

PROTECTING YOUR RIGHT TO FUTURE COMMISSIONS

Leases may contain options

- **To renew the lease**

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- To renew the lease
- **To extend the lease**

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- To renew the lease
- To extend the lease
- **To expand the leased premises**

Leases may contain options

- To renew the lease
- To extend the lease
- To expand the leased premises
- **To purchase the Property**

Tenants may have other rights
which would lead to a future
commission

Right of First Offer (ROFO)

Right of First Refusal (ROFR)

**Your Rights to Future Commissions
will depend upon:**

Your rights to Future Commissions will
depend upon:

- **Your Listing or Commission Agreement**

Your rights to Future Commissions will depend upon:

- Your Listing or Commission Agreement
- **Your Commission Schedule**

Your rights to Future Commissions will depend upon:

- Your Listing or Commission Agreement
- Your Commission Schedule
- **The terms of and specific language in the Lease**

TODAY:

- How to secure rights to future commissions

TODAY:

- How to secure rights to future commissions
- **How to claim rights to future commissions**

TODAY:

- How to secure rights to future commissions
- How to claim rights to future commissions
- **How to identify parties who are or may be liable for such commissions**

TODAY:

- **What your listing or commission agreement should say**

TODAY:

- What your listing or commission agreement should say
- **What you want in the lease**

TODAY:

- What your listing or commission agreement should say
- What you want in the lease
- **Whether broker lien rights apply**

Brokerage agreement = personal
services agreement

A personal services agreement
does not run with the land

UNLESS there's a statute that so
provides

A personal services agreement binds only the specific party which signs the agreement

Solution? What type of commission agreement runs with the land?

Answer: the LEASE!

Commission agreement language

“The provisions of this paragraph shall be binding upon Owner, its heirs, successors, and assigns; and shall apply to all commissions due or which may become due to Broker in connection with any lease referenced in this Agreement, including commissions which are or which may become due upon any renewal, expansion, or extension of the such lease.”

Schedule of Commissions Language

- Option(s) or Right(s) of First Refusal to Renew, Extend Lease or Occupy Additional Space: If a lease for which a commission is payable hereunder contains: (i) an option(s) or right(s) of first refusal to renew or extend, and a lease term(s) is renewed or extended whether strictly in accordance with the terms of such option(s) or right(s) or otherwise; and/or (ii) an option(s) or right(s) to first refusal to expand, and a tenant occupies additional space whether strictly in accordance with the terms of such option(s) or right(s) or otherwise; then Owner shall pay a leasing commission in accordance with the provisions of the Schedule on the additional base rental to be paid, calculated [at the commission rate applicable hereunder to the years of the lease in which additional base rental is payable; or as if such transaction were a new lease]. Said commission shall be earned and payable at the time the extended term commences or the additional space is occupied, as applicable.

Schedule of Commissions Language

- If a lease for which a commission is payable hereunder contains an option, right of first refusal, or a similar right, and a tenant, its successors or assignees, or any agent, officer, employee or shareholder of a tenant purchases the Property, whether strictly in accordance with the terms of such option, right of first refusal, similar right or otherwise, during: (a) the lease term or any extension thereof; or (b) within ninety (90) days after the expiration of the lease term; then a sale commission shall be calculated and paid in accordance with the provisions of [this Schedule or at a rate of _____% of the gross sale price]; provided however, that there shall be a credit against such sale commission in the amount of lease commission previously paid to Broker relating to that portion of the purchaser's lease term which is canceled by reason of such sale. In no event shall the credit exceed the amount of the sale commission.

Elements

- **Rights to future commissions**

Elements

- Rights to future commissions
- **Right applies when option is exercised**

Elements

- Rights to future commissions
- Right applies when option is exercised
- **Right applies even if the terms of the extension, expansion, or purchase vary from the option terms**

CBRE v. “Wisconsin Wanderers”

Do Future Commission Claims Survive the Sale of the Property?

CB Charlotte v. That “Damned Yankee”

Third Party Beneficiary

Third Party Beneficiary

- Definition:

“Where a contract is made by A and B, and it appears that A and B intended to benefit C, then C is a third party beneficiary.”

Lease Language:

- **“Landlord and Tenant each represent and warrant to the other that the only brokers who have represented the parties are ABC as Landlord’s agent and XYZ as Tenant’s agent; and each party hereto agrees to indemnify, defend, and hold the other harmless against commission claims brought by any other broker based in the acts or promises of the indemnifying party”.**

Lease Language

- **ADD: Landlord agrees to pay all commission due to ABC and XYZ in the amount of _____% of the rents required in the Lease.**

Lease Language

- **ADD: The brokers named herein shall have the right to bring legal action to enforce and declare the rights of the parties under this provision, which is included in this Lease for the benefit of the brokers named herein.**

Lease Language

- **ADD: The brokers named herein are intended third party beneficiaries of this Lease.**

A Tale of Two Ralphs

Third Party Beneficiary Rights and Lien Rights

The Tideman Company v. Aircraft Gear Corporation

Illinois Broker Lien Language

- Any broker shall have a lien upon commercial real estate.... in the amount that the broker is due... under a written instrument signed by the owner.... or the owner's.... agent. 770 ILCS 5/10 (a)(1)

Third Party Beneficiary v. Successor Landlord

Pagano

Broker Lien Right Statutes where Future Commissions are Protected

Broker Lien States

- AL
- AZ
- CO
- CT
- FL
- GA
- IL
- IN
- KS
- KY
- LA
- ME
- MD
- MO
- NV
- NH
- NY
- OH
- OK
- PA
- SC
- TN
- TX
- VA
- WA
- WI

Broker Lien States with Special Benefits

- LA- Special statute and real estate broker privilege if lease is recorded, and states the broker's commission rights in the lease
- OK- Requires separate recorded notice after lease execution and up to 90 days after the commissionable event, but prior to sale of the property, but clearly binds the successor landlord
- TX- Although the lien for future commissions is deemed waived if the commission right is contained in the lease, the assignee of the lease is bound by such commission agreement (Sec. 62.022)
- VA- Purchaser of a property subject to a lease who has knowledge of future commission liability contained in the lease is deemed to assume the commission liability (Sec. 55-527B)

Broker Lien States with Special Benefits

- Connecticut- Broker may record notice and bind subsequent owner

Broker Lien States with Special Benefits

- Georgia- Where the commission obligation is incorporated in the lease, the obligation binds subsequent owners without separate notice

Broker Lien States with Special Benefits

- Louisiana- Where lease contains a commission obligation and lease is recorded, subsequent owners take title to property subject to the commission obligation

Broker Lien States with Special Benefits

- Oklahoma- Where broker records a notice of lien to protect future commission prior to sale, subsequent owners take title subject to the commission obligation

Broker Lien States with Special Benefits

- Tennessee- If the commission became due during the tenure of a new owner's ownership and such owner had notice of the commission agreement on which the claim was based prior to taking title, then the commission agreement binds the new owner

Questions??

THANK YOU!