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Court of Appeal Holds Dual Agency Exists Where Buyer's Agent and Seller's Agent Are Employed by the Same Broker

The court of appeal in *Horiike v. Coldwell Banker Residential Brokerage Company* held that salespersons employed by the same broker are dual agents, even if each salesperson separately represents the buyer and seller in a real estate transaction. The case is heading to the California Supreme Court.

In *Horiike*, the listing prepared by the listing agent stated the Malibu home "offers approximately 15,000 square feet of living areas." When specifically asked by the buyers about the size of the home, the listing agent advised them to hire a specialist to verify the square footage. The buyer did not verify the square footage, closed escrow, and thereafter discovered the home was "just" 12,000 square feet. The buyer sued the listing agent and Coldwell Banker for fraud and breach of fiduciary duty.

The trial court refused to instruct the jury on the breach of fiduciary duty claim on the grounds the listing agent was not a fiduciary of the buyer. The case when to trial on the fraud claim alone and the jury returned a verdict in favor of the listing agent and Coldwell Banker. The jury found the listing agent had "reasonable grounds" for believing the home was 15,000 square feet, and thus, had no fraudulent intent.

Please see *Dual Agency* on page 3

"The court of appeal in Horiike held that salespersons employed by the same broker are dual agents, even if each salesperson separately represents the buyer and seller in a real estate transaction. The case is heading to the California Supreme Court."

Lease Restrictions against the Use of Premises as a Day Care Center (for up to 12 children) Are Void in California

Health & Safety Code §1597.40(b) voids any clause in a residential lease (or CC&R's) which prohibits or even restricts the use of real property "as a family day care home for children." As a result, a tenant can use their premises for purposes of operating a day care center for up to *twelve* children *without the consent of the landlord*. Needless to say, this section comes as an unwelcome surprise to many landlords.

Please see *Day Care Center* on page 2

The Small Wine Producer Tax Credit

The federal Small Wine Producer Tax Credit allows certain small wine producers to offset up to 90 cents per gallon in excise taxes (IRC §5041(c), 27 C.F.R. §24.278). The credit was passed to afford some relief to small wine producers from dramatic increases in the excise tax on wine which occurred in the early 1990's.

"The small wine producer tax credit is available only to proprietors who produce less than 250,000 gallons of wine per year. While is no minimum level of production needed to claim the credit, some wine must be produced in order to claim the credit."

The credit is available only to proprietors who produce less than 250,000 gallons of wine per year. There are rules against creating different entities commonly controlled in order to fall below the 250,000 gallon limit.

There is no minimum level of production needed to claim the credit, but *some* wine must be produced during the year in order to claim the credit. If wine is removed for consumption or sale during the calendar year, but no wine is actually produced, the credit cannot be claimed.

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Day Care Center, from page 1

What protections are available to the landlord? Unfortunately, not many. In fact, the only thing the landlord can unilaterally do is increase the tenant's security deposit, *but only to the maximum amount allowed by law* (which is two times the monthly rent). While this may protect the landlord against damage to the premises (caused by upwards of twelve children), what about the landlord's liability for owning a property used as a day care center?

Me on top of Mt. Vaca looking down at Lake Curry. Climbing the 22% road to the top was especially difficult in 100 degree heat.

Again, unfortunately, the Health & Safety Code provides little protection for the landlord. For example, the landlord cannot require the tenant to obtain releases from the children's parents. The landlord cannot even require the tenant to obtain liability insurance for the operation of the day care center! Only if the tenant voluntarily elects to obtain such insurance, can the landlord request to be named as an additional insured (but only if the landlord pays for the extra cost of so doing). Further, if the tenant does get liability insurance, the Code only requires the tenant to obtain a policy with limits of $100,000 per occurrence, $300,000 aggregate – not much when you are talking about the lives of twelve children.

What is a landlord to do in such a situation? First, rather than automatically increasing the security deposit, a more prudent course of action may be to use the threat of raising the security deposit as leverage. Thus, in exchange for not increasing the security deposit, the tenant may agree to obtain liability insurance and to name the landlord as an additional insured. In addition, by not increasing the security deposit, the tenant may be willing to have each parent sign a release and waiver of the landlord's liability. The tenant may be especially inclined to do so if the landlord drafts a waiver which protects both the landlord and the tenant from liability (although the later may be unenforceable).

Please see, *Day Care* on page 3

Day Care from page 2

Second, the Code does require the landlord's consent if the tenant desires to expand the scope of their license. A small day care center license allows the tenant to care for up to six children. The landlord's consent is required if the tenant wants to care for up to eight children. Likewise, a large day care center license allows the tenant to care for up to twelve children, but the landlord's consent is required to care for up to fourteen children. Any such consent should be conditioned upon the tenant obtaining adequate liability insurance, naming the landlord as an additional insured, and obtaining waivers and releases from each parent.

All alone on top of the world. The only place I know where you can see San Francisco and the Sierras at the same time.

