

have no choice but to accept their risks. Therefore, they need to be paid for performing the necessary marketing function of risking.

In one actual case, the broker worked half time on one transaction for the better part of the year. If he closed the sale he would get \$90,000 less expenses and less double the social security tax. If he failed to close he would get nothing, but would still have bills to pay, for living expenses as well as for business, which would drain his savings, and he had no other sales materializing in that year. The transaction was nip and tuck, one day looking good and the next day looking bad. Sometimes he would wake up at three in the morning wondering if he were sane to stay in this business. He refuses to state whether he closed the sale or not. He doesn't want to talk about it. As one might guess, business-brokering has a high rate of turnover.

Some brokers require a non-refundable retainer to list a business for sale. Advantages to the broker are less risk of unpaid work and a steadier flow of income. Advantages to the seller are a lower percentage on the commission and—assuming that the broker is competent and is willing to do the work—an appraisal of the seller's business.

In addition to the normal, necessary risk of a transaction failing to close, there is the ever-present risk of being cheated:

Example 5.3 A small manufacturing company is listed for sale at \$530,000 with a 10% broker's commission. A prospective buyer has excellent technical qualifications but modest financial resources (a net worth of \$120,000 with about \$70,000 available for a down payment). The buyer considers trying to negotiate a lower price but decides to offer full list price because he knows he will need the owner's cooperation and also because he feels that the price is fair. The broker is impressed by the buyer's wisdom and his sense of fairness. The owner accepts the \$530,000 offer.

Financing will be difficult partly because of the buyer's modest means, but, more importantly, because the owner and his accountant have used all sorts of tricks to hide most of the earnings to

minimize taxes. The broker prepares a full-scale loan application package carefully crafted to discreetly bring the earnings out of hiding and also carefully crafted to exploit the considerable potential available to a young and energetic new owner. (The seller, at retirement age, is turning away work because he is tired and he does not need the money.) The buyer reviews the package and expresses enthusiasm over the quality of it. He then tells the broker that heretofore he had viewed brokers as a shallow lot but that he has just changed his thinking. The broker and the buyer then begin working as a team and they submit the package to one bank after another while suffering one rejection after another. Finally a bank accepts on condition of obtaining SBA type 504 financing. (SBA 504 is explained in Chapter 9.)

Now comes the struggle of working through the approval process. The Local Development Company (an LDC is a quasi-political group closely involved in all Type 504 financing) turns down the application without comment. Not knowing what else to do, the broker refers the buyer to a very successful lawyer whom the broker previously has worked with and been impressed by. The lawyer, with a single telephone call to an LDC board member (who is a fellow member at the lawyer's country club), learns that the machine tools pledged as collateral were deemed to be highly depreciable and therefore unsuitable for a 15-year loan. The package is then resubmitted along with an explanation that these tools can and do have long lives with the aid of periodic refurbishing. The LDC responds with a list of questions, several of which probe into the nature of the hidden, and mostly illegitimate, earnings. The broker carefully crafts a responsive letter (which is like walking on eggs) and submits it to the buyer who signs and submits it to the LDC. The loan then is conditionally approved by the LDC pending approval by the SBA. The SBA rejects but submits a list of its own probing questions. The broker again crafts the replies for the buyer's signature and submittal to the SBA, and total ap-

proval of financing is finally won.

At this point, more than seven months have elapsed since the broker's first showing to the buyer. From the time that the buyer expressed admiration for the loan application package and realized the broker's quality, the two have worked closely together, communicating almost daily by phone or in person and they have developed a relationship wherein the buyer has shared some of his intimate thoughts and feelings about how this business will affect his life. The buyer's father is a university chancellor and his brothers are physicians with lucrative practices. The buyer up until now has been the low person in the family in terms of prestige but all that will change with the acquisition of this business. The buyer tells the broker that he is grateful for all the broker has done to make this dream possible. He takes the broker to lunch where they exult in having obtained the financing which virtually assures that the sale will close. All that remains to be done is for the lawyers to work out the details of the contract with the bank, the LDC, the SBA, the landlord, and each other.

The lawyers now are in charge of everything and the broker has little to do except wait for closing. A month passes without the broker's hearing from anyone so he calls the buyer to check on progress. The buyer is diffident but, on coaxing, allows that the contract is complete. Upon further questioning the buyer agrees to bring a copy to the broker but only after three days pass. The buyer stops by the broker's home, hands the contract to him at his doorstep, and takes a few steps back. Then the buyer states that there is nothing that the broker can do to prevent the closing. The broker notes that the contract has no provision for the broker's fee but the buyer says that the fee is not his problem, and there the conversation ends.

The broker hires a lawyer and provides copies of the listing agreement and the buyer's non-disclosure statement promising not to skirt the broker. The broker's lawyer calls the buyer's

and seller's lawyers, then reports to the broker that the seller will agree to pay only \$44,000 instead of the \$53,000 he is liable for. But I've got a signed contract with both the seller and the buyer, protests the broker to his lawyer. The lawyer agrees that a lawsuit would result in a full \$53,000 award since the broker has a cut-and-dried case. He also points out that the buyer, the seller, and both of their lawyers are in collusion to cheat and he recommends that the broker accept the reduced commission because it would take two years to reach a trial court and that the broker would lose the use of the money during that time, not to mention the legal fees. The broker agrees with the lawyer's recommendation, the sale closes (after a total of nine months), and he collects \$44,000. Later, the broker confides to a colleague that what hurt the most was not the loss of \$9,000. What hurt the most was that he thought he had made a friend.

In Example 5.3, the broker lost only a minor part (17%) of his commission. In Example 5.4, the seller had a bigger share in mind.

Example 5.4 A very lucrative business (actually, the place is a gold mine) is put up for sale for \$950,000 with a broker who has a non-exclusive listing. The broker and seller agree on a \$50,000 commission. The broker advertises and canvasses for a year before finding a well-qualified buyer who, after fact-finding and negotiating, agrees to the full list price. The broker then prepares a full-scale loan application package and finds a bank willing to lend \$600,000 conditioned on an SBA guarantee of most of the loan. The SBA, however, agrees to guarantee only \$320,000, thus killing the loan. (Helping to kill the loan is that the bank is being reorganized and can't seem to do anything right.) Several other banks are approached by the broker until finally one agrees to lend \$400,000 with no SBA participation. The buyer will pay \$320,000 down and the seller will accept a promissory note for