

Pre-Sale Considerations – What You Should Know About Your Listing Contract

Looking to hire a real estate broker to help you sell your property? Read your broker's listing contract very carefully. Many people believe that a broker's commission is earned only if and when the sale of the property closes. However, under Wisconsin's standard listing contract forms, a seller may owe a commission to its broker even if the sale of the property does not close. These standard forms include the WB-5 Commercial Listing Contract, WB-3 Vacant Land Listing Contract and the WB-1 Residential Listing Contract.

Per the standard Wisconsin forms, a commission is earned when:

1. Seller sells or accepts an offer which creates an enforceable contract for the sale of all or any part of the Property;
2. Seller grants an option to purchase all or any part of the Property which is subsequently exercised;
3. Seller exchanges or enters into a binding exchange agreement on all or any part of the Property;
4. A transaction occurs which causes an effective change in ownership or control of all or any part of the Property; or
5. A buyer is procured for the Property by Broker, by Seller, or by any other person, at no less than the price and on substantially the same terms set forth in this Listing and in the standard provisions of the current WB [] OFFER TO PURCHASE, even if Seller does not accept this buyer's offer ...

Notably missing from the above provision: a requirement that such sale, exchange or transaction actually closes.

In *Ash Park LLC v. Alexander & Bishop, Ltd.*, 2014 WI App 87, 356 Wis. 2d 249, 853 N.W.2d 618, the court of appeals held that, under the terms of the listing contract, the broker was entitled to a commission even though the sale of the property did not close. Ash Park entered into the standard form WB-3 Vacant Land listing contract with Re/Max Select, LLC. After signing the listing contract, Ash Park and

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Alexander & Bishop entered into a contract for the sale and purchase of the property for \$6.3 million. Alexander & Bishop failed to close on the property as required by the offer. Ash Park brought suit against Alexander & Bishop and obtained an order of specific performance to enforce the sales contract and require Alexander & Bishop to purchase the property. However, Ash Park subsequently settled with Alexander & Bishop and the sale was never completed.

Re/Max moved to intervene in the lawsuit, and sought a judgment against Ash Park for its 6% commission under the listing contract. Re/Max argued it was entitled to its commission because Ash Park and Alexander & Bishop entered into an enforceable contract, evidenced by the fact that Ash Park obtained an order for specific performance against Alexander & Bishop. The circuit court granted Ash Park's motion for summary judgement, holding that no commission was owed to Re/Max, but the court of appeals reversed.

The listing contract provided that a commission is earned when the seller sells or accepts an offer which creates an enforceable contract for the sale of all or any part of the property. The court noted that an enforceable contract is "one where an individual can compel observance of the contract by seeking a remedy for a breach." (¶ 15.) The court held that because specific performance is a remedy that is only available under an enforceable contract, the contract between Ash Park and Alexander & Bishop was enforceable, and therefore Re/Max was entitled to its commission.

Ash Park appealed the decision and the Wisconsin Supreme Court has accepted review.

Nothing in the standard form listing contracts requires that a transaction must actually close (or that a seller even accept an offer to purchase) before the broker earns a commission.

Regardless of how the Wisconsin Supreme Court decides the case, these situations can be avoided. An attorney can help you negotiate and revise the standard form listing contracts to ensure that commissions are earned only upon the successful sale of the property.

If you would like to know more about the information in this alert, please contact your Reinhart attorney or any member of Reinhart's [Real Estate](#) team.

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