

## Real Estate Agency Law: The Perils Of Dual Agency

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Although it seems counterintuitive, real estate brokers and agents are permitted to act as “dual agents” — agents for both parties in a real estate transaction — provided, however, that there is full disclosure and consent by both principals. In an active real estate market, as we have today, agents often aggressively pursue parties looking to “make a deal” without realizing that they may have inadvertently created an agency relationship and without regard for making timely disclosures to their principals. An agent’s carelessness can have severe consequences to the agent, but it can also undermine the entire transaction between the parties. This article will provide a brief overview dual agency and the perils associated with it.



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Real estate agency is intended to enable a party to participate in the real estate market through the expert services of another’s efforts. Here, real estate agents bring a wealth of experience and knowledge to a field where the principal market participants are usually not as sophisticated and often less experienced. Since a principal’s reliance on an agent in this regard can easily lead to an agent’s misdealing, the law creates a fiduciary relationship between the principal and agent, such that the agent is held to a higher standard of care and accountability to the principal.

A real estate agent’s fiduciary obligations to the principal includes the duty of due care and diligence to effect the sale or purchase at the best price for the principal, the duty to disclose to the principal all offers and information pertaining to the transaction and the agent’s undivided loyalty. An agent’s duty of undivided loyalty obligates the agent to act only in the interest of the agent’s principal and to forego personal advantage, aside from compensation, in the exercise of the agent’s tasks. This means that the agent may not act for an adverse party without the principal’s consent, the agent may not act secretly in the same transaction on his own account and the agent must not give his time and effort to a competing interest. Accordingly, an agent’s fiduciary duty of undivided loyalty precludes an agent’s dual agency, absent the agent first disclosing his dual role and obtaining consent of both principals.

An agent may not represent both parties in a transaction unless the agent fully discloses this fact beforehand, both parties have full knowledge of the dual agency and both parties have consented to it. Without the agent obtaining the knowing consent of both parties to the transaction, the agent’s fiduciary relationship precludes a dual agency on the ground that the interests of the parties are diametrically opposed and in conflict. Since an agent’s duty is to use his expertise and judgment to bring parties to the transaction together on his principal’s terms, the agent cannot fulfill this duty if his

loyalties are divided among the two principals to the transaction. As the District Court for the Southern District of New York observed in *Sotherby's International Realty Inc. v. Black*, (SDNY):

In the context of a real estate transaction, a broker may not act as an agent for both seller and purchaser of the property unless the broker first obtains the consent of both principals, given after full knowledge of the facts. To establish the requisite consent for dual agency, an agent must demonstrate that both principals are fully informed of every fact material to their interests and that they consent freely in the presence of such knowledge. An agent's disclosure of its dual agency may not be 'indefinite' or 'equivocal'; rather, if the dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance. Similarly, proof of consent by a principal to dual agency must be exacting.

It is this "exacting" standard that gives pause for concern when agents act on behalf of both parties to a transaction. If an agent fails to timely disclose and obtain the principals' consent to his role as a dual agent, the entire underlying transaction is voidable at the option of either or both of the principals who did not consent to the dual agency. In addition, the agent is barred from collecting a commission, regardless of whether or not the deal closes, even if the principal cannot prove any damages as a result of the agent's conduct. To the extent that there are damages, the parties may seek recovery against the agent. Of course, the agent is also subject to a fine and further disciplinary action. Justice Benjamin Cardozo espoused the underlying principles to these harsh consequences in the matter of *Wendt v. Fisher*, 243 N.Y. 439 (1926):

If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance (citations omitted). Finally, we are told that the brokers acted in good faith, that the terms procured were the best obtainable at the moment and that the wrong, if any, was unaccompanied by damage. This is no sufficient answer by a trustee forgetful of his duty. The law does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case (citations omitted). Only by this uncompromising rigidity has the rule of undivided loyalty been maintained against disintegrating erosion.

Following the 2008 mortgage crisis, the courts were flooded with "buyer's remorse" cases in which crafty lawyers for contract vendees asserted similar "strict liability" law of "uncompromising rigidity," such as the Interstate Land Sales Act (ILSA), in a desperate effort to void contracts of sale, or to renegotiate contract terms, to reflect the sudden drastic fluctuation in the market. Having had personal experience with a number of these cases back then, it is not unforeseeable to me that an agent's malfeasance, inadvertent or not, may one day be used for the same purpose, if for no other reason than for a party to a transaction opportunistically looking to re-trade the deal. However, unlike the ILSA cases, the sellers would have recourse against a dual agent for any resulting damages, which puts a careless agent in a very precarious position. It is immaterial that the party seeking to terminate the deal may not be able to prove actual injury or that the agent committed intentional fraud. All that party would need to demonstrate in order to void the contract is the creation of a dual agency relationship without disclosure and that party's informed consent.

An agency relationship is consensual and created when a principal manifests an intention that an agent shall act on his behalf and the agent consents to represent him. The relationship is most often thought of being contractual; however, it is not necessary that the relationship arise out of a written contract. The relationship may be created orally or in writing, or by some other conduct by the principal and agent which may be interpreted as an intention to appoint an agent. This can happen, by example, with

email, phone calls, oral conversations or negotiations in other transactions. Accordingly, a careless agent aggressively communicating with numerous parties in an effort to “make a deal” may inadvertently send an email or communicate in some way which may give rise to an argument that an agency relationship was created; and if an agent is unaware his actions at that time created an agency relationship, it is unlikely that the agent complied with his disclosure obligations to that unintended principal.

Disclosure by an agent is an act calculated to give information to a principal with the principal understanding its implications and consequences. A real estate agent bears a duty to make a full, fair and timely disclosure to the principal of all facts within the agent’s knowledge, which are, or may be, material to the transaction and which might affect the principal’s rights and interests, or influence the principal’s actions. An agent’s stringent disclosure obligations are codified at 19 NYCRR §175, et seq. and in Article 12-A of the Real Property Law, which include the agent’s obligation to make it clear for which party he is acting. Section 443 of the Real Property Law further requires agents to acquire the principal’s written acknowledgement of this disclosure on a form at the “first substantive contact.” In the 21st Century computer-age, this “first substantive contact” can be by email or text message, as well as by phone calls or faxes.

In sum, a real estate agent’s compliance with his fiduciary obligations may have a substantive impact on a real estate transaction. Therefore, real estate market participants should only use a reputable real estate agent and they should consult with their counsel at the early stages of any transaction to make certain that the deal closes properly.

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