

MIRROR, MIRROR

Mirror, mirror, on the wall, who is the fairest attorney of them all? Ok, don't answer that. Consider instead:

Seller writes and signs an offer. Offer contains a provision requiring purchaser to make an earnest money deposit. Upon presentation, purchaser crosses out the earnest money provision, signs the offer, and returns the contract. The attorney for the seller verifies with his clients that they were not concerned about an earnest money deposit. Sellers do not initial the deposit change. The parties move forward to closing. Purchaser later refuses to close and claims that because the sellers never initialed the earnest money change there was no binding contract.

What is the result?

This actual case (from Tennessee, reported by NAR) raises a couple of legal issues I get questions about on average two to three times per month. Essentially, those questions turn on whether there is an enforceable contract because some provision or change in the contract was not initialed by both parties, or there was some variation between the offer and acceptance.

As to the question regarding variation, Virginia essentially follows what is known as the "mirror image" rule. That is, if the terms of the acceptance are not a mirror image of the offer then the result is then there is a counter-offer and no enforceable contract.

The Virginia Supreme Court explains:

The offeror has a right to prescribe in his offer any conditions as to time, place, quantity, mode of acceptance, or other matters, which it may please him to insert in and make a part thereof, and the acceptance to conclude

Legal Corner

the agreement must in every respect meet and correspond with the offer, neither falling within or going beyond the terms proposed, but exactly meeting them at all points and closing with those just as they stand. An acceptance to be effectual must be identical with the offer and unconditional. Where a person offers to do a definite thing and another accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat, or it is a counter proposal, and in neither case is there an agreement. That is true, for example, where an acceptance varies from the offer as to time of performance, place of performance, price, quantity, quality, et cetera

Note though that there is Virginia law to the effect that non-material variations in the acceptance may be outside of the scope of the mirror image rule.

The second issue in the NAR case is not the mirror image rule. Rather it is simple contract law once you understand the issue. In the NAR case the court held that the purchaser's acceptance did not mirror the terms of the seller's offer, thus constituting a counter-offer. However, even though there was a counter, the court held that the evidence was sufficient for a jury to conclude that the sellers had in fact accepted the purchaser's no-deposit counter-offer.

How so? The court held that the jury could look to the conduct of the parties – who moved forward to closing – as compelling evidence that the sellers had in fact accepted the no-deposit-counter, and so the parties had a ratified contract.

In other words, even though you might be missing initials by oversight to this provision or that provision, if as a factual matter you accepted the offer or counter then there is in fact an enforceable contract and in that regard, a party's conduct (e.g. in moving forward to closing) is very strong evidence that you did in fact agree.

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Legal Corner

In summary, there are two lessons: first, Virginia essentially follows the mirror image rule in real estate contracts, which requires that the terms of acceptance match the terms of the offer. Bear in mind there can be functional equivalents of the mirror image rule if there are in fact no substantive changes. Second, the mere fact that the parties failed to get initials on a change does not necessarily mean you have no contract. Your conduct will have significant bearing on that conclusion. So if you do not feel you have a contract then you should speak up immediately and loudly – don't think you can hold that in your back pocket as an out if your client changes his mind.

As always, please feel free to e-mail me at bdlytle@lytlelaw.com if you have any questions or suggestions for future articles.