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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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Improved Broker Commission Lien Law

The broker commission lien statute establishes the right of real estate brokers to secure the payment of commissions in transactions involving commercial real estate. Operating much like a construction lien, a broker's commission lien secures the payment of commissions or other compensation that the broker earns pursuant to the terms of a written commission or compensation agreement.

Wis. Stat. § 779.32 applies to all commercial real estate, that is, all real estate except property that contains one to eight dwelling units, property zoned for agricultural purposes and undeveloped property zoned for residential purposes. If a broker follows the required steps for notice and lien perfection, the broker has a lien on the commercial real estate being sold, purchased, leased, rented, exchanged or optioned for the unpaid amount of any commission, fee or other compensation that the broker has earned and that is due and payable. In other words, the broker lien law in § 779.32 provides real estate brokers with an insurance policy to make sure they are paid the commission or fees that are owed to them.

Problems with the procedures and timelines in the prior version of § 779.32 led to the enactment of 2009 Wis. Act 348, which creates a more logical and practical process for brokers to follow when they wish to establish a broker commission lien. The Wisconsin REALTORS® Association worked with the Commercial Association of REALTORS® of Wisconsin to make several changes to our state's commission lien law that increase its

effectiveness and make it a better logical fit for real estate practice. The WRA and CARW also worked with Knight-Barry Title, Inc. to develop new forms and checklists for brokers to use when filing broker commission liens under the revised law.

This *Legal Update* summarizes the changes to the real estate broker commission lien law, overviews the new procedures and forms and then gives a "how to" description of the broker lien law in various sale and lease situations. The steps involved in establishing a commission lien in a commercial sales transaction, a commercial buyer agency representation, a commercial lease listing, a commercial tenant representation scenario and a property management situation are examined in a step-by-step manner, using hypothetical fact situations. The new broker commission lien forms are explained and samples of the new forms are included in this *Update*.

Prior Commission Lien Law

Wisconsin's commission lien law in Wis. Stat. § 779.32 authorizes real estate brokers in a real estate transaction involving commercial real estate to place a lien on property to ensure payment of the commission in both sales and lease transactions. While the requirements for filing a lien in purchase and sale transactions have some similarities to those in lease and property management transactions, they also have some significant differences. In this *Update* the revisions to the law for sales and purchase transactions will

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be explained separately from the legal revisions pertinent to lease listings and property management situations.

Sale and Purchase Transactions

In a sales transaction under prior law, a listing broker or buyer's broker was authorized under Wis. Stat. § 779.32 to place a lien on property prior to closing to ensure payment of the commission at closing. The broker needed to file two separate documents with the register of deeds for the county in which the property was located:

1. a Notice of Intent to Claim Broker Lien, which be filed 30 days prior to closing; and
2. the actual lien (called a Notice of Broker Lien), which had to be filed three days before closing.

This was difficult to implement because the broker was put in the position of having to file a form indicating his or her intent to file a commission lien more than a month before the commission was due at closing. The commission lien document was also filed before closing – before the broker became aware that the client would not be paying the commission due at closing.

This process proved to be problematic. Brokers were required to give notice of intent to file a lien too far in advance of closing. Brokers generally are unaware that their clients will not pay them until right before or at closing, and filing such a Notice of Intent to Claim Broker Lien could jeopardize the transaction or a broker's relationship with the client.

If the broker did not file the Notice of Intent to Claim Broker Lien and the Notice of Broker Lien on time and did not get paid at closing, the broker could pursue a breach of contract claim. If the breach of contract claim was against the seller, the seller

no longer owned the property and the broker had to find some other way to enforce a favorable judgment from a court. Having a lien against the property sold is clearly an advantage for a broker who does not get paid.

Lease and Property Management Transactions

In lease listing and property management transactions the backwards timing was even more pronounced. The broker again used two separate documents:

1. a Notice of Intent to Claim Broker Lien had to be delivered to the person who would owe the broker compensation before the date the lease listing or property management agreement was signed and entered into; and
2. the Notice of Broker Lien, which was filed no later than 90 days after the later of the date the broker earned a commission or compensation, or the date the broker received notice that he or she had earned a commission or compensation. The authority to place a lien on the property in a lease transaction after a commission is owed is similar to the authority provided under Wisconsin's construction lien law.

Commission Lien Law Revisions

2009 Wisconsin Act 348 (www.legis.state.wi.us/2009/data/acts/09Act348.pdf), effective May 28, 2010, amends Wis. Stat § 779.32 to make numerous changes to the process of obtaining and terminating a real estate commission lien.

Act 348 made the following improvements to the § 779.32 commission lien law, effective May 28, 2010:

- To make sure the property owner and other parties are aware of the broker's lien rights, all commercial listing contracts, property management agreements, lease listing contracts,

buyer agency agreements and tenant representation agreements related to commercial real estate must include language informing the client that brokers have the right to file a lien if the commission is not paid when due.

- The “Notice of Intent to Claim Broker Lien” is replaced with a “Notice of Interest” for all purchase/sale transactions. A Notice of Interest must be recorded with the Register of Deeds at least 30 days prior to a

closing. The Notice of Interest will be valid for up to 24 months from the date of recording.

- For lease listings and property management transactions, the Notice of Intent to Claim Broker Lien requirement is eliminated and a Notice of Interest is not specifically required.
- The broker in a sale and purchase transaction is authorized to record a commission lien at any time up to 30 days after the closing documents are recorded. Act 348 changes the time

period for perfecting a lien involving a written commercial real estate listing contract or buyer agency agreement from three days before the conveyance documents are recorded to 30 days after the conveyance documents are recorded with the register of deeds.

- The fact that commission lien law applies to “tenant representation agreements” is clarified.
- The fact that the lien can be filed to recover commission “or

Comparison of Broker Commission Lien Process: Prior Law vs. New Law

Sale and Purchase Transactions

Prior Law	New Law
<p>Recording/Filing requirements:</p> <ul style="list-style-type: none"> • Notice of Intent to Claim Broker Lien recorded or filed at least 30 days before closing. • Notice of Lien filed no later than three days before closing documents recorded. <p>Mailing requirements:</p> <ul style="list-style-type: none"> • Mail copy of Notice of Lien to property owner or acquirer within 72 hours of filing. 	<p>Disclosure requirements:</p> <ul style="list-style-type: none"> • Notice of broker lien rights language must be included in all agency agreements: sales listing contracts and buyer agency agreements. <p>Recording requirements:</p> <ul style="list-style-type: none"> • Notice of Interest recorded at least 30 days before closing. • Commission Lien recorded no later than 30 days after closing documents recorded. <p>Mailing requirements:</p> <ul style="list-style-type: none"> • Mail copy of Commission Lien to property owner or acquirer within 72 hours of recording.

Lease and Property Management Transactions

Prior Law	New Law
<p>Notice requirements:</p> <ul style="list-style-type: none"> • Notice of Intent to Claim Broker Lien provided to person owing commission at lease one day before the lease listing or property management agreement entered into. <p>Filing requirements:</p> <ul style="list-style-type: none"> • Notice of Lien filed no later than 90 days after commission earned or broker receives notice that commission earned. <p>Mailing requirements:</p> <ul style="list-style-type: none"> • Mail copy of Notice of Lien to property owner or acquirer within 72 hours of filing. 	<p>Disclosure requirements:</p> <ul style="list-style-type: none"> • Notice of broker lien rights language must be included in all agency agreements: lease listing contracts, property management agreements and tenant representation agreements. <p>Recording requirements:</p> <ul style="list-style-type: none"> • Commission Lien recorded no later than 90 days after commission earned or broker receives notice that commission earned. <p>Mailing requirements:</p> <ul style="list-style-type: none"> • Mail copy of Commission Lien to property owner or acquirer within 72 hours of recording.

compensation,” which is intended to cover other types of fees often owed under buyer agency/ tenant representation agreements, lease listings or management agreements is clarified. Current law indicates that a lien can be filed only to recover a commission.

- Brokers working under tenant representation agreements may file a commission lien against the property owner/landlord's property interest if the property owner/landlord has agreed to pay the tenant representative broker's fee.
- Under prior law, the broker is required to satisfy a commission lien if the person owing a commission that is the subject of the lien pays an amount equal to 125 percent of the commission owed into the trust account of the broker or of an attorney who does not represent any party to the dispute, pending resolution of the dispute. The new law adds a mutually agreed-upon third party to those who can receive and hold the money pending resolution of the dispute.
- An enforcement provision indicating that commission liens can be foreclosed is created.
- Prior law provided that a commission lien is extinguished if an action to enforce the lien is not commenced within two years after the lien is perfected. Under the new law, a notice of interest is extinguished if a new notice of interest in the commercial real estate is not recorded within two years after the original notice of interest was recorded.
- Under amended § 779.32, a broker may rescind a notice of interest by recording a notice in the office of the register of deeds for the county in which the commercial real estate is located indicating that he or she no longer claims an interest in the commercial real estate.
- The new law requires a broker to record a notice rescinding a notice of

interest in the commercial real estate if the agreement that created the interest in the commercial real estate is terminated or expires.

- Under the revised statute, a broker may waive the lien by signing a written waiver, but no action between any other persons may invalidate the lien, other than the payment in full of the broker's commission.

