

DUELING BUYERS, MULTIPLE OFFERS AND BACK-UP OFFERS

Hello, Michigan Realtors® and welcome back to the “Letter of the Law”, a monthly video series designed to provide introduction and analysis on various legal issues impacting your industry. I’m Brian Westrin and today’s Letter of the Law covers Dueling Buyers, Multiple Offers, and Back-up Offers.

In today’s market, many buyers are finding themselves in a situation in which they are competing with one or more other buyers for the home of their dreams. Buyers in this situation often have the mistaken belief that the seller has an obligation to treat all potential buyers equally or at least fairly. This is simply not true.

There is no requirement that a seller with multiple offers consider the offers in any particular order or that a seller reject the “first” offer prior to considering a “second” offer. Additionally, there is no requirement that a seller reject an offer in writing or even acknowledge receipt of the offer. A seller who receives an offer can accept, reject or counter that offer. In addition, the seller can choose to do nothing. A seller can choose to “sit” on an offer while waiting for a second offer, or not. A buyer can request that a seller respond in writing, however, the seller has no legal obligation to do so. Further, a Realtor® acting on behalf of the buyer is generally ethically prohibited from contacting directly any seller who is represented by a Realtor®.

Dueling Perspectives

As long as the seller does not discriminate on the basis of religion, race, color, national origin, age, sex, disability or familial or marital status, the seller has significant discretion in the selling process. A seller is not required to take the highest offer. A seller can decide, for example, to accept a lower offer because it is a cash offer or because that particular buyer has

a preapproval letter from a lender. A seller could even accept a lower offer because he knew that the offer was from an avid gardener and believed that he or she would take good care of the garden he had put so much time into over the years.

That being said, it is certainly true that most sellers will in fact accept the highest price offer. In fact, Realtors® and others in the real estate business often instruct buyers in this situation to present their “highest and best.” To some buyers, this term suggests that this is in fact an auction-type situation in which the terms of the offers must be kept confidential and the highest offer must be accepted. Again, this is simply not true. The seller can choose to disclose the amount of the other offers to some but not all of the potential buyers. It is also the case in these “highest and best” scenarios that the seller can offer one of the buyers an opportunity to submit another bid, without offering the other buyers a similar opportunity.

Offer and Acceptance

Listing agents working with multiple offers on the same property should pay particular attention to the rules of offer and acceptance, as the failure to do so could result in a situation where more than one buyer claims to have a binding contract to purchase. Remember that acceptance requires a signature and delivery of the signed contract. Do not attempt to verbally accept or counter any buyer’s offer. Perhaps the most common dispute in multiple offer situations arises when a listing agent orally advises one agent that his or her client’s offer has or will be accepted and then the seller accepts another buyer’s offer. Even if the first buyer has no legally enforceable right, it can take significant time and money to establish that fact during which time the closing on the sale to the second buyer is delayed.

Buyer’s agents with clients bidding against other buyers should also be ever-mindful of the rules of offer and acceptance. Buyer-clients should be advised that a seller with

multiple offers has total discretion as to how the offers will be handled. To assist buyer's agents in so educating their clients, MR has put together a form for buyers entitled, "A Primer on Multiple Offers," which is available on its website and below the transcript for this video. Realtors® are encouraged to provide their buyer clients with this form. Buyers who understand the process at the outset may be less likely to conclude that something nefarious has happened to them if they are not the successful bidder.

Agency Protections

The dueling buyer situation becomes even more dicey when the competing buyers are represented by the same agent (in a designated agency office) or by two agents in the same firm (in a traditional agency office). An agent in this situation owes competing duties of disclosure and confidentiality to both clients. The best way to address this situation is in advance in the buyer agency contract. A buyer agency contract should inform the buyer of the "dueling buyer" possibility and describe in advance how the situation will be handled.

Some forms simply provide that the agent will continue to represent both buyers but will keep each client's offer strategy confidential. For example:

In the event Agent works for two competing buyer-clients in connection with any specific property, Agent will be working equally for both buyer-clients and without the full range of fiduciary duties owed by a buyer's agent to a buyer. In this situation, the competing buyer-clients are giving up their rights to undivided loyalty and will be owed only limited duties of disclosure, obedience and confidentiality.

Other buyer agency forms provide that the agent will not introduce a client to any home while another client remains interested in pursuing that home. For example:

Agent shall not show any client a property in which another client has expressed an interest, unless and until the first client expressing an interest in the property shall discontinue such interest; provided, however, if Agent notifies Client of another client's interest, Agent may assume that Client's

interest has been discontinued unless Client advises Agent to the contrary within 48 hours.

Most forms also include a provision whereby the buyer's agent is relieved of any obligation to disclose confidential information learned in a prior or current agency relationship. For example:

Client understands and agrees that Broker shall not disclose information learned during the course of a prior or pending business or real estate transaction.

If a buyer's agent does not have a buyer agency contract in place that deals with this situation, the buyer's agent will not be able to continue to represent both of the dueling buyers.

Back-up Offers

Finally, sellers who are lucky enough to have more than one offer on their home may wish to have a second offer in place in case the first transaction fails for some reason. While there is nothing wrong with accepting a back-up offer, great care must be used in drafting back-up offer language. Perhaps the most common problem arises when the Seller and Buyer #1 want to renegotiate or modify a term in the first purchase agreement. Buyer #2 may argue that its offer is only subject to original deal with Buyer #1 and that once that deal is not proceeding as originally drafted, Buyer #2's offer has priority. To address this potential problem, an agent representing the seller may wish to include the following language in the back-up offer:

Buyer acknowledges that this Agreement is a back-up offer which shall be effective only in the event that the closing on the prior purchase agreement on the property does not take place for any reason. Buyer acknowledges that nothing in this Agreement shall in any way restrict the right of the Seller to modify the terms of the prior purchase agreement as Seller shall, in his sole discretion, deem advisable.

There is another potential issue with back-up offers from the Buyer #2's perspective. How long is Buyer #2 required to wait to see if deal with Buyer #1 is going through? When can Buyer #2 safely assume that he has just lost out and look for another home? This can be clarified by a provision in the back-up offer which provides:

In the event that the Seller does not notify the Buyer that this back-up offer is in first position within two (2) weeks of the date hereof, the Buyer may at any time thereafter declare this agreement null and void by providing written notice of same to the Seller.

Conclusion

Given the increased frequency of these types of scenarios, an agent is well-advised to do his or her best to manage expectations through education. If a client understands the playing field, that client will ultimately be better prepared for the buying or selling process. Furthermore, utilizing the aforementioned language in contract and disclosure is added protection for buyers, sellers, and agents alike.

As always, thank you for tuning in and watching this final installment of 2017. We look forward to a 2018 full of meaningful information for your business. If you have questions or would like to suggest topics for next season, please see the email below. Again, thanks for watching and see you next time.