

## DUAL AGENCY

### I. INTRODUCTION

For a number of years, REALTORS® have used a system formulated by MAR to avoid claims of undisclosed dual agency. This system includes pre-approval of a possible dual agency relationship in listing and buyer agency agreements, a dual agency agreement or addendum used at the creation of the actual dual agency situation and checking the box for dual agency on the agency disclosure form. While this system has appeared to work quite well in protecting REALTORS®, until recently, we did not have any reported case law that we could point to in which this system had defeated a claim that there had been unconsensual dual agency.

### II. DISCUSSION

Under Michigan law, if a dual agency situation arises without the full knowledge and consent of the parties, the contract negotiated by the agent is voidable at the option of either buyer or seller who did not have knowledge of the dual agency. Almost 100-year old Michigan case law stands for the proposition, "a broker cannot act as the agent of both parties where their interests are conflicting." Further, it is not even necessary for a party seeking to void a contract based on non-disclosed dual agency to show that any improper advantage has been gained or damage has been suffered by him. A party may repudiate the contract irrespective of any proof of active fraud. Further, a broker who has acted for both buyer and seller without the full knowledge of both is not allowed to recover compensation from either. Dual agency without informed consent is, among other things, a breach of an agent's duty of good faith.

The Occupational Code also contains statutory prohibitions against undisclosed dual agency. In particular, MCL 339.2512(1) specifies that it is a violation of the Occupational Code when a licensee acts for more than one party in a transaction without the knowledge of the parties. The statutory provision subjects a licensee to various penalties for acting for more than one party in a transaction without the knowledge of the parties. A violation of this section subjects the licensee to the penalties listed in Article 6 of the Occupational Code, including: suspension of a license; denial of a license; denial of renewal of a license; revocation of a license; a civil fine not to exceed Ten Thousand Dollars (\$10,000.00); censure; probation and/or a requirement that restitution be made. These statutory penalties are in addition to and cumulative with any or whatever legal remedies are available to the buyer or the seller.

In the 1980s, REALTORS® throughout the nation were beset by claims of dual agency, *i.e.*, claims that the REALTOR® represented both the seller and buyer without the informed consent of both parties. Fortunately, Michigan REALTORS® were able to successfully fend off many dual agency claims during that period of time. Further, a set of procedures and forms were developed to make certain that dual agency claims did not become common in Michigan. We offer a brief refresher on dual agency and the procedures to handle it.

#### **A. Traditional Agency Firms**

In traditional agency firms, as opposed to designated agency firms, a client of the firm has an agency relationship with every member of the firm. If the traditional agency firm represents both sellers and buyers, then the firm's listing agreement should have a provision

dealing with dual agency. The provision should set forth the understanding and agreement of the seller that the REALTOR® firm represents buyers, and one or more of those buyers may become interested in buying the seller's property. Further, this provision should also provide that the REALTOR® will preserve any confidential information learned during the agency relationship with the buyer and, further, that the REALTOR®'s failure to disclose the confidential information to the seller will not constitute a breach of fiduciary duty. The MAR listing form contains the following dual agency provision:

SHOWING PROPERTY/DUAL AGENCY: Seller understands and agrees that Broker can show Seller's Property to, and obtain offers from, all prospective buyers, including buyers with whom Broker has an agency relationship. In the event a buyer which Broker has an agency relationship shall become interested in the Property, Broker shall notify both the Seller and the buyer of its intention to represent both and obtain both parties' written consent to the dual agency. *Broker will preserve any confidential information obtained during another agency relationship or in a prior transaction or business relationship. Seller acknowledges and agrees that the preservation of this confidential information shall not constitute a breach of any fiduciary duty owed by Broker to Seller.* Seller also understands and agrees that as part of marketing the Property, Broker will show potential buyers properties other than Seller's and provide such buyers with information on the selling prices in the area.

There is a very practical reason for including this dual agency provision in the listing agreement. If a REALTOR® firm represents sellers and buyers, it is not likely that the REALTOR® firm will be able to obtain a separate, side agreement with the seller prior to the time that one of the firm's agents shows the seller's home to a buyer represented by the firm. Thus, obtaining the seller's consent to dual agency prior to it occurring is necessary.

