

SHARPEN YOUR NEGOTIATING TACTICS

In my 21 years giving advice on the HotLine, I have neither bought nor sold real estate, that is....until now. As both a buyer and a seller I am now reminded that there is no better teacher than first-hand experience. What I seem to be learning (and the experience is not yet complete) is that as much as we understand fiduciary relationships, as much as we want to win for our principals, we are in danger of growing complacent, of tiring and losing the energy to advocate wisely for our clients. We fall prey to old practice standards even when the real estate market begs for new approaches.

A client of mine is buying an estate property that is presently vacant. The personal possessions have been removed so the interior could be thoroughly inspected. The home inspector took note of the problems as well as the limitations of his inspection with respect to items, the operating condition for which could not be tested. The central air conditioning unit was one item that could not be effectively operated in this subfreezing winter we are experiencing.

What would you do as the buyer agent? Standard operating procedure may be that the buyer relies on the seller's representation that the air conditioning unit is operating perfectly well, or was when last used in September or October. Buyers just have to take some chances, right? This position comports with the Pennsylvania Association of REALTORS® *Standard Agreement*, which places all risk of loss on the buyer. You buy it; it's your problem (unless you can prove the seller lied). To be more balanced, the *Agreement* also gives the buyer the right to conduct any inspection the buyer elects (subject to the practical limitations of testing things like air conditioners in winter). What other practical options are available to the buyer with regard to the central air conditioning?

One solution is to shift that risk of loss (that the a/c unit is not functioning) to the seller by inserting a clause in the agreement of sale that seller warrants the operating condition of the air conditioning unit; and that the warranty will survive settlement for a reasonable period of time to accommodate buyer's ability to ascertain its operating condition. It's not the norm, but tell me that in a tight market there aren't sellers who will accept terms like this if it means selling the home. My own experience tells me that sellers are game: my seller has agreed to warrant the plumbing and electrical systems, the operating condition of every light fixture, socket, and even the water quality (well) beyond settlement.

Shifting the risk of loss from buyer to seller is not without practical limitations beyond the anticipated push back from the seller. The strength of the warranty is tied to the strength of the seller. If you have ever purchased a product from a company that is now defunct, you know that a warranty can have less value as the paper it is written on. But, as there are strong companies, there are strong sellers who are financially capable of honoring obligations.

I know that in some cases sellers put some portion of their proceeds in trust to cover repairs that will be made following settlement. That may work well when the seller acknowledges that there is unfinished business seller was supposed to complete before settlement. Try to get seller to put up funds for unknown possible future malfunctions! Frankly, I am no fan of holding money in escrow or requiring a seller to perform tasks subsequent to settlement. Clearly the best transactions are those where the buyer pays the full purchase price at settlement and where the seller delivers the property, in its promised condition, at settlement. Unfortunately, real circumstances frequently make this impossible.

Real circumstances are much more complicated than teaching examples. In the case involving my client who is buying the estate-owned property, there are more issues than just the condition of the a/c system. That property is serviced by a well and there is an apparent freeze in the water line where the water enters the home. Thus, the home inspector was unable to test the quality and flow of the water or the operating condition of those systems that use water such as the hot water heater, the whirlpool tub and other plumbing related items. Further, because the line is frozen, the electrical breaker that controls the well pump flips off, suggesting that the well pump is not operating or is burned out.

While the buyer has the option of terminating the agreement on the basis of the home inspection, that is not what the buyer wants. The buyer wants assurance that the estate will put the house in working order by settlement. And beyond that, the buyer wants some short but reasonable period of time to verify that everything is operating, not just at the pre-settlement walk-through, but after. The seller's promise to have complex problems corrected by settlement may not satisfy the reasonably prudent buyer who's brief tour on the morning of settlement is insufficient to verify that complex repairs were successful.

Sellers should be reluctant to warrant conditions beyond settlement. What reasonable seller wants to live under the question-mark of a future potential obligation? What can a seller do to avoid warranting a repair item? Get the work done well before settlement so that buyer can verify the successful repair. Good idea, but in the dead of a sub-freezing month tell me how to verify that the pool leak has been repaired! Or that the water line, unfrozen for settlement, wasn't just a temporary fix.

Delaying settlement is a possible solution. Let's see, the swimming pool can be filled....by April? And how many buyers have commitments that will expire on the scheduled settlement date? Guess what the rates have done since buyer's lock at 4.75%!

The resolution of the problem in question is beyond the scope of this article and certainly would render this article more torturous to read than perhaps it already is. The lesson should not be lost however. It is rare that I see a buyer demand that a seller warrant a condition or system beyond settlement. In a seller's market, why would a seller ever take on a risk of loss when there are other buyers ready and willing to

purchase a property subject to whatever the future may hold? Today's market is different and negotiating skills have to be reevaluated by those of us who take on buyers in a fiduciary relationship.

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