

OBSERVATIONS

from the desk of Mildred Wilkins, (FIS)...

To sign or not to sign That is the question?

Sellers, Buyers, Real Estate Agents on both sides of the transaction, Managing Brokers and Boards across the country are faced with a challenge no one could have conceived just a few years ago—



Do we want the seller to sign this contract?

It is such a fundamental question you wouldn't think it would cause even a second thought—everyone knows you want the seller to sign a contract as soon as you can get the two parties to agree to the terms of an offer. But wait—this is one of those NEW transactions—this is a short sale attempt which will “require lender approval of a short sale”. Real estate professionals have strong feelings in both camps about when an offer should be signed and what the implications are for both parties. If you will bear with me for awhile I will attempt to shed some light on some the issues which frequently are not considered in the quest to get a contract pended so everyone can feel satisfied that progress has been made.

First, I must point out that while I have studied lots of real estate law (and especially on this particular point) I am NOT a lawyer. Nor am I your Broker. All licensees must be careful to comply with the guidelines set by your Broker in conjunction with the stipulations set by the local board. Many boards have not taken a position on this issue or have not studied it enough to recognize that there are potential major risks associated with allowing the seller to sign and thereby ratify a contract PRIOR to the official approval by the lender. Careful study of some of the points in this article could be the basis for an in-depth evaluation of the subject. In order to avoid substantial financial risk, legal counsel should be sought by boards and brokers for guidance in establishing a policy which agents are made aware of and agree to incorporate into their practice effective immediately.

I am a former Fannie Mae Broker-Specialist and understand the inner workings of the guarantor and loss mitigation shops better than most. I have successfully processed and CLOSED numerous short sales—without having the purchase agreement signed until the end of the process—AFTER the lender granted permission in a written communication. I have taught this strategy for more than five (5) years as an (FIS) Foreclosure Intervention Specialist and for the many graduates across the country who are using it successfully, they appreciate what ‘lender approval required’ means.

A ‘short sale’ attempt is totally unlike a traditional transaction. While the borrower (seller) is still entitled, the fact that it is identified as a short sale means there is the expectation that a new buyer will not offer enough money to cover the mortgage and necessary expenses to complete the transaction. The lender is NOT a party to this transaction, as some proponents of the “SIGN now”

group readily point out. However, while the lender is not a party to the transaction, the LENDER has the power to prevent the seller from completing the transaction unless or until the seller either pays the full amount owed OR the lender agrees to waive a portion of that payment (take a shortage).

Let's look at a series of possibilities:

1. The Seller signs/ratifies an agreement when offer #1 is presented. The home is pended, earnest money is deposited. What happens when a 2nd offer is received? Does the listing agent FAIL to present this offer? Suppose the 2nd offer would net a higher amount to the lender, thus reducing the potential amount of a 1099 assessment or a deficiency judgment? Is the listing agent fulfilling their agency responsibility by failing to allow the lender the option to consider any and all offers which might be made for the home?
2. In #1 above, let's further suppose that the 2nd offer was presented and the lender determines that the 2nd offer is better and chooses to accept #2, while the seller has already ratified #1. The seller is now in position where they "cannot perform". Under basic contract law Buyer #1, who has a duly ratified contract has recourse against the seller and their agent.
3. Let's take another example. There is only one offer on the listed property, accepted and signed a month ago. The listing agent has just become aware that the home has been sold at the Master's (sheriff's) sale. Agent was unaware that foreclosure was imminent, certainly not aware that the sale had been scheduled. Buyer on this \$1M property has just been informed that the home they expected to close on next week has been sold at auction. Does the buyer have recourse against the seller for failure to perform? They certainly do. How about the buyer's agent against the listing agent? It would appear that this qualifies as blocking their ability to receive a commission.
4. Yet another example: the seller has signed an offer which the lender has not yet approved. Let's say the seller gets tired of the wait and the hassle from the lender and other creditors and decides to file bankruptcy. The home immediately becomes a frozen asset which cannot be sold until the Trustee of the Bankruptcy court decides if that is what is best for the creditors. A signed contract which is unenforceable becomes an issue for the seller and both real estate agents.

