

Holding the bag for pre-settlement repairs/improvements

By James L. Goldsmith, Esquire

Most transactions are contingent on inspections, which usually result in pre-settlement repairs or improvements. Most of the time the sellers make or pay for the work, though there are occasions when buyers agree to make or pay for those pre-settlement fixes. So, the usual transaction goes like this: agreement, inspections, problems found, agreement, problems fixed, settlement, and nirvana.

But is not always so. Sometimes it's this: agreement, inspections, problems found, agreement, problems fixed, unexpected problem (e.g. buyer loses job and financing fails, the property is ravaged by floods, etc.), no settlement, recrimination/accusations/unhappiness, lawyers. Yes, these things happen and there is not much you can do about it, or is there?

Something can be done, and not necessarily things that will avoid the unexpected. What can be done is to set the expectations of buyer and seller. For the seller who makes repairs or improvements pre-settlement, there is the chance that settlement will derail for legitimate or other reasons that may result in nonpayment. Most of the time this should not be a problem for the seller because most of the time the seller is making repairs that a subsequent buyer likely would have sought. It is when the seller makes special upgrades or changes as opposed to the repair of material defects that the seller feels burned. The cost of those special improvements and upgrades would probably not have been sought by any other buyer and therefore that expense may be lost. If your sellers understand the risk when they negotiate corrective proposals, they will have little to complain about when the unforeseen occurs. Or if they complain, at least you can say that you covered the risks with them. Also, sellers can usually negotiate that the cost of nonessential repairs can be credited to the buyers at settlement rather than paid in advance. In this way, if settlement doesn't occur, no additional loss.

Builder/sellers are frequently asked to incorporate special, custom features that would not appeal to any other buyer. And you have probably witnessed how builder/sellers protect themselves against the costs of these special add-ons in the event of a failed settlement; they may ask for the full cost of the customization to be paid in advance and with the provision that the payment is nonrefundable if settlement does not occur for any reason.

Buyers who pay or undertake those pre-settlement repairs or improvements are also at risk that their outlay of labor and/or money will not be recouped if settlement fails. For this reason, the nonessential, lender-required repairs should be deferred until after settlement. If the buyer chooses to spend the effort and/or money in advance, either because the lender requires the repairs and the seller has refused to make them, or simply because the buyer wants to have the work done, then the buyer must understand the risk he/she faces. I suppose you could negotiate a provision that if settlement fails the seller agrees to reimburse some cost of the repairs or improvements, but good luck introducing this unorthodox approach to your transaction!

**Copyright © James L. Goldsmith, Esquire, CALDWELL & KEARNS, P.C., 2015
All Rights Reserved**

Jim Goldsmith is an attorney with Caldwell & Kearns and serves as general counsel to PAR. A substantial portion of his practice is dedicated to providing advice and counsel to real estate licensees. He and his firm represent and defend real estate salespersons and brokers in civil lawsuits and licensing claims across the Commonwealth. Jim also defends REALTORS® in disciplinary hearings conducted by the Real Estate Commission. He routinely counsels employers on employee relations issues and is one of the voices of the PAR Legal Hotline. He may be reached at www.realcompliance.com.