

WHEN A TRANSACTION FAILS – Seller 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.

Seller Options

A. Liquidated Damages.

The seller needs to determine what liquidated damages, if any, are available to them through the terms of the earnest money deposit ("EMD") as set forth in the purchase agreement. Does the earnest money deposit provision provide them with the option of claiming the EMD and pursuing other legal remedies against the buyers?

B. Claims for Damages.

The sellers need to make a determination as to whether a claim for damages from breach of contract is economically viable.

The measure of damages for breach of contract in the sale of real estate is the difference between the purchase price and the market value of the land on the date of the breach of contract. The seller's damages are not determined by a price the seller might later obtain on resale of the property.

Seller can also make a claim for consequential damages. Consequential damages are described as those damages which were reasonably foreseeable as a consequence of the buyer's breach of contract. Typical consequential damages could be maintenance of the property for the period between the date of the breach and the time of resale; property taxes accruing during that period of time; and payment of a commission upon resale if the first sale did not include payment of a commission. Consequential damages typically do not include the seller's attorney fees or costs of litigation with the buyer.

C. Specific Performance.

There appears to be a recent Court of Appeals decision that stands for the proposition that a Seller could sue a buyer for specific performance, i.e., requires the buyer to proceed forward with the purchase of the property. Arguably this is not a viable course of action for the seller.

D. Mitigation of Damages.

Under Michigan law, the seller must take action to mitigate any damages they may have suffered by reason of the buyer's breach of the purchase agreement. Typically, this would include immediately relisting the property for sale. If the seller does not take steps to mitigate their damages, when they sue the buyer, they will face a defense from the buyers that the sellers could have avoided their damage claims by simply reselling the property.

E. Settlement.

The seller will need to make a rough determination of what potential damages could potentially be obtained from the buyer through litigation; the buyer's ability to pay those damages; and the costs of litigation in obtaining a judgment for the damages. This rough calculation will help the seller determine what demand they should make from the buyers for settlement, e.g., forfeiture of the EMD and possibly some additional dollars in exchange for a mutual release.