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Commercial Real Estate Brokers' Listing Agreement Tune-Up

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Most brokers will have a listing agreement dispute once or twice during their careers, at best. However, as a law firm that drafts and enforces these agreements on behalf of brokers and owners (sometimes with significant dollars at risk), we see forms being used that are most likely unenforceable. That "one dispute" in your career could cost you tens of thousands of dollars. Now, when business is slow, is the time to look at your forms and operating systems to make sure they are up to date and working as they should. Your local board and state association can assist in providing compliant base documents meeting the statutory requirements, but those forms may not extend commission triggers to some of the more unusual situations that pop up in commercial transactions. And, don't think the law will be sympathetic to you when that dispute arises. The Connecticut courts and legislature expect brokers to comply with their statutory and regulatory listing agreement obligations. Typical theories of unjust enrichment, estoppel, misrepresentation and others, as an alternative claim against the non-paying brokerage client, have been uniformly rejected by the courts. Comply with the law or don't bother enforcing those defective agreements.
In recognition of this bias in the law, brokers and agents reviewing their listing agreements should consider the following:

A. Unusual Commission Trigger Events.
Virtually every listing agreement form in use addresses the common commission triggers (i.e. closed sale or signed lease) but more often than not neglect to pick up other possible scenarios arising in the complex commercial setting such as:
-A leasing or sale assignment that results in an "option" to lease or purchase with consideration paid for the option but no actual lease or sale occurring during the listing term.
-An exercise of that "option" after the listing term.
-A leasing assignment that results in a sale of the subject property rather than a lease.
-A leasing or sale assignment that results in a sale of the equity, or joint venture not resulting in a change of title, sale or lease, but where new money comes in or consideration is paid.
-A consummated lease that after the listing expires, extends, renews, expands, contracts or terminates under terms other than as set forth in the lease but where consideration is paid. For example, would broker be entitled to a commission under its "exercise" of an option clause if the option is not exercised but instead a new lease is negotiated with terms other than the stated option exercise terms?
-A sale assignment that results in a lease perhaps with extension, renewal, expansion, contraction and termination rights for which consideration will be paid, but no sale.
-Owner decides to not accept a ready, willing and able buyer upon the terms outlined in the deal and maybe pulls it from the market after substantial dollar and time investment from broker.

-Owner consummates a deal post listing agreement with a party introduced to owner during the listing period.

B. Statutory Requirements.

CGS 20-325a sets forth the base requirements including the required language to create a broker's lien. Various reported cases, regulations, and other statutes, however, create additional requirements that you will need to incorporate into your agreements. For example, CGS 20-325a requires the broker to include the "conditions of such contract" and various court decisions gone on to define what that means. Regulation Sections 20-328-6a, 20-328-4a(c), 20-328-2a(g) and CGS 20-325b set forth additional requirements. It is surprising how many listing agreements do not have the required provisions. The good news, however, is that there is a "safety" subsection in CGS 20-325a(d) that allows for a less than perfect agreement to be enforced if it materially complies with the statute and a shorter form is allowed in commercial deals per CGS 20-325a(c); however, one's base forms should meet the gold standard and only use the "safety" or short form statutes when absolutely necessary. Why spend the time litigating over the materiality of the omission when you can simply draft it correctly the first time.

C. Bells and Whistles

-Client disclosures, indemnities and duties
-Client representations on authority, ownership and other matters
-Expansive definitions of key terms to avoid clever "interpretations"
-Reimbursement of costs and marketing budgets
-Approval of marketing plan
-Authorization to disclose information
-Authorization to negotiate
-Signage rights
-Agency disclosure
-Dispute resolution, attorneys fees, court costs
-Governing law, submission to local jurisdiction and venue selection

Thoroughness aside, your owner clients may not agree with all of these inserts, but that is what negotiation is all about. Just remember to use your new gold standard base form next time rather than starting with that old "had no leverage" negotiated gutted form.

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