



BY: JIM HOCHMAN

Now that brokers have lien rights in 32 states, more if additional state legislatures consider a new lien act in the future, it is important to use lien rights wisely, and to waive those rights very carefully. In the broker lien states, for the vast majority of transactions, both sales and leases, it is customary for the closing agent or landlord to request a lien waiver from the broker when paying a commission. "Just sign our standard form, and here is your check." At that point, with no apparent resistance to paying your fee, and no visible competing claims, your inclination is to just sign that "standard form," collect the check, and head happily to the bank.

But, you might wonder, is there really such a thing as a standard form for any document? On reflection, your experience should warn you that every document is drafted on behalf of a party by its own counsel and therefor benefits the drafting party. Could there be a problem?

I have read each of the 32 broker lien acts; and each of them requires a broker receiving a fee to provide a waiver (whether partial or full) in exchange for payment or after payment has been received. However, only Michigan mandates the form of a waiver. Most important: none of the lien acts require the broker to give an affidavit, or to provide anything more than a waiver of lien rights in exchange for a specified amount.

Nonetheless, many of these so-called "standard forms" contain both a waiver and a second part, usually termed a "Broker's Affidavit." Just what is requested in that affidavit, by whom, and why it should cause you to worry.

The party paying the commission, seller, landlord, or a title company disbursing a fee from escrow, asks for the affidavit to confirm:

- The party executing the waiver is authorized to do so.
- The amount of the fee to be paid is the entire amount claimed, so the waiver constitutes full satisfaction of the claim.

I would suggest that these first two requests for representations are reasonable, and you should, if asked, agree to make them. However, that seemingly innocuous Broker Affidavit usually requires more:

"Broker warrants and represents to the best of its knowledge that it is the only broker entitled to and seeking a fee in the (sale or lease) of the property between _____ (Landlord/Seller) and _____ (Buyer/Tenant)."

Are there sharks and shoals in these seemingly calm waters? Let's dive in and see.

Is there any harm or potential risk in a broker giving a warranty, an unconditional promise that no other broker is entitled to a fee?

Of course there is risk! Could Seller or Landlord have promised a fee to another broker, independent of your own listing agreement? Could another broker claim – and be entitled to compensation based on a prior listing, or based on language in a lease which have been extended or renewed? The fact is, you just don't know. I have already seen several lawsuits where a prior listing or a broker's actions, which are prior in time to your

own services, serve as the basis for a valid commission claim, in addition to your own claim. Should you, in exchanging a waiver and affidavit, take on liability, even worse, perhaps provide indemnity against such a claim? Take another look at that Broker Affidavit.

First, absent language in your own fee agreement, there is no obligation to give an affidavit, or a warranty, or even a representation to the best of your knowledge. None of the 32 lien acts require such an affidavit. One seasoned title officer explained to me:

"When I pay a fee and insure against broker lien, I go on a broker witch hunt, to make sure that I smoke out and have recourse against the recipient of the fee – for any other claims for commissions on that deal."

In my opinion, you have no statutory obligation to provide the affidavit, meaning nothing in the statute requires you to do so. If any party or parties should be required to give such a warranty, it is the parties to the deal, those who benefit from the title insurance being provided.

In two very recent deals, my clients were asked to give such an affidavit; and even though the title insurer (and Receiver) grudgingly admitted to me that they had no legal basis for the

requested affidavit, they nonetheless insisted on one. Is there some middle ground, you might wonder, hopefully. You want your fee, and you don't see any risk. Consider alternatives. Here is the affidavit that I tailored for each of these situations, just to satisfy the title officer and court appointed receiver who wouldn't disburse the fee without some form of affidavit:

"_____ represents that he/she is authorized to bind Broker and further represents to the best of his/her actual knowledge that Broker is entitled to \$_____ for the sale/lease of property commonly known as [address] from _____ [Landlord/Seller] to _____ [Tenant/Buyer]."

As you review the brief statement above, consider what you would warrant is merely your authority to bind your firm and to state the full amount of the fee your firm is owed. If pushed, you could add:

"To the best of the actual knowledge of the undersigned, only _____ [Cooperating Broker] is entitled to commission on the subject transaction."

Again, your representation (never a warranty) is based only on the actual knowledge of the person signing, not on any other broader scope of liability.

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I recommend the following when asked for completion of that so-called standard form of waiver:

1. Limit it to a waiver only.
2. Waive only your firm's rights to a fee.
3. Condition the waiver upon payment.
4. Make no warranty.
5. Make no representations or limit the representations to the signing party's actual knowledge.
6. Think twice before accepting a so-called standard form while your check sits on the desk exchange for that form.

Yes, those calm waters just might contain a shark, or a title officer on a broker witch hunt, or at least a shoal or two.

ABOUT THE AUTHOR



A partner of Arnstein & Lehr LLP law firm, Hochman practices law for a wide range of clients in real estate transactions and real estate related litigation. He also consults for SIOI and NAR on important legislative issues including broker lien rights and license portability. Hochman writes freelance

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