



REAL ESTATE AGENTS E&O ISSUES REGARDING DUAL AGENCY

A dual agency transaction is the biggest area of E&O exposure for real estate brokers and therefore carries the greatest risk. Every real estate transaction has a fiduciary relationship between the parties. A real estate broker has a fiduciary relationship to his or her principal that obligates the broker to act in the principal's best interest. The buyer's agent is the buyer's fiduciary, the seller's agent is the seller's fiduciary, and a dual agent is both the buyer and seller's fiduciary.

In a dual agency transaction, the broker/agent will find it difficult to provide the full range of fiduciary duties to the buyer and seller. The fiduciary relationship imposes duties of fidelity, individual loyalty, full disclosure, utmost care and good faith, and a duty to explain and counsel the client.

Therefore, it is quite difficult to be fully loyal to both parties. If the broker/agent agrees to a dual agency role, full

disclosure to buyer and seller in writing is essential (use any state mandated form). The agent must advise both buyer and seller that the agent is acting for the other party as well. The agent should advise, if possible, effects of a dual representation, including that by consenting to the dual agency relationship, the buyer and seller are giving up their right to undivided loyalty and that no confidences can be maintained by the agent without disclosure to both buyer and seller.

An agent should avoid creating a dual agency, if one is not intended. This can be mistakenly created by voluntary assumption of extra responsibilities or an implied agreement to undertake some act for a party to the transaction whom the agent is not representing. This will subject the agent to a potential claim of undisclosed agency and to liability to both buyer and seller.

THE ANATOMY OF A CLAIM

Alleged Error or Omission

The Insured is a broker/agent who acted in a dual agency capacity in the sale of a property on behalf of the seller and buyer. The broker represented to the buyer that the property could be subdivided based on the zoning status of the property. The broker made this representation on unsubstantiated information. The broker also failed to fully disclose to the seller his representation to the buyer.

Resume of the Claim

The buyer represented to the broker that it was their intention to purchase the property which had a single family home and additional acreage that could be subdivided to allow building of another single family dwelling. The broker, relying upon the seller's statement that they thought the property could be subdivided, made an affirmative written statement to the buyer. However, the broker made this written representation without first checking with the local planning department as to the current zoning status. The broker relied upon information from prior sales transactions that the broker was involved in with adjoining lots and the very questionable statement made by the seller. Unknown to the broker, however, zoning changes had taken place a year prior which affected this current property. The broker did not disclose to the seller that he made this written representation to the buyer which was a key element to a successful transaction.

Subsequently after the close of the sale, the buyer learned they would not be allowed under current zoning requirements to split the lot. The buyer made a claim against the broker and seller for misrepresentation. They alleged the broker owed them a fiduciary duty to check the accuracy of all information conveyed on the Transfer Disclosure Form and representations made that failed to confirm the information with the planning department. Thus, the broker breached his

fiduciary duty to the buyer.

The broker also breached his fiduciary duty to the seller by not disclosing that he relied upon their unqualified statement that it was their thought that the zoning requirements would allow the property to be divided. While the sellers were liable for the misrepresentation as to the divisibility of the property, they have a claim against the broker because of non-disclosure and the fiduciary duty to ensure that the property zoning status was accurate.

How the Claim May Have Been Avoided

It should be clear in this example that the broker has a fiduciary responsibility to make full disclosure to both the buyer and seller of everything that is communicated by the parties to the transaction. This was not accomplished! Also, the broker should not have relied upon unsubstantiated statements by the seller in zealous desire to make the sale happen. The proper due diligence would have been to research the matter with the local planning department as to current zoning status.

This report is certainly not intended to imply that a dual agency transaction should be avoided at all costs. This is meant to bring awareness to the risk involved and perhaps create additional awareness for the great care needed to satisfy the broker's fiduciary responsibility to the buyer and the seller.



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