

WHEN A TRANSACTION FAILS – Buyer Options

Scenario - A seller and buyer have entered into a purchase agreement which is moving towards a closing. Arguably, all of the contingencies have been waived by the buyer and the buyer's lender is ready to proceed with closing. Then, typically, the buyer determines that they do not wish to proceed forward with the transaction for some reason that may or may not provide a plausible basis for refusing to close.

In this situation, it is important for each of the parties to know what possible courses of action are available to them and the consequence of following any of those courses of action.

Buyer Options

A. Possible Liability to the Sellers.

Prior to terminating the purchase agreement with the sellers, the buyers should obtain legal advice as to any available basis to justify their refusal to proceed forward with the transaction. If there is an arguably, justifiable basis, the buyers must be in a position to assert that basis either in the context of a settlement with the sellers or as a defense in litigation against the buyers for damages.

The Buyers must make a determination as to the likely damage claim against them. If they obtained financing to purchase the property, there is most likely a current appraisal which would at least give them a rough estimate of the fair market value of the property at the time of the alleged breach of contract. If the amount in the appraisal exceeds the purchase price for the property, the buyers can contend there are no monetary damages to the sellers from the breach of contract. The buyers also need to determine if there is a possibility for any other consequential damages suffered from the seller by reason of the breach of contract.

The buyers need to consider forfeiture of the EMD and their costs of litigation in considering any settlement proposal they might make or receive from the seller.