Overview of Commission Lien Process

A broker who follows all of the steps outlined below by the specified deadlines will have a lien that secures all unpaid commissions and compensation that is due to the broker with respect to the commercial real estate subject to the lien, regardless of whether the commission or compensation was earned at the time the lien was recorded.

Commercial Real Estate

As before, the types of real estate that can be made subject to a broker commission lien are categorized in § 779.32(1)(b) as commercial real estate. Commercial real estate includes all real estate except “real property containing 8 or fewer dwelling units, real property that is zoned for residential purposes and that does not contain any buildings or structures, and real property that is zoned for agricultural purposes.” In other words, residential properties with one to eight units, vacant land zoned for residential purposes and properties zoned agricultural are excluded and all other kinds of properties are potentially subject to commission liens.

Types of Commissions and Commission Agreements

The commissions and fees that may be protected with a broker commission lien are those earned by the real estate

broker under the following types of written broker agency agreements:

- **Commercial real estate listing contracts.** With respect to commissions owed by the seller under a listing contract for the sale of commercial real estate, the broker may record a lien against the commercial real estate, or the interest in commercial real estate, listed for sale with the broker. [§ 779.32(2)(a)]
- **Commercial buyer agency agreements and tenant representation agreements.** With respect to commissions or fees owed by the buyer under a buyer agency agreement for the purchase of commercial real estate, or owed by a tenant/lessee under a tenant representation agreement for the lease or rental of commercial real estate, the broker may record a lien against the commercial real estate, or the interest in commercial real estate, acquired by the buyer or tenant/lessee. [§ 779.32(2)(b)]
- **Commercial lease listing or property management agreements.** With respect to commissions or fees owed by the owner or landlord under a lease listing or property management agreement for the lease or rental of commercial real estate, the broker may record a lien against the commercial real estate, or the interest in commercial real estate, for which the leasing or management services were provided. [§ 779.32(2)(c)]
- **Tenant representation agreements (cooperative commission).** If the landlord or owner has agreed to pay the tenant representative's fees or commissions owed by the tenant under a tenant representation agreement for the lease or rental of commercial real estate, the broker may record a lien against the commercial real estate, or the interest in commercial real estate, for which the leasing or management services were provided. [§ 779.32(2)(c)]

Initial Notice of Lien Rights

To preserve the broker's rights and ability to possibly record a commission lien, the broker must notify the person who will owe the broker any commission or other compensation, in writing, of the broker's right to claim a commission lien. The notice required by § 779.32(2m) must be included in all agency agreements pertaining to commercial real estate where the broker wants to preserve his or her right to record a commission lien: sale listing contracts, buyer agency agreements, lease listing contracts, property management agreements and tenant representation agreements.

This first step in the revised process is critical and is something that every broker who wants to be in the position to later file a commission lien, should circumstances later warrant it, must do when the agency agreement is executed. The broker must notify the person who will owe commission or fees in writing of the broker's right to claim a lien under § 779.32. If the agency agreement pertains to commercial real estate and the broker wants to reserve the right to file a commission lien if the broker is not paid, then the broker must include the following language in the broker's listing contract, buyer agency/tenant representation agreement, lease listing or property management agreement:

NOTICE: A broker has the authority under section 779.32 of the Wisconsin Statutes to file a broker lien for commissions or compensation earned but not paid when due against the commercial real estate, or the interest in the commercial real estate, that is the subject of this agreement.

REALTOR® Practice Tips:

A broker entering into any agency agreement pertaining to commercial real estate must include this language if the broker wants to have the chance later on to record a commission lien should

the broker not be paid. This means for any listing or other agency agreement pertaining to residential property with nine or more dwelling units, or any other property not zoned residential or agricultural, the broker should include this notice language. This is critical because the broker cannot record a lien if the notice language was not given.

REALTOR® Practice Tips:

Brokers should make this a routine practice and include the broker lien notice language in all agency agreements for commercial real estate. It may be prudent to include the language in all agency agreements if the broker does a lot of commercial real estate work. The language may be typed into the Additional Provisions lines in the agency contract or the broker may use an addendum like the WRA Addendum CL (Notice of Broker Commission Lien Rights) appearing on Page 19 of this *Update*.

REALTOR® Practice Tips:

2009 Wis. Act 348 did not address the applicability of the revised process in situations where a commercial agency agreement had already been executed, but the broker arguably may add the notice language to an existing agency agreement by amendment, providing the client will agree.

Recording a Notice of Interest

The broker next must record a § 779.32(3) written notice of interest at the office of the register of deeds for the county in which the commercial real estate is located. The notice of interest must contain:

1. the name of each party to the agreement under which the interest is claimed,
2. the date that the agreement was entered into and
3. a description of the commercial real

estate that is subject to the broker's lien rights.

If the broker's agency agreement is a sales listing contract or a buyer agency or tenant representation agreement where the client is contractually obligated to pay the broker when the commission is earned, then the notice of interest must be recorded at least 30 days before the conveyance of the commercial real estate subject to the listing contract or buyer agency/tenant representation agreement.

Like the inclusion of the broker's lien rights notice in the initial agency contract, this too is a critical step in preserving the broker's ability to record a broker commission lien later on if the broker is not paid at closing. If this is not promptly done before the closing, the broker will lose his or her rights to record a lien once the broker realizes the client is not paying the commission earned and due at closing. REALTORS® may use the WRA Real Estate Broker Notice of Interest form for this purpose.

One circumstance may delay the recording of the notice of interest. In some buyer agency and tenant representation agreements the desired property is specifically identified while in other agreements the desired property is only generally described based in terms of desired property characteristics. A specific description of the property potentially subject to a commission lien is needed to record a notice of interest. Thus, in some instances the broker cannot immediately record a notice of interest and will need to wait until the specific property/property interest the party wishes to acquire is identified and a legal description is obtained before the broker will be able to record a notice of interest.

REALTOR® Practice Tips:

The new law says the notice of

interest must be recorded with the register of deeds at least 30 days before closing, but brokers should record the notice of interest immediately after entering into the listing contract or buyer agency/tenant representation agreement if the property description is available. This is critical because the broker cannot record a broker commission lien if the notice of interest has not been recorded.

REALTOR® Practice Tips: Brokers should make it routine to record the notice of interest right away to avoid the risk of forgetting to do it later on after the parties enter into an offer to purchase or other contract. The broker will be distracted by the parties and contract implementation at that time and may easily forget.

The statute is silent as to whether a

notice of interest must be recorded in the case of a lien under a lease listing or property management agreement, or a tenant representation agreement where the broker is being paid by the property owner. The broker in such situations may record a notice of interest if desired, but it is not necessary under the statute. The title companies tracking broker liens will be happy and it establishes a record of the broker's potential lien interests, but with the new recording fees (\$30 per document), this may turn out to be an expensive practice.

Recording a Commission Lien

Wis. Stat. § 779.32(4)(a) provides that a broker commission lien must be recorded in the office of the register of deeds for the county in which the commercial real estate is located.

- For a commission earned and payable by the client under a listing contract or buyer agency/tenant representation agreement, the lien must be recorded no later than 30 days after the date that the conveyance or closing documents are recorded with the register of deeds.
- For a commission earned and payable by the property owner under a lease listing or property management agreement, or a tenant representation fee to be paid by the property owner, the lien must be recorded no later than 90 days after the later of the following:
 - The date that the broker earns a commission or compensation that gives rise to a lien. A commission or compensation is considered earned on the date that payment of it is due under the lease, tenant



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representation agreement or management agreement.

- The date that the broker receives notice that he or she has earned a commission or compensation that gives rise to a lien. A commission or compensation is considered earned on the date that the payment of it is due under the lease, tenant representation agreement or management agreement.

According to § 779.32(4)(b), a commission lien must be signed by the broker and must include:

- the name and license number of the broker,
- the name of the owner or acquirer of the commercial real estate that is subject to the lien,
- the legal description of the commercial real estate subject to the lien and
- the amount of the lien at the time the lien is recorded.

Brokers may use the Real Estate Broker Commission Lien form developed by the WRA, CARW and Knight-Barry Title, Inc., when preparing and recording a commission lien.

Mailing Copy of Lien to Owner

A broker must mail a copy of the lien to the owner or acquirer of the commercial real estate that is subject to the lien within 72 hours after the recording of the lien, per § 779.32(4)(c).

When the Broker must Satisfy the Real Estate Broker Commission Lien

According to § 779.32(8)(a), the broker must execute and deliver a satisfaction of the lien to an interested party if one of the following conditions is met:

1. the person owing the commission or compensation pays the broker in full the amount specified in the lien, or
2. the person owing the commission or compensation pays an amount equal to 125 percent of the commission or

compensation owed into the trust account of the broker, the trust account of any attorney who does not represent any party to the dispute and who is in good standing with the State Bar of Wisconsin, or to a mutually agreed-upon third party. The money shall be held in escrow until disbursed pursuant to the written mutual agreement of the parties or pursuant to a court order, or

3. if the parties to the contract or agreement giving rise to the lien agree to binding arbitration regarding the disputed commission or compensation and if the parties to the contract or agreement, other than the broker, agree to pay all of the costs of arbitration.

