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Buyer Breach of Contract

How to protect your seller from Buyer Breach of Contract

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In my practice, it is not uncommon for me to deal with the issue of buyer breach of contract. Normally, this means that the buyer is simply not going to buy the property and does not show up for the closing. The domino effect from a buyer breach can have a significant impact on many people. The first thought of the seller in the situation is to sue to make the buyer buy the house; the second thought is to sue for damages such as the carrying costs of the property until they can sell it including mortgage payments, taxes, insurance, utilities, and the like.

While there are cases where a seller has been forced to sell a home through specific performance, I have yet to see a case where a court will force a buyer to buy residential property. Instead, courts will assess damages associated with the contract price and the value of the home at the time of the breach.

In *Roesch v. Bray* (1988), 46 Ohio App.3d 49, the court stated in the headnotes:

1. When a purchaser defaults upon a contract for the sale of real estate, the seller may recover the difference between the contract price and the market value of the property at the time of the breach; but the seller may not recover the expenses incidental to ownership pending the resale of the property.
2. When, following the breach of a real estate sales contract, the seller resells the property, the resale price may be used to determine the market value of the property at the time of the breach if the resale occurred within a reasonable time after the breach and at the highest price obtainable.

Expenses incidental to ownership are those expenses that are incurred by an owner associated with owning the property, such as mortgage payments, taxes, insurance, and utilities.

The seller's damages are measured by comparing the contract purchase price to the value of the property at the time of the breach. If the value of the property is greater than the contract purchase price, the seller does not have any recoverable damages. If the value is less than the contract purchase price, the seller may pursue recovery for that difference. In determining the value, the resale price may be used if the resale occurred within a reasonable time after the breach and at the highest price obtainable. Therefore, a sale to the seller's mother for \$50,000 below market will not qualify to establish the value. Every effort will have to be made to obtain the highest price possible.

In our current housing market, it is not likely that the value of the property at the time of the breach will be significantly lower than the purchase price. So what can a seller do to guard against a buyer breach?

The answer is in the earnest money deposit. The 2nd District Court of Appeals stated in *Gaskins v. Young*, 2004-Ohio-2731, 04-LW-2201 (2nd) stated in paragraph 31, "In determining whether the earnest money provision is reasonable, we have looked to whether the payment or refund of the earnest money deposit would satisfy the considerations for reasonable liquidated damages. We note, however, that unlike liquidated damages, which constitute both the maximum and minimum damages available to the non-defaulting party, a reasonable (and, therefore, enforceable) earnest money provision sets forth the minimum, but not the maximum, damages. When actual damages exist, the non-breaching party may also pursue specific performance or actual damages."

Therefore, it is imperative that sellers understand the importance of an earnest money deposit because in most cases, that is about all that they will get if the buyer breaches. I suggest a one percent earnest money deposit as reasonable. With higher priced homes, you may want to consider a two step approach to the deposit. A small deposit of \$500 or \$1000 is provided at the time of contract with a larger one to be deposited after inspections are conducted and any requests for remedy have been resolved.

The common thread in most of the buyer breach cases I have encountered is a very small deposit and an uninformed seller. By informing the seller of the importance of a reasonable earnest money deposit, the real estate agent has advanced the probability of a successful closing.

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