – critically – real estate agents (aka, “realtors”). Indeed, over 79% of homebuyers work with a buyer’s agent in purchasing a home. As self-described experts on the housing market, these buyer’s agents serve a variety of functions for buyers including assisting them in finding a suitable property, preparing an offer, and negotiating with the seller. Agents also typically advise the buyer as to an appropriate price, and whether the property is a good investment.

Once a client has made an accepted offer, real estate agents will help buyers in navigating the process of closing the deal. This

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13 Janet A. Sniezek & Timothy Buckley, Cueing and Cognitive Conflict in Judge-Advisor Decision Making, 62 ORG. BEHAV. & HUM. DECISION PROCESSES, no. 2, May 1995, at 159 (arguing that the notion of “individual judgment or choice” does not represent the social aspects of many important decisions); Smith et al., supra (discussing “the embeddedness of actors in a network of social relations housing transaction are conducted.”); see generally, Deborah S. Levy & Christina Kwai-Choi Lee, The Influence of Family Members on Housing Purchase Decisions, 22 J. PROP. INVESTMENT & FIN., no. 4, 2004.
16 See Why You Should Work With a REALTOR®, Handouts for Customers, REALTOR® MAGAZINE, (explaining, “[a] professional will be able to help you answer these two important questions: Will the property provide the environment I want for a home or investment? Second, will the property have resale value when I am ready to sell?”) (emphasis added), available at http://www.realtor.org/rmosales_and_marketing/handoutsforcustomers/handouts/bu yer13 (last visited Oct. 15, 2010). Agents also frequently advise home buyers when their emotions may be leading them to make a bad decision – such as when a home they “love” happens to be near a busy road or near a congested commercial area that will adversely affect the home’s resale value. Similarly, in helping clients determine a price point for their offer, a realtor may caution clients against offering, out of emotional exuberance, significantly more for a home than it’s objectively worth, or, out of unrealistic expectations, too little.
often includes helping buyers line up necessary documents for financing, ensuring that the appraisal does not scuttle the deal, addressing title defects, and dealing with any serious repair issues unveiled during the home inspection.\(^{18}\) Aside from these various practical issues, real estate agents must also frequently deal with their clients’ anxieties about purchasing a home.\(^{19}\)

Buyers may worry, for example, about whether they are purchasing at the right time or making a good financial decision by investing in real estate.\(^{20}\) This was particularly likely to be the case when housing prices reached the stratosphere during the boom and a reasonable person might have questioned whether it really made

\(^{18}\) See Evans, *Clearing the Closing Hurdles*, supra.

\(^{19}\) See See Kelle Sparta, REALTOR® MAGAZINE, *Help Emotional Clients Keep Their Cool*, Sept. 2008, http://www.realtor.org/rmosales_and_marketing/salescoach/columns/0811_salescoach_emotions (observing that, “[p]anic, regret, frustration, fear. As real estate practitioners, we get to witness it all… being a real estate agent is often synonymous with being a therapist…After all, when helping people through a process as life-changing as buying and selling a home, you would expect emotions to come into play.”). Of particular concern to many realtors is that their clients will “panic” and back out of the deal. See Mariwyn Evans, *Buyer Psychology: Beat the Fear Factor*, REALTOR® MAGAZINE, Aug. 2010 (“Many of the issues that delay closings come down to legal issues or dollars and cents, but fear and uncertainty about the market can also cause a buyer or seller to pull back”), available at http://www.realtor.org/rmosales_and_marketing/articles/2010/1008_closinghurdles_buyerpsychology. Advice columns in realtor magazines thus explain how to keep clients emotions “under control:"

Oddly, panic is the easiest to handle of all the emotional triggers. Start by programming your clients not to panic in the beginning of the transaction before anything has happened. Here’s a strategy I use with first-time buyers: I tell them “You’re not allowed to panic until I tell you it’s time. I promise I will tell you when it’s time, but until then you’re not allowed, OK?” This gives them a chance to laugh and they always agree. By setting this rule up front, we accomplish two goals— We’re telling them that we’re in control and have everything handled, which builds trust; and we’re giving ourselves something to refer back to that will break the cycle later when they start panicking. What do I mean by this? By setting up the Don’t Panic rule at the start of the transaction, you can, when a person begins to panic, ask them “What’s the rule?” This causes them to stop thinking about whatever it is that they’re panicking about and start trying to remember what the rule was. When it looks like they have changed their focus sufficiently, you can remind them that the rule was that they weren’t allowed panic until you told them to. This gives them a chance to laugh at themselves while still breaking the cycle of panic.

\(^{20}\) See Id. (discussing clients, “financial worries”).
sense to buy at those prices. Anxieties are also likely to be pronounced now in a declining market, when a buyer might reasonably worry that the market still has a ways to go to hit bottom. Buyers in both situations will typically turn to their real estate agents for advice and reassurance. Real estate agents not infrequently respond – both in booming and declining markets - by assuring their clients that it is a “great time to buy,” and that buying a home is a wise and safe investment.

Real estate agents will also typically offer some rationale why this is the case.

Because most buyers lack the perceived knowledge or experience of their real estate agents, buyers frequently trust their agents’ opinions and representations on such matters. Indeed, the buyer has probably engaged the agent for their expertise. Many successful agents work hard to further cultivate this trust throughout the relationship, including the sense that the agent is not simply “a salesperson,” but rather “a reliable adviser who cares more about the customer than the transaction.” If the agent succeeds in engendering this trust, it can pay “back in spades” at decision time, when the buyer is called to trust the agent as the “expert.”

21 See Sparta, supra (indicating that clients sometimes, “[p]anic about making the wrong decision.”).
23 See id. (“Homeownership is a safe, secure way to build long-term wealth.”); see discussion infra Parts X.
24 Nancy Keates, Realtors’ Former Top Economist Says Don’t Blame the Messenger, WALL ST. J., Jan. 12, 2009, at A1 (defining trust as “the willingness to be vulnerable to the actions of another party based on the expectation that the other will perform a particular action important to the trustor.”); RUSSELL HARDIN, TRUST AND TRUSTWORTHINESS 11 (2004) (“trust involves giving discretion to another to affect one’s interests.”).
25 See Sparta, supra (“When a client decides to hire you, they’ve decided to trust you. You’ve already put their trust in place, but you have to maintain it.”).
26 Realtors build trust in a variety of ways, but one is to advise their clients early on not to buy a particular home, so they can later remind the client that they steered them away from an earlier mistake when the realtor could have made a quick buck.
27 Id. (explaining that if realtors play the role of concerned advisors, directing client away for “poor housing choices,” they will “make any lost commission back in spades because of the trust [they] engendered. “Sounds simple. Yet, it’s amazing how frequently practitioners squander an opportunity to build this valuable trust.”) (emphasis added); see infra, “Hard Wired to Trust” for a detailed discussion of individual’s tendency to follow the advice of trusted experts.
28 Sparta, supra (“During your initial conversations with clients, help them understand that they might have to make compromises. Ask them what their expectations are and help bring them closer to reality using market statistics, your
But while homebuyers are called to trust real estate agents as experts, real estate agents also sell houses for a living. This dual role as advisor and salesperson creates an inevitable conflict of interest for real estate agents. For example, if a real estate agent had told her clients in 2005 and early 2006 that some of the country’s most prominent economists believed that housing prices were unsustainable or, in late 2006, that these same economists were arguing that home prices were headed for significant declines, her clients might have decided not to buy.\(^{29}\) If too many of her clients made this decision, the realtor could not have earned a living. It’s not good business to tell prospective homebuyers that the housing market may crash.

While highly-conscientious real estate agents might have nevertheless have issued such warnings, many undoubtedly did not. Such agents were not necessarily acting nefariously, as many agents may have truly thought that residential real estate was a great investment. Like most homebuyers, many real estate agents didn’t see the crash coming. One doesn’t have to look far to find real estate agents who lost their own shirts in the housing collapse. Many real estate agents, however, must have at least heard the warnings that the real estate market was headed for trouble – and, if they didn’t, they weren’t paying attention.

**The Bubble May Burst, Circa 2005-2006**

The after-the-fact conventional wisdom is that no one could have foreseen the housing crash.\(^{30}\) Former Federal Reserve Chairman Alan Greenspan has proclaimed, for example, that “no one could have predicted the housing bubble. ‘Everybody missed it, academia, the knowledge of the community, and your personal experiences. This is your job, after all, and you are the expert.’”\(^{29}\)

\(^{29}\) See discussion infra, “The Bubble May Burst, circa 2005-2007.”

Federal Reserve, all regulators.’” But Mr. Greenspan is simply incorrect – and perhaps a bit self-protective.

By 2005, if not before, a vigorous debate raged between economists over whether the U.S. was in a soon-to-burst housing bubble. This debate only intensified in 2006. Moreover, the debate was publically aired on numerous occasions in newspaper articles and government reports. For example:

- On May 28, 2005, the New York Times reported in *Is Your House Overvalued?* that home price-to-rent ratios were out of proportion - and that this indicated a possible housing bubble.

- On May 30, 2005, the Washington Post reported in *A Bane Among the Housing Boom: Rising Foreclosures* that foreclosures were sharply on the rise and “should the nation's housing bubbles deflate, as many economists and federal officials expect, the foreclosures could prefigure a national crisis.”

- On June 3, 2005, NPR aired *Yale Professor Predicts Housing 'Bubble' Will Burst*, reporting that Yale University Economist Robert Shiller, of the Case-Shiller Home Price Index, “calls the housing market a ‘bubble’ -- meaning prices are out of touch with economic reality -- and predicts the market will collapse.”

- On June 20, 2005, Barron’s Magazine reported in *The Bubble’s New Home* that Shiller had warned that “[t]he [housing] market is in the throes of a bubble of unprecedented

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31 Burry, supra.
32 Greenspan has been criticized for fueling the bubble and not acting to real it in much sooner. Sewell Chan, *Greenspan Concedes that the Fed Failed to Gauge the Bubble*, N.Y. TIMES, Mar. 18, 2010, at B1.
33 See e.g., News Release, Office of the Federal Housing Finance Agency (OFHEO) House Price Index Quarterly, (Dec. 1, 2004) (reporting, “[t]he growth in home prices over the past year surpasses any increase in 25 years,” and noting that some have become “concerned about the possibility of a home price collapse, either nationwide or in a number of major cities.”); FDIC Quarterly Outlook, Housing Bubble Concerns and the Outlook for Mortgage Credit Quality, FDIC (Spring 2004), available at http://www.fdic.gov/bank/analytical/regional/ro2004q1qa/infocus.html.