Real Estate Broker Satisfaction of Commission Lien

Wis. Stat. §779.32(8)(am) requires that a satisfaction of a commission lien must include:

1. the name and license number of the broker,
2. the name of the owner or acquirer of the commercial real estate that is subject to the lien and
3. the legal description of the commercial real estate that is subject to the lien.

The satisfaction of lien must be signed by the broker and recorded with the register of deeds. Brokers may use the Real Estate Broker Satisfaction of Commission Lien form for this purpose.

According to § 779.32(8)(c), a broker is liable to a person requesting a satisfaction of lien in an amount equal to 50 percent of the sum claimed in the lien if the broker does not provide the requested satisfaction within 30 days of the latter of the date on which the broker receives the request for the satisfaction and whichever of the following is applicable:

1. The date on which the broker receives payment in full of the amount specified in the lien.
2. The date on which the broker receives evidence that 125 percent of the amount of the commission owed to the broker

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has been deposited into a trust or escrow account by the person owing the commission.

3. The date on which the broker receives the agreement to binding arbitration or evidence of payment of the arbitrator's fee.

Foreclosure of Commission Lien

If the broker has not been paid the commission due and the commission lien is not satisfied, the broker may foreclose on the commission lien, using the procedures for a mortgage foreclosure to the extent applicable.

Extinguishment of Notice of Interest

A notice of interest expires and is extinguished if a new notice of interest is not recorded under § 779.32(3) within two years after the recording of the original notice of interest. A notice of interest may be rescinded by the recording of a notice with the register of deeds in the county where the real property is located, indicating that the broker is no longer claiming an interest under § 779.32. Brokers may use the Real Estate Broker Rescission of Notice of Interest form for this purpose. A broker must record a notice rescinding the notice of interest if the contract or agreement under which the interest was created expires or is terminated.

Waiver of the Commission Lien

A broker may waive the commission lien in a written document signed by the broker, but no action or agreement between any other persons may invalidate the lien, other than the payment in full to the broker of the commission or compensation to which the lien relates. Brokers may use the Real Estate Broker Waiver of Commission Lien form for this purpose.

Checklist of Commission Lien Forms and Steps

- ☐ Initial written notice of lien rights to owner, landlord, buyer or tenant

- ☐ Recording Notice of Interest
- ☐ Recording Commission Lien
- ☐ Mailing a copy of commission lien to owner, landlord, buyer or tenant
- ☐ Recording rescission/extinguishment of Notice of Interest
- ☐ Recording Satisfaction of Commission Lien
- ☐ Foreclosure of Commission Lien
- ☐ Waiver of Commission Lien

Commission Lien Forms

The following commission lien forms will be available to WRA members in ZipForm:

- **Addendum CL (Notice of Broker Commission Lien Rights)(WRA-ACL):** This is the addendum that may be attached to the agency agreement. It contains the required notice informing the property owner or client of the broker's lien rights as well as the definition of commercial real estate. See the sample copy of this form on Page 19 of this *Update*.
- **Real Estate Broker Notice of Interest (WRA-NOI):** This must be recorded in sales transactions no later than 30 days before closing. See the sample copy of this form on Page 20 of this *Update*.
- **Real Estate Broker Commission Lien (WRA-CL):** This is the commission lien that provides security for commissions the broker has earned. It contains a reminder to the broker to mail a copy to the owner or acquirer of the described commercial real estate. See the sample copy of this form on Page 21 of this *Update*.
- **Commission Lien Letter (WRA-CLL):** This is a cover letter that may be used to send a copy of the commission lien to the owner or the acquirer of the commercial real estate that is subject to the commission lien. This must be done within 72 hours after the commission lien is recorded. See the sample copy of this

form on Page 22 of this *Update*.

- **Real Estate Broker Satisfaction of Commission Lien (WRA-SCL):** This form satisfies the commission lien and removes it as an encumbrance on title. See the sample copy of this form on Page 23 of this *Update*.
- **Real Estate Broker Rescission of Notice of Interest (WRA-RNOI):** This form removes the notice of interest from the record. See the sample copy of this form on Page 24 of this *Update*.
- **Real Estate Broker Waiver of Commission Lien (WRA-WCL):** This waiver releases a commission lien, presumably under circumstances where the broker has not been paid in full. See the sample copy of this form on Page 25 of this *Update*.

The Real Estate Broker Satisfaction of Lien and the Real Estate Broker Waiver of Lien contain a second page marked "Exhibit A" that prompts the broker to attach a copy of the commission lien being released. The parenthetical instructions indicate that the broker should attach a copy of the original commission lien that was recorded and was received back from the register of deeds with the recording information stamped thereon, if that document is available. The Exhibit A page is intended to be a cover page preceding the attached copy of the commission lien. The Exhibit A page does not appear with the sample copies of these forms included in this *Update*.

Similarly, the Real Estate Broker Rescission of Notice of Interest contains a second page marked "Exhibit A" that prompts the broker to attach a copy of the notice of interest being released. The parenthetical instructions indicate that the broker should attach a copy of the original notice of interest that was recorded and was received back from the register of deeds with the recording information stamped thereon, if that document

is available. The Exhibit A page is intended to be a cover page preceding the attached copy of the notice of interest. The Exhibit A page does not appear in the sample copy of this form included in this *Update*.

Both the Real Estate Broker Satisfaction of Lien and the Real Estate Broker Waiver of Lien contain a note indicating that any notice of interest referenced in the commission lien is also thereby rescinded. Thus both the notice of interest and the commission lien are being addressed and removed as outstanding items on title.

Using a Commission Lien in a Commercial Sales Transaction

A commission lien is used in a commercial sale transaction to secure the listing broker's commission. A commission lien could be used with a WB-5 Commercial Listing Contract, a WB-6 Business Listing Contract, a WB-3 Vacant Land Listing Contract (if the land is not zoned for residential or agricultural purposes), a WB-1 Residential Listing Contract (if the property contains nine or more dwelling units) or any other listing contract relative to commercial real estate. The sample fact situation in the following step-by-step description, however, involves a WB-5 Commercial Listing Contract.

Sample Fact Situation: Sale of Commercial Warehouse

Broker C is trying to get a listing for a local warehouse owned by Seller W. He just read that real estate brokers can have a commission lien to protect themselves if they follow certain steps. First Broker C reviews the commission language of the WB-5 Commercial Listing Contract. The broker's commission is earned, per lines 54-73 of the WB-5,

if during the term of the listing:

- (1) The seller sells or accepts an offer which creates an enforceable contract for the sale of all or part of the property;
- (2) The seller grants an option to purchase for all or part of the property which is subsequently exercised;
- (3) The seller exchanges or enters into a binding exchange agreement on all or part of the property;
- (4) A transaction occurs which causes an effective change in ownership or control of all or any part of the property or
- (5) A buyer is procured by the broker, seller or any person, at no less than the price and on substantially the same terms set forth in the listing and in the standard provisions of the current WB-15 Commercial Offer to Purchase, even if the seller does not accept the offer.

Once earned, the broker's commission is due and payable in full at the earlier of closing or the date set for closing (in the event of a failed transaction), unless otherwise agreed in writing.

Broker C also reviews the steps for setting up a commission lien. Wis. Stat. § 779.32(2)(a) provides that if a listing broker has earned a commission under a written commercial real estate listing contract, the listing broker has a lien for the commission due provided the broker records a notice of interest and perfects the lien in the required manner. Wis. Stat. § 779.32(2m) provides that a broker also must provide written notice of the broker's lien rights to the person who will owe the commission or compensation and this must be provided in the agency agreement giving rise to the broker's right to compensation. In other words, if a listing broker is going to have an effective commission lien,

- (1) the broker must provide the required notice in the WB-5 Commercial Listing Contract informing the seller

of the broker's lien rights;

- (2) the broker must record a notice of interest at least 30 days before closing;
- (3) the broker must record the commission lien no later than 30 days after closing;
- (4) the commission must be earned and
- (5) the commission must be due.

The commission need not be earned when the commission lien is recorded.

Broker C reaches an agreement with Seller W to list her large commercial warehouse facility. Broker C begins to prepare a WB-5 Commercial Listing Contract, but quickly remembers that he needs to include language about broker lien rights in the listing contract.

Notice Regarding Broker Lien Rights in Listing Contract

The first step in establishing a commission lien for Broker C is for Broker C to include the broker lien rights language in the listing contract with Seller W. Broker C completes the Addendum CL (Notice of Broker Commission Lien Rights) by naming Seller W on line 1 of the Addendum CL, putting his company name (an LLC broker entity) on line 2, entering the date of the listing on line 3 and filling in the warehouse property description on lines 3-4. At this juncture, the street address used in the WB-5 is sufficient, but Broker C makes a mental note to be sure to get the legal description for the property because that will be needed if a notice of interest or a commission lien are to be recorded later on. Seller W and Broker C initial the addendum and attach it to the WB-5 Commercial Listing Contract. The Addendum CL is referenced on line 271 of the WB-5 as an attached addendum and this step has been completed.

Broker C likes to use the addendum because he does not have to worry about getting the language right or

making typing errors, but observes that the broker lien rights notice would readily fit on the Additional Provisions lines in the WB-5 (lines 258-270).