For traditional agency firms that represent both sellers and buyers, it is also important to have a dual agency provision in a buyer's agency form. Currently, the MAR exclusive buyer agency form provides:

In the event Client elects to make a bona fide offer on real property listed by Broker (check as applicable):

(a) \_\_\_ This Agreement shall automatically terminate only with regard to that real property (but shall continue as to all other real property) and Broker shall continue the agency relationship with the owner of the real property listed by Broker. Any fees previously paid to Broker by Client pursuant to this Agreement shall be returned to Client at closing where the agency relationship was terminated pursuant to this paragraph.

(b) \_\_\_ Broker shall act as disclosed dual agent of both Client and the owner of the real property listed by Broker pursuant to a written agreement in the form attached hereto between Broker, Client and the owner of the real property listed. In such event, Broker shall be entitled to any fees owed by Client pursuant to this Agreement.

(c) \_\_\_ Broker shall act as a transaction coordinator to facilitate the transaction, and not as an agent for either the Client or the owner of the real property listed by the Broker. In such event, Broker shall be entitled to any fees owed by Client pursuant to this Agreement.

Under this agreement, the parties can agree that if the buyer becomes interested in one of the firm's listings, either the agency relationship with the buyer will terminate or the broker will act as disclosed dual agent.

The legal reason for including dual agency provisions in listing agreements and buyer agency agreements is to avoid breaching the respective fiduciary duties owed to both the seller and the buyer when the firm represents both parties. As an example, under common law, both the seller and the buyer are entitled to have all of their material information held

completely confidential and to have all other material information disclosed to them. Thus, under the common law, the seller would be entitled to know any material information known by the REALTOR® firm about the buyer, but the REALTOR® firm in turn would have an obligation to the buyer to keep that information confidential. The only way to address this possible source of liability is through a dual agency provision in the listing agreement and the buyer's agency agreement.

In *Clancy REALTORS® and Charles Clancy v Michael Rubick*, 2008 WL 4958793 (Mich App), the REALTORS® listed vacant land for a seller. A portion of the land, 80 acres, was swampy and was not contiguous with the other 99 acres the seller wished to sell. The REALTORS® helped the seller develop a price for the property. The listing REALTORS® indicated to the seller that they would be contacting adjacent property owners, as they may be persons who would most likely be interested in the 80-acre swampy parcel.

After taking the listing from the seller, the REALTORS® met with an owner of neighboring property. The owner of the neighboring property had a real interest in purchasing the swampy 80 acres and all or a portion of the 99-acre parcel. The neighbor became the client of the REALTORS® and an offer was prepared on his behalf. The offer was then submitted to the seller. Ultimately, an agreement was reached between the seller and the neighbor for the neighbor's purchase of the 80 acres and a portion of the 99-acre parcel.

The claim of unconsensual dual agency in this case arose fairly typically. After the purchase agreement was signed, the relationship between the REALTOR® and the seller deteriorated. Eventually, the REALTOR® sued the seller for failing to pay a commission, and

the seller responded that the REALTORS® were not entitled to a commission because they had engaged in misconduct by failing to obtain informed consent regarding dual agency, thereby breaching their fiduciary duties. The seller's claim of unconsensual dual agency arose in connection with the period between the time the REALTORS® met with the buyer and became the buyer's agent and the time the purchase agreement was signed. It was not until then that the REALTOR® asked for, and obtained, the seller's consent to the dual agency arrangement.

Obviously, a REALTOR® cannot obtain informed consent to a dual agency with a specific buyer until the specific buyer becomes a client of the REALTOR® and wishes to write an offer on a listing of the REALTOR®. We have always contended that the "gap" between the time a REALTOR® has a client who becomes interested in one of the REALTORS® listings, until the time the REALTOR® submits an offer on the listing, is covered by the pre-approval of dual agency contained in the listing agreement at the time of signing by the seller.

This Court of Appeals in the *Clancy* decision effectively eliminates any argument about the "gap" and whether a REALTOR® has in fact fully informed a seller prior to the seller consenting to dual agency. In its decision, the Court expressly noted that the listing agreement had included a provision regarding the possibility of dual agency. The Court noted further that at the time the listing contract was signed, the REALTOR® had provided the seller with the statutory agency disclosure form explaining all types of agency relationships available and the licensee's duties that each agency relationship creates. When the offer from the neighbor was presented to the seller, the REALTORS® had provided the seller with

an agency disclosure form indicating that the REALTORS® were acting as a dual agent. The Court of Appeals noted that the agency disclosure law specifically provides in the form that:

[a] real estate licensee can be the agent of both the seller and the buyer in a transaction, but only with the knowledge and informed consent, in writing, of both the seller and the buyer.

