California Supreme Court Case Challenges Ethics of Dual Agency

In what could become a precedent-setting case, the California Supreme Court has now heard the oral arguments that will scrutinize the long standing practice of dual agency by real estate firms. The case, Horiike vs. Coldwell Banker Residential Brokerage Company began on September 7th.

The original case was based on a dispute regarding the square footage of a property purchased by the plaintiff, Hiroshi Horiike. Horiike was represented by the same company marketing the property for sale, Coldwell Banker. But, the case has now morphed into an examination by the court of the practice of dual agency. The question of whether any one brokerage firm can really represent two different parties - buyer and seller or tenant and landlord - and provide "conflict free" representation to each side within the same real estate transaction will be examined by the court.

Dual Agency has long been a common practice at both residential and commercial brokerage firms in the US, where the parties to a real estate transaction are represented by an agent (or agents) from the same brokerage company. "In one form or another, every state in the US allows real estate brokers to double-dip on real estate commissions, essentially to make money while trying to represent both sides in a single transaction. Some states call them Dual Agents, Transaction Brokers, Designated Agents, Facilitators or Intermediaries," said William Gary at ITRA MacLaurin Williams in Denver/Boulder. "Frankly, they're all the same lousy thing. These relationships, while they may be legal, allow room for conflicts of interest to occur. In effect, they leave Tenants or Buyers completely without an active advocate in a transaction. Ethically, despite its legality, we believe that it's wrong and we won't do it."

Many of the world's largest real estate companies both practice and encourage dual agency. CBRE, JLL, and DTZ/Cushman & Wakefield all represent property owners and sellers which are their primary clients and source of income. But, these same firms also represent corporate tenants and buyers in lease and sale transactions. In many cases, these dual agents are actually members of the same in-house leasing team that represents the landlords or sellers, so the opportunity for conflicts of interest is very high. Yet, these firms have long insisted that they have internal policies which mitigate potential conflicts of interest.

With respect to a dual agent providing the same services as a designated tenant rep firm when representing a space user or tenant, Debra Stracke Anderson, Chair Emeritus of ITRA Global, added "When dual agency exists, it is far more likely that a tenant will be steered to a building that is managed or leased by the dual agent's company for one of their landlord clients. The listing agent's fiduciary responsibility is solely to the landlord, so the dual agent's incentive to aggressively negotiate on behalf of the tenant rather than the landlord is significantly diminished for fear of losing the listing and the lucrative business of the landlord client entirely. The dual agents keep the entire commission in-house, while providing a new tenant for their landlord client, viewing this as a win-win. However, we see it as a huge conflict of interest and certainly detrimental to the best interests of the tenant."

"Colorado's real estate laws are far more advanced than those in California. Licensed Brokers here have long had written disclosure requirements for Consumers of real estate services. But Colorado still allows Transaction Brokers and Designated Agents, both of which are simply Dual Agency under other names. All of them deprive Tenants and Buyers of a true advocate in transactions. The Gold Standard of Representation is Single Agency Representation and that is solely what we practice," noted Gary.