

## **SELLER'S EARLY TERMINATION OF EXCLUSIVE RIGHT TO SELL AGREEMENT**

It is important to keep in mind that sellers can always terminate an exclusive right to sell agreement; the question is what damages, if any, the sellers may owe the listing broker as a result. Put another way, an early termination of a listing may be a breach of contract, but that does not mean that the sellers would ever be required to continue to work with the listing broker. Rather, because of their breach, sellers may owe the listing broker damages.

In determining if the sellers owe damages, the question is whether the sellers' early termination is, in fact, a breach of contract. If the sellers terminate the listing in bad faith in order to avoid paying a commission, then such termination is a breach of contract. For example, if the sellers terminated the listing agreement and then sold the property to a buyer who had been introduced to the property during the listing, then the termination is likely to be deemed to be in bad faith. Likewise, if it can be shown that discussions/negotiations between the sellers and the eventual buyer began before the sellers terminated the listing agreement. In either case, a court is likely to conclude that the termination was done for the sole purpose of avoiding a commission and therefore that the seller's termination was a breach of contract.

But what if at the time the seller terminates the listing agreement, there is no buyer in sight? Here, the analysis is more complicated. A listing agreement between a seller and a listing broker creates a principal/agency relationship. Under agency law generally, a principal may revoke the authority of his agent "at his mere pleasure or caprice."<sup>1</sup> Over the last 100 years or so, Michigan courts have struggled with the applicability of this general rule to situations where sellers have

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<sup>1</sup> *Seelye v Broad*, 379 Mich 289; 150 NW2d 785 (1967).

provided a real estate broker with a stated period of time in which to find a purchaser for their property.

Since the 1960s, the analysis has focused on whether the listing broker can show substantial performance of the duties imposed upon him/her by the listing contract (even though the listing broker has not yet produced a buyer). Where the listing broker has expended time, effort or money in attempting to find a purchaser for the property, Michigan courts have found that the broker has provided sufficient consideration such that the seller may not unilaterally terminate the listing contract.<sup>2</sup> It has been held, for example, that a seller did not have the unilateral right to terminate a listing contract after the broker had spent \$5,000 on promotion and advertising of the property.<sup>3</sup> The fact that the listing contract is found to be irrevocable does not mean that the sellers are obligated to continue to work with the listing broker until the end of the term of the listing contract. If the contract is irrevocable, then the sellers' early termination will be a breach of contract, making them liable for damages.

Of course, if the listing broker breaches the listing agreement first, then the sellers can terminate the listing agreement without liability. A listing broker may be deemed to be in breach, for example, if the listing broker does not advertise/promote the property as agreed upon in the listing agreement.<sup>3</sup> Likewise, for example, the listing broker may be deemed to have breached his duty of confidentiality if he has disclosed the sellers' "bottom line" price to a potential buyer. In either example, it is likely that the sellers would be entitled to terminate the listing agreement without liability.

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<sup>2</sup> *Ladd v Teichman*, 359 Mich 587 (1960).

<sup>3</sup> *H.M. Seldon Co v Carson*, 11 Mich App 613 (1968).

Assuming that the sellers' termination of the listing contract is, in fact, a breach of the listing contract, what is the proper measure of damages? If there has been an actual sale of the property, the commission amount is the proper measure of damages. If the broker has produced a buyer who is ready, willing and able to purchase the property on the terms set forth in the listing agreement and the seller has refused to sell, then, again, the commission amount is the proper measure of damages. But what if no buyer has been produced by the broker and no sale has been made by the seller within the listing period? In this instance, a listing broker is entitled to lost profits only if it can show that it was reasonably certain that it would have earned its commission without the action of the seller. And this is a significant burden. It was not enough, for example, for the broker to testify that there was "a greater than usual interest in the property."<sup>4</sup> If the listing broker cannot meet this burden, then the broker's damages will be limited to reimbursement for expenses the broker has incurred in promoting the property.

Keep in mind that the fact that a listing broker cannot require the sellers to continue to work with him/her through the end of the listing does not mean that the listing broker is required to provide sellers with a release if requested to do so. If your sellers demand a termination, you can certainly acknowledge such termination while at the same time making clear that you view such termination to be a breach of your listing contract. A note along the following lines should suffice:

Pursuant to your request, I have withdrawn your listing from the MLS and will remove my sign/lockbox on or before [date]. Please be advised, however, that I consider such termination to be a breach of contract. By honoring your request, I am in no way waiving my rights under the listing contract.

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<sup>4</sup> *HM Seldon Co v Carson*, 29 Mich App 643; 185 NW2d 842 (1971).

In this way, the listing broker can preserve his/her legal rights. If the sellers decide they no longer wish to sell the home, a listing broker can accommodate this request by keeping the listing agreement in place but agreeing not to market the property.

A cooperating broker has no remedy against a seller who breaches a listing contract. A cooperating broker has no contractual relationship with the seller. A cooperating broker's right to a commission is through the MLS and is enforceable against the listing broker only. Under the MLS and professional standards rules, if the transaction fails to close for any reason, a cooperating broker has no right to a commission for the listing broker. If the transaction with the cooperating broker's client eventually closes, then the cooperating broker's remedy, if any, is against the listing broker through the arbitration process.

Finally, if the sellers breach one listing contract and then list with another broker who is eventually paid a commission, the first listing broker cannot file an arbitration to collect its commission from the second listing broker. The first listing broker's sole remedy for the sellers' breach of contract is against the former seller-client.

#### CONCLUSION

Realtors® often inquire as to whether or not they should pursue a seller who has breached a listing contract. Realtors® should, of course, consult with legal counsel, but certainly any discussions should include a damages analysis. If the sellers terminated the listing contract soon after it was signed, before the listing agent spent any time, effort or money in presenting the property, then a court is likely to conclude that the contract was revocable and the sellers do not owe damages. Even if the contract was irrevocable, if the sellers did not actually sell the property after their breach, then it is unlikely that a listing broker will recover anything other than expense reimbursement.

