

Being made whole

How sellers can recover if real estate buyers back out of a deal

Despite entering into a written agreement to buy real estate, buyers sometimes back out of their deal and refuse to buy. When this occurs, a seller may be able to recover losses incurred based on the buyer's breach.

Smart Business spoke with Andrew D. Campbell, a partner with Novack and Macey LLP, about some of the options disappointed sellers have when buyers renege on deals.

If a buyer won't close on a deal, what should a seller do?

The first thing a seller should do when a buyer backs out on a deal is to review the terms of the purchase agreement. Most agreements require a buyer to provide earnest money to the seller. If the sale goes through, this money is applied towards the purchase price of the property. In the event that the buyer backs out, some sales agreements provide that the earnest money will constitute liquidated damages and will be the seller's sole remedy.

What if the agreement does not limit a seller's remedy to the earnest money?

If keeping the buyer's earnest money is not the seller's only remedy, the seller has to assess whether he or she has in fact been damaged by the buyer's breach. For example, if a buyer deposits \$100,000 in earnest money and walks away from the deal, the seller has not been damaged if the property later sells at a price equal to or \$100,000 less than the contract price with the first buyer.

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What if the value of property decreases by more than the amount of the earnest money?

For many buyers who entered into purchase agreements just before the great recession this 'what if' was a reality.

In one recent case, a buyer agreed to purchase property in late 2006 for \$1.2 million with a closing in early 2007. The buyer reneged, claiming he could not get financing because of the recession — there was no financing contingency in the agreement — while the real estate market was collapsing. The seller eventually sold the building in July 2007 for about \$900,000. In that case, the seller sued the buyer who reneged at the \$1.2 million price.

What types of money damages can a disappointed seller recover?

The principal form of recovery that sellers may recoup when a buyer breaches is the contract price less the fair market value at the time of breach.

In deciding fair market value at the time of the breach, courts often look at what the property sells for a 'reasonable' time after the buyer breaches. A reasonable time can be

up to a year after the breach. So, in the case where the buyer backed out of the \$1.2 million deal and the seller sold at \$900,000, the seller was entitled to at least \$300,000, referred to as benefit of the bargain damages.

In addition to benefit of the bargain damages, some courts allow sellers to recover expenses incurred in obtaining a new buyer. These costs can include brokers' commissions and expenses for advertising.

Further, if the seller does not have beneficial use of the property while it is looking for a new buyer, it may be able to recover expenses such as maintenance, utilities, taxes, insurance premiums and other reasonably foreseeable expenses that the seller had to cover following the buyer's breach.

At bottom, a seller's goal is to sell his or her property at an agreed upon price. If a buyer refuses to go forward at the price agreed to, the seller is entitled to be made whole. Making sellers whole includes providing the seller with the difference between the contract price and the value of the property at the time the buyer breaches and may also include carrying costs and costs for obtaining a new buyer. ●