PERSPECTIVES

Brokers in dual agency face new legal risks

By Talon Powers

In a recent decision, the California Supreme Court imputed the fiduciary duties that a supervising broker or corporate broker owes their clients to all "associate broker licensees" (a term which includes both brokers and salespeople working under another supervising broker's license). While the facts underpinning the decision hold an associate broker licensee responsible for the general duties of disclosure that any listing broker would owe a buyer regardless, the implications of the duties imposed by the California Supreme Court have the potential to create new legal risks for brokers in dual agency.

In Horiike v. Coldwell Banker Residential Brokerage Company, et al., a family trust engaged Chris Cortazzo, a salesperson at Coldwell Banker, to be the listing agent for a luxury residence in Malibu. In preparing to list the property, Cortazzo found conflicting information about the property's living area, and used the larger number of 15,000 livable square feet in his listing.

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The plaintiff, Hiroshi Horiike, had been working for several years with Chizuko Namba, another salesperson at Coldwell Banker. After some negotiations, Horiike and the trust agreed on a price for the Malibu property and entered into a dual agency arrangement with Coldwell Banker where Coldwell was both the listing agent and the selling agent.

When preparing to do work on the property after the sale had closed, Horiike found public records indicating that there was less livable square footage than advertised. Horiike then filed suit against Cortazzo and Coldwell Banker alleging a breach of fiduciary duty.

Under the California Civil Code, a broker in a dual agency representation owes a fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the seller and with the buyer. This fiduciary duty includes the duty to learn and disclose all information materially affecting the value or desirability of the property. The only limitation on this duty in a dual agency situation is that the broker may not disclose (1) that the seller is willing to sell the property for less than the listing price, or (2) that the buyer is willing to pay a price greater than the listing price.

In the Horiike decision, the California Supreme Court concluded that when an associate broker licensee represents a brokerage as either its listing agent or selling agent in a real property transaction, that associate broker licensee has the same duties as the brokerage. This means that the associate broker licensee representing the seller in a dual agency transaction has a fiduciary duty to the buyer (including the duty to learn and disclose all information materially affecting the value or desirability of the property), and vice-versa.

Of course, this fiduciary duty to learn material information and inform all parties is well established when an individual broker or associate directly represents both a seller and buyer (or landlord and tenant). What Horiike clarifies is that these duties continue to apply when one associate represents a seller and another associate represents a buyer, where both associates are working under the same broker.

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One way of understanding this duty would be to think of all associate broker licensees working under a single broker or brokerage as being a team, required to share all information with all parties and with everyone involved with the transaction owing the same duties to all principals being represented.

It is reasonable to expect that following the Horiike decision we will see future lawsuits aimed at determining the boundaries of the duty to "learn and disclose." Does a seller's associate broker licensee, for example, have an obligation to disclose to the buyer that the seller is in financial or reputational peril where the seller's issues could have a theoretical material effect on the value or desirability of the property? Does a buyer's associate broker licensee have a duty to disclose a higher or better use for the property unforeseen by the seller? And what is the scope of the duty to affirmatively seek out knowledge harmful to a represented buyer or seller?

The California Supreme Court fully acknowledges that such potential conflicts of interest are quite likely, but concluded that such conflicts are inherent issues with dual agency representations generally. While it concludes a legislative fix is possible (and points out that examples already exist in Alaska, Connecticut, and Illinois), there is no guarantee that the California Legislature and Governor will act in the immediate future. In the meantime, any brokers who engage in dual agency representations need to consider what their standards and practices for supervised associate broker licensees are, especially those relating to the associate broker licensee learning and disclosing material information about a listed property.

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