

## California Supreme Court to Review Important Real Estate Dual Agency Case Affecting Broker and Agent Liability

The California Supreme Court is reviewing the recent Court of Appeals decision *Horiike v. Coldwell Banker* (2014) 225 Cal.App.4th 427. The key issue is whether a listing agent owes a fiduciary duty to a buyer when the buyer is independently represented by a different agent from the same brokerage. The Appellate Court held that the listing agent does owe the buyer a fiduciary duty because agents acting under the broker have the same fiduciary duty to the buyer and seller as the broker.

In *Horiike*, the owners of a Malibu residential property retained Chris Cortazzo of Coldwell Banker to sell their property. The building permit specified that the property's square footage was 11,050 square feet. Also, public record information on the MLS stated that the property had 9,434 sq. ft. of living areas. Despite the contradictory information, Cortazzo marketed the property as 15,000 sq. ft. of living areas in the MLS and marketing flier, based on an architect's letter.

In March 2007, a couple offered to purchase the property. Pursuant to the couple's request for verification of the square footage, Cortazzo provided the letter from the architect but advised the couple to verify the square footage with a qualified specialist, which he reiterated in a visual inspection disclosure. Ultimately, the couple cancelled the transaction. Thereafter, in July 2007, Cortazzo revised the approximate square footage in the MLS listing to "0/O.T," meaning "zero square feet and other comments."

In November 2007, Plaintiff Hiroshi Horiike offered to purchase the property. Horiike was represented by Chizuko Nambo, another real estate agent at Coldwell and received a copy of the flier (specifying the 15,000 sq. ft.) and the building permit. During escrow, Cortazzo and Nambo signed a document explaining that Coldwell was a dual agent of both the buyer and seller since it was the

listing agent and selling agent. Cortazzo never disclosed the contradictory square footage measurements to Horiike and never advised Horiike to verify the square footage with a specialist.

In 2009, Horiike discovered the square footage discrepancy when he remodeled the property. He filed a lawsuit against Coldwell and Cortazzo for breach of fiduciary duty.

The trial court granted Cortazzo's nonsuit on the ground that Cortazzo, as the listing agent, did not owe a fiduciary duty to Horiike.



The Court of Appeal reversed the judgment, finding that Cortazzo, as a licensee of Coldwell, owed Horiike the same fiduciary duty as owed by Coldwell since Coldwell acted as a dual agent of the buyer and the seller. "When one salesperson obtains the listing and represents the seller, and another salesperson employed by the same broker represents the buyers, they both act as employees of the same broker. That broker thereby becomes a dual agent representing both parties." The Court stated that under *Civil Code* section 2079.13(b), "the duty that Cortazzo owed to any principal, or to any buyer who was not a princi-

pal, was equivalent to the duty owed to that party by Coldwell. Coldwell owed a fiduciary duty to Horiike, and therefore, Cortazzo owed a fiduciary duty to Horiike."

The Appellate Court further stated that a jury could conclude that Cortazzo breached his fiduciary duty to Horiike by failing to communicate the material information he knew about the square footage. A fiduciary's duty to disclose all material information to the principal includes the duty to disclose reasonably obtainable material information. The fiduciary must "perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision."

In July 2014, the Supreme Court granted review of the Appellate Court decision. If upheld, the Appellate Court's ruling would have a significant impact on the California real estate industry since the ruling runs counter to the way dual agency has been commonly practiced.

Brokers should consider loss prevention techniques to avoid claims stemming from this recent decision. For instance, brokers may consider updating their handbooks and/or policy manuals, and/or implementing new training seminars to properly educate real estate agents on the fact that listing agents will have a fiduciary duty to a buyer in transactions where the brokerage is in a dual agency situation. Such training should focus on proper disclosures and communication with both the buyer's and seller's principals as well as the agents who are involved in the transaction.

**Please feel free to contact Randy Koenig, Kim Dawley or Wilfred Llauro at Koenig Jacobsen should you have any further questions or comments concerning this case and/or to schedule a loss prevention seminar.**

### KJ Obtains Dismissal of Multi-Million Dollar Claim Against Real Estate Agent & Broker

Plaintiff sued her real estate agent and broker for alleged breach of fiduciary duty, negligence and fraud in connection with the purchase of real property. Koenig Jacobsen represented the agent and brokerage in an extremely contentious and protracted litigation. Plaintiff claimed nearly \$2 million in damages and sought punitive damages. Prior to trial, the court granted Koenig Jacobsen's motion to dismiss the case in its entirety based on complex procedural and jurisdictional defenses. Judgment was entered in favor of the real estate agent and broker.