

Real Estate Broker Liens: Are They a Problem for Lenders?

Amundsen Davis Financial Services Alert

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Illinois law allows real estate brokers to record liens on commercial properties for commissions that they claim they are owed. When such liens are recorded, questions abound as to their validity and priority.

Broker's liens have existed in Illinois for 25 years, yet they are seldom seen and rarely utilized. When they do arise, however, other lien holders take notice because priority becomes paramount in deals where slim margins exist.

Illinois established the Commercial Real Estate Broker Lien Act in 1992. It allows a real estate broker to record a lien on commercial real estate for any amount that they are due. Unlike mechanics liens, however, broker liens do not relate back to the date of the contract and instead are effective only at the time that the lien is recorded in the county where the affected property is located. This means that so long as a lender has a valid and perfected mortgage in lien place, a broker's lien cannot prime the lender's priority. Further, in order to be valid, the broker must send proper notice of the lien to the owners of the real estate within a certain time frame.

One of the main reasons that broker liens are seldom seen is that they are all but unnecessary. A seller of real estate almost universally is required to provide real estate title insurance to the buyer, and title companies require sellers to provide sworn statements as to the lack of any other person or entity having an interest in the subject property, and the broker's interest must be disclosed. Further, as soon as a broker provides a commission statement to the title company, a title policy with clear title will not be issued by a title company without the real estate broker's claimed commission being dealt with in some way, shape or form. If a broker decides to place a lien on the property that is to be sold, the lien must be resolved by either payment, or with the creation of an escrow account for the deposit of the disputed amount to allow for the transaction to close. This way the broker and seller can resolve their differences privately or through the court system without interfering with the closing.

Simply put, there is very little reason for a broker to use a lien in order to guaranty payment, but the law allowing for broker liens remains in the Illinois Compiled Statutes. When such liens do occur, it is important for sellers, lenders, and other parties to know and understand the impact of such liens and whether they can create a cloud on title that could derail the closing of a transaction.

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