



LEGAL HOTLINE Q&A

FROM GET THE FACTS, January 16, 2024

Question:

If a transaction closes after 01/01/2024 and we receive money from escrow and there is not a buyer agency agreement in place, what do we do with it? From the buyer side do we send the money back to escrow to give back to the seller? From the seller side, do we need to see that the buyer's firm has one signed to protect our sellers money?

Answer:

It is not up to the listing firm to police buyer broker's firm's compliance with Washington law. Listing firms should not ask buyer broker firms to provide buyer broker firm's agency agreement with buyer for the purpose of proving that the agreement exists. There may be other reasons the two firms want to share their agency agreements but listing firms should not take on the role of determining whether buyer broker's firm complied with Washington law.

With respect to buyer broker's firm and its response if it discovers, prior to closing, that broker failed to enter a services agreement with buyer, the first answer has to be the obvious answer: "an ounce of prevention is worth a pound of cure." Firms must have a file review protocol that prevents this circumstance. Firms must have a training program that emphasizes the importance of a broker discussing with buyer, in advance, the cost of broker's services and entering an agreement, even a non-exclusive agreement, confirming buyer's acknowledgment of those costs should buyer utilize broker's services. With that training and policy review in place, hopefully, the firm never discovers that a broker failed to timely enter a services agreement with a client.



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Answer Continued...

In that (hopefully) rare circumstance where a transaction closes without a buyer agency agreement between buyer and buyer broker firm, buyer broker's firm is going have to decide how to proceed. Will it accept compensation and hope it doesn't get caught? Will it take some other approach? Those are not questions that the Hotline lawyer can answer. Those are questions that an individual firm will have to answer with the assistance of its own legal counsel.

As a final thought, DB needs to think critically about how the funds are characterized. In broker's question, broker asks whether the funds should be returned to the seller. One of the complexities in this situation should be the determination of whether the funds, at that point, are more appropriately the property of buyer or seller, if not the firm. Seller agreed to pay the funds to reimburse buyer for buyer's brokerage service costs. Buyer never received the benefit of negotiating and agreeing with buyer as to what those costs would be. When there is a pot of money to pay costs in an amount that were never agreed or documented, who should own those funds? That is a question that DB and the firm's lawyer will have to confront in determining how to address the situation where closing funds arrive to the firm with no services agreement in the firm's transaction folder.

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