

PUBLICATION

Real Estate Commission Agreements

Authors: Kenneth P. Ezell Jr.

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Summary: Separate commission agreements entered into by a property owner with brokers representing tenants of a commercial property can create liability for commissions long after the owner has sold the corresponding property.

Owners of commercial rental properties, whether office buildings, retail centers or industrial/distribution properties or other types of commercial real estate that generate rental income frequently enter into commission agreements with real estate brokers acting as tenant representatives. These brokers agreements are seldom drafted by or reviewed by the owner's attorney. Typically these agreements call for the payment of a commission to the tenant's broker upon the execution of the lease, which is sometimes delayed until the tenant takes actual occupancy of the leased premises. However, these agreements may further obligate the owner to pay an additional commission to the broker upon a renewal of the term of the lease or upon the expansion of the tenant's space within the owner's building.

These separate commission agreements can be hazardous to the owner for a couple of reasons. First, if the owner has not reviewed the commission agreement carefully, it may not realize that there is a provision for an additional commission to be paid in the future upon renewal or expansion. While this might result in an unexpected obligation to pay a commission, at least the owner is getting new value (a lease renewal or expansion) concurrently with the commission obligation.

The real danger in separate commission agreements, however, lies in the fact that the commission agreement is separate and apart from the corresponding lease. Thus when the owner sells the property, it will typically enter into an assignment and assumption agreement with the purchaser of the building pursuant to which the owner assigns all of its rights under tenant leases and the purchaser assumes the obligations of the owner. However, unless the owner has remembered to also have the purchaser assume the owner's obligations under the separate commission agreement, it may find itself in the unpleasant situation of being obligated to pay a commission upon lease renewal or expansion of the tenant space, long after the owner has sold the building. The purchaser's assumption of a lease does not implicitly include the assumption of obligations under a corresponding commission agreement.

Commission agreements are not recorded and do not run with the land, so that upon a sale of the rental property, the purchaser does not become subject to the obligations of the owner. Any such assumption must be express in order to be binding upon the purchaser.

For this reason, it is wise to have separate commission agreements reviewed by your attorney. Not only to make sure that the obligations of the owner are clearly stipulated, but also so that the owner's attorney is aware of the existence of the separate commission agreement and, upon a sale of the property, can be sure to require that the purchaser assumes all commission agreements at the closing.