

FSBOs and the statement of estimated costs

By James L. Goldsmith, Esquire

What happens when a FSBO freaks out at settlement when she learns for the first time that she is paying seller assist and that the proceeds are less than she anticipated? She goes hunting, that's what. Who is the likely target?

By definition, a FSBO is without an agent and we all know what a horrible idea that is! A listing agent would have reviewed the agreement and brought to the seller's attention that seller assist would be deducted from the purchase price. A listing agent would have provided an estimate of closing costs and return.

While it is unlawful for a buyer agent to engage in conduct that confuses or deceives a seller, a buyer agent has no duty, in this author's opinion, to review all the terms and provisions of the contract with the unrepresented seller. An unrepresented seller has a duty to assure that she reads the contract and understands what she is signing and to seek help if she does not (one the reasons the standard agreement suggests that the parties consult with an attorney).

Unfortunately, the seller may have a successful hunt because, in many cases, the buyer agent fails to provide the unrepresented seller with an estimate of closing costs detailing the costs and estimated proceeds. By regulation of the State Real Estate Commission, a buyer agent is required to present an estimate of reasonably foreseeable expenses associated with the sale that the FSBO may be expected to pay before she executes the agreement. The regulation (Section 334) states "Before an agreement of sale is executed, the brokers involved in the transaction shall provide each party with a written estimate of reasonably foreseeable expenses associated with a sale that a party may be expected to pay . . ." and it goes on to include the type of expenses for which there is to be an accounting. By my reckoning, the only broker involved in the transaction with a FSBO is the buyer broker whose agent is therefore duty bound to provide the estimate.

What is the consequence of not providing the estimate? It is likely that a disappointed seller will attribute the full amount of the seller concession to the selling broker and will demand that amount in suit. A common defense is based on causation: the buyer agent's failure to estimate closing costs and proceeds did not cause the problem; rather, market conditions dictated a reduced sale price or seller concessions. While that may be true, it is difficult to assert this retroactively. Another consequence of not providing the estimate is that seller may report the omission to the Real Estate Commission, which would likely seek to impose a fine.

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