

Commercial Broker Lien Law

Background

As a means to ensure that a broker's agreed upon commission would be paid upon completion of a commercial sales or lease transaction, brokers sought the statutory right to place a lien on the property. Twenty nine jurisdictions have adopted laws that allow a broker to claim a lien from his brokerage services and four jurisdictions include brokerage services as a qualifying property improvement within their mechanics' lien laws.

All state lien laws define the type of property and services subject to a lien. Most jurisdictions limit the lien right to commercial sales or leasing transactions. A few also include residential property and property management services. Almost all states require the brokerage agreement to be in writing and provide that a broker's lien can only be a lien on the property that is the subject of the brokerage's commission agreement. Most states provide a procedure to escrow funds in an amount sufficient to cover the broker's commission and a process to release the broker's lien.

Exhibit A is the National Association of REALTORS® ("NAR") Executive Summary of Broker Lien Laws. Additional information on each state's lien laws can be found at <http://www.legalebook.com/ebook/eBookFrame.asp> (You must be signed into www.realtor.org in order to review this content.)

Ohio's Commercial Broker Lien Law

Ohio's lien law went into effect on August 28, 1997. Under Ohio's law, lien rights are limited to commercial real estate which is defined as real estate other than real estate containing one to four residential units. A broker is required to have a signed written contract for brokerage services with the owner of the property. A lien can only be filed on the property that is the subject of the brokerage agreement. If the broker's commission is payable in installments, a portion which is due after conveyance, the amount of the lien is limited to the amount due to the broker prior to or upon conveyance.

In a sales transaction, a lien is perfected by filing a lien affidavit in the county recorder's office prior to conveyance of the property. In a lease transaction, a lien affidavit must be filed within 30 days after the first rental payment is due unless the owner has provided the broker with written notice, at least 10 days in advance, of the intended date for signing the lease. If notice has been provided, the broker must record the lien affidavit before the lease signing date.

A broker must commence proceedings to enforce the lien within one year of filing the lien affidavit. A broker and owner can agree to alternate dispute resolution to resolve the commission issue.

In a sales transaction, the lien will be released if the broker is paid at closing. If not, funds from the proceeds of the closing in an amount sufficient to release the broker's lien will be deposited into an escrow account. The broker is then required to release the lien. The escrow provision is not required if the broker and owner agree to an alternative procedure or the proceeds from the sale are not sufficient to release all liens claimed on the property.

If a broker is not paid on a lease transaction, the broker has one year to commence the proceeding to enforce the lien.

Issues Identified with Ohio's Commercial Broker Lien Law

Sales Transaction – Filing Lien Affidavit Prior to Closing

For a sales transaction, in most states, the timing to file the lien is determined by which party has contracted with that broker for brokerage services. If the seller has contracted to pay the broker's commission (listing broker or buyer broker) the lien generally has to be filed prior to closing. When the buyer has contracted to pay the broker's commission, the lien must be filed within 90 days of closing. Therefore, if a buyer agreed to pay his buyer broker's fee, the lien must be filed on the property within 90 days of the buyer obtaining title.

Ohio's lien law follows the general rule with regard to filing the lien when the seller is paying the commission. However, Ohio's law does not provide the buyer broker who is being paid by the buyer the ability to place a lien on the property after closing. Ohio's law could be expanded to provide this lien right to broker's being compensated by the buyer.

Lease Transaction – Filing Lien Affidavit within Thirty Days After the First Rental Payment is Due Unless Notified of Date of Lease Signing, Then Prior to That Date

The lien laws of most states provide that if the landlord is paying the commission, the lien must be filed within 90 days of the tenant taking possession, unless the broker has been notified of the lease signing date and then prior to that date. Possession is not defined in the statutes. However, the date the tenant has the right of possession should be clear under the terms of the lease.

Pennsylvania's law provides that the lien be filed "within 90 days of default by the owner or successors in interest under the terms of the compensation agreement." "Default" under the

terms of the compensation agreement may be less clear than the tenant's right of possession under the lease.

Most state laws provide that if the tenant rep has a written agreement with the tenant that provides that the tenant is to pay his commission, the broker can file a lien against the tenant's leasehold interest within 90 days of the tenant's possession.

Ohio's law could be changed for those transactions where the landlord pays the commission to allow 90 days from the tenant's possession. This would extend the time from 30 to 90 days and provide a less ambiguous term "possession" rather than "when the first rental payment is due."

Ohio's law could also be expanded to provide lien rights to tenant reps that are paid by the tenant. A lien could be placed on the tenant's leasehold interest within 90 days of the tenant's possession.

Additional Considerations

Installment Payments in Lease Transactions

Currently under Ohio's lien law, the lien for commission earned in a lease transaction must be filed within 90 days after the first rental payment is due unless notified of the date of the lease signing and then prior to that date. The lien is limited to the amount due the broker pursuant to the contract. If the broker's commission is payable in installments, a portion of which is due after conveyance, the amount of the lien is limited to the amount due to the broker upon conveyance. Therefore, the amount of the lien would most likely only cover the first commission payment. No lien right is provided for subsequent payments.

Ohio's law could be expanded to provide that after conveyance, but not later than 90 days after the date on which a commission payment is due, the broker could file a lien in the amount of the past due payment. The lien would be on the fee interest if the landlord is obligated to pay the commission and on the leasehold interest if the tenant is to pay the commission.

Is there a need to address installment payments in sales transactions?

Option Contracts

Currently Ohio's lien law provides that if a lease renewal option is exercised, the broker's lien must be filed before the intended date of signing the renewal if the landlord provided

notice of the lease signing date. If no notice, the lien must be filed within 30 days after the first rental payment is due under the lease renewal. With an option to purchase, the lien must be filed prior to closing.

Unfortunately, a broker's client does not always notify the broker of his intention to exercise an option. Title transfer may be the only way the broker finds out that an option to purchase has been exercised. A broker may also not be aware of a lease renewal in the short timeframe provided by Ohio law to file a lien.

Indiana's lien law provides that with options to lease or purchase, the broker may record a memorandum of lien at any time after execution of the lease or other contract that contains rights to future fees or commissions. The broker must then record a lien no later than 90 days after the occurrence of a condition (sale or renewal) for which future commissions are claimed. Indiana's statute specifically provides what information must be included in the memorandum of lien. The memorandum of lien is not a lien against the real estate but does provide notice of the right to future commissions. If the property is sold before the date on which the future commissions are due and the broker has recorded a memorandum of lien or lien before the sale or other conveyance of the property, the buyer or transferee is considered to have notice of and takes title to the property subject to the right to future commissions.

Ohio's lien law could be expanded to provide additional protection for commissions earned on option contracts.

Court Proceeding to Enforce the Lien Must be Filed Within One Year of Filing the Lien Affidavit

State laws vary on the timeframe to initiate the proceeding to enforce the lien. Two years is common. Some states have the same timeframe for the broker's lien as for a mechanic's lien. For example, in Indiana a broker must initiate the court proceeding within one year, the same as the timeframe to commence a suit on a mechanic's lien.

In Ohio, an action to enforce a mechanic's lien must be commenced within six years of filing the lien affidavit.

Ohio's broker lien law could be changed to follow Ohio's mechanic's lien law and provide six years to commence the court proceeding to enforce the lien.