On June 1, 2010, Broker C lists Seller W's warehouse facility. The warehouse is listed for \$1,650,000, the broker's commission is 6 percent and Addendum CL is attached.

After exceptional marketing by Broker C and prolonged negotiations between the parties, Seller W enters into a WB-15 Commercial Offer to Purchase with Buyer A for \$1,585,000 on July 14, 2010. The closing is scheduled for October 1, 2010. The financing and environmental evaluation contingencies in the offer have a deadline of September 14, 2010.

Notice of Interest Recorded

The next step in establishing a commission lien for Broker C is to record a notice of interest. A sample copy of the Real Estate Broker Notice of Interest appears on Page 20 of this *Update*. This form must be recorded at the office of the register of deeds at least 30 days before the conveyance of the warehouse (at least 30 days before closing), as is noted on the form. Accordingly, Broker C must record a Notice of Intent with the register of deeds no later than September 1, assuming that the transaction is going to close on schedule or at some time after the original closing date. In the event that there is any chance of an early closing, the notice of interest should be recorded with the register of deeds even earlier. Broker C decides to not risk forgetting to record the notice in September. Since there is now an accepted offer, Broker C decides to record the notice of intent right away.

When completing the Real Estate Broker Notice of Interest, Broker C fills in the name of his LLC brokerage company as the Real Estate Broker at the top of the form and under item 3. He indicates that the agreement is

a commercial listing contract under item 1, fills in the date of the agreement as June 1, 2010, under item 2, enters Seller W's name as the seller under item 3, fills in the address and legal description of the warehouse property under item 4, and again states Seller W's name as the owner of the property under item 5. Broker C fills in the parcel number of the warehouse property and writes in his name and mailing address in the Name and Return Address box so that he will receive the original back with the document number and recording information on it after the register of deeds completes the recording process. He dates the form; prints his name, title (LLC member), address and telephone number on the form; and signs his name – in his capacity as member of the LLC – before a notary public. Once the form is notarized, Broker C can make copies of the completed form and record the original with the register of deeds.

Listing Broker's Commission Earned and Due

Note that the broker's commission is not earned until the accepted offer is an enforceable contract or the seller sells the warehouse, per line 56 of the WB-5 Commercial Listing Contract.

The term "enforceable contract" is a bit problematic because different cases, judges and attorneys interpret this phrase in different ways. There are Wisconsin cases that indicate that a contract, like an offer to purchase, is not enforceable if there is an unresolved condition or contingency. However, there are also cases that discuss whether a contract is enforceable in terms of whether there are specific, definite contract terms, whether the statute of frauds was violated, etc. Because of these different directions that courts may take, the listing basically leaves it to the courts to determine what is required for an "enforceable contract" on a case-by-case basis.

Accordingly, it is possible that the broker does not earn his or her commission until closing if there are contingencies that are being satisfied and removed at the last minute. As long as the transaction closes and the warehouse is sold, then the \$95,100 commission is due to Broker C from Seller W at closing. The broker's commission was earned and is due at closing.

Listing Broker Prepares to Record Commission Lien

The next step in establishing a commission lien for Broker C would be to perfect the lien by recording a Real Estate Broker Commission Lien with the register of deeds. A sample copy of this form appears on Page 21 of this *Update*. This form must be recorded at the office of the register of deeds no later than 30 days after the documents conveying the warehouse are recorded (at least 30 days after closing) and a copy of the form must be mailed to the seller within 72 hours after the lien is recorded. Accordingly, Broker C would need to record a Real Estate Broker Commission Lien with the register of deeds no later than November 1 (October 31 is 30 days, but it is a Sunday), and mail a copy to Seller W within 72 hours of recording.

When completing the Real Estate Broker Commission Lien, Broker C would again fill in the name of his LLC brokerage company at the top of the form, the broker's license number for the LLC in item 2, the property address and legal description in item 3, the name of the owner (Seller W) in item 4 and \$95,100 as the commission (\$1,585,000 x 6 percent) secured by the lien in item 5. Broker C would fill in the parcel identification number of the warehouse property and write in his name and mailing address in the Name and Return Address box so that he would receive the original back with the document number and recording information on it after the register of deeds

completed the recording process.

Broker C would also fill in the date of the Notice of Interest, the date when it was recorded with the register of deeds and the document number that was assigned to the Notice of Intent by the register of deeds in item 1. Broker C would date the form; print his name, title and contact information on the form; and sign his name before a notary. Once the form was notarized, Broker C could make copies of the completed form, record the original form with the register of deeds and mail a copy to Seller W. However, it appears that Seller W is going to pay the commission due at closing.

Seller Payment of Listing Broker's Commission

With the Notice of Interest having been recorded more than 30 days before closing, it hopefully will appear on the title insurance commitment for the warehouse. The Notice of Interest will be indexed by the register of deeds under Seller W's name, and under the legal description of the warehouse if the register of deeds maintains a tract index. The title insurance company should find this if they recheck the record right before closing or if the buyer has a gap endorsement. Consequently, Seller W will hopefully want to pay Broker C's commission at closing to remove the Real Estate Broker Notice of Interest from the title and keep Broker C from recording a Real Estate Broker Commission Lien.

Broker C is fortunate because that turns out to be the case. Seller W will pay commission at closing. Broker C accordingly needs to rescind the Notice of Interest to remove it from title so Seller W can give the warehouse buyer clear title. Broker C may use the Real Estate Broker Rescission of Notice of Interest form (a sample copy appears on Page 24 of this *Update*).

To complete the Real Estate Broker

Rescission of Notice of Interest, Broker C fills in the LLC's name and the recording information for the Notice of Interest. Broker C then should attach a copy of the Notice of Interest, preferably a copy of the Notice of Interest that was actually recorded and came back to Broker C from the register of deeds with all of the recording information stamped on the form. The Real Estate Broker Rescission of Notice of Interest form includes a second page labeled "Exhibit A" (not included in this *Update*). This page will remind Broker C to attach a copy of the Notice of Interest to the rescission form and serves as the cover page to the attached Notice of Interest. That copy of the Notice of Interest (preferably a copy of the one that was actually recorded) becomes the third page of the Real Estate Broker Rescission of Notice of Interest form. Broker C completes the return address, parcel identification number and signature block, and signs the rescission form before a notary public. He will be ready to present the rescission form at closing provided that Seller W comes through and pays his commission.

In this scenario, Broker C never had to actually record a commission lien because the recorded Notice of Interest served its purpose by bringing attention to the fact that the warehouse buyer was going to end up with a commission lien on his property if the seller did not pay the commission at closing.

Using a Commission Lien in a Commercial Buyer Agency Transaction

A broker lien is used in a commercial buyer agency situation to secure the buyer's broker's fee due under the WB-36 Buyer Agency Agreement. In this instance, the commission

lien would be recorded with respect to the interest in commercial real estate that the buyer is acquiring.

The WB-36 provides in the Compensation section on lines 21-34 that the buyer's broker's success fee is earned when the buyer acquires an interest in property or enters into an enforceable written contract to purchase a property provided it is not an excluded property under lines 11-20 of the WB-36. The buyer's broker is paid if any such interest is obtained by the buyer during the contract term, regardless of who helps the buyer procure that property interest. This is true even if the buyer's agent was not involved in the location of this property interest and was not involved in the negotiation of the procurement of the interest in property. Once earned, the fee is due and payable in full at the earlier of closing or the date set for closing (in the event of a failed transaction) unless otherwise agreed in writing.

Sample Fact Situation: Purchase of Health Club

Broker B has been discussing working as a buyer's agent for Buyer H who wants to buy a health club. Broker B begins to prepare the WB-36 Buyer Agency/Tenant Representation Agreement and remembers that he needs to include the broker lien rights language in the buyer agency agreement with Buyer H if he wants to protect his ability to record a commission lien if his success fee is not paid at closing.

Notice Regarding Broker Lien Rights in Buyer Agency Agreement

The first step in establishing a broker commission lien for Broker B is for Broker B to include the broker lien rights language in the buyer agency agreement with Buyer H. Broker B is in a rush and does not have an Addendum CL handy, so he decides

to type the following language in the Additional Provisions section on lines 182-190 of the WB-36:

NOTICE: A broker has the authority under section 779.32 of the Wisconsin Statutes to file a broker lien for commissions or compensation earned but not paid when due against the commercial real estate, or the interest in the commercial real estate, that is the subject of this agreement.

On December 1, 2010, Broker B and Buyer H enter into a WB-36 Buyer Agency Agreement. The desired health club property would be in the Fox Valley and would include the building, land, equipment and membership contracts. The price range is \$800,000 - \$1,000,000. The buyer's broker's success fee is 8 percent of the purchase price.

After intense negotiations, Buyer H enters into a WB-16 Business Offer to Purchase with Seller F on April 6, 2011. The purchase price is \$850,000 and the closing is scheduled for July 1, 2011.

Recording Real Estate Broker Notice of Interest

The next step in establishing a broker lien for Broker B is to record a Notice of Interest. Unlike a broker working under a listing contract, a broker working under a buyer agency agreement cannot record the notice of interest right away after entering into the agency agreement because the notice of interest requires the description of the property. That description generally is not known until the buyer has identified a specific property or entered into an offer to purchase, option contract, exchange agreement or some other contract to acquire an interest in a property. Now that Buyer H has entered into an offer to purchase that looks promising, Broker B can prepare and record a notice of interest.

