



Courtside *Newsflash!*

California Supreme Court Issues Opinion on Horiike v. Coldwell Banker Residential Brokerage Company, et. al.

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HOLDING:

- On November 21, 2016, the California Supreme Court published its long awaited opinion on Horiike v. Coldwell Banker Residential Brokerage Company, et. al.
 - The primary issue before the Court was whether an associate licensee owed a duty to the buyer to learn and disclose all information materially affecting the value or desirability of the property.
 - If you would like to access the Supreme Court's opinion, please visit <http://www.courts.ca.gov/opinions/documents/S218734.PDF>.
- The Supreme Court unanimously agreed with the holding of the Court of Appeals.
 - The language of California Civil Code § 2079.13(b) states that when a brokerage acts as a dual agent of both the buyer and the seller, the respective agents licensed under that broker have the same fiduciary duties to the clients as that of the broker.

OVERVIEW SUMMARY OF FACTS:

- Hiroshi Horiike ("Horiike") filed a suit against Coldwell Banker Residential Brokerage Company ("CB") in November 2010 after he purchased a residential property in Malibu that he later discovered had significantly smaller acreage or square footage than had been represented to him by the CB listing agent, Chris Cortazzo ("Cortazzo"), who was an associate licensee of CB.
- Horiike argued that Cortazzo breached his fiduciary duty to Horiike, even though Cortazzo was not Horiike's agent. Horiike was exclusively represented by his own CB salesperson, who worked in a different office of CB and who Horiike did not want to sue.
 - Traditionally, only an agent who directly represented a buyer or seller in a transaction would owe that party a fiduciary duty. Here, Cortazzo did not represent Horiike, the buyer of the property, because Cortazzo directly

represented the seller of the same property. As such, Cortazzo would have only owed a general duty to Horiike and a fiduciary duty to his client, the seller of the property.

- Horiike argued that Cortazzo owed a fiduciary duty to investigate and inform him of the incorrect acreage or square footage because Cortazzo was an associate licensee of CB, and CB had entered into a dual agency agreement with Horiike.
- Horiike initially lost the case at trial but prevailed on appeal.

DUAL AGENCY DEFINED

- Dual agency is a relationship in a real estate transaction in which the listing broker represents both the seller and the buyer in the same transaction.
 - Sometimes the same agent in a brokerage will represent both the buyer and the seller. Here, the seller had one CB agent and the buyer had another CB agent.

TWO TYPES OF DUTIES TO THE CLIENT

- Fiduciary duties include the need to disclose all material information that an agent knows or could reasonably obtain relating to the property or transaction that would help the client make a well-informed decision.
 - Under a fiduciary duty, a broker is expected to research, investigate and learn important information that could affect their client's decision in the transaction and to advise and counsel with regard to that decision.
- General duties include the need to disclose all facts relating to the transaction that materially affect the value or desirability of the property that would otherwise be undiscoverable through diligent attention and observation.

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THE LANGUAGE OF CIVIL CODE SECTION 2079.13(B):

- The last sentence in Statute 2079.13(b) states, “When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions.”
 - The Court stated the last sentence of the Statute establishes that fiduciary duties are required by salespeople involved in a dual agency through a brokerage, and that such duties are the same as those required by the brokerage because sales agents cannot work independently of the broker.
 - If the law was meant to separate a broker’s fiduciary duties to a client in a dual agency transaction with that of a salesperson’s general duties to the client involved in that relationship, the Legislature would have drafted the law with this distinction in mind.

THE HISTORY OF DUAL AGENCY:

- The legislative history was a prime factor in the Court’s decision. California law allows dual agency but requires that disclosures discussing fiduciary and non-fiduciary duties are made available to all clients involved (C.A.R. Form AD, “Disclosure Regarding Real Estate Agency Relationship”), and that clients give informed consent to the dual agency.

THE ISSUE OF CONSENT:

- In order to participate in a dual agency relationship, all parties, not just the client, must give their informed consent.
- The Court held that Cortazzo and Horiike did consent to a dual agency relationship because Cortazzo was acting as the salesperson under CB, and could not have acted independently of CB.
 - Therefore, because CB consented to the dual agency, so too did Cortazzo. As a result, Cortazzo was then charged with fulfilling CB’s “fiduciary duty to learn and disclose all material information affecting the value or desirability of the property” on behalf of Horiike.

CONFIDENTIALITY CONCERNS:

- CB argued that confidentiality issues would arise for each party if a fiduciary duty is owed to both sides of the transaction when a broker is acting as the dual agent and each respective associate licensee has the same duties as that of the broker.
 - The Court acknowledged that CB had legitimate concerns regarding confidentiality,

but did not fully address the issue as the Court decided to leave the issue for another day.

- Instead, the Court stated that the narrow disclosure duty in this particular case created no such conflict because the general duty Cortazzo already had to Horiike was “strikingly similar” to the fiduciary duty Cortazzo failed to provide since the acreage issue was a material fact affecting the value or desirability of the property.
- The Court stated that the provided no opinion as to whether Cortazzo did breach a fiduciary or general duty to Horiike, only that such a duty existed as a result of the dual agency agreement with CB.
- Current law already creates specific statutory limitations on the duties of a dual agent with regard to pricing issues on a transaction.
- Any further concerns regarding the scope dual agency and confidentiality concerns should be addressed with the Legislature.

OVERALL:

- Focusing on the facts of this case, the concept of dual agency has not been expanded, but instead has been clarified to establish that both associate licensees and brokerages in a dual agency relationship owe fiduciary duties to each client in the transaction.
- The Court did not establish a means for associate licensees to be released from a fiduciary duty which means that if a brokerage decided to enter into a dual agency relationship, it would still legally be able to do so, but the associate licensees of both parties to the transaction would owe a fiduciary duty to the party who was not the salesperson’s client.
- The Court’s holding has the potential to create new requirements for commercial brokerages or alter a company’s fiduciary duty when engaged in a dual agency relationship.
 - Some companies may react by limiting dual agency relationships all together, which could hinder buyer choices in the market since a brokerage has no ability to anticipate when a seller of a property is represented by the same brokerage.
- Changes to dual agency disclosures may be necessary, but may not be enough since many of the documents signed in the transaction process are either not read or not fully understood by consumers.

Educational seminars regarding broker training, information sharing, and more may be required in order to maneuver through the revised landscape of dual agency.