Your seller may not have a dime's worth of recourse!

By James L. Goldsmith, Esquire

Who remembers when the pages of the agreement of sale came sandwiched with carbon paper? For the youngsters in the group, I am talking about the days before computer generated forms and e-signature software. Believe it or not, offers were hand-delivered, as were the counter-offers and acceptances. Gas might have been cheaper, but one did far more driving.

In those good ole days, offers were also accompanied by deposit checks. There was no place on the standard agreement to accommodate todayøs practice of transmitting deposits õwithin ___ days (5 if not specified) from execution.ö It is evident from the many Hotline calls on this topic, that todayøs practice leaves sellers vulnerable, for at least those first days.

Despite my rants and raves over the past many years, the common practice remains that sellers accept offers where the deposit constitutes the sole remedy available to a seller in the event of buyer default. Thus, for most sellers, if the buyer defaults, sellerøs remedy is to retain sums **paid** toward the purchase price. The problem is, until the escrow account is funded, no sum has been **paid** on account of the purchase price. So, all you buyers out there who find yourselves in a competitive market, make your offer, keep shopping, and if you find something you like better within those five days and before your deposit is **paid**, walk from your first offer. Donøt worry, you are only liable for sums **paid** and since you havenøt **paid** anything í .

Awards are bestowed upon Realtors® for production and by production we mean settled transactions and not the number of agreements written. But as long as listing agents and sellers are happy removing their properties from the market without a deposit and without other recourse, the practice will continue. I must tell you, however, that I am hearing many more complaints from sellers who learn of their lack of recourse from an embarrassed listing agent. This problem is especially distressing where the seller takes significant action, like purchasing another property, before receiving the deposit.

So what is the fix? I have little doubt that the subject will come up at PARøs agreement of sale forms subcommittee, but until then consider the following. Donøt accept offers that have the checkmark; rather, advise the buyerøs agent, in writing, of your clientøs willingness to amend the agreement to include the checkmark once the deposit has been received and cleared.

The more articulate among you can counter an offer that includes the checkmark with an addendum providing that until the deposit check has been received and cleared, sellers retain all legal remedies and the right to retain sums **paid** on account of the purchase price; after the deposit check has cleared the sellerøs sole remedy is to retain sums **paid** on account of the purchase price.

Nothing requires that you take these steps. What is required, in this authorøs opinion, is that your seller be made aware that when accepting an offer that includes a checkmark in the liquidated damage provision (Paragraph 26(G) of ASR), seller has no recourse until the escrowed deposit has been received and cleared.

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