Broker B will use the Real Estate Broker Notice of Interest form that

appears on Page 20 of this *Update*. This form must be recorded at the office of the register of deeds at least 30 days before the conveyance of the health club property (at least 30 days before closing). Accordingly, Broker B must record a Notice of Interest with the register of deeds no later than June 1, 2011, assuming that the transaction is going to close on schedule or at some time after the original closing date.

When completing the Notice of Interest, Broker B fills in his brokerage's corporation name as the Real Estate Broker near the top of the form and in item 3. He checks the box under item 1 to indicate that he is working under a commercial real estate buyer agency agreement, fills in the date of the agreement as December 1, 2010, under item 2, enters Buyer H's name as the buyer under item 3 and fills in the address and legal description of the health club property in item 4. The owner of the property at that point in time will be the seller under the WB-16 offer that Buyer H has entered into, so that name may be entered under item 5. Broker B fills in the parcel number of the health club property and writes his name and mailing address in the Name and Return Address box so that he will receive the original back with the document number and recording information on it after the register of deeds completes the recording process. He dates the form; prints his individual name, title (President), address and telephone number on the form; and signs his name – in his capacity as president of his brokerage corporation – before a notary public. Once the form is notarized, Broker B can make copies of the completed form and record the original with the register of deeds.

Earning the Buyer Agency Success Fee

The success fee provisions at lines 26-29 of the 2008 WB-36 Buyer Agency Agreement state, "If this

Agreement calls for a success fee, it is agreed that Broker has earned the success fee if, during the term of this Agreement (or any extension of it), Buyer or any person acting on behalf of Buyer acquires an interest in property or enters into an enforceable written contract between owner and Buyer to acquire an interest in property, at any terms and price acceptable to owner and Buyer. ... Once earned, Broker's compensation is due and payable at the earlier of closing or the date set for closing, unless otherwise agreed in writing." Wis. Stat. § 779.32 provides that if a buyer's broker has earned a fee under a written buyer agency agreement for the acquisition of commercial real estate, the buyer's broker has a lien for the unpaid buyer's broker's fee due to the broker provided the broker records a notice of interest and perfects the lien in the required manner, that is, records a commission lien and mails a copy of the lien to the buyer.

Buyer's Broker's Fee Dispute

Despite the complexity of the transaction, all proceeds reasonably well until a problem arises with respect to the equipment inventory. The owner of the health club discovers that some of the equipment was under priced in the original negotiations and there is more equipment to be included than was initially contemplated by Buyer H. After a few anxious days of back and forth messages, Buyer H grudgingly agrees to take the additional equipment and to accept the higher inventory valuation, all of which results in an overall price increase of \$24,000. After Buyer H unhappily signs the amendment to the offer that increases the price to \$874,000, Buyer H informs Broker B that he will not be paying any buyer's broker's fees on the additional \$24,000. When closing day arrives, Broker B and Buyer H are in the midst of a fee dispute. Buyer H's lender, in the meantime, wants the Notice of Interest removed from title before

funds are disbursed and the lender's mortgage is recorded. The lender asks that a rescission of the notice of interest be produced at closing and Buyer H relays that request to Broker B.

At this point it appears Buyer H cannot close unless Broker B's Notice of Interest is removed from the record. Buyer H stubbornly refuses to pay Broker B the additional \$1,920 for the success fee. Broker B wonders whether the lender can be persuaded that the notice of interest will not affect the priority of the lender's mortgage so that the lender will release the mortgage funds. The lender discusses the matter with legal counsel and reluctantly agrees to proceed with closing as long as Broker B signs a written promise to not record any commission lien before the mortgage has been recorded. The lender asks to receive a copy of the lien once recorded.

Buyer H gives a sigh of relief and the parties close. Broker B and Buyer H manage to maintain a good enough relationship that Buyer H still pays Broker B the original success fee of \$68,000 (\$850,000 x 8 percent). Broker B is glad to receive the bulk of the fee due, but is a principled individual who believes parties should live up to their contractual agreements and he intends to file a commission lien for the balance of the success fee still outstanding. He knows that the relatively small amount of \$1,920 (\$24,000 x 8 percent) may never be paid until the property is sold again and the relatively small amount does not make it worth foreclosing, so it is likely the lien will sit on the property for years to come unless the owner refinances and another lender requires satisfaction of the commission lien.

Buyer's Broker Records Commission Lien

The next step in establishing a commission lien for Broker B is to perfect the lien by recording a Real Estate Broker Commission Lien with the

register of deeds and mailing a copy to Buyer H. Broker B will use the Real Estate Broker Commission Lien form that appears on Page 21 of this *Update*. This form must be recorded at the office of the register of deeds no later than 30 days after the documents conveying the health club to Buyer H are recorded (at least 30 days after closing) and a copy of the form must be mailed to Buyer H within 72 hours after the lien is recorded. Accordingly, Broker B would need to record a Real Estate Broker Commission Lien with the register of deeds no later than August 1, 2011 (July 31 is 30 days, but it is a Sunday), and mail a copy to Buyer H within 72 hours of recording.

When completing the Real Estate Broker Commission Lien, Broker B fills in the name of his brokerage corporation at the top of the form, the corporation's broker entity licensee number in item 2, the property address and legal description of the health club property in item 3, the name of the acquirer (Buyer H) in item 4 and \$1,920 as the success fee secured by the lien in item 5. Broker B fills in the parcel identification number of the health club property and writes in his name and mailing address in the Name and Return Address box so that he would receive the original back with the document number and recording information on it after the register of deeds completes the recording process.

Broker B also fills in the date of the Notice of Interest, the date when it was recorded with the register of deeds and the document number that was assigned to the Notice of Intent by the register of deeds in item 1. He dates the form; prints his individual name, title (President), address and telephone number on the form; and signs his name – in his capacity as president of the corporation licensed as a broker entity – before a notary public. Once the form is notarized, Broker B can make copies

of the completed form and record the original with the register of deeds.

Buyer's Broker Mails Copy of Lien to Buyer

Broker B must mail a copy of the Real Estate Broker Commission Lien that he recorded to Buyer H within 72 hours of recording. ZipForm includes a Commission Lien Letter that may be used as a cover letter to send a copy of the commission lien to Buyer B. See the sample copy of this form on Page 22 of this *Update*. Broker B will also send a copy of the letter and the lien to the lender, as he promised, and then he will be basically done with the process until he is paid the balance due.

Satisfaction of Commission Lien by Buyer's Broker

When Broker B sends Buyer H the copy of the commission lien, Buyer H replies, restating his position that he will not pay the extra commission amount. Broker B does get lucky, however, because Buyer H does go for additional financing a couple of years later and the lender insists that Buyer H apply part of the loan proceeds to pay the commission lien at the loan closing. Broker B, accordingly, needs to prepare a Real Estate Broker Satisfaction of Commission Lien. See the sample copy of this form on Page 23 of this *Update*.

When completing the Real Estate Broker Satisfaction of Commission Lien, Broker B fills in the name of his licensed brokerage corporation at the top of the form, the date the lien was signed, the date the lien was recorded and the document number assigned to it by the register of deeds. Broker B also fills in the parcel number of the health club.

Broker B then attaches a copy of the Commission Lien, preferably a copy of the Commission Lien that was actually recorded and came back to Broker B from the register of deeds with all of the recording information

stamped on the form. The Real Estate Broker Satisfaction of Commission Lien form includes a second page labeled "Exhibit A" (not shown in the sample copy in this *Update*). This page will remind Broker B to attach a copy of the Commission Lien to the satisfaction form and serves as the cover page to the attached Commission Lien. That copy of the Commission Lien (preferably a copy of the one that was actually recorded) becomes the third page of the Real Estate Broker Satisfaction of Commission Lien form.

Broker B dates the form; prints his individual name and title (President) on the form; and signs his name – in his capacity as president of the corporation licensed as a broker entity – before a notary public. Broker B is paid the final \$1,920, the Satisfaction of Commission Lien is recorded and Buyer H goes on to operate a successful business.

Using a Listing Broker's Commission Lien in a Commercial Lease Listing Transaction

A commission lien is used in a commercial lease listing situation to secure the listing broker's commission due under a commercial lease listing. Wisconsin real estate licensees may use the WB-37 Exclusive Listing Contract for Lease of Real Property that is mandatory for use as an exclusive lease listing for residential property, but it may also be used as an exclusive lease listing for commercial property. Commission liens would be available to a lease listing broker to create security for payment of rental and leasing commissions for residential property containing more than eight dwelling units and for other properties not zoned residential or agricultural.

Sample Fact Situation: Lease of Retail Space in Shopping Mall

Broker L has been talking with Owner O about entering into an exclusive commercial lease listing contract with Owner O whereby Broker L would procure a tenant and negotiate a lease for a retail rental space in a shopping mall. Broker L knows that if she wants to protect any commissions earned under the commercial lease listing with a commission lien, she must provide Owner O with a notice regarding broker lien rights using the new mandatory language when the commercial lease listing is entered into.