Third, nothing in the Code expressly prohibits the landlord from not renewing a lease on the grounds the tenant is operating a day care center. In theory, this could be an opportunity to impose additional requirements (or to not renew the lease altogether). However, given the public policy of the State of California with respect to home day care centers, this strategy has its own risks. If a landlord cannot restrict the use of property for a home day care center, it is uncertain whether the landlord can elect to not renew the lease on that basis.

Fourth, talk to your insurance broker to make sure your own liability policy will adequately protect you against the risk of injury or death to a house filled with twelve children.

Dual Agency from page 1

The judgment was reversed on appeal. The court of appeal held that a dual agency relationship existed as a matter of law by virtue of the fact both salespersons were employed by the same broker. The court quoted from the Miller & Starr treatise for the proposition that "When there is one broker, and there are different salespersons licensed under the same broker, each salesperson is an employee of the broker and their actions are the actions of the employing broker.... That broker thereby becomes a dual agent representing both parties." As a result, the listing agent was the unsuspecting fiduciary of the buyer, and had a duty to "learn the material facts that may affect the principal's decision" and to "perform the necessary research and investigation in order to know those important matters."

The decision also makes it clear that the legal relationship between the *broker and the salesperson* is immaterial to the analysis. Specifically, it is immaterial whether the salespersons were *employees* or *independent contractors* of the broker. Although a salesperson can be classified as an independent contractor for *tax purposes*, for purposes of the *Real Estate Law*, such distinctions are immaterial in relation to the salespersons dealings with the public.

"The decision also clarifies that the relationship between the broker and the salesperson is immaterial to the analysis. Although a salesperson can be classified as an independent contractor for tax purposes, for purposes of the Real Estate Law, such distinctions are immaterial with relation to the salespersons dealings with the public."

As a practical matter, the existence of a fiduciary relationship relieves the buyer of proving the critical element of fraudulent intent – always a huge obstacle to any claim of misrepresentation or concealment. A fiduciary can be charged with "constructive fraud" based solely on the failure to disclose material information, even if there is no fraudulent intent, and even if the fiduciary actually believed he was not providing misleading information.

The California Supreme Court just agreed to hear an appeal in the *Horiike* case and will presumably determine whether a dual agency relationship exists when two salespersons employed by the same real estate broker separately represent the buyer and seller.

Wine Tax Credit, from page 2

For purposes of the credit, wine production includes primary fermentation, secondary fermentation, sweetening, wine spirits addition, and the blending of a formula wine. A custom crush arrangement would not meet the definition of "production" (since the entity performing the custom crush is treated as the producer and is liable for the excise tax). However, an alternating proprietor arrangement would qualify as production for purposes of claiming the credit.

The amount of the credit is 90 cents per gallon of wine (which gradually gets reduced if the proprietor produces more than 150,000 gallons per year). The credit can be claimed on the first 100,000 gallons of wine removed for consumption or sale during the calendar year, representing a maximum credit amount of $90,000 per year for qualifying small producers.

If a producer transfers wine in bond to another bonded wine premises (such as a warehouse) for storage pending subsequent removal, the producer cannot claim the tax credit because the producer has not removed the wine for consumption or sale. Under certain circumstances, the warehouse (called the "transferee") can claim the tax credit for itself if, amongst other things, the producer would have qualified for the credit had the producer removed the wine itself for sale or consumption (§24.278(b)(2)). If the warehouse claims the tax credit it will reduce the available credit for wine the producer removes itself. (§24.278(e)(2)). Thus, if the warehouse claims a credit for 60,000 gallons of the producer's wine it removes, the producer will only be able to claim the credit for 40,000 gallons of wine it removes.

There is no requirement that the credit be applied toward the same wine which is produced. Therefore, a proprietor could produce a small amount of wine solely to claim the credit on the first 100,000 gallons of wine removed. This might be attractive to a proprietor who removes wine during the year, but does not produce any wine. By producing a small amount, the proprietor could claim upwards of a $90,000 per year tax credit.

HOA's Can't Fine Members for Not Watering Lawns during Drought

On July 21, 2014, Governor Brown signed AB 2100 into law. AB 2100 adds a new subsection (c) to Civil Code §4735, a part of the Davis-Sterling Act which governs common interest developments, like homeowners' associations.

AB 2100 prohibits a homeowners' association from imposing a fine or assessment against a member for "reducing or eliminating the watering of vegetation or lawns" during a state of emergency declared by the Governor due to drought, or a local emergency declared by a local government due to drought.

As a result, during a drought, a homeowners' association may not assess or fine a member for violating a covenant in the CC&R's requiring each owner to water and maintain their.

Interestingly, AB 2100 does not void such covenants, it only prevents homeowners' associations from *fining* a member for not watering their lawn. Many CC&R's also allow homeowners' associations to impose *non-monetary* sanctions, such as a loss of voting rights, in the event a covenant is violated. Technically, the letter of AB 2100 would not prevent a homeowners' association from imposing a non-monetary sanction against a member who failed to water their lawn, although this would certainly fly in the face of the intent of the legislation.

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