The Court of Appeals then determined that the REALTORS® were not prohibited from acting as a dual agent, but could do so only with the knowledge and informed consent of the buyer and seller. The Court of Appeals then held:

It is sufficient under the statute for a real estate broker to satisfy the informed consent requirement by explaining that the possibility of dual agency may arise during the course of the transaction and providing a form that substantially complies with [the statutory agency disclosure form]. **By executing the form, the signor agrees to allow a dual agency** [emphasis added].

This decision by the Court of Appeals is unpublished, *i.e.*, it is not necessarily binding on a trial court. Nonetheless, it provides strong support for the system MAR has developed to avoid claims of undisclosed dual agency.

## **B. Designated Agency Firms**

In a designated agency firm, the law in Michigan provides that it is not a dual agency situation where two different designated agents in the firm represent the buyer and seller. This does not mean that a dual agency situation can never arise in a designated agency firm. Where the buyer and seller are represented by the same designated agent, or have the same supervisory broker, those individuals are dual agents and the same conflicting fiduciary duties arise. Although it is less likely that a dual agency situation will arise in a designated agency office, the possibility certainly exists. For this reason, designated agency firms are also

encouraged to include dual agency consent language in their listing agreements. MAR's designated agency addendum to its listing agreement provides:

REALTOR®/Brokerage Firm and Seller hereby designate \_\_\_\_\_ as the Seller's designated agent. For purposes of this Addendum, Seller shall have an agency relationship with ONLY the REALTOR®/Brokerage Firm, the designated Agent(s) named above and the following supervisory broker(s): \_\_\_\_\_. If a potential buyer is represented by a designated agent within the REALTOR®/Brokerage Firm other than the designated agent(s) named above, REALTOR®/Brokerage Firm and all supervisory broker(s) shall automatically be deemed disclosed consensual dual agents.

Similarly, MAR's designated agency addendum to its buyer agency agreement provides:

REALTOR®/Brokerage Firm and Buyer hereby designate \_\_\_\_\_ as the Client's designated agent. For purposes of this Addendum, Client shall have an agency relationship with ONLY the REALTOR®/Brokerage Firm, the designated agent(s) named above and the following supervisory broker(s): \_\_\_\_\_. If a potential seller is represented by a designated agent within the REALTOR®/Brokerage Firm other than the designated agent(s) named above, REALTOR®/Brokerage Firm and all supervisory broker(s) shall automatically be deemed disclosed consensual dual agents.

Again, the seller-client and buyer-client are advised of the possibility that a dual agency situation could arise. Should it occur, *i.e.*, should the same agent represent both the seller and the buyer, then that agent should make sure both clients sign an agreement consenting to the dual agency role of that agent.

Remember that under the law, you do not have a designated agency arrangement with your seller unless the listing agreement expressly states that it is a designated agency

listing. It is impossible to create a designated agency relationship without a written agreement signed by the seller designating specific persons as the seller's agents. Agents or firms who attempt to practice designated agency without written designated agency contracts with both seller-clients and buyer-clients will find themselves in unconsensual dual agency situations.

### III. CONCLUSION

We are often asked why it is necessary for REALTORS® to have a separate dual agency agreement signed at the time the dual agency situation arises. If the REALTOR® simply relies upon the sellers' and buyers' consent at the beginning of their agency relationship, it could be argued that the seller or buyer did not fully understand that to which they were consenting, *i.e.*, limited representation. Moreover, buyers and/or sellers could argue that they were not only entitled to notice that a dual agency situation COULD arise, but also that a dual agency HAD ARISEN.

Certainly, an agency disclosure form, signed at the time the dual agency situation arises provides an opportunity to demonstrate that the seller and buyer were fully informed. However, MAR has always recommended a "belt and suspenders" approach to make certain that neither the sellers nor buyers can claim that they did not provide timely and fully informed consent to the dual agency situation. As shown by the *Clancy* decision, advance notice of the possibility of a dual agency situation together with the use of a dual agency agreement signed at the time the dual agency situation actually arises effectively eliminates any potential claim that the seller or buyer did not provide their full, informed consent to dual agency.