

## COMMISSION CLAIMS

Hello Michigan Realtors and welcome back to the Letter of the Law. Today we're going to look at the most common questions that arise with commission claims. We often get calls on the Legal Hotline from Realtors® who are understandably unhappy because they have lost a commission they believe they had earned. Often times during these calls, the discussion is about whether it makes economic sense to pursue the seller-client for the commission owed. Other times the discussion is about procuring cause and whether it makes sense to file an arbitration request against a fellow Realtor®. But sometimes, unfortunately, the answer is that under the facts, there is simply no means available for a Realtor® to collect a commission. In these situations, it is simply not worth a Realtor®'s time to try and pursue a commission. The following are two real-life scenarios that may help Realtors® identify those situations where a commission cannot be collected.

### **The Reluctant Seller**

The first scenario arose out of a binding purchase agreement that was breached by the seller. There was no justification given – the seller simply decided that she did not want to sell. The buyers chose not to fight with the seller and just found another house to buy. The buyers' salesperson was less forgiving and decided to file a lawsuit against the defaulting seller asking for the commission that she would have earned if the seller had not defaulted. For a number of reasons, the salesperson's lawsuit should be thrown out of court.

First, in Michigan, a right to a commission, if it exists, belongs to the buyer's brokerage firm, not the individual salesperson who worked with the buyer. A real estate salesperson is prohibited by law from receiving a commission from anyone other than his or her broker.

Second, in order to have a right to a commission, a broker must have a contract. Here, as is typically the case, the buyers' broker had no contract with the seller. The buyers' broker's right to a commission was through a "contract" with the listing broker through the MLS. By listing a home in the MLS, a listing broker agrees (or in other words, "contracts") with other MLS participants, that if one of them produces the buyer of the listed home, the listing broker will pay that MLS participant the commission split offered through the MLS. Again, however, this is an obligation of the listing broker to potential cooperating brokers. The seller has no contractual obligation to pay a commission to a cooperating broker.

Third, one of the Realtors®' membership requirements is that a cooperating broker who claims a commission from a listing broker cannot go to court to collect that commission, but instead must file an arbitration request with the appropriate local Realtor® board. By joining the Realtor® trade association, a real estate licensee agrees that a local board, not the courts, will decide any commission disputes.

Fourth and finally, in order to arbitrate a claim to a commission, the transaction must have been successful. If the sale does not close for any reason, the buyer's broker has no claim to a commission. It does not matter which party was at fault. If the broker's client did not buy the home, the buyer's broker cannot pursue arbitration.

### **Successive Listing Contracts**

In the second scenario, upon the expiration of his first listing contract, the seller listed his property with a different broker. During the second listing, a buyer who had previously looked at the home during the first listing resurfaced. The new listing broker received an offer on the property from this buyer, which offer was accepted by the seller.

Upon learning of the sale, the first listing broker filed an arbitration request against the second listing broker with his local board, claiming that since the buyer had originally looked at the property during the term of his listing contract, he was the broker who was entitled to the listing commission. This type of arbitration case should be thrown out by a grievance committee.

While the seller was obligated to pay a commission to the second listing broker under the terms of the second listing contract – whether or not the first listing broker is entitled to a listing commission has nothing to do with the second listing broker. Whether the first listing broker is entitled to a commission depends on the wording of the protection period in his own listing contract. Most protection period clauses contain “exceptions” so that the protection period does not apply if the property is relisted with another broker.

But there is no legal requirement that a protection period clause have any “exceptions,” and some of them do not. And some “exceptions” do not apply unless the second listing broker was a Realtor® and/or used “substantial efforts” to facilitate the sale. If there are no “exceptions” to the protection period clause, or if for some reason the “exceptions” do not apply in a particular situation, sellers who have entered into successive listing contracts with different brokers can find themselves legally obligated to pay more than one commission.

But regardless of the terms of a particular protection period clause, as a legal matter, the first listing company has no claim against the second listing company. If a listing company wishes to enforce a protection period clause in its listing contract, it can only do so by filing a lawsuit against the seller. As a matter of contract law, a seller is not excused from paying the first listing company just because the seller has already paid the second listing company. If a

seller is not careful when entering into two successive listing contracts, theoretically 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 is likely to go out of his or her way to reach a different conclusion.) But a listing broker will not be able to recover the commission collected by a second listing broker even if the ultimate buyer first looked at the home during the first listing.

### **Conclusion**

Obviously, a Realtor®'s right to a commission is very important to protect. However, in those instances where the facts and law simply don't support the claim, it's also important to know when to walk away and refocus on the opportunities before you. As always, thank you for tuning in. If you enjoy the Letter of the Law format, please visit [ondemand.mirealtors.com](http://ondemand.mirealtors.com) for legal continuing education opportunities. If you have any suggestions for future topics, please send those to the email below. Thanks again, and we'll see you next time!