- On August 8, 2005, Nobel Prize winning economist Paul Krugman argued in a column in the New York Times that the housing bubble had already begun to burst: “So the news that the U.S. housing bubble is over won't come in the form of plunging prices; it will come in the form of falling sales and rising inventory, as sellers try to get prices that buyers are no longer willing to pay. And the process may already have started.”\footnote{Paul Krugman, Op-Ed., \textit{That Hissing Sound}, \textit{N.Y. Times}, Aug. 8, 2005.}

- On August 21, 2005, the New York Times again reported Shiller’s warnings of a housing bubble in an article titled, \textit{Be Warned: Mr. Bubble’s Worried Again}, in which it reported that “that prices could fall 40 percent in inflation-adjusted terms over the next generation and that the end of the bubble will probably cause a recession at some point.”\footnote{David Leonhardt, \textit{Be Warned: Mr. Bubble’s Worried Again}, \textit{N.Y. Times}, Aug. 1, 2005.}

- In January 2006, John Talbott, a visiting scholar at UCLA’s Anderson School of Management, published a well-publicized book, \textit{Sell Now!: The End of the Housing Bubble}, arguing, “[t]he question is no longer \textit{if}, but rather \textit{how far}, home prices will fall and over what time frame this bubble will deflate.”\footnote{John R. Talbott, \textit{Sell Now! The End of the Housing Bubble} (2006); see also John R. Talbott, \textit{The Coming Crash in the Housing Market: 10 Things You Can Do Now to Protect Your Most Valuable Investment} (2003) (making similar warnings).}

- On April 12, 2006, Barron’s Magazine reported that, “[s]peculative buying has driven housing prices to nosebleed levels – giving rise to fears that there’s a bubble and that rising interest rates will be the pin that makes it explode.”\footnote{Christopher C. Williams, \textit{Bubble? What Bubble? \textit{Barron’s Magazine}} (Apr. 10, 2006) http://online.barrons.com/article/SB114445527114120758.html.}
• On July 15, 2006, The New York Times reported in *Keep Eyes Fixed on Your Variable-Rate Mortgage* that, “[t]he raising of interest rates on millions of adjustable rate mortgages over the next several years has all the makings of a classic horror story. With more homes on the market, prices could begin to fall.”

• On July 31, 2006, in *The Coming Housing Crash*, Dean Baker at the Center for Economic Policy Research, argued that, “[s]everal reports released this week provide the strongest evidence yet that the housing bubble may finally be deflating. Sales of new and existing homes are both more than 10 percent from their peaks last year. Mortgage applications are down 20 percent.”

• On Sep 24, 2006, New York Magazine reported that Nouriel Roubini, a professor of economics at the Stern School of Business at NYU, argued that the speculative housing bubble was bursting and that, “[o]n the national level, real home prices may fall 20 to 30 percent.”

In other words, a steady stream of media reports appeared in 2005 and 2006 reporting a possible bursting of the housing bubble and major price declines to follow. Moreover, these reports demonstrate that it wasn’t just a few pessimists who were predicting trouble for the U.S. housing market. To the contrary, fears of a housing bust were relatively widespread among economists.

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NAR Spin

While an average person, caught up in their own lives and deluged by information in the internet age, might not have been aware of this debate, a real estate expert should have been - at least in order to be worthy of the expert label. Indeed, these warnings so alarmed those in the real estate brokerage industry that the New York Times reported that in August of 2005 that Robert Shiller had already “become the bugaboo of the multibillion-dollar real-estate industry. Its executives, like many Wall Street economists, say that low interest rates and a growing population will keep house prices rising, even if future increases are smaller than recent ones.”46 In other words, experts in the real estate brokerage industry were well aware of the housing bubble warnings – and actively dismissed them.

The NAR, in particular, tended to discount any concerns about the housing market in 2005, 2006, and even well into 2007. The persistent line of the NAR during the height of the housing bubble was that there was no bubble - and that buyers should jump before prices got even higher.47 Moreover, as the housing market began to weaken in 2006, the NAR’s chief economist, David Lereah, explained that the market would land on a “high plateau” in 2006,48 and that the market was just leveling out, “headed for a soft landing.”49 Lereah

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46 See Leonhardt, supra.
48 April 2006 - “Home sales will move up and down somewhat over the remainder of the year but stay at a high plateau...providing solid investment returns into the future. The national median existing-home price for all housing types is likely to increase 6.4 percent this year to $221,700.” NAR: Housing Market to Stay on High Plateau, REALTOR® MAGAZINE, Apr. 11, 2006, http://www.realtor.org/RMODaily.nsf/pages/News2006041101?OpenDocument.
argued that home prices had never declined on a national level before, and that worries of a national bubble bursting were absurd:

I’m getting tired of all these doomsayers. We live in houses, and our houses are not going to crash. This isn’t the stock market…. Local economies are relatively healthy. There’s job creation – this isn’t a scenario where bubbles burst. Can there be one or two or three or several local markets where prices actually go down? Yes. But to generalize for 30 markets or the whole real estate marketplace – that’s absurd.\(^{50}\)

Once prices did start to decline on a national level and continued to do so into 2007, the NAR assured its members and prospective buyers each month - for months on end - that the housing market had hit bottom and prices would soon begin to rise again. As Mr. Lereah would famously declare in March of 2007: “It looks like we've bottomed out. . . . When it's all said and done, this contraction in housing is probably going to be the least severe contraction we've ever had, which is going to surprise a lot of people.”\(^{51}\) Prices continued to decline for over three years thereafter, declining an additional 23% by July 2010.

Lereah’s persistently rosy forecasts earned him the name Baghdad Dave by some bloggers, after Iraqi information minister Mohammed al-Sahaf, called "Baghdad Bob" for his detached-from-reality press briefings as Baghdad fell to U.S. forces.\(^{52}\) Similarly, Mr. Lereah – and his colleagues at the NAR - assured buyers that the housing market was strong and that residential real estate continued to


In fact, each month last year, [Lereah] said the market was bottoming out. And he said it again the next month after the market somehow discovered a new bottom. September: “The price drop has stopped the bleeding for housing sales. We think the housing market has now hit bottom.” October: “The worst is behind us as far as a market correction. This is likely the trough for sales.” November: “We don't expect to see any changes of note until early next year when we're likely to see a modest lift to home sales.” December: “Most of the correction in home prices is behind us . . . By the fourth quarter of 2007, existing-home sales will be 4.6 percent higher than the current quarter.”

\(^{52}\)Keates, \textit{supra} .
be a good investment, even as the residential market collapsed around them:

January 2006 – “Home sales have been peaking for the last five years and we will land on a high plateau in 2006 - a market that will be healthy for both buyers and sellers.”

February 2006 – “Metro Home-Price Appreciation Stays Hot Across Country.”

March 2006 – “The national median existing-home price for all housing types is projected to rise 5.8 percent in 2006 to $220,300... some buyers who have believed hype about a housing bubble are hoping prices will drop, but that's not happening either.”

April 2006 – “Home sales will move up and down somewhat over the remainder of the year but stay at a high plateau...providing solid investment returns into the future. The national median existing-home price for all housing types is likely to increase 6.4 percent his year to $221,700.”

May 2006 – “Consumers generally can expect normal price appreciation for the foreseeable future, providing solid returns over time.”

June 2006 – “The housing boom has ended but sales at historically healthy levels will continue, and price appreciation will return to normal patterns across much of the country.”

July 2006 - “The slight change in pending home sales indicates the market is beginning to level out... This is consistent with our forecast, which is showing a soft landing for the housing sector. ... The national median existing-home price for all housing types is expected to rise 5.3 percent to $231,300 in 2006.”

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56 NAR: Housing Market to Stay on High Plateau, supra.
59 Press Release, National Association of Realtors, Pending Home Sales Index Leveling Out (July 6, 2006).
August 2006 – “We are presently experiencing a soft landing in the housing sector…Over the long haul, housing is the most solid investment that most people make.”

September 2006 - “This is a normal pattern during a market correction, but home prices should return to positive territory within a few months and annual appreciation will be slower than historic norms…. Keep in mind that over time, home prices rise at the rate of inflation plus one-to-two percentage points – buyers in most of the country who plan to stay in their home for a normal period of homeownership can pretty well bank on those historic averages…”

October 2006 – “Home sales appear to be bottoming out… the national median existing-home price is likely to rise 1.6 percent to $223,000 for all of 2006. “Considering that existing-home sales are based on closed transactions, this is a lagging indicator and the worst is behind us as far as a market correction – this is likely the trough for sales.”

November 2006 - “With the exception of parts of the West, sellers are cutting their price enough to encourage sales.”

December 2006 - “Most of the correction in home prices is behind us, but general gains in value next year will be modest by historical standards.”

January 2007 – “Home buyers should act before their window of opportunity closes….”

February 2007 – “We expect existing-home sales to gradually rise all this year and well into 2008… The median new-home price is expected to increase 1.8 percent to $249,800 in 2007…”

March 2007 – “Unusual weather patterns and problems in the subprime lending marketplace are creating challenges in

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61 Press Release, National Association of Realtors, Home Sales Forecast Lowered, Prices to Dip Temporarily (Sept. 7, 2006)
63 Press Release, National Association of Realtors, Existing Home Sales Rise in October, Market Stabilizing (Nov. 27, 2006).
assessing housing market conditions, but a recovery is likely this year.\textsuperscript{67}

May 2007 – “Home sales will be relatively sluggish in the second quarter, but a modest uptrend should resume during the second half of this year.” “It appears the worst of the price correction is behind us … More stable home prices and declining mortgage interest rates are increasing buying power, which should encourage potential buyers who’ve been on the sidelines.”\textsuperscript{68}

June 2007 - “Home sales will probably fluctuate in a narrow range in the short run, but gradually trend upward with improving activity by the end of the year. …Buyers who’ve been on the sidelines may want to take a closer look at current conditions in their area – if they wait for sales to rise, their choices and negotiating position won’t be as good as they are now.”\textsuperscript{69}

November 2007 – “[A]ll real estate is local.” “Some metro areas are hot while other are experiencing localized problems.”\textsuperscript{70}

December 2007 – “Home price growth in the vast affordable midsection of America will help raise the national median existing-home price slightly in 2008. I then expect price appreciation to return to normal patterns in 2009, perhaps rising one or two percentage points above the rate of inflation.”\textsuperscript{71}

If one looked narrowly at NAR median home prices in 2006 and 2007, one could cobble together a weak basis for the NAR’s prediction of a soft-landing - at least until mid-2007, when even NAR median home prices fell dramatically. However, a soft-landing was not the only plausible - or most likely – scenario:

Industry experts have tried to predict what the post-boom era will look like. Their predictions are as unreasonably optimistic as they were during the boom. These experts suggest that if there is a decline, it will be regional in nature, only affect the most overpriced cities, not unduly impact the U.S. economy, and will be

\textsuperscript{67} Press Release, National Association of Realtors, Housing Recovery Likely this Year, but Timing isn’t Clear (Mar. 13, 2007).

\textsuperscript{68} Press Release, National Association of Realtors, Pending Home Sales Indicate Near-Term Softness (May 1, 2007).

\textsuperscript{69} Press Release, National Association of Realtors, Home Sales Projected to Fluctuate Narrowly with a Gradual Upturn (June 6, 2007).

\textsuperscript{70} Press Release, National Association of Realtors, Median Home Prices Rise in Most Metros; Majority Shows Modest Gains (Nov. 20, 2007).

\textsuperscript{71} Press Release, National Association of Realtors, Existing-Home Sales to Trend Up in 2008 (Dec. 9, 2007) (quoting NAR Chief Economist, Lawrence Yun).
more of a soft landing than a total collapse. They universally agree that home prices will continue to grow at 4 to 6 percent in the future. That is one scenario. But that is not the most likely scenario. Prices have gone up too much in too many areas for there not to be a major correction that will be national, or possibly global, and that will have a very meaningful impact on the world economy.  

Moreover, NAR median home prices reflect “the mix of homes actually sold in a given month as well as the change in prices. Such measures rise in months when a lot of high-end houses are sold and fall at times when a lot of low-end houses are sold.” In other words, if prices are down across the board, but sales of lower priced homes slow down more than higher priced homes (as was the case in 2006), then the median price might go up or appear to hold firm even as overall home values go down.

Indeed, the Case-Shiller Home Price Index and Zillow Home Value Index (or Zindex) both showed home values falling from mid-2006, with the pace of those declines picking up in 2007.

