

When is an offer accepted?

by Greg McClelland

Although most of the questions received these days over the Michigan Association of REALTORS® Legal Hotline relate in some way to agency issues or to the handling of earnest money deposits, there is one question which has been posed at least monthly since the beginning of the Hotline. The question centers on when can a buyer make an offer that a seller cannot reject.

More than one offer

The situation typically arises in one of two scenarios. In the first scenario, REALTOR® Smith has listed seller Brown's property for \$90,000, payable in cash or its equivalent. REALTOR® Smith has found a prospective purchaser who submits an offer to the seller through REALTOR® Smith for the asking price, subject only to the prospective purchaser of the property obtaining financing for 90% of the purchase price. Prior to REALTOR® Smith being able to present the offer to seller Brown, another offer is received by REALTOR® Smith through a cooperating broker who offers \$91,000 for seller Brown's property without any contingencies. REALTOR® Smith calls the Hotline to inquire as to whether seller Brown is required to accept the first offer, since the offer was for the asking price.

Counter offers

In the second scenario, REALTOR® Smith lists seller Brown's property for \$90,000. REALTOR® Jones finds a prospective purchaser who submits an offer for \$85,000, contingent upon the prospective purchaser's ability to obtain financing in the amount of \$75,000. Seller Brown, through REALTOR® Smith, rejects the offer but submits a counter-offer offering to sell the property for \$88,000. The prospective purchaser accepts the counter-offer but scratches out the contingency for financing of \$75,000, inserts the amount of \$78,000, and then initials the change. Seller Brown never initials the change. When seller Brown later refuses to proceed forward with the transaction, REALTOR® Smith calls the Hotline to determine whether seller Brown is required to proceed with the transaction.

Court of Appeals case highlights problems

REALTORS® who pose these questions over the Hotline are advised that unless the terms offered by a buyer, or a seller in the case of a counteroffer, exactly mirror the pending offer or counteroffer in all material terms, then neither party can compel the other party to proceed forward with the transaction. While this answer is not generally well received by someone who has worked long and hard to put together a transaction, a recent decision by the Michigan Court of Appeals demonstrates why the answer is given. In this recent case, Defendants were personal representatives of their mother's estate who had listed her home for sale. They were offered \$155,000 for the home by the Plaintiffs, who also submitted a \$2,500 deposit. Plaintiffs' offer included a contingency that the buyer be able to obtain financing in the amount of \$124,000. The personal representatives of the estate counter-offered to sell the home for \$160,000. The buyers then signed an acceptance of the counter-offer after changing the amount to be financed to \$128,000 and initialing the change. According to the decision by the court, the real estate agent told the personal representatives that the buyers had

accepted the counter-offer but did not advise them of the modification in the amount to be financed from \$124,000 to \$128,000.

The personal representatives proceeded to obtain all the necessary approvals from the probate court to complete the sale of the property. Unfortunately, one of the personal representatives became interested in buying his mother's home for himself and his wife. The personal representatives advised the buyers that they wished to rescind the transaction. The buyers refused to rescind the transaction and sued to require the personal representatives to complete the transaction.

The trial court agreed with the buyers, finding that the personal representatives had seen the change which had been made to the counter-offer by the buyers and thereafter had taken actions--i.e., sought approval from the probate court--indicating that the change by the buyers was not a material change to the agreement. The trial court determined that the personal representatives must proceed with the sale to the buyers.

The Court of Appeals "reluctantly" agreed with the personal representatives that they should not be required to proceed with the transaction. The Court of Appeals held that by changing the amount to be financed, the buyers had modified a material condition and thus, that the buyers "acceptance" amounted to a counter-offer to the personal representatives' counter-offer. By increasing the amount to be financed from \$124,000 to \$128,000, the Court of Appeals found that this had the affect of widening the scope of a contingency by which the buyers could escape the transaction.

The fact that the buyers had in fact obtained financing for \$128,000 was found not to be sufficient to satisfy the Statute of Frauds so as to require the personal representatives to proceed with the sale. The court found the same to be the case as to the fact that the personal representatives had proceeded forward and obtained the necessary approvals from the probate court.

Buyer/seller offers must mirror each other

If REALTORS® representing buyers wish to be absolutely certain that their offer must be accepted by the seller, then it is extremely important that the offer submitted by the buyer absolutely mirror the offer to sell the property made by the seller. Otherwise, a court will not find that the buyers, in effect, have accepted the outstanding offer by the sellers.

Disclosing defects

As an update, we have been advising REALTORS® for the past several years that Michigan law does not require them to disclose defects known to them to prospective purchasers. In other words, there is no reported case in Michigan imposing liability for "silent fraud" on REALTORS® when acting as agents for a seller. We have received calls from REALTORS® advising that it is their understanding that the law has recently changed and now they must disclose all defects known to them to prospective purchasers.

We believe that the confusion regarding REALTORS® affirmative duty under Michigan law to reveal defects is arising from the recent Court of Appeals decision in *Shimmons v Mortgage Corporation of America*. In that case the buyer purchased the property "as is". Prior to the sale, the Township building department inspected the house and determined that it was uninhabitable. The Township issued a repair notice and order to the seller, but the seller did not advise the buyer of the existence of the order at the time of the sale.

The trial court determined that the seller had no duty to disclose that the house had been deemed uninhabitable by the Township. The Court of Appeals reversed this determination, finding that the issuance of the repair notice and order was a latent defect and had to be disclosed by the seller.

The decision in this case only stands for the proposition that a seller must disclose latent defects in a house. Presumably, this situation will not arise in the future if sellers honestly fill out the Seller's Disclosure Statement. In any event, this case does not stand for the proposition that REALTORS® are required to make any disclosures with respect to latent defects. Instead, the law continues to essentially require REALTORS® to avoid making any misrepresentations and to correct any representations that they made previously which have since become inaccurate.

Greg McClelland is the Michigan Association of REALTORS® legal counsel and an attorney with the firm of Dickinson, Wright, Moon, Van Dusen and Freeman in Lansing, Mich.

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