

## SUCCESSIVE LISTING AGREEMENTS

### I. INTRODUCTION

Sellers who change listing companies when a listing agreement expires may end up obligating themselves to pay more than one commission. This situation can arise if a buyer who looked at the home during the listing with Company A actually purchases the home during a later listing with Company B. As a legal matter, ordinarily, whether Company A has a right to a commission has nothing to do with whether Company B has been paid a commission. Instead, the question is whether Company A's listing contract contained a protection period clause and, if so, whether there was an exception that applied in this instance.

#### A. All Protection Periods are Not the Same

As REALTORS® are well aware, most listing agreements contain a clause that states that under certain circumstances, the listing 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 buyer with whom the broker “**had negotiations**” during the listing. Other protection period clauses provide that the listing broker is entitled to a commission if the buyer “**viewed**” the property during the listing. Still other protection periods cover situations where the buyer “**became aware of**” the property during the listing. 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® (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®.**” Other “exceptions” apply only if the second listing broker “**used substantial efforts.**” Some protection period clauses provide that the “exception” applies only to the extent of any commission paid to the second listing broker. (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.)

There is no legal requirement that a protection period clause have any “exceptions” at all – and some of them do not. If there are no “exceptions” or if for some reason the “exceptions” do not apply, sellers who have entered into successive listing contracts with different companies can find themselves legally obligated to pay two commissions.

Regardless of the terms of a protection period clause, as a legal matter, “Company A” has no claim against “Company B.” One listing company has no right to file a lawsuit against another listing company on the basis that the commission received from that company belongs to it. If a listing company wishes to enforce a protection period clause in its listing contract, it can only do so by filing a claim against the seller. A seller may owe a commission under either or both listing contracts. A seller is not excused from paying one listing company just because the seller has already paid another listing company. If a seller is

not careful when entering into two successive listing contracts, he or she could owe a commission under both listing contracts. (As a practical matter, a judge is not going to like this outcome and may go out of his or her way to reach a different conclusion.)

## **B. Not a Matter for Arbitration**

There can be no arbitration where two successive listing brokers each claim a commission in connection with a particular sale. In order for a dispute between two REALTORS® to be arbitrable, there must have been a written or oral contract between the two REALTORS® OR it must be one of the specific non-contractual disputes listed in Standard of Practice 17-4.

Standard of Practice 17-4 (1) covers a dispute between two REALTORS® who each claim to be the cooperating broker – *i.e.*, the procuring cause – in the transaction, which is the most common type of arbitration. Standard of Practice 17-4 (4) deals with two listing brokers with open listings (as opposed to exclusive rights to sell listings), so is not applicable here.

In our situation, there is no contract between “Company A” and “Company B,” and none of the arbitrable non-contractual disputes described in Standard of Practice 17-4 apply.

## **II. CONCLUSION**

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 terms 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.