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72 See Talbot, supra note __ at 137.
74 The Case-Shiller Index and Zindex avoid the distortions of the NAR measure or home prices by using the same mix of housing over time. The Case-Shiller Index, for example, looks at repeated sales of the same houses over time, whereas the Zindex uses a propriety formula to estimate the median price of all homes if they were sold on the same day. Though they use different methodologies, the two indexes had a 95% correlation between the 3rd quarter of 2006 and the 3rd quarter of 2007. S&P/Case-Shiller Home Price Indices: Index Methodologies, March 2008, available at http://www.macromarkets.com/csi_housing/documents/tech_discussion.pdf; What’s the Zillow Home Value Index? ZILLOW.COM (Oct. 15, 2010), http://www.zillow.com/wikipages/What’s-the-Zillow-Home-Value-Index/.
While the NAR median home prices would not have been irrelevant as a measure of the housing market, they are not particularly useful in isolation – and a real estate market analyst would most certainly not have relied upon NAR median home prices alone. Rather, an analyst would have considered NAR median home prices in context with other indexes, such as the Case-Shiller Home Price Index. Given that other indexes showed home values dropping, a careful analyst would not have put any confidence in monthly fluctuations of NAR median home prices as a predictor of future price trends, as did NAR economists appeared to do in their public pronouncements.

Moreover, regardless of which measure of home prices is used, home prices lag behind other important indicators that tend to signal trouble in the housing market. Two such indicators are existing home sales and unsold housing inventory. As the chart below illustrates, home sales started plummeting and unsold inventory shot up starting in late 2005 – two ominous signs for the housing market:
Consistent with the bleak news in existing home sales and unsold housing inventory, housing starts, another important indicator for the housing market, also plummeted starting in January of 2006:


Source: U.S. Census Bureau, SAAR. Data through November 2008.
The mortgage delinquency rate also began to rise sharply in mid-2005, an indication of possibly serious trouble in the housing market:

With these various indicators all suggesting weakness in the housing market, many economists predicted in 2006 that the housing bubble had burst, or soon would:

Several reports released this week provide the strongest evidence yet that the housing bubble may finally be deflating. Sales of new and existing homes are both more than 10 percent from their peaks last year. Mortgage applications are down 20 percent. Sale prices have barely risen from the level of last year, and are actually down after adjusting for inflation. Inventories of new and existing homes both stand at record levels, and the vacancy rate for ownership units has also hit a new high.\(^75\)

NAR economists somehow managed to discount or overlook these housing market statistics in their consistently rosy forecast for the housing market in 2005, 2006, and into 2007.\(^76\)

Incidentally, NAR forecasts were also out of line with the Housing Bubble Bellwether Index, which was a composite index of 12 real estate related companies during the housing boom, including

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\(^75\) Baker, *The Coming Housing Crash*, supra.

\(^76\) See Part X infra.
homebuilding, mortgage, and real estate companies. The Housing Bubble Bellweather Index, prepared by InvesTech Researchers, was followed by professional investors and bubble watchers alike - and reported upon in financial news outlets such as Forbes. For example, a Forbes article, Still Bullish, But Bubble Wary, in March 9, 2006, explained: “If this bellwether composite of homebuilding, mortgage and real estate stocks breaks sharply to new lows in the next several months, it means the housing bubble unwinding is about to turn ugly.” However, as the Bubble Bellwether Index turned ugly, the NAR stayed positive:

Given all the indications of trouble in the residential real estate market beginning in late 2005, the NAR has been criticized for repeatedly dismissing concerns of a bubble and for not warning buyers that it might, in fact, not be a good time to buy:

By being such dishonest brokers of information, the NAR has now made themselves look ridiculous. No one knows what the future will bring, but consistently absurd spin offered up by the Realtor group not only does a disservice to the public, but is now working against the interest of Realtors themselves.”

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Indeed, after leaving the NAR, Mr. Lereah himself admitted that he had put a “positive spin” on the housing numbers:

I worked for an association promoting housing, and it was my job to represent their interests. If you look at my actual forecasts, the numbers were right in line with most forecasts. The difference was that I put a positive spin on it. It was easy to do during boom times, harder when times weren't good. I never thought the whole national real estate market would burst…. [Looking back] I would not have done anything different. But I was a public spokesman writing about housing having a good future. I was wrong. I have to take responsibility for that.\footnote{Donna Rosato, \textit{Confessions of a Former Real Estate Bull}, CNN.com (Jan. 6, 2009 5:20 P.M.), http://money.cnn.com/2009/01/05/real_estate/Lereah.moneymag/index.htm.}

The Blind Leading the Blind

Mr. Lereah’s admission of having spun the numbers aside, one can understand why many individual real estate agents - most of whom have no training as economists or as investment advisors - might have believed what they were being told by the NAR’s chief economist. As such, an agent might have understandably decided that there was no need to mention to his clients in 2005 and 2006 that some economists were predicting a bursting of the bubble and huge price declines to follow – assuming of course that the agent was paying attention to these warnings.

While this may seem reprehensible in retrospect, individual real estate agents would have had a powerful psychological need to believe that there was no housing bubble - and later that prices would land softly. This need would have arisen from the fact that a real estate agent who did not believe these things, yet failed to advise her clients that buying a home in 2005, 2006 or 2007 was a risky proposition, could not have seen herself as ethical and honest individual. However, an agent who advised her clients that buying a home was risky would have likely driven many clients away.

In other words, a real estate agent’s built-in conflict of interests – and the psychological need to see herself as ethical and honest person - would have consciously and unconsciously motivated her to selectively perceive information that supported her belief that residential real estate was a good investment and to discount information that did not. Confirmation bias, disconfirmation bias, and the tendency of individuals to engage in motivated reasoning are
well-documented in scientific literature - and it’s safe to assume that real estate agents suffer from the same psychological biases as all other human beings.

Additionally, real estate agents as a class would have been susceptible to herding behavior, which refers to the tendency of individuals to go along with the crowd – often despite their own misgivings. A real estate agent who had his own doubts as to the sustainability of the housing market would have been confronted by the apparent fact that few of his fellow agents agreed. If most other real estate agents were bullish on the housing market, an agent might reasonably have concluded that he must be wrong about his doubts – especially to the extent that he was not sure about his own judgment in the first place. Few individuals will stand alone and reject the reasoning of their cohort. Ironically, however, the more individuals who cast their own judgments aside and go along with the crowd, the stronger the herding behavior becomes, even though many – or even the majority – of the real estate agents in the crowd may have heard the warnings about the overheated housing market and privately feared that the herd was about to run off a cliff.

Given these psychological biases, one can also understand those real estate agents who, once the housing market began to soften, told their clients that the market was just leveling out, and would not decline. Moreover, to the extent that real estate agents believed the “all real estate is local” mantra, they might have felt justified in keeping any concerns or negative information about the national housing market to themselves, so as long as the buyer was not paying more than local “market prices.” In short, it’s understandable that many realtors may have chosen in 2005 and early 2006 to “accentuate the positive” and to say nothing to their clients about signs of trouble brewing in the housing market. Some might also have genuinely felt certain that their clients were making a good investment.

On the other hand, as early as January 2006, Realtor® Magazine began running stories indicating that the market was cooling, including 60 Days to Hot Sales in a Down Market, which advised realtors how to deal with sellers who were unwilling to reduce prices. Early stories were followed by others, including: Is There an Upside to a Downturn? (July 2006), advising realtors that, “prices are leveling off and inventory is rising in many markets, the story is changing;” and 10 Survival Skills for a Cooling Market

80 “It’s important to keep in mind that all real estate is local, and many markets are expected to have higher sales and strengthening prices during the second half of this year.” NAR - Home Sales Projected to Fluctuate Narrowly with a Gradual Upturn, supra.
(August 2006), conceding, “[y]es, the real estate market that boomed for the past several years is slowing... Mortgage rates are rising. Prices are cooling. Buyers are no longer racing each other to open houses.”

Given these warnings, one might argue that even a real estate agent’s good-intentioned failure to warn their buying clients of potential market dangers becomes professionally inexcusable at some point – especially to the extent that the agent represented himself to his clients as an expert on the real estate market.

“It’s a Great Time to Buy!” – NAR, 2006-2007

In contrast to such errors of omission by individual real estate agents, however, the NAR launched a multi-million dollar media campaign in late 2006 to \textit{affirmatively} convince potential clients that it was a “great time to buy.”\textsuperscript{84} In July 2006, for example, the NAR released a “consumer education brochure” called “To Buy Or Not To Buy?,” which it distributed through local realtors and touted through press releases.\textsuperscript{85} The “educational” brochure claimed that, “[r]enting can cost more than seven times annually than owning,” when in actuality price-to-rent ratios were so out of line in many markets that it cost two to three times a month \textit{more to own} than rent.\textsuperscript{86} Nevertheless, in a message to its realtor members, the NAR implored: “Are your clients still on the fence about buying a home? Then tell them what they need to know! Homeownership is easier and less expensive than renting.”\textsuperscript{87}

Not only was owning less expensive, the brochure claimed, it was also a safe investment and an effective way to build wealth: “The Federal Reserve Board estimates the homeowners have a net worth nearly 36 times more than that of renters.”\textsuperscript{88} The brochure, of course, did not explain the contestability of these claims, including that wealthier individuals buy homes in the first place and that the net-worth estimates were based upon “paper money” that might evaporate if the housing market was indeed seeing the end of a housing bubble. The brochure implied no such worries were necessary because steady appreciation of at least 4.5\% was a pretty much a historical guarantee:

For the majority of Americans, their home is their largest financial asset and a major player in their investment portfolio. It’s a good thing, too. The \textit{NATIONAL ASSOCIATION OF REALTORS®} estimates that home value rises, on average, by 4.5 percent a year. That’s a steady return on investment; one’s own home is a much less volatile asset that stocks, bonds, or mutual funds.\textsuperscript{89}

\textsuperscript{85} Press Release, National Association of Realtors, To Buy or not to Buy; NAR Consumer Brochure Answers the Question (July 19, 2006).
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{Why Rent When You Can Buy? supra} note 98 (The brochure posed the question, “Are you worried about whether homebuying is a good INVESTMENT?”)
In November 2006, the NAR followed up To Buy Or Not To Buy? with a “Public Awareness Campaign” called It’s Great Time to Buy or Sell a Home. In a message to its members, the NAR invited realtors to learn about the “strategy behind the campaign” and explained that it would include a “media blitz” in major newspapers:

“It’s Great Time to buy or Sell a Home” is NAR’s first-ever newspaper blitz. The print advertisement is the beginning of an NAR campaign to urge buyers and sellers to take advantage of today’s favorable market conditions. The ad is scheduled to appear on November 3, 2006 in the Wall Street Journal and USA Today, on November 5, 2006 in the Times, Washington Post, Los Angeles Times and Chicago Tribune; and in these same newspapers again on the weekend of November 12.

In a “message from the leadership,” the NAR informed realtors that, “[r]ight now may actually be one of the best times to buy a home.” It explained that, “[c]ontracts for home sales in August are up 4.3 percent and the outlook is for home prices to increase next year.” Moreover, it explained, “[h]omeownership is a safe, secure way to build long-term wealth. The national median price of homes bought ten years ago has increased 88 percent” (the suggestion apparently being that one could expect the housing market to see similar gains in the next ten years). The NAR “leadership” encouraged its members to promote the message that it was a “great time to buy” in their local markets, and provided advertising templates for them to do so.

