

# A BROKER'S DUTY TO SUBMIT ALL OFFERS DOES THIS APPLY IN THESE UNUSUAL TIMES?

By Jim Hochman

In these most unusual times, I can foresee some opportunistic buyers stepping into the market and making unusual—make that “low-ball”—offers on otherwise, or once, attractive commercial real estate. Those buyers could include the broker himself. Who knows how values of property and cap rates will settle out in the coming months and years? That is a question which can only be answered by the old bromide that “only time will tell.” Therefore, this may be an appropriate time to review the listing broker’s duty to refer all offers to its seller or landlord client, regardless of the terms of these offers. Your owner client may or may not be interested in low-ball offers, and in fact you may have been instructed not to submit an offer unless the price is \$X or more, or the asking rent is \$Y/ft, or the term of the lease is Z years or more. Your client may have even confirmed those instructions in writing.

However, when that low-ball offer comes in—an offer that clearly does not measure up to minimum terms outlined by your client—are you as the listing broker excused from submitting that offer? I answer that question in a

resounding voice, “NO, a listing broker is never excused from the duty to submit all offers” and you need to bear this in mind during times of turbulent markets. Values change, owner inclinations change, but your fiduciary duty to keep your owner apprised of all material facts—including all offers—will not be excused. That low-ball offer might just be a starting point in a negotiation that leads to a deal at a higher price. Those states which have so-called “Minimum Services Requirements” in their license acts require a broker to commit to submit all offers, and that simply echoes the broker’s duty under the common law. Likewise, brokers have a legal duty to refer all offers, especially when that offer could result in negotiation and realization of an even higher price.

Also, let’s think about the issue of a broker choosing to buy the property he has listed for sale, perhaps during, but more likely at the end of the listing term. It could and has happened.

Let’s look at a few of the reported cases—some old, some not so old—and see how courts have viewed the broker’s duties, especially when the broker had some stake in the transaction as a principal,

as well as broker. The Supreme Court of Illinois ruled in 1928, in *Rieger v. Brandt*, 329 Ill 21 (1928), that when a listing broker, hoping to buy the listed property at the list price, failed to disclose interest of competing buyers in the property at a price in excess of the list price. The broker hoped to keep the opportunity for development or resale to himself. The broker claimed his commission when the seller refused to close the deal, and he sued the owner. As you might imagine, the listing broker’s failure to disclose all offers—especially the higher ones—was fatal to his commission claim and to his suit for specific performance of the sale he had engineered. This case is one that speaks to a broker’s self-interest exceeding his duty to the client...NEVER a good idea.

Another Illinois case, *Jefferey Allen Industries v. Sheldon F. Good & Company*, 153 Ill App 3d 120 (1st Dist., 1987) is instructive. In this one, a listing broker selfishly failed to disclose the potential and eventual existence of an offer from a purchaser coming from a buyer’s agent, counseling his seller client to counter the offer he had procured from a buyer he had represented, putting the property



under contract before the information about the second purchaser's interest came to light. Yes, the listing broker sought to make the first deal, where he would earn both sides of the commission. When the existence of the second offer came to light (that buyer finally contacted the seller directly), the seller opted to stay with the first contract, close the deal, and refused to pay the listing broker anything at all. The listing broker was found to have breached its duties of full disclosure and referring all offers, and was denied its commission. The common thread here is the broker putting its own self-interest—larger commission or the opportunity to buy the listed property—ahead of the client's best interests.

In yet one more self-interest case where a listing broker sought to buy the listed property, the broker's greed was its downfall as well. In *Letsos v. Century 21-New West Realty and Alex Brusha*, 285 Ill App 3d 1056 (1st Dist., 1996), the

broker listed the owner's two flat, and after failing to sell it, renewed the listing several times—in fact reducing the asking price with each listing renewal. Finally, the listing salesperson contracted to buy the property himself; and either before or during the period in which the contract was in place, failed to apprise the seller of the fact that there was a buyer out there who agreed to pay an increased sale price to the broker after he closed on the property. It mattered not that the listing agreement had expired, because the broker's agency continued through the closing of the sale; and it was clear that the broker breached his fiduciary duty to his seller client when he failed to refer the higher offer, or at least inform the seller of the existence of the offer. The listing broker's greed and self interest in the "flip" to the undisclosed new buyer was his downfall.

The common thread is that a broker should never put his or her interests

above the client's interest; and that seems to happen with alarming regularity when the listing broker steps up to buy the listed property, either during or after expiration of the listing term. There are always facts that should be shared by the broker with the seller client, and when self-interest of the broker enters the picture, full disclosure may not occur. I won't tell my readers that they should never buy their listed property, there may be a way to insulate against a claim from the disgruntled seller. I just haven't seen such a case yet. If you are a broker, stick with that role, if you are an investor, stick with that role. When a real estate licensee mixes those roles on the same property, bad things can happen if roles are not clearly defined and the parties' rights are not confirmed. ♥

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## MEET THE AUTHOR

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