

Volume 4, No. 1 -- Spring 2019

## Is the Buyer Broker Commission Rule doomed?

by Joshua B. Rosenzweig

Anyone who has purchased a home knows that one of the most significant expenses in the entire process – aside from the purchase price for the home – is the fee paid to the realtors representing the seller and buyer. The standard practice in the residential real estate industry is to compensate brokers and agents with commissions that are calculated as a percentage of a home's sale price. Commissions are paid when the home sells. In most cases, realtors receive up to six percent of the purchase price. In a \$200,000 transaction, the seller's proceeds are diminished by a whopping \$12,000, which is then split between the seller's agent and the buyer's agent.

In the case of *Moehrl v. National Association of Realtors, et al.*, the lawyers that took on the tobacco companies are challenging the propriety of how commissions are paid to realtors. The class-action lawsuit, which is filed on behalf of anyone who sold a home through one of the 20 largest listing services in the country, the NAR, Realogy Holdings Corp., HomeServices of America, Inc., RE/MAX Holdings, Inc., and Keller Williams Realty, Inc., alleges the defendants engaged in a conspiracy to restrict competition. The complaint provides that the defendants have conspired "to require home sellers to pay the broker representing the buyer of their homes, and to pay at an inflated amount, in

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If the buyer has a broker, the seller -- or the seller's broker -- pays the buyer's broker half of the total commission paid by the seller. In other words, buyer brokers -- who assist their clients in negotiating against the seller -- receive their compensation from the total commission paid by the seller, not from the buyer they represent. In fact, a standard of conduct in the National Association of Realtors' ("NAR") Code of Ethics permits and encourages buyer brokers to tell their clients that their services are free. The payment of the broker's commission from the sale price is known as the "Buyer Broker Commission Rule," and it is now the subject of a class-action lawsuit filed on March 6, 2019 in the Federal District Court in Chicago.

violation of federal antitrust law." Further, the complaint states that the conspiracy is "centered around NAR's adoption and implementation of a rule that requires all brokers to make a blanket, non-negotiable offer of buyer broker compensation (the "Buyer Broker Commission Rule") when listing a property on a Multiple Listing Service ("MLS")."

The plaintiffs allege that, as a result of Buyer Broker Commission Rule, home sellers are saddled with a cost that would be borne by the buyer in a competitive market. Furthermore, the complaint alleges that most buyer brokers refuse to show homes to their

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## The Multi-Board Real Estate Contract 7.0: How much has changed?

by James G. Wargo

The Multi-Board Real Estate Contract 7.0 was recently introduced with a number of important changes over the previous 6.1 version of the contract. Below is a brief summary of the more significant changes that real estate brokers and attorneys should be familiar with are as follows:

**Purchase Price and Payment.** The 7.0 contract moves the "purchase price" provision in paragraph 3 of the 6.1 contract to paragraph 4 and modifies this heading to read "purchase price and payment." The 7.0 contract also adds three new subparagraphs to this provision, including (a) Credit at Closing; (b) Earnest Money; and (c) Balance Due at Closing.

The 7.0 version also adds a new sentence regarding the disbursement of earnest money in the event of termination, which reads as follows: "In the event the Contract is declared null and void or is terminated, Earnest Money shall be disbursed pursuant to Paragraph 26."

**Fixtures and Personal Property at No Added Value.** The "fixtures and personal property at no additional cost" provision of paragraph 5 of the 6.1 contract has been moved to paragraph 3 of the 7.0 contract and the heading modified to read "fixtures and personal property at no added value."

Paragraph 3 of the 7.0 contract also expands the list of identified personal property items that may be transferred to the buyer by a bill of sale at the closing, including the

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# Multi-Board Real Estate Contract

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following: (1) water heater; (2) wine/beverage refrigerator; (3) wall mounted brackets (AV/TV); and (4) hardscape.

**Attorney Review.** The 7.0 version makes significant changes to the “attorney review” provision now found at paragraph 10. Both the 6.1 and the 7.0 versions contain four options that may be exercised by the respective attorneys for the parties within five (5) days after the date of acceptance, including subparagraphs (a) through (d).

Under subparagraph (c) of the 7.0 contract, if written agreement has not been reached by the parties with respect to all the proposed modifications, either party can terminate the contract after the expiration of ten (10) business days from the date of acceptance. The 6.1 version requires the notice of termination to be commenced within ten (10) days of the date of acceptance.

Subparagraph 10(c) of the 7.0 contract also adds new language that states that any proposed modification “shall be conclusively deemed a counteroffer notwithstanding any language contained in any such proposal purporting to state the proposal is not a counteroffer.”