Terms of Commercial Lease Listing

On January 7, 2011, Broker L enters into a commercial lease listing with Owner O. The available space is 4,500 square feet and Owner O would like an annual net rent of \$20 per square foot of rentable area, payable monthly, with a minimum lease term of 36 months. The listing broker's commission is 7 percent of the base rent, with 3.5 percent due upon the lease signing, 3.5 percent due upon the tenant's occupancy and 7 percent due on the anniversary date of the lease signing throughout the balance of the lease term. A 4.5-percent commission is also due upon any lease renewal.

Notice Regarding Broker Lien Rights in Listing Contract

Before the contract is signed, Broker L completes the Addendum CL (Notice of Broker Commission Lien Rights) by filling in Owner O's name on line 1 of the Addendum CL and the trade of Broker L's business on line 2 (Broker L is a sole proprietor with a "doing business name" on file with the Department of Regulation and Licensing), entering the date of the lease listing on line 3 and including the property description on lines 3-4. At this juncture, the street address

used in the commercial lease listing is sufficient, but Broker L makes a note to be sure to get the legal description for the property because that will be needed if a notice of interest or a commission lien are to be recorded later. Owner O and Broker L initial the addendum and attach it to the exclusive commercial lease listing contract. The Addendum CL is referenced in the commercial lease listing as an attached addendum and this step has been completed. The parties execute the commercial lease listing.

No Notice of Interest for Commercial Lease Listing Broker

Broker L remembers when § 779.32 used to provide that the broker needed to give the potential client a Notice of Intent to Claim Broker Lien at least one day before the commercial lease listing was signed. Broker L tried this once but the potential client was so offended that he was being warned of a lien for non-payment before he had even signed the lease listing that he left in an angry rush and went straight to another broker. Broker L is anxious to try the revised commission lien process because she knows that she will not need to chase away potential clients before they sign an agency agreement.

Under the revised § 779.32, there is a notice of interest given, at least in some transactions, and there is no notice of intent to claim broker lien. The statute does not include any requirement for recording a notice of interest in situations where the agency agreement is a lease listing or property management agreement for commercial real estate, or when the tenant representation broker under a tenant representation agreement is being paid by the landlord/property owner. A broker in these situations may still record a notice of interest if the broker wants to make sure that the title company or closing agent has notice of the broker's interest. Broker L, however, believes

she will try to keep the process as simple as possible, at least for the first time she tries out the commission lien process under the revised law.

Commission Lien in Commercial Lease Listing Transactions

The Real Estate Broker Commission Lien in the case of a commercial lease listing must be recorded with the register of deeds no later than 90 days after the date that the broker earns a commission, or the date that the broker receives notice that he or she has earned a commission. A fee or other compensation is considered to be earned on the date that payment is due under the commercial lease listing, property management agreement or tenant representation agreement where the fee is being paid by the landlord/owner. A broker thus need not record any commission liens until such time that the owner fails to pay a commission that is due.

The broker may use the threat of filing a commission lien to encourage the owner to make timely commission payments. If the owner is in default, the broker can file a commission lien and satisfy it once the commission payment has been received. If the owner is again in default with a subsequent payment, the broker can file another commission lien. This hopefully would not be necessary because after the broker has recorded one commission lien, the owner is apt to make serious efforts to avoid a repeat of the broker lien process.

Terms of Retail Lease

After weeks of negotiation, Owner O enters into a commercial lease with Lessee E on April 19, 2011, and Lessee E takes occupancy on June 1, 2011. The net rent is \$10,125 per month (\$121,500 annually) and the lease is for a four-year term. Broker L earns a total commission of \$34,020, with \$4,252.50 due

and payable on the lease signing on April 19, 2011, and \$4,252.50 due and payable on June 1, 2011; and \$8,505 is due and payable on April 19 in the years 2012, 2013 and 2014.

Lease Listing Broker Records Commission Lien

Broker L is paid the commission due in 2011 and 2012, but Owner O runs into hard times and fails to make the payment due in 2013, even though the tenant is doing well in the retail space. Broker L attempts to call Owner O and sent him a few letters but weeks pass by and still no commission payment. Broker L decides to try the commission lien route.

Broker L will use the Real Estate Broker Commission Lien form that appears on Page 21 of this *Update*. When completing the commission lien form, Broker L fills in the trade of her business at the top of the form, her broker licensee number in item 2, the property address and legal description in item 3, the name of the owner (Owner O) in item 4 and \$8,505 as the commission secured by the lien in item 5. Broker L enters the parcel identification number of the shopping mall property and writes in her name and mailing address in the Name and Return Address box so that she would receive the original back with the document number and recording information on it after the register of deeds completes the recording process.

In item 1, Broker L writes in "n/a" or fills in a dash (–) because no notice of interest has been recorded. She dates the form; prints her name (she does not use a title since she is a sole proprietor broker), address and telephone number on the form; and signs her name before a notary public. Once the form is notarized, Broker L can make copies of the completed form and record the original with the register of deeds.

Lease Listing Broker Mails Copy of Lien to Owner

Broker L must mail a copy of the Real Estate Broker Commission Lien to Owner O within 72 hours of recording. She will use the Commission Lien Letter in ZipForm as the cover letter when she mails a copy of the commission lien to Owner O. See the sample copy of this letter on Page 22 of this *Update*. She will go to the post office and get a mailing receipt to show when the copy was mailed to the owner. Broker L also decides to send a second copy of the lien via certified mail with return receipt requested so that she will have proof that the copy was received, if the owner accepts certified mail and signs for it. Broker L wants to establish the best proof possible of this mailing even though \$ 779.32 only requires simple mail.

Waiver of Commission Lien

Owner O faxes a copy of the Real Estate Broker Commission Lien to her attorney and is asking whether there is a way to avoid having this commission lien recorded against the shopping mall. The attorney suggests that, other than making sure that Broker L is paid on time, maybe Broker L would waive the commission lien if Owner O can find some other way to secure the payment of her commission payments. Owner O is adamant that Broker L waive the commission lien, so Broker L proposes to waive the commission lien if Owner O posts a letter of credit as security for the remaining commission payments. Owner O's attorney approves of this so Owner O agrees.

Broker L prepares a Real Estate Broker Waiver of Commission Lien, using the form appearing on Page 25 of this *Update*. Broker L fills in the trade of her sole proprietor brokerage business at the top of the form, the date the lien was signed, the date the lien was recorded and the document number assigned to it by the register of deeds. Broker L then fills in the parcel number of the shopping mall property.

Next Broker L attaches a copy of the Commission Lien, preferably a copy of the Commission Lien that was actually recorded and came back to Broker L from the register of deeds with all of the recording information stamped on the form. The Real Estate Broker Waiver of Commission Lien form includes a second page labeled "Exhibit A" (not shown in the sample copy in this *Update*). This page will remind Broker L to attach a copy of the Commission Lien to the waiver form and serves as the cover page to the attached Commission Lien. That copy of the Commission Lien (preferably a copy of the one that was actually recorded) becomes the third page of the Real Estate Broker Waiver of Commission Lien form. Broker L dates the form; prints her individual name on the form and signs her name before a notary public.

Owner O promises to pay the 2013 commission within a week and the payment of Broker L's future commission is secured by the letter of credit posted by Owner O. The parties chose to use the waiver form rather than the satisfaction form because the commission payment for 2014 is still outstanding. The waiver released the commission lien recorded for the 2013 payment but does not release the underlying obligation established under the commercial lease listing contract.

Using a Commission Lien in a Property Management Situation

A commission lien is used in a property management situation to secure the property manager's fees due under a property management agreement. It may be used for commercial property management such as office or retail space and for residential property management as long as rental property to be managed has nine or more dwelling units.

Sample Fact Situation: Property Management of 100-Unit Apartment Complex.

Broker P does a lot of property management work, and has been talking with Owner A about entering into a property management agreement for Owner A's 100-unit luxury apartment complex. Owner A's attorney begins drafting the property management agreement.

Notice Regarding Broker Lien Rights in Property Management Agreement

It occurs to Broker P that if he wants to protect any fees earned under the property management agreement with a commission lien, he must make sure that the attorney includes the language from Wis. Stat. § 779.32 regarding broker lien rights in the agreement. Broker P telephones Owner A, who relays the message to this attorney. The attorney suggests to his client that it is not in the owner's best interests to include that language because he is setting the stage for the broker to later record a commission lien. Upon hearing this, Broker P reassures Owner A that this is becoming the new standard and that Wisconsin brokers are including this language in all of their agency agreements relative to commercial real estate. The attorney still thinks that the owner should stand his ground and refuse the provision, but the owner relents and the broker lien rights language from § 779.32 is included in the property management agreement.

Terms of Property Management Agreement

On March 16, 2011, Broker P enters into property management agreement with Owner A that will be effective starting April 1, 2011. The listing broker's fee is 5 percent of all rents collected payable monthly. \$1,000 is due on the first day of each month and the balance of the monthly fee

is calculated and paid on the last day of each month. With 100 units renting at an average of \$800 per month, Broker P's monthly fee will be around \$4,000 per month ($\$800 \times 100 \times 5$ percent) and \$48,000 per year. The property management contract has an initial term of three years, with a provision for three one-year renewals.

