

## Weekly Insight 7-7-2010

### Is it Illegal to Sell a Property You Don't Own?

This Weekly Insight started with a phone call from a wholesaler who I have personally known for probably 6 years. He used to rehab when I did but we never actually rehabbed a deal together. Instead, I had sold him a few wholesale properties that he either rehabbed or re-sold as wholesale deals. I haven't asked him, but I suspect between wholesaling and retailing, he has bought and sold between 135 and 150 properties.

So I was surprised when he said on the phone that he was confused and needed an answer to a question that he was arguing about with a realtor. The realtor's contention was that the investor couldn't sell a property he didn't own and the realtor wanted proof that some law in Florida allowed it. I suspect that the realtor came across, or discovered that the investor was re-selling a property he had under contract and where the realtor probably had the listing.

Let me reiterate that the above 150 deals the investor completed, if each one only netted him \$10,000, means he has grossed \$1,500,000 in his short career. He has never had an office other than a spare bedroom in his home and has never been licensed except to drive a car. Of course, he has never had to take continuing education credits or split a paltry 6% commission with two or three other parties. I would say this investor is a success by most standards as he continues to do 2 – 3 wholesale deals a month.

The fact that the realtor even brought up the issue implies he hasn't been in the business very long and I suspect will have a hard time making it as a realtor. I say this because the realtor is having a hard time separating the real world from what he learned in the law class at realtor school – the two can be massively different but yet both can be legal in the proper context.

So what is the answer to the question, "Can you sell a property you don't own?" The answer is a resounding, "Yes and No, but first let's define what the term "sell" means to the realtor and to the investor:

In the legal sense and realtor-speak, selling means closing on a property and the proceeds of the sale go to the seller, who is the deed holder or owner of record and usually the property's homeowner. Even a bank has to foreclose to get title to a property before they can sell it, so obviously you can't sell something you don't own. Otherwise, you could sell your neighbors home and any other property in the county at will, so to speak. Score one for the realtor; he was right about closing on a sale without owning it. I won't cloud the issue by saying that in California buyers often come to closing before the sellers and close in escrow and if an investor is in the transaction, technically the property has been sold without owning it. But the deed is not transferred until the original seller comes forward and signs the closing documents.

In the investor sense of the term “sell”, it means that he gets a property under some sort of contract for purchase and sale or option agreement, with the owner of record, and he markets the property and finds a buyer. Some of the largest commercial real estate deals in the world have been because of a simple option contract. The next part seems to be what the realtor is missing.

The investor doesn't come to the closing and transfer the property to his buyer without the signed deed transferred by the owner of record. The owner of record or legally authorized representative of the owner of record (probate for example) comes to the closing and transfers (sells) the property either to the end-buyer or to the investor who then resells it to his contractual end-buyer. Either of these two methods of closing are done tens of thousands of times a day in the US – legally, ethically and with realtors involved in many of these sales. Score one for the investor.

When a realtor calls his client with whom he has a listing and says, “I sold it!” he didn't sell the property, he simply found a buyer with whom the seller now has to sign a purchase and sale contract, come to closing, close and pick up a check. Because the realtor has no equitable interest in the property such as a partnership agreement, option contract or his own purchase and sale contract with the seller, he is obliged to only make a commission by law. To receive a commission a realtor has to be licensed by the state and follow rules and regulations that investors don't even know exist, because they don't apply to investors.

The difference between what a realtor does and an investor does is defined by the equitable interest issue and the monetary risk investors take in each transaction. Realtors have no financial investment in the transactions they have listings for with their buyers. If they don't find a buyer, no loss, no gain, as they are paid by performance. Investors have market and monetary risk on every transaction. The risk may be as little as a deposit or as large as the full value they pay for the property, but they have risk. If the investor doesn't make the transaction (wholesaling, rehabbing or buying to rent) work they can lose substantial funds.

I have heard all the arguments that realtors have overhead, advertising costs, licensing fees, continuing education costs, customer expenses, all of which don't get reimbursed. Well, it may be shocking to realtors, but investors have similar expenses and they are often many times more if you consider the courses investors pay for. The difference is that one deal for an investor can be equal to 5 – 50 times what a realtor makes in commission on the same deal. Many investors go broke following their investing dream, many realtors just quit because they can't make a living – that's a big difference if it's your money being lost.

The big problem with who is right about selling and not owning the property, is that the term “selling” to the investor means marketing the property, finding a buyer for it and putting it under contract to an end-buyer. If the investor has an equitable interest in the

property, by contract, option contract or partnership agreement, he is acting within his legal rights.

Actually, this is no different than a real estate auction house selling a property where they have a contract (listing agreement) with the seller (REO property) and they find a buyer who goes to the closing with the owner of record (REO Asset Manager's representative) and they get paid. Except the auction house has to be licensed to receive commissions and hence they are licensed realtors.

The auction house has costs and expenses that aren't paid unless the properties sell, but they have no market risk in the properties. If they were good at selling outside of hyping the properties to an adrenalin-pumped audience, they would buy them themselves and re-sell to the retail market after they rehabbed the property. Mention that to an auction house and they would laugh and say that they aren't stupid enough to take that type of risk. This "stupidity" of risk taking is exactly what investors do.

If you are a realtor reading this, the last REO auction property I purchased had a 36.7% commission that was paid at closing. If you are still thinking 6% commissions, take a look at <http://www.12PercentPlus.com> for the insider secrets of how successful realtors legally make the big dollars. I actually have the closing statement in the documents so you can see the real estate brokerage firm involved and the exact financial breakdown. If you are an investor reading this, the text is a gold mine of ideas to get realtors to legally work with you and not other investors.

So, was the investor right or was the realtor right? When all is said and done, it depends on how you define the word "sell". If the realtor thinks he has won, let him think it. While he is beating his chest, the investor is quietly carrying closing checks to the bank and living the American Dream that the realtor can only ever dream about. So in closing, would you rather be right or happy?

To your limitless success,

Dave Dinkel

PS – I can't cover all the topics which directly affect readers (both of them). So I am thinking about starting a column to answer specific questions from readers. I may answer you directly, or publish an article about it. Your identity will remain anonymous and I am not paying anything except the knowledge you gain from my answer. Send your questions to [Dave@WJL.net](mailto:Dave@WJL.net) and let's see what happens.