



Fiduciary Duties of Real Estate Professionals: A Brief Overview of What They Are and How Not to Breach Them

“WHEN in doubt, disclose it. If not in doubt, disclose it anyway.” I have been defending errors and omissions claims brought against real estate professionals for more than 13 years, and have come to believe that this quote should be the liability prevention mantra chanted by all agents, from the greenest rookies to the most seasoned veterans. The overwhelming majority of errors and omissions claims brought against real estate professionals involve one or more defects of the property of which the purchaser had no actual knowledge at closing, yet were known or discoverable to one or more of the other parties involved in the transaction.

Errors and omissions claims against real estate professionals generally fall into three categories: negligent, fraudulent, and fiduciary. Negligence claims assert that the agent had a professional duty to act and the agent breached that duty by failing to conform to the required standard of conduct, causing damage (generally monetary) to the claimant as a result. Such claims are typically subject to the “preponderance of the evidence” standard of proof, meaning that the claimant has to prove each element of the claim to be more likely true than not. Fraud claims assert that the agent consciously tried to mislead or trick the claimant, causing harm. These claims are usually subject to a much higher burden of proof, generally “clear and convincing evidence” in most jurisdictions. This is the highest burden of proof in our civil justice system. Fiduciary claims assert that an agent breached an elevated duty of trust to a client, causing damage. These claims can be a source of some confusion. Professional negligence implicates a duty of care, while breach of a fiduciary duty implicates a duty of loyalty and honesty. (Citations omitted.)

What exactly is a fiduciary relationship? “[A] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other.” (Internal quotation marks and citation omitted.)

It is axiomatic that a party cannot breach a fiduciary duty to another party unless a fiduciary relationship exists between them. [A] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. (Internal quotation marks and citation omitted.)

“The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him....Once a [fiduciary] relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary.” (Citation omitted; internal quotation marks omitted.) Moreover, “[a]lthough we have not *expressly* limited the application of these traditional principles of fiduciary duty to cases involving only fraud, self-dealing or conflict of interest, the cases in which we have invoked them have involved such deviations.” (Emphasis in original; citation omitted.)

Finally:

[p]rofessional negligence alone...does not give rise automatically to a claim for breach of fiduciary duty.... [Thus] not every instance of professional negligence results in a breach of [a] fiduciary duty....Professional negligence implicates a duty of care, while breach of a fiduciary duty implicates a duty of loyalty and honesty. (Citations omitted.)

Basically, if clients puts themselves in your hands because of your superior professional experience and knowledge, and their financial well-being is at least in part dependent upon your acting loyally in their best interest, a fiduciary relationship has likely been created.

Some jurisdictions statutorily impose fiduciary duties upon real estate professionals. For example, Connecticut General Statutes § 20-325d(1)(c) defines a seller’s agent as “a real estate broker or real estate salesman who

acts in a fiduciary capacity for the prospective seller or prospective lessor in a real estate transaction.” Section 20-325d(1)(d) provides that a buyer’s agent “means a real estate broker or real estate salesman who acts in a fiduciary capacity for the prospective buyer or prospective lessee in a real estate transaction.”

So what exactly are the “fiduciary duties?” The widely recognized duties of a fiduciary to a client in the real estate professional context are as follows. Various acronyms have been used to help agents remember them; this example uses the common acronym “**OLD CAR:**”

Obedience

An agent has a duty to obey the instructions of a client, as long as the directed action is legal. As an agent, it is your responsibility to offer your client guidance through the benefit of your expertise and experience, but the decisions are theirs, and you are duty-bound to abide by those decisions. For example, you represent a seller. Offers come in from potential buyers A and B. The offer from A is higher, but your client instructs you to accept B’s offer because A’s agent “is obnoxious.” You may disagree, but you must obey.

Loyalty

With respect to a transaction, agents are bound to place the best interests of their clients first, ahead of even their own. Some agents get into trouble by glossing over or even failing to reveal a potentially problematic issue for fear of losing a deal (and a commission). The duty of loyalty to the client is limited by the duty of honesty to all parties, i.e., although an agent must put the client’s interests first, that duty ends short of concealing material facts from other parties.

Disclosure

Most jurisdictions require agents to disclose known material facts to all parties to the transaction. The fiduciary duty of disclosure goes farther, requiring agents to disclose to their clients any information they have which might assist the client in making an informed decision, even if that information might put the deal (and the agent’s commission) at risk. See, “Loyalty,” above.

Confidentiality

Agents must maintain any personal information gained through their clients in the utmost confidence. Absent written consent to disclose personal information, the best rule is: don’t disclose it.

Accounting

Agents are duty-bound to account to their clients for every necessary document and every penny involved in a transaction. This includes any commission splits.

Reasonable Care

The duty of reasonable care is essentially the duty not to be negligent, to honestly represent your client to the best of your ability, and to be truthful with all parties to a transaction.

Each of these duties has been the subject of extensive litigation and could be the subject of separate articles, but as a general rule, agents would do well to ask themselves, when considering any decision regarding what action to take during the course of a transaction, “if I were my client, what would I want me to do?” Whatever the answer to that question might be, as long as it is not illegal, fraudulent, or in breach of any existing contract, odds are it is the correct answer. Remember: when in doubt, disclose it. If not in doubt, disclose it anyway. If still in doubt, call an errors and omissions defense attorney. A ten-minute phone call may help prevent years of costly and time-consuming litigation.

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