

A tip from the west?

Timely tender of deposit checks is a growing problem that did not exist when offers and deposit checks were hand delivered. Now, deposit checks follow an offer's acceptance by a handful of days. Further, a typical agreement includes a checkmark in Paragraph 26(G) limiting the seller to retaining paid deposits as the sole remedy in the event of buyer default. Thus, if a buyer backs out of the agreement and no deposit has been paid, the seller is without recourse. Shrewd buyers can use this tactic to hold a property in reserve while they continue shopping, but you don't have to cite the extreme, however, to know that agreements not supported by healthy deposits make for weaker agreements.

In a competitive market the strongest offer should prevail. A strong offer has a substantial deposit tendered with it. An even better offer is one that comes with a substantial deposit and no checkmark in Paragraph 26(G).

So, why not borrow a practice from the west? By west, I mean Pittsburgh and western Pennsylvania where deposit checks are held in escrow by the buyer's broker. Let's explore how this practice can prevent the "unfunded offer."

A deposit can go into escrow more quickly when it is tendered by the buyer to the buyer agent. Usually, the buyers and their agents will have a face-to-face meeting at the time an offer is drafted, or shortly before. The buyers and their agents know that the offer needs to be supported by a "good" deposit, especially in this sellers' market. A strong buyer should be prepared to pay a deposit as soon as she is ready to extend the offer and there should be no greater problem getting a deposit check days before the offer is drafted and tendered rather than 1-5 days after the offer is accepted.

There are several slight adjustments to make in your paperwork. First, the agreement of sale will need to be modified at Paragraph 2(C) to show that the deposit is being paid to the broker for buyer rather than the broker for seller. There is a line to accommodate this change.

Second, it may be necessary to have your buyer sign a one-sentence note for placement in your file. Ordinarily, when any agent receives a deposit, it is to be placed in an escrow account within the next business day unless the seller and buyer have agreed to the agent's holding it (uncashed) until the agreement is executed. When buyers sign agreements of sale they agree to this (Paragraph 2(C)) and sellers agree that deposit checks can be held until an agreement is accepted when they sign their listing agreement. If a buyer agent collects a check from a buyer more than a day before the buyer signs the agreement of sale, the agent should obtain permission to hold the check from the buyer in writing. This is as simple as borrowing language from Paragraph 2(C) of the agreement of sale where it says "checks tendered as deposits may be held uncashed pending the execution of [this] an agreement of sale." This will be unnecessary if the buyer is giving the buyer agent a deposit check no more than a day before signing the agreement of sale. To repeat, you only need this simple waiver agreement if the buyer is going to tender a deposit check to you more than a day before the buyer signs a standard agreement of sale.

Lastly, be prepared to prove to the listing agent that you've deposited the buyer's purchase deposit in your broker's escrow account. A copy of the deposit slip should suffice as should any other reasonable verification that the funds are received, accounted for and in an escrow account.

To those of you accustomed to having listing brokers hold the deposit, don't fret. What is the advantage of holding a deposit when, by law, it can't be released until there is settlement, an agreement by the parties or a final order of court? As a practical matter, it doesn't matter which brokerage holds the deposit. It is more important that the agreement is supported by a deposit that is in an escrow account.

The advantage to having the buyer broker hold the deposit is that the delay from transferring a check from agent to agent is avoidable. While the deposit may not be the most important term of an offer it is a factor that a seller will consider. A competitive offer with a better deposit funded immediately just might win the day.

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