

Escalation Clauses *Revisited*

We noted Given the current seller market, buyers are forced to respond rapidly and dynamically to competing offers received by the seller. As often as not, a particular buyer and her agent do not feel as though they are able to manage that process as well as they would like, so buyers are resorting to escalation clauses in their offers to make sure they get the house, or to at least make sure they do not lose it by a relatively small amount of money.

The consensus of opinion is that an escalation clause is enforceable – it is not an unenforceable invitation to bid or too vague to enforce – provided the price can be readily determined by reference to some ascertainable standard. In other words, can a judge determine whether the parties actually agreed on a sales price?

If not properly drafted, an escalation clause can devastate your purchaser. For example, one must include a cap – a sales price ceiling – to the purchaser’s escalating offer otherwise your purchaser may well find himself agreeing to buy the house for more than it is worth and for more than he can pay. Instant breach, complaint and lawsuit. Likewise, one must consider what we mean by our definition of “offer” since an offer can be less than one ostensibly higher because it contains concessions. Consequently, simply specifying the highest offer plus a number does not truly identify the best offer.

At the Association we are in the process of revamping the standard clause booklet and we are working on an escalation clause for members. Recently, at the contract writing seminar, we disseminated a draft of our escalation clause. To give you an idea of how this process works, I have modified the clause twice since then.

Presently, the working clause is as follows:

Escalation clause

Uses: An escalation clause is used in a seller’s market where multiple offers are expected, your buyer wants to make sure they do not lose the property over relatively minor amounts of money, and there is no time to negotiate in the traditional fashion.

Note: An escalation clause should only be used in a situation where the purchasers have been fully advised of the consequences of an escalating offer. They should be fully prepared to purchase at a higher number. Note particularly the “net of concessions” language so there is an apple-to-apple comparison.

Legal Corner

Clause: Contract Price to be [insert number, e.g. \$500.00] higher than the highest bona fide offer, net of concessions, received by Seller, not to exceed [insert cap number, e.g. \$5,000.00]. The parties intend this agreement to be a binding contract, and not an offer to enter into a contract at a later date. The price determination will take place as set forth herein, but the fact that the price is not determined as of the time this contract is fully executed by both parties shall not defeat the existence of a contract. Listing Firm is provide Selling Firm with a copy of the next highest bona fide purchase agreement offer.

As always, I commend you to your broker and company policy when drafting or using this clause. You also may email the author at bdlytle@erols.com for help.

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