

DIRT Periodic Development for Wednesday, June 18, 2014  
**Fiduciary and Nonfiduciary Duties**

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California allows a real estate broker to be a dual agent, but then provides that s/he owes fiduciary (and nonfiduciary) duties to both sides of the transaction. Inevitably that causes trouble as two recent decisions have demonstrated. My column on those cases is below.

### FIDUCIARY AND NONFIDUCIARY DUTIES

#### Introduction

Two decisions reported in this issue inevitably invite comparison. In *Saffie v. Schmeling* (2014) 224 CA4th 563, announced by the Fourth District on March 17 and reported on p 68, a buyer who discovered that he could not build on the property that he had just purchased sued the listing and showing brokers for providing him with an optimistic 1982 earthquake fault hazard investigation report (the “earthquake” report) without also saying that the report had become unreliable after the 1994 Northridge earthquake, so that what he thought was a buildable lot was not, and he would have to spend more money than it was worth on geological investigations to make the lot buildable. He prevailed against his own showing broker (who did not appeal), but he lost against the listing broker, in both the trial and appellate courts, on the ground that his loss was due entirely to his own showing broker’s failure as a fiduciary and not to anything done wrong by the listing broker.

On the other hand, on April 9, in *Horiike v. Coldwell Banker Residential Brokerage Co.* (2014) 225 CA4th 427, reported on p. 68, the Second District ruled that a listing salesperson, as a fiduciary, could be liable for misdescribing the acreage of the property sold, even though he himself was representing only the seller, not the buyer. That conclusion was based on the fact that the two salespersons involved worked under the single broker’s license of Coldwell Banker (CB), which meant that the relationship between CB and the principals was a dual agency, and that dual agency characterization applied to each of the two salespersons individually. That meant that the listing salesperson owed to the buyer fiduciary obligations and not just ordinary nonfiduciary duties, even though he thought (and said on the agency confirmation sheet) that he was representing only the seller.

So we have one case—*Saffie*—holding that a listing salesperson is not a fiduciary of the buyer (and therefore not liable for fiduciary breaches), and another—*Horiike*—saying

that the listing salesperson there was a fiduciary (with potential fiduciary liability to him). I'll call *Horiike* the profiduciary case and *Saffie* the nonfiduciary one.

### **Fiduciary to One Side or Both?**

In *Saffie*, although not stated explicitly, no fiduciary relationship between the listing salesperson and the buyer was found to exist because the salesperson worked for a broker who was the agent of only the seller, whereas the salesperson in *Horiike* was held to be fiduciary because he worked for the broker who also represented the buyer—albeit through a different salesperson. It was the dual agency feature of *Horiike* that made the listing broker a fiduciary of the buyer, a feature that was not present in *Saffie*, making that listing salesperson not a fiduciary of the buyer.

The *Horiike* conclusions of dual agency when a single house represents both principals, and dual agency responsibilities that trickle down to both salespersons despite what they think, are rather inarguable, in light of CC §2079.13(b), which says just that. If the broker (Coldwell Banker) was a dual agent because it represented both seller and buyer, then each salesperson was also a dual agent even though he may have thought that he represented only one principal.

The nature of the broker-principal relationship matters because our statutes impose different burdens on fiduciary and nonfiduciary real estate agents. Under CC §2079.16, a real estate agent who is a fiduciary to only one side owes that principal the duties of “utmost care, integrity, honesty, and loyalty,” whereas she owes the other, nonfiduciary principal “diligent exercise of reasonable skill and care,” “honest and fair dealing and good faith,” and a “duty to disclose all facts” known to her that materially affect value. (From now on, I'll refer to an agent with fiduciary obligations as “he” and to an agent with only nonfiduciary duties as “she.”)

When these statutory standards and distinctions first came into existence, I thought that they were impossible. In my column *Broker's Agency Disclosure Law: Misinformation or Disinformation?*, 11 CEB RPLR 113 (July 1988) (findable on my website, RogerBernhardt.com), I challenged the possibility of brokers being able to sensibly explain to their clients the differences between their fiduciary obligations of utmost care, integrity, honesty, and loyalty, and their general duties of reasonable skill and care, honesty, fair dealing, good faith, and disclosure of all material facts, not because I thought that the brokers were incompetent or inarticulate, but because those statutory phrases looked to me like nothing but contradictory clichés, not comprehensible to clients and brokers (or jurors if a dispute gets to trial). (Even the California Association of Realtors (CAR), sponsor of the legislation, got it wrong, referring to the fiduciary category as including “loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and accounting” (Compliance Manual p. 25, Answer 3), thus hopelessly blurring its own distinctions.) So my question is now whether these two decisions make the fiduciary/general distinction any easier to deal with.