Because Broker P is using a non-interest-bearing trust account to manage this property, he is not too concerned about not being paid. Wis. Admin. Code § RL 18.09(3)(b) provides that: "A broker providing property management services shall disburse the fee earned for providing property management services on [sic] a regular monthly basis unless otherwise agreed in a written property management agreement signed by the parties to that agreement." Broker P's property management agreement with Owner A provides for Broker P to disburse two installments of the property management fee each month. In other words, Broker P has the authority to pay himself. Owner A also recognizes this fact and is not too concerned. Should the apartment complex encounter financial difficulties down the road, Broker P has the ability to file a broker lien should payment of his commission be in jeopardy.

Using a Tenant Representative's Commission Lien in a Commercial Lease Listing Transaction

A commission lien on the owner's property, rather than on the interest in the commercial real estate acquired by the tenant, may be used in a commercial lease listing situation to secure the tenant representative's compensation due under a commercial tenant representation agreement such as the WB-36 Buyer Agency/Tenant Representation Agreement. This may

be done if the landlord/property owner has agreed to pay the tenant representative's compensation due under the WB-36. A commission lien to create security for payment of commissions under these circumstances can be recorded against the landlord/property owner's interest in the commercial real estate under the new law.

Sample Fact Situation: Lease of Office Space in Office Building Complex

Broker S has been talking with prospective Tenant O about entering into a WB-36 Buyer Agency/Tenant Representation Agreement whereby Broker S would help Tenant O locate and negotiate a lease for office space in a large Milwaukee area office complex. Tenant O is hoping to find a situation where the office complex owner will pay the tenant representative's success fee so that Tenant O's funds can be devoted to paying for quality office space.

Notice Regarding Broker Lien Rights in Tenant Representation Agreement

Broker S knows that if she wants to protect any fees earned under this arrangement with a commission lien, she must provide Tenant O with a notice regarding broker lien rights using the new mandatory language when the commercial tenant representation agreement is entered into. Broker S prepares a WB-36 Buyer Agency/Tenant Representation Agreement and includes an Addendum CL that is incorporated by reference into the WB-36.

Terms of Tenant Representation Agreement

On November 1, 2010, Broker S enters into a WB-36 Buyer Agency/Tenant Representation Agreement with Tenant O. Tenant O is looking for an office suite of approximately 5,000 square feet with an annual net rent of no more than \$14 per square foot of rentable area, payable monthly, with

a minimum lease term of 36 months. The tenant representative's success fee is 4 percent of the base rent, with 2 percent due upon the lease signing, 2 percent due upon occupancy, and 3 percent due on the anniversary date of the lease signing throughout the balance of the lease term.

No Notice of Interest for Commercial Tenant Representation Broker

Broker S remembers when § 779.32 used to provide that the broker needed to give the potential client a Notice of Intent to Claim Broker Lien at least one day before a commercial lease listing or property management agreement was signed. Under the revised § 779.32, there is a notice of interest given, at least in some transactions, and there is no notice of intent to claim broker lien. The statute does not include any requirement for recording a notice of interest in situations where the agency agreement is a lease listing or property management agreement for commercial real estate, or when the tenant representation broker under a tenant representation agreement is being paid by the landlord/property owner.

Broker S hopes that it can be arranged for the office space lessor to pay her fees, but recognizes that this is something that cannot be predicted. If it turns out that Tenant O would need to be responsible for Broker S's fees under the WB-36, Broker S knows that she can record a notice of interest against the interest that Tenant O is acquiring and later record a commission lien, if need be. That is a decision Broker S can make after she finds a good office suite for Tenant O and negotiates a favorable lease for the client.

Terms of Office Lease

After weeks of hunting, Broker S finds an office suite that meets Tenant O's requirements. Broker S negotiates with the office building complex owner and the parties finally agree to

a three-year office lease that includes the property owner's agreement to pay Broker S's success fee as stated in the WB-36. Tenant O enters into an office space lease with the owner on March 19, 2011, and Tenant O takes occupancy on June 1, 2011. The net rent is \$14,208 per month (\$170,500 annually) and the lease is for a three-year term. Broker S earns a total commission of \$17,050, with \$3,410 due and payable at the lease signing on March 19, 2011 and \$3,410 due and payable on June 1, 2011; \$5,115 is due and payable on March 19 in the years 2012 and 2013.

Commission Lien in Commercial Tenant Representation Transaction

The Real Estate Broker Commission Lien in the case of a commercial tenant representation situation where the property owner is contractually obligated to pay the tenant representative broker's success fee must be recorded with the register of deeds no later than 90 days after the date that the broker earns a fee or commission, or the date that the broker receives notice that he or she has earned a fee or commission. A fee or other compensation is considered to be earned on the date that payment is due under the commercial lease listing or property management agreement, or tenant representation agreement where the fee is being paid by the landlord/owner. A broker thus need not record any commission liens until such time that the owner fails to pay a fee or commission that is due and is in default.

Tenant Representation Broker Records Commission Lien

Broker S is paid the commission due in 2011 but he does not pay Broker S the \$5,115 due and payable on March 19, 2012, even though Tenant O is flourishing in the office suite. Broker S attempts to communicate with the owner about the deficiency, but still no commission payment is made. Broker S decides

to try the commission lien route.

Broker S will use the Real Estate Broker Commission Lien form that appears on Page 21 of this *Update*. When completing the commission lien form, Broker S (a sole proprietor) fills in the trade of her business at the top of the form, her broker licensee number in item 2, the property address and legal description of the office complex property in item 3, the name of the owner (office building complex owner) in item 4 and \$5,115 as the commission secured by the lien in item 5. Broker S fills in the parcel identification number of the office building complex property and writes in her name and mailing address in the Name and Return Address box so that she would receive the original back with the document number and recording information on it after the register of deeds completes the recording process.

In item 1, Broker L writes in "n/a" or fills in a dash (–) because no notice of interest has been recorded. She dates the form; prints her name (she does not use a title since she is a sole proprietor broker), address and telephone number on the form; and signs her name before a notary public. Once the form is notarized, Broker S can make copies of the completed form and record the original with the register of deeds.

Tenant Representation Broker Mails Copy of Lien to Owner

Broker S must mail a copy of the Real Estate Broker Commission Lien that she recorded to the office building complex owner within 72 hours of recording. She will use the Commission Lien Letter in ZipForm as the cover letter when she mails a copy of the commission lien to the property owner. See the sample copy of this letter on Page 22 of this *Update*. She will go to the post office and get a mailing receipt to show when the copy was mailed to the owner. Broker S also decides to send a second copy of the lien via certified mail with return receipt requested so that she will have proof that the copy

was received, if the owner accepts certified mail and signs for it. Broker S wants to establish the best proof possible of this mailing even though § 779.32 only requires simple mail.

The office building complex owner contacts Broker S to find a way to arrange to have the commission lien removed.

Satisfaction of Commission Lien by Buyer's Broker

Broker S is obligated to execute and deliver a satisfaction if the office owner deposits 125 percent of the fees owed into Broker S's trust account, into the trust account of an attorney who does not represent any of the parties involved in the fee dispute or to a mutually agreed-upon third party. These moneys would be held in escrow and disbursed only pursuant to a written mutual agreement or court order. Another alternative is for Broker S and the office owner to agree to binding arbitration, with the property owner obligated to bear the costs thereof.

The office owner decides to challenge whether the terms of the lease require him to make the payments in 2012 and 2013. He will initiate local board arbitration against Broker S and pay the fees involved in that process (\$500 in many boards). The office owner and Broker S execute an agreement drafted by the owner's attorney agreeing to arbitration. This triggers Broker S's obligation to execute and deliver a Satisfaction of Commission Lien.

When completing the Real Estate Broker Satisfaction of Commission Lien (see the form on Page 23 of this *Update*), Broker S fills in the trade of her business at the top of the form, the date of the Commission Lien, the date it was recorded and the document number assigned to it by the register of deeds. Broker S fills in the parcel identification number of the office building complex property and writes in her name and mailing address in the Name and Return Address box so that she would receive the original back with

the document number and recording information on it after the register of deeds completes the recording process.

Broker S then attaches a copy of the Commission Lien, preferably a copy of the Commission Lien that was actually recorded and came back to Broker S from the register of deeds with all of the recording information stamped on the form. The Real Estate Broker Satisfaction of Commission Lien form includes a second page labeled "Exhibit A" (not shown in the sample copy in this *Update*). This page will remind Broker S to attach a copy of the Commission Lien to the satisfaction form and serves as the cover page to the attached Commission Lien. That copy of the Commission Lien (preferably a copy of the one that was actually recorded) becomes the third page of the Real Estate Broker Satisfaction of Commission Lien form.

Broker S dates the form, prints her name on the form and signs her name before a notary public. Broker S awaits paperwork from the local board regarding the arbitration.

Conclusion

The number one requirement for brokers interested in recording commission liens is to ALWAYS INCLUDE THE BROKER LIEN RIGHTS LANGUAGE IN ANY AGENCY AGREEMENT PERTAINING TO COMMERCIAL REAL ESTATE. This is necessary to preserve a broker's lien rights.