The ads themselves told potential buyers that, “[t]he latest economic forecasts suggest that the real estate market correction is coming to an end, offering consumers a once-in-a-lifetime buying opportunity.” They further explained that, “[f]or prospective buyers, there may never be a better time to buy a home than right

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90 NAR’s Ad Blitz Spawns Major Media Coverage, supra note 96.
92 CANNOT FIND THIS QUOTE ON THE INTERNET
93 Press Release, National Association of Realtors, Today’s Real Estate Market: The Best Time to Buy is Now, supra note 58.
94 Id.
95 NAR: Public Awareness Campaign, supra note 104; see also NAR: Public Awareness Campaign, REALTOR MAGAZINE, November 30, 2006, http://web.archive.org/web/20061130234242/www.realtor.org/pac/ntf/pdf (“State and local associations, you can download a version of the ad with space for your name”).
96 Press Release, National Association of Realtors, Today’s Real Estate Market: The Best Time to Buy is Now, supra note 58.
now.”  They warned potential buyers that home prices were “expected to rise again” and that “[a]s prices begin to rise again buyers who do not act now could be making a costly mistake.”  The ads also declared: “Research indicates that home prices will not go any lower.”

In addition to that bold claim, the ads presented real estate as “the best investment available.”  In making this claim, the NAR cited to statistics that, “U.S. real estate sale prices increased more than 56% from the beginning of 1999 to the end of 2004. The S&P 500 index dipped nearly 6% during that same period.”  The ads suggested that, unlike other investment options, real estate was a risk-free proposition, with truly astonishing profits a likely possibility:

Median existing U.S. home sale prices have increased on average 6.5% each year from 1972 through 2005, and 88.5% over the last 10 years combined. For consumers looking for long-term and stable growth rates, real estate is still their number one choice.

The ads failed, however, to include any disclaimer, like those required with marketing materials for mutual funds, that past returns are not indicative of future gains and that investing can result in losses to principle.  To the contrary, the NAR assured buyers that, “[h]omeownership is a safe, secure way to build long-term wealth.”

NAR press releases around the same time were designed to reinforce the message of the ad campaign that real estate was a no-lose proposition: “Keep in mind that over time, home prices rise at the rate of inflation plus one-to-two percentage points — buyers in most of the country who plan to stay in their home for a normal period of homeownership can pretty well bank on those historic averages.”  NAR press releases also reinforced the conception that real estate was an almost sure route to strong returns: “Since the typical owner stays in a home for six years, it’s more useful to look at the five-year comparison for metro area home prices — most of them are seeing strong gains. The median five-year price gain is 41.8 percent.”  Finally, the ads encouraged people to ignore concerns

97 Id.
98 Id.
99 Id.
100 Id.
101 Id.
102 Id.
103 17 C.F.R. 245.206(4)-1, infra note 183.
104 Press Release, National Association of Realtors, Home Sales Forecast Lowered, Prices to Dip Temporarily, supra note 72.
105 Press Release, National Association of Realtors, Fourth Quarter Metro Home Prices & State Sales Likely Have Hit Bottom, (Feb. 15, 2007); see also id. (“Over the last five years … 155.3 percent, and Los Angeles-Long Beach-Santa Ana, up
about the housing market: “Media reports of a vast market decline are deceiving, and consumers will benefit from purchasing a home now before prices begin to rise once again.”

As the housing market continued to deteriorate in 2007, the NAR expanded on its “Public Awareness Campaign” with a $40 million media buy, including “television and radio ads that [began] running on January 15 and January 29.” The 2007 media blitz marked “the most extensive outreach effort since the Public Awareness Campaign began” and ads were aired “more than 8,750 times on national TV and radio outlets and more than 25,000 times on local radio stations through a national buy.”

The new ads, captioned “Every Market’s Different, Call a Realtor® Today,” encouraged individuals to discount talk of national housing crisis: “Many media reports about trends and developments in the housing market are on a national level and don’t capture what’s happening in individual communities across the country.” Instead, the campaign “highlight[ed] favorable conditions for home buyers and explain[ed] how Realtors® can help buyers make smart decision in their local marketplace.” “In some parts of the country,” the NAR explained, “it may be the best time to buy a home since 2001...Home buyers should act before their window of opportunity closes.”

The “Every Market’s Different, Call a Realtor® Today” campaign explicitly highlights the role of the “all real estate is local” mantra played in helping real estate agents defray buyer’s concerns as the housing market declined in 2006 and 2007. By emphasizing that all real estate is local, agents could dismiss concerns about the national housing market as inapplicable to the local market:

None of the areas with price declines had previously experienced rapid growth. Generally, these were lower-cost areas experiencing one of both of the conditions necessary for temporary price softness – local economic weakness, mainly in jobs, or a large supply of homes available in the local market.”

142.3 percent, followed by the Miami-Fort Lauderdale-Miami Beach area of Florida, up 135.4 percent.”).

106 Press Release, National Association of Realtors, Today’s Real Estate Market: The Best Time to Buy is Now, supra note 58.


108 Id.

109 Id.

110 Id.

111 Id.

112 Id.

113 –Press Release, National Association of Realtors, Metro Home-Price Appreciation Stays Hot Across Country, supra note 65; see also –Press Release,
In addition to explaining that “none of these conditions necessary for temporary price softness” were present in the local market, a savvy real estate agent could also suggest special reasons why the local market was uniquely strong, such as: “The Gainesville area has a strong and stable underlying economic foundation. The University of Florida and other governmental entities really drive the local economy and offer great job opportunities.”

The “Every Market’s Different, Call a Realtor® Today” campaign also encouraged individuals to hire and trust realtors to guide them through the complex world in which every local real estate market required specialized expertise to understand. Realtors, the ads explained, could competently advise homeowners as to whether buying a home in *their particular area* was a wise investment decision.

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114 *Florida’s Existing Home Sales Slower in October 2007*, P.R. NEWSWIRE, Nov. 28, 2007, available at http://www.thefreelibrary.com/Florida’s+Existing+Home+Sales+Slower+in+October+2007.-a0171853411; see also *A tale of two markets*, CNNMONEY.COM (February 13, 2006), http://money.cnn.com/2006/02/13/real_estate/twomarkets_fortune/index.htm (reporting that realtor Gary Watts, didn’t hesitate when asked if the “good times” in Orange County (which had seen a 195 percent rise since 1997) would last another year: “Fifteen percent is pretty much in the bag for Orange County in 2006. . . . It’s impossible for prices to go down this year.”); *Un-Real Estate*, PLANET JACKSON HOLE, at 11 (September 6, 2006), http://www.planetjh.com/issues/2006_09_06.pdf (reporting that realtor Linda Walker declared, “[i]n Jackson, the market doesn’t really go down,” and that real estate broker Ryan Olsen agreed: “‘We are immune to the up and down trends that plague many real estate markets,’ he says. ‘Our real estate market is essentially quite ‘bullet proof!’”).

115 Press Release, National Association of Realtors, NAR Sees Opportunity Knocking for Many Buyers, But Timing is Key, *supra* note 120 (“These new advertisements explain how Realtors® insight and experience into their local markets add real value in today’s dynamic real estate environment” and “Consumers considering a home purchase should contact a Realtor® to take advantage of the current environment now, said National Association of Realtors® President Pat Vredevoogd Coombs in a press conference today.”).

116 Press Release, National Association of Realtors, NAR Sees Opportunity Knocking for Many Buyer, But Timing is Key *supra* note 120 (“As local real estate
Moreover, a concurrent media campaign called, “Someone You Can Trust,” promoted the “REALTOR® Code of Ethics” and assured buyers that their realtor would, with “honesty and integrity,” look out for their best interest in helping them decide whether to purchase a home and what to pay for it:

Our Realtor® members handle hundreds, if not thousands, of real estate transactions over the course of their careers, and can counsel and guide consumers through the process. Realtors® have the expertise and experience to help sellers protect their investment and help buyers build theirs.117

While it would be impossible to quantify the impact of the NAR’s $40 million advertising campaign as the market began to decline, according to the NAR’s “annual tracking research” the commercials “made a big impact with consumers over time.”118 In other words, the NAR’s research suggests that many now underwater homeowners otherwise wouldn’t have bought homes in 2006 and 2007 in absence of the NAR’s media push to convince them to do so.

Walking Away Scot-Free

Unlike buyers, who have been stuck in underwater homes, and lenders, who have also taken significant losses, the NAR has walked away scot-free from its role in contributing to the housing crash and the losses that its inaccurate advice caused homebuyers. Moreover, real estate brokers and agents have kept the billions of dollars in commissions, including $100 billion in 2005 alone, generated, at least in part, from assurances to their clients that the prices they paid for their homes actually reflected the homes’ value and that buying a home was a good investment.119 Indeed, the NAR indicated to the New York Times that it is not aware of any case where a real estate agent has been held liable for inaccurate representation as to a home’s value or its investment potential.120 Westlaw and Lexis-Nexis

117 Press Release, National Association of Realtors, NAR Sees Opportunity Knocking for Many Buyer, But Timing is Key supra note 120
118 Id.

Real estate agents generally escape liability because courts treat them as mere salespeople, or connecters of sellers and buyers, who bear no legal liability for their pronouncements about the health of the housing market or their investment advice,\footnote{122}{See e.g., Flaherty, 808 F. Supp. 55 (holding, in the wake of the mid 80s housing boom gone sour, alleged misrepresentations of real estate broker were mere predictions and opinions about real estate market rather than statements of fact that were susceptible of actual knowledge and thus statements couldn’t support purchaser’s fraud cause of action.); STE Fin. Corp. v. Popkin, 1991 Mass. App. Div. 204,*10 (1991) (“agents’ statement of the current market value of Unit #304 was properly found by the trial court to be an expression of opinion or dealer’s talk, the agents’ additional representation that the unit could be ‘sold at a profit’ after one year was clearly an opinion as to the increased future market value of the condominium and thus an inactionable statement of ‘conditions to exist in the future.’”); Dancin, 291 S.W.3d at (holding that the investor did not have a right to rely upon real estate agent’s prediction of future profitability of property.); Pacesetter, 85 Cal. Rptr. 39, 43 (statements that “buildings would be an excellent investment” if purchaser received rents contemplated were statements of opinion concerning future estimated rentals and were not fraudulent misrepresentations.).}

Courts also generally refuse to hold realtors responsible when they misrepresent a property’s fair market price\footnote{123}{ReMax, 537 S.E.2d at 142 (Real estate agent’s statements to purchaser that sellers’ home was a good buy and was in good condition were mere statements of opinion that were not actionable for fraudulent misrepresentation).}

or mislead investors as to a property’s rental value.\footnote{124}{Stevenson, 99 N.W.2d 690 (statement than apartment was “a good investment property” and “would bring in $300 per month rental income” not actionable).}

Instead, courts typically hold that matters of price are matters of opinion, not fact; that the buyer is assumed to have done their own research;\footnote{125}{McRae v. Bolstad, 676 P.2d 496 (Wash. 1984) (holding that the buyer has an obligation to himself to inform himself of the market).}

and that the buyer is not entitled to rely upon their agent’s opinions.\footnote{126}{See e.g., Flaherty, 808 F. Supp. at 62 (holding that “no risk/no lose” statement was “clearly puffing and thus any reliance would be unreasonable as a matter of law.”).}

Courts generally find that, absent fraud or non-disclosure of a material “fact,”\footnote{127}{See P.C. Murray, Real Estate Broker and the Buyer: Negligence and the Duty to Investigate, 32 Vill. L. Rev. 939 (1987) (discussing liability for failure to discover or disclose material defects).}

real estate agents are not responsible for their opinions, no matter how wrong or recklessly given. In short, courts echo the

popular view that homebuyers have no one to blame but themselves for their decision to purchase their house.