## **Fiduciary vs. Nonfiduciary Duties**

In *Saffie*, the court held that it was the duty of the buyer's broker, *as a fiduciary*, to further investigate the reliability of the earthquake report and to appropriately caution the buyer about it. But, as far as the nonfiduciary listing salesperson was concerned, providing the buyer with a copy of the earthquake report fully satisfied his duty of "honesty, fairness and full disclosure." So there is a distinction that can be comprehended: A nonfiduciary agent has only a general duty to not furnish false or incomplete information; she does not have to "make certain that the buyer and the buyer's broker perform the appropriate due diligence" regarding the information she has furnished. On the other hand, a fiduciary agent has the greater duty of assuring that his principal appreciates the significance of the information provided. Because the injury to this buyer resulted from a failure of his own agent to investigate and understand the implications of the earthquake report, he – the showing agent – was the one who would be liable to the buyer. The distinction between fiduciary and nonfiduciary duties did seem to be understandable, contrary to my prediction when the agency disclosure statutes were enacted.

*Horiike* triggers a different reaction in me on that question. After the court of appeal ruled that the trial court had been wrong in holding that the listing salesperson was not a fiduciary to the buyer, the case needed to be remanded to have the jury decide whether that salesperson, and his broker, were liable for fiduciary breaches. The previous jury had already found that the listing salesperson was not liable for negligently misrepresenting the square footage because he honestly and reasonably believed that it was correct, but that finding had been made under the auspices of the trial court's erroneous determination that he was not a fiduciary of the buyer. The appellate court said that, under those circumstances, that jury finding did not dispose of the question of whether the salesperson fulfilled his obligation as a fiduciary to learn all the necessary material facts, to do all the necessary research and investigation, and to give good counsel and advice; because he knew that conflicting measurements as to this property existed, a new jury could find that he breached his fiduciary obligation to the buyer to give this information to him. Constructive fraud by a fiduciary is different from negligence or negligent misrepresentation by a nonfiduciary.

The logic in *Horiike* is unclear to me. Would not even a nonfiduciary agent who was aware of conflicting measurements have a duty to speak out, under his general duty to disclose all material facts? Perhaps my earlier prediction about people getting mixed up about appreciating the distinction between fiduciary and nonfiduciary duties was not misguided, except that I should have included appellate judges, as well as jurors and brokers and principals as those who might suffer the confusion.

## Being a Fiduciary to Rival Principals

But whether or not *Horiike's* ultimate conclusion is correct—that the listing salesperson may have failed to perform the fiduciary duties that he owed to the buyer—the court's process of getting to that issue was surely proper. An agent can be a fiduciary or nonfiduciary, a dual agent will be held to be a fiduciary to both, and each subagent of a dual agent is to be treated the same way. That means that there is no way for a broker who wants to earn a full rather than half a commission (and therefore has to be a dual agent) to lessen her duties to either principal. Conflicting fiduciary obligations are the cost imposed on choosing dual agency, and I doubt that any clever language in the documents or bureaucratic structure in the office can change that.

These dual agency conclusions did not have to be that way. The legislation could have provided that rival subagents at the same house could get themselves treated differently from each other, by erecting appropriate barriers between them. In fact, had we allowed that arrangement, clients would probably have been better served through allowing each separate agent not to worry about fiduciary obligations to the other side interfering with those owed to her separate principal. That might have forced the system to treat brokers as different from their salespersons, but in larger brokerage houses, the broker's liability is more often based on the principle of respondeat superior than on the commission of any bad acts that he/she has done personally. In any event, that is not our current rule, so it is all wishful thinking by me.

The broker industry likes the concept of dual agency, so as to make larger commissions possible. But the price of dual agency is dual fiduciary obligations, which are intrinsically dangerous. Its combination with the barely comprehensible distinction between fiduciary and nonfiduciary duties makes these issues fodder for a field day for trial lawyers.