Additional guidance for working with commercial liens may be found on the WRA Web site. Knight-Barry Title, Inc., has prepared "Instructions – Commercial Real Estate Broker Commission Liens (pursuant to § 779.32, Wis. Stats.)" and "Timeline for Securing Commission Lien." Look for these resources at www.wra.org/Legal/forms_update.htm in the right column under Additional Resources.

ADDENDUM CL (NOTICE OF BROKER COMMISSION LIEN RIGHTS)

Addendum CL may be used with any of the following agency agreements: WB-5 Commercial Listing Contract or any other contract used to list commercial real estate for sale; WB-36 Buyer Agency/Tenant Representation Agreement or any other buyer agency agreement or tenant representation agreement used to establish a client relationship with one or more individuals or entities seeking to buy, lease or acquire an interest in commercial real estate; WB-37 Exclusive Listing Contract for Lease of Real Property or any other agreement for the lease of commercial real estate; and any property management agreement for the management of commercial real estate (the Agreement).

1 This Addendum is made part of the Agreement between _____
2 (Seller/Buyer/Tenant/Owner) and _____ (Broker/Manager)
3 dated _____ with respect to the Property at _____
4 _____ **COMPLETE AS APPLICABLE** .

5 **COMMERCIAL REAL ESTATE DEFINED:** "Commercial real estate" means any real property other than any of the
6 following:

- 7 1. Real property containing 1 - 8 dwelling units.
- 8 2. Real property that is zoned for residential purposes and that does not contain any buildings or structures.
- 9 3. Real property that is zoned for agricultural purposes.

10 **NOTICE OF LIEN RIGHTS:** NOTICE: A broker has the authority under section 779.32 of the Wisconsin Statutes to file
11 a broker lien for commissions or compensation earned but not paid when due against the commercial real estate, or the
12 interest in the commercial real estate, that is the subject of this agreement.

13 **READING/UNDERSTANDING:** By initialing and dating below, each party acknowledges they have received and
14 carefully read this Addendum.

15 (X) _____	(X) _____
16 Party's Initials ▲ Date ▲	Party's Initials ▲ Date ▲
17 (X) _____	(X) _____
18 Party's Initials ▲ Date ▲	Party's Initials ▲ Date ▲

PARTIES ARE ADVISED THAT THIS ADDENDUM CONTAINS PROVISIONS THAT MAY NOT BE APPROPRIATE IN ALL TRANSACTIONS. NO REPRESENTATION IS MADE THAT THE PROVISIONS OF THIS ADDENDUM ARE APPROPRIATE, ADEQUATE OR LEGALLY SUFFICIENT FOR ANY SPECIFIC TRANSACTION. PARTIES ARE ENCOURAGED TO CONSULT WITH THEIR OWN LEGAL COUNSEL REGARDING THE PROVISIONS OF THE OFFER AND THIS ADDENDUM.

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No representation is made as to the legal validity of any provision or the adequacy of any provision in any specific transaction.

**REAL ESTATE BROKER
NOTICE OF INTEREST**
(Pursuant to § 779.32(3) WIS. STATS.)

Document Number _____

The undersigned _____ is a Real Estate Broker licensed under Chapter 452, Wisconsin Statutes, and is recording this Notice of Interest pursuant to § 779.32(3) Wis. Stats.

1. Type of written agreement under which this Notice is being recorded (the "Agreement"):

- ☐ commercial real estate listing contract,
☐ commercial real estate buyer agency agreement
☐ commercial tenant representation agreement,
☐ written agreement for the lease or management of commercial real estate, or
☐ Other (please describe): _____

2. Date the Agreement was entered into: _____

3. Parties to the Agreement (please name all parties as defined in the Agreement):

- ☐ Real Estate Broker: _____
☐ Seller: _____
☐ Buyer: _____
☐ Client: _____
☐ Other (please identify party and name): _____

4. Legal description and address of the property ("Property") subject to broker lien rights:

Parcel Identification Number (PIN) _____

5. Owner of the Property: _____

NOTE: Broker must record this Notice of Interest at the office of the register of deeds for the county in which the commercial real estate is located at least 30 days before the conveyance of the commercial real estate subject to the listing contract or buyer agency agreement.

ACKNOWLEDGMENT

STATE OF WISCONSIN)
COUNTY OF _____) :SS

Dated _____, _____.

Name: _____

Title (if applicable): _____

Address: _____

Phone Number: _____

Personally came before me on _____,
the above named _____

to me known to be the person(s) who executed the
foregoing instrument and acknowledged the same.

Document Drafted By: _____

Notary Public, State of Wisconsin
My Commission (is permanent) (expires: _____)

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REAL ESTATE BROKER**COMMISSION LIEN**

(Pursuant to § 779.32 WIS. STATS.)

Document Number _____

The undersigned _____ is a Real Estate Broker licensed under Chapter 452, Wisconsin Statutes, and is recording this Commission Lien pursuant to § 779.32 Wis. Stats.

1. If required by § 779.32(3), Wis. Stats., the undersigned recorded a Notice of Interest against the Property described below. The Notice of Interest was dated _____ and recorded with the _____ County Register of Deeds Office on _____ as Document No. _____.
2. The undersigned's real estate broker license number under Chapter 452, Wis. Stats. is: _____.
3. Legal description and address of the property ("Property") that is the subject of this commission lien:

Recording Area _____

Name and Return Address _____

Parcel Identification Number (PIN) _____

4. The name of the owner or the acquirer of the Property is:

NOTE: Broker must mail a copy of this Commission Lien to the owner or acquirer of the commercial real estate that is subject to this lien within 72 hours after the recording of this lien.

5. Amount of the lien: _____.

Dated _____, _____.

Name: _____

Title (if applicable): _____

Address: _____

Phone Number: _____

ACKNOWLEDGMENT

STATE OF WISCONSIN)

)

COUNTY OF _____)

):SS

Personally came before me on _____, the above named _____, to me known to be the person(s) who executed the foregoing instrument and acknowledged the same.

Notary Public, State of Wisconsin

My Commission (is permanent) (expires: _____)

Document Drafted By: _____

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DATE _____

ADDRESSEE _____

Re: REAL ESTATE BROKER - COMMISSION LIEN
PROPERTY: _____

Dear Ladies and Gentleman,

I am writing to inform you of a Real Estate Broker - Commission Lien that I have recorded with the Register of Deeds, as authorized under Wis. Stats. § 773.32. A copy of this lien is attached. Please feel free to contact me with any questions that you may have. Thank You.

Very truly yours,

Encl: Real Estate Broker - Commission Lien

Sample

Document Number

Legal Update, June 2010

**REAL ESTATE BROKER
RESCISSION OF NOTICE OF INTEREST**
(Pursuant to § 779.32(9) WIS. STATS.)

Document Number _____

The undersigned _____ is the Real Estate Broker licensed under Chapter 452, Wisconsin Statutes, who recorded a Notice of Interest dated _____ and recorded with the _____ County Register of Deeds Office on _____ as Document No. _____, a true and correct copy of which is attached as **Exhibit A**. Pursuant to § 779.32(9), Wis. Stats., the undersigned hereby rescinds the foregoing Notice of Interest and confirms that the undersigned no longer claims the interest in the property as identified in the Notice of Interest.

Recording Area _____

Name and Return Address _____

Parcel Identification Number (PIN) _____

Dated _____, _____

Name: _____
Title (if applicable): _____

ACKNOWLEDGMENT

STATE OF WISCONSIN)
)
COUNTY OF _____)**:SS**

Personally came before me on _____, the above named _____, to me known to be the person(s) who executed the foregoing instrument and acknowledged the same.

Notary Public, State of Wisconsin
My Commission (is permanent) (expires: _____)

Document Drafted By: _____

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REAL ESTATE BROKER
WAIVER OF COMMISSION LIEN
(Pursuant to § 779.32(9) & § 779.32(11), WIS. STATS.)

Document Number _____

The undersigned _____ is the Real Estate Broker licensed under Chapter 452, Wisconsin Statutes, who recorded a Commission Lien dated _____ and recorded with the _____ County Register of Deeds Office on _____ as Document No. _____, a true and correct copy of which is attached as **Exhibit A**. Pursuant to § 779.32(11), Wis. Stats., the undersigned hereby waives the foregoing Commission Lien and confirms that the undersigned no longer claims the interest in the property as identified in the Commission Lien.

Pursuant to § 779.32(9), Wis. Stats., this Waiver of Commission Lien also serves as a rescission of the Notice of Interest referenced in the Commission Lien, if any.

Recording Area _____

Name and Return Address _____

NOTE: This Waiver of Commission Lien releases the subject property from the Commission Lien; unless otherwise released, the Broker may retain contractual rights against the party(ies) with whom the Broker entered into an agreement.

Parcel Identification Number (PIN) _____

Dated _____, _____

Name: _____

Title (if applicable): _____

ACKNOWLEDGMENT

STATE OF WISCONSIN)
) :SS
COUNTY OF _____)

Personally came before me on _____, the above named _____, to me known to be the person(s) who executed the foregoing instrument and acknowledged the same.

Notary Public, State of Wisconsin
My Commission (is permanent) (expires: _____)

Document Drafted By: _____

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