

## ALL PROTECTION PERIOD CLAUSES ARE NOT EQUAL

As REALTORS® are well aware, most listing agreements contain a clause that states that under certain circumstances, the broker is entitled to a commission even if the property is sold after the listing expires. The Michigan Court of Appeals has previously held that such clauses are enforceable. Hawkins v Smithson, 181 Mich App 649 (1989). The protection clause upheld in Hawkins stated as follows:

If during the term of this listing I/we, you, or anyone else sell or exchange the property or produce a purchaser ready, willing and able to purchase the property or make exchange therefore [sic] on the terms listed herein or other terms acceptable to me/us, or if, within 6 months after this listing expires, I/we, or anyone else other than another Real Estate Broker sell or exchange the property to or with anyone with whom or to whom I/we, you, or any sub-agent engaged by you or anyone else, during the period of this listing, had negotiations for the sale of the property, exhibited the property, or had oral or written contract as a prospective purchaser for the property, then, I/we will pay you a commission of 10% of the sale.

Not all protection period clauses are the same. REALTORS® are cautioned to look at the particular language of the protection period clause in question to determine when and how it applies. For example, some protection period clauses state that the listing broker is entitled to a commission if the property is sold to a party with whom the broker had negotiations during the listing. Other protection period clauses provide that the listing broker is entitled to a commission only if the buyer learned of the property through the listing broker's efforts. Still other protection period clauses provide that the broker is entitled to a commission if the property is sold during the protection period to anyone who looked at the property during the listing, even if the listing broker had no contact with that buyer at all. The obvious intent of these types of clauses is to prevent

sellers from avoiding a commission simply by waiting to sign a purchase agreement until after the listing expires.

But what about the situation where the seller is not trying to avoid a commission? Suppose that upon the expiration of his listing, the seller lists his property with a different broker. Suppose further that during the second listing, a buyer who had previously looked at the property resurfaces. The new listing broker receives an offer on the property from that buyer which is accepted by the seller. The seller is clearly obligated to pay a commission to the second listing broker. Remember, however, that just because a seller is obligated to pay the second listing broker a commission does not automatically excuse him from paying the first listing broker. In the situation outlined above, should the seller also be required to pay a commission to the first listing broker if the sale takes place during the protection period under that listing contract?

We assume that many REALTORS<sup>®</sup> (and all sellers) would answer "no." For that reason, many protection period clauses contain exception language drafted solely to address this situation. These "exceptions," like protection period clauses themselves, are not uniform. For example, some of the "exceptions" apply if at the end of the listing contract, the seller lists the property with any licensed broker; others apply only if the seller lists the property with another REALTOR<sup>®</sup>.

We recently became aware of a number of situations where a seller B with the assistance of a real estate licensee B has used an "exception" to a protection period clause to deprive a listing broker of an otherwise earned commission. The typical scenario is as follows.

Seller Smith lists with Broker Green. Buyer Bob becomes interested in Seller Smith's house and a purchase agreement is signed which contains contingencies. For some unexplained reason, the contingencies are not satisfied and the purchase agreement is allowed to expire without apparent concern from Seller Smith. When Broker Green's listing expires, Seller Smith immediately lists the home with Broker Brown and simultaneously signs a new purchase agreement with Buyer Bob on terms that are almost identical to his first purchase agreement. Since Seller Smith's deal with Buyer Bob is pretty much in place at the time the second listing is signed, Broker Brown agrees to take a significantly lower commission than that which was being charged by Broker Green. The commission savings are reflected, at least in part, by a lower purchase price for Buyer Bob. Seller Smith then claims that Broker Green is not entitled to a commission because under the plain language of his own listing contract, the protection period does not apply in the event the property is relisted with another broker. Broker Green is understandably upset about what he perceives to be a manipulation of the terms of his listing contract.

There is a possible response to a seller who wrongfully attempts to circumvent the protection period clause as set forth in the above scenario. Michigan courts have long held that in the absence of a specific agreement to the contrary, a broker earns its commission when it produces a buyer ready, willing and able to purchase the real estate under the price and terms set forth in the contract or on other terms acceptable to the seller. Hayman Management Co v Dura Corp, 45 Mich App 522 (1973); Rich v Emerson-Dumont Dist Corp, 55 Mich App 142, lv den 393 Mich 766 (1974). It would thus appear that a strong argument could be made that the

protection period clause does not apply in the above scenario at all. That is, one could argue that the broker earned the commission when Buyer Bob initially signed the first purchase agreement -- which was during the term of the initial listing contract.

It would appear also that there may be a couple of ways to address this latest issue in the listing contract itself. First of all, a protection period clause can be drafted so that the protection period does not apply only if the seller lists the property with another REALTOR® after the listing contract expires and that second REALTOR® uses “substantial efforts” to obtain the purchaser. The difficulty raised by this language is that it will likely invite disputes as to what constitutes “substantial efforts.”

Another possibility would be to amend listing contracts to provide that during the protection period, the broker=s commission shall be reduced by the amount of any commission paid to another REALTOR® pursuant to a valid listing contract with the seller. So, for example, if the first listing contract called for a 5% commission and the second listing contract called for a 1% commission, the seller would be required to pay the first broker a 4% commission and the second broker a 1% commission.

In summary, REALTORS® should never assume that all protection period clauses work the same. REALTORS® should be particularly cautious when listing a home that has previously been listed with another company. As a matter of contract law, just because a seller is obligated to pay the second listing broker a commission does not automatically excuse him from paying the first listing broker. Depending on the term of the listing contract in question, a seller could be obligated to pay both listing brokers. Obviously, a seller in this predicament is none too happy and a listing agent who has put her client in this position has done her client a disservice.

REALTORS® should also examine the protection period clause in their own listing form to make certain that they understand when and how it applies. It may be that the clauses in your contract need to be revised, with the assistance of counsel, to address the latest issue raised in this memorandum.