The Sanctity of "Home" Under Traditional Anglo-American Law Finds Modern Protection from the Application of Fiduciary Principles

By Steven G. Wood

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HOA fiduciary duties especially apply to the initial directors who are employees or agents of the developer. They may not make decisions that benefit their own interests rather than those of the members. Thus, the initial directors are liable for failure to assess each unit and for failure to set up adequate reserves for maintenance and repairs. *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.*, supra, 114 Cal. App. 3d at 797–801. Yet, the statute of limitations for bringing an action against the directors of a homeowners' association for breach of fiduciary duty is three years. Code Civ. Proc. § 359; *Smith v. Superior Court* (1990) 217 Cal. App. 3d 950.

In *Frances T. v Village Green Owners Ass'n* (1986) 42 Cal.3d 490, 513, the California Supreme Court distinguished between a director's fiduciary duty to the association and that same director's non-fiduciary duty to individual homeowners. The cases frequently do not distinguish between a duty fiduciary in nature and other types of duties or a cause of action against individual directors in contrast to an action against the HOA itself, though technically speaking, individual directors rather than the HOA itself owe fiduciary duties, and further, the duty is owed to the HOA itself, not to individual members.

In *Raven's Cove Townhomes, Inc. v Knuppe Dev. Co*., supra, 114 Cal.App.3d at 799, the court held that when a developer or its agents or employees control the HOA's affairs, the developer and its agents and employees owe a fiduciary duty to the HOA and its members. This duty includes, but is not limited to, the establishment of sufficient operating budgets and reserves. The fiduciary duty includes a duty to refrain from making decisions that benefit the developer at the expense of the HOA and its members. The fiduciary duty includes a duty to properly manage and supervise the HOA's operations.

If the association was not properly capitalized at its inception, claimants will have difficulty measuring compensatory damages for the alleged breach because on closer analysis, the complaint is that members should have paid more assessments. Working closely with a forensic accountant or reserve specialist can help articulate the amount of assessments the developer, as a member, should have paid when it owned the homes.

Fiduciary Duties of Real Estate Agents & Brokers

Real estate brokers and agents take required courses to acquire and maintain licensure and pass examinations to obtain licenses. They are generally familiar with a wide array of buyers' and sellers' disclosure and contract obligations, lending practices, escrow and title operations, and local requirements. Thus, the law imposes on real estate brokers and agents the following fiduciary duties. See *Batson v Strehlow* (1968) 68 Cal.2d 662, 675; *Roberts v Lomanto* (2003) 112 Cal.App.4th 1553; *Assilzadeh v California Fed. Bank* (2000) 82 Cal.App.4th 399, 414:

- To act in the highest good faith and undivided service and loyalty;
- To avoid taking or obtaining any advantage over the principal;
- To research and investigate sufficiently to learn which matters might affect the value or desirability of property, and, therefore, the principal's decision to buy or sell the property;
- To counsel the principal on the suitability and consequences of the principal's decisions;
- To fully disclose the nature and full amount of any compensation, commission, or profit the agent will receive from the transaction and to obtain the approval of the principal;
- To make the fullest disclosure of all reasonably available material facts concerning the transaction that might affect the principal's decision; and
- To investigate facts not known by the agent and to disclose all material facts that might reasonably be discovered.

The foregoing fiduciary acts help ensure that the acquisition, ownership and enjoyment of the "castle" is safe and secure, or at least has sure footing in law and recourses afforded thereby.

Fiduciary duties are thus much broader than the statutory duties required of brokers. *Michel v Moore & Assocs., Inc*. (2007) 156 Cal.App.4th 756, 763; *Assilzadeh v California Fed. Bank* (2000) 82 Cal.App.4th 399, 415. Also, the breach of any one of these duties may constitute mere negligence rather than fraud. *Assilzadeh v California Fed. Bank*, supra.

