



MORTGAGE BROKERAGE – AGENT FOR LENDER

Summary: Mortgage brokerages may choose, as their business model, to represent lenders. When representing a lender in a mortgage deal, a mortgage brokerage must enter into a written service agreement with the lender. In this service relationship, since the lender is the brokerage’s client, the brokerage has an obligation to represent the lender’s best interests at all times. The precise services provided to the lender will vary based on the type of lender. [See *Real Estate Act Rules*, s.72, s.73 and s.74]

The type of lender that a brokerage represents may have an effect on the brokerage’s representation model. In general terms, there are two types of lenders. The first type of lender includes persons that are in the business of making loans secured by a mortgage, such as financial institutions, loan corporations, insurance companies, etc. The second type includes private lenders, investors in syndicated mortgages and mortgage investment corporations. The level of service to each of the respective types can vary significantly thus creating different relationships for each type.

The mortgage brokerage industry refers to the second type of lenders as “private lenders.” While there are some problems with this term as some of the entities in the first type could be privately-owned and some of the entities in the second type could be publically-owned, this terminology is used by the mortgage brokerage industry and is used by RECA for the purposes of this Information Bulletin.

A mortgage brokerage may only represent the lender OR the borrower but not both, when the lender is a private lender.

Representing Private Lenders

This bulletin will focus primarily on “private” lenders as defined above. This type of lender typically relies more on the expertise of their mortgage broker in conducting due diligence on the borrower and property, and will rely on the recommendation of the mortgage broker in committing to the loan. For more information mortgage brokerage relationships with all types of lenders, please see RECA Information Bulletin: *Mortgage Brokerage – Lender Relationships*.

If a broker chooses a business model that includes representing lenders who are not in the business of lending money secured by a mortgage (i.e. “private” lenders), the brokerage and all of its industry members need to have an understanding of the basic concepts of a principal/agent relationship.

Agency describes a consensual relationship created by contract or by law where one party, the principal, grants authority for another party, the agent, to act on behalf of and under the control of the principal to deal with a third party and where the agent accepts responsibility for representing the principal. An agency relationship is fiduciary in nature and the actions and words of an agent exchanged with a third party bind the principal. Agency law sets out rules and principles for these consensual relationships.

An agency relationship is usually created in the mortgage brokerage business through express agreement, which may be achieved either in writing or verbally.

Although an agency relationship may be created by express agreement in writing or verbally, in a situation where the mortgage brokerage is representing a lender in an agency relationship, the relationship must always be by written agreement.

To receive commission or remuneration, the brokerage must prove that a contract existed. The best solution is a written, properly executed service agreement.

Obligations to a Lender Client

The *Real Estate Act* Rules, section 73, set out the obligations mortgage brokerages have when representing a lender client. Section 73(6), however, exempts brokerages from the obligations in section 73(1), 73(2) and 73(3) when the lender is a bank, treasury branch, credit union, loan corporation, trust corporation, insurance company or any person engaged in the business of making loans secured with mortgages.

Essentially, the obligations in section 73(1)(2) and (3) are in place when a mortgage brokerage is representing private lenders, investors in syndicated mortgages, mortgage investment corporations, etc.

When representing such lenders, the mortgage brokerage must enter into a written service agreement, and that agreement must:

- be signed by all relevant parties;
- clearly show all terms and conditions, which must include:
 - the names of the parties to the agreement;
 - the responsibilities of each party to the agreement;
 - the services to be provided by the mortgage brokerage;
 - the duration of the agreement;
 - the loan terms, property description details and analysis;
 - the provisions for terminating the agreement;
 - the risk tolerances of the lender, respecting priority on title, ratio of loan to property value, nature and type of the property used as security for the loan, costs and outcomes associated with foreclosures, and source of loan capital;
 - the amount or method of calculating the remuneration to be paid by the lender;
 - the process for the collection, use, safekeeping and distribution of confidential and personal information;
 - if the brokerage is expected to hold trust funds, the terms of trust;
 - if the agreement is of an ongoing basis, the method of communicating loan possibilities and property details to the lender and the lender's response to same;
 - if the agreement is of an ongoing basis, the method of communicating changes to the lender's risk tolerances; and
 - the role of the mortgage broker, if any, in the event the borrower defaults on the mortgage deal.

Additionally, mortgage brokerages that represent such lenders must ensure the lender is provided with:

- a copy of the registered mortgage;
- a copy of the certificate of title for the property affected by the mortgage;
- a copy of the solicitor's report, if any, with respect to the registration and the effect of the transaction.

Best Practices

In addition to the regulatory requirements, there are a number of best practice guidelines for mortgage brokerages when representing a lender client. A RECA hearing panel or a court of law may determine, based on the facts of a specific case, that these types of services and activities would be included in a principal/agent relationship.

As best practices, a mortgage brokerage representing a lender client should:

- provide competent underwriting services
- understand the lender risk tolerances
- present suitable mortgage products for lender's risk tolerance
- disclose risks associated with each mortgage deal
- verify identity of lenders and borrowers
- return original documents to lender
- disclose all legal, appraisal or any other fees
- disclose remuneration to be received from borrower or other parties, if any

Best Practices When Administering a Loan

Just as there are regulatory requirements and best practices for brokerages when they represent lenders, regulatory requirements and best practices also exist when a mortgage brokerage administers a loan on behalf of a lender.

When administering a mortgage for a lender, the mortgage brokerage must:

- enter into written service agreement with lender client
- prepare and maintain ledger for each borrower
- prepare periodic statements of receipts and disbursements
- disburse all trust funds in accordance with terms of trust
- provide lender with periodic reports
- advise lender of any missed payments or other defaults

Additionally, all written mortgage administration agreements should:

- identify property in which mortgage is registered
- contain terms of trust for funds disbursement
- provide information to be reported to lender on periodic basis
- provide frequency of reports
- identify who is responsible for borrower compliance

And finally, a mortgage brokerage should not sell interests in mortgages or represent lenders in relation to mortgages where the value of the mortgage exceeds the value of the real estate while acting as a mortgage broker under the *Act*.

For more information about mortgage brokerage relationships with lenders, please see RECA Information Bulletin: *Mortgage Brokerage – Lender Relationships*.