

## **Best of the Hotline – Dual Agent**

*By James L. Goldsmith, Esquire*

**Facts.** This Hotline question comes from a dual agent whose buyer and seller had recently penned an agreement of sale. The agent claimed to have carefully reviewed the provisions of the agreement with the buyer and the seller, including "time is of the essence" and the importance of doing all that was required on or before schedule. The buyer, unfortunately, must not have been paying attention to that part of the lesson because when the dual agent asked her buyer how the mortgage application process had gone, the buyer nonchalantly explained that she hadn't gotten around to making the application, but that she would take care of it the following day. According to the agreement, however, the buyer was already two days late.

**Q.** What, if anything, is the dual agent required to tell her seller? What advice does she now give her buyer about making the application and/or the potential problems the buyer now faces?

**A.** For most transactions, a mortgage application that is two or three days late is probably a benign issue. It probably makes no difference to the outcome. One would hope that a seller would not declare a breach for the sake of keeping the deposit and then selling the property to someone else. Most sellers understand the adage that a bird-in-the-hand . . .

But lawsuits and Hotline stories abound as real life takes many twists. If the agreement was difficult to reach and the seller isn't particularly enamored of the buyer or if there are back-up buyers known to be lurking about, and the deposit is a goodly sum, the seller may have a strong impulse to declare a breach and terminate the transaction. As the dual agent, you undoubtedly do not want this to occur (despite the fact that your listing agreement may provide that you are entitled to a percentage of the buyer's deposit in the event of buyer default).

Regardless of what the seller may elect to do, the dual agent must bring the issue to the seller's attention. Look no farther than the Real Estate Licensing and Registration Act (RELRA), which provides that all licensees, regardless of their agency relationship, are obligated to keep the parties to the transaction informed.

Can the dual agent salvage the transaction by dragging the buyer to the mortgage lender before informing seller? What other games might one play to keep the deal from souring? The right answer might bring the wrong consequences, but the right answer is this: the dual agent, upon learning of the buyer's temporal breach, should have informed the buyer of the problem and of the fact that, as a dual agent, she is required to provide the information to the seller. The buyer should know that the seller can deem the agreement breached and make claim to the deposit as liquidated damages. The dual agent may offer her opinion as to why the reasonably prudent seller wouldn't choose this course, but must also be frank in disclosing the seller's options. The buyer can be told that it might help if the application were to be made immediately and should be

told to consult his lawyer if he has any questions about whether the late application can legally give rise to termination and retention of the deposit by the seller.

The disclosure and advice given to the seller can be both objective and subjective. The objective: the buyer failed to make a timely mortgage application, the agreement provides that "time is of the essence," and the seller may consult her attorney to determine her rights under the agreement. The subjective: if the transaction is terminated, it may take a while to find a replacement buyer, prospective buyers may perceive that the property is a problem property because it went from "pending" to "active," and three days makes little difference to the process of acquiring a mortgage loan. Further, the seller should be advised to seek legal counsel.

The bigger story is not so much what you would say to the buyer and the seller in this particular situation. The bigger story is how to deal with the competing interests that a dual agent faces so often in a single transaction. Dual agents talk about dual agency generally: how it comes about and how the agent won't reveal confidential information. Rarely is the discussion as stern as it should be. Clients should be informed that virtually all information will be shared equally regardless of the advantage it may create for one party or the other. The buyer should be told that the temporal obligations of the agreement must be satisfied because of the language "time is of the essence" and that any failure has to be reported to the seller given the agent's obligation to inform all clients of the status of the transaction. This will be so whether a breach is material or harmless (in the absence of the provision that "time is of the essence" a temporal failure may not justify termination of the agreement and retention of deposit. The failure is a breach only if the non-breaching party is harmed by the failure. A mortgage application made two or three days late is hardly going to have any impact on the transaction and thus would not be a material breach. Inclusion of "time is of the essence" is therefore a very powerful clause).

The obligation of disclosure runs both ways. When the dual agent learns of a "minor" boundary issue with a neighbor that "will be resolved" before settlement, what must she do? Timely disclose to the buyer (timely means NOW).

Dual agency amplifies those difficulties that occasionally arise and are routinely squelched in a transaction. "I am going to tell on you" is a hard stance we like to take. We want our clients to be our friends. We want to soothe, coddle and encourage.

While you should consider that dual agency is difficult and fraught with peril, you should also know that it can be done reasonably well. It starts with that candid conversation that everything you know about the transaction is going to be shared with both parties. It requires the parties to know, before they sign the agreement, that they will be expected to abide by all of the requirements and that your obligation is to keep each informed of the status. Your reports to each will sound similar and be somewhat objective. You may also advise the parties that they share a similar objective, a successful settlement. Your attempt will be to get them to the finishing line with the fewest problems, but their own active participation and involvement is required. And for your own protection, when questioned by either party as to a course that should be taken or a potential problem that has arisen, your go-to advice is that they should

consult their legal counsel. Being a dual agent means having to be extremely objective and factual no matter what the ripple it may cause.

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