Subparagraph (d) of both the 7.0 and the 6.1 versions similarly allow either party to propose a suggested change to the contract. To the extent the parties are unable to agree to the suggested change, neither party may declare the contract null and void and the contract will remain in full force and effect. The 7.0 contract adds language to subparagraph (d) that states that any proposed change to the contract that references subparagraph (d) will not be considered a counteroffer. To the extent a proposed change does not reference subparagraph (d), it will be deemed to be a proposed modification under subparagraph (c).

**Professional Inspections.** The 7.0 contract makes several significant revisions to

the inspection provisions of the contract. Specifically, the 7.0 contract adds a new “waiver of professional inspections” provision at paragraph 11. This new paragraph 11 allows the buyer to waive the inspection provisions of paragraph 12 of the contract.

Both the 6.1 and the 7.0 versions authorize the buyer to conduct any of the following inspections: home, radon, environmental, lead-based paint, lead-based paint hazards or wood-destroying insect infestation. However, paragraph 12 of the 7.0 contract expands the right of inspection to include “any other inspections desired by [b]uyer in the exercise of reasonable due diligence.” The 7.0 contract also includes language that the seller agrees to make all areas of the property “accessible for inspection(s) upon reasonable notice and to have all utilities turned on during the time of such inspections.”

With respect to the scope of repairs covered under the inspection contingency, subparagraph 12(a) of the 6.1 contract provides that the buyer agrees that “minor repairs and routine maintenance items of the Real Estate do not constitute defects and are not part of this contingency. The fact that a functioning major component may be at the end of its useful life shall not render such component defective for purposes of this paragraph.”

Subparagraph 12(a) of the 7.0 contract similarly implies that minor repairs are not included under this contingency with the following language: “The request for repairs shall cover only the major components of the Real Estate, limited to central heating and cooling system(s), plumbing and well system, electrical system, roof, walls, windows, doors, ceilings, floors, appliances and foundation.” However, the 7.0 contract deletes the language referencing a functioning component near the end of its useful life. As such, the 7.0 contract contemplates that a functioning component near the end of its useful life may constitute

a defective component under the inspection contingency.

The 7.0 contract also adds language at the end of subparagraph 12(a) which provides that if the buyer requests credits or repairs for items that do not constitute major components of the property, the seller may terminate the contract and direct the return of the buyer’s earnest money. This revision further confirms that minor repairs and other routine maintenance items may not constitute a basis to terminate a contract.

The 7.0 and the 6.1 contracts also differ on when the notice of termination can be given as a result of an unresolved inspection issue. Under subparagraph 12(b) of the 7.0 contract, either party may terminate the contract if after the expiration of ten (10) business days after date of acceptance a written agreement has not been reached by the parties with respect to the inspection issues raised by the buyer. Under subparagraph 12(b) of the 6.1 contract, the right to terminate regarding any unresolved inspection issue must be given within ten (10) business days after date of acceptance.

**Financing/Mortgage Contingency.** The 7.0 contract includes several changes to the mortgage contingency provisions contained in the 6.1 contract. For starters, the “mortgage contingency” heading in paragraph 8 of the 6.1 contract has been renamed “financing” and moved to paragraph 7 of the 7.0 contract.

The 7.0 contract deletes the “Intent to Proceed” provision under the 6.1 contract and requires the buyer to provide written evidence from the buyer’s lender confirming that the buyer has received loan approval not later than forty-five (45) days after the date of acceptance or five (5) business days prior to the date of closing, whichever is earlier. Under the 6.1 contract, the buyer is initially required to provide written evidence from his or her lender that the buyer has provided to the lender an “Intent to Proceed” as the term

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# 2018 Amendments to the Limited Liability Company Act

by Michael Castaldo, III

Since the significant revisions to the Limited Liability Company Act that took effect back in July 2017, the 100th Illinois General Assembly has made several smaller, albeit noteworthy amendments to said Act. Below is an exhaustive list of these amendments followed by a brief discussion of each.



## Change in Prescribed Time Period for and Reduction of Late Fees

Upon the Secretary of States determination that a limited liability company (“LLC”) or a foreign limited liability company is delinquent and not in good standing for failure to satisfy the requirements set forth in 805 ILCS 180/50-15(a), an initial penalty of \$300.00 was imposed if the delinquent company had not corrected the default within 60 days after the respective due date. Now, the time frame given to correct the delinquency is no longer a static 60 days. By requiring any needed correction “before the first day of the second month after the anniversary month”, the time frame could fluctuate a day or two depending on the number of days in the following two months after the relative anniversary month. In addition, the initial penalty for failure or refusal to comply with the requirements has been reduced to \$100.00.

