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Is it a crime to be a dual agent?

by Ronald R. Rossi

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Many, many years ago, when a state senator proposed that it should be a misdemeanor for a real estate agent or company to act as a "dual agent" (*i.e.*, for the agent or company to represent both the buyer and the seller in a real estate transaction), the real estate industry went ballistic.

In response to that proposed legislation, the California Association of Realtors, in conjunction with the then Division Department of Real Estate, set up a task force, and I was privileged to be selected as a member. After working on the problem for years, our committee suggested that the legislature pass a dual agency statute allowing real estate companies and agent to be dual agents.

In one particular set of circumstances, however, buyers, sellers, real estate agents, and brokers are often confused about their rights and obligations under the law. That situation arises when one agent in an office has the listing and another agent in the same office (or a branch office of the same company) has a buyer. Do both individual agents owe fiduciary duties to the other principals? In other words, does the listing agent owe a fiduciary duty to the buyer and, conversely, does the agent working with the buyer owe a fiduciary duty to the seller?

Knowing what is required in these circumstances is critically important because when one is a fiduciary, one is required to, and must without fail, tell its principal everything one knows and share all information one possesses that is material to the principal's interest. A fiduciary's failure to share material information with the principal is called "constructive fraud." This is a term the law invented to cover situations where

fraud is present without fraudulent intent. In other words, if a fiduciary makes a careless misstatement that causes harm to its principal in any way, that may constitute constructive fraud, even though the fiduciary had no fraudulent intent.

In real estate litigation, the relationship between a principal and a fiduciary is an extremely important relationship.

A recent case, *Horiike v. Coldwell Banker*, decided on April 9, 2014, put this issue to rest. In that case, Coldwell Banker was the brokerage company, and one of its agents prepared a property listing for a seller. That listing erroneously listed the square footage of a Malibu estate as approximately 15,000 square feet. This estimate turned out to be either erroneous or ambiguous and was subject to different interpretations.

A potential buyer went through another Coldwell Banker agent, who did not tell the buyer about discrepancies regarding the square footage or inform the buyer that another potential buyer backed out of the transaction because of the uncertainty as to the actual square footage of the property. The trial court held that the listing agent owed no duty to the buyer. The Court of Appeal, however, strongly disagreed and reversed that opinion.

The Court of Appeal held that the listing agent owed a fiduciary duty to the buyer and the buyer's agent owed a fiduciary duty to the seller, because the broker was a dual agent representing both parties. The appellate court held that because the listing agent knew the square footage of the property had been measured and reflected otherwise in different documents, he had a duty to give that information to the prospective buyer and that even though it might not have been intentional, he breached his fiduciary duty by failing to communicate all material information he knew about the square footage.

Many agents working for the same broker, while in theory understanding the concept of dual agency, still end up forming allegiances to either buyer or seller in a dual-agency situation and thus (though often not consciously) believe they are responsible to only one party, not both, in terms of fiduciary obligations. The *Horiike* case helps to explain that dual agency is tested at the office level, and no matter how many agents a real estate company has, if one agent at one location has a listing and another agent at a different branch of the same company has a buyer, they are still dual agents, and both represent both the buyer and seller and owe fiduciary duties to both of them. This is why it is critical that agents understand their agency relationships, whom they represent, and what duties they owe.



Laurie and I had two very challenging real estate rights issues that we were advised were going to be difficult to prevail on. The RHRC team engaged with us and helped us understand our rights and prevailing position. RHRC were thoughtful advocates for us from the beginning to conclusion of our cases. We feel fortunate to know we will always be able to call on the firm in the future and that they are our legal counsel.

Albert "Rocky" and Laurie Pimental, President of Global Markets and Customers, Seagate Technology

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