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Legal Hotline Q&A of the Week

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Question:

The scenario is this; A property was listed with the seller offering a specified commission. A purchase and sale was written disclosing the offer amount in box "a" of the purchase and sale agreement and requesting the same amount to be paid by seller in box "b." The seller counters the offer reducing the commission and the purchaser accepts. There was no prior discussion from the listing broker nor was there an agreement from buyers broker for the reduced commission. Not wanting to stand in the way of the buyer with an acceptable counter offer, the selling broker allowed the buyer to sign off on the agreement under duress. Assuming the transaction closes, would there be any recourse with the seller or listing firm for the difference in commission?

Answer:

This question ignores a critical element of buyer broker compensation. It must be remembered that before buyer and seller signed the PSA, buyer and buyer brokerage entered a Buyer Brokerage Services Agreement in which buyer and brokerage agreed that buyer would owe the agreed compensation to buyer brokerage. Buyer still owes the agreed compensation to buyer brokerage. Buyer did not and could not change the agreement between buyer and brokerage by entering a different agreement with seller.

All that happened in the PSA is that buyer agreed that seller would offset only a portion of buyer's obligation to buyer brokerage rather than paying the entire amount owing. At closing, seller will pay a portion of the amount buyer owes buyer brokerage. Buyer will owe the balance to the brokerage. If buyer brokerage chooses to relieve buyer of the remaining debt owed by buyer, that is a choice brokerage can make but is not required to make. Buyer owes brokerage all of the earned compensation, even if seller pays only a portion of the compensation.

Buyer brokerage has no recourse against seller because buyer brokerage has no contract with seller. Seller made no offer to buyer brokerage and owes no debt to buyer brokerage. Seller's offer to pay buyer broker compensation was an offer seller made to buyer. Based on seller's offer, buyer could have refused to negotiate with seller regarding seller's payment of buyer brokerage compensation. Buyer could have forced all negotiations to focus on other factors, such as purchase price. Buyer chose, however, to negotiate with seller regarding seller's contribution toward buyer's obligation to buyer broker. That was buyer's choice. By entering a PSA with seller that includes seller's payment of less compensation than buyer owes buyer broker, buyer chose to retain an obligation to buyer broker rather than contracting with seller for seller's payment of the entire debt owing to buyer brokerage.



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Answer Continued...

Buyer brokerage is entitled to payment of all earned compensation. If all earned compensation is not paid to brokerage at closing, brokerage's remaining claim is against buyer, not seller. If brokerage intends to pursue recovery of unpaid compensation from buyer, buyer broker and the firm's designated broker should consult the firm's legal counsel. If buyer broker assured buyer, during negotiations for the PSA, that seller was engaged in wrongdoing but that buyer would not owe brokerage any more than what seller agreed to pay, that erroneous information may impact any potential claim by brokerage against buyer.

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