In all four (4) scenarios above there were some basic principles of law which real estate professionals should understand as they navigate this new terrain.

Basic Principles

- A. **An offer to make a purchase can stay open as long as the two individuals wish for it to remain open.** Yes, that means either party can walk away, but isn't a walk away better than a lawsuit. The offer can be signed and ratified AFTER the lender decides whom they wish to sell to (based on the highest net to them, which is all they care about). It is strongly recommended that you have permission in WRITING to have the seller sign anything before you authorize them to do so.
- B. **A seller is guilty of "breach of contract" if they fail to complete the contract (fail to perform). The legal remedy for breach of contract is to award monetary damages to the party who was prepared to perform AGAINST the individual who has failed to perform.** Further, the buyer who has not breached the contract is relieved of any obligation to perform and

still has recourse against the seller and/or their agent. The seller would have a very weak argument that they told the buyer the lender would have to approve, even if this were included as a contingency in the contract. The fact is that short sales, by their nature, mean the lender has final say so. If you agree to sell me something which you do not have full authority to transfer, you have obligated yourself and therefore can be held liable.

- C. **IF there is no pended offer until the lender approves SOMEBODY, then you totally avoid having the earnest money in escrow for someone who will not be the eventual buyer.** Guaranteed funds for the total amount necessary can be brought to closing; it really is not a problem.
- D. **It is common practice which says that earnest money must be submitted with an offer, it is seldom, if ever the law.** A COPY of an earnest money check submitted with an offer on a short sale serves to demonstrate an interest from the buyer and will not create havoc if and when the offer is NOT accepted if it has never been deposited. Adjusting real estate practices to be more in keeping with the new reality would ease much of the frustration being felt by agents across the country.
- E. **In the event multiple offers have been received, presented to the seller and forwarded to the lender for their consideration, any of them might be chosen, any of them might be countered.** It is this aspect of short sales which irritates a lot of agents who counter that this not an REO transaction. You're right, it is not. But it is governed by the same principle that the lender must work to get the highest amount possible in order to reduce the amount of an eventual insurance claim. The lender is also motivated to move forward with the foreclosure process which continues even as all the parties are waiting for a response to whether or not a sale is going to be approved. It is easy enough to avoid having angry buyer's agents if you make the extra effort to inform them that multiple offers are possible, all offers will be forwarded to the lender for consideration AND use a multiple offer disclosure form if and when you receive additional offers. Again, not complicated, just good business practice.
- F. **Finally, the lender's shop cannot give a definite answer about what the actual number is that they can accept until they have completed a multiplicity of tasks.** Those tasks can take months. Even if the lender has given you a number which they say is workable and specifically TOLD you it was okay to have the seller to sign the contract, you would be wise to remember what we discussed in paragraph #4 above—the LENDER is NOT a party to the transaction. Unless you received the listing lead from the lender, then you have an agency relationship with and a fiduciary responsibility to the seller who engaged you to help them handle their housing issue. The seller has operated on your professional judgment. The lender did not promise to sell anything to anybody. The lender has not signed any documents. The lender cannot be sued for failure to perform. Lenders do not carry E & O insurance.

You, on the other hand, have a lot of explaining to do.

As I summarize, for those of you who disagree: there is no single way to do anything. If your way is working for you, I wish you well and hope you never find yourself on the wrong side of a lawsuit. However, I believe that a clearer understanding of offer, ratification of a contract, guidelines for depositing money into escrow, when to pend a property, agency, breach of contract, failure to perform, appropriate disclosure of multiple offers, procedures for handling multiple offers, impact of foreclosure on a listing

and force majeure will cause you to pause next time you are considering instructing a seller to sign when the lender has not yet approved the offer you want your client to ratify.

I was convinced by the material I have studied on this matter. REALTORS who have lost “failure to perform” lawsuits after lengthy and expensive legal battles, which they have shared with me, have totally convinced me to continue teaching that it is better to be safe than sorry.

What will you recommend? To sign or not to sign? That is still the question...



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