This legal and popular instinct to place complete responsibility on the buyer is understandable in terms of the buyer’s responsibility to the outside world. It should be no answer, for example, against a mortgagee’s claim for a deficiency judgment that the mortgagor’s real estate agent gave them bad advice when they purchased their homes (except perhaps for cases where the realtor and the mortgage broker both work for the same company). The buyer selected their agent and they should not be heard to complain to a party not responsible for that choice that their agent induced them to pay too much for their home, induced them to buy at the wrong time, or otherwise led them wrong.

But one might question why, if a real estate agent negligently, recklessly or intentionally made inaccurate pronouncements about the housing market or gave misleading investment advice to his client, the agent should completely escape personal responsibility for his actions – either for the advice itself or for offering opinions as to matters outside his expertise. It is unclear why the ethos of personal responsibility does not extend to the agent. Moreover, absolving real estate agents of responsibility for their advice creates a genuine moral hazard in which agents profit from the buyer’s purchase of a home, but bear no risk if the advice that they gave to induce that purchase is wrong, or intentionally misleading. Real estate agents risk other people’s money – and get paid even if the agent knows that the risk is reckless, or downright foolish.

Treating real estate agents as mere salesmen also runs counter to their self-description as professionals and to their representations to their clients that they owe them a fiduciary duty to look out for their best interest – an obligation that mere a salesperson does not have. Nevertheless, courts seem to assume that homebuyers do or should understand that, despite their agent’s protest to the contrary, their agent is no different in principle than a car salesperson. Everyone knows not to trust a car salesperson to look out for their best interests. Puffery is to be expected and one should enter a car lot at their own

129 As discussed above [or will be discussed above], the Realtors’ Code of Ethics provides that realtors owe a fiduciary duty “to protect and promote the interests of their client,” “shall avoid exaggeration, misrepresentation, or concealment” and shall not undertake to provide services “outside their field of competence.” Code of Ethics, supra, at arts. 1,2,11. Moreover, in early 2006 as the market began to decline, the NAR launched a nationwide advertising campaign design to foster public trust in realtors called “Someone You Can Trust,” which it ran concurrently with advertising campaign designed convince potential clients that, “It’s a Great Time to Buy.” The NAR pitched the “Someone You Can Trust” campaign as a way to “promote the REALTOR Code of Ethics and highlight the honesty and integrity that REALTORS bring to the every transaction.”
risk. As far as most courts are concerned, the same apparently goes for hiring a real estate agent.

**Hardwired to Trust**

The legal rule that buyers may not reasonably rely upon the advice and opinions of their real estate agents is out of step with what cognitive science literature tells us about human decision-making. This literature suggests that the more uncertain a person is about a decision, the more likely they are to seek out and trust expert advice. Additionally, individuals are more likely to trust experts when facing complex tasks, when the expert is perceived to be more knowledgeable and experienced, when the expert is confident, when the expert is able to offer convincing rationales, when the expert’s opinion is consistent with advice from other perceived experts, and when the expert offers a case specific opinion.

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130 Lyn M. Van Swol & Janet A. Sniezek, *Factors Affecting the Acceptance of Expert Advice*, 44 British J. Soc. Psychol., no. 3, at 444, (Sept. 2005) (“uncertainty is an antecedent to the decision to trust another.”); id. at 445 (“a novice judge is likely to have high levels of uncertainty answering questions. However, they can reduce their uncertainty by trusting an expert advisor for advice); Sniezek & Van Swol, *Trust, Confidence, and Expertise in a Judge-Advisor System, supra*, at 298 (“In fact, the less expertise Judges had, the more they trusted the Advisors.”).

131 Dilek Onkal et al, *The Relative Influence of Advice from Human Experts and Statistical Methods on Forecast Adjustments*, 22 J. Beh. Decision Making, no. 4, at 392 (Oct. 2009) (“It has also been suggested that task complexity influences the extent of advice discounting, with judges appearing to discount advice less when the task is difficult.”) (citing

132 Van Swol & Sniezek, *Factors Affecting the Acceptance of Expert Advice, supra*, at 443 (“An advisor’s expertise should be an important factor in a judge’s decision to use an advisor’s advice. Indeed, research has found that judges are more likely to accept advice from expert advisors than novice advisors.”).

133 Van Swol & Sniezek, *Factors Affecting the Acceptance of Expert Advice, supra*, at 446 (“Confidence is defined as a person’s degree of belief that his or her decision is accurate and correct. Many studies have found that advisors and group members who express higher confidence are more influential.”) (internal citations omitted); Sniezek & Van Swol, *Trust, Confidence, and Expertise in a Judge-Advisor System, supra*, at 298 (“[H]igh Advisor confidence, and Advisor comments giving information or expressing high confidence, were positively related to Judges’ trust, and the former cue was related to Judge matching behavior.”); id. id. at 306 (“Information asymmetry leads to a trust asymmetry and in the absence of other information about a person, confidence may act as an important cue to trust.”).

134 Onkal et al, *supra*, at 393 (“Such agreement may reinforce belief in each individual expert’s forecast and the perception that the experts are able to draw on a common wisdom.”).

135 Onkal et al., *supra*, at 393 (“a common reason for rejecting statistical guidance is the perception that statistical methods are not applicable to unique individual cases If the expert’s forecast is perceived to be ‘case-specific’, [sic] it is likely to
Every one of these factors is likely to be present in a typically residential real estate transaction. First, buying a home is a complex transaction and most buyers of residential real estate are “amateurs making infrequent transactions on the basis of limited information and with little or no experience in gauging the fundamental value of the houses they are buying and selling.”\textsuperscript{136} Moreover, as NAR brochures explain, “real estate has its own language,” which real estate agents understand and buyers do not:

If you don’t know a CMA from a PUD, you can understand why it’s important to work with a professional who is immersed in the industry and knows the real estate language.\textsuperscript{137}

As such, buyers are likely to feel a great deal of anxiety and uncertainty about buying a home, and feel unqualified to do so on their own. This is precisely the type of situation in which individuals are most likely to seek advice.

In particular, individuals are likely to seek advice from a perceived expert, or someone with superior knowledge and experience in the housing market. The perceived expert of choice is frequently a real estate agent. Indeed, as discussed above, the NAR has devoted millions of dollars in advertising to promote “Realtors” as real estate experts who “handle hundreds, if not thousands, of real estate transactions over the course of their careers,”\textsuperscript{138} and who posses specialized expertise on local real estate markets.\textsuperscript{139} Recent surveys suggest that this marketing has been effective, with a significant percentage of individual believing that real estate agents attract far more attention than the ‘base rate’ forecast of the statistical method.”\textsuperscript{136} (internal citations omitted).

\textsuperscript{136} Margaret Hwang Smith & Gary Smith, \textit{Bubble, Bubble, Where’s the Housing Bubble?}, \textit{Brookings Papers on Econ. Activity}, at 3 (Spring 2006); see also Harold W. Elder et al., \textit{Buyer Search Intensity and the Role of the Residential Real Estate Broker}, 18 J. REAL ESTATE FIN. AND Econ., no. 3, at 351 (May 1999) (“The residential real estate market is characterized by complex, confidential, and infrequent market transactions, a heterogeneous product, and high information and transaction costs. It is in this type of market that institutionalized intermediaries, such as real estate brokers, typically arise”).

\textsuperscript{137} Why You Should Work With a REALTOR®, \textit{supra}.

\textsuperscript{138} Press Release, National Association of Realtors, NAR Sees Opportunity Knocking for Many Buyers, but Timing is Key, \textit{supra} note 120. (“Our Realtor® members handle hundreds, if not thousands, of real estate transactions over the course of their careers, and can counsel and guide consumers through the process. Realtors® have the expertise and experience to help sellers protect their investment and help buyers build theirs.”) \textit{Id}.

\textsuperscript{139} Press Release, National Association of Realtors, NAR Sees Opportunity Knocking for Many Buyers, but Timing is Key, \textit{supra} note 120. (“These new advertisements explain how Realtors® insight and experience into their local markets add real value in today’s dynamic real estate environment.”).
can be trusted as ethical advisors and resources for real estate information.\textsuperscript{140}

Buyers are particularly likely to trust their real estate agent if their agent express confidence in their judgments.\textsuperscript{141} It is thus unsurprising that NAR’s Realtor® Magazine advises that real estate agents, “[a]nswer objections with confidence: Know how to respond the next time you’re confronted with tough questions.”\textsuperscript{142} Moreover, the magazine offers scripts that agents can practice in order to appear “confident and persuasive.”\textsuperscript{143} Unfortunately, to the extent that an agent’s confidence is borne from rehearsed scripts, rather than actual knowledge, it risks leading the buyer astray.\textsuperscript{144}

Buyers can also be misled by the rationales that real estate agents offer for their advice and opinions. For example, when prices were booming, an agent might have explained – following the lead of the NAR’s chief economist - that the high prices were being driven by economic “fundamentals.”

\textsuperscript{140} James E. Larsen et al., The Ethics of Real Estate Agents: A Comparison of Realtor and Public Perceptions, 10 J. REAL ESTATE PRAC. & EDUC., no. 1, at 41 (2007) (“The public perceptions of real estate agents revealed in the Gallup Poll no doubt contributed to the implementation, in 1998, of an ongoing public awareness campaign by the National Association of Realtors (NAR). The extensive campaign was designed to enhance the image of Realtors and distinguish them from real estate licensees who are not NAR members. In addition, NAR commissioned Riter Research to conduct an annual tracking study to measure the campaign’s impact. The results of the most recent tracking study suggest that the campaign has been fairly successful. In 2004, 46% of 900 individuals who had purchased or sold real estate in the past twelve months (or planned to purchase or sell real estate within the next twelve months) stated that Realtors are ‘someone you can trust.’”); see also Keates, supra (noting, “[r]ealtors are the most trusted resource for real estate information.”); see also Dilek Onkal et al., supra, at 392 (“The term ‘expert’ itself carries connotations of great knowledge and experience and acts as an advertisement for the advice itself. The frequent use of experts in print and broadcast media carries an implied message that their advice is reliable.”).

\textsuperscript{141} Van Swol & Sniezek, Factors Affecting the Acceptance of Expert Advice, supra, at 453 (“Expressions of confidence had a powerful effect on influencing people.”); Sniezek & Van Swol, Trust, Confidence, and Expertise in a Judge-Advisor System, supra, at 290 (“Another variable that is important in reducing uncertainty about advice is the level of confidence of the Advisor. Confidence is the strength with which a person believes that a specific statement, opinion, or decision is the best possible. High Advisor confidence can act as a cue to expertise and therefore influence the Judge to accept the advice.”) (internal citations omitted).


