

## [Heartland Real Estate Business: October, 2004]

### Commission Agreements: Beware of Contract Language

By Steven Susser

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In a recent lawsuit, Grubb & Ellis Company v. Griswold Properties, L.L.C., a building owner learned a harsh lesson about the importance of paying close attention to its commission agreement.

The owner of a large office building in Detroit presented a written commission agreement to Grubb & Ellis, which was representing a tenant looking for office space. Grubb & Ellis signed the commission agreement, which did not contain an expiration or termination date. The operative language of the commission agreement was: “Please use this correspondence as our clarification and commitment for the direct payment of real estate commissions as described herein to Grubb & Ellis in the event that [tenant or tenant’s subsidiary] enters into a lease agreement at [the building].”

Shortly after the commission agreement was signed, the tenant put its relocation efforts on hold for almost one year. A subsequent new management team negotiated and finalized a lease directly with the building owner and without Grubb & Ellis’s involvement. The building owner refused to pay commissions to Grubb & Ellis, claiming that Grubb & Ellis was not the procuring cause and that the commission agreement had expired during the year of inactivity. However, it took the jury only twenty-two minutes to enforce the written commission agreement as written and award Grubb & Ellis almost \$900,000 — the full value of its commission plus interest.

The Grubb & Ellis case illustrates some important points about negotiating, drafting and signing written commission agreements:

#### **Do Not Omit Essential Terms**

You will face an uphill battle in trial if you are forced to claim that the written commission agreement does not encompass the parties’ entire contract. It is impossible to reduce all the terms of your agreement to a written document. However, at a minimum, the key terms must be in writing. A judge or jury will not rewrite your contract to save you from a bad business deal.

#### **Do Not Use Ambiguous Or Undefined Terms**

Judges and jurors are not real estate professionals. A term like “procuring cause” may have a standard definition in the real estate industry, but to a juror it probably does not have a clear meaning. Make sure the language is clear. In the Grubb & Ellis case, the jurors were left to choose between two different versions of what the term “gross rent” meant in the commission agreement. Before you sign a commission agreement, ask yourself whether you would be willing to live by the terms and conditions as they are captured by the four corners of the written

document. Then ask yourself whether the chosen terms would have a clear meaning to “the man on the street.”

### **Do Not Ignore The Agreement**

Carefully note important conditions and terms, especially those that relate to performance, compensation and termination. Jurors are inclined to value the words you decided to include in the contract and will not let you walk away from them. Jurors are not forgiving to corporations or brokers who miss deadlines in commission agreements or fail to follow notice provisions for termination or extensions.

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