When a broker markets property, the broker has a fiduciary duty to the owner to disclose all material facts. Once the agency relationship has been created, the fiduciary duty continues even if the broker, or a relative or associate of the broker, becomes a principal in the transaction. *Roberts v Lomanto*, supra.

Of particular note to persons and entities involved in dual agency transactions with their broker/salespersons, as well as the licensed professionals, in November of 2016 the California Supreme Court issued a decision that could modify the way large real estate brokerage firms do business. The Court held that a brokerage company who represents both buyer and seller in a real estate owes a fiduciary duty to *both* parties, even if different agents represent them.

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It is well settled that an agent who represents both buyer and seller owes fiduciary duties to both parties. In the *Horiike* case, the Court extended fiduciary duties to brokerage companies, when in 2007 a Hong Kong millionaire, Hiroshi Horiike, purchased a Malibu estate for $12.25 million. Chris Cortazzo, a successful agent at Coldwell Banker, represented seller. A different Coldwell Banker agent represented Horiike. The parties agreed to dual representation.

Horiike claimed Cortazzo told him the house was 15,000/SF. Horiike post-sale realized that the house was only 10,000/SF. Horiike sued Cortazzo and Coldwell Banker, alleging that both parties breached their fiduciary duties when they sold him the house by falsely representing the house size to him. Cortazzo argued that he could not be held liable because his sole duty was to his client, the seller.

The Court sided with Horiike and expanded the 1986 state law that authorizes and regulates real estate dual agents, holding that Coldwell Banker owed a fiduciary duty to Horiike to learn and disclose all material transaction information, including the information that Cortazzo knew, since Coldwell Banker was presumed to know all facts known to its salespersons. The Court did not determine whether an actual breach of fiduciary duty occurred.

This decision will affect big brokerage real estate transactions, since dual agency transaction will be ripe for conflict. Dual agents can no longer only consider their client's interest when selling a house; they must also consider the interests of both the buyer and seller. As such, big brokerage companies will need to be more cautious before they enter into a dual agent relationship for particular transactions. The *Horiike* decision could lead to a limitation in sales involving big brokerages and/or restructuring of big brokerages into smaller firms.

The statutes on which the Court relied, Civ. Code, §§ 2079.13 et seq., govern the required disclosure of dual agency relationships in real estate transactions. Although the *Horiike* decision arose out of a pre-2015 residential transaction, the statute was amended effective January 1, 2015 to apply not only to residential but to commercial real estate transactions. See Civ. Code, § 2079.13, subd. (h), (k).

The *Horiike* holding imposes the same fiduciary responsibilities on a listing salesperson as on the selling salesperson, if the same broker employs both agents and the property is nonresidential real estate. See Civ. Code, § 2079.13. The statutory recitals include matters that under the inspection and disclosure statutes (e.g. §§ 2079.1 to 2079.12) are limited to residential real estate. As such, the exact operation of *Horiike* as applied in commercial real estate transactions may not be identical to residential transactions, although the issue is far from clear.

Conclusion

The "castle concept" remains a partial reality as presently perpetuated, albeit far from perfectly, through real property laws. It has been sorely tested, however, as over one-fifth of Americans have contracted for detailed and seemingly intrusive private governance of property through

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condominiums and private subdivisions (private communities). Robert H. Nelson, *Private Neighborhoods and the Transformation of Local Government*, at xiii (2005).

From feudal roots, fee simple ownership, originally symbolized by transferring dirt from one owner to another, has enjoyed almost sacred status. America has rejected most meaningful differences between the property use rights of a fee simple owner and those of a non-freehold lessee [See D. Benjamin Barros, "Toward a Model Law of Estates and Future Interests," 66 *Wash. & Lee L. Rev*. 3, 12-13 (2009) (observing that "the freehold-leasehold distinction no longer has any legal significance")], yet the notion that a man's house is his castle persists, in part protected by the common law and statutory fiduciary principles described above.

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