

The Real Estate Brokerage as Fiduciary: A Summary Review of What it Means and Why it Matters

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The word “fiduciary” is derived from the Latin words *fiduciarus* and *fiducia*, relating to confidence and trust. It also appears to stem from the Latin words *fides*, meaning faith, and *fidelitas*, the equivalent of loyal. While the term fiduciary is somewhat amorphous, vague and difficult to precisely determine, it is commonly applied to a person who holds a special position of confidence, trust and responsibility towards another.

It was in the realm of trusts that the legal conceptualization of fiduciary relationships arose almost 80 years ago. While he was the Chief Judge of New York’s highest State court, Justice Benjamin Cardozo opined that “[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the *punctilio of honor the most sensitive*, is the standard of behavior”. *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928). In distinguishing “trusted persons” (fiduciaries) from the general public and the market place, Justice Cardozo determined that certain conduct which is permissible in the business world for those acting at arm’s length is impermissible to those bound by fiduciary duties.

Under California law, certain “special” relationships involving a high degree of trust, fidelity, integrity and confidence, and the exercise of professional expertise or special knowledge and discretion or power, rise to the stature of a fiduciary relationship. They include a trustee and a beneficiary, a lawyer and his or her clients, a member of a board of directors and his or her corporation, and a real estate agent and his or her principals/clients. The latter includes a mortgage loan broker licensed by the Department of Real Estate and his or her principals. .

In the real estate transactions context, by reason of the fiduciary relationship, the brokerage, acting through its designated broker officer and the responsible real estate broker associate(s) and/or salesperson(s), owes, and its agents (and sub-agents) owe, certain special fiduciary duties to its client(s). Fiduciary duties impose the highest standard of care, and real estate agents must be committed to scrupulously fulfilling those obligations.

In the case of *George Ball Pacific, Inc. v. Coldwell Banker & Co.*, 117 Cal. App.3d 248 (1981), at page 256, the Court of Appeal (First District) noted that the general principles of agency combine with the statutory duties of the Real Estate Law to impose “on a real estate agent ‘the same obligation of undivided service and loyalty that [the law] imposes on a trustee in favor of his beneficiary.’ [Citations.] This relationship not only imposes [on the agent] the duty of acting in the highest good faith toward his principal but precludes the agent from obtaining any advantage over the principal in any transaction had by virtue of his agency. [Citation.]” A real estate licensee is further

“charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal’s decision. [Citations]”.

With regard to the duty of full and truthful disclosure as it relates to a property, a real estate agent has an affirmative obligation to disclose to his or her client all material facts which are within the knowledge of the licensee affecting the value and/or desirability of the property. In addition, the duty of full disclosure would require that an agent present all offers and counteroffers in a timely and diligent manner, unless his or her client has previously directed the agent to do otherwise. Providing a client with all of the available information permits the client to make an informed and intelligent decision in his or her best interest. Real estate licensees must also disclose the nature and full amount of any compensation, commission, or profit that they receive or will receive from the transaction.

In addition to those duties of undivided loyalty, good faith and full disclosure identified in the *Coldwell Banker* decision, California law imposes the following fiduciary duties on real estate licensees:

*To diligently exercise reasonable care, diligence and skill in representing a client and in the performance of the responsibilities of the agency relationship. By reason of his or her licensure, a real estate agent is deemed to have specialized and professional expertise, knowledge and skill in real estate related matters superior to that of the average person. The nature of the fiduciary relationship is such as to cause the client to justifiably rely on the licensee/agent.

*To fully account in a timely manner for all funds and property received in which the client has or may have an interest. This duty requires an agent to safeguard any money, deeds, and other documents entrusted to the agent that are related to his or her client.

*To not disclose confidential information of or about the client, including the client’s business, financial or business affairs, unless authorized to do so. This duty mandates that an agent must keep confidential any information that might weaken or undermine his or her client’s position if the same were revealed.

*To exercise the utmost honesty, absolute candor, integrity and unselfishness toward the client. This requires that an agent not compete with his or her client and act at all times in the best interests of his or her client to the exclusion of all other interests, including interests that could benefit the agent or others. In addition, this requires that a licensee refrain from dual representation in a real estate sales transaction unless he or she obtains the consent of both principals after full disclosure.

*To obediently, efficiently and promptly follow the lawful instructions of his or her client.

