Best of the Hotline

By James L. Goldsmith, Esq.

Q. A property owner called an agent and asked for a CMA. The agent, figuring she'd get the listing, agreed. When the agent presented the owner with the copy of the CMA, the owner asked the agent to include a handwritten sentence stating that she performed the CMA to the best of her ability. The owner asked the agent to sign the statement! The agent did not feel comfortable doing this and asked what the Hotline thought.

A. If you undertake a task that fits within the scope of your vocational endeavors, shouldn't that task be performed to the best of your ability? Implicit in your undertaking is your agreement to perform the undertaking with in the standards of practice applicable to that undertaking. So why not sign that you are doing so?

On the other hand, I can't help but wonder if our agent is being set-up. Or perhaps the owner is hoping that including this sentence, along with the agent's signature, will lend greater credibility to the CMA.

I question the value of such a certification in light of the conspicuous language that appears on the front page of this and every CMA stating that the analysis has not been performed in accordance with the Uniform Standards of Professional Appraisal Practice and is not to be construed as an appraisal nor used as such for any purpose. Whether the agent should sign the language proposed by the seller is a tough call. It would not be wrong to do so despite the mystery behind this request.

What did our caller decide? She determined that she would only sign her name under the mandatory and conspicuous disclosure that appears on the front page of the CMA. We like her choice

Q. Buyer and seller entered into an agreement of sale that obligated buyer to place a $2,000 deposit check in the listing agent's hands within three days of executing the agreement. The buyer complied, but a week later the listing agent learned that the check had bounced. Within a day or two, she heard from the buyer agent that the buyer was denied a mortgage and was terminating the agreement.

The listing agent insists that she told her seller that the buyer's deposit check bounced as soon as she learned of it and before learning of the mortgage denial. The seller, however, claims not to have learned of the bounced check until she also learned of buyer's termination of the agreement for want of a mortgage.

The seller is furious and demands that the listing agent pay her $2,000, the amount of the buyer's bounced deposit check. Does the listing agent bear any culpability that would make her responsible for the $2,000 deposit?

A. No, but trouble is brewing and the listing agent might consider buying her way out of this mess with kindness, if not money. This is a very common situation, and it illustrates that sellers rarely understand that when they agree to the liquidated damages clause (by checking the box at Paragraph 26(G)), they are limited to retaining sums paid on account of the purchase price when a buyer breach occurs. Sums paid on account of the purchase price are sums held in escrow. When a bad check is passed, there is no money held in escrow on account of the purchase price; and, therefore, when the buyer breaches by not timely paying a deposit, there is no fund to secure as damages. Zip. Zero. Nada.

Yes, in our situation the buyer breached by not tendering a deposit as required, and arguably the buyer's breach would cost the buyer all sums that buyer paid into escrow (none). The caller, however, felt that her seller wasn't entitled to money damages in any event because the buyer was ultimately rejected for a mortgage and therefore was entitled to her deposit. That would be so if the listing agent explained to the seller that the deposit check bounced and if the seller waived her right to declare the buyer default for failing to pay a deposit.

The problem for our listing agent is that the seller is irate at having not been informed of the bounced check. Argue as we might that it would have made no difference, the seller might be justified in her anger. Both the Real Estate Licensing and Registration Act and the Rules and Regulations of the Real Estate Commission require licensees to keep their clients informed of the status of the transaction. The seller should have known that the buyer bounced a check as soon as the listing agent learned of it, and arguably should have known that buyer was struggling with obtaining financing. Although the listing agent insists she informed the seller, there is no written proof and so this is a matter of credibility. The listing agent has left herself open to a complaint before the Real Estate Commission.

This happens to be one of my most favorite Hotline calls only because of the caller's closing remark: thank you for making this so very clear and not yelling at me like everyone else has!

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Jim Goldsmith is an attorney with Caldwell & Kearns and serves as general counsel to PAR. A substantial portion of his practice is dedicated to providing advice and counsel to real estate licensees. He and his firm represent and defend real estate salespersons and brokers in civil lawsuits and licensing claims across the Commonwealth. Jim also defends REALTORS® in disciplinary hearings conducted by the Real Estate Commission. He routinely counsels employers on employee relations issues and is one of the voices of the PAR Legal Hotline. He may be reached at www.caldwellkearns.com.