

## EARLY TERMINATION OF LISTING CONTRACTS

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Unfortunately, brokers sometimes find themselves in a situation where the seller wants to terminate the listing contract before the expiration date. Assuming the broker has properly performed under the listing contract, the seller doesn't have the legal right to terminate the contract early, but he does have the power to do so. In other words, the seller's unwarranted early termination may constitute a breach of contract. Should this happen, the broker has several options.

### How Does the Seller Terminate the Listing Contract Early?

The seller may terminate the listing by verbal notice, by written letter or notice, or by amendment of the listing contract (changing the expiration date to an earlier date). Upon receipt of such notice from the seller, the broker has no right to refuse the seller or exact any price or penalty for the cancellation, unless originally stated in the listing contract, but may seek legal remedies for breach of contract.

Depending on the nature of the termination, a notice, amendment or cancellation and mutual release (CAMR) may be an appropriate means for responding to the seller and documenting the termination. The WB-42, Amendment to Listing Contract, is an appropriate form if the seller and listing broker have an agreement to amend (shorten in the case of early termination) the expiration date in the listing contract.

If the listing broker does not agree to amend the listing and is merely acknowledging the seller's termination, a notice is appropriate. The listing broker may wish to work with his or her attorney regarding the language of the notice to ensure that any remedies available as a result of a seller's bad-faith termination are preserved (i.e., include language that the broker retains all legal rights under the contract and law stemming from the seller's breach).

If the seller and the listing broker agree to waive all rights under the listing including listing protection, damages for bad-faith termination, the right

### **BROKER Pointer**

*Sometimes brokers feel that the seller may not unilaterally terminate the listing contract so they tell the seller they don't intend to do anything. The problem with this is that first, the seller **may** terminate the listing contract; second, the MLS is a form of advertising and brokers may only advertise with the owner's consent; and finally, the listing contract imposes marketing duties upon the broker. If the broker ceases to perform his obligations under the contract, **he may be in breach of contract as well.***

to collect commission if earned, etc., a WB-45 CAMR form may be used if properly modified to meet the parties' intent. A broker may agree to a CAMR (and to give up his rights such as listing protection), for instance, if the seller has potential claims, (i.e., breach or misrepresentation), against the broker.

### **Agents of the Listing Broker Do Not Have the Authority to Terminate the Listing Contract or Shorten the Term.**

The termination of listing provisions found in the "Termination of Listing" section in the listing contract explicitly states that agents do

not have the authority to terminate or shorten the term of the listing *without the written consent of the agent's supervising broker*. This provision is primarily to protect the listing broker from the unauthorized conduct of unscrupulous agents who may attempt to take the listing to a new employer. These provisions also make it clear that the contract is between the listing broker and the seller so the contract remains with the broker (absent an agreement between the listing broker and seller to the contrary) even when the listing agent leaves the company.

### **What are Allowable Remedies for the Seller's Breach?**

The best description of the damages the broker may be entitled to in the event of the seller's improper termination is the jury instruction. Instructions #3740 Damages: Termination of Real Estate Listing Contract (Exclusive) by Seller, reads as follows:

*"If the real estate listing contract was improperly terminated by the defendant, then you must determine the amount of recovery by the plaintiff.*

*"If you find that the plaintiff had procured a buyer ready, willing, and able to purchase the property upon the terms specified in the listing contract (or on terms acceptable to the owner), then the plaintiff is entitled to recover the commission.*

*"If, on the other hand, you find that the broker had not produced a buyer, then the broker's recovery is an amount sufficient to compensate the plaintiff for his losses. That is, those losses which have been proven by the plaintiff to have flowed directly and necessarily from the improper termination of the listing contract by the defendant. In determining this amount, you may take into consideration the time spent by him in the performance of the work undertaken on seller's behalf, the difficulties involved, and the plaintiff's standing in the profession. You may also consider any profits which plaintiff could show would have accrued*

*to the plaintiff had the contract not been improperly terminated, taking into account the probability of procuring a buyer on the seller's terms, and all other relevant circumstances.*

*"Comment: To recover lost profits, the broker must prove with reasonable certainty, that he would have earned the commission but for the seller's breach."*

Assuming the broker had not yet procured a buyer, allowable damages may include out-of-pocket expenses for advertising, marketing, mileage, staging, and time. Brokers who keep detailed, thorough and accurate records will not only be well served if they are required to prove their damages in court, but they may also increase the likelihood of successfully resolving the issue with the seller without the need for litigation by clearly documenting their losses.

Brokers may also consider including a liquidated damage clause (LDC) or early termination fee in their listing contracts. An LDC allows the parties to stipulate to a certain amount of damages in the event a party breaches the contract. If brokers wish to use an LDC they should retain an attorney to draft it to ensure its enforceability.

### **A Common Practice Pitfall**

Sometimes brokers feel that the seller may not unilaterally terminate the listing contract so they tell the seller they don't intend to do anything. In other words, the brokers leave the property in the MLS and cease all marketing and advertising efforts. The problem with this approach is threefold. First, the seller **may** unilaterally terminate the listing contract. Second, listing a property in the MLS is a form of advertising, and brokers may only do so with the owner's consent per Wis. Admin. Code § RL 24.04(3). Finally, the listing contract imposes marketing duties upon the broker. If the broker ceases to perform his obligations under the contract, **he may be in breach of contract as well**. Depending on the facts of the situation, this may create a counterclaim or defense for the seller that limits the broker's ability to recover damages.

### **Don't Forget the Notice Requirement to Assert Listing Protection!**

If a seller terminates the listing term early or if the parties agree to an amendment shortening the term of the listing, the broker may still deliver written notice within three days of the termination of the contract to protect buyers who negotiated to acquire an interest in the property during the term of the listing. In the case of an early termination, the one-year period begins on the early termination date. If the broker intends to assert listing protection, he should not agree to a CAMR.

### **Communicate and Negotiate**

There are many reasons why a seller may wish to terminate a listing contract early. Many times, a simple discussion between the parties may alleviate the seller's concerns or solve communication problems and the parties can move forward. If the seller remains adamant about terminating the listing, the broker must decide which method of termination is the best. Generally, this depends on what options the broker wants to keep open. Remember, under no circumstances should a broker tell a seller he cannot unilaterally terminate the listing, refuse to stop marketing and advertising the property or refuse to remove the listing from the MLS. On the other hand, the broker is always free to negotiate with the seller as to an acceptable amount of compensation for his loss stemming from the seller's breach.

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