

Supreme Court Ruling in Horiike v. Coldwell Banker (dual agency case)

The California Supreme Court has recently issued its opinion in the Horiike v Coldwell Banker case involving issues relating to dual agency. It is important to note that the opinion did NOT outlaw dual agency.

The holding of the Court was that a salesperson working with a seller owes a fiduciary duty to disclose material facts to the buyer in a transaction when both the buyer's and seller's salespersons are licensed under the same broker. It has been long established that listing agents representing the seller have a duty to disclose known material facts about the property and must conduct a reasonably competent and diligent visual inspection of the property and disclose the results of this inspection in writing to the buyer. Nothing in this ruling changes this.

The Horiike case involved an issue of conflicting information regarding the square footage of a residential property. Both the listing agent and the selling agent were affiliated with Coldwell Banker, although they were physically located in different offices. The listing agent indicated that the property was approximately 15,000 square feet both in the MLS and in flyers for the property. In fact, the tax assessor's information indicated that the property had considerably less square footage. The listing agent did provide documentation to the buyer indicating that that the broker had not verified square footage and advising the buyer to investigate square footage. But due to the fact that the listing agent was aware of this discrepancy, the listing agent had the further duty of disclosing to the buyer the existence of this discrepancy as well as advising the buyer that the broker had not and would not verify this information and further advising the buyer to do his own independent investigation of the square footage issue.

The key take-aways from this court decision, as we currently see them, are as follows:

1. All agents who work for the same broker of record, regardless of which office they may be working, are deemed to be dual agents. It is important for you to understand this and treat all such transactions as dual agency transaction. It is also critical that you are aware of which offices within your company have the same broker of record.
2. There is language which seems to state that a listing agent has a duty to investigate or "learn" of issues which might impact the value or desirability of a property and include that with all disclosures to the buyers. We have serious reservations as to whether this will actually be the ultimate interpretation and if so, what is the scope of such investigation. For now, it would be safe to assume that anything which may be within the knowledge of the broker and/or any agents with that broker would be something that should be investigated and disclosed.
3. In all events, the standard concerns of disclosure should be treated very carefully whether or not you are a dual agent. It is critical that listing agents always disclose everything that they know that may be considered a material fact. This applies whether the listing agent is a dual agent or only represents the seller. Anytime there is a discrepancy between public records and information provided regarding square footage, lot size, room count, number of legal units, or any such matters, it is imperative that the listing agent make a complete and thorough written disclosure of the discrepancies. Boilerplate language contained in the CAR forms provide some level of protection, but this language will not protect a listing agent who does not fully disclose the issues and potential discrepancies.

4. Dual agency always carries an additional layer of potential liability and you should be aware of the pitfalls of dealing as a dual agent whether you represent both parties yourself or another agent under the same broker of record represents the other party.

The moral of the story, as always, is disclose, disclose, disclose. And disclose IN WRITING. When transmitting information relative to square footage or the like, it is imperative to identify the source of the information. And when in doubt, DO NOT quote larger square footage, lot size, etc than that which is contained in the public records.