

REAL ESTATE

DC Dual Agency Brokerage Law May Produce Silly Results For Commercial Leases

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In the world of residential real estate brokerage, some find it shocking that the same brokerage firm might represent—and negotiate on behalf of—both the buyer and the seller, or the property owner and the tenant, in the same transaction. But there are only a small number of large brokerage companies. When an agent at one of them lists a property, that listing goes out to the entire brokerage community, including the large brokerage firm whose agent signed up the listing. Once in a while, an agent in the large brokerage firm—sometimes the same agent that listed the property—has a client that wants to buy or lease in the property. None of this comes as a surprise to anyone familiar with real estate brokerage.

How would one prevent this? Preclude a buyer from looking at listings maintained by the same brokerage that represents the buyer? What if one of those listings best meets the buyer's desires and requirements? Should a different brokerage firm step in when the same brokerage firm would otherwise represent both sides of the deal?

Legislators sometimes find these “dual agency” situations shocking, so they decide that any “dual agency” must be disclosed to the brokerage firm’s clients. That leads the legislators to come up with disclosure laws. As so often happens, these laws end up creating more problems than they solve.

A perfect example of this occurred recently in Washington, DC, where a commercial tenant engaged the JLL real estate firm to negotiate a lease. On behalf of the tenant, JLL eventually negotiated a lease in a building where JLL also represented the owner—heaven forbid, a dual agency!

The DC dual agency disclosure law doesn’t limit itself to residential transactions, where a poor, innocent, and naïve home buyer might be shocked and outraged to learn that the same brokerage firm represents both buyer and seller. Instead, the DC dual agency disclosure law applies to all real estate brokerage, including commercial transactions where everyone in the business knows the same brokerage firms regularly represent both sides of a deal.

The DC law goes into great detail about how a real estate broker should disclose any dual agency. If a broker doesn’t comply, it forfeits its commission—an excessive and disproportionate penalty meted out by a government that, like those of New York City and State, apparently doesn’t miss an opportunity to punish anyone in the real estate industry.



In the JLL engagement, JLL's dual role was well known during the transaction. JLL communicated to the owner on behalf of the tenant, and vice versa. In short, JLL as a dual agent was all over the transaction, with total visibility to all. JLL wasn't hiding anything.

When the time came for the owner, S.C. Herman & Associates, to pay JLL its commission for the lease, however, the owner announced that JLL had not properly disclosed its dual agency in compliance with the DC statute. The JLL paperwork contained some attempts at disclosure, but they weren't good enough. The owner said that because of JLL's defective disclosures, it wasn't entitled to a penny of commission. Litigation followed.

The court that initially heard the litigation decided that the owner was right and didn't have to pay a penny. At the time of writing, that decision is on appeal, with a strong hint that the appellate court doesn't like the owner's position very much.

Going forward, regardless of how this case turns out, commercial brokers in DC will probably learn to be more vigilant about complying with DC's dual agency law. That doesn't actually pose a monumental challenge. It's just one more piece of paper that brokers (who are usually not lawyers) now need to remember to get signed with every new client engagement or whenever the need otherwise arises. One might also reasonably expect that the owner that refused to pay JLL will find that its future brokerage relationships have turned a bit frosty.

It would probably be unreasonable to hope that the DC government might amend its law to get rid of the dual agency disclosure requirement in commercial transactions. In that branch of real estate, the requirement serves no purpose except to create potential windfalls for sellers or anyone else who can use the law to avoid paying a commission that was otherwise fully earned.

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I help buyers, sellers, borrowers, lenders, tenants, property owners, and other commercial real estate market participants identify and achieve their business goals. To do that, I need to understand risk, security, numbers, value, financeability, flexibility, and exit strategy. Some legal issues matter a lot and many don't. It's important to know the difference. I write extensively on commercial real estate law and practice – over 300 articles and five books on leasing, lending, and other areas, with some emphasis on ground leases. I occasionally serve as an arbitrator or expert witness in complex real estate disputes. That lets me see how transactions go wrong. Often, the problems could have been avoided by keeping it simple and following the money, but everyone got sidetracked. As a Forbes contributor, I try to tell stories that teach worthwhile lessons for real estate deals. **Read Less**