



P.O. Box 1
Navarre, Minnesota 55392
612-435-8515
952-842-9961 fax
dmiller@caare.org
www.CAARE.org

Senate Committee Education, Health, and Environmental Affairs

Re: Support –SB644

Dear Senators and Committee Members:

In today's treacherous residential real estate environment, it is more important than ever to provide homebuyers and sellers with the best possible advice and guidance. Navigating a short sale or foreclosure transaction will cause a consumer to encounter some of the most hazardous circumstances possible in residential real estate. Unfortunately, for low-income homebuyers and sellers, distressed properties make up a large portion of the real estate inventory. If avoiding a second wave of poor residence investment choices and more foreclosures is important to the state of Maryland, then the representatives of Maryland will ensure that real estate consumers receive the expert advice for which their consumers are paying with commission dollars and tax dollars that fund the Maryland Real Estate Commission. What better way to help homebuyers and sellers than to make sure that real estate brokers and their agents pledge to represent their clients to the best of their professional abilities?

Logical and meaningful agency choices are perhaps the most important part of any real estate licensing law framework. These laws are designed to balance the consumer's inexperience with the licensee's distinct position of expertise and advantage. Licensing laws protect consumers from licensees, not the other way around. If a consumer hires a fiduciary with expertise in residential real estate, they should be able to rely upon the fact that their agent will represent them to the utmost degree and place their client's interests above all others, especially their own.

Maryland traveled a slippery slope when it carved out special treatment for real estate brokers by rewriting 200 years of common law with a confusing and inadequate "replacement" that legalized dual agency. When it comes to fiduciary law, there is no other profession that has received such preferential treatment and disregard for important legal standards as the real estate brokerage industry.

In 1992, I helped win a ground breaking class action lawsuit against a brokerage firm for undisclosed dual agency. We won that case on Summary Judgment, we made national news, and I got to speak alongside Ralph Nader. The Judge in that case was abhorred at the blatant disregard for clients' interests and fiduciary law. Little known to me was that win for consumers would translate into a national movement by the Realtor Association to abolish fiduciary law – only for real estate licensees. What you are looking at today in –SB644 is a small step in the right direction to at least bring some small semblance of logic to a relationship that should not exist at all in the real estate profession.

As with every other state, Maryland has a two-tiered licensing scheme consisting of broker licensees and salesperson licensees. Only broker licensees may collect fees, sign contracts with clients, and supervise salespersons. The entry standards to become a licensed broker are much higher than are those for salespersons. Salespersons require minimal entry standards, they must be supervised by their brokers, hold their licenses with their brokers, and derive their legal fiduciary duties from their broker. Salespersons represent whomever their broker represents. The broker is responsible for supervising all salesperson's acts governed by the licensing laws, including negotiations of price and terms. If the broker represents the buyer and the seller as a dual agent, then the only logical and legal result is that the salesperson must also be a dual agent. However, that is not what the Maryland Real Estate Act currently states. It is that portion of the Act that comes before your scrutiny today.

For purposes of our argument, it is important that you understand the contractual flow of fiduciary duties as they occur between licensees and consumers. Under the Act, all client representation contracts must be through or on behalf of the broker licensee. The client has a contract with the broker, not the salesperson. The client is owed duties from the broker, not the salesperson. Those duties then flow downstream to the salesperson (from the broker) while preserving the broker's licensing responsibility to supervise that salesperson.

The Maryland Real Estate Brokers Act (“Act”)¹ contains a logically and legally impossible agency relationship which benefits large brokerage firms to the detriment of the majority of real estate licensees, small brokerages and more importantly home buyers and sellers. The Act in its current form essentially allows dual agents (“serving two masters”)² to act as if they are undisclosed dual agents. Under the common law, undisclosed dual agency is considered fraud and the damages are severe including rescission and disgorgement of all fees collected.

¹ Md. Code. Ann Real Estate Brokers § 17

² Dual agency is when real estate brokers claim to represent both the buyer and the seller in the same transaction, creating an impossible conflict of interest. **In a dual agency situation, the fiduciary is not permitted to negotiate to the benefit or detriment of either party.** Although the term appears to infer an important fiduciary relationship, dual agency is in fact no agency at all. Or more accurately, dual agency is a betrayal in which your agent becomes a secret double agent working for the other side. In real estate, it often involves a “bait and switch” in that the exclusive agent with all his fiduciary duties intact transforms into a dual agent with little or no warning.

Section 17-530(d)(1)(v)³ allows salespersons to exceed the limits of the broker's legal relationship with the client – an impossible result. This part of the Act addresses the situation where dual agency occurs and the broker is legally prohibited from negotiating to the detriment or benefit of either party. However, this section of the Act is incorrectly constructed in that it actually allows the salesperson, in a dual agency situation, to do exactly what the broker is prohibited from doing – negotiating price and terms. How can a sub-agent of the broker (the salesperson) be allowed to negotiate on behalf of the broker's client, when the broker is legally prohibited from doing so? They cannot.

How can the broker fulfill their licensing responsibility to supervise their salespeople when their salespeople are engaging in acts for which the broker is prohibited? If the salesperson consults their broker about the legality of certain negotiating terms, how can the broker advise their salespeople when doing so will violate the Act. The current statutory construction is logically flawed and needs to be revised.

Although we understand how profitable dual agency is for large brokerages in that they get to keep a double commission, at some point we must balance the integrity of the licensing scheme and consumers' interests. The current Act does not do that.

Although it is CAARE's position that dual agency should not be permitted in any form in residential real estate, we recognize that real estate licensing law in Maryland is far from reaching that standard. Although we do not approve of the new proposed language because it does not go far enough to protect consumers, we do support the proposed new language in – SB644 as a step in the right direction of providing consumers with at least a legally possible result. Salespersons under no circumstances should be able to exceed the agency authority of their brokers. –SB644 reinstalls some integrity in the Act where it currently is lacking any.

CAARE is non-profit charity 501(c)3 dedicated to exposing conflicts of interests in residential real estate and providing information, solutions and resources to consumers and others to help combat these problems. CAARE's board of directors is comprised of four consumers and three industry experts to intentionally balance our decisions in favor of those whom we serve – residential real estate consumers. CAARE is possibly the only non-profit charity that is well versed in some of the most complex issues that face residential real estate consumers.

Sincerely,

Douglas R. Miller

Douglas R. Miller
Executive Director,
Attorney, Real Property Law Specialist, Certified by the Minnesota State Bar Association

³ §17-530 (d)(1)(v) Establishes that “An intra-company agent representing the seller or buyer may provide the same services to the client as an exclusive agent for the sell or buyer, including advising the clients to price and negotiations strategy, provided that the intra-company agent has made the appropriate disclosure to the client and the client has consented, as required by this section, to dual agency representation.”