While fiduciary duties have been imposed over the years through the common law, which is the extensive non-statutory body of law reflecting general legal principles and Court-made case law and precedent, such high standards can also be undertaken by agreement and imposed or prescribed by statutory and regulatory law.

As will be discussed briefly below, the California statutory and regulatory scheme imposes fiduciary and fiduciary-like duties on real estate licensees. However, it does not restrict or limit the broader fiduciary duties owed by licensees existing under the common law. See, for example, the Legislature's statement of its intention in adopting the legislation which became section 2079 of the California Civil Code, which section is titled "Real estate brokers and salespersons; inspections and disclosures; standards of professional conduct".

Breaches of Fiduciary Duties and Remedies

The following discussion is not intended to be an exhaustive discussion of all the remedies available for the breach(es) of fiduciary duties, or an analysis of the distinctions and boundaries between the common law and statutory and regulatory law, legal and equitable remedies and/or contract and tort law. Rather, the purpose of the discussion is to familiarize real estate licensees with the general range and variety of remedies available.

When a client feels wronged by his or her real estate brokerage and agent, the client oft-times files a lawsuit seeking damages and other remedies on theories ranging from breach of contract, intentional misrepresentation, negligent misrepresentation, and various others. It is the nature of the breach, the wrong and the loss (or the harm suffered) that will determine the scope and the applicability of remedies. In an action for an alleged breach of fiduciary duty(ies), a presumption of unfairness and undue influence arises when a fiduciary self-deals or gains an advantage in a transaction.

Depending on the facts of a particular case, a client suing for breach(es) of fiduciary duties can recover a full range of damages, including actual as well as punitive and exemplary damages. Moreover, when a client is defrauded by a fiduciary, the client is entitled to the benefit of his or her bargain and is awarded compensation for all of the detriment proximately caused by the breach, whether it could be anticipated or not. See sections 1709, 3333 and 3343 of the California Civil Code. Also, a real estate agent who breaches his or her fiduciary obligations may forfeit and be deprived of his or her commission. *Sierra Pacific Industries v. Carter*, 104 Cal.App.3d 579 (1980), at page 583.

In appropriate cases, such as where there is no adequate legal remedy capable of providing a client with a complete measure of justice, or where necessary to prevent irreparable injury, the client may obtain equitable relief, including an account of profits, the disgorgement of "secret" profits, the imposition of a constructive trust, the grant of an equitable lien, the setting aside, rescission or voiding of unconscionable transactions, and the delivery and/or cancellation of documents. When applying equitable remedies, the Courts endeavor to shape and design a judgment to provide substantial justice to the client who has been wronged and has suffered harm by the breach(es).

Administrative Discipline Because of Breach(es) of Codified Fiduciary and Fiduciary-Like Duties

As mentioned above, fiduciary and fiduciary-like duties or standards have been prescribed by statutory and regulatory law. Some of the fiduciary duties that arose through common law principles have been codified and/or enhanced in certain of the California statutes and regulations that are enforced by the Department of Real Estate. For example, the duty to fully account for client funds is reflected in Real Estate Commissioner's Regulation 2831.1, which pertains to the requirement that agents must adequately separate trust fund beneficiary records. Section 10176 (e) of the California Business and Professions Code prohibits the commingling of trust funds belonging to a client with the funds of a broker. Similarly, the duties that preclude an agent from obtaining any advantage over the principal by virtue of the agency, and that require that an agent act in his or her client's best interests are incorporated or sown into sections 10176 (g) and 10176 (i) of the Business and Professions Code, dealing with secret profits or undisclosed compensation, and fraud or dishonest dealing in a licensed capacity, respectively. Also, the fiduciary duty of disclosure imposed on real estate agents by the common law is the same general obligation to disclose under statutory/regulatory law. There are more examples of such statutory and regulatory codification, but a further discussion of the same is beyond the scope of this article.

Violations of the statutes and regulations enforced by the Department of Real Estate form the basis for administrative discipline against the offending real estate licensees. For a violation of one or more of such statutes and/or regulations, a licensee can have his or her license revoked or suspended.

What Does This Mean in Practical Terms?

California real estate agents, when acting as fiduciaries, owe special duties to their clients. Agents must be continuously aware of these important duties and must perform them responsibly, diligently and completely. If they fail to do so, they risk significant civil liability and remedies, in addition to administrative discipline where their misconduct also violates the statutes and/or regulations enforced by the Department of Real Estate.

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