

Risk Manager



July 2005

Whose Side Are You On?

a Real Life Claim Situation involving Dual Agency, Conflicts of Interest, and Fraud

Situation

A home seller signed an Exclusive Right to Sell Listing Agreement with an agent from XYZ Realty. Significantly, the seller did not authorize XYZ to act as a dual agent. At about the same time, another agent with XYZ signed a Buyer's Agent Agreement with a prospective home buyer. The listing agent asked the buyer's agent to show the property to the interested buyer. The buyer saw the house and made an offer with a standard successful loan and home inspection contingency clause. The offer was accepted with a closing date in six months.

Problem

After contracting for the listed property, the buyer found another house she preferred. With the assistance of her agent, she withdrew from her contract by indicating she could not secure financing and stating material defects were found during the home inspection. Both statements were false. Subsequently, the seller learned the buyer had found financing for the more expensive second home and that the home inspection never took place.

Mistake

The buyer's agent should never have assisted the buyer in making false statements to facilitate withdrawing from the contract. Moreover, since there was no Dual Agency Agreement, the buyer's agent owed the seller a fiduciary duty to look after his best interests since XYZ also had the Exclusive Right to Sell Listing Agreement. A fiduciary duty heightens the duty owed to the client.

Result

The seller sued the buyer, the buyer's agent, and XYZ Realty for breach of contract, fraud and breach of fiduciary duty. Due to the allegation of fraud, the carrier for XYZ reserved the right to deny coverage for damages arising from intentional acts. After nearly two years of litigation, the case was settled for a substantial amount, and the state licensing board sanctioned the agent.

Prevention

Honesty and full disclosure of all potential conflicts of interest are always the right policies. It was unethical and possibly illegal for the agent to assist the buyer with the false representations. When approached to participate in unethical or illegal behavior, a REALTOR®'s best move is to terminate the relationship. Do not hesitate to consult with an attorney or your insurance representative if confronted with a request that raises ethical or legal concerns. A REALTOR® should also know and honor his legal, ethical, and fiduciary responsibilities to clients, especially in the absence of a Dual Agency Agreement.

For more information, please contact Pearl Insurance at 1.800.289.8170.

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