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## Can I Get Out of This Deal?

By Andrew J. Wiegel

Between the time that a real estate purchase contract is signed and the close of escrow, when the title actually transfers, either the buyer or the seller may have second thoughts. It is common for a client to seek legal advice asking if they can get out of the deal.

The terms of the purchase and sale agreement will generally give the buyer certain rights to cancel the purchase after obtaining information. These “contingencies” usually include a pest control inspection, a contractor’s inspection, approval of title, review and approval of documents such as leases and CC&Rs, and a loan contingency. The seller seldom has any contingencies or right of cancellation as long as a buyer performs according to the contract.

As a result, a buyer may generally cancel a purchase agreement more easily than a seller. As long as the buyer makes the decision within the time periods set forth in the contract for the removal of the buyer’s contingencies, and as long as the contingencies are such that the buyer can set out a good faith basis for rejection of a contingency, the buyer can terminate the contract and receive a return of any deposit.

The seller who wants to terminate the contract must examine whether the buyer has performed each step on time or whether a time period set forth in the contract has expired. When there is a time provision in the contract for the buyer to perform by removing a contingency or closing the escrow, the failure of the buyer to perform on a timely basis will often provide the seller with the right to terminate. Real estate agents sometimes refer to the failure to meet contract deadlines as causing the parties to be “out of contract.” A diligent agent will generally assist the parties in reconfirming the contract through the use of an extension addendum providing a new time schedule. If a seller does not wish to agree, the situation presents the opportunity to cancel.

The rights of either buyer or seller to terminate a contract are dependant on the precise wording of the contract. Since there are a number of real estate purchase and sale forms in use in the industry, there are different provisions. Some forms give the seller the right to cancel anytime the buyer has failed to meet a deadline. Other forms require the seller to give notice to the buyer and the opportunity to correct the oversight before the seller can cancel.

Purchase and sale contracts usually provide that “time is of the essence.” This language is given weight by the courts, and time deadlines are generally enforceable. However, if either party has acted in a way that would reasonably lead the other party to believe that deadlines were not critical, the court will not strictly enforce the time is of essence provision, and will instead impose a “reasonable time” standard for the performance of the parties.

A buyer who does not want to give the seller the opportunity to cancel the contract should be careful to perform all contract obligations and remove all contingencies within the time periods set forth in the contract. The seller has no obligation to agree to extend any time period, and the failure to act on a contingency will give the seller the right to cancel.

To reduce the opportunity for a buyer to back out of a purchase, the seller should be careful in the negotiation of the contract contingency terms. The time periods allowed for physical inspection, record review and other due diligence should be kept to the minimum time reasonably necessary for the buyer’s legitimate needs. The financing contingency, describing the buyer’s loan, should not require loan terms which would be difficult to obtain in the existing finance market. A seller might also require some preliminary assurance of the buyer’s ability to obtain the loan.

The analysis of the rights of the parties to a real estate contract is quite complex. It depends on the precise language of the terms of the contract and the actions taken by their parties and their agents while the contract is in force. In the event of a dispute, most contracts require the parties to initially pursue resolution through mediation and compromise.

If mediation is not successful, litigation may follow, either in court or through arbitration, if the parties have initialed the arbitration clause. Generally, the prevailing party will be entitled to recover an award of attorneys’ fees. The consequences of guessing wrong about the right to cancel a transaction can be very expensive. A careful analysis should be made before initiating such a dispute.

Andrew J. Wiegel is a partner at Wiegel & Fried, LLP. The information contained in this article is not intended to be exhaustive - instead it is provided to inform the real estate community of some important features of California law. The information in this article is general in nature; consult with an attorney for legal advice on any particular matter. © Copyright 2004, Wiegel & Fried, LLP.