This amendment affects all LLCs alike, and although the time frame to correct any delinquency will generally remain around 60 days, it may make a difference for those LLCs with an anniversary month of December or January thanks to February’s 28-day duration. Of course, it is always recommended to file

the annual report in a timely manner to avoid a delinquent status, let alone a late fee.

## The Nature of Business

The amendments to the Act eliminate all exceptions to the lawful purposes for which an LLC may be formed, other than insurance, and instead now provides that “[a] limited liability company that intends to provide a professional service licensed by the Department of Financial and Professional Regulation must be formed in compliance with the Professional Limited Liability Act.” (805 ILCS 180/1-25(d).)

## Cleaning up Conversion & Domestication

The recent amendments also created the Entity Omnibus Act, which modifies the Act to no longer specifically provide for the conversion or domestication of a limited liability company. Prior to the creation of the Entity Omnibus Act, the provisions for entity conversion and domestication were located in several separate acts, a side effect of the aforementioned July 2017 overhaul. The Entity Omnibus Act consolidated the applicable acts into more easily accessible location. It may also be worth noting that the Entity Omnibus Act includes business corporations within the definition of “entity”. This is significant because this change now provides for the possible conversion of a corporation to an LLC, which was previously impermissible by Illinois law.

## Reduction of Filing Fees

Finally, the amendments operate to substantially reduce nearly all fees associated with the filing of any documents with the State for both limited liability companies and foreign limited liability companies. This amendment makes the processes involved in creating and operating any LLC much more affordable and accessible to all.

If you run an LLC, or are thinking of forming an LLC to operate a new business, you should contact Ottosen Britz. The member attorneys of the firm’s business law practice group can provide the necessary advice to assist you to navigate the Act and any issues you may encounter. ■

## Real Estate Contract

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is defined in the rules of the Consumer Financial Protection Bureau by the date inserted by the parties. The buyer must also provide written evidence of a mortgage commitment prior to the date inserted by the parties. If no date is inserted, the mortgage commitment must have been provided not later than sixty (60) days after the date of acceptance.

**Seller’s Representations.** The “seller representations” provision in the 7.0 contract requires the seller to disclose whether any improvements have been made to the property that were not included in the most recent tax assessment and whether there are any improvements to the property that may be eligible for a home improvement tax exemption.

In summary, real estate brokers and attorneys that work with the Multi-Board Real Estate Contract should be familiar with the changes to the 7.0 contract and should evaluate their current processes and procedures to ensure compliance with some of the more significant revisions to the contract.

If you are thinking of buying or selling residential real estate, the attorneys at Ottosen Britz can help. ■



## Commission Rule

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clients where the seller is offering a lower buyer broker commission, or will show homes with higher commission offers first.

Opponents of the Buyer Broker Commission Rule contend that if buyer brokers were paid by their clients, the result would be lower commission amounts because buyer brokers would then compete to be retained by offering a lower commission. "The Buyer Broker Commission Rule ensures that price competition among buyer brokers is restrained because the person retaining the buyer broker, the buyer, does not negotiate or pay his or her broker's commission."

to communicate with each other about various issues during the pendency of a transaction including, but not limited to, the terms of the deal, repair issues to be resolved and appraisal scheduling. Additionally, from the buyer side, brokers provide a helpful source of inspectors for their clients to use and lenders for their clients to talk with about obtaining a mortgage.

Some brokers will reduce their fees to accommodate some buyers. But, the reality is that a number of brokers could elect to not reduce their fees, thereby limiting certain

Broker Commission Rule because, without it, the transaction process will completely change. Whether you are thinking of buying or selling your home, investing in real estate, taking on a second job as a broker or entering into a new career as a broker, this case should be closely watched to see how it will impact the largest transaction that most of us will ever enter into – buying/selling a home. ■



The results of this lawsuit will have far-reaching implications for anyone involved in the real estate industry. Obviously, it impacts the individuals that home-sellers and buyers rely upon to assist them in selling/finding a home.

As a real-estate practitioner, I rely heavily on the assistance of my client's agents – regardless of whether I am representing the buyer or the seller – to move the transaction along. Regardless of what side of the transaction I am representing, I need brokers

buyers' abilities to even enter into the transaction. For example, on a \$200,000 transaction, a buyer broker may indicate she wants to be paid 3% of the transaction amount "up front." A "cash-strapped" buyer, who has saved every penny just to afford a down payment, now has to use a portion of those savings - \$6,000.00 to be exact – to pay her broker. What happens if the buyer simply can't afford the additional expense?

It will be interesting to see how the Northern District of Illinois handles the Buyer

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