\textsuperscript{144} Van Swol & Sniezek, Factors Affecting the Acceptance of Expert Advice, supra, at 445 (“[A] novice judge is likely to have high levels of uncertainty answering questions. However, they can reduce their uncertainty by trusting an expert advisor for advice, but in the process of doing so they make themselves vulnerable to any incompetence or ill will on the part of the advisor.”).
What supports the housing markets are income gains, job creation, consumer confidence, and mortgage rates. We have all of the above still supporting us. Meanwhile, the demographic trends are wonderful. You have boomers buying homes and retirees living longer. The boomer children are now first-time home buyers. Everything still points to strong demand for home buying.\textsuperscript{145}

Such rationales seemed plausible and were convincing to many people, including buyers and real estate agents alike. But none of the rationales advanced to justify high home prices were based on careful empirical examination:

There are various theories bandied about in the media as to what is really causing home prices to increase. The majority are advanced by real estate industry representatives in an attempt to convince homebuyers that the prices they are seeing are completely rational and easily explained and that, therefore, no one should worry about the price stability of the market going forward. The thinking is that if a reasonable explanation can be presented for why home prices are astronomically high, then maybe they will remain there or increase in the future and thus encourage buyers not to delay their purchases. The problem with almost all of these armchair empiricists is that they make no attempt to tie their explanations of rising prices to the evidence observed in the market. A thorough explanation would require a statistical analysis to see whether there is indeed a correlation between the causes they present and actual home price movements.\textsuperscript{146}

\textsuperscript{145} \textit{Investing in Real Estate: Housing Takes a Deep Breath}, supra.

\textsuperscript{146} TALBOTT, \textit{SELL NOW!}, supra at 56; see also id. at 166 (explaining that, “none of the popular explanations of why housing prices deserve[d] to be at these high levels [made] much sense.”); id. at 164 (“Housing bulls also make a number of statements that are just plain wrong. They argue that housing construction costs are escalating, when the opposite is true. They think that larger homes with greater amenities explain the price increases, but statistics shows this not to be the case. The same home sold multiple times over a ten-year period is increasing dramatically in value…Housing bulls look to the health and growth of the economy as a reason for the increase in home prices. What they fail to see is that the housing bubble is the sole reason there is growth in the economy. Without the housing boom and associated banking, mortgage industry, and construction activity, there would be no economic growth.”); id. at 21 (“Different theories, both in support of the bubble premise and against it, are discussed, but no attempt is made to see if individual theories actually help explain the housing price data we have witnessed to date or if
Nevertheless, the important factor in engendering trust is not the actual accuracy of a rationale, but whether it sounds convincing when given.\textsuperscript{147} Delivery is as important as content. Scripts can again be helpful in this regard. After prices began to decline, for example, NAR’s Realtor\textsuperscript{R} Magazine provided realtors with scripts for dealing with clients worried about the advisability of buying in a down market.\textsuperscript{148} One such script suggested realtors assure their clients, “[e]ven if home prices fall slightly over the short term, you’re still likely to come out ahead if you live in your home for eight or nine years, as you plan to do. Historically, housing prices have risen about 6 percent a year, according to NAR.”\textsuperscript{149} This particular script also they can stand up to tough critical questioning from experts in the field.”); Smith et al., \textit{supra}, at 93 (“Crucially, and as we argue elsewhere, it is the involved emotional version of the economy, not the detached rational format, that prevails in practice.”).

\textsuperscript{147} Onkal et al., \textit{supra}, at 392 (“Even when experts are poor at forecasting, they may be able to provide convincing and valid explanations of past and present events. Experts are also usually good at communication and will generally supply a clear rationale to underpin their forecasts.”) (internal citations omitted).


\textsuperscript{149} The entire script from which this excerpted read as follows:

Buyer: “All I read about in the papers are how real estate prices are falling. Why would I want to buy now when I’ll be able to get a better deal later on?”

You: “It’s true that real estate prices have declined slightly nationwide in the last couple of months, but that’s after an increase of some 88 percent in the last 10 years. In fact, according to the NATIONAL ASSOCIATION OF REALTORS\textsuperscript{R}, 2007 is the fifth best year in the history of real estate in the United States. You do intend to live in your new home for a while, don’t you?”

Buyer: “Yes, we want our 10-year-old to finish high school before we move again.”

You: “Even if home prices fall slightly over the short term, you’re still likely to come out ahead if you live in your home for eight or nine years, as you plan to do. Historically, housing prices have risen about 6 percent a year, according to NAR.”

\textit{(You should cite your own market’s price figures in this answer, especially if you’re in a market with stable or rising prices. If that’s the case, emphasize that all real estate is local.)}

Buyer: “Still, it wouldn’t hurt to wait a while, would it?”

You: “One big reason to buy now is that interest rates are still near historic lows. But if oil prices and other rising costs push up inflation, as some economists think they will, interest rates will
advised realtors to emphasize that all real estate is local: “You should cite your own market’s price figures in this answer, especially if you’re in a market with stable or rising prices. If that’s the case, emphasize that all real estate is local.”

Not only did such scripts assist realtors in providing seemingly persuasive rationales to many individual buyers, they also highlight the role of the NAR as the central source of information for real estate agents and in standardizing the language that agents use when talking to their clients. This standardization exploits an additional psychological propensity of individuals to trust advisors if their opinion is consistent with advice from other perceived experts.

Equally as critical, a potential buyer will frequently have been “primed” by NAR advertisements and by statements of public experts to accept his agent’s advice as true. For example, if the buyer has read in the paper or heard on television that one can expect steady returns of 6% on real estate, they will tend to believe an agent who tells them the same thing. They might even take the fact that the agent has “confirmed” what they already “knew” as evidence of the agent’s expertise. They buyer is not likely to remember, however, the previous source of this information, even if the source was the NAR’s own economist, David Leaher. Indeed, the echo effect in NAR’s

probably go up, too. That can make your monthly mortgage payment higher and affect how much home you could buy.

Buyer: “Yes, that’s a good point.”

You: “Another reason that it’s a great time to buy is that there’s a big inventory of houses to choose from right now. A couple of years ago, when the market was overheated, I had buyers who would just buy the first thing they saw because they were so afraid of not getting any home at all. Now you have the option of more time and a bigger choice so you’ll get the best home for you. And because of the large inventory, you’re in a better position to negotiate a price discount with the seller than you will be when the market begins to strengthen.”

Filisco, supra.

The NAR Magazine website offers realtors updated scripts that realtors are encouraged to practice and tailor to their local markets. See Quick Sales Scripts, REALTOR® MAGAZINE, http://www.realtor.org/rmosales_and_marketing/scripts (last visited Oct. 15, 2010).

Additionally, as discussed above, realtors - like other human beings - tend to exhibit herding behavior, increasing the chance that a potential buyer will hear the same advice from different realtors.

Filisco, supra. at 444 (“Cued judges tend to be more accepting of advice and more swayed by an advisor’s confidence level than independent judges and they tend to engage in less information processing.”)
efforts to market real estate tends to go unnoticed by buyers. Moreover, this echo effect is frequently amplified by other “experts” in the media who, in typical herding behavior, similarly trumpet real estate as a no-lose proposition.\textsuperscript{154} Given this priming, it’s no surprise that amateur buyers tend to put too much trust in their agents’ congruent explanations as to why real estate is a great investment.\textsuperscript{155}

Finally, buyers – like other human beings - are likely to trust experts who offer case specific opinions.\textsuperscript{156} Offering case specific opinions is, of course, at the heart of what many real estate agents do for buyers. Moreover, when offering an opinion as to the value of a particular piece of real estate, the agent will typically come armed with some convincing rationale, including most typically a “comparative market analysis” that will purport to show the objective “market value” of the subject property.\textsuperscript{157} Indeed, real estate agents tend to speak of market price as a definable fact that they possess special skills to ascertain,\textsuperscript{158} using language such as “the market provides the price” and “the market has spoken and the price is too

\textsuperscript{154} See Onkal et al., supra , at 393(“In macroeconomic and earnings forecasting, experts often manifest herding behavior so that their forecasts are similar. Such agreement may reinforce belief in each individual expert’s forecast and the perception that the experts are able to draw on a common wisdom.”) (internal citations omitted).

\textsuperscript{155} Sniezek & Buckley, supra , at 160(“Such cueing of one of the alternatives was found to raise overconfidence above the level observed….this ‘cueing effect’ had opposite effects on accuracy and confidence – simultaneously making people less correct but more confident. . . .Cueing is thought to make people less accurate but more confident about their accuracy because it reduces information processing about the uncued alternative.”); Onkal et al., supra , at 401 (“It may be that multiple advice from similar sources increases the salience of the advice (relative to the individual’s initial forecasts”)); Sniezek & Van Swol, Trust, Confidence, and Expertise in a Judge-Advisor System, supra , at 291(“Cueing is common with information asymmetry because Judges with low expertise have difficulty making an independent choice. Compared to independent choice, cueing tends to reduce information search and accuracy and increase confidence.”).

\textsuperscript{156} Onkal et al., supra note 144, at 393( finding that case specific “expert advice” receives more attention by individuals seeking assistance than does statistical guidance).

\textsuperscript{157} Smith et al., supra , at 85 (“[P]art of the data suggests that—in their working lives at least—market intermediaries have a very explicit economic model of housing markets in mind. In this economic conception of the world, markets revolve around supply, demand and price and, although intermediaries facilitate transactions, they are powerless to alter market outcomes or behaviors in any fundamental way.”).

\textsuperscript{158} Smith et al., supra , at 87 (noting that real estate agents tend to believe that “[i]t is no more the role of a housing intermediary to question the concept of markets (much less interfere with their basic mechanisms) than it is the role of a doctor to query the idea of contagious disease. The role of both professionals is to know enough about their specialist objects to serve their clients.”); id. at 90 (“Their key claim to expertise is, indeed, in their accurate understanding of price—being able to set prices, having a good idea of what is a reasonable, rational valuation is, and being able to predict what the property will sell for.”).
They will also speak to specific characteristics of the house and assign them some “market value” presumably based upon the agent’s superior knowledge and expertise as to what each item is worth (e.g., plus X amount for the pool, granite counter tops, and stainless steel appliances, and minus X amount for the small closets, lack of a master bath, and awkward floor plan).  

In focusing narrowly on current “market value”, the agent’s price opinions miss many other important considerations:

Nowhere in his analysis is there a reference to what prices have done historically, what they are in comparable neighborhoods in other cities and other countries, or what the raw land is worth if put to other uses. No, his total emphasis is on measuring what occurred most recently in the local market in comparable housing sales. If the market is rational and always achieves reasonable pricing, this is an adequate approach. But it can be self-reinforcing if real markets like housing have a tendency to inflate and run away with themselves. If they do, what sense does it make for an expert to opine that a price paid is reasonable when compared to the most recent crazy price paid for similar properties in the community?

Nevertheless, lacking experience in determining the value of property and believing the real estate agent is an expert in such matters, the buyer is called to trust the agent’s determination as to the “objective” market price. As long as the agent is confident, trust is exactly what the buyer is likely to do.

Social scientists who have studied the tendency of individuals to trust human experts have argued that belief in the judgment of

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159 Smith et al., supra, at 86 (“Across the interviews, in response to a direct question on whether market professionals are implicated in price rises, there is an insistent (though not unqualified) message that ‘it’s the market that sets the prices’ ... ‘respond to market conditions’ ... ‘You’ve got to follow the market.’ The aim is to get prices ‘right’, not to influence or change them to any other effect.”).  
160 Smith et al., supra., at 87 (professional home price valuations strive for an air of detachment and scientific authority when placing values on particular features of a home).  
161 Smith et al., supra, at 86 (“The model of markets most widely held among the housing professionals we spoke to is one which presumes that markets are ‘things’ which are external to people and have an actancy of their own: ‘It’s only the, you know, the market that’s driven it [prices] up.’”).  
162 TALBOTT, supra, at 120-121; see also Smith et al., supra, at 92 (“[B]y believing themselves to be powerless against a tidal wave of independent market forces, the work of intermediaries may help to place the system beyond control . . . There is reference to ‘herd instinct’ as people agree to prices whose only predictor is the price other have paid.”).
human experts is a deeply rooted, psychological need, borne of the desire for certainty in the face of uncertainty. Others have suggested that it may be borne of evolutionary psychology, as individuals who trust knowledgeable experts tend to make better decisions that those who do not. However, this tendency to trust also leaves individuals vulnerable to incompetent, reckless, or conflicted advice – including such advice from their real estate agents.

