

3086 REAL ESTATE LISTING CONTRACT: VALIDITY: PERFORMANCE

A contract, to constitute a valid real estate listing contract, must, in writing, describe the real estate, express the price for which the same may be sold, the commission to be paid, and the period during which the agent or broker shall procure a buyer. The contract must be complete at the time it is signed by the person agreeing to pay the commission.

Before a real estate broker is entitled to any commission under a real estate listing contract, the broker must procure a purchaser who is ready, willing, and able to meet the express terms of the listing contract. (A seller has the right to reject an offer that does not conform to the terms specified in the listing contract. When a seller refuses to accept an offer which is substantially in accordance with the listing contract, but which contains variances from the terms of the listing contract, the seller to relieve himself or herself from liability for the broker's commission must, when rejecting the offer, point out the variances to the broker so that the broker may be afforded an opportunity to obtain an offer that does comply. However, where the variance is a substantial one, such as one that is directly in conflict with a material provision in the listing contract, then there has been no substantial performance by the broker which would entitle the broker to the commission and the owner is under no obligation to specify the reasons for rejection.)

To "procure a purchaser" means to obtain an unequivocal written offer, which in this case means an offer to pay \$_____ at the time the seller specifies.

A purchaser must be ready, willing, and able to pay \$_____. All three elements must exist before it can be said that the broker has procured a purchaser. The purchaser must not only be ready and willing, but must be able to pay \$_____. The purchaser

need not have the required cash in hand, but must be able to command the necessary funds at the required time.

COMMENT

This instruction and comment were approved by the Committee in 1975. The comment was revised in 2019.

Substantial Variance. Sellers can reject an offer to purchase without giving a reason and without triggering a broker's entitlement to a commission if there are "substantial" variances between the terms of the listing contract and the terms of the offer. Kleven v. Cities Serv. Oil Co., 22 Wis. 2d 437, 126 N.W.2d 64 (1964). Subsequent to the Kleven decision, the court held in Libowitz v. Lake Nursing Home, Inc., 35 Wis. 2d 74, 150 N.W.2d 439 (1967) that offer terms may constitute a "substantial variance" only if they directly conflict with express terms specified in the listing contract. No conflict or tension was observed between Kleven and Libowitz when the court examined both in Peter M. Chalik & Associates v. Hermes, 56 Wis.2d 151, 201 N.W.2d 514 (1972) and the implicit conclusion was that they present the same standard. Kleven thus remains the law with regard to determining whether a substantial variance exists between the listing contract and the offer to purchase. Although a term of the offer to purchase that is directly in conflict with the listing contract is a substantial variance, it is not the sole manner in which substantial variance may be shown. Kleven offered direct contradiction as an example, not as a limitation. McNally v. Capital Cartage, Inc., 2018 WI 46, ¶ 41, 381 Wis. 2d 349, 365, 912 N.W.2d 35, 43.

Wis. Stat. § 240.10; this section is an extension of Statute of Frauds; it requires that the listing contract be signed by the person who is to pay the commission. It does not indicate which of multiple owners must sign the contract, nor apply to the question of whether or not a sale must be consummated. Winston v. Minkin, 63 Wis.2d 46, 216 N.W.2d 38 (1974).

Sale price or rentals must be specified. Wozny v. Basack, 21 Wis.2d 86, 123 N.W.2d 513 (1963); Buckman v. E. H. Schaefer & Associates, Inc., 50 Wis.2d 755, 185 N.W.2d 328 (1971).

"Able to purchase" in a situation where the buyer must borrow means that a mortgagee or other lender must have made commitment to loan. Peter M. Chalik & Associates v. Hermes, 56 Wis.2d 151, 201 N.W.2d 514 (1972).

At time of rejection, the seller must specify insubstantial variances in order to avoid paying the commission. Libowitz v. Lake Nursing Home, Inc., 35 Wis.2d 74, 150 N.W.2d 439 (1967).

For damages in this situation, see Wis JI-Civil 3740.