



February 24, 2010

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Payment of Commissions on the "Busted Deal"

THE BAD NEWS: The deal didn't close (and likely will never close).

THE QUESTION: Is a commission still payable even if the commission agreement says that the commission is payable "on closing"?

THE ANSWER: Maybe.

When engaging the services of a real estate broker, many sellers, buyers and brokers assume that the broker will be paid only if the deal closes. In fact, many commission agreements do provide that the commission will be **payable** "through escrow" or "upon closing," but that language may not be determinative as to when the commission is **earned**. If the deal doesn't close, either because the transaction is cancelled voluntarily or because either the seller or the buyer breaches the contract, a commission may still be payable if the commission was earned at some earlier time.

In some transactions, the broker earns his or her commission when the purchase agreement is signed, even if the commission is to be paid "through escrow." In other transactions, no commission is earned or payable unless and until the escrow actually closes and title transfers. The **two key questions** that the commission agreement should answer are:

- **When is the commission earned?**
- **When is the commission payable?**

If the commission agreement is very clear that the commission is earned when the buyer and seller sign a purchase agreement, then the broker will earn a commission when the contract is signed. If the commission agreement is clear that the broker will earn a commission only if escrow actually closes and only if title transfers, then the broker will earn a commission only if the escrow actually closes.

Unfortunately, many agreements for engagement of a broker do not clearly state when the commission is earned and, as a result, misunderstandings are more common than one would suspect.

There are no correct answers to the two key questions. If a broker will have to spend considerable time and effort to bring a ready, willing and able purchaser to the table, then a good argument can be made that the broker has earned a commission at that point and later problems caused by the parties or by economic conditions should not deprive the broker of compensation.

DRAFTING TIP: If the commission is intended to be earned and payable only if escrow closes, then the commission agreement should say that. If the commission is to be earned when a purchase and sale agreement is signed, but payable later (for instance, when escrow closes), then the agreement should say that. In the latter case, if escrow does not close, then the commission will likely be payable in a

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