Choosing a Path

At a basic level, courts’ descriptions of what individuals should do when making complex financial decisions about whether to purchase homes (i.e. – ignore the opinions of their agents) is at odds with what people actually do (which is to seek and trust expert advice). Moreover, most people likely hire a real estate agent without any knowledge, or reason to suspect, that their agent’s “false statements concerning the market are held to be matters of opinion, judgment, seller’s talk” - and that their agents are not legally accountable for the advice that they give.

This approach is not only detached from the concrete reality of real estate transactions, but also fundamentally unfair to buyers, who are doing exactly what an amateur who must make a complex decision typically will do: engage and trust an advisor that they believe to be a qualified expert to guide them through the process. In addition to leaving unsuspecting homeowners without redress, not holding real estate agents to account runs counter to notions of professionalism and the ethos of personal responsibility.

There are two basic ways to address the discrepancy between homebuyers’ psychological propensity to trust their real estate agents and the general legal rule that buyers may not reasonably rely upon

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163 Onkal et al., supra, at 402 (“Our belief in the judgment of human experts appears to be deeply rooted and may be motivated by different considerations that moderate our personal decisions like justifiability or our individual psychological needs, such as a need to believe that the world is predictable and controllable.”) (internal citations omitted).

164 Sniezek &Van Swol, Trust, Confidence, and Expertise in a Judge-Advisor System, supra, at 303 (trust in experts “actually put them at risk and vulnerable to any incompetence or malice by the Advisor.”).

165 Janet A. Sniezek and Lyn M. Van Swol, Trust, Confidence, and Expertise in a Judge-Advisor System (“People facing important decisions may solicit the advice of physicians, brokers, consultants, therapists, or even psychics. Uncertainty is aversive in most situations, and one way to reduce it is social information search, i.e., the solicitation of information from another person.”); Id. (“when people have low self-confidence, they are more likely to trust another source for information over themselves.”)

their agents’ advice. The first path is to change the legal rule, fully professionalize the real estate agents’ relationships to their clients, and formalize their fiduciary duty. The second – and opposite – path is to bring the real estate agent’s role in line with the legal rule, which means de-professionalizing the realtor-client relationship and clearly delineating real estate agents “mere salespersons.”

The first path may find the most support with real estate agents, as there has been and continues to be a substantial movement among real estate agents to professionalize their vocation. Indeed, as previously discussed, the NAR markets “realtors” as professionals and many real estate agents tend to see themselves as professionals, rather than mere salespersons. But despite strides toward professionalization, the real estate brokerage industry has still resist legal responsibility when real estate agents negligently or recklessly offer inaccurate advice, or even intentionally manipulate their clients into making poor decisions.

If real estate agents are to be treated as “professionals,” however, they should be subject to regulations similar to those to which other advisory professionals are subject. As an analogous profession, for example, investment advisors have an “affirmative obligation” under the Investment Advisors Act “of utmost good faith and full and fair disclosure of all material facts to their clients, as well as a duty to avoid misleading them.” Investment Advisers must also be competent,\(^{168}\) “have reasonable and objective basis for investment recommendations,” and must ensure that that “any investment recommendations are appropriate considering the client’s financial objectives, needs and situation.”\(^{169}\)

As a corollary to this fiduciary obligation, investment advisors also have a duty to act to disclose potential conflicts of interest in writing to each client and to avoid “fraudulent, deceptive, or manipulative” behavior.\(^ {170}\) Such behavior is defined to include advertisements that suggest, directly or indirectly, that any past recommendation of the investment advisor were or would have been profitable without prominent including on the first page the following disclaimer: “it should not be assumed that recommendations made in

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\(^{168}\) Sec. and Exch. Comm’n v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (U.S.N.Y. 1963)(emphasizing the fiduciary nature of the adviser profession and thus the duties of utmost good faith and reasonable care naturally flowing from the position)

\(^{169}\) U.S. Securities and Exchange Commission,General Information on the Regulation of Investment Advisers, www.sec.gov/divisions/investment/iaregulation/memoia.htm.(last visit November 7, 2010) Investment advisers owe a fiduciary duty to provide only suitable investment advice.” “This duty generally requires an investment adviser to determine that the investment advice it gives to a client is suitable for the client, taking into consideration the client's financial situation, investment experience, risk tolerance, and investment objectives

\(^{170}\) 17CFR275.206(4)-1]
the future will be profitable or will equal the performance of the securities in this list.’’ Additionally, investment advisors may not make statements that are false or otherwise misleading.

State laws also often subject investment advisers “to substantial liability for inappropriate advice, fraudulent actions, and other related misfeasance.”

State law claims run the gamut, including breach of fiduciary duty, negligence, misrepresentation, fraud, breach of contract, churning, lack of disclosure, as well as statutory claims based upon specific state securities law provisions. Similarly, a plaintiff may rely on a range of legal principles to hold the employing firm vicariously liable along with, or instead of, the adviser.

Given that real estate agents who advise prospective buyers as to the value and investment potential of real estate are engaged in substantially similar activities as investment advisors - with an equal or greater risk of harm to their clients for misleading or inaccurate advice - they should be arguably be subject to a similarly stringent standard. Indeed, the nature of an advisory profession is risking liability if one misleads or otherwise breaches one’s fiduciary duty to one’s clients. This fiduciary duty includes not only a requirement that one’s advice must be objectively reasonable, but also that one must conduct adequate research and disclose all information that is reasonably relevant to the decision about which client has sought advice.

In other words, a real estate agent who merely repeated the NAR’s line that there was no housing bubble (and later that prices might level out but never decline) would not have fulfilled her fiduciary obligation to look out for her client’s best interest and to discover and disclose relevant information. The debate among prominent economists in 2005 and 2006 as to whether the U.S was in a soon-to-burst housing bubble would have been relevant information to most individuals contemplating purchasing a home at that time. Similarly, declining housing market indicators in late 2005 and early 2006 would have been relevant information to many buyers – and particularly relevant to those who sought their real estate agents’ advice regarding whether it made financial sense to buy or to wait. Though one cannot say what any individual homebuyer would have done with such information, it’s safe to assume that at least some would have decided to sit it out.

Regardless of a client’s ultimate decision, being a professional carries an obligation to be vigilant in fully advising clients of the risks associated with purchasing a home (particularly in an inflated or
declining market). Professional advisors should not, as the NAR Realtor Magazine suggests, push their clients “off the fence” by misleadingly suggesting that renting costs 7 times more than owning, or by telling them that they can “pretty much count on” appreciation of inflation plus 2 percent. Professional advisors should not practice scripts that “accentuate the positive” or engage in any form of puffery. Rather, they should soberly caution clients about potential negatives and positives and help clients dispassionately weight benefits and risks. And they must put their clients’ interests ahead of their own at all times, even if it means losing the sale or the client. In other words, if professionalism is to be the chosen path, real estate agents must accept a fundamental change in their role in real estate transactions. They must also give up the benefits of being mere salespersons, including the benefit of being largely free from legal liability.

If professionalism comes at too great a cost, real estate agents could embrace their role as salespersons, not only when sued but also when representing themselves to clients. Indeed, given that real estate agents are unlikely to agree as to the best path, there could be two categories of agents: “real estate advisors” and “real estate brokers” - just as there are investment advisors and stock brokers. In this two-tiered system, real estate advisors would be free to represent themselves as professional real estate experts (provided that they could demonstrate sufficient knowledge of real estate valuation, real estate investment and housing market economics). Such advisors might be in high demand to buyers looking to make wise purchasing decisions. But in exchange for the trust of buyers, real estate advisors would be required to accept potential legal liability similar to that of investment advisors.

Real estate brokers, on the other hand, would bear no responsibility for customers’ unwise purchasing decisions – aside from being required to disclose known material facts and defects about the property itself. In exchange for this free pass, and to protect buyers, brokers under such a system would be barred from

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171 Qualities of a Successful Salesperson, REALTOR MAGAZINE, Apr. 2010 ("I look for sales experience and a sales personality. I ask candidates about the sales cycle and how they handle it. Real estate is just the product; I can teach them that. It’s the Sales 101 that I’m hoping they come with."). available at www.realtor.org.rmobrokers/articles/2010/1004_forbrokers_successfulsalesperson.
172 North American Securities Administration Association, Series 65 and Series 66 (Series 65 is the Uniform Investment Advisor Law Examination and 66 is the Uniform Combined State Law Examination for securities agents and investment adviser representatives) available at www.nasaa.org/industry_regulatory_resources/exams/733.cfm. Investment adviser must, for example, pass an exam demonstrating that they know “how to evaluate the financial stability of a company issuing a particular security and how to estimate that investment's potential growth over time”. They must also posses “a good grasp of how the economy works and what factors influence market cycles.”
representing themselves real estate advisors, as “professionals,” or as “experts” possessing specialized knowledge in real estate. Rather, brokers would be limited to representing themselves simply as salespersons. As salespersons, brokers could still provide many helpful services, including helping their customers find a suitable home, analyze and select neighborhoods and schools, and navigate the closing process.

But brokers would be strictly prohibited from offering advice or opinions as to the appropriate purchase price for a particular property, the current state or direction of the real estate market, or whether purchasing real estate is a wise investment decision. Broker training would emphasize that brokers are not to volunteer such opinions, and must respond to questions seeking such opinions by telling their customers that they are not legally allowed to offer an opinion. Brokers who broke this rule should also be strictly liable if their advice or opinions turned out to be inaccurate.

Of course, as learned in the case of stock brokers, merely prohibiting real estate brokers from offering investment advice or opinions as to price would not likely prevent some from doing so. Prohibitions on advice giving would also need to be combined with mandatory disclosure of both the broker’s lack of expertise and the broker’s conflict of interest. Such disclosures would be designed to encourage homebuyers not to rely upon their broker’s opinions and instead to seek independent, unbiased information elsewhere. The disclosure would need to be clear, unequivocal and in plain English.

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173 See Christopher T. Robertson, Epistemic Reliance and Bias, 60 Emory Law Journal 22 (2010). (“…as the epistemic asymmetry ratio approaches zero, and the bias ratio grows, [ ] policy interventions, such as an outright ban on those with conflicted interests providing advice, will become more salutary.”)

174 Harold W. Elder, Leonard V. Zumpano, Edward A. Baryla, Buyer Search Intensity and the Role of the Residential Real Estate Broker, Journal of Real Estate Finance and Economics (“Buyers and sellers who use a broker reduce their own search intensities, substituting the broker’s efforts for their own. Since brokers have more effective search technology, they have the ability to obtain a match more quickly than those who search on their own.”)

175 Id.

176 The point here is to create a strong deterrent effect and to avoid collateral litigation as to whether the advice given by the realtor was “reasonable.” The amount of damages might, however, be capped at three times the realtors commission, as the goal is deterrence, not shifting all responsibility from the buyer to the realtor.

177 As discussed above, individuals are most likely to trust experts who express a high degree of confidence in their opinions. Requiring realtors to disclose that they are not in fact experts might reduce this effect by compelling realtors to express uncertainty. Reduced confidence from the realtor should make the buyer more open to considering conflicting information.

