

New Federal Consumer Protections Are Needed to Reveal Inherent Dangers of Dual Agency.

Now, upon the expiration of the long trial period negotiated with the National Association of Realtors, is the time for the Federal Trade Commission to prevent shocking widespread violations of common-law fiduciary duties by real estate agents.

Many if not most licensed real estate brokers and salespeople demonstrate they really do not understand the very basic difference between 'broker' and 'agent', As sophisticated readers here will know, 'agents', under ancient and enduring common law, are always fiduciaries...who pledge to promote the clients' interests over their own. (Only licensed brokers and salespeople who do not claim to be agents can legitimately avoid fiduciary duties.)

The attached consumer pamphlet (which I wrote in 2007, in deliberately-simple language, for a general non-sophisticated public, unlike my audience here) explains agency fiduciary duties in deliberately very simple, yet hopefully comprehensive, detail. (This consumer-friendly booklet has never been requested nor distributed by any state or local Realtor Association; so it's had, thus far, an extremely narrow audience) As my booklet explains in very simple terms, one of those key fiduciary duties is undivided loyalty to the client.

Law firms are scrupulous about avoiding any conflicts of interest; yet Realtors openly disguise and promote them! If you try to hire a big law firm in Boston, a first thing the firm will do is check to see if anyone else in the company (not just in the Boston office, but also including its Chicago and California offices) has ever represented your adversary. (If so, the law firm won't, of course, take you as a client.)

But should you approach a large Boston real estate brokerage company about selling your house or condo, hear them tell or imply to you, "Wee have (say) 100 salespeople...who have hundreds of buyers...for you." But the firm will hardly ever tell you, "Of our 100 agents, only one or two of them will be representing you, seeking a higher price; and the other 98 or 99 will be representing buyers, with a duty (to them) to find out everything they can to get a lower price and more buyer-favorable contingencies out of you." Those are egregious, undisclosed conflicts of interest; yet, in real estate, this game happens all the time!

It's the duty of agents to try to find out any negotiating weakness of the other side. For example: the seller might be under pressure to sell because they want to buy another place, with offers on that place due soon. A good seller's agent would never reveal that, because a buyer might think they can thus get the place for less. Another example: a buyer may have looked at dozens of properties and only like one. A good buyer's agent would never reveal that, because the seller may think, "Goodie. I can get more." Each agent has a legal duty to probe the other side, if possible.

And, as a practical matter, the probing may be more possible if the adversarial agent is in fact a close friend in the very same office!

However, unlike some other consumer advocates, I do not feel that fiduciary duty should be required of brokers,,,in either stock brokerage or real estate brokerage. But I do feel any lack of fiduciary duty should and must always be clearly and unambiguously disclosed. Thus, I feel a stockbroker (not claiming to be a fiduciary) should remain legally free to sell high-fee mutual funds, as long as he/she discloses, “We do not claim this fund has a low management fee...and we have not searched choices of lower-fee funds for you. But we do like this one, because of...(XYZ factors)” I think that’s OK! [I wouldn’t choose that role myself; but I don’t think it shoulda be forbidden to others,]

Similarly, the large dual-agency real estate office in my example above, could go on to say something like this to a potential seller-client: “We want to make it very clear to you that most agents in this firm will be representing your potential buyer, who is your price-adversary. But remember, we do have more buyers! And we have extensive education for all our agents, and strict policies, enforced by all managers, that no broker or salesperson may ever reveal any of your confidential information to an adversarial licensee within the office to ‘sell you out’ for a quickie commission. Any associate who ever did that would be immediately fired.” I also think that should be OK (for others, though not my own preference).

What we must not let happen is continuation of the current dual-munch custom, which is: Talk little about dual agency, disguise it by the term ‘designated agency’, and say virtually nothing about the inherent conflicts of dual agency!

For all dual agency (including innocuous-sounding ‘designated’ agency) you should require that a well-established common-law principle now be strictly kept: clients must have all potential conflicts of interest well-explained to them in detail. And the burden that the client understand and consent to all the inherent conflicts must (as under common law) rest NOT upon the client, but on the dual agent and agency. Thus, if the agency’s client is a lawyer, the discussion can be very short. But if the client an uneducated laborer, it will (and should) take the agent very much longer to explain.

A requirement of true understanding of inherent conflicts of interest must not be left to chance (as it has been in the long trial period). Instead, my suggestion is that you require dual agents to certify, on their initial agency information forms, that they have discussed the inherent conflicts of dual agency with these clients from (time A) to (time B) and further certify that the client(s) seems to understand all the conflicts and have willingly and knowledgeably consented to them.

Another unfortunate necessity:: the federal government must assert its reasonable national consumer-protection pre-eminence by not allowing state governments (easily lobbied by politically-influential local Realtors) to enforce any ‘**conclusive presumption**’ of **informed consent** in state legislation. Massachusetts enacted exactly that in 2004, after the MA Realtor Association tied that anti-consumer atrocity to a key State Legislature vote on the final version

of the state's budget (to which no amendment, but only an up or down vote, is allowed). [For the record: I'd been the 2000 president of the MA Realtors, continuing on as state director (as is customary for past presidents) for five years; but upon hearing of that shocking anti-consumer move, I immediately resigned that position, in order to be able to oppose that unethical maneuver by our lobbyists.]

After all, a 'conclusive presumption', by definition, cannot be rebutted! Not even if the agent had in fact never explained the conflicts at all, To show how extreme a 'conclusive presumption' is: Conceivably (to illustrate how strong) a client's signature would be irrefutable even if the agent had held a gun to the client's head! Any time clients feel they have been deceived, whether they really have been or not should remain a matter of fact to be determined in court...not by Realtors' lobbying fiat.

Possibly I might need to explain, to some staff-people studying my argument here, a vital social real-estate fact that they may never have had opportunity to observe, but which I've seen so often from watching agents over 55 years of real estate brokerage: Most home sellers and buyers will quickly sign anything their own trusted agent puts in front of them...often without much of a glance at it. That definite understandable habit makes this 'conclusive presumption' state provision especially egregious.

As you can further imagine, home-sellers are more likely to sign a form if it's a standard state-required consumer-protection form, even one as poor as Massachusetts' 'agency disclosure' one. The MA form offers no description of the inherent dangers of dual agency...and makes no mention of the corresponding MA conclusive-presumption provision in state law! My state (and any other offending state) must not be allowed to continue enforcing any state law stating that a signature on any agency-provided form is conclusively presumed to be informed consent to inherent conflicts of interest. How absurd!

All these suggested reforms seem to me very necessary consumer protections. I devoutly hope you'll adopt them.

And I'll be more than happy to come to D.C, to discuss this with your staff. In semi-retirement, I have the time and funds to do that easily.

Thank you very much for carefully considering these vital matters.

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My consumer-information agency pamphlet, composed in 2005, is attached.

