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Beware Double Agents

New rules for residential brokers on both sides of deals in California have raised old issues in NYC

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Albany has a clear warning for consumers facing brokers who represent both buyers and sellers on a residential real estate deal. “BE WARY OF DUAL AGENCY,” the New York Department of State’s Office of the General Counsel trumpets in bold on its website.

Make no mistake, though — the practice is entirely legal in New York. It occurs when brokers employed by the same firm represent the buyer and the seller. It can also happen when a seller’s broker finds a buyer or tenant for a property and then represents both parties. Such situations crop up frequently in New York City. In 2011, a new law made dual agency easier but at the same time upped disclosure rules about it.

More recently, a California Supreme Court decision has stoked new worries about the future of dual agency. In that November case, Horiike v. Coldwell Banker, the court ruled that a brokerage representing a buyer and seller in a transaction owes both parties the same fiduciary responsibilities. That can be a tall order for residential agents. In New York, clients sign a consent form that basically acknowledges that a dual agency means that the brokerage's attention is divided — but not necessarily evenly. Below is a primer on the complexities of dual agency.

When is dual agency permitted in New York?

In New York, not only can a brokerage represent both sides on a deal. In many cases, it's unavoidable. Here a handful of big firms — Douglas Elliman, the Corcoran Group, Sotheby's International, Brown Harris Stevens and a few others — dominate the market. As a result, having brokers from one firm sitting on both sides of the table is hardly unusual.

What did the 2011 law change?

Before then, brokers were barred from getting advanced consent to dual agency. Such consent basically means that the brokerage obtains written permission from the seller and buyer before a dual agency can take place. Without that permission, prospective parties on both sides had to sign disclosure forms each time an agent from the listing brokerage wanted to show a property to a potential buyer. The bill, signed into law by Gov. David Paterson in August 2010, went into effect in January 2011, paving the way for advanced consent.

The broker still must let the buyer and seller know when a dual agency is about to take place, and get their written consent. But that disclosure comes when "substantive contact" is first made. What constitutes "substantive" is a bit foggy. Typically, matters reach that level when negotiations begin. At that point brokers need written acknowledgement from buyers and sellers that they understand the firm's multiple roles.

In another change, the new law covers dual agency in deals involving condominiums and cooperatives, which were previously excluded from disclosure rules. The new rules also allow sellers and buyers to designate specific agents at a brokerage to represent them should a dual-agency issue arise.

What are the dangers of dual agency?

Having the same broker or brokerage on opposite sides of negotiations can seem, on its face, like an ethical quagmire. But New York state simply requires brokers to obtain clients' written acknowledgement that "they understand that they are giving up their right to the agent's undivided loyalty." From the buyer/tenant perspective, the inherent risk in dual agency is a potential imbalance. The brokerage may or may not act with a client's best interests in mind because it has another client on the same deal.

What penalties do brokers face for nondisclosure?

Failing to abide by the dual-agency disclosure rules can mean a $1,000 fine and, more substantially, forfeiture of commissions. In 2009, a lawsuit involving disclosure of dual agency caused a stir in the real estate industry. In that case sellers of a Park Avenue co-op accused a Douglas Elliman broker of simultaneously working for the buyers without seeking permission. Ultimately, the state's Court of Appeals determined that a dual agency didn't truly exist. Still, the suit highlighted the potential legal dangers for brokers.

Why does the California case matter?
The Golden State's court decision in Horiike v. Coldwell Banker could set a precedent for how dual agency is handled there. In the case, two different brokers from Coldwell Banker — Chizuko Namba and Chris Cortazzo — respectively represented the buyer and seller of a Malibu mansion in 2007. In November, the California Supreme Court unanimously upheld an appeals court ruling that found that the seller's agent owed the same fiduciary duty to the buyer since he too worked for Coldwell Banker. Some industry insiders fear the ruling could change what information sell-side brokers must disclose to both parties. The California Association of Realtors argued that restricting dual-agency transactions could hurt buyers if brokers actively avoid showing them listings held by their brokerage.

Will the California case have repercussions here?
To date there is no indication the Malibu mansion decision will alter New York's handling of dual-agency transactions. Frances Katzen of Douglas Elliman, for one, argues that a move to apply such a fiduciary requirement here would likely face opposition from home sellers and possibly others. "I think it would ruffle feathers in New York quite a bit. Sellers are very protective and want to be handled with a lot of boundaries."

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