



WASHINGTON REALTORS®

Legal Hotline Q&A of the Week

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Question:

Form 41 (BBSA) section 7 references "cancellation without legal cause." It states that if a Buyer cancels without legal cause, Buyer may be liable for damages. Our broker has a Buyer attempting to cancel without legal cause. The broker wishes to charge the Buyer a "cancellation fee". The Broker, however, did not write in additional terms regarding a cancellation fee up front, therefore the Buyer is stating that they should not have to pay a fee to cancel. 1) What is your opinion about the Broker's right to set a cancellation fee, at the time a cancellation has been requested, in order to agree to the cancellation? The contract is silent on cancellation fees, but the Broker has stated they have incurred damages as a result of the cancellation. 2) In your opinion, what would be considered "damages"?

Answer:

The answer to this question must begin with the fact that buyer has no automatic right to cancel the contract. The response from the buyer broker and the firm, to the buyer, could be that buyer is obligated to the terms of the contract and thus, buyer cannot terminate, period. If buyer purchases property subject to the brokerage services agreement, buyer owes compensation to the firm and if buyer fails to pay the required compensation, buyer will be in breach. If buyer breaches the brokerage services agreement, the firm's damages include the compensation owing under the agreement. Understanding all of this as the operation of the contract makes understanding the question simpler.

However, if instead of refusing to allow the buyer to terminate the buyer brokerage agreement, the firm entertains the buyer's request to terminate, the firm can set terms that will allow the termination. Thought of differently, the firm and the buyer can agree to "settle" the firm's claim for breach of contract by agreeing to a sum that is less than the damages will be if buyer breaches the contract. That lesser sum can be any amount agreed by the parties and if the parties cannot agree, then the buyer brokerage services agreement remains in effect, obligating buyer to the compensation terms established in the agreement.

Buyer is correct that there is not a cancellation fee established in the Form 41 BBSA. That is because the Form 41 BBSA has no provision allowing the buyer to unilaterally cancel the contract. This buyer seeks an outcome that is not contemplated by the terms of agreement and thus, achieving that outcome requires a new negotiation and a new agreement. As part of that new negotiation, the firm may suggest a cancellation fee acceptable to the firm and if buyer agrees, the firm and the buyer can agree to cancel the BBSA in exchange for buyer's payment of that cancellation fee even though no cancellation fee is referenced in the Form 41 BBSA. If buyer and broker cannot agree, then again, the BBSA will remain in effect.

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