

Dispute Over Selling Bonus Language in MLS: Is the bonus owed or not?

Scenario:

A listing agent put a property into MLS and under REALTOR Remarks stated:
\$1500 selling bonus with acceptable offer by August 5.

On August 1, a Selling Broker presented an offer to the Listing Broker that was significantly less than the listed price. Not only was the offer less than the seller's list price but would result in the seller going to the closing table with money rather than receiving proceeds. After consideration of the offer, however, the seller accepted it and a contract created on August 2.

At closing the Selling Agent was expecting the \$1500 bonus which was not paid by the listing broker with the reasons as follows:

- a. The offer wasn't really "acceptable" since the seller had to come to the table with money
- b. The bonus was not written into the purchase agreement
- c. The MLS profile sheet contained the statement: "the information is considered accurate, but not guaranteed."

Was the bonus owed or not?

Based upon the facts as stated above, it is the JAR Attorney's opinion that the offer of a selling bonus contained in the REALTOR Remarks is enforceable and should be paid. His rationale follows:

The Rules and Regulations of the Multiple Listing Service, Section 5, Part 1 state:

*In filing a property with the MLS, the Participant of the service is making a blanket unilateral offer of compensation to the other MLS participants, and shall therefore specify on each listing filed with the Service, **the compensation being offered** to the other MLS Participants. Specifying the compensation on each listing is necessary, because the cooperating broker has the right to know what his compensation shall be prior to his endeavor to sell. (a bonus is considered compensation).*

The offer in the MLS listing was a unilateral contract which lacked consideration until the consideration was supplied by the performance of the Selling Broker. The contract then became enforceable to the extent performed.

The defenses raised by the Listing Broker are without merit.

1. The contract cannot be reasonably argued that it was not acceptable because it *was* accepted and the sale closed. The bonus offer language did not require that the offer to purchase be at the listing price.
2. The bonus offer did not have to be included in the purchase agreement. As quoted above, the Rules and Regulations of the MLS expressly provide for this circumstance. The offer in dispute is between the Listing Broker and the Selling Broker. It is not dependent upon the purchase agreement other than the purchase agreement became evidence of an "acceptable offer."

3. The statement at the bottom of the MLS profile sheet that “the information is ...not guaranteed” would not be allowed to negate the validity of the offer of the bonus. The Listing Broker cannot argue that because the information on the MLS sheet is not guaranteed that the offer of a bonus cannot be relied upon.

If a Listing Broker includes selling bonus language in a listing, he should be aware that if a dispute arises as to the interpretation of such language, it is likely that a court would construe the language more strongly against the Listing Broker as being the preparer of the language.

In addition to the contractual obligation arising out of an MLS listing offering compensation to another REALTOR®, the listing broker should also be aware of the ethical duties regarding same. Article 3, Standard of Practice 3-4 of the REALTOR® Code of Ethics states:

REALTORS® shall, with respect to offers of compensation to another REALTOR® timely communicate any change of compensation for cooperative services to other REALTORS® prior to the time such REALTOR® produces an offer to purchase/lease the property.

There are no specific guidelines as to how to draft MLS listing compensation language or selling bonus language. However, listing brokers should use due care in preparing such language, knowing that they will be bound contractually and ethically by such language upon performance by a Selling Broker. To avoid misinterpretation, the bonus language should be clear stating any and all criteria that must be present for the bonus to be paid.