178 Robertson, supra note 186, at 30 Though research has suggested that mandatory disclosures can be detrimental when it’s in an individual’s best interest to follow expert advice, “only in situations of high epistemic asymmetry will it be worrisome for a policy to drive a wedge between a layperson and her advisor.”
It would also need to be in large print, on one page, and separate from other information that the buyer might receive:

<table>
<thead>
<tr>
<th>What is a Real Estate Broker?</th>
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<tbody>
<tr>
<td>A Broker is a Salesperson.</td>
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<tr>
<td>The More You Pay for Your House, the More Money Your Broker Makes.</td>
</tr>
<tr>
<td>A Broker is not an expert on the economics of the housing market.</td>
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<tr>
<td>A Broker cannot advise you as to what you should pay for a house.</td>
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<tr>
<td>A Broker is not qualified to advise you whether buying a house is a wise investment decision.</td>
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<tr>
<td>A Broker who advises you as to these things is breaking the law.</td>
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Buyer Acknowledgement/Date

Given the role that we’ve grown accustomed to “realtors” playing in real estate transactions, such a disclosure may seem a bit jarring. But the above disclosure is, until the last sentence, consistent with court opinions holding that real estate brokers are mere salespersons, whose opinions should be disregarded as puffery. The last “breaking the law” sentence would merely state the law if real estate brokers were barred from offering advice, as this article proposes. Putting brokers and their customers on equal footing in understanding the broker’s legally constrained role would also serve as an added deterrent to brokers tempted to step over line.179

It would not likely be enough, however, to give buyers effectively-worded disclosures. Rather “evidence suggests that disclosure policies should, where practicable, target laypersons before they receive substantive advice from conflicted advisors.”180

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179 See Robertson supra note 186, at 26-27 (Combining the disclosure with a legal prohibition would also help avoid the risk that the disclosure would provide realtors with “‘moral license’ to give even more biased advice.”).

180 Robertson supra note 186, at 25.
Disclosures given afterward are less effective because, once an individual has been given advice, they will anchor to that advice and insufficiently discount it when learning later that the advice was given by someone with a conflict of interest or lacking in actual expertise. For example, if a broker tells an uninformed buyer that a house is worth $400,000, the buyer will anchor to that number (even if actual – but unknown – value is really $100,000). The buyer will then discount the number by a more or less random amount. The tendency, however, would be to end up much closer to $400,000 than $100,000.

The same goes for advice as to the investment potential of real estate. If a broker confidently tells a uninformed buyer that they can expect the value of a house to increase by at least 50% within six years, the buyer may discount that advice by some amount, but is still likely to think that real estate must be a really good investment (even if it is, in fact, a mediocre to poor one). Similarly, if a broker tells an uninformed buyer that, after factoring in tax breaks and expected appreciation, renting is 7 times more costly than owning, a buyer may discount this statement by some amount, but is likely to conclude that owning must be significantly less costly than renting (even if the opposite is true).

Research suggests, however, that individuals are less likely to anchor to advice if they know that the advisor has a conflict of interest at the time the advice is given - or if they know the advisor has no special expertise to begin with. As such, regulations would need to require brokers to give the above disclosure (or something

181 Dilek Onkal, Paul Goodwin, Mary Thomson, Sinan Gonul and Andrew Pollock, The Relative Influence of Advice From Human Experts and Statistical Methods on Forecast Adjustment, Journal of Behavior Decision Making ("Armstrong’s seersucker theory (Armstrong, 1980) suggests that people’s faith in experts’ judgment and advice persists even when there is overwhelming evidence that these experts are no more accurate than people with only basic knowledge.")
182 Press Release, National Association of Realtors, Today’s Real Estate Market: The Best Time to Buy is Now, supra note 58 (citing a Forbes article that highlighted HUD statistics pointing to a 56% increase in home sale prices from 1999-2004 and implying that all homes significantly increase in value in a few years time)
183 Press Release, National Association of Realtors, NAR: To Buy or Not to Buy; NAR Consumer Brochure Answers the Question (Jul. 19, 2006).
184 Robertson supra note 186, at 24.
185 Lyn M. Van Swol and Janet A. Sniezek, Factors affecting the acceptance of expert advice “An advisor’s expertise should be an important factor in a judge’s decision to use an advisor’s advice.”; Dilek Onkal, Paul Goodwin, Mary Thomson, Sinan Gonul and Andrew Pollock, The Relative Influence of Advice From Human Experts and Statistical Methods on Forecast Adjustment, Journal of Behavior Decision Making (explaining that “The term ‘expert’ itself carries connotations of great knowledge and experience and acts as an advertisement for the advice itself, meaning that individuals tend to discount advice from perceived experts less than advice from non-experts.”
similar) at the very first interaction with their customers. A dated buyer’s acknowledgement should be included at the bottom of the disclosure to ensure that it happens at the appropriate time.

Finally, at the same time that buyers are given the above disclosure, they should be given information as to where they can go to get unbiased information about home prices and the housing market. In the real estate context, this would mean directing individuals to information sources without any interest in encouraging them to buy, or pay more, for a house. It would also include steering individuals away from the NAR, a trade organization dedicated to promoting the interests of the real estate brokerage industry and thereby to encouraging individuals to buy houses. The point though is not to leave potential buyers alone - with no help in making a very difficult decision - but to direct them to information so that they can educate themselves and to places where they can seek unbiased advice.

While providing a comprehensive list of such information sources is beyond the scope of this article, sources might include www.fhfa.gov, where individuals can access the Federal Housing Finance Agency’s monthly House Price Index and other housing data. The website also has a “Home Price Calculator,” where one can enter in a home’s most recent sales price and date and get an estimate of the home’s current value. Another possibility would include the Standard & Poor’s website where individuals could access Case-Shiller housing market reports, which not only provide information

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186 See Robertson supra note 186, at 39 (The clearest remedy to the epistem ic asymmetry with conflicting interests is to a) force disclosures of the conflicts, and b) make sure that laypersons also have access to, and actually use, unconflicted advisors too.”)

187 See Talbot at 21-22 (“It is no coincidence that many of the biggest housing price bulls today who express the strongest positive opinions regarding the health of the housing market happen to work for real estate, housing construction, or mortgage industry organizations such as the National Association of Realtors (NAR). Turning to the NAR’s chief economist for advice on housing prices is like asking the devil whether he likes warm climates. You would do much better to seek the opinions of people not so directly involved in the issue you are trying to explore.”)

188 Directing buyers to information sources that might conflict with the real estate industry would also have a positive effect on buyer’s decision making process, as it would tend to encourage “consideration of all information available in the environment.” Janet A. Sniezek and Timothy Buckley, Cueing and Cognitive Conflict in Judge-Advisor Decision Making (“opposing recommendations of advisors will have a generally positive effect on performance because it encourages the consideration of all information available in the environment...conflict should effectively eliminate the cueing effect by forcing judges to process evidence about multiple alternatives.”)

189 Individuals could also, of course, check Zillow.com and Truilla.com for their estimates as to a particular property’s value – as well as price trends and other housing market information. Cite to Trulia, which releases a quarterly Rent vs. Buy index http://www.truliacom/2010/10/08/trulias-rent-vs-buy-index-reveals-top-10-cities-for-renting-owning-homes-2/
on home value trends, but also existing home sales, unsold inventory, mortgage foreclosures, and housing starts. Under the two-tiered system proposed in this article, individuals might also be given contact information for an “Association of Real Estate Advisors,” which could direct them to professionals who would bear a fiduciary obligation to provide objectively reasonable advice and to look out for the buyer’s broadly-defined best interest.

Finally, individuals working with brokers and/or real estate advisors should be given printed information as to where they can hire an independent and qualified appraiser to give them an estimate of what they should offer for a particular home. Additionally, they should be told in writing where, if they so desire, they can hire a licensed investment advisor who can advise them as to the comparative attractiveness of real estate as opposed to stocks, bonds, or other investment vehicles. Then, if an individual decided to buy a particular home and determined a price that they were willing to pay, their broker and/or real estate advisor could help in negotiating with the seller to get the best possible price that the seller is willing to accept.

**Conclusion**

The above discussion is not intended to disparage the majority of real estate agents who work conscientiously and ethically for their clients. Rather, the proposals in this article are all forward-looking and borne of the recognition that real estate agents – like homebuyers, mortgage brokers and banks – played a significant, if unwitting, role in creating the housing bubble and burst. In others words, by

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190 Appraisers have been the subject of intense and justified criticism in the wake of the housing market meltdown. During the housing market boom, too many appraisers were both unqualified and corrupted by relationships to mortgage brokers and realtors. See Talbot at 120 (“The real estate agency business is very competitive, and the agent only gets paid if he closes the deal. The appraiser is introduced into the process to provide some moderating influence, but he also is paid only if his numbers support the deal price. The appraiser might ask the real estate agent to bring him other overpriced deals in the neighborhood that he can put in his comparables list to justify the high price being paid. There is no motivation to achieve a realistic level of valuation in the neighborhood, only an effort to garner the highest valuation possible.”). Many continue to argue that many appraisers are unqualified and are often wildly inaccurate. CITE. For reform proposals addressing appraisers see CITE.

191 See Robertson supra note 186, at 30 (“in a robust marketplace for advice, a disclosure of bias may have the salutary effect of driving laypersons to better advisors.”)

192 Susan J. Smith, Moira Munro and Hazel Christie, Performing (Housing) Markets (noting how agents’ “actions fed into a spiral of rising prices” and that it is possible that this air of uncertainty [around rising prices] was nurtured (or at least tolerated) by market professionals because it proved financially convenient…. Professional
drawing lessons from the past, the proposals are designed to prevent its reoccurrence. Moreover, the hope is to engage real estate agents in discussing these forward-looking proposals - and not to punish them for past mistakes.

That said, it must be recognized that many homeowners might not currently be stuck in underwater homes if more real estate agents had listened to that voice inside themselves telling them that the market was crazy, had sought to educate themselves about the dangers of an inflated market, and had advised their clients that they might want to sit it out. Additionally, much suffering could have been avoided if the NAR had been a more objective purveyor of information to the public and to its members - instead of a cheerleader for the housing market encouraging potential buyers to get in before the “window of opportunity” closed.

A genuine moral hazard underlies the current role of real estate agents and the NAR. This moral hazard fueled the housing market bubble and contributed to the suffering of many people that the NAR and its realtor members encouraged to buy homes as prices began to decline. Unfortunately, the legal system allows real estate agents to benefit from the trust associated with portraying themselves as professionals, yet to avoid the consequences of the advice that they give – no matter how reckless or objectively misleading that advice may be. Other than their reputation, real estate agents have no skin in the game. They profit if people buy, but suffer no loss if they buy in error. This state of affairs is unfair to unsuspecting buyers and runs counter the ethos of personal responsibility. It should continue no more.

Real estate agents should be required to choose between two paths: (1) fully professionalize their role, including accepting legal liability when they negligently, recklessly or intentionally make inaccurate or misleading pronouncements about a home’s value or investment potential; or (2) embrace their role as “salespersons” and refrain from offering advice or opinions about the real estate market to their customers.

intermediaries benefit financially from the uncertainty around volatile rising prices”)

193 Susan J. Smith, Moira Munro and Hazel Christie, Performing (Housing) Markets (“Equally, they are not rewarded if buyers make a return on their investment, nor are they penalised if buyers later experience a capital loss.”